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Panel Paper

Race Riots on the Beach

A case for criminalising hate speech?

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Abstract

This paper analyses the verbal and textual hostility employed by rioters, politicians and the media in Sydney (Australia) in December 2005 in the battle over Sutherland Shire's Cronulla Beach. By better understanding the linguistic conventions underlying all forms of maledictive hate, we are better able to address the false antimonies between free speech and the regulation of speech. It is also argued that understanding the harms of hate speech provides us with the tools necessary to create a more responsive framework for criminalising some forms of hate speech as a preliminary process in reducing or eliminating hate violence.

Key Words: hate violence, hate speech, free speech, media regulation

Introduction

Riots are occasionally adopted to highlight unequal race relations in Western nations. However, in December 2005, this form of radical action - used predominantly by dispossessed ethnic minorities - was appropriated by white Australians to reinscribe their ownership over an iconic beach. Beaches are a significant symbol in Australian mythology, and central to the construction of nationhood; not least of which are the planting of the English flag in 1788 as an act of dispossession, and the storming of the Gallipoli beach front in 1915. Moreton-Robinson and Nicoll (2006:149) argue that the fascination with the beach as a symbol of nationhood has led white Australians to perceive their beaches as sacred sites that must be protected against invasion. In this paper, the desire to control Cronulla beach (New South Wales) will be investigated in light of the linguistic tropes employed by the media and rioters before, during and after this latest display of the fantasy of white supremacy (Hage, 2000). In particular,

the paper will focus on the role of the media in inciting racist violence and the consequential need to re-assess the criminal sanctions available to manage these types of speech acts.

In Ghassan Hage's foreword to *'Bin Laden in the Suburbs'* (Poynting et al., 2004:vii) he argues that the 'other' in Australian mythology is constructed by the polarity between what he calls 'the other of the will' and 'the other of the body'. Hage states that:

... it was his or her supposed inferiority and lack of intelligence that made the lazy other of colonisation, the other that is all body, exploitable. The other of the mind, the cunning other, was by definition un-exploitable, for if anything, such an other had the potential to himself or herself exploit the European colonisers, manipulate them and use them against their will. By definition such an other could only be exterminated (in Poynting et al., 2004:viii)

The shift between exploitation and elimination occurs, according to Hage, when the 'other of the will' has been eliminated as a threat - that is, when they have been "killed" politically and socially' (in Poynting et al., 2004:viii). Hage's framework acknowledges that the other is not universally constructed as cunning and conspiratorial, nor inferior and exploitable. Equally, Hage's framework allows us to map the shift in these forms of Anglo-Australian hatred, and assess the social and political contexts that facilitate the reconstruction of hatred from exploitation to elimination, or elimination to exploitation. This approach to social exclusion also obliges us to be cognisant of the way in which the 'other of the body' presupposes the social (and physical) death of the 'other of the will'. In December 2005, this ambivalent vacillation between 'the other of the will' and 'the other of the body' informed the battle over an iconic Australian beach. Despite appearing to be a 'bolt out of the blue' - as an exceptional display of Anglo-Australian hatred - the violent riot that occurred in early December 2005 shares many characteristics with other acts of hatred perpetrated against those on the margins of Australian citizenship.

Expanding on earlier analyses of hate experienced by gay men, lesbians and Jews (Asquith, 2004; 2008), it will be argued that while there were many unique factors that led to the Cronulla riot (especially, the use of flash mobbing), the conventions of maledictive hate are consistent despite differences in victims. Sharing experiences of hatred can be a basis from which to develop collaborative responses between out-of-place communities. Collaboration between these out-of-place subjectivities, at times, may appear counterintuitive (particularly, the distance between homosexuality and some readings of the monotheistic religions of Islam and Judaism). However, if there is to be a strategic response to public displays of bigotry, common ground must be found between those who experience hatred. In previous research, a pattern of malediction was revealed in the hate speech used against gay men, lesbians and Jews (Asquith, 2004; 2008). This pattern revealed that malediction draws upon

six themes of abjection: *profane naming, pathologising, criminalising, demonising, sexualising and terrorising*.¹ In this paper, the malediction - or hate speech - used during the Cronulla riot, but more importantly, the discourses employed by the media (particularly, radio broadcaster, Alan Jones) in the days leading up to the 11 December 2005 riot will be analysed in light of this earlier typology of hate speech. Using critical discourse analysis, this investigation of the Cronulla riot examines 92 press reports in major Australian daily newspapers between 7 December and 22 December 2005 and the broadcasts of Alan Jones from the radio station *2GB* between 5 December and 9 December.

