# Contextualising the hate speech debate: the United States and South Africa

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***Abstract***

This article focuses on two seminal moments that shaped the United States and South Africa's respective trajectories on the hate speech debate. For the United States, this moment was the so-called New Deal settlement, an informal, unspoken arrangement where the court deferred to Congress in its interpretation of the Constitution's structural provisions – such as federalism and the separation of powers – while reserving the right to defend individual rights more aggressively. The New Deal settlement created the conditions for the court to enforce the country's commitment to individual rights via the Bill of Rights on more robust and unapologetic terms. The court's subsequent approach to hate speech is but an unintended consequence of this New Deal. Coming nearly sixty years after the New Deal, the formation of a constitution 'based on democratic values, social justice and fundamental human rights' served as South Africa's own version of a settlement'. South Africa's hate speech jurisprudence demonstrates the inherent tension embedded in this settlement, in which the democratic value of speech conflicts with other competing Constitutional values such as dignity and equality. This article examines each country's hate speech jurisprudence through the prism of these 'moments', arguing that the divergence of these systems is a function not merely of the different languages or structure of the two countries' constitutions, but rather, is born of unique historical and cultural contexts.

## INTRODUCTION

Over the past several decades, countries have faced the question of what legal measures, if any, should be taken to combat expressions of hate – expressions commonly referred to as 'hate speech'.[1] In answering this

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[1] Hate speech, generally, is defined as expressions of hate against an individual or group based on immutable characteristics. Hernández 'Hate speech and the language of racism in Latin America: a lens for reconsidering global hate speech restrictions and legislation models', quoting Parekh *Hate speech: is there a case for banning?* (2006) 12 *Pub Pol'y Res* 213 214. ('"Hate speech expresses, advocates, encourages, promotes or incites hatred

question, different countries have explored a variety of avenues. Some passed hate speech laws, including those that proscribe 'racial, ethnic and religious epithets, historical revisionism about racial or religious groups (*ie* denying the Holocaust), or incitement to ethnic, racial or religious hatred, discrimination or violence'.[2] For example, many European countries criminalise, to varying degrees, the propagation of Nazi ideology and Holocaust denial.[3] Alternatively, a minority of countries, the United States included, have no explicit restrictions on hate speech and only regulate such speech when it falls under the few, relatively narrow, exceptions to free speech.

Despite common rejection of hate speech, laws regulating this speech are controversial. Generally speaking, there are two sides to this debate. One argues that the harms associated with the propagation of hate speech justify restrictions. It claims that hate speech perpetuates systematic discrimination and oppression and 'freedom of speech' should not be used as a shield to protect this discrimination. The other side maintains that laws regulating hate speech amount to government censorship and are impossible to implement without stifling legitimate discourse.[4]

This article takes neither side in this debate. Rather, it seeks to contribute to the extensive literature on this subject by arguing that the debate should take account of the unique historical and cultural legacy of the relevant country. To support this claim, I shall examine the diverging approaches to the problem of hate speech in the United States and South Africa. By focusing on the oldest constitutional democracy and one of the newest, respectively, this article seeks to show how the debate over hate speech laws is not shaped by abstract constitutional or philosophical values. Instead, how countries address the problem of hate speech is shaped in a very real way by the day-to-day experiences of the collective polity.

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of a group of individuals distinguished by a particular feature or set of features", whom are targeted for hostility'.)

2 Knechtle 'When to regulate hate speech' (2006)110 *Penn St L Rev* 539, 539.

3 Of course, the law on the books often diverges from the law in action. While countries such as Germany and Austria prosecute violations of these laws strictly, others such as Lithuania and Romania enforce these laws rarely. Bazyler *Holocaust denial laws and other legislation criminalizing promotion of Nazism* International Institute for Holocaust Studies, Yad Vashem available at: http://www.yadvashem.org/yv/en/holocaust/insights/pdf/bazyler.pdf (last accessed 2 March 2014).

4 Taylor (2010) 12 *U Pa J Const L* 1115

The article will focus on two seminal moments that shaped the United States and South Africa's respective trajectories on the hate speech question. For the United States, the moment's impact on hate speech was merely incidental. For South Africa, the moment marked a conscious consideration of the proper limits on speech in a democratic and pluralistic society. The former embraced a free market approach towards expression, while the latter seeks to protect this right though not at the expense of other fundamental rights, such as dignity and equality. Ultimately, to understand the United States' and South Africa's divergence on the issue of hate speech one must go beyond the language of each state's constitution and examine the historical, political, and social context in which each jurisprudence has been fashioned. Neither country's stance on hate speech is an inevitable consequence of the text or structure of its constitution. America's free speech jurisprudence originated in the post-*Lochner* Supreme Court's active participation in matters involving individual rights, developed in the Warren Court's commitment to civil rights, and maintained (and in areas expanded) during the court's conservative stance of the 1990s and 2000s. South Africa's free speech jurisprudence was born in the wake of centuries of official and unofficial racial subjugation by a white minority of a black majority, a history that the court wrestles with in its hate speech cases. Ultimately, the two jurisdictions' respective hate speech jurisprudence reveals that the debate on hate speech laws should not only appeal to abstract principles, but must include a careful consideration of the distinctive characteristics of the jurisdiction in question.

## THE UNITED STATES

On 29 October 1929, the US stock market crashed, plunging the country into a decade-long depression. Between 1929 and 1933, the peak of the crisis, the gross national product (GDP) in relation to industrial production, declined by forty-seven per cent and the real GDP by thirty per cent.[5] Over twenty per cent of Americans were out of work.[6] Upon assuming office in January 1933, Franklin Roosevelt, along with progressive Democrats in Congress, rejected the *laissez-faire* economic philosophy that had dominated the

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5 See Romer (entry on the Great Depression for the Encyclopædia Britannica) available at: http://elsaRLINK"http://elsa.berkeley.edu/~cromer/great_depression.pdf".berkeley.edu/~cromer/RLINK"http://elsa.berkeley.edu/~cromer/great_depression.pdf"great_depression.pdf (last accessed 2 March 2014).

6 *Ibid*.

previous decade.[7] Instead, Roosevelt, with the support of a willing Congress, pursued an aggressive agenda to ameliorate the ailing economy by empowering the federal government through the creation of new programmes and agencies intended to stabilise the banking sector, lower the unemployment rate, regulate the private sector, and assist individuals suffering the consequences of the nation's worst economic catastrophe in history.[8] While the President and Congress adopted the so-called 'New Deal' agenda with a remarkable sense of urgency – bringing about this radical restructuring of government within just months of Roosevelt's inauguration[9] – the Supreme Court was not ready to embrace such an extensive role for the federal government in the national economy.

