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‘Shoot the Boer’ – Hate Speech, Law and the Expediency of Sound

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Abstract

In recent years, “Shoot the Boer” (“Dubul’ ibhunu”), a well-known protest song from the apartheid era, experienced an unexpected revival in the streets of South Africa—and the courts. The article traces the history of the intersection of the song and the law as it meandered through an intricate topography of cases, rules and regulations ranging from the common-law crime of high treason, apartheid “anti-terrorism” and “anti-communism” law, post-apartheid constitutional law and the Broadcasting Code of Conduct. In contrast to established judicial practice where hate speech is reduced to its verbal dimension and sound serves as an expedient and abject to be invoked and discarded at will, the article focuses on sound as an equally pertinent criterion for regulating expressions such as “Shoot the Boer.”

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On March 26, 2010, a defiant Julius Malema, then president of the ANC Youth League, the youth wing of South Africa’s former liberation movement and current governing party ANC (African National Congress), stepped out of the building of the South Gauteng (Johannesburg) High Court to address a throng of his supporters. They had assembled to protest the charges that were brought against him for having sung a song: ‘Dubul’ ibhunu’ (Shoot the Boer). Under subsection 1 of s 16 of the South African Constitution, the indictment stated, Malema’s right to freedom of expression did not extend to ‘a. propaganda for war; b. incitement of imminent violence; or c. advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.’ Surrounded by Nelson Mandela’s ex-spouse Winnie Madikizela Mandela and other ANC officials, Malema urged the crowd to respect the court proceedings: ‘As we march here outside, demonstrate, protest in support of our songs, we must be disciplined.’ And in a demonstration of just what he meant by respect and discipline, he launched – yet again - into a rousing rendering of ‘Dubul’ ibhunu.’ But instead of singing ‘kill the Boer,’ he changed the lyrics to ‘kiss the Boer.’

In this paper I follow the song as it meandered through an intricate topography of cases, rules and regulations ranging from the common-law crime of high treason, apartheid “anti-terrorism” and

"anti-communism" law, post-apartheid constitutional law and the Broadcasting Code of Conduct. Yet despite the stark contrast between these doctrines and the wider historical and political circumstances in which 'Dubul' ibhunu' figured there is one constant that unites the legal construction of the song: the absence of sound. The article is divided into six sections. I begin with a relatively lengthy discussion of the key claims and concepts guiding the inquiry. In the second part of the article I move on to examine one of the key trials of the late apartheid period in which eleven leaders of the ANC-led alliance called United Democratic Front (UDF) were charged with high treason for having given speeches and having sung 'revolutionary' songs - including 'Dubul' ibhunu' – in order to incite to acts of treason, violence, and 'dissent between races' (*S v Ramgobin & others* 1985 (3) SA 587 (N), Indictment). This will be followed in the third and fourth parts by a discussion of Malema's brush with the law over the public performance of the song in 2011. In the fifth part I discuss a hearing that was held in the summer of 2017 at the Broadcasting Complaints Commission of South Africa (BCCSA) over an episode in the wildly popular soap *Isidingo* depicting a particularly graphic example of hate speech and attempted murder, complete with a lynch mob intoning 'Dubul' ibhunu.' (The discussion of the first case is based on my having served as a witness for the defense and on recently discovered court papers of that trial. For the BCCSA case I rely on my role as a participant observer of the hearing.) I close with some preliminary thoughts on how attempts at countering hate speech in music and other creative practices may not only end up regenerating the politics of hate but also undermine the possibility of a critique of hate and violence that goes beyond liberal visions of an ideal public sphere and constitutional constraints on the freedom of expression.

1

In his groundbreaking book *Acoustic Jurisprudence. Listening to the Trial of Simon Bikindi*, which examines the role of sound and music in the trial of the popular singer Simon Bikindi and his role in the 1994 Rwanda genocide, James Parker states that law is 'never without the problem of sound.' (2015: 2) The 'problem,' he elaborates, is nowhere more apparent than in the attention given to the voice in judicial speech. Thus, on the one hand the Bikindi court reproduced some of the most entrenched (Western) stereotypes of the voice as the medium par excellence of logos and, hence, as the crucial mechanism through which the Tribunal secured the connection – the 'expressive chain' – between Bikindi's genocidal intent, his words and the listeners who tuned into radio RTLM's non-stop Tutsi-baiting and Bikindi's songs (Parker 2015: 118). But on the other hand, it was through a 'sophisticated rhetorical, grammatological and, moreover, specifically jurisprudential technique' that the acoustic qualities of the voice were left unsaid (ibid: 122). In other words: 'in the process of 'giving voice' to speech, the [Bikindi] Tribunal did as much as it could to quieten it.' (ibid: 123) This paradox haunts the project of an acoustic jurisprudence, compelling scholars to engage in two mutually dependent exercises: to '*think sonically*' (ibid: 212) by uncovering a previously unheard dimension of legal thought and practice, and conversely, to '*listen jurisprudentially*' by 'attending to the peculiar dilemmas and techniques of legal judgment.' (ibid: 213)

In what follows I want to amplify Parker's argument by suggesting that the precarious entanglement of sonic presences and absences constitutes law's very condition of possibility. Law's 'problem,' then, is not owed to the exclusion of sound from legal discourse or to a lack of aural sensibility. Nor is it resolved solely by gestures of interdisciplinary reciprocity. What do I mean by this? Earlier, in a contribution to *Sound Objects*, a collection of essays edited by Ray Chow and James Steintrager, I invoked Julia Kristeva's work on abjection to highlight this enabling rather than diminishing function of law's sonic indetermination (Erlmann 2019, Kristeva 1982). 'Sound,' I argued there, may function

as what she called an 'abject,' a phenomenon whose conceptual and perceptual instability is a necessary condition of the subject's desire for identity by maintaining a firm separation between self and other. Kristeva's concept was attractive as an analytical category because it seemed to offer an alternative to Freud's views on repression as resulting from a subject's desire for a forbidden object. For Kristeva, it is the antecedent ambiguity of the subject-object relation itself that is being repressed. Hence, the return of repressed things like uncontrollable body fluids does not recall specific traumas as much as it evokes the fragility of the borders separating the inside from the outside. And it is these unstable boundaries that form the space proper of the abject.

