HATE SPEECH IN THE NEW SOUTH AFRICA: CONSTITUTIONAL CONSIDERATIONS FOR A LAND RECOVERING FROM DECADES OF RACIAL REPRESSION AND VIOLENCE

*Eric Neisser**

I. INTRODUCTION

This Article touches on a most difficult and sensitive topic — racially-biased invective or hate speech.[1] The subject is controversial in any setting because of the perceived conflict between two fundamental, democratic values — achieving racial equality and preserving freedom of expression.[2] My own effort is complicated by the fact that I am a white American law professor who is neither a scholar of South African history, law, and culture nor a participant in its current political and constitutional processes. Thus, I cannot, and do not, attempt to give advice or suggest the "right" answer. This Article

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*Professor, Rutgers Law School-Newark. The author wishes to thank his colleagues Alfred Blumrosen, Charles Jones, James Pope, and George Thomas at Rutgers Law School-Newark for their helpful comments on an earlier draft of this Article. This Article is a substantially expanded version of an Article to be published in 10 S. AFR. J. ON HUM. RTS. 336 (1994).

[1]There is an enormous amount of literature on hate speech, to which I am deeply indebted, but which is too voluminous to list here. For this article, I have relied most heavily on: the pioneering work of Mari J. Matsuda, Charles R. Lawrence III, Richard Delgado, and Kimberlè Williams Crenshaw, MARI J. MATSUDA ET AL., WORDS THAT WOUND (1993), advocating restrictions on hate speech in the American context; Cass R. Sunstein, *Liberalism, Speech Codes, and Related Problems*, 79 ACADEME 14 (1993), defending such restrictions in the university context; Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 DUKE L.J. 484, eloquently presenting the classic American civil libertarian position against such restrictions; Charles H. Jones, *Equality, Dignity and Harm: The Constitutionality of Regulating American Campus Ethnoviolence*, 37 WAYNE L. REV. 1383 (1991), seeking to elaborate a middle ground between the two extremes; and, regarding the international perspective, Elizabeth F. Defeis, *Freedom of Speech and International Norms: A Response To Hate Speech*, 29 STAN. J. INT'L L. 57 (1992).

[2]*See* MATSUDA ET AL., *supra* note 1, at 1 ("Many believe that hate speech regulations constitute a grave danger to first amendment liberties, whereas others argue that such regulations are necessary to protect the rights of those who have been and continue to be denied access to the full benefits of citizenship . . . ."); Strossen, *supra* note 1, at 489 ("Combating racial discrimination and protecting free speech should be viewed as mutually reinforcing, rather than antagonistic, goals. . . . Those who frame the debate in terms of this false dichotomy simply drive artificial wedges between would-be allies . . . ."); Jones, *supra* note 1, at 1383-84 ("Opponents and advocates of regulation tend to divide into two camps: civil libertarians and equalitarians.").

will endeavor simply to outline the considerations relating to hate speech that I, as a student of American constitutional law having some familiarity with international human rights law, perceive as relevant as South Africa implements its new interim Constitution and commences the task of developing a permanent one.[3]

II. DEFINITIONS

Hate speech can be, and has been, defined quite differently. For example, the International Covenant on Civil and Political Rights ("Rights Covenant") requires signatories to ban "[a]ny advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility or violence."[4] In contrast, the International Convention on the Elimination of all Forms of Racial Discrimination ("Discrimination Convention") more broadly requires criminalization of "all dissemination of ideas based on racial superiority or hatred . . . ."[5] Professor Matsuda suggests three identifying characteristics: "1. [t]he message is of racial inferiority[;] 2. [t]he message is directed against

[3]On December 22, 1993, the South African Parliament approved, by a vote of 237 to 45, an interim Constitution, relevant portions of which are described in text accompanying notes 95-124. Kenneth B. Noble, *South African Parliament Adopts New Constitution*, N.Y. TIMES, Dec. 23, 1993, at A3. That interim Constitution, which led to the new government's election in April 1994, defines both a process and governing principles for developing a permanent Constitution. S. AFR. CONST. ch. 5, sched. 4.

[4]*International Covenant on Civil and Political Rights*, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966), *quoted in* Defeis, *supra* note 1, at 81. The United States expressed concern that a prohibition of content-based speech would restrict freedom of expression. Defeis, *supra* note 1, at 81. Ultimately, however, it was agreed that signatories would take affirmative action to restrict certain expression. *Id.* The limitations are reflected in the prohibition of hate speech in Article 20 as quoted in text. *Id.* When ratifying the Covenant, the United States expressly added a reservation that the Covenant would not require legislation in conflict with the United States Constitution. *Id.* at 84.

[5]*International Convention on the Elimination of All Forms of Racial Discrimination*, Jan. 4, 1969, 660 U.N.T.S. 195, *quoted in* Defeis, *supra* note 1, at 86-87. The Discrimination Convention's drafting coincided with the civil rights movement in the United States. Defeis, *supra* note 1, at 86. As such, many provisions of the Discrimination Convention evolved from the events taking place in the United States and are similar to those contained in the United States Civil Rights Act of 1964. *Id.* (citing Clyde Ferguson, *International Convention of the Elimination of All Forms of Racial Discrimination, in* U.S. RATIFICATION OF HUMAN RIGHTS TREATIES: WITH OR WITHOUT RESERVATIONS 41, 43 (Richard B. Lillich ed., 1981)). Article 4 of the Discrimination Convention, quoted in text, pertains to racist propaganda and speech. *Id.*

a historically oppressed group[; and] 3. [t]he message is persecutory, hateful, and degrading."[6]

I believe the inquiry will be more complete and less result-oriented if we begin with a broad definition and address, during the analysis, the impact of varying political settings and historical experiences. Consequently, I will use the terms "hate speech" and "biased invective" interchangeably to refer to all communications — verbal, written, or symbolic — that insult or degrade a racial or ethnic group, whether by suggesting that its members are inferior in some respect or by indicating that they are despised or not welcome for any other reason. This definition includes not only a virulent personal epithet hurled at a particular individual in a physically threatening manner, but also a political speech or tract addressed to the general public advocating new policies or a particular electoral result. I leave for later consideration the important issue posed by Professor Matsuda's definition, which is particularly important to South Africa — whether an essential element of hate speech is that it be directed at a historically persecuted group. Also relevant to South Africa is whether that qualifier should still apply if that group becomes the political majority.

Likewise, constitutional consideration of the subject may take different forms. In the American mode, accepted by some, but far from all, countries recently developing constitutions, the fundamental charter should define only the structure of, and limitations upon, state power.[7] Thus, in the individual

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[6]MATSUDA ET AL., *supra* note 1, at 36 (discussing what Professor Matsuda considers to be the three identifying characteristics of "the worst, paradigm example of racist hate messages [that distinguish it] from other forms of racist and non-racist speech").

Professor Matsuda suggests that the first element is "the primary identifier of racist speech." *Id.* She explains that racist speech asserting racial inferiority denies the "personhood" of the target group members, and considers group members both alike and inferior. *Id.*

Professor Matsuda's second element recognizes the nexus between racism and power and subordination. *Id.* She asserts that "[r]acism is more than race hatred or prejudice. [Rather, i]t is the structural subordination of a group based on an idea of racial inferiority." *Id.* As a mechanism of subordination, Professor Matsuda maintains, racist speech is uniquely harmful as it serves to reinforce "historical vertical relationship[s]". *Id.*

Professor Matsuda explains that her final element is related to the "fighting words" concept. *Id.* She further notes that this is the "worst form of racist speech" because the language is intended to be persecutory, hateful, and degrading. *Id.*

[7]Adrien K. Wing, *Communitarianism vs. Individualism: Constitutionalism in Namibia and South Africa*, 11 WIS. INT'L L.J. 295, 298 (1993). The individualist perspective is hostile to group rights, as it views the individual as the only agent to which a right can attach. *Id.* For example, Professor Wing describes how an individualist views the government as an entity that should not "obstruct a person's right to associate with whomever he or she chooses." *Id.* In this example, Professor Wing notes, the role of the state is to allow a person to "succeed or fail on his or her own merits." *Id.* As such, Professor Wing explains, the state would not

rights area, the American Constitution states only what may *not* be the subject of action by the current political majority, but does not define what the political branches *must* do.[8] In contrast, most European constitutions speak of the duties and responsibilities, not just the powers and rights, of the state and individuals.[9] In addition, as noted, recent international treaties, such as the Rights Covenant, the Discrimination Convention, and the International Convention on the Prevention and Punishment of the Crime of Genocide ("Genocide Convention") impose affirmative obligations on governments to condemn or outlaw certain activities, including some forms of hate speech.[10]

Thus, the constitutional question may be posed as either: (a) should the permanent South African Constitution, to be developed in the coming years, *allow* the government to outlaw hate speech in some forms and contexts, if and when it deems it advisable to do so?; or (b) should that Constitution *require* the state to outlaw hate speech in some contexts? Under the former approach, if the Constitution were to permit hate speech bans, there would be the additional question of whether it would be wise policy for the government at some point to adopt such laws.

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have much need to get involved in "economic, social, or cultural issues." *Id.*

[8]Defeis, *supra* note 1, at 62. Professor Defeis explains that:

> The United States system of government, based on the liberal tradition, seeks to further the rights of the individual and to shield the individual from abuses by the state and by the majority.
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> Absent from the United States Constitution is an articulation of responsibilities either of the individual toward society or of the Government toward the individual.

Id. See also LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 2, 8-9, 1010 (2d ed. 1988) (noting that the American Constitution has been criticized by legal scholars as an "unacceptably individualistic document").

[9]Wing, *supra* note 7, at 302 & n.22 (noting that the French Constitution provides that "the nation shall insure to the individual and the family the conditions necessary to their development," while the West German Basic Law of 1949 specifies that "the family, children, and mothers shall be entitled to special protections" (citations omitted)).

Most European constitutions create affirmative duties furthering protection of citizens' economic and social welfare. *Id.* at 302. Moreover, the experience of some Western democracies illustrates that "protection of individual civil and political rights is often balanced by the imposition of obligations on others." *Id.*

[10]*See supra* text accompanying notes 4-5; *International Convention on the Prevention and Punishment of the Crime of Genocide*, Dec. 9, 1948, 78 U.N.T.S. 277, *quoted in* Defeis, *supra* note 1, at 90-94. Article III of the Genocide Convention requires signatory states to punish "[d]irect and public incitement to commit genocide." Defeis, *supra* note 1, at 91 (citation omitted). The Genocide Convention entered into force in 1951 and has been ratified or acceded to by more than 100 states. *Id.*

I suspect that the issues merge somewhat in the current South African setting. If hate speech remains an issue and the constitutional process, which will be dominated by the political forces that will probably control the government under any new constitution, produces a document authorizing hate speech regulation, then the new government would most likely adopt such a law. Because of that common sense political guess, I will proceed to outline the relevant considerations for outlawing hate speech without focussing on whether such a prohibition is framed as a constitutional mandate or as a political choice that is constitutionally permitted despite constitutional protection for free speech generally.[11]

The analysis is clearer if one examines the problems of hate speech in two separate ways — from the ethical or intrinsic perspective and from the instrumental, consequentialist, or utilitarian perspective.[12] The ethical

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[11]There are some theoretical differences between a constitutional mandate against hate speech and a constitutional authorization for such regulation. In the former setting, the courts, following the Western mode of judicial review being adopted in South Africa, would have to explicate the precise nature of the restrictions in interpreting the constitutional mandate. In the latter, the political process would initially define the scope of regulation. The political format allows for easier and more frequent modification, some would say manipulation, of the hate speech ban as well as greater input from various political entities. Although politically formulated bans would still be subject to judicial review for conformity to the constitutional authorization, there is likely to be greater judicial deference to political choices when the constitution expressly delegates such authority to the political process. *See* TRIBE, *supra* note 8, at 316-17, 789-92 (contrasting United States Supreme Court's extremely lenient review when the American Constitution delegates power to Congress to regulate interstate commerce with the presumption of unconstitutionality, under the First Amendment's express ban on abridgement of free speech, when legislation seeks to regulate the communicative impact of conduct).

