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Abstract
Speech act theory has been applied to genocidal speech in an extension of its use in other forms of speech regulation. I detail how a misguided reliance on speech act theoretic tools has negatively impacted legal thinking in understanding direct and public incitement to commit genocide. I argue that undue factive and normative significance has been placed on the idea that incitement to genocide may be considered an illocutionary or performative speech act, rather than as a perlocutionary act, as an inchoate crime. With attention to the role of causation in the regulation of incitement to genocide within a speech act framework, I clarify legal applications of speech act theory which have confused or displaced the appropriate questions underpinning genocidal speech regulation. In doing so, I reinforce the role of causation with respect to inchoate speech crimes, and particularly the potential merits of a preventative risk assessment model when identifying genocidal speech. I demonstrate that while these speech act accounts present unique issues for genocidal speech regulation, they also in part stem from prior work applying speech act theory to other speech crimes such as hate speech and pornography.

Keywords Genocide · Speech Act Theory · Normativity · Incitement · Causation

1 Introduction

Speech act theory is widely employed in theories of speech regulation to construct and help understand an array of speech phenomena. A few works have used it in order to understand the notion of 'genocidal speech' ([1], p. 58) or 'genocidal language games' ([2], p. 176) in international law. This paper is concerned with the role of speech act theory in relation to our normative and factive legal reasoning when considering such speech regulation. As I have argued of other speech phenomena [3] speech act theory has often occupied a precarious position in relation to legal reasoning. Here I consider relatively novel applications of speech act theory

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to genocidal speech which reveal distinct lessons about the role of speech act theory as a conceptual framework for both genocidal speech and beyond. These speech act applications to genocidal speech are interesting in a new way because they concern the first explicit application of speech act theory to the regulation of an inchoate speech crime. My basic claim will be that speech act theoretic frameworks as currently employed at best distract from the appropriate factive and normative legal questions we need to ask for coherent speech regulation, and at worst displace them via an arbitrary pursuit of speech act categories which do not translate in the ways claimed to legal reasoning.

I will therefore synthesise and critique various applications of speech act theory to genocidal speech regulation and argue that such applications encroach erroneously on the appropriate normative and descriptive (or empirical/factual) legal questions that ought to be the only focus underpinning such regulation. It is clear that the theory has been attractive in this context, and this is not for entirely problematic reasons, but as such work stands speech act theoretic frameworks can conceal and undermine the reasons to regulate speech. This is not to say that speech act theory can tell us nothing about understanding speech and therefore speech regulation, but that what is taken to be gleaned from it in the context of linguistics is overstated for law in this problematic way.

To explicate this position, I make the case for a reduced minimal conceptual utility for speech act theory and consider its attraction for two crimes: direct and public incitement to commit genocide and instigation (as a mode of liability) to commit genocide. As a matter of terminology, when I use the term genocidal speech I mean to capture both, and I specifically use the terms "incitement to genocide" or "incitement" when referring to the inchoate crime and "instigation to genocide" or "instigation" as a means of committing the crime of genocide as a mode of liability.

Incitement to genocide is an inchoate crime that can be punished in isolation to the potential completion of the attendant crime it incites, whereas instigation requires the genocidal outcomes to occur as a mode of liability ([1], p. 26) (that is, as part of a genocidal event). The primary difference between these crimes is therefore that instigation requires a causal link between the commitment of an actual genocidal event and incitement does not – and may be punished in advance or independently of such an event, in and of itself. The role of causation is thus central to the normative and factive reasoning for incitement and instigation in different ways. My critique here should also anticipate any further applications of speech act theory to different inchoate speech crimes when contrasted with more typically causal crimes or modes of liability.

Understood as such a difference of causation, speech act theory has been considered attractive by theorists attempting to resolve doctrinal problems with respect to incitement to genocide because it, on the face of it, distinguishes between a speech act *in and of itself* and the consequences of a speech act. Due to this legal doctrinal importance between speech which actually causes genocide and speech which does not, incitement to genocide stands to benefit especially strongly from the ability to identify what is incitement *independently of* its causal effects as an inchoate crime. Interestingly, despite speech act theory's wide use in speech regulation it has not been, until very recently for insights toward incitement to genocide, been considered

explicitly in the context of inchoate crimes ([1], p. 58). This is of wider significance, since inchoate crime as a regulatory tool is increasingly relied on across jurisdictions [4] and '[s]everal developments[…]have rendered it of ever-expanding importance.' ([5], p. 265). That said, prior applications of speech act theory do have a close relationship to these uses for inchoate crime, as I shall show.

The fact incitement is an inchoate crime has therefore been taken as an important differentiator between it and other speech crimes that have received the attention of speech act theory. For reasons that will become apparent, I focus here on the illocutionary and perlocutionary elements of speech act theory as applied to genocidal speech. These notions will be explained and applied but in essence the illocutionary aspects of a speech act represent the act performed by the speech (e.g. to order, request, insult, etc.) and the perlocutionary act/effects concern the consequences upon a hearer.

It makes sense that the first explicit considerations of speech act theory to inchoate crimes are toward incitement to genocide, as much of the doctrinal difficulty found in the jurisprudence revolves around the inability to properly separate the speech act and the consequences of the speech act. For example, it is well documented that the International Criminal Tribunal for Rwanda (ICTR) struggled to separate the causal effects of inciting speech in finding criminal liability, despite the crime not requiring any such connection ([1], p. 25). The averse effects to the function of the crime are considered by Gordon who writes that this and other issues have 'sapped incitement of its preventive force—its chief value from a policy perspective.' ([6], p. 185). There is therefore a feeling of need for tools that can help resolve these problems and thus speech act theory has been recruited.

In this article, I clarify the limitations and appropriate role of speech act theory, pulling back its overzealous application to the extent it infringes on or confuses normative and factual questions regarding the reasons to identify and regulate inciteful speech.

Section Two will introduce the doctrinal background to genocidal speech to understand the perceived attraction of speech act theory in resolving enduring problems of causation in judicial reasoning. In Section Three I explain the necessary speech act theory for the purposes of the arguments I consider and my response to those. Section Four features my main argument and critiques academic work that employs speech act theory in genocidal speech considerations and contextualises it in reference to wider work on speech act-oriented speech regulation. I conclude my argument in Section Five.