During the first several years of the New Deal, the Supreme Court declared major pieces of Roosevelt's agenda unconstitutional. The court, fully committed to the logic and the legacy of *Lochner*,[10] embraced an interpretation of the due process clause of the Fourteenth Amendment in which government had no role in the regulation of private enterprise. This curtailed the state's narrowly defined 'police power' to protect its citizens' health and safety.[11] In this vein, between 1935 and 1936, the court struck down, *inter alia*, the National Industrial Recovery Act,[12] the Bituminous Coal Conservation Act of 1935,[13] the first Agricultural Adjustment Act,[14] the Railroad Retirement Act,[15] and a New York statute providing a minimum wage for women.[16] In 1937, however, everything changed.[17]

Frustrated by the court's opposition to his economic policies, Roosevelt confronted it after his landslide election victory in 1936 with his famous

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7 See generally Solomon *FDR v The Constitution: The Court-Packing Fight and the Triumph of Democracy* (2009).

8 *Ibid*.

9 *Ibid*.

10 *Lochner v New York* 198 US 45 (1905) (declaring that a 'liberty of contract' was implicit in the Due Process Clause of the Fourteenth Amendment).

11 See Solomon n 7 above at 43.

12 See *ALA Schecter Poultry Corp v United States* 295 US 495 (1935).

13 See *Carter v Carter Coal Co* 298 US 238 (1936).

14 See *United States v Butler* 297 US 1 (1936).

15 See *Railroad Retirement Board v Alton RR Co* 295 US 330 (1935).

16 See *Morehead v New York ex rel Tipaldo* 298 US 587 (1936).

17 There were some outliners, however, including *Nebbia v New York*, 291 US 502 (1934) (upholding New York state's regulatation of the price of milk for dairy farmers, dealers, and retailers) and *Home Building & Loan Association v Blaisdell* 290 US 398 (1934) (upholding Minnesota's suspension of creditor's remedies).

'court packing' plan.[18] Shortly thereafter, in 1937, Justice Owen Roberts, who had previously represented a reliable vote for the conservative majority, changed his position and became the crucial fifth vote in upholding two New Deal laws that the court, including Roberts, had previously declared unconstitutional.[19] While there is debate as to whether Roosevelt's proposal indeed caused Justice Robert's dramatic reversal, his change of heart – known famously as the 'switch in time that saved nine' – also changed the trajectory of the court's jurisprudence.[20]

This 'switch in time' marked the beginning of a constitutional revolution.[21] A year after *West Coast Hotel*, in the famous 'Footnote 4' to his opinion in *United States v Carolene Products Co*, Justice Harlan Fiske Stone articulated the court's new two-tier jurisprudence, noting that

> [t]here may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth.[22]

Professor Larry Kramer has labelled this revolution the 'New Deal Settlement' (NDS).[23] The NDS consisted of an informal, unspoken arrangement, where the court deferred to Congress in its interpretation of the Constitution's structural provisions – such as federalism and the separation of powers – while reserving the right to more aggressively defend individual rights. Thus, while the court yielded to Congress on economic and regulatory matters, it sought rigorously to enforce substantive individual rights found in the Bill of Rights. This dichotomy produced America's two-tiered jurisprudence, where the court would subject structural matters to a highly

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18 See *eg* Shesol *Supreme power: Franklin Roosevelt vs the Supreme Court* (2010) 3.

19 See *West Coast Hotel v Parish* 300 US 379 (1937) (upholding state minimum wage law for women) and *NLRB v Jones & Laughlin Steel Corp* 301 US 1 (1937) (upholding federal regulation of the steel industry).

20 Solomon n 7 above at 162.

21 See Cushma *Rethinking the New Deal Court: the structure of a constitutional revolution* (1998) 4; Ackerman 'Revolution on a human scale' (1999) 108 *Yale L* 2279, 2286.

22 *United States v Carolene Products Co* 304 US 144, 152–153 n 4 (1938) (upholding a federal regulation banning the interstate shipment of 'filled milk').

23 Kramer *The people themselves: popular constitutionalism and judicial review* (2004) 219.

deferential 'rational basis scrutiny' while subjecting matters implicating individual rights to heightened scrutiny.[24]

The developments of the NDS laid the groundwork for the Warren court's expansive free speech jurisprudence.[25] The Warren court embraced the two-tiered jurisprudence of the NDS and ambitiously expanded individual rights protections on issues of historic import, including school segregation (*Brown v Board of Education*),[26] police interrogation (*Miranda v Arizona*)[27], abortion (*Roe v Wade*),[28] and the death penalty (*Furman v Georgia*).[29] The Warren court also applied the two-tiered jurisprudence of the NDS to free speech, establishing the jurisprudence that has dictated the court's treatment of hate speech ever since.

The first demonstration of the extent of the Warren court's commitment to the NDS with regard to speech was the 1957 *Yates v United States*.[30] Though a case of statutory interpretation, *Yates* foreshadowed the court's later First Amendment jurisprudence. In *Yates*, the court overturned the convictions of several individuals under the Smith Act, which, *inter alia*, made it unlawful for any person 'to knowingly or willfully advocate, abet, advise, or teach the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence, or by the assassination of any officer of such government'.[31] While failing to invalidate the Smith Act on constitutional grounds, the court imposed a high evidentiary standard, distinguishing between advocacy of unlawful action and advocacy of belief.[32]

In 1964, the court's seminal decision in *New York Times v Sullivan* precluded the development of a 'group libel' jurisprudence.[33] In the 1952

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24 *Id* at 219–20.

25 *Id* at 220.

26 *Brown v Board of Education of Topeka* 347 US 483 (1954).

27 *Miranda v Arizona* 384 US 436 (1966).

28 *Roe v Wade* 410 US 113 (1973).

29 *Furman v Georgia* 408 US 238 (1972).

30 *Yates v United States* 354 US 298 (1957).

31 Smith Act of 1940 ch 439, § 2, 54 Stat 670, 671 (1940) (codified as amended at 18 USC § 2385 (2000).

32 Note 30 above (emphasising the 'distinction between advocacy of abstract doctrine and advocacy directed at promoting unlawful action'.) *Yates* did not, however, mark the end of either the Smith Act or the court's willingness to uphold convictions under the Act. See *Scales v United States* 367 US 203 (holding 'the teaching of forceful overthrow, accompanied by directions as to the type of illegal action which must be taken when the time for revolution is reached,' was sufficient for a Smith Act conviction).