In the South African context of simultaneously re-created constitutional and governmental structures dominated by the same political forces, one would expect those differences to be minimal.

[12]Professor Tribe poses the issue as follows:

> [I]s the freedom of speech to be regarded only as a means to some further end — like successful self government, or social stability, or . . . the discovery and dissemination of truth — or is freedom of speech in part also an end in itself, an expression of the sort of society we wish to become and the sort of persons we wish to be?

TRIBE, *supra* note 8, at 785. *See id.* at 785-89. Similarly, Professor Cockrell explains:

> In the recent history of political thought two strands can be identified which argue for maximum freedom of expression. The first strand of thought . . . argues that this freedom will produce desirable consequences in the form of knowledge and truth. The second strand of thought argues that this liberty is *intrinsically* — rather than instrumentally — good; for the state to deny its subjects this individual liberty is . . . to deny them their status as rational agents and this is to treat them with disrespect.

perspective condemns unjustified harm to others, whether or not that harm has pragmatic consequences for the life of the community. In contrast, the instrumental perspective focusses on societal consequences, without making *a priori* moral judgments.

III. THE ETHICAL PERSPECTIVE – THE INDIVIDUAL HARMS CAUSED BY HATE SPEECH

Because the ethical perspective addresses needless injury to others, it forces us to define with care the harm that biased invective causes. One way of understanding the harm is by comparing it to that caused by other insults – nasty comments deprecating a person's intellect, beauty, athletic ability, photographic or computer skill, height, weight, or any other characteristic that is valued by a society. Why does one feel differently when called a nasty name referring to one's race or religion than when called a nasty name suggesting one is ugly, fat, or dumb?

The first and probably most important reason is that, in light of historical experiences, insults based on race are more likely to imply physical threats. A burning cross in the United States has historically been a threat of violence, often very imminent violence, to African-Americans, just as a swastika has been a threat of violent extinction to Jews throughout the world for the last sixty years. To my knowledge, people who are considered ugly have not been physically persecuted as a group because of that characteristic in any society. The ugliness insult, therefore, does not carry the same implicit physical threat, and thus does not trigger the same gripping fear of physical injury, that most racial insults do.

Thus, we immediately see how historical experience can affect the scope of the hate speech definition in a particular culture. A history of violent repression, for example, will make a racial slur into a threat of physical

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Alfred Cockrell, *'No Platform For Racists': Some Dogmatism Regarding The Limits of Tolerance*, 7 S. AFR. J. ON HUM. RTS. 339, 339 (1991).

The term "intrinsic," used by Professor Cockrell, among others, seems less appropriate to me than the term "ethical" when discussing hate speech in particular, rather than free expression in general. The focus here is not primarily on the activity's inherent value to the speaker, as it is when discussing the values of free expression generally. *See infra* text accompanying notes 40-43. Rather, when considering the intrinsic evil of hate speech, our attention is on the expression's effect on other individuals, as compared to the consequentialist concern with its impact on social institutions, and the justification, if any, for the behavior. Ethical systems typically evaluate the propriety of behavior by examining its effect on other people and any countervailing interest justifying the behavior despite its effects. Even intentional killing is not condemned by most belief systems as intrinsically evil under all circumstances, but only when not justified by self-defense, necessity, or other circumstances making the tragic effect on the victim acceptable or forgivable in that ethical system.

violence when addressed to a member of a historically persecuted minority, although it might not when addressed to a member of the same racial or ethnic group in a different culture, or when a comparable slur is used against a member of the oppressing class.[13] Just as the criminal law in most countries does not penalize all arm movements, but only those that are understood in the particular culture as threatening a physical attack, a constitution could restrict, or allow restriction of, at least those racial slurs that would be understood in that culture as threats of violence.[14]

Secondly, quite apart from any threat of violence, racial slurs typically impose the psychological injury of stigma and exclusion, the hurt that we normally associate with the term "insult." Even when people are not literally placed in fear of physical violence by a racial invective, they will feel devalued, stigmatized, degraded and, typically at the same time, unwelcome and excluded. Put another way, they are made to feel unworthy of being part of "us," the "in crowd," or, more pertinently, "our community" or "our country." On one level, that feeling is similar to the hurt experienced by those condemned as ugly, dumb, or clumsy, who are excluded, respectively, from cheerleading squads, honor societies, and ball games. One feels put down and left out.

There are, however, four significant differences between the stigmatizing impact of the racial slur and that of, for example, the athletic-prowess insult.

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[13]Richard Delgado, who has proposed a tort cause of action for racial insults, notes that the phrase "you dumb honkey," although technically within his definition of such insults, would probably not entitle a white plaintiff to damages because of the difficulty in proving any real injury. MATSUDA ET AL., *supra* note 1, at 110.

[14]A comparable limitation is found in American constitutional law's permission for criminalization of "fighting words." These are personal epithets that would provoke the average listener in the American culture to react with a breach of the peace. Chaplinsky v. New Hampshire, 315 U.S. 568 (1942). *See infra* text accompanying notes 32-33. *Chaplinsky* dealt with the conviction of a Jehovah's Witness for violating a New Hampshire law prohibiting an individual from directing "offensive, derisive or annoying word[s]" towards another in public or from making "any noise or exclamation . . . with intent to deride, offend or annoy him, or to prevent him from pursuing his lawful business or occupation." *Chaplinsky*, 315 U.S. at 569. The New Hampshire Supreme Court narrowly interpreted the statute to cover only words that "have a direct tendency to cause acts of violence in the persons to whom, individually, the remark is addressed." *Id.* at 572-73. The United States Supreme Court held that the statute, as narrowed, although punishing words, was "carefully drawn so as not unduly to impair liberty of expression . . . ." *Id.* at 574 (citation omitted). Yet, the Court determined that calling a law enforcement officer a "'damned racketeer' and 'damned Fascist'" is likely to cause retaliation towards the speaker, and thereby a breach of the peace. *Id.* *But see* Lewis v. New Orleans 408 U.S. 913, 913 (1972) (Powell, J., concurring) (suggesting that "fighting words" should be treated differently when addressed to a police officer, while joining a decision reversing a conviction for saying "'g-- d--- m----- f-----' police" because the state law was not narrowed as in *Chaplinsky*).

First, one's race, religion, or ethnic origin is more an objective fact than a value judgment. One either is or is not black[15] or Jewish. Whether one is athletic or clumsy is more a matter of categorization and judgment and thus the pain can be assuaged somewhat by a caring parent's reassurance of one's athletic potential.[16]

Second, race, religion, or ethnic origin is a more central part of one's identity. When asked for one's background or "what are you?" one is far less likely to say one is tall, smart, handsome, or an amateur first-baseman than to say that one is African American, Jewish, or of Italian descent. This is not only a result of the cultural transmission of pride in one's racial, ethnic, and religious background and of voluntary association along those lines. Unfortunately, but frequently, this type of response is evoked also because society tends to lump members of racial, ethnic, and religious groups together, both socially and politically.

This group aspect highlights the third difference from other insults. The racial slur implies that you are rejected simply because you are a member of a group, not because of inadequacy in your own efforts or abilities. This offends our sense that individuals should be judged on their own merits. It also undermines the sense of pride in identification with the group, because one is now being told that belonging to the group is *per se* bad.

Finally, race is immutable. One can work on improving one's curve ball, but one's race or ethnicity is fixed from birth. One cannot change one's membership in a race or ethnic group, nor can one, by oneself, alter the bigot's view of the entire race.

Because the racial insult more closely touches the unchangeable and objective core of one's social identity, it makes one feel less valued and more degraded and, thus, hurts more than other insults do.[17]

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[15]I use the term "blacks" in this article when the concept is applicable to both black South Africans and African Americans. I use the latter term, *see supra* text accompanying notes 12-13 (using the term "African American" in the context of cross burning), when I refer only to the American experience.

[16]The difference is more a matter of degree than of kind. There are, of course, some objective facts in athletics — one either did or did not strike out at every one of the last fifty at-bats. Likewise, there are some subjective aspects to racial or religious identity — persons who are one-thirty-second black or Jewish would, in some cultures, have a choice regarding how they wish to identify themselves. *See* HOWARD M. SACHER, THE COURSE OF MODERN JEWISH HISTORY 429 (1958) (describing Nuremberg laws passed in 1935 by Nazi Germany which banned persons who were half-Jewish from being German citizens but allowed persons who were one-quarter Jewish to remain German although not allowing them to marry others who were one-quarter Jewish). *Cf.* Plessy v. Ferguson, 163 U.S. 537 (1896) (involving plaintiff with one-eighth African blood who was asked to leave seat in car reserved for whites).

[17]*See* MATSUDA ET AL., *supra* note 1, at 94 ("Racial insults, relying as they do on the unalterable fact of the victim's race and on the history of slavery and race discrimination in this country, have an even greater potential for harm than other insults."); O. COX, CLASS, CASTE, AND RACE 383 (1948), *quoted in* MATSUDA ET AL., *supra* note 1, at 90-91 ("[R]ebuff

In some settings, given historical experience, the racial slur may even threaten physical, not just social, exclusion. For example, blacks in South Africa were forced into "homelands" and denied access to white areas,[18] European Jews were confined in ghettoes,[19] Muslims have been "cleansed" from parts of Bosnia,[20] and Palestinians in Israel were displaced from their homes.[21] For members of such groups, the racial insult carries as much a threat of physical exclusion as it carries a threat of physical assault for groups historically victimized by racial violence.

Finally, a racial insult may also leave one feeling powerless in two different ways. First, as noted, race is an immutable characteristic; thus, one is literally powerless to change the circumstances triggering the insult. But, even more importantly, just as language reflects culture, racial slurs ordinarily reflect racial politics — disparities in, and use of, power based on race — and are designed to continue the political subordination of the target.[22] Thus, the fear of physical injury and/or the pain of devaluation and rejection are often accentuated by the knowledge that one is powerless to overcome or to alter one's place in the political/social universe.[23]

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due to one's color puts [the victim] in very much the situation of the very ugly person or one suffering from a loathsome disease. The suffering . . . may be aggravated by a consciousness of incurability and even blameworthiness, a self-reproaching which tends to leave the individual still more aware of his loneliness and unwantedness.").

[18]Johan D. van der Vyver, *Constitutional Options for Post-Apartheid South Africa*, 40 EMORY L.J. 745, 745-47 (1991). Under the National Party's political control in the late 1940's, segregation became the official policy in South Africa. *Id.* at 745. Acting on its belief that conflict could best be controlled and white interests best served by dividing the country and creating separate land areas for black African communities, the South African government drew racial lines across the country. *Id.* at 746.

[19]SACHER, *supra* note 16, at 25-27 (describing the isolation of 400,000 Jews in the ghettoes of Western Europe in the 18th century).

[20]Chuck Sudetic, *Bosnian Serbs Force More Than 2,000 Muslims to Leave Their Homes*, N.Y. TIMES, Aug. 30, 1994, at A8 (describing six-week campaign to "cleanse" area of Bosnia-Herzegovina of Muslim residents); Andrew Bell-Fialkoff, *A Brief History of Ethnic Cleansing*, FOREIGN AFFAIRS, Summer 1993, at 110 (placing current Serbian campaign to "cleanse" areas of Bosnia-Herzegovina of Muslims in historical perspective).