Building on this premise, it seemed to make sense to examine the intersection of the sonic abject with a range of theorisations of voice, speech and language such as Shoshana Felman's 'scandalous' speech act (Felman 1983); Kristeva's work on poetic language and the preverbal, 'rhythmic' *chora*; Judith Butler's theory of hate speech and the 'incongruity of the speaking body' that remains 'uncontained by any of its speech acts,' (1997:155); and crucially, with more recent developments in the burgeoning field of sound studies centered on the 'ontology of sound' and sound as an object. As my earlier article, however, did not progress beyond some rather preliminary thoughts, I wish to widen the scope of this inquiry by taking the argument into a slightly different direction. Rather than presuming the abjection of sound to be a priori of securing law's self-identity, I am approaching the sonic abject from its opposite or, if you will, from the subject-point of Kristeva's subject-object-abject triad by attending to law's instability, tentativeness, limits and failures in asserting its authority over sound. In other words, instead of conceiving of abjection as a preexisting condition for the law, I stress the contingent, incomplete, even capricious nature of legal strategies of sonic abjection in dealing with the notorious difficulties created by hate speech. Or, following Stanley Fish's controversial essay 'The Law Wishes to Have a Formal Existence,' I see law as 'continually creating and recreating itself out of the very materials and forces it is obliged, by the very desire to *be* law, to push away' (Fish 1999: 181).

I call this self-reproduction of the law out of the abjection of sound the expediency of sound. However, in contrast to the conventional association with unscrupulous self-gratification, and opportunistic political maneuvering or just plain usefulness, the way I deploy the term is inspired by its more neglected etymological roots. More than a mere rhetorical device or means toward an end, it is the ordering function of sound that I highlight. As an expedient, sound allows the law to put its house in order and to represent law to itself. In other words, it is "good to think with." Consequently, in the sections that follow I focus less on the doctrinal aspects or justifications of hate speech regulation and more on the procedural and probative work the abjection of sound actually does in different judicial contexts. But before I enter into a detailed analysis of this work, I need to introduce three additional concepts.

The first concept, agency, has competing meanings in legal discourse and critical, post-structuralist scholarship. In commercial law, for instance, agency refers to contractual and non-contractual relationships between a principal and an agent who acts on the authority – whether express, implied or apparent – of the former. In the context of criminal and international criminal law, the term refers to the 'innocent agency' in a criminal act that is committed by an agent who himself may not have *mens rea* or the capacity to commit a crime. The point that interests me most about these forms of agency is their mediating quality. Agency here is not inherent in only one actor, but a function of relationships in which several actors are entangled at different levels of liability. By contrast, there does not appear to be a corresponding concept of responsibility in either Felman's, Kristeva's or Butler's work. A subject whose speech always and already is but one link in an endless chain of repeatable enunciations beyond her control cannot be said to exercise the absolute agency of the autonomous, self-possessing individual imagined by law. Yet, by the same token, agency cannot be delegated to a surrogate agent who might be held accountable because of the alleged proximity of her speech act to an effect. Agency and responsibility, in critical theory, can never be traced to an original moment; they are always deferred indefinitely.

Butler did, however, elaborate an alternative concept of agency, one that may prove useful in securing a more prominent position of sound in legal discourse. In a series of by now canonical formulations, she has suggested that by uncoupling the speech act from the sovereign subject, agency may be rethought in novel ways: 'agency begins where sovereignty wanes' (Butler 1997: 15-16). By this she means that rather than demolishing agency, the critique of the 'conceit' of sovereignty opens up the possibility for a new sense of agency to emerge. Not only does this agency more fully acknowledge the constitution of the subject in language in general and its subjugation in hate speech in particular, it may also enhance our responsibility for that speech. The responsibility of the one who utters hate speech consists of 'negotiating the legacies of usage that constrain and enable that speaker's speech' (ibid: 27). But at the same time this responsibility – 'afflicted with impurity from the start' – also puts the speaking subject in an ethical bind, one in which the question of how best to use speech is unanswerable without prior consideration being given to the fundamental aporia between language as exceeding the speaking subject on the one hand and this very 'excess' making possible the speech of the subject on the other hand (ibid: 28).

Of course, for Butler that antinomy can no more be dissolved by fiat than agency simply follows from a sovereign will. In fact, there is not only no escape from the dilemma of the concurrently subject-exceeding and speech-enabling language, its very existence is the condition of possibility for confronting hate speech. The counter-appropriation of injurious speech for Butler is therefore squarely located in the intersection of the semiotic and the social, in practices of resignification and recontextualisation. Ironically, it is this theory of linguistic agency that also puts her argument in close proximity to the very push for legal remedy against hate speech that she otherwise laments. As we will see in the discussion of the case against Malema mentioned at the beginning, the court's opinion, Malema's shrewd rephrasing of the lyrics, and even some of the criticism the case occasioned from proponents of critical race theory, all in one way or another and for different ends deploy the rhetoric of recontextualisation.

The discrepancy between legal and critical understandings of agency becomes perhaps even more pronounced when viewed in conjunction with the debate about another key concept: the harm in hate speech. Although it may be a uniquely American preoccupation (albeit one with growing import for liberal democracies elsewhere that are getting swept up in the resurgence of populism and extremism) situated within the controversy about the pros and cons of free speech protections, some of the points in this debate may be relevant for the topic at hand (Delgado-Stefancic 2019, Fish 1995, Heinze 2016, Strossen 2018, Matsuda et al 2019, Sorial 2012). There are two, sharply contrasting viewpoints. According to the first, pro-protection position, hate speech is just an expression like any other and therefore protected under the First Amendment. Implicit in this argument is the notion that the precise nature of the harm and its relationship to an offensive expression cannot always be unequivocally determined. But in a contrary, pro-regulation perspective, that relation is much more straightforward. At issue here is not the causal relation between expressions of hate and its purported effects as much as the speech itself that might constitute the harm. On this view, hate speech would thus have to be viewed as a form of conduct or a performative act and the harm associated with this act-like speech as being integral to its very existence as hate speech (Waldron 2012).

