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Racism in Great Britain: Drawing the Line on Free Speech

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RACISM IN GREAT BRITAIN: DRAWING THE LINE ON FREE SPEECH

Kenneth Lasson*

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I. INTRODUCTION

On any given Sunday in Hyde Park, London's huge urban sanctuary of tailored ponds and manicured gardens, one is likely to hear outrageous and provocative public utterances about race and religion. A few of those venting their spleen here are practicing rhetoricians, a few are clearly acting — but others are absolutely sincere in their hate-mongering and passionate in their vilification. All of them are focal points for assembled spectators of varying classes, many of whom are professional hecklers. The police, milling about to put down possible disturbances of the peace, are seldom called upon to quell roused rabble. Thus is this weekly theatre, Britain's custom-laden monument to free speech, neatly contained by day, boundary, and protocol.

Would that such a basic human right, the simple freedom to express one's thoughts, be always and everywhere maintained so easily! Beyond Speaker's Corner in Hyde Park, however, the reality in Great Britain is quite different. Racial tension and the confrontations it engenders have appeared with increasing frequency during the 1980's. The religious warfare that has plagued Ireland for more than two decades has been barely contained. The British authorities, unlike their American counterparts, who are limited by a strictly construed First Amendment, have been much less hesitant to repress provocative speech.

It goes almost without saying that in this country we take the freedom of speech to be virtually absolute. An American can parade through a predominantly Jewish community wearing full Nazi regalia, proclaim his allegiance to Hitler, and publicly spout justifications for genocide without fear of government reprisal. Such incitement would be severely restricted if not punished in all other Western democracies.

In England, perhaps our closest relative as far as the recognition and protection of basic human rights are concerned, laws against incitement to racial hatred are likewise direct and restrictive, in sharp counterpoint to American notions of what true liberty is all about.

This article traces the history and development of the group-libel laws in England, and addresses a fundamental question: have the British truly missed the point about

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freedom of speech — or is our perception of where the line should be drawn a misplaced preoccupation with blind principles?

II. HISTORY OF THE LAW IN ENGLAND

The evolution of British law prohibiting incitement to racial hatred has been lengthy and serpentine. At common law, criminal sanctions have long been provided against people who incited others to bigotry, but only if their actions were likely to disturb the peace. The actions available at common law to prosecute racial defamation were those of criminal libel and public mischief.¹

The sedition laws made it illegal "to promote feelings of ill-will and hostility between different classes of His Majesty's subjects."² But if this vague and broad definition had been literally applied, freedom of speech could easily have faced serious compromise. As cases were tried under sedition laws, two issues quickly came to the fore: must actual violence result from inciting remarks in order to obtain a conviction, and need the state prove some sort of intent on the part of the accused?

The actual wording of the early definition for seditious libel implies that any stirring up of ill-will could be restricted, regardless of whether it tended to promote violence. Indeed, this interpretation seemed to be the accepted theory underlying both R. v. Osborne³ and R. v. Burns.⁴

The Osborne case was one of the first prosecutions for seditious libel based upon incitement to racial hatred. It involved a scandal-seeking newspaper which printed a story that some Portuguese Jewish immigrants living in London had burned a woman and her child because the child's father was a Christian. Subsequently, several of the named Jews suffered mob beatings. The Osborne court held that the publication tended "to raise tumults and disorders among the people, and inflame them with a spirit of universal barbarity against a whole body of men."⁵

In R. v. Burns⁶ the defendant was alleged to have uttered seditious speeches in Trafalgar Square before a crowd of unemployed workers, causing a crowd of three thousand people to follow him through St. James' Street and Piccadilly breaking windows. Burns was charged "with stirring up 'jealousies, hatred and ill-will' between different classes of Her Majesty's subjects"⁷ and at one point in the trial the presiding justice said, "... the intention to incite ill-will amongst the different classes of Her Majesty's subjects may be seditious."⁸

Although these decisions seemed to suggest that incitement could be prosecuted regardless of the consequences, both holdings did involve violence. Indeed, later cases made it clear that prosecutions were to rely on this factor.

In R. v. Aldred,⁹ the defendant was convicted of having published a periodical which advocated India's independence from Britain, glorified an Indian student who had killed

¹ A. Lester and G. Bindman, Race and Law 344 (1972) [hereinafter Lester].
² Sir J.F. Stephan, Digest of the Criminal Law (1883), arts. 91, 23.
⁶ See supra note 2.
⁸ Id.
⁹ 22 Cox C.C. 1 (1909).
a British political figure, and asserted that political assassination was not murder.\textsuperscript{10} Although the case did not directly involve racial incitement, the test for seditious libel was said to be “whether the language was calculated . . . to promote public disorder or physical force or violence.”\textsuperscript{11} Factors to be weighed included the audience addressed, the posture of public opinion, and the place and mode of publication. The court added that the truth of the language was not a defense to a charge of seditious libel.\textsuperscript{12}