In this research, the approach used by van Dijk (1987; 1993) in his studies of racism - developed for his initial study into ethnic prejudice in thought and talk, and later refined for his analysis of elite discourse and racism - is used as a template for understanding contemporary Australian maledictive hate. This approach foregrounds the contextual factors that are, if not determinative, at least predispose particular intersubjective relationships between the dominated and dominant. In '*Communicating Racism*', van Dijk (1993) details the steps necessary to adequately account for the varying layers of social, individual and cognitive factors in prejudice. He states that these can be answered by addressing six questions:

1. *What* do people actually say?
2. *How* do people talk about others?
3. What are the communicative *sources* of maledictive hate?
4. What and how does such talk *express* or *signal* underlying structures and strategies of prejudice in social cognition?
5. What are the real or possible *effects* of prejudiced talk?
6. What are the *social contexts* of such talk? (van Dijk, 1993:384).

Using these six questions as a guide, this examination of maledictive hate analyses the socio-historical contexts of how words are used to constrain actions. Simultaneously, these six questions offer a framework for understanding the institutional factors that predispose the use of maledictive hate against particular marginalised groups, the role that maledictive hate plays in the larger field of hate violence as a constraining practice, and the legislative and regulatory frameworks used to remedy a *perceived* problem. In order to capture the multi-dimensional character of inter-ethnic conflict, this analysis of maledictive hate and its regulatory frameworks speaks directly to van Dijk's six questions by addressing the linguistic, sociological and criminological contexts of the Cronulla riot.

¹ In this paper, only four of these six categories will be discussed. Sexualizing the other is predominantly used against gay men and lesbians, and was only used in one incident of malediction relating to the Cronulla riots. Similarly, the process of demonizing the other most commonly requires more complex acts of verbal and textual hostility such as hate mail.

Reclaiming the sand

On the weekend prior to the Cronulla riot, three white lifesavers, after finishing their shift on North Cronulla beach, entered into a verbal altercation with young men perceived to be from a Middle-Eastern background. The verbal battles between these two groups were not unusual - it was the usual banter of North Cronulla beach; a beach where the privileged, cloistered white middle class of the Shire of Sutherland came face-to-face with the ethnic minorities of Sydney's western suburbs. Cronulla Beach is the only beach in inner-city Sydney with a direct train line from the outer-western suburbs. As such, this beach has become as much the home of the young Middle-Eastern men who travel from the western suburbs, as it is of the privileged white lifesavers who claim sovereignty over the Shire.

On that fateful day, a week before the riot, the white off-duty lifesavers were again marking their territory, and making claims about who can use the beach and under what conditions. During the altercation, one lifesaver stated that 'Lebs² can't swim', and he was sure as hell not going to save them if they were drowning (Lawrence and Gee, 2005:5). Contrary to the mythology of lifesavers as heroes guarding everyone against their own stupidity, these young men had drawn a line in the sand of Cronulla Beach.³ They had decided who was to be saved and under what conditions. Obviously, the young men visiting from the western suburbs could not have their right to the beach, nor their masculinity so easily trashed. So they pulled the first punch. They also called for assistance from their friends on the beach. The result was the grievous bodily harm of the lifesavers (Lawrence and Gee, 2005:5).

By Monday morning, when Alan Jones began his morning, talk-back radio show, the story of the assaults had become headline news. Over the next five days the media, particularly Alan Jones, made the assaults and the use of Cronulla Beach the hot topic of the week. By Tuesday, an unknown individual had created and forwarded an SMS call to arms:

this Sunday, every Aussie in the Shire get down to North Cronulla to support Leb and wog bashing day, bring your mates and let's show them that this is our beach and they are never welcome. Let's kill these boys (Anonymous SMS read out by Alan Jones, 8 December 2005, *cited in* ACMA, 2006:59-61, 73)

² 'Lebs' is term of derision used against Lebanese Australians, or anyone perceived to be Lebanese.