The latter paradigm entails important implications. Because hate speech might be construed as equivalent to an assault and, hence, the harm inherent in it as being prima facie evident, there would hardly have to be any reason to produce compelling evidence about the precise nature of the harm. Furthermore, the notion that the harm of hate speech is figured as inextricably interwoven with the 'content' of the hate speech and that therefore any injurious effect is necessarily traceable to speech, dispenses with the need of considering any situational context such as the person of the speaker or the role of the listener and their potentially uneven positions of power. This, obviously, would not only have broader political implications beyond evidentiary constraints such as complicating any attempt at distinguishing between radical but otherwise protectable political

enunciations and direct incitements to violence. It might also have the undesired effect of disseminating or, to use one of the key terms Butler invokes in arguing against censorship, 'repeating' elements of the very hate speech that legal interventions are called upon to suppress in the first place. Likewise, by foreclosing the 'gap' between speech and its effects, the constitutive theory of hate speech might embolden forms of state intervention that stifle 'nonjuridical forms of opposition, ways of restaging and resignifying speech in contexts that exceed those determined by the courts' (Butler 1997: 23).[1]

Without a doubt, despite numerous question marks and the rich potential for divergent interpretations (known to every philosopher and student of the law trying to argue their way around First Amendment absolutism), these interventions offer suggestive leads for crafting a theory of sound as a legal expedient. At the same time, they are noteworthy for their utter silence on the place of sound in injurious speech. For even where Felman, Kristeva and Butler and others occasionally stray into the physicality of the voice – the breath, vocal cords, glottis and the resonant spaces of the mouth – they tend to do so by summarily substituting the voice for the sound it generates. The question thus remains as to the logic by which sound may be producing harmful effects. Is it in the form of what John L.Austin (1962) termed perlocution or is, alternatively, sound a type of illocution and, thus, the injury itself?

This is also the question that preoccupies a strand of theory that operates under the label 'ontology' and here especially a variant within sound studies that seems to be fixated on the 'object sound.' One of the most influential statements to date of this trend is Steve Goodman's (2010) book *Sonic Warfare*: *Sound, Affect, and the Ecology of Fear*.[2] Everything in Goodman's 'ecology of fear' is alive with vibration. It is through the visceral effect of vibration, he argues, that sound acts on bodies. But in so doing, vibration always precedes consciousness and signification by a split second. Thus detached from the possibility of any cognitive response, this 'vibrational force' becomes a key vehicle of contemporary forms of power to reproduce themselves by arousing a

diffuse array of primal affects such as fear. So far Goodman's argument appears to extend to sound Butler's concept of language as the condition of possibility for the (speaking) subject, as that which 'precedes and exceeds the subject' (Butler 1997: 28). And, like Butler, Goodman is interested in developing alternative strategies for the formation of oppositional subjectivities. Yet unlike Butler and echoing Brian Massumi (2002), such strategies cannot be based in any rationally guided, non-affective responses such as the first's highly self-aware 're-signifying.' Power can only be resisted by what Goodman calls a 'politics of frequency,' through an experimental aesthetics and practice such as Afrofuturism or electronic dance music (both of which also inform Goodman's own work as a DJ) that transduce 'bad vibes into something more constructive' (2010: 73).

In response to the latter point, Brian Kane, possibly sound ontology's most discerning critic, has pointed out that Goodman fails to explain how a counter-hegemonic politics of frequency may be substantiated merely by shifting from the ontologically antecedent, fear-inducing vibrations to the decidedly more pleasurable sensations produced by EDM (Kane 2015: 7). Rather what ensues from ontologies such as Goodman's is anything but counter-hegemonic: a concern with boundaries. 'Most ontological claims are less arguments than assertions or commitments,' Kane writes and, as such, these assertions serve to stabilise claims where the conclusion is already predetermined and, in this manner, 'make legible the epistemic and axiological views of those who do the positioning' (2019: 67). The question then, Kane goes on to argue, is not so much what this scholarship might tell us about the being or mere thereness of sound but how the ontological reduction of sound and the attendant 'phantasmagoric occultation of production' might be countered by recognising sounds as 'sedimentation of historical and social forces' (2019: 68).[3]

The words 'sedimentation' and 'forces' may be poorly chosen here, for sound is being ossified as the product of a mechanism depriving it of any agency of its own. But as Actor-Network Theory (ANT) has taught us, history, culture, society, or nature are no more given 'forces'

or domains of reality than sound is an object. Rather, they are ways of connecting disparate phenomena and consolidating them into more or less durable entities that then become operational as 'matters of concern' for different epistemological and practical interests (Latour 2005: 113). On this view, then, sound – physically and figuratively born from friction – might more productively have to be understood not as an object, medium, let alone as a subject. Rather I propose to consider sound as a 'mediator' in the ANT sense of the term: as a somewhat evanescent construct translating, transforming and modifying what it is supposed to carry: language, music, and even the very meaning and harm of hate (Latour 2005: 38).

But what, precisely, are the connections with the law sound might afford and vice versa? What is it about sound's promiscuity that renders it so fundamentally incompatible with and yet at the same time useful to the law? What would be the sonic, non-verbal equivalent of the harm in hate speech? And how might Butler's and Goodman's conceptions of creative anti-hegemonic agency square with some of the arguments being proffered for and against the protection of hate speech? As the discussion above has shown, ontological, that is, object and vibration-centered theories of sound offer only scant guidance here. Attempting to translate the logic of sonic ontology into a legal one about the sonic harm in hate speech risks confounding the constitutive theory of harm (whereby harm is inherent in the injurious speech) with a consequentialist one according to which harm results from speech.