A thorough test of these criteria did not come until 1947, when two British sergeants were murdered in Palestine by a Jewish gang. Indignant mobs in England responded by smashing and looting Jewish shops. A number of those caught received stiff sentences.\textsuperscript{13} Against this backdrop James Caunt, the editor of a small\textsuperscript{14} British newspaper called the \textit{Morecambe and Heysham Visitor}, wrote:

\begin{quote}
[T]here is very little with which to rejoice greatly except the pleasant fact that only a handful of Jews bespoil the population of our borough . . . . The foregoing sentence may be regarded as an outburst of anti-semitism. There is a growing feeling that Britain is in the grip of the Jews . . . violence may be the only way to bring them to a sense of their responsibility to the country in which they live.\textsuperscript{15}
\end{quote}

Caunt was prosecuted for seditious libel.\textsuperscript{16} At his trial, he admitted that he had intended his editorial to offend Jews. He denied, however, that he had intended any violence to result. Justice Birkett explained to the jury:

\begin{quote}
The proper statement of the law was that a man publishes a seditious libel if he does so with the intention of \textit{promoting violence} by stirring up hostility and ill-will between different classes of His Majesty's subjects . . . . It is not enough merely to provoke hostility or ill-will, because that may be done by speeches which certainly do not come within the realm of seditious libel.\textsuperscript{17}
\end{quote}

Under this “subjective intent” test, the jury, after deliberating thirteen minutes, returned a verdict of not guilty.

The opposite results in \textit{Aldred} and in \textit{Caunt} can be explained by analysis of the disparate tests applied. The judge in \textit{Aldred} set forth a more objective set of standards. Considering the language used, the audience, the place and mode of publication, and the current social climate, was the publication \textit{likely to promote} public disorder or violence? In \textit{Caunt}, however, a narrower test was used, requiring proof that the defendant had deliberately \textit{intended} to promote disorder. Caunt's article, admittedly an anti-semitic outburst, advocated violence as “the only way to bring [British Jewry] to the sense of their responsibility . . . .”\textsuperscript{18} He was acquitted, however, because of the \textit{Caunt} court's

\begin{footnotes}
\item[10] See \textsc{Lester, supra} note 1, at 346.
\item[12] \textit{Id.}
\item[13] \textit{See B. Cox, Civil Liberties in Britain} 231 (1975) [hereinafter \textsc{Cox}].
\item[14] Circulation 17,800.
\item[15] \textit{Cox, supra} note 13, at 231.
\item[16] \textit{Seditious Libel Charge — Article on the Jews — , London Times, Nov. 18, 1947 at 3, col. 3; see also} \textit{Note}, 64 \textit{L.Q.R.} 203 (1948).
\item[17] \textit{Id.}
\item[18] \textit{Cox, supra} note 13, at 231.
\end{footnotes}
subjective intent requirement, and its instruction to the jury that “nothing should be
done in this court to destroy or weaken the liberty of the Press.”

The failed prosecution of Caunt, who “went away to write a rather gloating anti-
semitic editorial to celebrate his triumph,” implied that “if sedition is to be used as a
weapon against those who incite racial hatred, then not only ill-will but also violence
must be proved to have been intended.” Thus both the element of promoting actual
violence and the necessity to prove intent were incorporated within this method of
restricting racial incitement.

There are also practical reasons that dictate against using sedition to prosecute racial
defamation. Charges under this rubric may only be tried formally by an Assize Court,
whereas a quick summary action before a magistrates’ court might be preferable in cases
of inciting racial hatred. A summary prosecution (without counsel) would not only be
less expensive, but there would also be less publicity given to the accused, the crime, and
the verdict. Finally, the nature of sedition and political considerations conspire in such
a way as to require that the jury be allowed to rule that a prosecution was improperly
brought.

Such inherent weaknesses in sedition prosecutions eventually led Parliament to
create the new crime of incitement to racial hatred, discussed at length infra. Caunt
helped supply grist for the mill. The leaders of British Jewry considered the verdict to
be a serious threat to their well-being, especially in view of the Nazi experience only
several years earlier. That a newspaper editor could publish an avowedly anti-semitic
editorial and go unpunished was outrageous to them and to

The other common law weapon against group libel is the old offense of effecting a
public mischief. Defined even more vaguely than seditious libel, it included “all
offences of a public nature,” that is, “all such acts or attempts as tend to the prejudice of the
community.” Under the public mischief laws, there is more opportunity to attempt to
restrict racially defamatory statements which do not directly promote violence. The very
ambiguity of this offense, however, could seriously threaten the freedom of speech.

A prosecution for public mischief arose in 1936 because of an article published in
The Fascist magazine by the leader of the Imperial Fascist League, Arnold Leese. His
article suggested that the Jewish community was guilty of a series of unsolved child
murders, associating the killings with the ritual Jewish slaughter of cattle. Leese was
charged with “inciting a public mischief by rendering His Majesty’s subjects of the Jewish
faith liable to suspicion, affront and boycott.” He was found guilty and sentenced to
six months in prison. The only apparent effect of the short sentence was to elevate Leese
to a status somewhere between hero and martyr. Upon his release from prison, his
followers drove him away in triumph, swastikas fluttering from their cars, to a celebration

19 Id.
20 Id. at 232.
21 Id.
22 See LESTER, supra note 1, at 349.
25 Id.
party. Leese thereafter began work on a book which elaborated upon his ritual-murder allegations. Though the book was published, there was no further prosecution.