33 Jacobs & Potter *Hate crimes: criminal law & identity politics* (1998) 116.

*Beauharnais v Illinois* case, the court had upheld a state group libel law that made it unlawful to defame a race or class of people.[34] Though *Beauharnais* has never been expressly overturned, the case's premise that defamation liability is unlimited by the First Amendment was rejected in *New York Times v Sullivan*, leading both courts and commentators to suggest that *Beauharnais* is no longer good law.[35]

In the 1969 *Brandenburg v Ohio* case, the court articulated the 'imminent lawless action' standard, holding that the First Amendment does 'not permit a state to forbid or proscribe advocacy of the use of force or violation of the law except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action'.[36] In declaring that the intent and 'likely' product of the speech must be 'imminent lawless action,' the court greatly expanded speech protection as compared to its earlier precedent. In 1919 in *Schenk v United States*, for example, the court articulated the 'clear and present danger' test, declaring that to determine the legitimacy of government regulation of speech, 'the question in every case' is whether the content and context of the speech are such 'as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent'.[37] In *Schenk*, the court, applying the 'clear and present danger' standard, upheld the conviction,[38] of several individuals who protested the draft by circulating a relatively mild and innocuous leaflet that stated: 'Do not submit to intimidation' and 'Assert your rights,' without, however, ever expressly urging any unlawful action.[39] The 'imminent lawless action' standard displaced the rather ambiguous and loosely applied 'clear and present danger' standard and thus expanded the protections afforded to speech.

The Warren Court expanded free speech protections by chipping away at the 'fighting words' doctrine. While hate speech is unlikely to constitute incitement except in a narrow category of circumstances, it is possible for the government to restrict such speech under the 'fighting words' doctrine,

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34 *Beauharnais v Illinois* 343 US 250 (1952).

35 Sunstein *Democracy and the problem of free speech* (1995) 185. ('[M]ost people think that after *New York Times v Sullivan*, *Beauharnais* is no longer the law.')

36 *Brandenburg v Ohio* 395 US 444 447 (1969).

37 *Schenk v United States* 249 US 47 52 (1919).

38 The Espionage Act of 1917 made it a crime, *inter alia*, for any person to willfully 'obstruct the recruiting or enlistment service of the United States'. Act of June 15,1917, ch 30, tit I § 3 40 Stat 219.

39 Note 37 above.

established by the court in 1942 in *Chaplinsky v New Hampshire*.[40] In *Chaplinsky*, the court held that the First Amendment did not protect 'fighting words,' defined as 'those which by their very utterance inflict injury or tend to incite an immediate breach of the peace'.[41] Though the Supreme Court has never overturned *Chaplinsky*, it has reversed the conviction in each case involving 'fighting words' and scaled back the scope of the doctrine.[42] Additionally, the Warren Court narrowed the definition of what constitutes 'fighting words'.[43] In order for speech to be open to regulation under the 'fighting words' doctrine it must be directed at a specific person and be likely to provoke a violent response; speech that is merely offensive or that merely produces anger, annoyance, or alarm does not warrant First Amendment protection.[44]

These concurrent trends – the demise of the group libel theory, the establishment of the Brandenburg exception, and the narrowing of the fighting words doctrine – coincided in the Seventh Circuit's decision in *Collin v Smith*, for which the Supreme Court later refused to issue a stay or grant certification.[45] In 1977, when the Nazi-inspired National Socialist Party of America (NSPA) announced its plan to march in the heavily Jewish-populated Chicago suburb of Skokie,[46] the Village of Skokie (the Village) took measures to prevent the demonstration.[47] Three ordinances that the

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40 *Chaplinsky v New Hampshire* 315 US 568 572 (1942).

41 *Ibid.*

42 In one line of cases, the court declared a number of state laws to be unconstitutionally vague under the fighting words doctrine. See *Goading v Wilson* 405 US 518 519 (1972) (finding a state statute prohibiting 'Any person who shall, without provocation, use to or of another, and in his presence … opprobrious words or abusive language, tending to cause a breach of the peace'; see also *Rosenfeld v New Jersey* 408 US 901 (1972); *Lewis City of New Orleans* 408 US 913 (1972), and *Brown v Oklahoma* 408 US 914 (1972).

43 *Cohen v California* 402 US 15 (1971) (holding that the First Amendment prohibits states from making the public display of a single four-letter expletive a criminal offence, without a more specific and compelling reason than a general tendency to disturb the peace).

44 *Id* at 26.

45 *Collin v Smith* 578 F 2d 1197 (7th Cir 1978) stay denied, 436 US 953**,** and cert denied, 439 US 916 (1978).

46 *Collin* 578 F 2d 1197, n 2 (noting that 'in 1974, 40 500 of the Village's 70 000 population were Jewish').

47 The procedural history surrounding the Skokie controversy is complex. Initially, on petition by the Village, a state trial court issued an injunction preventing the demonstrators from wearing Nazi uniforms, displaying swastikas, or expressing hatred against 'persons of Jewish faith or ancestry or hatred against persons of any faith or ancestry, race or religion'. Though the state appellate courts upheld the injunction, the United States Supreme Court granted certiorari and reversed the Illinois Supreme Court's

Village enacted, with the intent to prevent the NSPA's threatened demonstration, were at issue in *Collin*.[48] The Seventh Circuit held the Village's ordinances invalid under the First Amendment.[49] The court recognised that while content-based legislation is not invalid *per se*, such regulations are permissible only in several specified exceptions to the First Amendment's robust protection of speech. These exceptions include obscenity, fighting words, the *Brandenburg* incitement exception, and libel as limited by constitutional parameters.[50] The court analysed these established exceptions, finding that none applied in the present case. The court quickly dispatched the obscenity exception, which applies only to material with erotic content.[51] The court also found the Village's concession that it did not expect any physical violence if the march were to be held, removed the ordinances from both the *Brandenburg* exception – which requires that the intent and 'likely' product of the speech be 'imminent lawless action' – and the fighting words exception, which applies only 'to words with a direct tendency to cause violence by the persons to whom, individually, the words were addressed'.[52]

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denial of a stay. *National Sociality Part of America v Village of Skokie* 432 US 43 44 (1977). On remand, the Illinois Court of Appeals modified the injunction so that it would prohibit only the display of swastikas, but then the Illinois Supreme Court reversed and held that the entire injunction violated the First Amendment. Concurrently, the Village of Skokie adopted several ordinances intended to prevent the Nazi demonstration. It was these ordinances that were at issue in the Seventh Circuit's decision in *Collin v Smith.*

48 Village Ordinance No 77–5–N–994, a comprehensive permit system for all parades or public assemblies of more than 50 persons, requires permit applicants to obtain $300 000 in public liability insurance and $50 000 in property damage insurance. One prerequisite for obtaining the permit is a finding by the appropriate official that the assembly 'will not portray criminality, depravity or lack of virtue in, or incite violence, hatred, abuse or hostility toward a person or group of persons by reason of reference to religious, racial, ethnic, national or regional affiliation' nor will it be conducted 'for an unlawful purpose'. Under this ordinance, parading or assembling without a permit is a crime, punishable by fines from $5 to $500. Village Ordinance No 77–5–N–995 (995) prohibits '(t)he dissemination of any materials within the Village of Skokie which promotes and incites hatred against persons by reason of their race, national origin, or religion, and is intended to do so'. A violation of this ordinance is a crime punishable by fine of up to $500, or imprisonment of up to six months. Village Ordinance No 77–5–N–996 (996) prohibits public demonstrations by members of political parties while wearing 'military-style' uniforms, a violation of which is punishable by fines from $5 to $500. See 578 F 2d 1197 1199–1200.