What then is the way out of this conundrum? Earlier I suggested that we consider sound as an expedient allowing the law to do its work. There is a fascinating counterpart to this hypothesis in what anthropologist and legal scholar Annelise Riles (2005) calls law's 'technicalities.' Over the years, Riles has made a compelling case for a new kind of interdisciplinary relationship between law and the humanities that eschews the instrumentalism of Legal Realism (in which the legal provides the means toward extra-legal ends and the humanities are called upon to examine both the ends and the failures of the means-end rationale) in favor of a more nuanced approach

inspired by Science and Technology Studies (STS) and ANT. For instance, using the conflict of laws doctrine Riles argues that it is 'the mundane technocratic dimensions of law, precisely those dimensions that fail to engage humanists' theoretical, critical, or reformist passions, that are the most interesting artifacts of lawyerly work,' and as such these dimensions are amenable to sophisticated cultural analysis (Riles 2005: 1029). However, in order to turn a new page in the humanistic study of law, such cultural analysis would need to go beyond the conventional wisdom of socio-legal studies or Critical Legal Studies that legal form – much like law in toto – is but a 'social construction' or a consequence of wider 'cultural' trends. Form and technicality are not effects or byproducts of more important agents and forces, Riles argues, but the 'protagonists of law's own account' (ibid: 975) In short, the humanistic study of law has to 'account for the *agency of technocratic legal form*' itself (ibid: 980).

Sound in hate speech cases, I suggest analogously, might be viewed as yet another protagonist of law's own account. As such it not only allows the judicial process to move along toward resolution, it also makes it possible to apprehend sound's agency without ever leaving the domain of the legal itself.

2

The first reported case in which 'Dubul' ibhunu' features is the so-called Pietermaritzburg Treason Trial of 1985 (*S v Ramgobin & others* 1985 (3) SA 587 (N)). It was brought by the apartheid regime against the leaders of the anti-apartheid umbrella organisation United Democratic Front (UDF) on common-law charges of treason and a variety of alternate charges based in apartheid legislation. The evidence presented by the state almost in its entirety consisted of some 35 videotapes (recorded by police and CNN) of what it called 'bellicose' speeches and songs – including 'Dubul' ibhunu' – that were delivered during UDF rallies. Although the trial eventually collapsed on procedural and evidential grounds (inaccurate translations, tapes that had been tempered with, and poor sound quality) and the state focused on the

lyrics of these songs throughout, the arguments during pleadings are instructive because they point toward some of the ambiguities of the sonic abject and the expediency of sound that this essay is about.

From the outset, the defense honed in on the state's inability to prove that the videos were the direct result of these witnesses having observed the accused initiating and participating in the singing and if so, to what extent *mens rea* might be ascertained on this evidence. Here are some typical examples from the further particulars illustrating the defense's strategy:

> 'Is it alleged that each of the Accused heard and understood each of the songs and slogans?'
>
> Or:
>
> 'Is it alleged that on each occasion specified in the relevant Schedule the Accused whose name is stated as being present on the particular occasion of the meeting concerned was also present when the song or slogan was sung or uttered?'

In a similar vein, the following passages from the cross-examination of one Izak Daniel de Vries, a self-styled expert of 'revolution' and one of the state's key witnesses, illustrate the defense's attempt to counter the charge of treason by undermining the idea that the mere performance of certain songs reveals a 'hostile intent' to commit or incite to treason:

> MR MAHOMED [counsel]: M'Lord, the only other observation, I think, which might be relevant is that the singing we saw in the beginning of that video appears to have been before the commencement of the meeting itself. […]
>
> MILNE, J P [judge]: Yes, we agree that that's correct.
>
> MR GEY VAN PITTIUS [prosecutor]: Well M'Lord, perhaps I should add then, then of course after the meeting had finished, then again the singing starts […] The observations that we need to make, so it seems to me, are not very many in view of the fact that the transcripts helpfully, in our view, purport to indicate not merely speech but gestures, movement, singing, and so on […]

MILNE, J P: Really perhaps one can clarify it by saying that the singing […] actually appears to take place outside the hall in which the meeting actually occurred.

MR MAHOMED: I'm quite happy as long as – I think it's common enough that the singing we see in the beginning of the video, whether inside or outside the hall, is before the commencement of the meeting itself. […]

MR MAHOMED: Because M'Lord, we will point out to Your Lordship and submit in due course that that seems to be a recurring thing which happens at all these meetings. The singing actually goes on before the meeting starts and it's a way in which the audience keeps itself occupied.

Further on there is this exchange:
MR MAHOMED: People often enjoy themselves with song.
MILNE J P: Oh yes, certainly.

MR MAHOMED: And we will be actually having expert evidence if we ever reach that stage, to say what the purpose of this sort of song is in African tradition, but that there was a mood of anger, with respect, is a correct observation.

MILNE, J P: Oh yes. That was the prevailing mood.
MR MAHOMED: Yes, but it ..(intervention)
MILNE, J P: I don't mean it was continuous.

MR MAHOMED: Yes, it is intermittently interrupted by a lot of good cheer and laughter and smiles as well, particularly during the singing. I noticed on the face of the singers and the gumboot dancers and so forth, there was a considerable merriment and enjoyment.

MILNE, J P: Yes, of course a lot of that was not observed by us because it was agreed that it was not relevant and it was just — if I can use the technical term – put on the fast-forward button. […]

MR MAHOMED: Yes, just to get the total picture M'Lord. One perhaps looks at these people participating in these songs and it undoubtedly serves a kind of entertainment and amusement value as

> well, regardless of the words, that one smiles oneself; one watches; one is affected by the rhythm and the tempo and the beat and the melody. So anger is true as a prevailing mood M'Lord, but it had these other features as well.
>
> MILNE, J P: Yes. Perhaps one could put it this way Mr Mahomed, although we received the impression that that was the prevailing mood, it's not necessarily the continuous mood.