³ Lifesavers are constructed in Australian culture as 'unsung' heroes who are dedicated to saving lives on Australia's dangerous coastlines - most often with little or no financial compensation for their time. Lifesavers are perceived in the collective Australian consciousness to be the bronzed, fit equivalent to other heroic public servants such as Ambulance Officers (though without the animosity often attached to public servants such as Police Officers). The Royal Lifesaving Society Australia has existed since the first days of this nation.

It was the combination of the mass distribution of this SMS, and the media's constant repetition of the SMS text that led to the unique conditions of a white race riot. On the Sunday of the riot, by 8am crowds had begun to arrive at Cronulla, complete with Australian flags, their picnics, BBQs and most importantly, for any Australian occasion, a surplus of alcohol (Jackson, 2006).

When the day was done, 31 people had been injured including six police officers and two ambulance officers tasked with retrieving and aiding the small number of non-Anglo visitors who had been unaware of what had been planned on that day (McIlveen and Jones, 2005:1). Once the sand had settled, 80 people had been detained with over 200 charges; none of which related to the pre-emptive call to arms and incitement to violence, nor the threats of violence used throughout that day (Jackson, 2006). In effect, on that day, the anti-vilification laws much heralded as a sign of Australia's tolerance of difference, were shown for the ineffectual laws that they have often been described as by those on the margins of Australia's tolerance.

What did you say?

'Hate speech' or malediction has traditionally been constructed primarily as an act of name-calling. The primary objective of name-calling is the ranking of people and conferring rights and privileges on those named. While *naming* is the most prevalent form of malediction recorded in previous research⁴ and in the hate speech used during the Cronulla riots, naming gains its efficacy not by interpellation alone. Rather, the name becomes an acronym for all the other categories of perception and reception, such that pooker equates with paedophile, Jew equates with manipulator, and Muslim equates with terrorist. The objective in this theme of malediction is primarily one of isolating marginal bodies from the body politic. *Naming* someone - recognising them within a hierarchy of subject positions - aims to isolate, separate and rank individuals according to their visibility as other. Beyond the name calling of rioters, other actors in the 'fantasy of White Supremacy' (Hage, 2000) also appended labels of exclusion before and after the riot. For example, Alan Jones (the prominent radio host) claimed that 'this lot were Middle-Eastern grubs' (Alan Jones, 5 December 2005, *cited in* ACMA, 2006:9), and Peter Debnam (leader of the parliamentary opposition) argued that New South Wales was dealing with 'Middle Eastern thugs' (Clennell, 2007:23). The act of turning a name into an abusive term derives its potency not only from the words themselves. Rather, the social context of the utterance predisposes the act of exclusion and the creation of secondary consequences. When power speaks, the label becomes a reality; a social definition for all to use, misuse and abuse.

⁴ In previous research, 33% of all incidents named the addressee (Asquith 2004; 2008).

A consistent linguistic partner to *naming* is *pathologising*. In societies that are vigilant in containing the pathological - whether medical, social or theistic - the process of making the other dirty, unclean or untouchable is not just a matter of individualised neurotic impulses aimed at control, it is institutionally bound. Forty years ago, Mary Douglas (1966) outlined the processes at work in defining bodies and things as dirt. She suggested that eliminating dirt is an active process of organising the untidy nature of everyday life, and the process of 'separating, demarcating and punishing transgressions' assists individuals and societies in controlling the unsettling presence of things and people that disturb the sense of order (Douglas, 1966:4). In contemporary social relations, the need to label the other as dirty or impure has become an integral process in managing the ever-changing membership of the community, particularly in communities where there is an official policy of recognising difference (such as multiculturalism) yet an historical experience of explicit exclusion (such as the *White Australia Policy*⁵).

Notions of 'matter out-of-place' and 'this place is a mess' were central to the debates over the use of Cronulla Beach. In particular, Muslim and Arabic Australians were perceived to be in the wrong place because they wore too many clothes, and were responsible for the garbage strewn across the beach (Jackson, 2006). While Douglas' framework offers an understanding of the individual and structural operation of dirt, this approach fails to adequately account for the consequences of labelling the other diseased. Unlike the social containment of pathological dirt, disease must be exiled or eliminated. In dividing these speech acts between dirt and disease, it is easier to recognise the shifting perception of the other. When the other is dirty, they are an 'other of the body' - containable. When the other is diseased, they are an 'other of the will', and, as such, are incapable of being incorporated or assimilated into the community.