The common law offenses of public mischief and sedition have been deemed cumbersome weapons against racial incitement primarily because of their definitional vagueness. The former has been roundly condemned by academics and practitioners alike simply because it exists. "The offense would also cover any other 'wrongs' which have not as yet been expressly made criminal offenses — and to make these wrongs into crimes is the work of Parliament and not that of the Bench." A further demonstration of the ambiguity of both sedition and public mischief is that they overlap. As the court in *R. v. Joshua* stated, "it is undesirable that the same offence should be charged both as seditious and as a public mischief."

### A. The Early Statutes

The Public Order Act was passed in 1936 as the first legislative response to a steady increase of incidents of incitement to racial hatred. The statute was aimed particularly at combatting anti-semitic fascist demonstrations. Specifically, it banned the wearing of uniforms during public demonstrations and broadened the state's power to prohibit a march or demonstration deemed likely to lead to a breach of the peace. In practice, however, fascists were often indulged and anti-fascist hecklers arrested.

Section 5 of the Public Order Act made it an offense to use "threatening, abusive or insulting words or behavior with intent to provoke a breach of the peace or whereby a breach of the peace is likely." The maximum penalties available under this section were three months' imprisonment or a fine of L50.

It is important to note that section 5 sets forth a test which may be satisfied by the analysis of either the defendant's motivation or the consequences of his acts. The test is met, and a conviction made possible, if it can be shown that the accused deliberately intended to provoke a breach of the peace or, regardless of his intention, due to his actions a breach of the peace would be likely. Thus, unlike the possibility in the *Caunt* case, a section 5 defendant cannot win acquittal merely by denying his intention to promote violence.

The case of *Jordan v, Burgoyne* is illustrative. In July 1963, Colin Jordan, leader of the neo-Nazi National Socialist Movement, addressed a gathering of several thousand in Trafalgar Square. Many in the crowd were upset by what he had to say, especially after he asserted that "Hitler was right . . . . Our real enemies, the people we should have fought, were not Hitler and the National Socialists of Germany but world Jewry and its associates in this country."

At Jordan's trial, the court held that his speech had not been likely "to lead ordinary reasonable people hearing it to commit breaching of the peace." The appellate court,

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26 See LESTER, supra note 1, at 350.
27 Id. at 349.
29 Public Order Act. 1936. 1 Edw. 8 & 1 Geo. 6, ch. 6.
30 Id.
31 Id.
32 2 Q.B. 744; 2 All E.R. 225 (1965).
33 Id.
34 Id.
however, reversed the trial court. Section 5 was construed to mean that "the [speaker] must take his audience as he finds them, and if those words to that audience, or part of that audience, are likely to provoke a breach of the peace, than the speaker is guilty of an offence." Thus, the test allowed for no consideration as to whether the audience was composed of reasonable men.

Commentators have criticized the approach taken in Jordan, viewing it as a "carte blanche offer to any group who wished to break up any meeting," and, as such, a serious danger to freedom of speech. Such critics apparently adopt the traditional libertarian view that no one should, or could, be granted the power to decide what speech is threatening, abusive, or insulting and what speech is not.

The scope of section 5 has been broadened even more by judicial and legislative acts. For example, in Ward v. Holman, it was decided that the application of section 5 was not to be limited to large public gatherings. It was deemed sufficient that the offensive words be spoken in public and provoke a breach of the peace.

Perhaps more significantly, Parliament itself acted to strengthen section 5 with the passage of the Public Order Act of 1963, which increased the maximum penalties for incitement to racial hatred to £500 and twelve months' imprisonment. In addition, the accused could be tried on indictment.

In 1965 Parliament passed the Race Relations Act, section 7 of which makes it an offense to "distribute or display any writing, sign or visible representation which is threatening, abusive or insulting with intent to provoke a breach of the peace, or whereby a breach is like to be occasioned."

On the other hand, with regard to civil damages, individual members of a racial/ethnic group had no cause of action unless the libel was specifically aimed at them. For example, in 1936, John Beckett, editor of the British Union of Fascists' periodical called Action, was sued for individual libel for asserting that Lord Camrose, owner of the Daily Telegraph, was "of Jewish extraction and has intimate contacts with international Jewish interests." In fact Camrose was not a Jew. But even if he were, argued Beckett, it is not derogatory to call a man a Jew. The jury awarded Camrose £12,500 and the Daily Telegraph £750 — presumably because, apart from the falsity of the statement, the article unfairly characterized him as an unpatriotic, foreign financier.

Via section 6 of the Race Relations Act of 1965, Parliament sought to create a law to deal specifically with racial incitement, as opposed to the more general provocation of breaches of the peace. Under section 6 a person is guilty if:

with intent to stir up hatred against any section of the public in Great Britain distinguished by colour, race or ethnic or national origins: (a) he publishes or distributes written matter which is threatening, abusive or insulting, or (b) he uses in any public place or at any public meeting words likely to stir
up hatred against that section on grounds of colour, race or ethnic or national origins.\textsuperscript{44}

The Act of 1965 differed from section 5 of the Public Order Act of 1936 in several important aspects. First, conviction under the 1965 Act allowed punishments substantially greater than those in the 1936 Act.\textsuperscript{45} Second, the newer law placed a much greater burden of proof upon the government. Whereas the 1936 Act required the prosecution to demonstrate that the defendant’s actions were \textit{either} intended \textit{or} likely to cause a breach of the peace, the 1965 Act necessitated that \textit{both} tests be met for an offense to have been committed.\textsuperscript{46} Therefore, no conviction could be secured unless it could be proven that the specific language used was abusive \textit{and} that there was an intent on the part of the speaker to promote hatred. The intention of the accused was thus sought to be determined objectively. So could a reasonable man infer from the defendant’s action that he intended to stir up local hatred?