[21]THOMAS L. FRIEDMAN, FROM BEIRUT TO JERUSALEM 13-15 (1989) (describing 300,000 Palestinian refugees who fled to Jordan after 1948 war); SACHER, *supra* note 16, at 558 (discussing 650,000 Arabs who fled Israel during 1948 war).

[22]MATSUDA ET AL., *supra* note 1, at 36 ("Racism is more than race hatred or prejudice. It is the structural subordination of a group based on an idea of racial inferiority. Racist speech is particularly harmful because it is a mechanism of subordination, reinforcing a historical vertical relationship.").

[23]Depending upon where and when a racial slur is uttered, it may also cause other harms. For example, a burning cross placed on the lawn of an African American family's home or a racially insulting cartoon slipped under an African American student's dormitory room door imposes a similar fear of physical harm, pain of rejection, and sense of powerlessness as would

The long-term psychological consequences of racial insults, particularly for the young, can be devastating. Social science studies show that "speech that communicates low regard for an individual because of race 'tends to create in the victim those very traits of 'inferiority' that it ascribes to him.'"[24] That is, persecuted minorities tend to internalize and accept the degrading characterizations.

Although the injuries from racial slurs are significant, most ethical systems do not condemn all harms but only those considered unjustified in the moral sense. In Western systems, threats of physical violence are generally thought to be justified only as an immediate response to comparable threats of violence.[25] Some racial slurs are uttered in the context of fights, riots, or other physical interactions, and may, therefore, be seen in some settings as a defense to an unprovoked attack. But the vast majority of uses cannot, in any meaningful sense, be described as acts of self-defense.

The parallel question is when, if ever, would verbal stigmatization and threats or suggestions of social or political, if not physical, exclusion be morally justified? Most people would not consider the insults themselves justified on an ethical plane, because they gratuitously inflict psychological pain. Rather, the theory is that racial invectives must be tolerated because of the great societal value of unfettered political, scientific, and artistic expression and because of the risks attendant upon empowering government to censor some forms of expression. Those are, however, instrumental, not ethical, justifications.[26]

The first constitutional question, then, is whether the law ought to ban racial slurs that are deemed unethical because they impose on others the unjustified harm of either a threat of violence, stigmatization and exclusion, or political subordination. Contrary to its medieval experience, the law in

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be engendered by the cross being burned on the sidewalk across the street from the target home or the cartoon being posted on the dormitory's hall bulletin board. In addition, however, the former examples also involve intrusions upon both physical privacy and control over property that are not present in the latter settings.

[24]MATSUDA ET AL., *supra* note 1, at 94-95 (quoting M. DEUTSCH ET AL., SOCIAL CLASS, RACE AND PSYCHOLOGICAL DEVELOPMENT 175 (1968)). Professor Delgado submits that, as a result of constantly hearing racial messages, minority children question their own competence, intelligence, and worth. *Id.* at 95. These "value-laden words, epithets, and racial names," Professor Delgado contends, are to blame for forming these self-deprecating attitudes. *Id.*

[25]*See, e.g.*, MODEL PENAL CODE § 3.04 (defining when the use of force for self-protection is justifiable).

[26]*See infra* text accompanying notes 52-71.

modern Western society[27] has increasingly eschewed condemning behavior *solely* because it is considered unethical. Thus, for example, although blasphemy — taking the Lord's name in vain — was a criminal offense subject to significant punishment in most American colonies in the eighteenth century,[28] it is no longer an offense anywhere in the United States. Such a law would, no doubt, be construed today as an unconstitutional establishment of religion.[29] This change reflects not only the secularization of American life generally, but also the increasing diversity of religious views and the diminishing ethical consensus in American society.[30]

On the other hand, a constitution is a statement of a society's basic values — such as fairness, equality, and respect for individual dignity — and is intended to have symbolic as well as practical effect. Moral judgments, therefore, seem more appropriate in a constitution than in a commercial code.

Whether law in general, or a constitution in particular, should address issues on which there is a moral consensus in society, regardless of any practical consequences for communal life, is a complex subject beyond the scope of this article. South Africa may need to consider that question in general because of its impact on many other issues. I venture my own guess: that, in a newly-reconstructed society like South Africa, with so many racial and ethnic animosities and differing cultural heritages, it is unlikely that there will be a broad-based moral consensus sufficient to support laws banning hate speech, even if such a consensus were generally accepted as a basis for law.

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[27] I speak of Western society not because I consider it the model for all other countries, but simply because I know more about Western systems and because South Africa has chosen to adopt a Western-style constitution.

[28] David Flaherty, *Law and the Enforcement of Morals in Early America, in* AMERICAN LAW AND THE CONSTITUTIONAL ORDER: HISTORICAL PERSPECTIVES 53-57 (Lawrence M. Friedman & Harry N. Scheiber eds., 1978) ("[The] intimate association of law and morality in early America resulted in the enactment of legislation tending toward the establishment and maintenance of high moral standards . . . . The concerns of Virginia and Maryland with drunkenness, fornication, adultery, blasphemy . . . were typical.").

[29] *Cf.* Stone v. Graham, 449 U.S. 39 (1980) (invalidating under the First Amendment's Establishment Clause a state statute requiring the posting of the Ten Commandments in every public classroom).

[30] Flaherty, *supra* note 28, at 54 ("Modern commentators have recognized that a high degree of homogeneity in a society is an essential prerequisite to the legal enforcement of morality. Such a precondition existed in colonial [American] society.").

IV. THE INSTRUMENTAL PERSPECTIVE – THE SOCIETAL IMPACT OF HATE SPEECH

It is vital, therefore, to consider the instrumental or utilitarian perspective – how hate speech injures society's interests or, put another way, undermines the greatest happiness for the greatest number.

When viewed as a threat of assault, hate speech poses some of the same dangers as physical assaults. First, there are the costs of treatment or remedies. Just as physical assaults require medical attention, threats of assault that frighten people may require psychological treatment, at least if the threats are repetitive or pervasive. Such treatment is costly, diverting scarce health care resources from other problems. More significantly, the remedies for a social/political problem like hate speech will include political, social, educational, and perhaps law enforcement efforts that are costly and divert scarce communal resources and energy from other important social endeavors.

But even when no remedy, personal or political, is provided, hate speech is costly to society in terms of the limitations imposed by the emotional scars. People who are scared for their physical safety are less likely to participate in society – in the workplace, the community's cultural or social life, or the political scene. The impact of the fear of sexual assault on the willingness of young women in urban American universities to participate in nighttime activities is a current example of how society's social and educational institutions are undermined by the fear of physical violence. As Professors Matsuda, Lawrence, and Jones, among others, have persuasively argued, a similar inhibiting effect on social and academic involvement flows from unregulated hate speech within a historical context of racial violence.[31]

Another societal concern with an assault or threat of assault is the risk of a violent reaction – revenge or self-help. The destabilizing societal effect of physical retaliation – and of the general message that disputes can and should be resolved by physical force – are obvious and substantial. For this reason, among others, societies generally condemn both assaults and threats of assault and penalize them through formal state intervention.

If the danger is only a verbal threat, however, rather than an actual assault, the response may also be so limited. Plainly the social dangers of verbal retaliation are far less substantial than those posed by physical responses. Indeed, many cultures encourage verbal expression of anger rather than

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[31] MATSUDA ET AL., *supra* note 1, at 24-25, 72-76 (noting that victims of hate speech "are restricted in their personal freedom. To avoid receiving hate messages, victims have to quit jobs, forgo education, leave their homes, avoid certain public places, curtail their own exercise of speech rights, and otherwise modify their behavior and demeanor"). *See also* Jones, *supra* note 1, at 1417-19 (comparing the "hostile environment" standard in sexual harassment law with an analysis of hate speech's effect on university campuses).

physical retaliation. The costs of counter-insult strike me as too small to warrant legal intervention.

It is important to recall, however, that racial slurs are often accompanied by, or regularly followed by, physical assaults. Accordingly, the reactions to hate speech may often be physical. Indeed, in American constitutional law, the major exception to the constitutional protection for free speech that is pertinent to hate speech is the one permitting restriction of "fighting words."[32] These are defined as verbal insults communicated directly to a particular individual that are likely to produce a physical reaction — a breach of the peace.[33] In a society like South Africa, where racial violence has been prevalent and racial insults, therefore, will often be seen as physically threatening, the societal interests in preventing the direct costs and destabilizing impact of violence are plainly applicable in considering whether to regulate hate speech.[34]

The consequences of the feelings of stigma and exclusion caused by racial invectives are also significant for communal life. Like the fear of violence, the pain of stigma and exclusion discourages the victims from participating in at least those aspects of communal life from which the insult suggests exclusion.[35] Although degradation may be less of a deterrent than actual violence, experience suggests it is a very real factor.[36] Thus, for example, advocates of regulating hate speech in America have often focussed on the impact of such invective on the involvement and success of minority students

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[32]R.A.V. v. St. Paul, 112 S. Ct. 2538, 2545-47 (1992) (confirming that "fighting words" are a category of expression not protected by the Constitution). *See supra* note 14 and *infra* note 33.

[33]Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) ("[S]uch utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." (citation omitted)).

[34]In the parallel context of bias-motivated violence, a unanimous Supreme Court determined that "bias-motivated crimes are more likely to provoke retaliatory crimes, inflict distinct emotional harms on their victims, and incite community unrest." Wisconsin v. Mitchell, 113 S. Ct. 2194, 2201 (1993) (upholding sentencing enhancement statute for bias-motivated crimes).

[35]MATSUDA ET AL., *supra* note 1, at 79 (arguing that racist speech deters minority group participation in the political process); Robert Post, *Racist Speech, Democracy, and the First Amendment*, 32 WM. & MARY L. REV. 267, 306-11 (1991) (discussing whether racist speech should be regulated because its stigmatization is said to deter minority groups' political participation).

[36]MATSUDA ET AL., *supra* note 1, at 72-76 (noting that the effects of racist slurs uttered at a public university and racist slogans and pictures painted on the soccer kickboard at a private high school were as powerful as the impact of violence).

in university life, both academic and social.[37] If the historical background of the insult suggests total exclusion from society, certainly a reasonable inference in a society that has had physical apartheid for forty-five years, hate speech may well deter participation in all aspects of communal life — economic, social, cultural, and political.[38]

To the degree that the new democratic South Africa sees widespread participation in political life as a social good, hate speech, like other forms of discrimination, may undermine the new political process. In addition, the effectiveness of a democratic system often depends upon a shared belief that the system belongs to all the people and a sense of communal cohesion. Cultural and social interactions among diverse groups are vital to that sense of cohesion and thus to the success of democratic processes. By deterring participation in communal life, exclusionary hate speech, like other forms of racial discrimination, may not only deprive the political process of the insights and energies of those who feel excluded, but may also undermine the community-building necessary for democracy to be sustained.

The question, then, might be: if hate speech has all these moral deficiencies and causes so many adverse societal consequences, why would any society not ban it? The primary answer is that almost all societies, as reflected in the Universal Declaration of Human Rights,[39] consider free expression to have positive benefits, both for the individual and for society, and believe that banning any speech, even hateful speech, may imperil or limit those benefits. We need, therefore, to consider the general benefits of free speech and the risks of censorship more closely to assess the consequences of banning hate speech.