2 Incitement, Instigation and Causation

In this Section I will introduce the relevant aspects of both incitement and instigation to genocide focusing mainly on the role of causation with respect to each. It will not be a comprehensive assessment of the two crimes, of which contemporary and thorough accounts are available [6], as the relevant factor for my analysis is that incitement to genocide does not need to result in a genocidal act to be committed, whereas instigation to genocide does. This places causation as

a central differentiator and speech act theoretic tools have been applied to help separate them and identify an independent speech act of incitement, as I explore fully in Section Four.

Incitement to genocide's relationship to causation – in not requiring a subsequent genocidal event – means it is an inchoate crime ([7], p. 32). The overarching crime (of genocide) need not be completed in order for one to be guilty of its incitement. In a hypothetically straightforward case, a clear direct and public call for genocide, such as a call for extermination of a relevant group (e.g. calls for extermination 'root and branch' in the Nuremberg trials) ([8], p. 548), would commit the offence regardless as to whether the act was carried out within modern legal frameworks ([1], p. 35). Such a call is rarely so explicit and genocidal speech can be very euphemistic, as for instance the expression 'go to work' in the Rwandan genocide meant to kill Tutsis ([9], §44). This raises difficult and atypical legal questions about what should count as inciteful speech, since incitement to genocide can not, or should not, be determined to have happened *when* it contributes to an actual genocide, but in advance (or at least independently) of any such occurrence ([1], p. 9).

This necessarily raises a slew of normative issues as to what speech should be captured by the crime of incitement to genocide, some of which are roughly shared with any form of speech regulation and some which are unique to its status as an inchoate crime. By normative I simply mean the value-laden arguments for the scope and construction of "direct and public incitement to commit genocide", though I will expand on this notion at the end of this Section. For practical examples of this consider the following issues.

Firstly, what counts as sufficiently "direct" incitement and what is too indirect to be captured by the crime? ([6], pp. 186–188). For example, a claim that a particular group is a drain on society, in some contexts, may invite action to address that claim in an ambiguously violent way. In contrast, asserting that the solution to this is the extermination of that group could be readily seen as a direct call for genocide. But what constitutes direct between and around these lines is not obvious and cannot of course be divined from the word "direct" itself, so we must construct it in a conscious way with attention to good reasons.

Secondly and similarly, variance exists on what should count as "public" communication – for instance '[h]ow many individuals does it take before reaching critical mass? What makes a place "public"?' ([6], p. 190). These questions cannot be answered without attention to the intended function of the crime and attendant values, such as to what it is to speak privately, etc.

Thirdly, when regulating inciteful speech with the aim of preventing genocide there are other legal considerations and values to bear in mind, such as the correct balance of freedom of speech and expressive value when regulating political speech [10]. What one considers incitement to genocide could for another be their perceived most essential political speech for their identified group interests. A sound scope for speech regulation must factor in any other rights or interests (in at least some way—even if it is to disregard them) that such regulation might encroach on ([11], p. 84). Defining incitement to genocide therefore inherently raises questions of how far the law ought to go in terms of anticipation and prevention when identifying and prosecuting inciteful speech. ([1], p. 253).

The amount of potential normative arguments as to what inciteful speech does or does not warrant regulation could be expanded on far further. Gordon offers deep insight into these sorts of questions:

> '[M]ight the medium of transmission—print versus broadcast, for example—have a bearing on the analysis? Should the individual history of the speaker, in terms of previous speeches, for example, be taken into account? What about the political situation of the country where the speech takes place or the demographic/educational makeup of the audience[…]?' ([6], p. 196)

The point here is not to suppose any answers to these questions or examine these problems and the varied positions one might take in relation to them, but rather to illustrate a few of the complicated normative issues the law must resolve when regulating such speech.

In contrast to these sorts of normative questions, there are descriptive, factual or empirical questions regarding how speech actually functions. For example, it is one thing to say that one is in favour of a far-reaching approach to regulating inciteful speech which may infringe on the exercise of some political speech on the basis that preventing such serious crime outweighs those expressive interests. It is another to know what kind of speech is *most likely in general* to incite and thus warrant such preventative regulation [12]. It would be incoherent or weak argumentatively to hold this normative position but then seek to regulate speech that is unlikely to result in genocide as an empirical matter. Alongside the normative arguments, and others, considered above, are such factual questions. For example, an underlying factive question is how much *is it* the case that strict or broadly defined regulation of inciteful speech does in fact chill political speech (given a shared construction of these notions). If it does not do so or only does so to a small extent, it should inform the strength of the legal argument either way.

The intertwining nature of questions of this factive sort with normative questions creates a complicated doctrinal picture for legal reasoning which are explored at length elsewhere ([1, 6, 12]), but here I am drawing the essential conceptual relation and (in at least some sense, explored more below) separation between such questions. For every normative position on the regulation of genocidal speech (or indeed any crime) there is both a domino effect of other different normative commitments and an underlying array of questions about reality that need to be answered given any such normative commitment. Though this is minimally sufficient to define facts and norms for my critique, at the end of this Section I contextualise this into legal facticity and normativity more widely.

Given the centrality of incitement to genocide as an inchoate crime for my analysis, it is worth noting that there has been some academic disconcertion as to its structural placement in the Rome Statute [13] alongside modes of liability at Article 25(3)(e) that require the completion of the crime, leaving a potential lack of clarity as to its status as an inchoate crime ([7], p. 42) ([1], p. 33). Since the International Criminal Court (ICC) has not charged anyone with it yet ([1], p. 41) this remains a potentially open point. However, the crime of incitement to genocide is found in different treaties, originally in the United Nation Convention on the Prevention and Punishment of the Crime of Genocide 1948 [14] in Article III(C) where it is

uncontestably an inchoate crime and 'it is only necessary to show that the speaker directly conveyed in his or her public speech acts the intention to incite others to commit genocide' ([7], p. 35). It is similarly so for the ICTR at 2(3)(c) in the Statute of the International Tribunal for Rwanda [15]. This structural anomaly of the Rome Statute ([16], pp. 266–268) is left aside here as untested since the work I consider treats it as inchoate, and it does seem unlikely that the Rome Statute intended a radically different construction to the Genocide Convention without being explicit about that.