Another substantive distinction was that the 1965 Act is confined to actions which provoke hatred of racial groups living in Great Britain. This limitation was not as restrictive as it may appear. A libelous attack upon a foreign group may be likely to stir up hatred against the group’s British segment. A virulent diatribe against foreign Jewry, for example, might still threaten disorder and stir up hatred against British Jewry, and thus fall within the proscription of the 1965 Act.

The third, and perhaps most important change rendered by the Race Relations Act of 1965, is the procedural requirement that a prosecution could only be brought by the Attorney General, or with his consent. This was a purposeful design, to enable the Government to avoid petty prosecutions and focus on what it perceived to be the more dangerous, persistent and insidious forms of propaganda — campaigns which, over a period of time, engender the hatred which begets violence. The Attorney General’s consent was also viewed as a safeguard against proceedings being undertaken in circumstances which would penalize or inhibit legitimate controversy. Thus is illustrated another fundamental difference in free-speech theory. Unlike the American approach, the British do not hesitate to invest one government official with the power to decide what is “legitimate” speech and what is not.

A fourth dissimilarity between the 1965 Act and its 1936 precursor was that the former criminalizes incitement only to racial, not religious, hatred. The argument was that a person should not suffer because of that which he cannot change, such as his race. His political and religious beliefs, on the other hand, may be fair game for criticism. Although the question has come up as to how Jews should be regarded, the general consensus was that they are covered under this law.\textsuperscript{47}

Additionally, the Race Relations Act of 1965 protected only against racial incitement which is verbal — that is, taking the form of spoken or written words. It would not prohibit mime or gestures intended to incite racial hatred. This approach appears to represent a retrenchment from the 1936 Act, which punished “the distribution or display of any writing, sign or visible representation which is threatening, abusive or insulting.”\textsuperscript{48}

\textsuperscript{44} Race Relations Act, 1965, ch. 73.
\textsuperscript{45} The new penalties were two years imprisonment, a £1000 fine, or both.
\textsuperscript{46} LESTER, \textit{supra} note 1, at 362.
\textsuperscript{48} Race Relations Act, 1965, ch. 73.
Now gesticulations unaccompanied by words would not be caught by section 6. This seems all the more anomalous in view of the fact that section 7 of the 1965 Act expressly attempted to tighten, this very loophole, by adding to section 5 of the Public Order Act of 1936 the aforementioned provision making an offense "any writing, sign or visible representation which is threatening, abusive or insulting." 49

Modeled upon the provisions of the 1965 Act, the 1968 Theatres Act 50 extended the offense of racial incitement to the public performance of plays. In determining whether the offensive words in a performance render it likely to stir up racial hatred, the performance must be "taken as a whole" 51 — an underscoring requirement designed to safeguard against the possibility that an offensive passage will be considered outside its proper context.

B. Prosecutions (1965–1975)

The initial prosecution under the Race Relations Act of 1965 came in 1967. It was against Christopher Britton, a seventeen-year-old laborer who had posted a racist pamphlet entitled Blacks Not Wanted Here to the front door of a house belonging to a member of Parliament. 52 Britton also attached an offensive sign to a beer bottle, which he launched through a window in the door. He was caught, tried, and convicted. On appeal, however, the conviction was overturned. Although the court described the defendant as a "wretched little youth," it held that his actions did not constitute a "distribution" within the meaning of section 6(2) of the 1965 Act. 53 Moreover, found the court, Britton was attempting to communicate his views to a member of Parliament — not inciting the population to racial hatred. 54

Implicit in Britton is the principle that the 1965 Act does not, or should not, cover small-scale isolated incidents of group libel. This is precisely the type of prosecution that, by requiring the consent of the Attorney General, the drafters of the 1965 Act sought to discourage.

In contrast, the racist literature published by the National Socialist Movement resulted in at least two convictions. One was of Colin Jordan, the aforementioned leader of the neo-Nazi Socialist Movement. In 1966 Jordan put out a pamphlet entitled The Coloured Invasion, which posited that "the presence of the Coloured million in our midst is a menace to our nation." 55 He also distributed anti-Semitic stickers. Prosecuted on a charge of incitement to racial hatred, Jordan defended on the basis of his printed disclaimer, which denied any intention to promote racial hatred. Rather, he said, he had only wanted to expose "grave national dilemmas" and to promote a patriotic and lawful resolution to them. 56

The jury was instructed to determine for itself Jordan's intention, and in so doing consider the policy and purposes of the National Socialist Movement. The jury returned
a verdict of guilty. Jordan was sentenced to eighteen months' imprisonment. Later in 1967 Vincent Carl Morris, a member of Jordan's organization, was found guilty of inciting two youths to distribute racist leaflets, and was sentenced to six months' imprisonment.