During the Cronulla riot, the cultures and religious practices of Muslim and Lebanese Australians were constantly conflated with disease and infection. Not least of which was the T-shirt printed especially for the Cronulla riot which claimed the wearer to be part of the Ethnic Cleansing Unit. Further, throughout Alan Jones' week of hatred he also drew on allusions to dirt and disease. For two days he likened immigration to being invited into a family home, and claimed that Lebanese Australians were trashing the invite. In particular, he stated:

but you're not going to sit down at the table and start spitting on my mother or putting your feet under the table, or bringing dog manure in with you (Alan Jones, 8 December 2005, *cited in ACMA*, 2006:61).

⁵ The Immigration Restriction Act 1901 (Cth) - also known as the *White Australia Policy* - empowered Australian governments, through their Immigration Officers, to reject applications for residency on the basis of the colour of applicants' skin, place of birth, language proficiency, nationality or religion.

Jones also conflated Lebanese Australians with an infestation (Alan Jones, 7 December 2005, *cited in* ACMA, 2006:54), and the far right was claiming that 'the gov needs to round up the leb vermin' (Stormfront Website, 7 December 2005, *cited in* Taylor, 2005:5). In contrast to *pathologising* - which focuses upon the bio-medical ordering of dirt or disease - *criminalising* the other is informed by the socio-legal ordering of deviance. Maledictive acts within this theme are divided between those which construct others as liars, and those that construct others as criminals. The latter of these relies, in part, on the former. The other lies in order to unfairly gain status or property. As such, any claims of being a law abiding citizen must be viewed with cynicism. Despite a clear distinction - or more appropriately, a continuum - between these forms of *criminalising*, both are ultimately practices of an othering of the will.

Central to the hate speech used by rioters, the media (in particular, Alan Jones) and politicians in the days leading up to, during, and after the Cronulla riot, was the labelling of Muslim and Lebanese Australians as criminals. According to Alan Jones:

... this is gang stuff mate... it's a gang problem (6 December 2005, *cited in* ACMA, 2006:50).

... we don't have Anglo-Saxon kids out there raping women in western Sydney. So let's not get carried away with all this mealy mouth talk about there being two sides (8 December 2005, *cited in* ACMA, 2006:65).

... all across Sydney there is a universal concern that there are gangs, the gangs are of one ethnic composition (8 December 2005, *cited in* ACMA, 2006:65).

Or from others:

... the locals do not use the picnic areas... because of the Middle-Eastern visitors to the Shire, they are dangerous (Anonymous letter read out by Alan Jones, 7 December 2005, *cited in* ACMA, 2006:56).

... every night we witness gang violence, including stabbing, ram raids, drive-by shootings... let's identify who these people are... they're Lebanese gangs (Peter Debnam (Parliamentary Opposition Leader) *cited by* Alan Jones, 7 December 2005, *cited in* ACMA, 2006:54).

Sydney's mini Kristallnacht (Devine, 2005:11, in relation to the revenge attacks committed by Lebanese Australians on 12 December 2005).

Constructing young Muslim and/or Lebanese Australian men as criminals gains its efficacy from the preliminary pathologisation and demonisation of not only 'ethnic' bodies, but just as importantly, 'ethnic' cultures. Incrementally, the named other shifts from being just different to being diseased, immoral, criminal, and as such, requiring physical containment. With each layer of malediction, the perpetrator is given more reason, more justification for 'getting tough'. While these may be 'mere words', they are also tied to institutional actions. Naming, pathologising and demonising the other leads to institutional surveillance and control of the other. While health professionals and moral leaders play central roles in the containment of pathology and 'folk devils', *criminalising* the other can lead to authorised and unauthorised policing of the other. Both responses were strongly advocated by Jones and his callers in the week prior to the riot:

... now the Police can't do the job, even though we've put faith in them and we want them to do the job, that means to me the next step is vigilantes and personal protection by ourselves (Alan Jones, 6 December 2005, *cited in ACMA, 2006:45*).

J: if the police can't do the job the next tier is us. AJ: Yeah, good on you (Exchange between Caller J and Alan Jones, 6 December 2005, *cited in ACMA, 2006:46*).