V. THE BENEFITS OF FREE EXPRESSION

A. RATIONALES FOR FREE EXPRESSION

In Western liberal theory and American constitutional law, the benefits of unfettered individual expression have usually been categorized in similar

[37] *Id.* (arguing for the regulation of hate speech on campus because of the effect on the opportunity to learn and participate in the school community caused by denigrating verbal harassment); Jones, *supra* note 1, at 1417-19 (noting that racism on campus discourages the use and enjoyment of all aspects of campus facilities and campus life). *See* Sunstein, *supra* note 1, at 20-23 (contending that, because of differences from the *R.A.V.* setting, universities should be able to regulate hate speech to the extent that it affects the school's educational mission).

[38] Some, of course, may react differently. After years of insult and injury, the victims may be spurred to action. Unfortunately, that action would often be a violent reaction, which is the societal harm previously discussed. *See supra* notes 32-34 and accompanying text.

[39] *Universal Declaration of Human Rights*, G.A. Res. 217A(III), U.N. GAOR, 3d Sess., U.N. Doc. A/810 (1948), *quoted in* Defeis, *supra* note 1, at 76-77 (affirming the universal rights to freedom of expression, to hold opinions, and to seek and disseminate information).

ways. Typically, the initial distinction is between intrinsic and instrumental values.[40] The intrinsic benefit of free expression is its contribution to the communicator's personal development, fulfillment, and satisfaction.[41] Instrumentalists usually suggest three benefits: assisting the search for truth, both scientific and political; participating in self-government; and maintaining social stability.[42] I will describe each of these four values briefly and then assess how the rationales apply to hate speech.

The paradigm of the self-development rationale is artistic expression — the painter, dancer, sculptor, or novelist whose expression is her self-definition. Although this rationale is primarily focussed on the intrinsic benefits to the speaker, it also has societal implications. From a utilitarian perspective, encouraging individual development both increases the contentment of citizens, thereby fostering social harmony, and unleashes creative forces likely to produce social benefits — in the form of cultural and scientific advances. Artistic expression also benefits the audience — by enlightening, entertaining, and challenging them with new perspectives and insights. Many great plays from Aeschylus' to Shakespeare's have political as well as psychological themes and are banned precisely because of their political impact. Indeed, it is difficult to imagine a society with a sharply constrained cultural life that one would call truly free or democratic in its other aspects.

The remaining free expression rationales — the search for truth, self-government, and social stability justifications — plainly view the issue solely from the perspective of the consequences of repression for communal life. The second rationale for broadly protecting free expression is that uninhibited intellectual inquiry and communication will advance the search for truth.[43]

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[40]TRIBE, *supra* note 8, at 785-89 (explaining the free expression system); Cockrell, *supra* note 12, at 339 (noting that one strand of thought argues that personal "freedom will produce desirable consequences in the form of knowledge and truth," while another strand argues that this liberty is intrinsically good, part of one's status as a rational agent entitled to be treated with respect).

[41]*See* FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 47-72 (1982) (arguing that, because there are other forms of self-expression and fulfillment, speech cannot claim a special status on that basis).

[42]John Milton, *Aeropagitica, A Speech for the Liberty of Unlicensed Printing, To the Parliament of England* (1644), *reprinted in* 1 POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES 1-4, (Emerson et al., eds., 4th ed. 1976); JOHN MILL, ON LIBERTY (1859); ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948); THOMAS EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION (1978); TRIBE, *supra* note 8. *See also* Cockrell, *supra* note 12 (discussing the application of the instrumental justifications for free speech to racist speech in South Africa); Raymond Suttner, *Freedom of Speech*, 6 S. AFR. J. ON HUM. RTS. 372, 379 (1990) (focussing on free speech's value in ensuring fuller democratic participation in South Africa).

[43]The classic statement of this position is enunciated in John Milton's "*Aeropagitica*":

> [T]hough all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously, by licensing and prohibiting, to misdoubt her strength.

As different theories are advanced, each can be examined in the light of reason and experience and the "truth" can be discovered. Scientific inquiry is the classic example of how unfettered individual exploration can advance the search for truth, as the world learned, or should have learned, from the excommunication of Galileo for suggesting that the earth revolves around the sun. Few today believe in political "truth" in an objective sense. Yet clearly, the American liberal ideal of a "marketplace of ideas,"[44] in which all kinds of proposed policies can be openly presented, examined, tested, refined, and ultimately either adopted or rejected, retains a strong appeal, at least rhetorically.[45]

Third, free expression is crucial to democratic self-government.[46] This is sometimes known as the checking function, because the democratic ideal

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> Let her and Falsehood grapple; who ever knew Truth put to the worse, in a free and open encounter?

Milton, *supra* note 42, at 3.

[44]Although Justice Holmes's dissent in Abrams v. United States, 250 U.S. 616, 624-31 (1919) (Holmes, J., dissenting), never actually used the phrase "marketplace of ideas," its references to the "free trade in ideas" and "the competition of the market," *id.* at 630, made it the source of the so-called "marketplace of ideas" rationale in American constitutional law. *See infra* note 45.

[45]*See, e.g.*, Eric Neisser, *Charging for Free Speech: User Fees and Insurance in the Marketplace of Ideas*, 74 GEO. L.J. 257 (1985) (using marketplace analogy in analyzing economic and constitutional implications of financial conditions on public expression). *See generally* Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1 (1984).

[46]*See* MEIKLEJOHN, *supra* note 42. In supporting his position, Meiklejohn explained that:

> No plan of action shall be outlawed because we disagree with what he intends to say. And the reason for this equality of status in the field of ideas lies deep in the very foundations of the self-governing process. When men govern themselves, it is they-and no one else-who must pass judgment upon unwisdom and unfairness and danger. And that means that unwise ideas must have a hearing as well as wise ones, unfair as well as fair, dangerous as well as safe, un-American as well as American. Just so far as, at any point, the citizens who are to decide an issue are denied acquaintance with information or opinion or doubt or disbelief or criticism which is relevant to that issue, just so far the result must be ill-considered, ill-balanced planning for the general good. It is that mutilation of the thinking process of the community against which the First Amendment to the Constitution is directed. The principle of the freedom of speech springs from the necessities of the program of self-government.

Id. at 26.

envisions the people checking government excesses.[47] There are two aspects that need be considered. On the one hand, in order to make and express an informed judgment, voters must hear and consider all different points of view. This is akin to the "marketplace of ideas" concept. On the other hand, each citizen, by expressing him or herself, is participating in the self-governance and checking processes. Self-governance is not limited to voting, even in a democracy. Street demonstrations and letters to the editor, for example, are often effective ways of checking or instructing government between elections. To restrict any of these forms of speech is to undermine the opportunity for each individual to help make governance decisions. This rationale differs from the "marketplace of ideas" perspective because its emphasis is not on the accuracy or quality of the end-product but on the breadth and quality of participation in the process.

The fourth rationale — the social stability or "safety valve" theory — is more pragmatic.[48] It suggests that, if people are allowed to blow off steam by expressing their views openly, they are less likely to feel repressed, ignored, and isolated, and thus less likely to blow up government buildings to make their point.[49] This down-to-earth, almost cynical, view belittles the social value of a dynamic interchange of ideas and exalts stability over change as a major political goal.

There is common-sense appeal to the idea that those who are silenced and excluded will turn to violence. The many experiences with repressed political minorities — for example, Palestinians in Israel — or repressed political majorities — for example, Catholics in Northern Ireland or blacks in South Africa — appear to confirm this intuitive hypothesis.[50] Yet other historical examples make one wonder whether repression always leads to violence. For

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[47]Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 523 (1977) (exploring "the idea that free expression has value in part because of the function it performs in checking the abuse of official power . . . [and] how this checking value differs from those values that have dominated First Amendment analysis").

[48]EMERSON, *supra* note 42, at 7.

[49]*Id.* ("[S]uppression of discussion makes a rational judgment impossible, substituting force for reason . . . ."); Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) ("Those who won our independence . . . knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies . . . .").

[50]*See* Denise Meyerson, Comment, *'No Platform for Racists': What Should the View of Those on the Left Be?*, 6 S. AFR. J. ON HUM. RTS. 394, 397 (1991) (arguing for racist speech toleration in South Africa because "it is better to let them be played out at the level of words rather than to bottle them up, thereby not only increasing their virulence, but also making more likely a more dangerous kind of discharge").

example, the massive, legal repression of American Communists in the 1940's and 1950's did not lead them to acts of political sabotage.[51] Presumably the "safety valve" rationale for free speech may not be uniformly valid, but rather may be dependent upon common, but not universal, social and political phenomena.

B. APPLICATION OF THE RATIONALES TO HATE SPEECH

The next inquiry is whether hate speech directly furthers any of the goals of free expression or whether the reason for permitting hate speech is more indirect — relying solely on the perceived dangers of allowing government to carve out any exception to free speech, even though it is highly desirable to remove hate speech. Phrased differently, is hate speech itself one of the benefits of a system of free expression or is it merely one of the costs we must bear in order to obtain the maximum benefit from such a system? The answer varies with the rationale.

At this point, it is important to recall the broad definition of hate speech with which I begin. I suggested that hate speech includes any expression that insults, disparages, or offends a racial or ethnic group by suggesting either the group's inferiority or simply others' hatred of the group.[52] So viewed, hate speech can take many forms. First is the direct personal insult — the calling of names. Next is the artistic rendition. Some say, for example, that Shakespeare's "Merchant of Venice" expresses, however elegantly, a biased stereotype of Jews.[53] In addition, there are scientific theories that purport

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[51]SAMUEL E. MORISON, THE OXFORD HISTORY OF THE AMERICAN PEOPLE 1074-76, 1083-84 (1965) (describing unfounded accusations by Senator McCarthy against peaceful, productive citizens); JAMES RESTON, DEADLINE: A MEMOIR 214-20 (1991) (describing journalist's perspective on McCarthy accusations); BUD SCHULTZ & RUTH SCHULTZ, IT DID HAPPEN HERE: RECOLLECTIONS OF POLITICAL REPRESSION IN AMERICA (1989) (providing an oral history of McCarthy victims). *See also* Dennis v. United States, 341 U.S. 494 (1951) (upholding conviction of American Communist Party leaders for Smith Act violations based on their advocacy of overthrowing the government, even though the record contained no evidence of violence or sabotage); Yates v. United States, 354 U.S. 298 (1957) (reversing Smith Act convictions based on mere advocacy).

[52]*See supra* text accompanying notes 6-7.

[53]DANIEL J. KORNSTEIN, KILL ALL THE LAWYERS: SHAKESPEARE'S LEGAL APPEAL 85-86 (1994). As Kornstein states:

> Shakespeare's portrayal of Shylock has generated controversy for centuries. There have been those who have believed that *Merchant* is anti-Semitic in its unflattering picture of Shylock. Such perceived anti-Semitism has led some to question whether the play should be produced at all during periods of actual or incipient anti-Semitism . . . . Others have gone further and doubted whether the play, given its clear anti-Semitic

to show that certain races are genetically inferior.[54] Finally, there is the political tract or speech — the proposal, such as Hitler's "Mein Kampf," that whatever group is despised in that society be enslaved, imprisoned, deported, or exterminated. One needs to recall these different forms in analyzing the applicability of the different free speech rationales.

Allowing biased invective, like all other forms of communication, logically furthers the first goal — of maximizing self-definition and development. Venting hatred in a one-on-one confrontation may not only be emotionally satisfying but may even be self-defining and empowering. The benefits are more obvious with artistic expression. However distressing it may seem to most of us, some artists are consumed with racial hatred.[55] For them, as for the great composer Wolfgang Mozart, who was consumed with beautiful melodies, writing, singing, painting, or speaking about their perspectives is their form of self-definition and their method of self-development. Although it may seem odious to compare Mozart to hate-mongers, one cannot channel or direct artistic expression — by excising certain words, phrases, or emotions — without limiting its creativity, dynamism, emotional impact, and hence its artistic value.[56] Thus, protection of hate speech is arguably justified by the

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> slant, should even be taught, especially after the Holocaust.