The Race Relations Act of 1965 was also used to prosecute leaders of the Black Power movement for anti-white diatribes. In November 1967, Michael Abdul Malik was charged with using a racist speech to stir up racial hatred at a Black Power gathering in Reading. Malik was convicted and sentenced to twelve months' imprisonment. Later that month, four other black radicals were fined a total of £270 for anti-white speeches made at Speaker's Corner in Hyde Park.

Even these prosecutions have been roundly criticised. The speakers did not represent large, active, or well-known racist groups, but rather, relatively insignificant organizations. Additionally, the principal effect of their trials was to give greater publicity to their views, which had originally been addressed to relatively small audiences.

Perhaps even more damaging than the criticism was the case of R. v. Hancock. Decided in 1969, it brought an abrupt end to the string of successful government prosecutions for incitement to racial hatred. In Hancock, five members of the Racial Preservation Society were arraigned for distributing their newspaper, the Southern News. Like Colin Jordan's pamphlet Coloured Invasion, the Southern News contained a carefully worded disclaimer seeking to deflect the operation of the 1965 Act. It specifically disavowed any intent to promote "racial hatred or contempt of any other race or minority group." The primary mission and message of the Southern News was the return of non-whites from Great Britain, called an "overcrowded island," to their ancestral countries. In so doing, it speculated that blacks were genetically inferior to whites, and that "race mixing" was a dangerous practice.

Unlike Jordan's Coloured Invasion, however, the Southern News used more sophisticated language and deliberately avoided the use of obvious threats or language of incitement. The defense in Hancock understandably argued that the passages in question were nothing more than hard-hitting public comment, and that application of the 1965 Act would be an unjustified infringement upon free speech.

After a trial at the Sussex Assizes, the defendants were all acquitted. This prompted the Racial Preservation Society to triumphantly reprint the contested issue of Southern News under the banners, "Souvenir Edition" and "The Paper the Government Tried to Suppress."

Hancock pointed out the distinction, inherent in the wording of the Act itself, between that which is said or published with the intent to incite racial hatred, and that which rationally and scientifically discusses negative aspects of various racial groups. Thus

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57 Id.
59 R. v. Malik, 1 All E.R. 582 (1968).
62 The case was poorly reported in the London press. For a detailed discussion by an eyewitness, see Longaker, supra note 61, at 130–42.
63 Id.
64 Id.
65 Id.
scientific studies would be beyond reproach as long as no intention of inciting racial hatred can be assumed under the criteria established in Jordan. In fact, even if the possibility of intent exists, if the actual language used is not abusive, there appears to be no legal recourse under Hancock.

The relatively moderate language of the racist propaganda employed by the Hancock defendants pre-ordained a trend away from the earlier more harsh and obvious forms of group libel and slander. Contemporary racist publications tend to be more cautiously worded. Their editorial substance has likewise changed, focusing less on anti-semitic slurs and more on the adverse impact of “coloured immigration” upon British society. They consistently disclaim any intention to stir up racial hatred and purport to be contributions to public education. In fact a major effect of this act has been to leave certain organizations with but two choices: to restrict their circulation to the members of a specific club, or to be more careful in their language. However, although this seems like a positive development, it is possible that provocatively racist messages, by being concealed in genteel, and outwardly acceptable language, could be disseminated to an even larger number of people — thereby promoting more racial ill-will rather than decreasing such feelings.

Indeed, in the wake of Hancock, it seemed apparent that future prosecutions would succeed only where the defendant was “so exceptionally odious or coarsely offensive in the virulence of his racist statements that a jury will be willing, if not eager, to overlook the free speech counter-arguments.”

Between 1965 and 1976, only twenty prosecutions were brought, four of them against blacks and the rest against whites, with acquittals in over a third of the cases. Among the acquittals was the case of Kingsley Read, leader of the avowedly racist Democratic National Party, who in a public speech in London referred to “niggers, wogs, and coons” and, in reference to an Asian killed in a race riot, said, “One down, a million to go.” In his summation to the jury the judge urged that Read’s words were not in themselves unlawful, adding that “Britain was still a free country and people should be able to say what they liked provided they did not incite to violence.” To the defendant, after he had been acquitted by the jury, the judge said “By all means propagate your views. You have been rightly acquitted. But use moderate language. I wish you well.”

In many, if not all, cases it appeared that the relative potential for physical violence was a major factor in both the Attorney General’s decision whether or not to prosecute and the court’s decision to acquit or convict.

C. The Newer Legislation

Such practical and perceived difficulties in prosecuting incitements to racial hatred led to still further revisions of British law. The Race Relations Act of 1976 shifted

[^66]: See Lester, supra note 1, at 371.
[^67]: Longaker, supra note 61, at 148.
[^69]: Id. at 378.
[^70]: Id.
[^71]: Id. at 378. Sunday Telegraph (London), January 8, 1978, at 1, col. 1.
[^72]: Id.
[^73]: Race Relations Act, 1976, ch. 74.
those provisions of the 1965 Act that dealt with racial incitement back into the 1936 Act. More importantly, it removed the requirement of proof that the speaker intended to incite racial hatred. Thus conviction could be obtained merely with proof that there was speech or publication of words which could be deemed "threatening, abusive or insulting" where "having regard to all the circumstances hatred is likely to be stirred up against any racial group in Great Britain."74