There are several aspects in these brief moments of wrangling over the admissibility of evidence that require close reading. At the most basic level of criminal procedure, the question about when and where the singing took place and where the witnesses were during those moments was not only directed at the potential for hearsay (which in turn resulted in long hours being spent debating the reliability of the recordings); it also enabled the defense to rebut the notion that the accused acted with *mens rea* when they were not even present during the singing and, hence, their liability as principals was all but certain. By far the most noteworthy aspect of the cross-examination, however, is the manner in which the defense time and again inserted sound as an object of legal scrutiny in its own right. Invoking 'song' as a placeholder for what in essence was a discussion about the audibility of sound within a given time-space, the attorney adroitly redirected the court's attention from the accused's individual actions toward a more diffuse situation of collective responsibility. For instance, one of the conditions of 'hostile intent' as the central element of the crime of treason is that it consists of an 'overt act' aimed against the state, such as organising an armed insurrection. But, in another sense, the overt act may also be construed as being little more than a 'manifestation' of hostile intent, such as in an individual writing, speaking and singing words that as such do not incite others to treason.[4] This possibility, blatantly at odds with the definition of treason at common law, is the reason why the defense sought to stress the 'entertainment' aspect of the singing, at one point even hinting at the notion (which I had rather frivolously recommended to counsel) that such collective 'letting off steam' in song was rooted in African tradition and was meant to restore

social harmony.

Another example of the drift toward sound may be seen in the defense's attempt to deflect attention from singing as intentional utterance. By raising the question of the accused's hearing, the defense adroitly widens the interpretive frame by shifting the focus from the intention of a singular speaking or singing subject toward a more dialogic situation in which the mere fact of being within ear-shot of an utterance proves culpability. Hearing others sing the allegedly 'bellicose' 'Dubul' ibhunu,' this line of reasoning seems to suggest, displaces the accused from the position of a solitary, willfully speaking subject 'inciting' an amorphous crowd and 'advocating' a certain course of action toward one of social embeddedness in which individual volition and collective action are submerged in a heterogeneous sonosphere.

3

More than 30 years after the 1985 Treason Trial 'Dubul' ibhunu' resurfaced in a totally different political and legal setting. In 2010 Afriforum, an organisation that describes itself as an NGO defending the minority rights of Afrikaners (i.e. 'Boers') by demanding that murders of white farmers be classified as racially motivated 'genocide,' filed a complaint against Malema with the South African Commission on Human Rights for having publicly performed 'Dubul 'ibhunu.' While the Commission ruled that the phrase 'Kill the Boer' did not qualify as hate speech but was simply an example of free expression, on appeal the Equality Court of South Gauteng set aside that decision. While Malema defended his actions by maintaining that the words were intended to symbolise the destruction of white oppression (the former regime) rather than to indicate the literal intention to shoot the Boers, the court disagreed. Both the words and the 'song,' it found, violated s 10 of the Equality Act which prohibits words that 'demonstrate a clear intention to be (a) be hurtful; (b) be harmful or to incite harm; (c) promote or propagate hatred' and as such they did not fall under s 16 of the Constitution that excludes hate speech from protection (*Afriforum and Another v Malema and Others* 2011 (6) SA

240 (EqC) *20968/2010*).

Afriforum has since become the subject of intense debate, as evinced for instance by the cartoon below. Here South Africa's leading cartoonist Jonathan Shapiro (aka 'Zapiro'), perhaps not very subtly, depicts Malema on the left as he sings 'Dubula' and a high-ranking member of the South African Police Service on the right orders a group of officers to 'shoot to kill.' The difference between both 'chants,' Shapiro seems to suggest, is the number of casualties (or absence thereof) they are said to have caused.

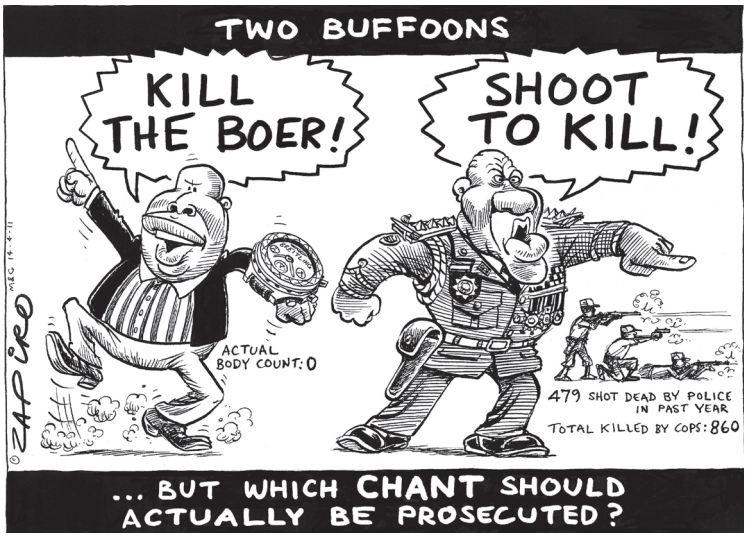

Fig. 1 Two Buffoons Singing Their Chant © 2014 Zapiro. Originally published on Daily Maverick. Re-published with permission - For more Zapiro cartoons visit www.zapiro.com