Id. at 85.

[54]Michael Omi & Harold Winant, *Racial Formations, in* RACE, CLASS, AND GENDER IN THE UNITED STATES 27-28 (Paula S. Rothenberg ed., 2d ed. 1992) (discussing scientific theories of racial inferiority from colonial times to the present); WILLIAM Z. FOSTER, THE NEGRO PEOPLE IN AMERICAN HISTORY 469-73 (1954) (summarizing scientific theories of racial inferiority of African Americans and evidence contradicting those theories). *See also* Levin v. Harleston, 770 F. Supp. 895, 899-903 (S.D.N.Y. 1991) (setting forth plaintiff professor's controversial views of African Americans' biological inferiority in a decision holding that the university's creation of alternative classes and other adverse actions responding to the professor's views violated his First Amendment rights).

[55]Some think that the 19th century German composer Richard Wagner was an example. SACHER, *supra* note 16, at 234-35, 421. Because Wagner's music was glorified by the 20th century Nazi regime, the Israeli Philharmonic Orchestra has refused for 56 years to play any of his compositions. *Conductor Expects Israel to Lift Ban on Wagner*, Reuters, March 17, 1994; Reuter in Jerusalem, *Orchestra to Continue 54-Year Ban on Wagner*, Guardian, Dec. 30, 1992, at 7.

[56]Cohen v. California, 403 U.S. 15, 25-26 (1971). The Court in *Cohen* expressed this view in the following passage:

> [O]ne man's vulgarity is another's lyric. Indeed, we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual . . . . [M]uch linguistic expression . . . conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often

self-development rationale for free expression. In any case, art is often intertwined with politics,[57] and to that degree, artistic regulation should be analyzed as a subset of political censorship.[58]

The answer is more complex for the second rationale — the "search for truth" justification. With regard to the scientific search for truth, it would appear that one need permit only those expressions of racial supremacy that *purport* to be grounded in a sociological, anthropological, or genetic theory. Thus, banning: (a) a direct, personal racial insult to an individual; or (b) a political platform that the country enslave or repress a particular race because of the race's alleged inferiority or criminal bent, would seem not to detract from freedom of scientific inquiry. But the problem is that, because of bitter experiences like the excommunication of Galileo and the Soviet control of biological research, we do not trust the state to distinguish "quackery" from "real science." Rather, views that *purport* to be grounded in scientific theories or empirical studies of a community's characteristics are allowed, and are subjected to, the rigors of proof and replicability imposed by the scientific community.[59]

The greatest controversy arises with regard to the application of the search-for-truth rationale to political speech — the "marketplace of ideas" concept. Proponents of banning political expression that is grounded in concepts of racial supremacy or hatred suggest that, with such speech, "we have the clearest possible example of conduct which *is* wrong and which is *not*

> chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function . . . .

Id.

[57]Consider, for example, Pablo Picasso's famous painting "Guernica" (1937), the Ukrainian poet Yevgeny Yevtushenko's poem "Babi Yar" (1961), or the peasant *arpilleras* produced in Chile under military dictatorship during the 1970's and 1980's.

[58]*See* ALBIE SACHS, ADVANCING HUMAN RIGHTS IN SOUTH AFRICA 175-77 (1992) [hereinafter SACHS, ADVANCING HUMAN RIGHTS] (noting the political aspects of artistic expression).

[59]*Cf.* American Booksellers Ass'n v. Hudnut, 771 F.2d 323 (7th Cir. 1985). The court invalidated, under the First Amendment, Indianapolis's pornography ordinance that was based on the feminist premise that pornography is a systematic practice of exploitation and subordination of women, improperly socializing males to treat women poorly. The court noted: "[u]nder the First Amendment the government must leave to the people the evaluation of ideas. Bold or subtle, an idea is as powerful as the audience allows it to be." *Id.* at 327-28.

conducive to any aspect of human flourishing."[60] In other words, we know racism is evil and wrong and thus can safely ban it.[61]

There are two standard responses. The classic Western liberal response is that "[u]nder the First Amendment, . . . there is no such thing as a false idea . . . so the government may not restrict speech on the ground that in a free exchange truth is not yet dominant."[62] The radical/progressive response is that, despite the self-evident wrongness of racism, toleration is required because of progressive values respecting autonomy, individualism, debate, and reason.[63]

I suggest a third response: unless one defines "racist expression" extremely narrowly, the wrongness of some speech typically grounded in racist assumptions will not always be obvious, eternal, or universal. For example, advocacy of segregating the races, whether in South Africa or the United States, has generally been an outgrowth of racial supremacist thinking. At different points in American history, however, African American leaders and political or community groups have advocated a separate African American nation or self-determination in several southern states,[64] all

[60]Cockrell, *supra* note 12, at 340.

[61]Albie Sachs, *Towards a Bill of Rights in a Democratic South Africa*, 6 S. AFR. J. ON HUM. RTS. 1, 13, 18, 22 (1990) [hereinafter Sachs, *Towards a Bill of Rights*] ("Here it is necessary to separate out from a group's way of life, what are presently objectionable features requiring abolition. . . . The right to behave as a member of a master race, to insult blacks and to use violence gratuitously, for example, . . . would clearly be denounced in any democratic constitution."); Meyerson, *supra* note 50, at 394 (in arguing for tolerance of non-inciteful hate speech, Meyerson states "I make no appeal to the traditional argument given in favour [sic] of free expression . . . if we know anything, we know that racist views have no merit, and there is therefore no possibility that their suppression might be suppression of the truth").

[62]*American Booksellers Ass'n*, 771 F.2d at 331 (citing Gertz v. Robert Welch, Inc., 418 U.S. 323, 339 (1974)). In *American Booksellers*, the Seventh Circuit Court of Appeals held unconstitutional an Indianapolis pornography ordinance that was premised on the view that pornography presents an unacceptable and harmful attitude towards women. *Id.* at 327-28.

[63]Meyerson, *supra* note 50, at 394-98 (arguing that Marxists should distinguish between property and expressional rights and tolerate even plainly evil racist speech in light of progressive beliefs in the power of debate and reason, the importance of respect for individuals, and the need to expand access to opinion-forming institutions).

[64]FOSTER, *supra* note 54, at 461-62, 466-67 (noting the various calls throughout history for African American nationhood, including the Mississippi colonization movement of 1887, the plan to make a Negro state of Oklahoma in 1890, the Garvey movement, the 49th State movement, and the American Communist Party's 1928 resolution calling for Black Belt self-determination).

African American high schools,[65] and similar separatist proposals. In South Africa, Chief Buthulezi still advocated an autonomous Zulu province throughout the recent constitutional process and election.[66] If one were to equate advocating segregation or apartheid with racism and were to ban all "racist speech and ideas," one might well stifle both white supremacists and black proponents of comparable ideas based on their perception of the best way of achieving true equality for blacks in light of past racism.[67] Clearly, this controversy would not be generated by a narrow ban on hateful slurs spoken directly to individuals. I suggest, however, that those with confidence in the ability to excise plainly bad or wrong ideas from the marketplace of ideas must work with surgical precision.

One faces a comparable debate in analyzing the third free expression rationale — that free speech is necessary to informed and broad-based self-government. If one is sure that a particular idea is utterly worthless, one could safely proclaim that it need not be available to participants in self-government and that there is no reason to allow holders of such views to participate in the process. The responses have just been noted. Again, however, one could distinguish between hate speech in the form of a direct, personal insult, which would not advance the self-governance goal, and hate speech in the form of a political agenda, which arguably would.

The justification for allowing personal racial insults, then, is not that they directly serve free speech goals. Rather, the rationale is that government cannot be trusted to stay within a narrowly defined exception to free expression or that citizens, being aware of the ban, might be "chilled" from fully expressing themselves out of concern that they might inadvertently cross

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[65]Note, *Inner-City Single-Sex Schools: Educational Reform or Invidious Discrimination?*, 105 HARV. L. REV. 1741, 1741 & nn.1-2 (1992) (referring to various proposals for only African American male high schools or academies in Detroit, Milwaukee, and Maryland); Garret v. Board of Educ., 775 F. Supp. 1004 (E.D. Mich. 1991) (granting a preliminary injunction against exclusion of females from Detroit male academies that had Afrocentric curriculum).

[66]Bill Keller, *Zulu Leader is More Isolated But Is Still Proudly Resistant*, N.Y. TIMES, March 31, 1994, at A1 (stating that Chief Minister of KwaZulu's Zulu homeland is willing to participate in elections if the constitution were amended to give the province power to run its own affairs).

[67]*See infra* notes 75-83 and accompanying text (discussing experiences in England, Germany, Canada, and America, in which anti-racism or racist speech bans have been used against the victims of racism). Typical of the risk that bans on racism, provoked by years of racist apartheid, could backfire on advocates for previously oppressed minorities is the proposal for a ban in South Africa on "any call to ethnic chauvinism, promotion, racism, or tribalism" or "any calls on racism or ethnicity." Ziyad Motala, *South Africa's Constitutional Options in Comparative Perspective: Moving Towards A Responsive and Democratic Constitution*, 2 DET. C.J. INT'L L. & PRAC. 253, 273-74 (1993).

the line into the area that the government believes is forbidden.[68] History has repeatedly shown the dangers of allowing those in authority — whether the state, the church, or academia — to define what is "real" science and "acceptable" artistic expression or political rhetoric. Given the power of the state, few dissidents will have the courage to risk their expression being defined as unprotected "personal racial insult" rather than protected "political speech."

The application of the fourth rationale — the social stability or safety valve theory — would seem at first straightforward. Repressing verbal communication of hateful invective might lead dissidents to violent anti-social behavior instead.[69] This rationale applies primarily to explicitly political speech, because repression of personal insults or artistic or scientific expression would rarely produce a violent reaction. As noted above, however, the validity of this common-sense view may depend on more historical research, which might be able to identify particular social conditions or settings in which the assumption holds true.[70]

In sum, artistic, scientific, and political expressions involving racial invective fit within the traditional, liberal view of the societal value of free expression. Conversely, individual racial insults do not; however, to some degree they do serve the goal of self-definition. Such slurs would probably be left unregulated only if one fears, as traditional civil libertarians do, the precedential and chilling effects on "valuable" expression of even the narrowest authorization for governmental regulation of any communication.[71]

VI. PRAGMATIC AND SYMBOLIC CONSIDERATIONS

One must, however, go beyond pure moral or political theory in determining what a specific society should do about a real problem in the current world. That is, one must also ask: what actual effects would a ban

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[68]*See* Dombrowski v. Pfister, 380 U.S. 479, 494 (1965) (facially invalidating a statute because of its "chilling effect" on protected expression of others arguably covered by its terms). *See also* Houston v. Hill, 482 U.S. 451, 472 (1987) (invalidating as overbroad an ordinance punishing citizens who "oppose" or "interrupt" a police officer in the exercise of his duty).

[69]Meyerson, *supra* note 50, at 397 (noting with regard to racist speech that "it is better to let them be played out at the level of words rather than to bottle them up, thereby not only increasing their virulence, but also making more likely a more dangerous kind of discharge").

[70]*See supra* text accompanying notes 50-51.

[71]Strossen, *supra* note 1, at 484, 526-30 (delineating the "chilling effect" of the University of Michigan's anti-hate speech policy, later invalidated under the First Amendment as overbroad and vague, which deterred members of the university community from engaging in protected expression because of fear that it might be sanctioned).

on hate speech, however defined, have? Would it work to stop hate speech and its moral and societal harms? Unfortunately, the limited historical evidence is not encouraging.