In contrast to the lack of development of incitement to genocide at the ICC, the ICTR involved the first application of the crime as found in both the Genocide Convention and its own statute ([7], p. 32) and (as explored further in Section Four) much of the academic work on the crime focuses on this. This makes sense as '[a]lthough the ICTR has closed its doors, it has left an indispensable corpus of jurisprudence for future tribunals addressing direct and public incitement to genocide.' ([7], p. 34). It is also noted that 'certain complications in the formulation and interpretation of the elements of this crime still persist.' ([7], p. 34). Much confusion stems directly from the jurisprudence of the ICTR itself, particularly concerning causation.

This confusion has stemmed from an inability to treat incitement as a properly inchoate crime by including the consideration as to whether the crime happened or not as retroactive evidence of criminal incitement having occurred ([12], p. 497). This sort of fallacious thinking about the role of causation in inchoate crimes is considered extensively by Wilson who notes that 'some judgments refer to causation in their legal analysis and mistakenly suggest that causation is a necessary element for establishing the crime of incitement to genocide.' ([1], p. 25). He is highly critical of this noting that '[t]he ICTR's insertion of a causation element into incitement to genocide constitutes a radical departure from at least a century of the criminal law of inchoate crimes and as such, has created controversy and confusion.' ([1], pp. 25–26). This appropriate role of causation for incitement to genocide is a longstanding discussion in international criminal law ([17], pp. 352–353). This is one of the reasons that speech act theoretic tools have recently been taken to be useful by Wilson and others.

Instigation to genocide in particular best serves as a foil to illustrate the conceptual issues of incitement to genocide in this regard and is a crime I will discuss in relation to speech act theoretic tools to this end. It is noteworthy that some international criminal case law has failed to appropriately separate the two crimes ([7], p. 47) but they are importantly different for international criminal law in that instigation to genocide requires the speech to cause an actual genocide whereas incitement to genocide does not require this. As held in Blaškić at the International Criminal Tribunal for the Former Yugoslavia '[t]he essence of instigating is that the accused causes another person to commit a crime' ([18], §270).

While instigation to genocide does not therefore have the same sort of issues encountered in incitement to genocide as an inchoate crime, it does obviously raise its own normative and factual challenges when deciding what counts. For instance, at a normative level the law needs to determine what degree of connection from the speech to the consequent crime is sufficient and how remotely should responsibility

be located, and then at a factive/descriptive level there are questions such as did the speech in that instance actually have that instigating effect ([12], pp. 512–513). A strong example of how a misalignment in this respect can be problematic (for either incitement or instigation, given the causation-based confusion in the ICTR) is the widespread claim that radio broadcasts in the Rwandan genocide were a primary factor in causing the genocide ([6], p. xxii). Drawing on research by Straus ([19], pp. 616–617), Wilson notes that there was 'little to no correlation between the broadcast range and the onset of genocide in different locales' ([1], p. 232) during the genocide. Whatever the case may be, this is separate but rationally related to the question as to whether speech over radio broadcasts ought to be regulated. Obviously, if it is the case that the radio broadcasts had such an overwhelming effect, there is at least more reason to regulate that mode of expression in some cases than if it had little to no effect. But the mere fact of that influence alone cannot resolve the issue as to whether it should be regulated – that can only be done with a value-oriented decision.

The distinction between facts and norms for legal thinking goes much deeper than I need go here, but given its possible theoretical complexity it may be important for some readings to shortly contextualise my basic construction against this background, as facts and norms are potentially philosophically fraught terms inviting a range of sceptical interventions. Those interested only in the argument I make specifically for genocidal speech may prefer to move to the next Section.

With respect to the relationship of my basic notion of facts and norms here with wider legal philosophical positions, an illustratively pertinent distinction is the separation and entanglement thesis as articulated by Bertea [20]. When it comes to legal facts and norms he considers the separation thesis and entanglement thesis. For the separation thesis 'there is a rigid dichotomy, or unyielding dualism, between facts and norms: facts are about what "is," whilst norms are about what "ought" to be, and there is no way to bridge the two worlds.' ([20], p. 252). The entanglement thesis involves 'the claim that facts and norms are, by contrast, conceptually intertwined.' ([20], p. 253).

It is not my aim to weigh in on the broader relationship of facts and norms for law beyond noting that my critique is not necessarily contingent on either of these broad understanding of the relationship between facts and norms. In arguing for a version of the entanglement thesis, Bertea notes that 'while objective facts and practical norms are indeed distinct categories of thought, that distinction does not amount to a conceptual gap—a dichotomy or unbridgeable divide.' ([20], p. 253). My analysis necessarily depends on seeing legal facts and norms as distinct categories, but this is coherent with either the position that facts and norms are irreducibly distinct *or* the idea that facts are only possible to know or construct via a normative framework. The distinction I draw attention to when discussing facts and norms therefore flies under the radar of more elevated philosophical questions such as these.

To show this with two of the examples I consider above, whether a location counts as "public" or a genocidal speech act is "direct" for the purposes of direct and public incitement to commit genocide could be taken as either a distinct empirical fact or one that is only possible via a normative construction, and the rational process I explore above would hold in either case. For either an epistemically separate

view of facts and norms or an interrelated one, the key point here is that they are in either case 'distinct categories of thought' ([20], p. 253). After all, as written by Bertea:

> '[F]acts and norms are central to the realm of law. Not only would there be no way to make sense of legal systems if either facts or norms were taken out of the picture, but also the distinction between facts and norms is understood to be central to legal practice.' ([20], p. 265).

This is therefore just to say on my part that whatever epistemic or metaphysical position one adopts in relation to the distinction between different kinds of facts and norms (the different kinds of which I do not break down here but do 'come in several varieties') ([20], p. 250), the proper relationship between them for legal reasoning as I discuss in this Section should hold, and thus the role of speech act theory in relation to the distinction I offer in Section Four need not be burdened by them. Though, it is an interesting and complicated separate question worth further exploration how speech act theory may align with different theories of legal facts and norms in speech regulation as for example is considered by Solum [21] and Wright [22] in applications of Habermas's work on communicative action [23].

Before moving on to consider the applications of speech act theory to the framework introduced in this Section, I will now explain the relevant elements of speech act theory.