One would have thought that this substantial relaxation of the state's burden of proof would have had a chilling effect on racist invective, or at least that it would have enabled more and easier prosecutions. Since 1976, however, when the Act was passed, racial defamation and violence have increased and prosecutions for incitement to racial hatred have been few in number.75

The problem, according to a number of critical observers, has largely been the Attorney General's refusal to consent to prosecution in more than a few instances.76 In 1986, for example, only five cases were brought against but twelve defendants. Of these, eight were convicted and four were acquitted.77

This anomalous state of affairs led to still further movement in Great Britain to revise the incitement laws. Wrote one critic:

[T]here may be a need for a clear legislative recognition that expression of unshamedly racist sentiments, as such, is an aspect of freedom of speech too costly in terms of long-term social disharmony to be tolerated in a pluralistic society where ultimately the possibility of democracy and civil liberty may depend on wholehearted public commitment to the fostering of social solidarity.78

Similarly, the legal adviser to the Commission for Racial Equality noted:

[It is] basic failure of the Government . . . to recognize that racialism is not a legitimate political philosophy, fit to take its place with others in the marketplace of ideas, but is a disease which cannot be allowed to spread in a civilized society. While it may not be possible or desirable to prohibit the holding of socialist views, the expression of such views publicly is not required by any acceptable doctrine of freedom of speech.79

But that view did not necessarily reflect public opinion. The London Times underscored the conflicting sentiments:

Englishmen have a strong attachment to freedom of speech. The freedom was won . . . not just to enable people to say pleasant, fraternal and acceptable things . . . but to say distasteful, unacceptable, provocative, antagonistic things . . . . Any criminal statute which is framed to circumscribe that

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74 Gewirtz, supra note 68 at 379.
76 Id.
78 Cotterrell, supra note 75.
freedom is likely to be given a bumpy ride, however desirable or even necessary to purpose may be.80

In May of 1985, the Secretary of State for the Home Department presented a White Paper to Parliament, outlining the government's proposals to increase the effectiveness of the incitement laws. The government proposed to criminalize conduct which is either likely or intended to stir up racial hatred, a change intended to further ease the prosecution's evidentiary burden by severing the public-order nexus and penalizing expression as such. The White Paper explained: "[A]t present, the more level-headed the recipients of racially inflammatory materials, the more difficult it is to show that racial hatred is likely, ... even when ... this was clearly the intention of the distribution."82 Thus, for example, in R. v. Britton,83 where a racist pamphlet was physically attached to the house of a member of Parliament, the defendant's clear intentions alone would likely result in his conviction. He could not hide behind the unlikelihood that the member of Parliament himself would be incited to racial hatred.84 Additionally, the government's White Paper proposed to remove the existing exemption for material published or distributed within an association, as well as to create a new offence of possessing racially inflammatory material with an intent to distribute or publish it.85

But do these proposals go far enough? Commentators have suggested that continuation of the requirement that the Attorney General consent to prosecution is a critical weakness in the government's proposals.86 In addition, the argument goes, the police must have the authority to arrest violators of the incitement laws, a power currently denied them. One critic of the White Paper wrote: "[A]s a document laying the ground of our public order law for the next 50 years or so, it is disappointingly lean — a bulletin from the barricades rather than the comprehensive tract that the problems of freedom of speech in public properly deserve."87

The debate in Parliament was heated. Calling the recent increase in racism a "desperately serious" problem, one member argued vehemently for removal of the Attorney General's consent requirement.88 "At times of economic distress there is a search for scapegoats," he said, "and scapegoats are often minority ethnic groups."89 Another member expressed his desire that religious groups be expressly included in the protection afforded by the incitement laws, citing this century's experience of "some oppression and harassment ... in Britain and the world."90 The National Council for Civil Liberties advocated making incitement an arrestable offence, likewise calling for removal of the Attorney General's consent to prosecution.91

81 REVIEW OF PUBLIC ORDER LAW, MAY 1985, CMND. No. 9510.
82 Id. See also supra note 68.
83 Supra note 52 and accompanying text.
84 NATIONAL COUNCIL ON CIVIL LIBERTIES, FREE TO WALK TOGETHER? (A GUIDE TO THE GOVERNMENT'S PUBLIC ORDER PROPOSALS) 28 (1985).
85 Id.
86 Id.
88 89 PARL. DEB. H.C. 859 (1986).
89 Id.
90 Id. at 854.
The law that was finally enacted in November 1986 was a clear affirmation of the government's resolve to oppose racial incitement both philosophically and physically, although it still falls short of meeting some of the major criticisms noted above. Part III of the Public Order Act of 1986 deals exclusively with racial hatred. Section 7 keeps

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92 The pertinent parts of the 1986 Act are as follows:

§ 17 Meaning of "racial hatred":
In this part "racial hatred" means hatred against a group of persons in Great Britain defined by reference to colour, race, nationality (including citizenship) or ethnic or national origins.