... now, these people have got to know that we're not going to cop this stuff any more (Alan Jones, 8 December 2005, *cited in ACMA, 2006:62*).

Terrorising - threats of bodily harm or allusions to previous acts of bodily harm - is the final theme of malediction. When a reference to bodily harm is made, speakers do more than voice a desire, they act; he or she creates an instantaneous threat and a set of consequences that are tied up in the threat, such as physical or emotional dysfunction. The threat or reminder of death is the perpetrator's most effective tool in silencing the other. Further, when a threat has an historical precedent of real violence, it becomes more than just a threat: it becomes an embodied experience. It is, as Iganski suggests, *in terrorem* (2002:30).

Before and during the Cronulla riots, both the media and rioters drew upon threats of elimination as a central technique for determining who can use public spaces such as the beach. In particular, in the days leading up to the riots, Alan Jones repeated the SMS call to arms on many occasions. On a single day, he repeated the SMS text five times. Interspersed with these repetitions were calls for protestors to leave it up to the police. However, he also clearly stated, or supported the statements of callers, that if the police were unable to act, then it was 'our' duty to defend 'our' land (9 December 2005, *cited in ACMA, 2006:80*). On one day, he recommended that Australia's biker gangs should be invited to defend the beach against the 'Lebanese thugs', and that 'it would be worth the price of admission to

watch these cowards scurry back onto the train for the return trip to their lairs' (Alan Jones, 7 December 2005, *cited in* ACMA, 2006:57). In other circumstances, Alan Jones and others stated:

... you gotta scare, there's got to be an element of fear in this (Alan Jones, 6 December 2005, *cited in* ACMA, 2006:48).

... shoot one, the rest will run (Anonymous caller to Alan Jones, 6 December 2005, *cited in* ACMA, 2006:47).

... we will destroy the mosques and any Leb that gets in our way (Anonymous email, *cited in* Bildstien, 2005:22).

... in this point in time [sic], 1 enemy at a time: Lebs first, Jews second (Posting to Fight Back website by Freak, *cited in* Hildebrand, 2005:4).

Speech acts that threaten elimination seek to terrorise an individual into not being, or to be somewhere else. *Terrorising* is the ultimate weapon in maledictive hate. There are few efficacious rejoinders available that do not exacerbate the chance of the threat becoming a reality. *Terrorising* is a dual process: a warning of what may come, but equally, a justification for acting on the threat when the threat is ignored or challenged.

Criminalising hate speech

Hate speech is often constructed as harmless, and, as our parents counsel us in childhood, does not break our bones. Yet even the most prevalent and seemingly innocuous form of hate speech – naming – can, as a matter of consequence, be harmful, such as the physical assaults perpetrated against anyone on 11 December at Cronulla who were rightly or wrongly named as a 'Leb'. However, if analyses of hate speech also acknowledge that there is more to maledictive hate than name-calling, it may be easier to recognise that defining individuals and groups as abject may lead to further harm. This additional harm stems not only from the social exclusion of individuals because of their perceived pathology, impurity or danger, but equally, because hate speech that is not censured acts as a dog-whistle to those who, in normal circumstances, may not enter into the fray (such as all those 'protestors' – not rioters – that participated in the 11 December 2005 assaults because others were participating and were not being held to account) (Jackson, 2006). Acknowledging the harms created by the stronger forms of malediction allows us to better judge the possible consequences of words that wound. It is through an acute awareness of the vacillation between constructions of the 'other of the body' and the 'other of the will' that we are offered a potent tool in measuring the force of hate speech, and the effects that could arise from these speech and textual acts.

While free speech absolutists may advocate against regulating any speech - even the incitement to violence - and argue that we should respond with more speech rather than regulation (Butler, 1997:15), a perfunctory glance at the experiences of victims on 11 December 2005 quickly illustrates that often even the ability to speak is stolen in vilification. More speech is often the last thing possible: not only because it may cause further isolation, but also because more speech, or responding to a perpetrator, can be perceived as enough of an engagement that physical violence becomes justifiable in the mind of the perpetrator. This was clearly demonstrated on 11 December 2005 when one visitor on the beach dared to claim that as he was born in Australia and, as such, he had an equal right to the beach (Jackson, 2006). Without the intervention of the police - with capsicum spray - his speaking back to the words meant to confine his actions could have been more dangerous to his health than the minor concussion he sustained.