3 Speech Act Theory

Speech act theory is applied widely as an analytical tool to a huge range of fields. Law is no exception to this, particularly in work on speech regulation. Its attraction in this context makes sense as the basic insight of speech act theory is a separation of different parts of any given total speech act and can therefore help isolate different parts and functions of linguistic utterances. These different aspects of a speech act are the locutionary act, illocutionary act and perlocutionary act. I develop these below, but at the outset it helps to identify the locutionary act with the propositional meaning(s) of the speech, the illocutionary act with the speech act(s) being performed and the perlocutionary act with the consequences upon hearers of the speech. All this happens within a certain social context. For instance, the statement "red wine gives me headaches" may convey certain facts or meanings—both explicit and implicit, and specific and general—while also representing a potential (illocutionary) "request" for white wine instead or red, and one consequence of that may be for my date/interlocutor to open a bottle of white instead of red. To separate the elements of the total speech act in this way helps examine the different functions an utterance has and is one reason it has been taken to be valuable for fields with even a slight connection to linguistic analysis. For incitement to genocide this separation of the act performed by speech and its causal effects and propositional content is problematically taken to be of regulatory aid, as I expand on in Section Four.

Of these three aspects, illocutionary acts have been perhaps most widely used in legal reasoning to help identify speech that performs specific regulable

acts—particularly in the cases of hate speech and pornographic speech. A classic example of this is the focus on the speech act of 'subordination' ([24], p. 26) in Langton's development of MacKinnon's work [25]. Though wider applications to other sorts of speech are made with varied approaches: see for instance work done by McGowan [26], Maitra [27], Butler [28], Greenawalt [29], Solum [21] and Wright [22].

This wider legal focus on illocutionary acts and performativity in helping identify regulable speech acts can make initial intuitive sense for the idea of incitement to genocide as an inchoate speech crime, as an illocutionary act is the "act" performed by an utterance in a way explicitly separated to the consequences upon listeners. Basic examples would be a request, an order, an appeal, etc. As considered by Searle in his expansion of speech act theory these are numerous:

> 'Some of the English verbs and verb phrases associated with illocutionary acts are: state, assert, describe, warn, remark, comment, command, order, request, criticize, apologize, censure, approve, welcome, promise, express approval, and express regret.' ([30], p. 221)

As noted, in contrast to illocutionary acts, perlocutionary acts (or perlocutionary effects) concern the consequences of a speech act on listeners. The perlocutionary effects of the military order to "bomb that occupied hospital" would in a simple case of commander-subordinate relationship be for the recipient of the order to do it, refuse to do it, to gain or lose respect for the commander, or any other possibility. As with the array of illocutionary acts that may be performed by a given utterance, the possibilities are restricted only by the context in which the speech act takes place. For speech act theory it is fundamentally just an analytical tool to separate the results of a given speech act on any interlocutors from the other elements of the speech.

As for locutionary acts it is more than sufficient for the applications herein to understand them basically as the propositional content of the speech act. So an order to "bomb that occupied hospital" or (more artificially) "I order you to bomb that occupied hospital" from a commander may in either case be an illocutionary act of ordering ([31], pp. 28–29) but also contains explicit and implicit propositional claims or locutionary elements: explicitly that it is occupied and implicitly that it is occupied by enemy soldiers and not civilians, and that it has not yet been bombed by another plane, etc.

With this technicality covered, it is argumentatively clarifying for the legal work I consider in the next Section to note that the original basis for speech act theory within linguistics was conceptualised by Austin (see Cerf, [32], pp. 351–352) to challenge a preoccupation with 'the assumption of philosophers that the business of a "statement" can only be to "describe" some state of affairs, or to "state some fact", which it must do either truly or falsely.' ([31], p. 1). Essentially, philosophical enquiry at the time was insufficiently attentive to the behavioural elements of speech beyond stating facts. To illuminate this, Austin initially considered two classes of speech which he distinguished from one another: constatives and performatives. The former being 'a statement' ([31], p. 6) and the latter 'doing something' ([31], p. 25). The dichotomy can be explained

very basically, but sufficiently for purposes here, by the idea that some speech conveys information that is true or false and some speech enacts changes in the world by doing things.

To avoid over-abstraction of what is really a fairly basic point, the difference is illustrated by the rudimentary example of a constative such as "it's cold in here" as contrasted with a performative "please turn on the heating". In the former the speech is on the face of it making a truth-conditional claim and in the latter case it is making a request, order, etc. (depending on context). This basic case illustrates though that each instance is both locutionary and illocutionary and cannot be reduced to either. For example, a friend visiting one's house and saying "it's cold in here" may constitute a request to turn on the heating and the request "please turn on the heating" contains relevant factual information similar to the statement that it is cold. Austin went on to illustratively reject this distinction in favour of the recognition that 'stating something is performing an act just as much as giving an order or giving a warning' ([33], p. 251) and that 'when we give an order or a warning or a piece of advice, there is a question about how this is related to fact' ([33], p. 251).

Accordingly, as noted by Collavin: '[a]fter having first created the constative/performative dichotomy, he [Austin] ultimately erodes it and argues that all utterances are in fact used to perform speech acts' ([34], p. 377). Austin concludes that 'in its original form our distinction between the performative and the statement is considerably weakened, and indeed breaks down' ([33], p. 251). It is this observation that led him to develop speech act theory into the above classifications of locutionary, illocutionary and perlocutionary acts to better reflect that all speech acts have all these elements, separating his illustratively redundant theory of performativity from his theory of speech acts.

All speech therefore involves the use of speech acts and all speech acts involve these three elements. Austin's swap from performativity to speech act theory in this tripart sense is supported and endorsed in a large amount of subsequent development and application of speech act theory. Searle is the most widely acknowledged and systematic post-Austin authority of speech act theory with Collavin noting 'Searle's systemization and development of Austin's ideas has been very influential, to the point that Searle's interpretation of the theory is at times taken as the definitive view of speech acts' ([34], p. 377).

Despite technical refinements and contestations between his work and Austin's, this fundamental observation remains consistent throughout his and Austin's work, with Searle writing that 'all linguistic communication involves linguistic acts' ([35], p. 16) and that 'communication necessarily involves speech acts' ([35], p. 17). As noted by Graham, Austin 'is therefore led to develop the theory of illocution as a *replacement* for the first theory' ([36], p. 54). Collavin writes in support of this that 'at the core of speech act theory[…]all utterances amount to the execution of an act' ([34], p. 373).

The key distinction I go on to consider is between illocutionary and perlocutionary acts (rather than between locutionary acts and these) since identifying a speech act as a criminal illocutionary act and distinguishing it from its causal effects is taken to be helpful in the regulation of the inchoate crime of incitement to genocide, to which I turn now.