The experiences in England and Germany, where racist speech has long been banned, indicate that such bans will not prevent hateful invective, development of hate organizations or, more importantly, hate crimes.[72] As Professor Strossen has documented, the Race Relations Act of 1965, the law criminalizing incitement of racial hatred in England, has had no discernible effect over twenty-five years on the National Front and other neo-Nazi groups.[73] Likewise, the laws in Germany banning hate organizations have plainly failed to stop the growth of skinheads or their recent vicious crimes against immigrants.[74] One possible explanation is that public prosecution or other repression of racist groups may give them visibility and the attractiveness of forbidden fruit and, thereby, enhance their recruitment ability.[75]

Even more distressing than the lack of success against racial supremacists is the fact that prosecutorial discretion has often been exercised so as to prosecute minorities and other victims of racism, rather than to protect such victims from further insult. In England, for example, the first individuals prosecuted under the Race Relations Act were black power leaders, and the law ever since has been used more often to curb the speech of blacks, trade unionists, and anti-nuclear activists, than to limit the expression of racists.[76] In the ultimate irony, the English statute that was intended to restrain the neo-

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[72]*See infra* notes 73 and 74 and accompanying text.

[73]Strossen, *supra* note 1, at 554-55 & n.367.

[74]Marc Fisher, *Neo-Nazi Attack Kills 3 Turks in Germany; Firebombing of Woman, Girls, plus 2 Other Deaths Bring Toll in Attacks This Year to 16*, WASHINGTON POST, Nov. 23, 1992, at A16 (stating that there were more than 1,800 anti-foreigner attacks in Germany in 1992, leading to 16 deaths); Craig R. Whitney, *Caldron of Hate — A Special Report; East Europe's Frustration Finds Target: Immigrants*, N.Y. TIMES, Nov. 13, 1992, at A1 (noting police estimates of 6,500 hard-core, neo-Nazi skinheads in Germany in 1992, describing anti-immigrant attacks by skinheads, and further noting that the leader in one town "became fascinated with the neo-Nazis who had been strictly forbidden under" East Germany's Communist regime).

[75]Psychological reactance theory supports the common-sense assumptions that forbidden fruit is attractive to many and that forced compliance with a rule does not change underlying attitudes. JAMES C. SCOTT, DOMINATION AND THE ARTS OF RESISTANCE: HIDDEN TRANSCRIPTS 108-10 (1990) (quoting SHARON S. BREHM & JACK W. BREHM, PSYCHOLOGICAL REACTANCE: A THEORY OF FREEDOM AND CONTROL 396 (1981)). *See also* Strossen, *supra* note 1, at 554 & n.358 (noting that psychological studies show that "censored speech becomes more appealing and persuasive to many listeners merely by virtue of the censorship.").

[76]Strossen, *supra* note 1, at 556 & nn.368-69.

Nazi National Front has barred expression by the Anti-Nazi League.[77] Likewise, only Emile Zola, but not the anti-Semitic accusers of Captain Dreyfus, was prosecuted under the French group libel law,[78] and German officers, clerics, and landowners, but not Jews, were protected by the 1871 German Criminal Code's ban on offenses against personal honor.[79] More recently, Canadian enforcement of the anti-pornography law advocated by Catherine MacKinnon has included a customs seizure of two works by Andrea Dworkin, MacKinnon's collaborator, and by the African American feminist scholar bell hooks![80] Although the initial injury occurs when such prosecutions are initiated, their full brunt is felt only if the judiciary is unwilling to curb the executive through limiting interpretations of the scope of the relevant laws.[81]

The experience with university hate speech codes has been similar. When the British National Union of Students adopted a resolution to prevent openly racist organizations from speaking on college campuses, the first victims were Israelis and Zionists, based on the United Nations resolution equating Zionism

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[77]*Id.* at 556 & n.370.

[78]*Id.* at 556 & n.371.

[79]Eric Stein, *History Against Free Speech: The New German Law against the 'Auschwitz' — and Other — 'Lies,'* 85 MICH. L. REV. 277, 286 (1986). The German Criminal Code made it a punishable offense to insult one's personal honor. However, in the period between the advent of the Code in 1871 and the momentous year of 1945, "the German Supreme Court (Reichsgericht) consistently refused to apply this article to insults against Jews as a group . . . ." *Id.* Germany's Supreme Court, nonetheless, did give the benefit of its protection to other groups, such as large landowners, Germans living in Prussian provinces, all Christian clerics, German officers, and Prussian soldiers who fought in Belgium and Northern France. *Id.*

[80]Paul McMasters, *Free Speech Versus Civil Discourse: Where Do We Go From Here?*, 80 ACADEME 8, 9 (1994). Although Canada's Supreme Court adopted Professor MacKinnon's theories on pornography in order to protect women from assaultive speech, the Canadian government has used that approach to suppress feminist, lesbian, and gay material. *Id.* Customs agents seized two works by Andrea Dworkin and copies of *Black Looks: Race and Representation*, by bell hooks, as they were transported across the Canadian border. *Id.* These seizures were the direct result of legal restrictions on certain kinds of speech deemed harmful to women. *Id.*

[81]Lynn Berat, *Courting Justice: A Call for Judicial Activism in a Transformed South Africa*, 37 ST. LOUIS UNIV. L.J. 849 (1993) (describing the abysmal failure of South Africa's appellate division to limit the racist practices of the executive and legislative branches); Stein, *supra* note 79, at 286 (chronicling the refusal of the German Supreme Court to apply the personal insult provision of the Criminal Code to insults against Jews while according the benefits to many other segments of society).

and racism.[82] At the University of Michigan, the American university that has had the most experience with a hate speech code, twenty charges were brought by whites claiming racist speech by African Americans and the only two cases in which sanctions were applied by the university to racist speech involved speech by, or on behalf of, African Americans.[83]

Whether hate speech bans will hurt historical victims of racism will depend, in large part, on who controls the prosecutorial authorities. Discretion has been applied unevenly in England, Germany, France, Canada, and American universities, as noted above, presumably because the power has been held by groups not historically injured by racism. The new South Africa presents a very different setting as the previously repressed and vilified group has taken control of the government. This would suggest that, if anything, prosecutorial discretion would be exercised mainly to suppress anti-black speech. Although such a power reversal would align the purpose and practice of a hate speech ban, it would raise in stark form the traditional free expression concern about empowering the government to censor its opponents.

Quite apart from the actual prosecutorial record, the reality is that hate speech laws or codes cannot ferret out most private or social uses of hate speech. Parents can, and unfortunately still too often do, convey racist views to their children over the dinner table, and bars, locker rooms, and social clubs still frequently breed racist jokes. Only the public expressions that come to media attention or are the subject of formal complaints are even subject to prosecutorial consideration.

Presumably the problems of limited detection and uneven exercise of discretion could be remedied somewhat by increasing the resources devoted to enforcement. But that would seem a gross misallocation of limited law

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[82]Strossen, *supra* note 1, at 557. A strong motivation for the rule had been the desire to stem an increase in campus anti-Semitism. *Id.* Some British students, however, ultimately found Zionism to be a form of racism beyond the realm of open discussion, and the British National Union of Students's resolution was invoked to disrupt speeches by Israelis and Zionists, including the Israeli ambassador to England. *Id.*

[83]*Id.* at 557-58. The source relied upon by Professor Strossen for those two cases is Plaintiff's Exhibit Submitted in Support of Motion for Preliminary Injunction, *Doe v. University of Mich.*, 721 F. Supp. 852 (E.D. Mich. 1989). *See* Strossen, *supra* note 1, at 557 n.377. Plaintiff's exhibit mentions one incident in which an African American student used the term "white trash" while conversing with a white student and another in which a white student reported that his minority roommate had said minorities had difficulty in a particular course and were not treated fairly. *See also Doe*, 721 F. Supp. at 865-66 (relying on latter incident in holding University policy unconstitutional).

enforcement resources when, as in South Africa or Germany, there are many serious, violent crimes motivated by racism that must be addressed.[84]

Given the difficulty of conducting controlled social experiments, we do not and cannot know with any precision how the enactment of a hate speech ban or its rigorous enforcement affects political debate. How often do political advocates trim their sails for fear of arrest under laws banning certain kinds of speech? Do prosecutions increase public attention and render the forbidden fruit of hate organizations more attractive? Do hate speech regulations undermine the general societal commitment to free speech and thereby lead to general acceptance of other forms of government censorship, with its negative impact on artistic, scientific, and political forms of expression? Although it seems that government censorship is rarely limited to one type of speech or one kind of opponent, it would be very hard to determine empirically whether the relaxation of one protection leads to a mindset allowing other censorship or whether underlying social dynamics lead to both forms of repression. Moreover, it is dangerous to generalize such experiences across all cultures and political systems.

Finally, alternatives to legal repression of racist speech, such as education, counter-speech, and community-building,[85] are too rarely tried and, when tried, their relative costs and effectiveness are rarely closely evaluated. Because we cannot or will not conduct controlled experiments with most public policies, there is really no scientific way of comparing the pragmatic impact and expense of the prosecutorial versus the educational approach. But in considering how to proceed, one should not lose sight of either the alternatives or the uncertainty of the pragmatic benefits derived from policy choices.

Like many policy choices, this one may be decided less by the application of pure moral philosophy, free expression theory, or even probable results, than by the symbolic value of the enactment of the law. Whether a law will fit a theory or solve a problem, politicians, lawmakers, or the public may desire to make a statement. Formal constitutional condemnation of racism even in its verbal form sends a powerful message — that this society takes

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[84] *See supra* note 74 (referring to skinhead violence in Germany). *See also* Scott Kraft, *South Africa: Is Now the Time?*, L.A. TIMES, Oct. 17, 1993, at L1 (noting that, in the transition to multiracial democracy, "a wave of violence has swept the country, fueled by political animosities between black groups, rising unemployment and mysterious bands of radical blacks and whites who oppose the current reforms").

[85] *See, e.g.*, Strossen, *supra* note 1, at 562-64 (advocating that universities provide training on diverse cultural perspectives, hold forums to discuss controversial race-related issues, and encourage students to take courses on the history of racism, rather than adopt and enforce hate speech codes).

racial equality seriously and gives it primacy among its fundamental values.[86] In a period of transition, such as South Africa is currently experiencing, a strong national stand on an issue, even if only symbolic, may be an extremely important element in the effort to move the public and the government from a racist past to a tolerant multi-cultural future.[87]

Another symbolic value of condemning hate speech for a country like South Africa is the signal that it sends to the international community. A country in transition needs all the financial, technical, and political support it can get from outside. Support often depends on international acceptance and approval. In this regard, symbolic gestures may have very tangible, material benefits, although not necessarily the benefit of suppressing racism. For South Africa, long an international pariah,[88] such acceptance is particularly important. Yet, as of September 1994, South Africa had not become a party to the International Convention on the Prevention and Punishment of the Crime of Genocide, the International Convention on the Elimination of All Forms of Racial Discrimination, or the International Covenant on Civil and Political Rights.[89] Clearly, signing such treaties and enacting a constitutional ban on racist speech would go a long way towards confirming South Africa's return to international norms,[90] and hence towards assuring its international acceptance, regardless of what pragmatic impact such a ban might have on the level of racism or even of racist speech in South Africa.

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[86]Nicholas Haysom, *Democracy, Constitutionalism and the ANC's Bill of Rights for a New South Africa*, 7 S. AFR. J. ON HUM. RTS. 102, 103-04 (1991) (noting the powerful symbolic importance of the African National Congress's ("ANC") first proposed Bill of Rights, with its strong statements promising equality and condemning racism, which included a hate speech provision). *See also infra* notes 94, 127-28 and accompanying text (discussing the ANC's proposed Bill of Rights).