49 *Collin* 578 F 2d 1197.

50 *Id* at 1202.

51 *Ibid.*

52 *Id* at 1203.

The court also rejected the Village's assertion that the ordinance was justified under a group libel theory.[53] First, the court found that *Beauharnaise* did not apply, noting that the rationale in that case was that the prohibited speech at issue had a 'strong tendency' to cause violence and induce a breach of the peace.[54] That rationale, the court concluded, was absent in the *Cillin* case.[55] Secondly, the court expressed doubt as to whether *Beauharnaise* remained good law at all.[56] Finally, while the court acknowledged that the demonstration would likely cause the 'infliction of psychic trauma on resident Holocaust survivors and other Jewish residents,' and that such residents could potentially have an intentional infliction of severe emotional distress tort claim, it stated that 'it is nonetheless quite a different matter to criminalize protected First Amendment conduct in anticipation of such results'.[57]

The court's changing stance from the liberal activism under Chief Justice Warren's tenure to the conservative resurgence under Chief Justices Rehnquist and Roberts has yet to sway its commitment to a robust free speech regime.[58] Though it has begun to undermine the bargain reached under the NDS through stricter scrutiny of federal laws based on federalism concerns,[59] the court has shown no sign of backing down from its strong inclination to protect speech, often embracing a libertarian approach[60]. Indeed, the court has expanded the First Amendment's protection to uncharted territory, most notably in the domain of corporate speech.[61]

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53 *Id* at 1204.

54 *Ibid.*

55 *Ibid.*

56 *Ibid.* ('It may be questioned, after cases such as *Cohen v California*, supra; *Gooding v Wilson*, supra; and *Brandenburg v Ohio*, supra, whether the tendency to induce violence approach sanctioned implicitly in *Beauharnais* would pass constitutional muster today.')

57 *Id* at 1206.

58 Epstein & Segal 'Trumping the First Amendment' (2006) 21 *Wash U JL & Pol'y* 81 (documenting the empirical data that demonstrates that in cases that involve speech as well as equality or privacy concerns 'liberal Justices are no more likely than their conservative counterparts to support the First Amendment; indeed, if anything, a reversal of sorts occurs, with conservatives more likely, and liberals less likely, to vote in favor of the speech, press, assembly, or association claim'.).

59 See *US v Lopez* 514 US 549 (1995) (invalidating a federal gun control law as an unconstitutional exercise of Congressional authority under the Commerce Clause) and *US v Morrison* 529 US 598 (2000) (finding the civil damages portion of the Violence Against Women Act unconstitutional under a Commerce Clause analysis).

60 Epstein & Segal n 58 above.

61 *Citizens United v FEC* 558 US 08–205 (2010) (holding that a provision of the Bipartisan Campaign Reform Act prohibiting unions, corporations and not-for-profit organisations from broadcasting electioneering communications within sixty days of a general election

Furthering the legacy of the Warren Court, the Rehnquist and Roberts Courts have employed a rigid, categorical analysis to justify such a speech-protective regime. This has led, at times, to confusing and intellectually incoherent results.[62] These are evidenced by the court's handling of anti-cross-burning laws which are intended to target a particularly pernicious manifestation of group hatred.[63] Moreover, in embracing such a categorical framework in addressing these cross-burning laws, the court has either downplayed or completely ignored the social cost of hate speech and its historical legacy.

In *RAV v City of St Paul*, the court struck down a city ordinance prohibiting the display of a burning cross, a swastika, or other symbol that is known or is reasonably known to 'arouse[s] anger, alarm or resentment in others on the basis of race, color, creed, religion, or gender'.[64] Although the state Supreme Court had previously construed the law as banning only 'fighting words,' the majority in *RAV* found that this ordinance violated the constitutional standard because it discriminated based on content (*ie* what types of fighting words were prohibited – on the basis of gender and race but not other types) and discriminated on the basis of viewpoint (*ie* did not prohibit anti-racism fighting words).[65] The majority opinion, written by Justice Scalia, explained that although fighting words have been deemed 'not within the area of constitutionally protected speech,'[66] there are nevertheless no 'categories of speech entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content'.[67] The court found the ordinance to be impermissibly content discriminatory because the regulation targets only 'fighting words' that insult or provoke violence 'on the basis of colour, creed, religion or gender' and not on other bases such as, hypothetically, 'political affiliation, union membership, or homosexuality'.[68] According to

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or thirty days of a primary election violates the First Amendment).

62 See *eg* Post 'Reconciling theory and doctrine in First Amendment jurisprudence' (2000) 88 *Cal L Rev* 2353 2355. ('The free speech jurisprudence of the First Amendment is notorious for its flagrantly proliferating and contradictory rules, its profoundly chaotic collection of methods and theories.')

63 *Virginia v Black* 538 US 344–45 (reviewing the history of cross-burning in the United States).

64 *RA v City of St Paul* 505 US 377 379 (1992)

65 *Id* at 378.

66 *Id* at 383, quoting *Roth v United States* 354 US 476, 483.

67 *Id.* at 383–84.

68 *Id* at 391.

the court, the ordinance is also viewpoint-discriminatory. The ordinance, the court reasoned, would disallow racist and sexist fighting words while simultaneously permitting those words targeted at persons motivated by a characteristic outside the ambit of the specified, protected classes. The state, Scalia quipped, has 'license(d) one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensbury Rules'.[69]

The court rejected the city's alternative argument that even if the ordinance is content and viewpoint discriminatory, the regulation is nevertheless permissible under a strict scrutiny analysis because it serves the compelling state interest of helping 'to ensure the basic human rights of members of groups that have historically been subjected to discrimination, including the right of such group members to live in peace where they wish'.[70] Though it acknowledged that such interests are compelling and that the ordinance promotes them, the court found that the ordinance 'plainly is not' reasonably necessary to achieve the state's compelling interest and therefore is Constitutionally invalid.[71] The court stated that a law prohibiting all forms of fighting words 'would have precisely the same beneficial effect'.[72]