§ 18 Use of words or behaviour or display of written material:
(1) A person who uses threatening, abusive or insulting words or behaviour, or displays any written material which is threatening, abusive or insulting, is guilty of an offence if —
   (a) he intends thereby to stir up racial hatred,
   (b) having regard to all the circumstances racial hatred is likely to be stirred up thereby.
(2) An offence under this section may be committed in a public or a private place, except that no offence is committed where the words or behaviour are used, or the written material is displayed, by a person inside a dwelling and are not heard or seen except by other persons in that or another dwelling.
(3) A constable may arrest without warrant anyone he reasonably suspects is committing an offence under this section.
(4) In proceedings for an offence under this section it is a defence for the accused to prove that he was inside a dwelling and had no reason to believe that the words or behaviour used, or the written material displayed, would be heard or seen by a person outside that or any other dwelling.
(5) A person who is not shown to have intended to stir up racial hatred is not guilty of an offence under this section if he did not intend his words or behaviour, or the written material, to be, and was not aware that it might be, threatening, abusive or insulting.
(6) This section does not apply to words or behaviour used, or written material displayed, solely for the purpose of being included in a programme broadcast or included in a cable programme service.

§ 19 Publishing or distributing written material:
(1) A person who publishes or distributes written material which is threatening, abusive or insulting is guilty of an offence if —
   (a) he intends thereby to stir up racial hatred,
   (b) having regard to all the circumstances racial hatred is likely to be stirred up thereby.
(2) In proceedings for an offence under this section it is a defence for an accused who is not shown to have intended to stir up racial hatred to prove that he was not aware of the content of the material and did not suspect, and had no reason to suspect, that it was threatening, abusive or insulting.

§ 20 Public performance of play:
(1) If a public performance of a play is given which involves the use of threatening, abusive or insulting words or behaviour, any person who presents or directs the performance is guilty of an offence if —
   (a) he intends thereby to stir up racial hatred,
   (b) having regard to all the circumstances (and, in particular, taking the performance as a whole) racial hatred is likely to be stirred up thereby.
(2) If a person presenting or directing the performance is not shown to have intended to stir up racial hatred, it is a defence for him to prove —
   (a) that he did not know and had no reason to suspect that the performance would involve the use of the offending words or behaviour, or
(b) that he did not know and had no reason to suspect that the offending words or
behaviour were threatening, abusive or insulting, or
(c) that he did not know and had no reason to suspect that the circumstances in which
the performance would be given would be such that racial hatred would be likely to
be stirred up.
(3) This section does not apply to a performance given solely or primarily for one or
more of the following purposes —
(a) rehearsal,
(b) enabling the performance to be broadcast or included in a cable programme service;
but if it is proved that the performance was attended by persons other than those
directly connected with the giving of the performance or the doing in relation to it
the things mentioned in paragraph (b) or (c), the performance shall, unless the contrary
is shown, be taken not to have given solely or primarily for the purposes mentioned
above.
(4) For the purposes of this section —
(a) a person shall not be treated as presenting a performance of a play by reason only
of his taking part in it as a performer,
(b) a person taking part as a performer in a performance directed by another shall be
treated as a person who directed the performance if without reasonable excuse he
performs otherwise than in accordance with that person's direction, and
(c) a person shall be taken to have directed a performance of a play given under his
direction notwithstanding that he was not present during the performance; and a
person shall not be treated as aiding or abetting the commission of an offence under
this section by reason only of his taking part in a performance as a performer.
(5) In this section “play” and “public performance” have the same meaning as in the
Theatres Act 1968.
(6) The following provisions of the Theatres Act 1968 apply in relation to an offence
under this section as they apply to an offence under § 2 of that Act —
§ 9 (script as evidence of what was performed),
§ 10 (power to make copies of script),
§ 15 (powers of entry and inspection).
§ 21 Distributing, showing or playing a recording:
(a) A person who distributes, or shows or plays, a recording of visual images or sounds
which are threatening, abusive or insulting is guilty of an offence if —
(a) he intends thereby to stir up racial hatred, or
(b) having regard to all the circumstances racial hatred is likely to be stirred up thereby.
(2) In this part “recording” means any record from which visual images or sounds
may, by any means, be reproduced; and references to the distribution, showing or
playing of a recording are to its distribution, showing or playing to the public or a
section of the public.
(3) In proceedings for an offence under this section it is a defence for an accused who
is not shown to have intended to stir up racial hatred to prove that he was not aware
of the content of the recording and did not suspect, and had no reason to suspect,
that it was threatening, abusive or insulting.
(4) This section does not apply to the showing or playing of a recording solely for the
purpose of enabling the recording to be broadcast or included in a cable programme
service.
§ 22 Broadcasting or including programme in cable programme service:
(1) If a programme involving threatening, abusive or insulting visual images or sounds
is broadcast, or included in a cable programme service, each of the persons mentioned
in subsection (2) is guilty of an offence if —
(a) he intends thereby to stir up racial hatred, or
(b) having regard to all the circumstances racial hatred is likely to be stirred up thereby.
(2) The persons are —
(a) the person providing the broadcasting or cable programme service,
(b) any person by whom the programme is produced or directed, and
(c) any person by whom offending words or behaviour are used.

(3) If the person providing the service, or a person by whom the programme was produced or directed, is not shown to have intended to stir up racial hatred, it is a defence for him to prove that —

(a) he did not know and had no reason to suspect that the programme would involve the offending material, and

(b) having regard to the circumstances in which the programme was broadcast, or included in a cable programme service, it was not reasonably practicable for him to secure the removal of the material.