[87]*See also* Motala, *supra* note 67, at 273-74 (emphasizing the importance of a hate speech ban in eradicating the worst residue of the old system).

[88]Berat, *supra* note 81, at 868-69 (arguing for "an activist theory of judicial decision making" to overcome the failures of South Africa's previous lawmaking system, which had helped make it "a pariah state in the international community"); Suttner, *supra* note 42, at 372 (explaining that, since 1974, members of the South African government were denied the right to attend the United Nations General Assembly as representatives of South Africa).

[89]Telephone interview with Mark Labelle, Treaties Section, United Nations Office of Legal Affairs (Sept. 1, 1994); UNITED NATIONS SECRETARIAT, MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL, U.N. Doc. ST/LEG/SER.E/10, Treaties Nos. 225, 490, 498 (1992). *See supra* notes 4, 5, 10 and accompanying text.

[90]Motala, *supra* note 67, at 273 (noting that ban on racist speech is consistent with international norms). *See also* S. AFR. CONST. ch. 3, § 35(1) ("In interpreting the provisions of this Chapter a court of law . . . shall, where applicable, have regard to public international law applicable to the protection of the rights entrenched in this Chapter . . . .").

VII. HATE SPEECH CONSIDERATIONS IN THE NEW SOUTH AFRICA

The task, then, is to determine how the ethical and instrumental detriments of hate speech would interact with the benefits of unfettered expression and the practical and symbolic impact of a hate speech ban in South Africa as it moves from legally enforced racial separation and widespread racial violence to a multicultural democracy.

As the preceding discussion suggests, there is inevitably some tension between the goal of insuring full racial equality and social acceptance of diversity and the goal of insuring robust political debate and unfettered artistic and scientific exploration.[91] If speech is unfettered, some racist invectives will be uttered, threatening the targets and making them feel devalued, excluded, powerless, and unwilling to participate in society. If hate speech is subject to censorship, some political, artistic, or scientific alternatives will be punished, and hence eschewed, and experience suggests that those who have been historically victimized may often bear the primary brunt.[92] Thus, hate speech may deter political and social participation by its victims, and banning hate speech may deter political participation by some.

Likewise, allowing hate speech risks violence, either by the communicator or those reacting to it, while repressing hate speech risks violence by those feeling precluded from non-violent political expression.[93] Similarly, one must assess whether allowing dissemination of hate speech or, alternatively, trying to censor its public expression and thereby potentially making martyrs of hate speech proponents, will make its message more attractive to others. In addition, one must consider whether prosecutorial authority is so structured, and the judiciary sufficiently independent, that a hate speech ban will be used to protect, rather than to persecute, the victims of racism.

The choice of policy will, I suggest, be determined both by a pragmatic assessment of what will actually happen in the particular society given a particular approach and, probably more importantly, by the value placed by the society on the benefits and risks. That is, we should consider what will realistically happen in South Africa if the newly elected black government were to impose and enforce a hate speech ban, whether broad or narrow. Regardless of the likely effect, however, the ultimate resolution may be on a symbolic level — does it matter more to this society, given its past experience and current political dynamics, to condemn racism and protect its

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[91] *See supra* text accompanying notes 52-71.

[92] *See supra* text accompanying notes 76-83.

[93] *See supra* text accompanying notes 31-34, 69.

victims from further threat and insult or to protect the new political process from government domination or intrusion?

As an outsider, I can offer only a few observations and surmises. The discussion within South Africa specifically about hate speech has been quite limited.[94] This is, presumably, both because constitutions generally address broader principles, such as equality and free expression, and because South Africa has had so many other major economic, political, social, and legal issues to attend to, including severe racial violence.

On the broader value level, the new black majority is firmly committed to both the equality and free expression principles that hate speech regulations place in conflict. Having been attacked and literally excluded because of race for so long, the new majority obviously had a tremendous need to affirm its equality and dignity. This is reflected at numerous points in the interim Constitution finally adopted in December 1993.[95] For example, in the chapter on Fundamental Rights, the equivalent of the American Bill of Rights, the very first right, even before the guarantee of the right to life, is "Equality."[96] This includes both a general promise of equality and equal protection of the law[97] and a more specific assurance against discrimination,

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[94]Sachs, *Towards a Bill of Rights*, *supra* note 61, at 16-17, 22, 34 (arguing how white minority would be protected against abuse of power under proposed Bill of Rights even though urging ban on dissemination of racist ideas and organizations); SACHS, ADVANCING HUMAN RIGHTS, *supra* note 58, at 181-82, 227-28 (explaining that, under the new constitutional order of South Africa, a citizen will "enjoy freedom of speech and information, but will lose the right to propagate division and hatred on grounds of race"); Motala, *supra* note 67, at 273-74 (discussing the implications of Germany's limitations on hate speech for the new South Africa); Cockrell, *supra* note 12, at 339 (arguing against "official toleration towards the propagation of racist views"); Meyerson, *supra* note 50, at 394-98 (maintaining that leftist values support official toleration of hate speech); Suttner, *supra* note 42, at 392 (discussing the limitations within the ANC's Freedom Charter on pro-apartheid speech justified as a promotion of "democratic participation" by the people of South Africa); Constitutional Committee of the ANC, *A Bill Of Rights For A Democratic South Africa — Working Draft For Consultation*, *reprinted in* 7 S. AFR. J. ON HUM. RTS. 110, 121 (1991) [hereinafter Constitutional Committee] (granting the State authority to "prohibit the circulation or possession of materials which incite racial, ethnic, religious, gender or linguistic hatred, which provoke violence, or which insult, degrade, defame or encourage abuse of any racial, ethnic, religious, gender or linguistic group"); Gilbert Marcus, *Freedom of Expression under the Constitution*, 10 S. AFR. J. ON HUM. RTS. 140, 147 (1994) [hereinafter Marcus, *Freedom of Expression*] (explaining that South Africa, like other democratic countries, will probably pass laws criminalizing hate speech and thus will face the difficult constitutional questions posed by such prohibitions).

[95]*See* S. AFR. CONST.; *supra* note 3.

[96]S. AFR. CONST. ch. 3, §§ 8-9.

[97]*Id.* at ch. 3, § 8(1) ("Every person shall have the right to equality before the law and to equal protection of the law.").

whether direct or indirect, on the basis of race and many other factors.[98] The third right, after equality and life, is "Human dignity" — "Every person shall have the right to respect for and protection of his or her dignity."[99] This provision is noteworthy both because it is not typically found in the Western constitutions upon which South Africa's is modelled, and because dignity would normally be understood as subsumed under the strong mandates of equality and non-discrimination. In addition, there is separate protection for "the right to use the language and to participate in the cultural life of his or her choice."[100]

Simultaneously, the new majority arising from decades of political repression plainly is committed to an open and tolerant political system. The new Constitution details extensive protection of political liberties. There is, first, a very broad freedom of conscience, belief and opinion, including "academic freedom in institutions of higher learning,"[101] followed by a broad assurance of free expression, including freedom of the press and "freedom of artistic creativity and scientific research."[102] It is unusual, although consistent with Western civil libertarian theory,[103] that academic freedom, artistic expression, and scientific inquiry are expressly mentioned. To be completely sure that freedom of expression is broadly understood and fully protected, the South African Constitution further requires that media controlled by the state be impartial and express a diversity of opinions,[104] separately protects the rights of assembly, peaceful demonstration, petition, and association, defines a set of political rights, including the right to

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[98] *Id.* at ch. 3, § 8(2) ("No person shall be unfairly discriminated against, directly or directly, and, without derogating from the generality of this provision, on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour [sic], sexual orientation, age, disability, religion, conscience, belief, culture, or language.").

[99] *Id.* at ch. 3, § 10.

[100] *Id.* at ch. 3, § 31.

[101] *Id.* at ch. 3, § 14(1) ("Every person shall have the right to freedom of conscience, religion, thought, belief and opinion, which shall include academic freedom in institutions of higher learning.").

[102] *Id.* at ch. 3, § 15(1) ("Every person shall have the right to freedom of speech and expression, which shall include freedom of the press and other media, and the freedom of artistic creativity and scientific research.").

[103] *See supra* notes 40-45 and accompanying text.

[104] S. AFR. CONST. ch. 3, § 15(2) ("All media financed by or under the control of the state shall be regulated in a manner which ensures impartiality and the expression of a diversity of opinion.").

participate in, and campaign for, a political party, and establishes a separate set of labor rights, including the right to organize and join trade unions.[105]

Significantly, neither the various drafts produced by the multi-racial negotiating process[106] nor the version finally adopted as the new Constitution directly addresses hate speech. The only clues on the subject come from the relative primacy of equality and expressional rights in the statements of the Constitution's general purposes, the clause authorizing limitations on fundamental rights, the clause setting forth rules of interpretation, and the earlier proposals from the African National Congress ("ANC"), to which I now turn.

Equality is, with one exception noted below,[107] the primary value mentioned in the various documents reflecting the framers's intent, with fundamental freedoms like free expression in a subordinate position. The Preamble of the Constitution speaks of the need to create a new order which

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[105] *Id.* at ch. 3, § 16 ("Every person shall have the right to assemble and demonstrate with others peacefully and unarmed, and to present petitions."); *id.* at ch. 3, § 17 ("Every person shall have the right to freedom of association.").

Section 21, dealing with political rights, states:

> (1) Every citizen shall have the right —
> (a) to form, to participate in the activities of and to recruit members for a political party;
> (b) to campaign for a political party or cause; and
> (c) freely to make political choices.
> (2) Every citizen shall have the right to vote, to do so in secret and to stand for election to public office.

Id. at ch. 3, § 21. Regarding labor relations, Section 27 provides:

> (1) Every person shall have the right to fair labour [sic] practices.
> (2) Workers shall have the right to form and join trade unions, and employers shall have the right to form and join employers' organisations [sic].
> (3) Workers and employers shall have the right to organise [sic] and bargain collectively.
> (4) Workers shall have the right to strike for the purpose of collective bargaining.
> (5) Employers' recourse to the lock-out for the purpose of collective bargaining shall not be impaired . . . .

Id. at ch. 3, § 27.

[106] *See, e.g.*, S. AFR. CONST. (Proposed Draft Aug. 20, 1993).

[107] *See infra* text accompanying notes 122-24.

assures equality "*so that*" citizens can exercise their fundamental rights.[108] This suggests that equality is a precondition to the exercise of free speech, a view plainly consistent with regulation of hate speech. In the same vein, though far less forcefully, the legislative memorandum outlining the purposes of the bill that became the Constitution mentions the principle of "equality between women and men and people of all races" first and separately from the principle of establishing justiciable fundamental rights and civil liberties.[109] Likewise, Schedule 4 of the interim Constitution, which sets forth the principles to be used in writing the permanent Constitution, first requires that the new Constitution provide for a system of government committed to achieving equality between men and women and among races.[110] After generally requiring fundamental rights and civil liberties along the lines set forth in the interim Constitution, however, the Schedule then separately requires a prohibition on racial and gender discrimination and promotion of racial and gender equality.[111] Equality clearly comes across in all of these documents as more important than, or essential to full exercise of, the traditional civil and political rights, such as free expression.

The last document reflecting the framers' intent is the unique constitutional postscript, entitled "National Unity and Reconciliation."[112] The postscript notes that the interim Constitution is a historic bridge between a past of strife, suffering "and a legacy of hatred, fear, guilt and revenge" and a future founded on recognition of human rights and peaceful co-existence of all South Africans.[113] After a hortatory plea for reconciliation and

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[108]S. AFR. CONST. pmbl. ("WHEREAS there is a need to create a new order in which all South Africans will be entitled to a common South African citizenship in a sovereign and democratic constitutional state in which there is equality between men and women and people of all races so that all citizens shall be able to enjoy and exercise their fundamental rights and freedoms . . . .").