Nearly a decade later, the court struggled with another cross-burning case in *Virginia v Black*, creating even more confusion in this already confusing area of constitutional law. The court, in a majority opinion written by Justice O'Connor, stated that the government may regulate cross-burning in a manner consistent with the First Amendment and the court's earlier decision in *RAV*.[73] The court distinguished the Virginia statute from the ordinance invalidated in *RAV*, noting that unlike the latter, the former does not single out for opprobrium only speech directed at 'one of the specified disfavored topics'.[74] However, the court ultimately invalidated the law, finding the cross-burning prohibition impermissibly over-broad in its provision stating: 'Any such burning of a cross shall be *prima facie* evidence of an intent to intimidate a person or group of persons.'[75]It also stated that, contrary to the law's *prima facie* provision, burning a cross is not always intended to intimidate, but is also done as 'a statement of ideology, a symbol of group

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69 *Id* at 392.
70 *Id* at 395.
71 *Id* at 395–96.
72 *Id* at 396.
73 *Virginia v Black* 538 US 343, 363 (2003).
74 *Id* at 345 quoting *RA v City of St Paul* n 64 above.
75 *Id* at 348.

solidarity'.[76] According to the plurality, under Virginian law, 'it does not matter whether an individual burns a cross with intent to intimidate because of the victim's race, gender, or religion, or because of the victim's 'political affiliation, union membership, or homosexuality'.'[77]

Unlike Scalia's majority decision in *RAV*, O'Connor reached the two conclusions – that Virginian law is not content discriminatory because it does not specify protected classes and that cross-burning is not used for the exclusive purpose of intimidation – with at least a minimal awareness of the practice's long and well-documented racist legacy. 'Burning a cross in the United States,' the court observed, 'is inextricably intertwined with the history of the Ku Klux Klan (the Klan), which, following its formation in 1866, imposed a reign of terror throughout the South, whipping, threatening, and murdering blacks, southern whites who disagreed with the Klan, and 'carpetbagger' northern whites.'[78] Burning crosses, the court continued, has been employed by the the Klan to both communicate threats of violence and to express messages of shared ideology, a message that the court characterised as opposition to reconstruction and 'the corresponding drive to allow freed blacks to participate in the political process'.[79] Though, unlike the majority in *RAV*, the court acknowledged the historical origins and legacy of cross-burning in the United States, it nevertheless adhered closely to the categorical thinking embraced by the court a decade earlier. Despite the fact that cross-burning is a well-known, identifiable symbol of Klan intimidation and harassment of 'racial minorities, Catholics, Jews, Communists, and any other groups hated by the Klan,'[80] the court reasoned that Virginia law is not impermissibly content or viewpoint discriminatory because it does not prohibit the cross-burning only when directed at a specified class of people. However, because the law erroneously presupposes that cross-burning necessarily must be intended to intimidate and not subjugate minorities through intimidation or express solidarity with those subjugating minorities through intimidation, the regulation is impermissibly broad.

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76 *Id* at 365–66.

77 *Id* at 362, quoting *RA v City of St Paul* n 64 above.

78 *Id* at 343–44.

79 *Id* at 352.

80 *Id* at 389 (Thomas J dissenting), quoting *Capitol Square Review & Advisory Bd v Pinette* 515 US 753, 770 (Thomas J concurring).

The court's libertarian approach towards speech rights has continued unabated in recent years. In 2011's *Synder v Phelps*, the court held that 'outrageous' speech on a public sidewalk on a public issue would not render a person liable for the tort of emotional distress.[81] The case involved a lawsuit which the father of a deceased military service member brought against a fundamentalist church, after members of the church had staged a protest coinciding with the funeral. The church involved, the Westboro Baptist Church, is particularly notorious for picketing military funerals 'to communicate its belief that God hates the United States for its tolerance of homosexuality, particularly in America's military'.[82] The court found the church's speech to constitute a public concern and thus protected by the First Amendment against claims of civil liability.[83] As the court, in an 8–1 decision, stated, 'What Westboro said, in the whole context of how and where it chose to say it, is entitled to 'special protection' under the First Amendment and that protection cannot be overcome by a jury finding that the picketing was outrageous'.[84]

The development of the court's First Amendment free speech jurisprudence generally, and hate speech jurisprudence specifically, is the consequence of a complex web of political, theoretical, and legal forces. The NDS was but one, albeit important, force. The NDS created the conditions for the court to enforce, aggressively and unapologetically, the country's commitment to individual rights via the Bill of Rights. The court's subsequent approach to hate speech is but an unintended consequence of this New Deal . While the NDS allowed for the court's vigorous defence of individual rights, as regards speech, it has enforced this right in a categorical and rigid way. This categorical approach has led to a relatively speech protective regime, despite occasional inconsistencies, and has also led to a lack of genuine considerations that mitigate against such a regime.

## SOUTH AFRICA

After decades of *de jure* racial segregation in which a white minority ruled over a black majority, the end of apartheid marked a turning point in South Africa's history. Coming nearly sixty years after the NDS, the drafting of a Constitution 'based on democratic values, social justice and fundamental

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81 *Synder v Phelps* 131 S Ct 1207 (2011).
82 *Id* at 1210.
83 *Id* at 1216–17.
84 *Id* at 1219.

human rights' served as South Africa's own version of a 'settlement'.[85] South Africa's hate speech jurisprudence demonstrates the inherent tension embedded in this settlement, in which the democratic value of speech conflicts with other values such as dignity and equality. The seemingly inconsistent treatment of hate speech in the country's case-law is revealing as South African courts struggle to realise the Constitution's injunction to 'recognise the injustices of our past' while also 'heal[ing] the divisions of the past'.[86] Like America's hate speech jurisprudence, which is rooted in a specific historical context, South Africa's must be understood *vis-à-vis* the unique history of South Africa and the circumstances surrounding the drafting of its Constitution.

Under apartheid, the South African government outlawed speech it considered as advocating national or racial hatred. On the surface, these laws were race-neutral but, ironically, the government employed these anti-hate speech measures exclusively to curtail anti-apartheid expression.[87] Yet from its inception, instead of rejecting the regulation of hate speech altogether and advocating for an unregulated speech domain, the political party that would later emerge as dominant in post-apartheid South Africa, the African National Congress (ANC), embraced the theory that restrictions on racist speech lead to a more tolerant and equitable society. In its 1955 Freedom Charter, the ANC endorsed the 'right to speak' but stipulated that the 'preaching and practice of national, race or colour discrimination and contempt shall be a punishable crime'.[88] In the ANC's 1990 draft Bill of Rights, article 14 requires the state to 'prevent any form of incitement to racial, religious or linguistic hostility' and permits 'legislation to prohibit the circulation or possession of materials which incite racial, ethnic, religious, gender or linguistic hatred'.[89] Several years later, in a preliminary submission to the Constitutional Assembly's Subcommittee on Fundamental Rights, the ANC stated that 'the right to freedom of expression is closely related to free political activity' and consequently serves to protect human

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85 South African Constitution 1996 preamble.