4 Speech Act Applications to Genocidal Speech

Speech act theoretic accounts of genocidal speech regulation are quite varied in their treatments but not numerous in the same way that applications to hate speech and pornography are [24–28]. Extensive applications to other kinds of speech are also influential [29] and it has been used as a tool to help identify speech that aligns with the aims of free speech [21, 22]. The influence of these works can be seen in free speech theory more broadly and is a part of the conceptual furniture of free speech discourse now ([37], p. 166). There have also been some critics of this reliance on speech act theory in speech regulation from different perspectives [3, 39–41] and genocidal speech applications take place against this background. Genocidal speech applications warrant a distinct treatment due to the application of speech act frameworks to the inchoate crime of incitement to genocide, and the relatively special problems faced for causation in its identification and regulation. I consider applications to genocidal speech by Wilson [1], Tirrell [2] and Fyfe [38].

Wilson makes the first explicit application of speech act theory to an inchoate crime through his extensive doctrinal considerations of incitement to genocide. He notes that speech act theory is useful in 'clarifying and constraining the range of impermissible speech.' ([1], p. 26). He acknowledges the 'ubiquity' ([1], p. 58) of speech act theory in hate speech regulation and considers that 'Austin has inspired many advocates of heightened legal regulation of hate speech' ([1], p. 57). In illustration of the novelty of his approach he notes that 'Austin's theory of speech acts has not yet been employed to distinguish between forms of criminal liability that require proof of criminal outcomes[…]and non-causal speech crimes.' ([1], p. 58).

There are a few strands to Wilson's application of speech act theory to inchoate genocidal speech and not all are relevant here. I leave aside here some of his arguments, for example his construction of the special intent to commit genocide ([1], p. 61) and the requisite directness of the crime ([1], pp. 35–36). He separates the locutionary, illocutionary and perlocutionary elements of incitement considering that:

> 'The appropriateness of Austin's model of language to incitement to genocide is apparent in the example he used to illustrate the distinction between locutions, illocutions and perlocutions.' ([1], p. 61]

He 'follow[s] attentively Austin's distinctions between the meaning, the force and the effects of a speech act' and considers that '[s]peech act theory is directly applicable to the legal regulation of inciting speech'. ([1], p. 60). Considering this framework and focusing on the illocutionary elements of such speech for the inchoate crime of incitement to genocide, he argues:

> 'Performative speech acts are acts, and they can be evaluated according to what they mean, what they encourage others to do and what corollaries they have. In what they mean and what they urge, certain speech acts can be criminal acts in and of themselves.' ([1], p. 70)

He considers incitement to be such an act ([1], p. 61) and the idea that speech act theory can identify regulable speech acts (such as incitement) is a conscious

([1], p. 61) continuation of the sorts of arguments encountered in hate speech and pornography literature which place significance on the idea that hate speech/pornography are speech acts to aid in its regulation. This is in keeping with arguments from theorists such as McGowan who, in her examination of hate speech from a speech act theoretic view, stated to '[r]ather than focus on the causal effects of racist hate speech (as the standard liberal defence does), I focus instead on the actions constituted by such speech' ([26], p. 122). She 'instead focus[es] on what the speech in question does (illocutionarily or otherwise)' ([26], p. 122). As noted more fully in the introduction to this Section, this is a line of argument broadly taken by a number of theorists with Langton writing 'Pornography is speech […] Pornography is a kind of act […] Put these together and we have: pornography is a kind of speech act.' ([24], p. 25). Similar claims can be seen throughout the literature, for instance in Maitra's assessment that 'the very act of producing speech of that kind [hate speech] just *is* a subordinating (speech) act' ([27], p. 98).

Expanding on this in the context of genocidal speech and inchoate crimes Wilson 'delve[s] deeper into the philosophy of language to grasp how speech acts are specifically acts, and how words do things.' ([1], pp. 58–59). Partially this is problematic in the same way many hate speech and pornography accounts of speech act theory are [3] but it is distinctly problematic as inchoate crimes are quite vulnerable to this form of thinking as I will show. To compound this, significant doctrinal problems facing genocidal speech are specifically about causation as illustrated in Section Two. This is where the technicality of speech act theory introduced in Section Three becomes important, as the focus on illocutionary acts, rather than perlocutionary acts, emerges with implications for the regulation of genocidal speech:

> 'Since it is an inchoate crime, intent to commit genocide focuses upon the locutionary and illocutionary aspects of a speech act, not on the perlocutionary dimensions.' ([1], p. 61).

This is coherent with the overall position he takes in:

> '[P]ropos[ing] an alternative approach that draws on the speech act theory of philosophers J. L. Austin (1962) and John Searle (2010) in order to highlight the inchoate character of the crime of incitement to genocide by emphasizing the content, meaning and illocutionary force of utterances.' ([1], p. 10]

The idea that we can consider incitement to genocide (or inchoate speech crimes more broadly) as an illocutionary act rather than a perlocutionary one leans on speech act theoretic frameworks to separate the meaning and illocutionary action conducted by an inciteful utterance from its consequences, which is on a certain linguistic level possible. However, illocutionary acts/forces take place within the total speech act (including perlocutionary acts) and, normatively speaking, is not so easily or precisely surgically removed. In regulating inchoate crimes the perlocutionary acts involved in speech are still relevant, it is just that rather than regulating the *individual or actual* effects of the speech it is more about the regulation of a general type of speech on the basis of their *potential or probable* perlocutions.

The distinction between actual and potential causation is a well discussed aspect of inchoate crimes. Benesch argues 'incitement to genocide must be defined as speech that has a reasonable possibility of leading to genocide, when and where the speech is made' ([12], p. 494) and in relation to this work Wilson acknowledges that '[i]nstead of determining direct causation, Benesch's criteria assess the likelihood that a speech act could have foreseeable genocidal consequences' ([1], p. 50). He is critical of her work due to its lack of social scientific support regarding the speech she highlights as likely to incite genocide ([1], p. 51), but the important thing here is that her account is posing the right sort of questions: that is, what kind of speech—given a prior normative commitment to preventing genocide—is *likely* to produce it. This can in turn inform general regulation of inchoate crimes.