Explicit speech regulation in Australia that seeks to restore justice for marginalised groups is in its infancy. To date, criminal justice agencies have preferred to rely upon individualised, civil anti-vilification measures to regulate hate speech rather than draw upon the provisions contained in the various criminal codes of each of the states. Despite its infancy, it is already becoming clear that the structure of speech regulation serves the interests of some, while leaving other, sometimes more significant speech acts untouched by Australian discourses of tolerance.

In adjudicating the harms created by hate speech, Australian jurisdictions have tended to rely primarily on where incidents occur. All Australian jurisdictions have limited anti-vilification legislation to *public acts* capable of being heard by, or capable of infecting, an average spectator; this is the reasonable third-person test of vilification (see for example, sections 20B, 38R, 49ZS, and 49ZXA of the New South Wales Anti-Discrimination Act 1977). Takach (1994) argues that anti-vilification legislation was introduced to remedy the perceived social problem of unequal race relations in Australia. However, in the conversion of social policy to a legal framework, the objective, reasonable third-person approach 'may not take into account the viewpoint of the very group[s] that the... legislation is designed to support' (Takach, 1994:41). The legislative containment to *public acts* of malediction is problematic when considered in light of the conciliation process for complaints of vilification. While vilification must be a public act, arbitration processes are confined to private conciliation, where neither parties (nor the legislative body hearing the case) are allowed to speak publicly about the proceedings. Gelber (2002) argues that confining acts of vilification to the public arena and the conciliation of these acts to the private arena fundamentally undermines the stated goals and objectives of the legislation as decisions reached are not made public and do not serve as examples of unacceptable behaviour (Gelber, 2002:24). The requirement for confidentiality means that unless a complaint is referred to the public arena of the Equal Opportunity Tribunal (which occurs in a very small percentage of vilification complaints), it is

impossible to know whether a complaint was lodged (for example, against Alan Jones), or whether a complaint was upheld and conciliated, and what type of award was made against the respondent. In effect, the process serves no purpose at all in making a wider, social and symbolic statement about tolerance.

While the hate speech of Alan Jones in the week leading up to the Cronulla riot may not been conciliated under the NSW anti-vilification measures, four residents of New South Wales did lodge complaints with the Australian Communications and Media Authority (ACMA). ACMA is responsible for regulating Australia's print and broadcasting services, particularly in relation to 'fostering an environment in which electronic media respect community standards and respond to audience and user needs' (ACMA, 2008). ACMA is also responsible for regulating breaches of the industry codes of practice. Between 17 January 2006 and 16 March 2006, ACMA received four separate complaints relating to Alan Jones' morning radio show. The complainants alleged that throughout the week leading up to the Cronulla riot, Alan Jones had breached the Broadcasting Service Act 1992 (Cth) by using the broadcasting service in the commission of an offence against another Act or law (in this case, the NSW Anti-Discrimination Act 1977), and that he had breached the Commercial Radio Codes of Practice 2004. In particular, he had included material during his radio show that had 'encouraged violence and incited hatred against or vilified people of Lebanese background or people of Middle-eastern background on the basis of their ethnicity, nationality or race' (ACMA, 2006:3).

Alan Jones was only found to have breached the Commercial Radio Codes of Practice 2004 three times during the week-long tirade against Lebanese and Muslim Australians. He was found to have breached clause 1.3(a) of the code on 7 December 2005 when he recommended that Australians invite biker gangs to stop Lebanese Australians from accessing Cronulla Beach (ACMA, 2006:2). Further, he was found to have breached clause 1.3(e) of the code for his constant conflation of criminality (particularly, gang activity and sexual assault) with the Lebanese ethnicity, nationality and/or race (ACMA, 2006:2). Despite repeating the text of the SMS call to arms on at least five occasions (including the day and time of the proposed riot) these speech acts were not deemed to have breached either the Broadcasting Service Act 1992 (Cth) or the Commercial Radio Codes of Practice 2004. In its adjudication of Jones' constant repetition of the SMS call to arms, ACMA found that directly quoting the text message was:

... ill-judged when considered against the pre-existing background of community unrest. However, on balance, ACMA does not consider that an *ordinary reasonable listener* would have considered the quotes in their contexts as likely to prompt to violence, encourage violence or stimulate violence by way of assistance or approval (ACMA, 2006:29, emphasis added).