86 *Ibid*.

87 Johannessen 'A critical view of the Constitutional Hate Speech Provision, 13 *S' Afr J on Hum Rts* 135, 137 (1997).

88 African National Congress's Freedom Charter, available at: http://www.anc.org.za/show.php?id=72 (last accessed 2 March 2014).

89 African National Congress Constitutional Committee' A Bill of Rights for a democratic South Africa – working draft for consultation' (1990) reproduced in (1991) 7 *S Afr J on Hum Rts* 110 121.

rights. However, the freedom of expression, the submission stated, 'should be reformulated to provide constitutional protection from racist, sexist or hate speeches calculated to cause hostility and acrimony, and, racial, ethnic or even religious antagonism and division'.[90]

Despite the ANC's consistent support for anti-hate speech measures, the express exemption of hate speech from the ambit of constitutional protection did not appear until the final version of the Constitution. The draft versions produced during neither the Multi Party Negotiating Process nor the interim Constitution contained any language explicitly addressing hate speech.[91] It is unclear whether or not this absence is the consequence of the drafters believing that the equality, limitations, and interpretation provisions were sufficient to deal with the issue of hate speech.[92]

Nevertheless, whether through ANC lobbying, or a change of heart by key drafters, the ANC's position ultimately triumphed.[93] The Freedom Front and the African Christian Party joined the ANC in support of the hate speech exemption within the freedom of expression provision, while the Democratic Party opposed this framework.[94] The Democratic Party argued that the limitation clause could effectively deal with the issue of hate speech without restricting a wide swath of speech, no matter how well intentioned. 'The tortuous development of free expression in such a well-established democracy as the United States,' the Democratic Party warned, should serve as a cautionary example against adopting this constitutional framework.[95] Exactly which aspect of the development of America's First Amendment jurisprudence was 'tortuous' remained unstated.

In the final Constitution, the freedom of expression is found in section 16(1) and provides that 'everyone has the right to freedom of expression, which includes a.) freedom of the press and other media; b.) freedom to receive or impart information or idea; c.) freedom of artistic creativity; and d.)

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90 Preliminary Submissions of African National Congress on Blocks Two and Three-Theme Committee 4, available at: http://www.constitutionnet.org/files/5108.PDF (last accessed 2 March 2014).

91 Johannessen n 87 above at 137.

92 *Ibid*.

93 *Ibid*.

94 *Id* at 138.

95 Democratic Party Submission On: Topic 6: Freedom of Expression, available at http://www.constitutionnet.org/files/6307.PDF (last accessed 2 March 2014).

academic freedom and freedom of scientific research'.[96] Section 16(2) serves as an internal limitation of the general right to freedom of expression provided in 16(1).[97] Section 16(2) reads:

> The right in subsection (1) does not extend to–
> (a) propaganda for war;
> (b) incitement to imminent violence; or
> (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.[98]

Section 16(2) does not automatically render 'advocacy of hatred' a criminal or civil offense, but rather provides that this category of speech is not subject to constitutional protection and can be regulated by the state. Thus, a statute prohibiting 'advocacy of hatred' that is sufficiently tailored is permissible under the Constitution and not invalid *per* section 16(1).[99]

Like other fundamental rights enumerated in the Bill of Rights, the freedom of expression as provided in 16(1) is subject to the general limitations clause in section 36. This section provides that the rights provided in the Bill of Rights may be limited, but only by a law of general application 'to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom'.[100] Section 36 stipulates that multiple factors must be taken into account when analysing the limitation of a right, including the nature of the right; the importance of the purpose of the limitation; the nature and extent of the limitation; the relation between the limitation and its purpose; and less restrictive means to achieve the purpose.[101] In terms of the Constitution the right to dignity enjoys primacy over other rights, including freedom of expression.[102]

The Constitutional Court has confronted the constitutionality of a hate speech law only once, in a relatively straightforward case where the court

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96 South African Constitution 1996 s 16(1).
97 *Id* at s 16(2).
98 *Ibid* .
99 *Ibid.*
100 South African Constitution 1996 s 36.
101 *Ibid.*
102 See *State v Mamabolo* 2001 3 SA 409 (CC)at 430–31 ('With us the right to freedom of expression cannot be said automatically to trump the right to human dignity. The right to dignity is at least as worthy of protection as is the right to freedom of expression....What is clear though and must be stated, is that freedom of expression does not enjoy superior status in our law.')

found a clearly over-broad and vague law to be an unconstitutional restriction of free expression.[103] In 2001, the South African Jewish Board of Deputies complained to the state-run Independent Broadcasting Authority that a broadcast on a community radio station breached the Code of Conduct for Broadcasting Services ('the Code').[104] At issue was The Islamic Unity Convention's airing of a programme entitled 'Zionism and Israel: An in-depth analysis,' in which an interviewee 'questioned the legitimacy of the State of Israel and Zionism as a political ideology, asserted that Jewish people were not gassed in concentration camps during the Second World War but died of infectious diseases, particularly typhus and that only a million Jews had died'.[105] The complainant argued that the programme violated clause 2(a) of the Code, which restricts broadcasting licensees, of which the Islamic Unity Convention is one, from broadcasting material that 'is indecent or obscene or offensive to public morals or offensive to the religious convictions or feelings of any section of the population or likely to prejudice relations between sections of the population'.[106]

The Islamic Unity Convention challenged the constitutionality of clause 2(a), arguing that the provision was vague, over-broad, and an impermissible restriction on the freedom of expression under section 16 of the Constitution.[107] In holding the clause unconstitutional, the court focused on the provision's phrase that restricted the broadcasting of material 'likely to prejudice the relations between sections of the population'. The court reasoned that the phrase 'sections of the population' went beyond the enumerated classes protected in section 16(2)(a)[108] and, moreover, that not every expression that threatens relations between peoples constitutes either 'propaganda for war' or 'incitement to cause harm'.[109] Thus, the relevant portion of clause 2(a) of the Code went substantially further than the constitutional insulation of hate speech under section 16(2)(a).[110]

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103 *Islamic Unity Convention v Independent Broadcasting Authority and Others*, 2002 (4) SA 294 (CC).

104 The Code is contained in Schedule 1 to the Independent Broadcasting Authority Act. Section 56(1) of the provides that '[s]ubject to the provisions of subsection (2), all broadcasting licensees shall adhere to the Code of Conduct for Broadcasting Services as set out in Schedule 1'. See n 103 above.

105 Note 103 above.

106 *Id* at par 14.

107 *Id* at par 21.

108 *Id* at par 33.

109 *Id* at par 34.

110 *Ibid*.