Legal scholars for their part have attacked the Afriforum court for failing to deal with, as Joel Modiri, drawing on core tenets of Critical Race Theory, puts it 'the ideological nature of law and the politics of race in post-1994 South Africa' (2013: 274).[5] While Zapiro's is a consequentialist argument predicated on the 'gap' between speech and

alleged harm, Modiri points to the jurisprudential flaws underpinning that argument from the outset. In his decision, he writes, Lamont J had refused to consider the 'black point of view.' Instead of a fair, objective legal outcome, the judgment implicitly perpetuates entrenched traditions of South African formalist legal reasoning and its equivalent in the politics of liberal-democratic governance and race neutrality. For instance, it is oblivious to the fact that in contexts of pervasive and persistent racism the law is incapable of race-neutral application, itself being the product of a racially defined political and economic order. Furthermore, and most crucially for the question posed in this paper, the *Afriforum* court operated on the basis of what Modiri calls 'structural determinism' in which the 'structure of legal thought and the prevailing legal culture determines its content and thus also who benefits from it and whose interests and values it protects and reflects' (Modiri 2013: 286). For instance, the unwavering belief in the precision and self-revealingness of words and texts at the heart of legal thought disregards the possibility of shifting intentionalities behind the singing of 'Dubula 'ibhunu,' such as reviving the legacy of 'struggle songs;' to legitimise Malema's claims to leadership by connecting current conflicts to the morally justified anti-apartheid struggle; or, to use the song as a non-violent expression of 'disciplined' dissent.

Modiri's critique and the intellectual environment that nourishes it deserves more attention than I can offer in this essay.[6] Instead, I am limiting my observations to one point; to the fact namely that he – and other critics of *Afriforum* and the regulation of hate speech more broadly – neglect to consider the judge's explicit inclusion of 'song' as a category of evidence determining hate speech. Yet upon reading several lengthy passages in the opinion, the observer is none the wiser as to what exactly the court understood 'song' to mean. Here are some examples: '[54] Song is a form of verbal art which people use both for emotional release and also for manipulation of others.' (*Afriforum and Another*: 32) While the court dwells on the 'emotional release' part of song at greater length elsewhere, several paragraphs later the judge goes into more detail about how precisely song may be used for the manipulation of others. In a move familiar from debates in which

cultural contingency is rendered as naturally given, he writes:

> [64] The song mutates as and when different people sing it and as and when the mood or occasion which is celebrated changes…. This is completely natural and in accordance with the way in which these songs are used to express the feelings of persons who sing the song (ibid.: 38).

The strategy becomes even more transparent two paragraphs later where the court expands on the notion of mutation, tracing the origin of 'Dubul' ibhunu' to a recording by one Collins Chabane.

> [66] The song sounds very different when Malema sings it to what it sounds like on the recording of Mr Chabane. When Malema sings the song, it is quite clearly a chant. Malema sings the first sentence, the audience sings the chorus. The words are sung in a rhythmic chant using a staccato. The effect is to produce clipped calls and clipped responses. When the song is heard on the recording of Mr Chabane, the song is played legato and sounds much like a gentle lullaby or hymn. The words remain the same. However, if the words are not understood, then the song appears innocuous from its tone and delivery (ibid.: 38).

This, the court goes on to state referring to an expert brief by an unnamed musicologist, is because

> historically struggle songs had been developed by persons who formulated them making use of existing music. Often, for example, the melody of hymns was used. The person who wrote the song then adapted the words of the hymn by replacing them with his own words. A person who heard the singing but did not understand the words would think that a hymn was being sung if he was familiar with the tune of the hymn. However, in truth and in fact, the words were different and conveyed the message of the person who had written them (ibid.: 39).

Musicologists might cringe at this bumbling foray into South African musical history. For what Lamont J references here is a tradition of South African 'protest song' that originated in the late colonial era during the second part of the nineteenth and consisted of two broad genres: a mournful tradition, exemplified in part by 'Dubul' ibhunu,' rooted in four-part Christian hymnody lamenting the loss of land and

freedom while simultaneously asserting black South Africans' humanity and dignity on the one hand; and a more defiant body of songs based on indigenous, traditional forms such as *ihubo* 'war songs' on the other hand (Erlmann 1985).

The 'chant' that Malema intoned on the steps of the South Gauteng High Court, however, is a relatively recent phenomemon having emerged during the dying days of apartheid as the UDF and, from 1989, scores of former guerilla fighters returning from their camps in neighboring countries such as Mozambique and Angola performed it in combination with a type of military drill referred to as *toyi-toyi*.

Yet musical history apart, there is more to the court's line of reasoning than simple ignorance. The court wants to have it both ways. On the one hand, 'song' is construed as the site of unlimited transformation, going from a lullaby or hymn to 'rhythmic chant.' At the same time, however, with the 'words' remaining unchanged, 'songs' may trick the unsuspecting listener into mistaking their true essence. Conversely, when in an identical 'song' existing texts are replaced with new lyrics in contrafact-like fashion, the effect on the judge's hypothetical listener is the reverse: the 'song' retains its original identity. 'Song' is thus hypostatised into something akin to what Michel Foucault (in a different context) called the 'author function;' a principle that impedes the production, reproduction and proliferation of meaning. Or, to draw an analogy with Kristeva's reading of Louis-Ferdinand Céline, 'song' to the Afriforum court is the 'grammatical' that prevents language to 'fly off its handle' (Kristeva 1982: 189). Leaving aside the improbability of the vast majority of South Africans being monolingual, the entire purpose of the court's reasoning is all too familiar then. It is to stabilise the 'verbal' as the sole repository of intention by situating 'song' within a nexus linking a knowing author and an ideal, linguistically competent ('reasonable') listener capable of seeing through the machinations of the Malemas of the world in manipulating 'song.'

But there might also be an additional layer to the holding. By referring to Malema's version as 'chant' Lamont may be drawing on

one of colonial mythology's most persistent tropes of African musical aesthetics as somehow being stuck in a pre-historic, pre-'song' past, one in which music, unlike that of the 'civilised' present, is primarily thought to be determined by its practical function. 'Chant,' then, is more action than representation or, to put it in Walter Benjamin's terms, it is mimesis in its primordial form predating 'nonsensuous similarity' (Benjamin 1999). Viewed through this lens, 'chant' might provide an opening for a different and more sono-centric interpretation of the term 'incitement of imminent violence' in subsection 1b of s 16 of the South African Constitution. The Afriforum court might be inadvertently gesturing toward a notion of 'song' as itself constituting incitement and violence all at once. In other words, as I mentioned earlier what is at stake in Malema's performance of 'Shoot the Boer' is not the 'words' but the performative act itself as exceeding verbally articulated intent.