[109]Memorandum on the Objects of the Constitution of the Republic of South Africa Bill, Bill No. 212B-93 (GA), at 222 (1993).

[110]S. AFR. CONST. sched. 4, ¶ I ("The Constitution of South Africa shall provide for the establishment of one sovereign state, a common South African citizenship and a democratic system of government committed to achieving equality between men and women and people of all races.").

[111]*Id.* at sched. 4, ¶ III ("The Constitution shall prohibit racial, gender and all other forms of discrimination and shall promote racial and gender equality and national unity.").

[112]Although the term "postscript" is not specifically used in this final, unnumbered provision of the Constitution, legal scholars have so designated it. Gilbert Marcus, *Interpreting the Chapter on Fundamental Rights*, 10 S. AFR. J. ON HUM. RTS. 92, 101 (1994) [hereinafter Marcus, *Interpreting Fundamental Rights*] (noting that the South African Constitution is unique in having a postscript).

[113]S. AFR. CONST. postscript.

understanding,[114] the postscript provides very specifically for amnesty for past political offenses.[115] Given that the focus is on amnesty and there is no specific discussion of either equality or civil liberties principles, it is hard to draw many conclusions as to the postscript's implications for hate speech regulation. Although reconciliation requires cessation of vituperative expression, the plea for understanding without vengeance suggests no legal retribution for hateful language. In sum, the framers' documents provide some support for giving equality primacy over free expression, but offer no clear directive regarding hate speech.

The South African Constitution's chapter on fundamental rights contains an express authorization for limitation of those rights.[116] It provides that the specified rights may be limited by a general law to the extent that the limitation is "reasonable[,] . . . justifiable in an open and democratic society based on freedom and equality[,]" and does not "negate the essential content of the right in question . . . ."[117] This general rule is further qualified by a provision that limitations on certain rights, including both the freedom of conscience, thought, belief, opinion, and academic freedom in Section 14(1) and the freedom of expression, artistic creativity, and scientific research in Section 15, but in the latter instance only "in so far as such [a] right relates to free and fair political activity," shall not only be "reasonable" but also "necessary."[118] The use of the words "reasonable" and "necessary" was intended to reflect the varying levels of scrutiny used in American

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[114]Id. ("The pursuit of national unity, the well-being of all South Africans and peace require reconciliation between the people of South Africa. . . . There is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not for victimization.")

[115]*Id.* The postscript states:

> In order to advance such reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offences [sic] associated with political objectives and committed in the course of the conflicts of the past. To this end, Parliament under this Constitution shall adopt a law determining a firm cut-off date, which shall be a date after 8 October 1990 and before 6 December 1993, and providing for the mechanisms, criteria and procedures, including tribunals, if any, through which such amnesty shall be dealt with at any time after the law has been passed.

Id.

[116]*Id.* at ch. 3, § 33.

[117]*Id.* at ch. 3, §§ 33(1)(a) & (b).

[118]*Id.* at ch. 3, §§ 33(1)(aa) & (bb).

constitutional jurisprudence.[119] There is, however, no definition of "free and fair political activity." Would a published platform of a political party calling for apartheid, not to mention a stump speech calling for a white homeland, be "fair" political activity given the history of South Africa? Whatever the definition of "fair political activity," it is clear that the South African Constitution draws a clear distinction, somewhat along the lines that then Professor Bork had recommended in the United States,[120] between political expression and all other forms of expression. The distinction in the level of scrutiny to be given limitations on different kinds of expression suggests that a hate speech regulation banning direct personal racial insults would pass constitutional muster, but that a ban on political calls for racial separatism would not.[121]

The fundamental rights chapter has its own rules of interpretation. Section 35 broadly mandates that, in interpreting the chapter, courts shall promote the values of a democratic society based on freedom and equality and "have regard to public international law."[122] These principles of interpretation are rather general.[123] Moreover, this is the only place where freedom and equality are placed on a par, with freedom being listed first, and although international law with respect to such rights is invoked, only "regard" is required, and South Africa has taken no steps to ratify the key international documents that mandate hate speech regulation.[124] The interpretation clause

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[119]Stuart Woolman, *Riding the Push-Me Pull-You: Constructing a Test That Reconciles the Conflicting Interests Which Animate The Limitation Clause*, 10 S. AFR. J. ON HUM. RTS. 60, 67-71 (1994) (noting that earlier drafts actually used the term "strict scrutiny" but arguing why complete adoption of the American approach would be inappropriate in South Africa).

[120]Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971).

[121]*See* Marcus, *Freedom of Expression*, *supra* note 94, at 147 (noting that any hate speech law "is likely to generate extremely complex issues of constitutional validity").

[122]S. AFR. CONST. ch. 3, § 35. Section 35 provides:

> In interpreting the provisions of this Chapter a court of law shall promote the values which underlie an open and democratic society based on freedom and equality and shall, where applicable, have regard to public international law applicable to the protection of the rights entrenched in this Chapter, and may have regard to comparable foreign case law.

Id. at ch. 3, § 35(1).

[123]*See* Marcus, *Interpreting Fundamental Rights*, *supra* note 112, at 95, 102 (indicating that interpretation will depend on the limitations clause and on the meaning of "open and democratic society").

[124]*See supra* note 89 and accompanying text.

gives little clue as to whether a hate speech regulation would be constitutional.

The only other indication we have on the matter comes from the proposals of the ANC in the years leading to the interim Constitution's adoption. The original document was the Freedom Charter, issued in 1955, which was essentially a political platform. In the section on equal rights, it simply declared: "[t]he preaching and practice of national, race or colour [sic] discrimination and contempt shall be a punishable crime."[125] In 1988, the ANC issued its first specific constitutional proposal, entitled "Constitutional Guidelines for a Democratic South Africa." This document declared that: "[t]he advocacy or practice of racism, fascism, nazism or the incitement of ethnic or regional exclusiveness or hatred shall be outlawed."[126] In October 1990, the Constitutional Committee of the ANC issued its draft Bill of Rights.[127] This was a far more complete and precisely developed version of the earlier Guidelines. Article 15 of that draft provided for "Positive Measures" that could be taken by the state to eliminate discrimination. The two key passages were sections 3 and 4:

> 3. The State and all public and private bodies shall be under a duty to prevent any form of incitement or racial, religious or linguistic hostility and to dismantle all structures and do away with all practices that compulsorily divide the population on grounds of race, colour [sic], language, gender or creed.
> 4. With a view to achieving the above, the State may enact legislation to prohibit the circulation or possession of materials which incite racial, ethnic, religious, gender or linguistic hatred, which provoke violence, or which insult, degrade, defame or encourage abuse of any racial, ethnic, religious, gender or linguistic group.[128]

Finally, in May 1992, the ANC Constitutional Committee issued a revised draft of its proposed Bill of Rights, in which the above provisions for hate

[125]The Freedom Charter, *reprinted in* SELECTED WRITINGS ON THE FREEDOM CHARTER 1955-85, A SECHABA COMMEMORATIVE PUBLICATION 1 (1985).

[126]ANC, CONSTITUTIONAL GUIDELINES FOR A DEMOCRATIC SOUTH AFRICA (1988), *reprinted in* Zola Skweyiya, *Towards a Solution to the Land Question in Post-Apartheid South Africa: Problems and Models*, 21 COLUM. HUM. RTS. L. REV. 211, 237 (1989).

[127]Constitutional Committee, *supra* note 94.

[128]*Id.* at 121.

speech regulation appeared unchanged.[129] Albie Sachs, a white member of the Committee and a leading proponent of a bill of rights for South Africa, eloquently explained the Committee's sensitivity to both the importance of unfettered artistic and political expression and the need to eliminate racism and uphold the dignity of all.[130] Sachs noted that the major discomfort within the ANC with the proposal quoted above was that the word "insult . . . is far too wide and open to abuse."[131] More pointedly, the annotated version of section 4 of Article 15 quoted above contains the following note: "[t]he question was asked whether, in light of the ease with which South Africans take insult, the word 'insult' should not be deleted."[132] Surprisingly, the focus on "insult" and on the ease with which South Africans take insult suggests some controversy even with regard to what I have repeatedly referred to as the narrowest and most easily justified form of hate speech regulation — a ban on direct personal insults.

The omission of any form of the ANC's hate speech proposal from the Constitution that was finally agreed upon probably reflects several factors. First, the internal ANC debate about the appropriateness of banning "insult" may have precluded the kind of consensus needed for the ANC representatives to push strongly for such a provision in the ensuing negotiations with the white government and other participants. The academic debate, even among ANC supporters, suggests significant divisions.[133] I assume the omission also reflects a contrastingly strong ANC consensus on the many other, complicated, and important issues that had to be resolved. Although rectifying racial inequality was clearly the ANC's overriding concern, racism's impact on political and economic opportunities clearly overshadowed its reflection in verbal communications.

Second, the lack of constitutional attention to hate speech may also reflect an assessment that pragmatically little could be accomplished. That is, the real and very serious problem in South Africa has been actual, not just threatened, racial violence and actual, not just threatened, racial exclusion.

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[129]ANC Draft Bill of Rights: A Preliminary Revised Text (May 1992), *reprinted in* SACHS, ADVANCING HUMAN RIGHTS, *supra* note 58, at 215-35.

[130]SACHS, ADVANCING HUMAN RIGHTS, *supra* note 58, at 175-83.

[131]*Id.* at 182.

[132]*Id.* at 228.

[133]*See, e.g.*, Cockrell, *supra* note 12, at 339-42 (challenging Meyerson's understanding of the "progressive view which would outlaw the espousal of racism" and arguing that such a view "is not inconsistent with democratic politics"); Meyerson, *supra* note 50, at 394-98 (arguing against the leftist position of intolerance of hate speech on the basis of fundamental progressive values, although agreeing that such expression is wrong and clearly of no social value).

It is my assessment, perhaps shared by some of the constitution negotiators and writers, that: (a) neither racial violence nor exclusionary practices will be significantly reduced *in the short run* by a ban on racial epithets; and (b) scarce prosecutorial resources should not be diverted from protecting life and limb to protecting dignitary interests. Moreover, in a society where race has been the predominant political issue for years, it seems naive to suggest that the expression of strong racial feelings can be excised from public discussion by the stroke of a pen.

Finally, the black majority that has just taken political power may no longer have the same concerns about feeling powerless and excluded as a result of racist expression as it would have had in the past, and as racial minorities that remain political minorities still do in other societies.[134] A ban on racist speech might have been more of an issue had the previously persecuted and disempowered blacks in South Africa remained in the political minority as they do in American universities and in American, English, and German societies, to reflect the prior examples.[135]

VIII. CONCLUSION

Hate speech, as compared to hate crimes and political repression, has understandably not been a primary focus of even anti-apartheid South Africans in the past few years. It may well become a major issue in the next few years, as the new South African society develops.[136] If, as all hope, racial violence subsides, racial tensions ease, and economic opportunities increase, the society may be in a position to look at the long-term task of building a multi-cultural community. For that task, excising overtly offensive racist speech, with all its complex theoretical and pragmatic considerations, may be considered an important tool. I hope this exposition will assist in sorting out those concerns when the time comes.

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[134]*See* MATSUDA ET AL., *supra* note 1.

[135]*See supra* notes 72-83.

[136]Marcus, *Freedom of Expression*, *supra* note 94, at 147 (predicting that South Africa will almost certainly have anti-racial incitement laws).