In turning to an analysis of the limitations, the court recognised that hateful stereotypes based on immutable characteristics threaten South Africa's goal 'to promote and protect human dignity, equality, freedom, the healing of the divisions of the past, and the building of a united society' after years of division.[111] Advocacy of hatred, the court acknowledged, 'reinforces and perpetuates patterns of discrimination and inequality' and therefore has the potential to further divide South African society.[112] However, the court stated that the complainants provided no grounds for justification for 'such a serious infraction of the right guaranteed by section 16(1) of the Constitution'.[113] The court noted that in the context of broadcasting, freedom of expression has 'special relevance' in that 'it is in the public interest that people be free to speak their minds openly and robustly, and, in turn, to receive information, views and ideas'.[114] The court concluded that an alternative measure that was more narrowly focused, and not as speech restrictive, would similarly satisfy the state's interest to 'protect[ing] dignity, equality, and the development of national unity'.[115]

Though the court acknowledged the legitimate purpose of prohibiting hate speech within certain parameters, the statute in question did not come close to meeting the basic Constitutional threshold. While the court may have found that case relatively uncomplicated, considering the statute's over-breadth and vagueness, the state's explicit exemption of hate speech from constitutional protection has served as more than a mere symbolic gesture. Two recent cases in lower courts reveal the judiciary's wrestling with the tension of protecting free expression and simultaneously protecting dignity and equality, all while striving to create a free, pluralistic, and tolerant new South Africa.

In 2006, the High Court in Johannesburg addressed the world-wide Mohammed cartoon controversy, ignited when a Danish newspaper published satirical cartoons of Islam's founding figure, and other Western (along with a few Muslim) publications reproduced the image.[116] Protests,

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111 *Id* at par 43, citing s 1(a) of the Preamble of the Constitution.
112 *Id* at par 45.
113 *Id* at par 51.
114 *Id* at par 35.
115 *Id* at par 49.
116 *Jamiat-Ul-Ulama of Transvaal v Johncom Media Investment Ltd & Others* [2006] Case No 1127/06 (S Afr).

some turning violent, subsequently engulfed the wider Muslim world.[117] In South Africa, a local Islamic organisation sought to enjoin several of the country's major media conglomerates from publishing cartoons of the Prophet Mohammed, depictions of whom are considered blasphemous under certain interpretations of Islam.[118] Though acknowledging the important role the media plays in a democratic society in the dissemination and exchange of ideas,[119] the court ultimately granted the plaintiff's petition and media companies were barred from 'publishing in any newspaper, magazine, or other publication any cartoons/caricatures/drawings of the Prophet Mohammed'.[120]

Under South Africa's constitutional system, the court explained, freedom of expression must be construed in the context of the constitutional values of freedom, equality, and in particular, dignity.[121] Dignity concerns not merely an individual's sense of self-worth, but also a group's, including a religious group.[122] The cartoon of Islam's holiest figure, the court concluded, insults and ridicules Muslims in a manner that is 'not only demeaning but also undignified'.[123] Limiting expressive freedom where the expression in question advocates hatred and stereotyping of a religious minority, the court reasoned, would help heal the divisions of the past and foster national unity.[124]

Whether this decision by the High Court in Johannesburg is representative or anomalous of South Africa's free speech jurisprudence is subject to debate.[125] Even if this case can be considered an exception, it is inconceivable that an American court would rule similarly given the Supreme Court's rejection of a group libel jurisprudence and its formulation of a narrow fighting words doctrine. This case demonstrates how far South

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117 Anderson 'Cartoons of Prophet met with outrage' *Washington Post* 31 January 2006 available at: http://www.washingtonpost.com/wp-dyn/content/article/2006/01/30/AR2006013001316.html (last accessed 14 March 2014).

118 Note 116 above.

119 *Id* at 5.

120 *Id* at 9.

121 *Id* at 6.

122 *Id* at 6–7.

123 *Id* at 8.

124 *Ibid.*

125 Kende *Constitutional rights in two worlds: South Africa and the United States* (2009) 203–5 (arguing that the High Court's decision in this case is anomalous and would have been overturned had it been appealed).

Africa's courts are willing to go in limiting freedom of expression with the rationale of dignity. Yet, it is important to recognise the unique context in which this case arose, one in which, contemporaneously, some Muslim protesters throughout Europe and the Middle East took to the streets, at times violently, in reaction to the publication of the cartoons in European newspapers. One can only speculate what weight the High Court gave to the potential dangers of ruling alternatively in its balancing of the rights of expression against those of dignities. Nevertheless, this danger, whether actual or imagined, would certainly not have swayed an American court from ruling as the High Court of South Africa had.

Some three years ago the Equality Court in Johannesburg ruled that the words of an old apartheid-era struggle song constituted prohibited hate speech under section 10 of the Equality Act.[126] In September 2011 Julius Malema, the charismatic and controversial then thirty year-old leader of the ANC Youth League, was found to have engaged in hate speech for singing the following lyrics: 'shoot the Boer/farmer, shoot the Boers/farmers they are rapists/robbers'.[127] The lines refer to Afrikaners, the white minority ethnic group that ruled the country during the apartheid era.[128] The case turned on whether Malema, in reciting these lyrics, violated section 10 of The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (Equality Act), which prohibits any person from publishing words involving the statute's protected classes[129] that cause or perpetuate systemic disadvantage, undermine human dignity, or adversely affect the equal enjoyment of a person's rights and freedoms in a serious manner.[130] The court held that the song could reasonably be construed to demonstrate an intention to be hurtful, to incite harm, and promote hatred against the white Afrikaans-speaking community and thus constitutes hate speech.[131]

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126 *Afri-Forum and Another v Malema and Others* 2011 Case No 20968/2010.

127 *Id* at par 49.

128 *Id* at pars 4–5

129 The 'prohibited grounds' include race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. Alternatively, if none of those specific categories apply, then on any other ground where discrimination causes or perpetuates systemic disadvantage, undermines human dignity, or adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner comparable to discrimination on one of the specifically enumerated grounds listed above.

130 Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 s 10 (S Afr).