With the court thus essentially putting the twin concepts of 'song' and 'chant' up for grabs, it may be useful to ponder the political consequences of *Afriforum v. Malema*. The 'chant' revived by Malema, I argue, is one if not the most important contribution he has made to the political debate, creating a type of political aesthetics hitherto unknown in post-apartheid South Africa. At a time when political discourse degenerates into an empty technocratic lingo that justifies the increasingly draconic means (deregulation, privatisation, surveillance and government secrecy) that South Africans are being asked to put up with by pointing to their alleged benefits somewhere down the line, Malema and his band of Economic Freedom Fighters have taken blunt talk to a new level. After former South African President Jacob Zuma had been found to embezzle public funds to upgrade his rural home with a swimming pool, Malema's minions regularly disrupted speeches by government officials with the slogan 'Pay Back the Money.'

There is a parallel between this twitterisation of politics and the instrumentalisation of 'song' as a mere vehicle of a signified to be invoked or discarded at will in the attempt of stabilising law's fragile authority in distinguishing hate speech from protected expression. As anthropologist Rosalind Morris views it, these types of intervention

in and outside of the state-sanctioned public sphere 'have incited fantasies of an immediacy that would transcend the pitfalls and the limits of all forms of mediation, whether political or technological' (2017: 123). Thus, it is not just that the *Afriforum* court subscribed to a profoundly Western, romantic idea in assuming that the meaning of a song is permanently and unalterably inscribed in the words and that, hence, authorial intent and work are identical. Nor is it that by thereby ignoring the possibility that music lives its own deedful life independent of the doer, the criterion of 'immediacy' in some definitions of incitement to violence risks to become redundant. By overlooking the massive shifts in popular culture toward quasi-illocutionary practices in which the boundary between announcement and the announced deed, between speech and the 'thing' spoken about is eroding, the court blinded itself to the troubling possibility that any form of sound-based communication aspiring to what Morris calls 'immediacy and communicative fullness' given the right target, may constitute hate speech (2017: 134).

4

Soon after the court handed down its decision that Malema had violated the hate speech provisions of the Equality Act, the parties entered into a mediation agreement in which Malema and the ANC (the second respondent) acknowledged that some words in certain 'struggle songs' go directly against 'morality of society' and are hurtful to minority groups. Yet fast forward several more years and 'Dubul' ibhunu' is alive and well. On May 17, 2017 the Broadcasting Complaints Commission of South Africa heard complaints of hate speech and incitement to violence submitted by a large group of viewers of the wildly popular soap titled *Isidingo* (The Need) (*BCCSA, 11/2017, van Wyk and several others v. SABC3*). In one of the episodes of the series one of the main characters of the show, allegorically named Sechaba ('Nation'), visits the grave of his father located on a farm owned by Afrikaners. (Black farm laborers were commonly buried on the farm they had been working on for their entire lives.) There, Sechaba is confronted by two

farmers who, after having hurled racial abuse at him, brutally assault him and, rather than shooting him, bury him alive. While Sechaba survives the ordeal, the community of farm laborers, armed with clubs, assegais and torches, and singing 'Dubul' ibhunu,' stage a march to a hotel where the two farmers are hiding out, demanding that they come out, presumably to face imminent death at the hands of the angry mob.

Hearings of the BCCSA tribunal are designed to give complainants an opportunity to engage with representatives of the responding broadcaster directly and for the commissioners to come to a decision about the complaint in terms of the industry's self-elected code of conduct. Over the years the tribunal has heard around a dozen complaints about hate speech and incitement to violence, most notoriously the 'AmaNdiya' case in which the South African Human Rights commission argued that famed dramatist-songwriter Mbongeni Ngema's song 'AmaNdiya' (Indians) amounted to hate speech against South Africans of Indian descent (*BCCSA, 31/2002, SAHRC v. SABC*), and more recently, the case of 'Get Out,' a hip hop track featuring lyrics calling for 'people fight' and the 'oppressor get out,' all to the accompaniment of machine gun sounds (*BCCSA* 05/2008, W Spies v SABC1).[7] In the May 17 tribunal the commissioners reviewed a selection of the 110 or so written complaints they had received about the farm episode, followed by a screening of the allegedly offending scenes and by testimony given by one of the complainants and a senior official of the South African Broadcasting Service (SABC) that produces and airs *Isidingo*. Most complaints were by whites that took issue with the way, as one Michael Coetzee put it for example, the show 'opened wounds, caused unnecessary hurt and pain and portrays white people (particularly farmers) as racists.' Viewer Deon Fialkov, for his part, reiterating a comment he had posted earlier on Facebook, argued that the show 'is only showing racism by white people' and that 'it doesn't seem right that only one race is made out to be racist when racism affects every race.'[8] In response, the SABC spokesperson defended the story as 'intended to address an important and complex part of our history and the present-day South Africa,' in hopes of speaking to 'the preconceived notions and stereotypes on both sides of the colour

divide that still needs to be addressed in order for the country to find healing. Its intent is to open a continuing dialogue on the issue of race to the benefit of all South Africans and our collective future.'

Predictably, after brief deliberation, the commission found that the scenes in question did not contravene either clause 4(1) of the Code of Conduct that prohibits the sanctioning or promotion of violence based *inter alia* on race or clause 4(2) that prohibits hate speech. Rather more startling, however, is the fact that at no point either during or after oral arguments did it occur to the commissioners that the singing of 'Dubul' ibhunu' in the hotel scene (a clip of which was also shown) might provide additional evidence of the hate allegedly being advocated in the episode. In fact, the acoustic dimension of both the graveyard and the hotel scenes was ignored altogether.