Considering which sorts of speech are likely to have genocidal consequences can aid a regulatory focus on a particular kind or category of speech most likely to effectively lead to genocide in general, but the important thing is that it is anticipating the likely effects on hearers in terms of probable/likely/possible causation. Taking calls for revenge or speech which references past atrocities as an example of this, Wilson gathers a large amount of social scientific data ([1], p. 240) to illustrate these as a sort of speech that 'powerfully reinforce collective identity and internal solidarity, thus adding a fresh component to existing theories of inciting speech.' ([1], p. 244). Therefore, as a general kind of speech, any legal regulation that was concerned with preventing genocide (presuming this is empirically true, as a separate question) should warrant particular attention to it. As noted above, it is through this sort of empirical analysis that Wilson disputes the widely accepted standard claim that the Rwandan genocide was significantly influenced by the use of radio ([1], p. 231). He is therefore obviously very attentive to these sorts of questions.

Nonetheless, he takes a number of issues with the reliance on such probable causation for incitement to genocide on the basis that '[i]f the prosecution is to build its theory of an incitement case on probable causation, then it is not at all evident what type and threshold of probability the prosecution is aiming for.' ([1], p. 53). In offering alternative models (such as a greater focus on the intention of the speaker) ([1], p. 63) he concedes that 'it is nonetheless highly likely that international prosecutors will continue to base their decisions to charge incitement or hate speech on a risk assessment model.' ([1], p. 261).

Benesch calls this risk assessment model '[t]he "possible consequences" test' which 'solves several problems that courts have faced in incitement to genocide cases so far.' ([12], p. 497). She goes on to consider a wide range of good reasons for this ([12], p. 497) but the important point here is that incitement to genocide does currently involve probabilistic reasoning of causation, is likely to continue to, and I would also suggest *must* rely on it as it is necessary to align the factive arguments for regulation with at least some of the normative reasons we have to regulate it. That is, if one thinks preventing genocide is a worthwhile normative end to the point it should infringe on some speech rights (however explicated) it is essential to know what sort of speech is most likely to cause genocide. Therefore, the inchoate crime of incitement to genocide merely *pushes back* the causal question to a more general level. If considering a conviction for instigation

to genocide, one question would be what *were* the perlocutionary effects of the speech act(s) in question. For incitement, it is what *might have been* those effects.

Fundamentally, this simply makes the question of perlocutionary effects one of broad anticipatory likelihoods rather than actual consequential effects. It is true that for speech act theory in an abstract sense there is an identifiable illocutionary speech act involved in any given utterance, and that this is distinguishable from the locutionary and perlocutionary dimensions of the same speech act. However, not only is this the case for any speech act, these categories were conceived to aid in a conceptual understanding of speech from a linguistic perspective with the particular ambition to explain speech as, at least in part, a form of behaviour – rather than because 'certain speech acts can be criminal acts in and of themselves' ([1], p. 70).

Insofar as it is Wilson's argument that we should not ideally be concerned with the effects of speech even probabilistically, and that instead the intent of the speaker is the 'ultimate issue' ([1], p. 63]), then this is of course a perfectly coherent normative position with respect to how the crime should be constructed. But in such a case, the separation between perlocutions and illocutions/locutions is merely a terminological matter. There is no particular enhancement of this position that the speech act of incitement *is an illocutionary or performative act*. Furthermore, as a separate but related matter, I would suggest that these three dimensions (locution, illocution and perlocution) are dependent upon one another within the total speech act to understand the full matrix of empirical/factive and normative issues when constructing it as a legal concept with a specific aim.

It is not clear what function speech act theory has for this particular argument by Wilson beyond noting that it is conceptually possible to think of speech without considering its effects. But when the categories of illocutionary and perlocutionary acts are appropriately emptied of normative and factive implication this is a very basic use it may have. That said, it may perhaps be conceptually clarifying in this way in light of the problems of causation faced by the ICTR.

Not dissimilarly to the way other authors have considered other speech acts, such as the speech act of subordination ([24], p. 34), Wilson writes 'Langton helps us to understand how inciting genocide is a crime because of what it itself does: namely to legitimate, authorize and condone genocidal behavior.' ([1], p. 62). This leads him to argue that:

> 'Austin included as "performative utterances" a number of examples that authorize, sanction, warn or threaten, and so it seems fair to include incitement under the general category of illocutionary performative utterances.' ([1], p. 60).

The problem with this is that it seems fair to include it as it is a triviality to do so – of course one of the things we can "do" with our words is to incite others, understanding language as a behavioural activity. There is no normative or factive import for thinking about incitement as a regulable speech phenomenon in this way. In expansion of his point, Wilson draws on Austin further ([1], pp. 62–63), noting that Austin says '[w]e have then to draw the line between an action we do (here an illocution) and its consequences' ([31], p. 110) and in turn Wilson remarks that '[s]

peech act theory conventionally draws sharp lines among the meaning, the force and the effects of a speech act.' ([1], p. 62).

This equivalence drawn by Wilson is a problem for the transference of speech act theory to legal reasoning, which at a fundamental level does not have the same function as Austin's purpose in philosophising these distinctions. While in the context of philosophy of language there are potentially theoretically sharp distinctions being drawn to help dissect linguistic acts, these distinctions are *not* sharp for normative and factive legal reasoning. The regulation of inciteful speech as an inchoate crime is—perhaps it is not too strong to say—inseparable from normative causal considerations, just in a way that is different to more typical understandings of causation in law.

In summary of my response to Wilson here: as explored in Section Three, in explicating the tripart elements of a speech act Austin was responding to a particular philosophical problem that philosophers of language were overattentive to truth-conditional statements as the main function of language. He drew attention to the fact that speech is really a kind of behavioural activity—and we do things with words as well as make claims all in one package when we speak. The illocutionary speech act of incitement to genocide is inextricably tied up within the total speech act involving locutionary, illocutionary and perlocutionary aspects warranting interrelated factive and normative attention. It is problematic to put normative weight on the idea that incitement can be considered 'under the general category of illocutionary performative utterances' ([1], p. 60) since, as established, this is a supremely basic fact about all speech. Speech act theory may be able to identify illocutionary acts as part of a total speech act, but the legally normative significance of incitement to genocide *comes from the fact we consider incitement to genocide and its effects so serious* morally, socially and politically, rather than because it is an illocutionary act per se. The construction of incitement as a criminal speech act for legal purposes therefore seems inevitably at least in part because of its likely causes. This should become increasingly clear in the subsequent work I consider.