131 Note 126 above.

The drafting of the Constitution, the court explained, served as an agreement 'between the groups, people who had lived lives separately from each other, who had hurt, tormented and degraded each other' to come together as equals in a unified society.[132] The Constitution implemented 'mechanisms to overcome reluctance to change and conduct regarded as inappropriate in the new society … ' and ' … provide[d] the framework to be used to alleviate and overcome the friction resulting from change'.[133] Acknowledging the inherent tension between freedom of expression and the prohibition of hate speech,[134] the court stated that the exemption of hate speech from constitutional protection is justified. Hate speech lacks the full protection afforded to other forms of public speech, the court explained, because unlike the latter, hate speech does not involve 'participation in political discourse with other citizens, in a manner that respects their own correlative rights'. Hate speech, the court concluded, has no respect for those rights and thus 'lacks full value as political speech'.[135] Hate speech not only affects the group target, but also the individual or group espousing the hate.[136] Participating in hate speech detracts from the perpetrators' own dignity by 'lower[ing] them in the eyes of right minded balanced members of society who then perceive them to be social wrongdoers'.[137] The inflammatory nature of hate speech also justifies restrictions since others who hear such words might become inspired to act upon them. Words are 'powerful weapons' that could lead to extreme actions if they are allowed to be used indiscriminately.[138] 'All genocide,' the court stated, 'begins with simple exhortations which snowball.'[139]

The old apartheid song at issue was originally chanted by anti-apartheid 'soldiers employed in the process of taking steps to overthrow the regime'. According to the court, struggle songs like this one served important psychological purposes. Struggle songs dehumanised the enemy in order to assist soldiers in overcoming their natural repugnance toward killing people. Struggle songs also bond soldiers together to encourage them to act against the enemy as a unit.[140] While the song may have been acceptable during the

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132 *Id* at par 11.
133 *Id* at pars 12–13.
134 *Id* at par 31.
135 *Id* at par 33.
136 *Id* at par 94.
137 *Ibid.*
138 *Ibid*.
139 *Ibid.*
140 *Id* at pars 62–3.

apartheid regime according to the court, in the new post-apartheid era, the enemy that once was, is no longer. Under the agreement embodied by the Constitution, 'the enemy has become the friend, the brother. Members of society are enjoined to embrace all citizens as their brothers.'[141]

## CONTEXTUALISING THE DEBATE

The United States and South Africa's divergent approaches to hate speech reveal that the debate over hate speech laws must take into account a country's unique historical and cultural legacy. The two jurisdictions adhere to vastly different approaches to speech. For the United States, speech is a paramount constitutional value, subservient only to a limited category of interests that the court finds sufficiently compelling and only then, when the speech restriction is narrowly tailored to meet those interests.

In contrast, South African courts regard dignity as the paramount constitutional value and are willing to subjugate freedom of expression should the latter sufficiently undermines the former. These divergent approaches to speech, and hate speech in particular, are not merely the consequence of divergent theoretical assumptions, but also factual ones. Universalising the approach in addressing hate speech is inadequate as jurisdictions rely upon a set of factual premises that derive from the specific cultural and historical context in which the jurisprudences are fashioned.

Ultimately, the two jurisdictions' divergent approaches to hate speech do not stem from how much weight each affords the value of free speech, but rather the dangers associated with this speech. Since the NDS, the US Supreme Court has sought zealously to protect individual rights, including speech rights. Yet, even in the United States' speech protective constitutional culture, threats are actionable under either a fighting words or incitement rationale. In the Supreme Court's view, speech can justifiably be restricted when the speech is targeted and threatening. Therefore, for the court, cross-burning constitutes unprotected speech when evincing an intent to intimidate. The court, in O'Connor's plurality opinion in *Virgina v Black*, recognised that cross-burning, long associated with the Klan's terrorist activities that target specific communities, can in certain circumstances communicate the very real threat of imminent violence.[142] Similarly, racist and other discriminatory speech that is severe or pervasive enough to create

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[141] *Id* at par 108.

[142] See *Virginia v Black* 538 US 343 (2003).

a hostile working environment is prohibited under Title VII of the Civil Rights Act and is not protected by the First Amendment – it is merely speech that the law targets.[143] However, a rally by a small contingent of neo-Nazis, even if causing the many Holocaust survivors who are nearby residents great anguish, does not demonstrate a sufficiently serious danger or threat to justify proscribing the ralliers' speech.[144] Though the US constitutional culture, as it has developed, reveres speech as almost sacred, the court is willing to limit speech rights when it perceives the speech in question to be posing a sufficiently serious danger. Alternatively however, when the speech in question does not pose a significant threat of serious and imminent harm, courts are unwilling to remove the speech from the ambit of First Amendment protection.

The South African Constitution explicitly enjoins courts to limit speech rights when the exercise of those rights impairs others' dignity rights. Yet, where courts come down in the speech/dignity balancing test is not based upon a priori principles, but rather, upon what courts views as sufficiently dangerous considering the country's legacy of racism, division, and gross power imbalances.

In enjoining South African newspapers from publishing cartoons of Islam's founding figure, the High Court in Johannesburg determined that the cartoons insult and ridicule Muslims in a manner that is 'not only demeaning but also undignified'.[145] The court recognised that the cartoons had led to unrest in the Muslim world[146] and later in the judgment concluded that publishing the cartoons 'in some cases constitute[d] unacceptable provocation' and will 'perpetuate patterns of discrimination and inequality'.[147] Similarly, when the Equality Court in Johannesburg

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143 The Supreme Court has only dealt with this particular challenge to Title VII in dictum. See *RAV v City of St Paul* n 64 above. ('[A] particular content-based subcategory of a proscribable class of speech can be swept up incidentally within the reach of a statute directed at conduct rather than speech. Sexually derogatory 'fighting words', among other words, may produce a violation of Title VII's general prohibition against sexual discrimination in employment practices. Where the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy.').

144 *Collin* 578 F d 1197 at 1206.

145 Note 116 above.

146 *Id* at 4. ('The deponent thereafter alludes to certain threats of of violence and the displeasure of Muslims worldwide. He further states that he is a witness to the fervour being stirred amongst Muslims in our country, who have threatened violence and protests of their own or what they view as an 'an insult to Islam and all Muslims'.)

147 *Id* at 8.

effectively branded an old apartheid-era struggle song as illegal hate speech, the court stated that the restriction of such rhetoric is justified because it may inspire others to act upon the words. Even in the case where the Constitutional Court directly confronted the issue of the constitutionality of an anti-hate speech law and found that law unconstitutional, the court recognised that advocacy and expression of hatred 'reinforces and perpetuates patterns of discrimination and inequality' and thus has the potential to divide South African society further.[148]

These cases demonstrate that South African courts do not merely apply a categorical analysis when determining what and who should prevail in a free expression/dignity balancing test. Rather, courts restrict speech that they perceive as posing a significant danger. The racism, division, and inequality of the not-so-distant past leads South African courts to deem certain forms of speech sufficiently dangerous to justify curtailment, where an American court would not find such speech threatening This divergence is an outcome of not merely the different languages or structure of the two countries' constitutions, but rather, is born of unique historical and cultural contexts. When American or South African courts decide to restrict speech, such a restriction is premised upon the perception of a serious danger; a perception which differs, owing to cultural and historical context.

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[148] *Islamic Unity* 2002 4 SA 294 (CC) at par 43.