5

One may speculate about the tribunal's deafness vis-à-vis a soundtrack so sparse that one cannot but notice the stark contrast between the serenity of the graveyard scene and the raucous atmosphere in the hotel lobby. In the former the faint traffic noise, chirping birds, the sound of Sechaba shaking a snuff box and clearing the grave from the overgrowth of grass, and most importantly, the drone-like choral chord that accompanies Sechaba's appeal for forgiveness from his father, like a sonic halo transfigures the scene into a quasi-religious moment of atonement, not unlike the post-apartheid project of nation-building in the name of democracy, *ubuntu* (human dignity) and reconciliation. In contrast, the hotel scene is dominated by the 'noise' of 'Dubula' drowning out the carefully balanced sonosphere by the grave.

In closing, I would like to expand on the hotel scene with a view to highlight the ability of techniques of resignification to disrupt law's desire to be itself by undermining sound's expediency, and concurrent with it, to perpetuate the abrogation of political or legal mediation at the heart of the politics of hate.[9] One notices several sonic and visual layers being skillfully superimposed on each other. Thus, when the mob enters the lobby demanding that the two farmers be handed over to them,

the song is no longer the much maligned 'Dubul 'ibhunu;' the crowd only intones the refrain 'Dubula,' other lines of the lyrics remaining indistinct in the background. And just in case any unsuspecting viewers might be unfamiliar with the meaning of the Zulu word 'dubula' or, might be irked by uncomfortable echoes of Malema's 'disciplined' performance of 'Dubula' several years prior, the subtitle makes it clear that what they are hearing is not an 'incitement to cause harm' but merely a form of 'protest.' But only a moment later, as the frame shifts from the action filling the entire screen to something approximating what in literature and art is known as polyfocality, this attempt at cleansing the phrase from its violent connotation takes a sudden turn into more ambivalent terrain. An employee or guest of the hotel, in a kind of alienation effect, is seen taking a video of the events on his cell phone, only to be reprimanded by one of the intruders: 'Hey, shove off. You think this is a movie?'

Several readings of this shot suggest themselves. On the one hand, by making itself the object of the narrative through the 'movie in the movie' frame, the scene might be said to invite its viewers to take at face value the producer's declared objective of laying bare 'preconceived notions and stereotypes.' In other words, by redirecting the audience's gaze from the 'actual' performance of the song to a 'movie' of the song as taken and viewed by the owner of the cell phone, the scene insinuates that what the viewers are seeing is not an incitement to cause harm but a movie indeed and therefore open to interpretation. On the other hand, despite placing the spectator in an active, self-reflexive position the shot may also achieve the exact opposite of such critical media consumption: the possibility, namely, that real-life performances of 'Dubul' ibhunu' *are* indeed 'movies.' This is of course a bold claim. Yet, without wanting to minimise the legitimacy of expressions of anger in the face of racist abuse and racially motivated violence, the theatricality of such expressions is hard to overlook. Just as Malema had shrewdly sanitised 'Dubul' ibhunu' into mere wordplay by 'resignifying' its lyrics from 'Kill the Boer' to 'Kiss the Boer,' the aestheticisation of political dissent is part and parcel of what Morris calls the 'ob-scenity' of a type of political intervention that deliberately positions itself outside

or 'off-scene' the norms of reasoned discourse (Morris 2017: 128). But at the same time this flouting of the protocols of liberal democracy depends on them for its efficacy in creating the echo chamber of populist politics. Because constitutional encroachments on the freedom of expression always carry within themselves the barely concealed threat of force (alluded to in Zapiro's cartoon above), at the hands of populist politicians such as Malema songs like 'Dubul' ibhunu' are meant to goad the state into revealing its true repressive nature, and in turn forge a visceral sense of shared identity among those imagining themselves as standing in opposition to the state and its institutions. Sound, Morris recognises (albeit by using the word 'song'), is crucial in this process. By uttering and repeating stripped-down phrases such as 'Dubula,' she argues, anyone can 'find themselves enthralled by the strange sensation of speaking someone else's words and simultaneously experiencing them as one's own' (ibid: 128). Sound, then, in its barest, virtually a-semantic form thus has the primary function and capacity to mediate (in the Actor-Network Theory sense of the word) the act of communication itself; to assemble words, meaning, and action into an alternate, movie-like reality taken for politics.

Endnotes

1. For further criticism see Barendt 2019 and Sorial 2012: 79-80.
2. See also Chow-Steintrager 2019, Daughtry 2015, Eidsheim 2015, Hainge 2013.
3. For another critique of 'vibration' as a cultural trope or 'cosmograph' see Kahn 2020.
4. For a detailed analysis of the 'hostile intent' doctrine in the context of the trial see Lawyers' Committee for Civil Rights under Law 1985.
5. See also Buitendag-van Merle 2014. See also the discussion in van der Merwe 2013 of *African National Congress v Harmse: In Re Harmse v Vawda (Afriforum Intervening) 2011 5 SA 460 (GSJ)* in which the High Court held that 'the publication and chanting of the words Dubula ibhunu prima facie satisfies the crime of incitement to commit murder.' Van der Merve even goes as far as declaring: 'One would indeed be hard pressed to deny a measure of similarity between the song 'Dubula Ibhunu ' and the song

'Tubatsembesembe ' ('We will kill them all'), which was sung by Hutu extremists prior to the Rwandan genocide.' (351)

6. See for instance the special issue on 'Conquest, Constitutionalism and Democratic Contestations' in the *South African Journal on Human Rights* 34, 2018.
7. Another case, pending with the Human Rights Commission, is the music video 'Larney Jou Poes' by hip hop crew Dookoom, in which rapper Isaac Mutant exhorts a group of back farmworkers brandishing guns and forks to burn down the white farmer's farm.
8. Quoted from emails received by BCCSA. I am grateful to BCCSA secretary Shouneez Martin for providing me with copies of these emails.
9. A similar dynamic may be at work in the music of hip-hop/rave group Die Antwoord and the critical reception videos such as 'Fatty Boom Boom' experienced (Haupt 2012).

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