Tirrell's speech act theoretic notion of genocidal speech serves as an informative comparator to Wilson's for the above argument I make. Her work is on the face of it different to Wilson's treatment of incitement to genocide because it considers the role of speech act theory in an explicitly causal way. Her work predates Wilson's application of speech act theory to inchoate crime, but she applies speech act theory to the regulation of genocidal speech more broadly.

Her argument is that genocidal speech acts are 'action-engendering—that is, they license non-linguistic behaviours.' ([2], p. 176). To illustrate this she focuses, similarly to Wilson, on the Rwandan genocide and elaborates on what she calls 'derogatory terms' ([2], p. 176) which may have such a licencing force. Her essential argument is that '[b]ecause of the action-engendering force of derogatory terms, actions hitherto unthinkable (i.e. the extermination of a people) came to be regarded as socially appropriate and even required.' ([2], p. 176). Therefore, her focus is on 'how speech acts can prepare the way for physical and material acts, and how speech generates permissions for actions hitherto uncountenanced.' ([2], p. 175).

In making this argument she seeks to show 'how speech acts contribute to the preparation for and execution of a genocide, and more generally, why words are

not only words.' ([2], p. 193). She therefore also sets up the idea that a speech act is itself a form of action that warrants regulation but specifically because it links into – is action-engendering toward – a subsequent physical act rather than as a distinction to that. She muddies the water of this argument by arguing that we:

> '[M]ust not presuppose an untenable distinction between language and behavior. Speech acts are behavior. Using snake vocabulary to refer to humans in order to undermine their status is doing something—it is dehumanizing them.' ([2], p. 206).

Whether her point is rhetorical or analytical here, it is meaningfully tautologous in the same way as Wilson's similar point above: all speech is behavioural conduct. Using 'snake vocabulary' is potentially regulable not because it is 'doing something' but in contrast because within her normative framework it is speech that 'is dehumanizing' in the way she constructs beyond the possible remit of speech act theoretic categorisation. To argue that the speech *is* behaviour or *doing* something is empty in the sense every instance of speech is doing so, and speech act theory's conception of illocutionary speech acts can not inject normative meaning, nor empirically elevate some speech and therefore cannot generate such legal normative value.

This fallacious reasoning, as I have argued elsewhere in relation to other speech phenomenon [3], shifts the focus of our thinking from the appropriate normative and descriptive questions about such dehumanising speech and onto whether they are a speech act of a certain stripe (or indeed at all). However, for the inchoate crime of incitement to genocide the speech act distinction between illocutionary and perlocutionary acts presents uniquely misleading attraction, since the law is seeking to regulate a speech act in isolation to any singular, obvious or actual consequences. Understood as a matter of probable/likely/possible causation, though, it can be seen to be little different from a speech act theoretic view.

Unlike Wilson's argument (at least as he postulates it), Tirrell's position with respect to regulating genocide is fundamentally a typically causal argument, as it explicitly concerns the effects of the derogatory speech on hearers and does not consider the inchoate crime of incitement: she writes '[t]he ultimate issue is the connection between verbal action and more macro-level physical action.' ([2], p. 206). Reinforcing this causal element, she stipulates a requirement for action-engendering speech that 'a language exit transition, moving from a location within the language game to a behavior that is not a position in the game. It is an exit-move.' ([2], p. 211). At a basic level her argument is that some speech leads to 'the exit to non-linguistic behaviors, including rape, murder, and ultimately genocide' ([2], p. 216).

Before fully synthesising Tirrell's point here with my critique, it is fruitful to consider Fyfe's argument regarding incitement to genocide, and her related response to Tirrell. Fyfe 'construct[s] an account of speech acts and genocide that can ground a consistent understanding of incitement in international criminal law.' ([38], p. 525). In doing so, she takes Tirrell's argument to be focusing on the perlocutionary effects of speech instead of the illocutionary or locutionary:

> 'The speech acts Tirrell focuses on can only constitute genocidal hate speech. Any action on behalf of a hearer that results from a genocidal hate speech act, is merely the result of persuasion.' ([38], p. 532)

Fyfe contrasts her analysis, considering that '(i)ncitement to genocide, for instance, remains a puzzling area of international criminal law' ([38], p. 524) and that this is in part 'because incitement is an inchoate crime, we must determine how much what surrounds or follows a speech act should count in assigning criminal liability for that speech act.' ([38], p. 524). Therefore, she notes that 'we are faced with a challenge in matching specific speech acts with specific crimes.' ([38], p. 524). In resolving this she writes that '[t]o understand the categorization of the explicitly performative act of direct and public incitement to commit genocide, Austin's conception of illocutionary acts and perlocutionary acts is a useful starting point.' ([38], p. 538).

In this application of illocutionary acts to genocidal speech she also focuses on the Rwandan genocide and the ICTR and 'discuss[es] the charge of "genocide" based on speech acts' ([38], p. 525), considering that these 'tools should inform our criminal liability structures.' ([38], p. 525). She distinguishes incitement as an inchoate crime because it can be understood as an illocutionary act, similarly to Wilson, stating: 'it makes the most sense to deem direct and public incitement to commit genocide to be an illocutionary act rather than a perlocutionary act.' ([38], p. 540).

Without wanting to be repetitious in the detail of my critique of this claim at this stage, as I note above in relation to Wilson and in Section Three, it is normatively and factively misleading to think of incitement to genocide as either of these, as really it is just different ways of thinking about perlocution (probabilistically rather than actually) and the determination of any normatively significant legal "act" of incitement is tied to a theory of likely causation. The illocutionary act of incitement does not sit in a vacuum in this respect—is not sharply separable—it is just a different style of reasoning about perlocutions.

This problematic thinking is reinforced further in her 'focus on the specific crimes of genocide and incitement to genocide as they involve speech acts.' ([38], p. 528). Fundamentally, speech act theory cannot aid the factual claim that a particular utterance is an act, nor can it inform us which kinds of acts are legally normatively meaningful. This is not a mere terminological issue that can be adjusted by simply changing the way the point is put. It reveals an issue in the fundamental application of speech act theory to normative reasoning as can be seen further:

> 'This three-fold distinction between locutions, illocutions, and perlocutions sets us up to begin solving the problem of assessing speech advocating for genocide. We should be able to label a speech act as one (or more) of these types of acts in order to determine what moral and/or legal responsibility should attach to a given speech act. ([38], pp. 532–533).