In *Harou-Sourdon v TCN Channel Nine* [1994] EOC 92-604, the ‘reasonable person’ was defined as one who is neither ‘immune from susceptibility to incitement’ nor compelled to act with ‘racially prejudiced views’ (*cited in* McNamara, 2002:186). It is unfortunate that both ACMA and the New South Wales Anti-Discrimination Board judge the effect of maledictive hate and threats of violence within the context of the reasonable, ordinary person. As this approach requires an analysis of the contextual factors that play a part in each incident of vilification, it appears counter-intuitive to start from a position of the ordinary, reasonable person not being inclined to racially prejudiced views. Australia was founded on the racist proclamation of *terra nullius*⁶; it did not give Indigenous Australians full citizenship until 1967; it retained the White Australia immigration policy from 1901 until 1967; and it retains a Christian calendar for public holidays. How then can we expect that the ordinary reasonable person is somehow immune from this racial, ethnic and religious socialisation?

Maledictive hate for the reasonable third person is only perceived as meeting the test of vilification (as being severe enough to constraining the actions of victims) when it is their norms and values that are shaken to the core. This is unlike the everyday hate of perpetrator and victim, which only shakes the other to the core, in silence, often without advocate or without respite. The ordinary reasonable person may not be necessarily incited by maledictive hate issued from an ordinary person on the street; however, they would be more likely to be incited by maledictive hate issued from a person with authority, or a person who has been authorised to speak.

Conclusion

A critical discourse analysis offers victims, community organisations and the state a framework for understanding the force and effects of maledictive hate. This paper has highlighted that common assumptions about what constitutes hate speech can act as barriers to stronger state intervention on the behalf of victims, and the provision of clear symbols of the intent of governments to create more inclusive communities. Despite the fact that threats of violence (or incitement to violence) are treated

⁶ According to international law in the eighteenth century, nations could only take possession of other countries if they were uninhabited, or alternatively if inhabited, that compensation is paid to the original owners or, through war, that possession is won through invasion and conquest. When Captain James Cook landed at Botany Bay in 1770 he claimed possession of the east coast of Australia under the doctrine of *terra nullius*. This doctrine stems from Roman law and literally means ‘empty land’. Obviously, Australia was not an ‘empty land’; rather, it was perceived to be an uncultivated land and, as such, the inhabitants were not human in the modern sense of the term, and thus, did not require compensation for dispossession. The doctrine of *terra nullius* dominated the relationship between Indigenous and colonial inhabitants until 1992 when Eddie Koiki Mabo - on behalf of many other Mer residents - successfully overturned this basis of Australian property law and sovereignty (*Mabo and Others v Queensland No. 2*, [1992]).

under law as a class of hate speech above and beyond all other themes of malediction (Crimes Act (NSW) 1990: s.26, 31), the New South Wales Government and their Police Service took no action against Alan Jones for his threatening comments or his incitation to violence. Nor were any of the rioters charged for their threats of violence and incitation to violence, despite the SMS containing an incitement to others to commit violence, and many of the protestors' chants including the statement 'kill the Lebs' (Anonymous Protestors, 11 December 2005, *cited in* King and Box, 2005:1). Anti-vilification complaints and broadcasting appeals take months, even years, to adjudicate. In contrast, the police can act immediately. While there is popular commitment to free speech in Australia, the civil laws relating to vilification are fundamentally counter-productive to the immediate censuring of maledictive hate, and so solutions must be found elsewhere. All policing jurisdictions in Australia have criminal provisions available to regulate threats of death and the incitation to violence. As a first step to regulate the most extreme forms of maledictive hate, we may need to accept that using the State and its instruments to greater effect - without significantly undermining the human right to free expression - may require finding solutions in pre-existing laws. These pre-existing laws were created to regulate speech acts that undermine the democratic process itself, rather than the specific damage against the 'other'. This universalisation of extreme harm may assist in making the reasonable, third person in Australian law much more likely to understand the social costs for the whole society when maledictive hate is allowed to circulate and inculcate. Speech regulation, in this sense, is about creating a speedier and more democratic system of language use, where we are all compelled to act in ways that open up the spaces available from which to speak.

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