It is agreeable that we should determine what moral and/or legal responsibility should matter for speech regulation, but it is not possible to apply or interrogate speech act theory in this way to aid in such questions, since all speech acts involve

all these elements. The concern Fyfe has here is with a particular illocutionary act (incitement) which is unproblematically an illocutionary act, as well as a whole speech act with locutionary and perlocutionary dimensions which are inseparably part of our legal reasoning.

To return to Tirrell's account and close the point, Fyfe uses speech act theory to identify speech that performs speech acts or illocutionary acts and contrasts her position with Tirrell's partly on this basis. But that said, Tirrell's position is—insofar as speech act theory is concerned—illustratively not fundamentally different in speech act terms. Tirrell's position is that action-engendering speech needs a causal relationship, but her position is comfortably explainable as identifying a general kind of speech to be regulated preventatively (action-engendering dehumanising speech), and this could be naturally thought of in probabilistic terms. If a certain category of dehumanising speech does have the various effects she considers in general (although, to be clear, it is not evidenced that this is the case, just postulated with a speech act framework) then it would possibly be a good candidate for a potential instance of incitement to genocide, provided other elements of the crime are met, such as the intention requirements ([38], p. 531).

As Fyfe notes ([38], p. 531), Tirrell does not contextualise her theory into the framework of international criminal law, so I leave that aside beyond the above remarks. For these speech act theoretic purposes, the salient point is that whether any sort of speech (such as Tirrell's derogatory terms) can be considered a "speech act" of incitement or some other causal crime is not down to whether it is an illocutionary or perlocutionary act (or indeed if it is a speech act or not). Both incitement, instigation and general hate speech always involve locutionary, illocutionary and perlocutionary elements and all are relevant for our legal thinking. It is just that the normatively significant perlocutions involved in incitement are probabilistic rather than actual. From then, such questions can only be answered by appropriate normative and descriptive enquiry of the kinds explored in Section Two. Speech act theory applies to all these normative and factive legal positions in exactly the same—silent—way.

It's noteworthy given her argument that Fyfe also acknowledges that '[t]he usefulness of the analysis of international criminal law using speech act theory is limited' ([38], p. 541) except insofar as it might help locate moral responsibility. I think this broader claim toward its limitations is correct and aligns with my approach, despite my specific critique of her use. I disagree with her view that 'speech act theory can help us understand the international criminal laws pertaining to genocide, and justify imposition of legal responsibility on individual speakers in the context of genocide' ([38], p. 548). These two claims badly need separation. It may be able to help us understand them in a broad conceptual way as discussed, but it cannot *justify* anything. "Ordering" a coffee is as much an illocutionary act as is "inciting" genocide and the "perlocutionary" elements of both are equally value-neutral in the framework of the linguistic theory of speech acts. It is only when constructed with our normative views in mind that some speech acts seem more significant. But by that same point, all the important normative and factive reasoning is done.

If we know that incitement to genocide is more serious than ordering a coffee from a moral, political, social or legal perspective this is because we understand

the act, its meaning and consequences as normatively intuitively more serious, and is where the argument lies or should lie for speech regulation. If one were able to identify an instance of speech (such as revenge-oriented speech or appeals to past atrocities) ([1], p. 240) which is likely to produce genocidal outcomes in some cases and also align this with the normative outlook that the law should seek to prevent genocide via speech regulation, then noting that this is an 'illocutionary performative utterance' ([1], p. 60) of incitement is simply rhetorical dressing. At best this is merely distracting from the appropriate legal questions and at worst it replaces them in arbitrary pursuits of whether an instance of speech is an illocutionary act or a perlocutionary act, etc. All the hard work of the reasoning is done before this point and speech act theory's role (if any) in the associated legal questions is simply a very minimal conceptual clarity insofar as it can be helpful to think of speech as involving locutionary, illocutionary and perlocutionary aspects. It is not therefore as Fyfe suggests that 'speech act theory justifies the international criminal law that places individual criminal responsibility' ([38], p. 548), but if it is helpful at a more basic (pre-normative and pre-factive) level to help think of speech and its many dimensions, then this is another thing. We should not though take legal significance from the fact that we can linguistically categorise speech via speech act theory.

Therefore, it is possible in some cases that speech act theory may be conceptually clarifying, especially when speech crimes face doctrinal confusion in the way the ICTR case law has in reasoning backwards from a genocidal event to the regulation of incitement to genocide when incitement does not require this connection. The way in which causation is confused there may possibly benefit from an analytical toolkit that can emphasise that speech acts have three (intertwining) elements. For example, Wilson does use it to conceptually 'disentangle' ([1], p. 26) the poor judicial reasoning in this ICTR case law concerning causation. The important point is that such speech act theoretic categorical pursuits do not supplant normative or factual reasoning by searching for acts of incitement (or beyond) in the linguistic epistemic ether. In this regard, speech act theory can only reflect legal normative commitments that we already have in mind.

5 Conclusion

I began by introducing the doctrinal issues concerning incitement to genocide and contrasted the crime with instigation to genocide. I showed how these issues surround problematic understandings of causation in the case law and introduced academic work on the issue. I then introduced the relevant aspects of speech act theory and the purpose it serves in linguistic philosophy and its distinctions between locutionary, illocutionary and perlocutionary acts. I showed how, in a unique way as an inchoate crime, incitement to genocide has attracted the application of speech act theory, and focused on the way illocutionary and perlocutionary acts have been used in genocidal speech regulation.

I have argued that attempts to define either incitement or instigation to genocide primarily in terms of their illocutions or perlocutions puts undue weight on the categorical power of speech act theory within legal reasoning. The reasons for

regulating each crime involve an array of normative and factive questions pertaining to all aspects of their total speech act. Moreover, because all speech acts involve illocutionary acts, it is a normatively and factively empty consideration that we can identify an illocutionary act of incitement to genocide (or indeed any inchoate speech crime) without attention to the total speech act inclusive of its meaning/locution and probabilistic perlocutions. I also illustrated how the issues encountered for speech act theoretic accounts of genocidal speech have roots in prior work in hate speech and pornography regulation, and that while speech act theory can be helpful in a minimalistic conceptual way when thinking about language, we need to avoid imputing any normative or factive power to its ability to identify categories for legal regulation.

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