(4) It is a defence for a person by whom the programme was produced or directed who is not shown to have intended to stir up racial hatred to prove that he did not know and had no reason to suspect —

(a) that the programme would be broadcast or included in a cable programme service, or

(b) that the circumstances in which the programme would be broadcast or so included would be such that racial hatred would be likely to be stirred up.

(5) It is a defence for a person by whom offending words or behaviour were used and who is not shown to have intended to stir up racial hatred to prove that he did not know and had no reason to suspect —

(a) that a programme involving the use of the offending material would be broadcast or included in a cable programme service, or

(b) that the circumstances in which a programme involving the use of the offending material would be broadcast, or so included, or in which a programme broadcast so included would involve the use of the offending material, would be such that racial hatred would be likely stirred up.

(6) A person who is not shown to have intended to stir up racial hatred is not guilty of an offence under this section if he did not know, and had no reason to suspect, that the offending material was threatening, abusive or insulting.

(7) This section does not apply —

(a) to the broadcasting of a programme by the British Broadcasting Corporation or the Independent Broadcasting Authority, or

(b) to the inclusion of a programme in a cable programme service by the reception and immediate re-transmission of a broadcast by either of those authorities.

(8) The following provisions of the Cable and Broadcasting Act 1984 apply to an offence under this section as they apply to “relevant offence” as defined in § 33(2) of that Act —

§ 33 (scripts as evidence),
§ 34 (power to make copies of scripts and records),
§ 35 (availability of visual and sound records),
and §§ 33 and 34 of that Act apply to an offence under this section in connection with the broadcasting of a programme as they apply to an offence in connection with the inclusion of a programme in a cable programme service.

§ 23 Possession of racial inflammatory material:
A person who has in his possession written material which is threatening, abusive or insulting, or a recording of visual images or sounds which are threatening, abusive or insulting, with a view to —

(a) in the case of written material, its being displayed, published, distributed, broadcast or included in a cable programme service, whether by himself or another, or

(b) in the case of a recording, its being distributed, shown, played, broadcast or included in a cable programme service, whether by himself or another, is guilty of an offence if he intends racial hatred to be stirred up thereby or, having regard to all the circumstances, racial hatred is likely to be stirred up thereby.

(2) For this purpose regard shall be had to such display, publication, distribution, showing, playing, broadcasting or inclusion in a cable programme service as he has, or it may reasonably be inferred that he has, in view.
(3) In proceedings for an offence under this section it is a defence for an accused who
is not shown to have intended to stir up racial hatred to prove that he was not aware
of the content of the written material or recording and did not suspect and had no
reason to suspect, that it was threatening, abusive or insulting.
(4) This section does not apply to the possession of written material or a recording by
or on behalf of the British Broadcasting Corporation or the Independent Broadcasting
Authority or with a view to its being broadcast by either of those authorities.
§ 24 Powers of entry and search:
(1) If in England or Wales a justice of the peace is satisfied by information on oath
laid by a constable that there are reasonable grounds for suspecting that a person has
possession of written material or a recording in contravention of § 23, the justice may
issue a warrant under his hand authorizing any constable to enter and search the
premises where it is suspected the material or recording is situated.
(2) If in Scotland a sheriff or justice of the peace is satisfied by evidence on oath that
there are reasonable grounds for suspecting that a person has possession of written
material or a recording in contravention of § 23, the sheriff or justice may issue a
warrant authorizing any constable to enter and search the premises where it is sus­
pected the material or recording is situated.
(3) A constable entering or searching premises in pursuance of a warrant issued under
this section may use reasonable force if necessary.
(4) In this section “premises” means any place and, in particular, includes —
(a) any vehicle, vessel, aircraft or hovercraft,
(b) any offshore installation as defined in § 1(3)(b) of the Mineral Workings (Offshore
Installations) Act 1971 and
(c) any tent or movable structure.
§ 25 Power to order forfeiture:
(1) A court by or before which a person is convicted of —
(a) an offence under § 18 relating to the display of written material, or
(b) an offence under §§ 19, 21, or 23, shall order to be forfeited any written material
or recording produced to the court and shown to its satisfaction to be written material
or a recording to which the offence relates.
(2) An order made under this section shall not take effect —
(a) in the case of an order made in proceedings in England and Wales, until the expiry
of the ordinary time within which an appeal may be instituted, until it is finally decided
or abandoned;
(b) in the case of an order made in proceedings in Scotland, until the expiration of
the time within which, by virtue of any statute, an appeal may be instituted or, where
such an appeal is duly instituted, until the appeal is finally decided or abandoned.
(3) For the purposes of subsection (2)(a) —
(a) an application for a case stated or for leave to appeal shall be treated as the
institution of an appeal, and
(b) where a decision on appeal is subject to a further appeal, the appeal is not finally
determined until the expiry of the ordinary time within which a further appeal may
be instituted or, where a further appeal is duly instituted, until the further appeal is
finally decided or abandoned.
(4) For the purposes of subsection (2)(b) the lodging of an application for a stated case
or note of appeal against sentence shall be treated as the institution of an appeal.
§ 26 Savings for reports of parliamentary or judicial proceedings:
(1) Nothing in this Part applies to a fair and accurate report of proceedings in
Parliament.
(2) Nothing in this Part applies to a fair and accurate report of proceedings publicly
heard before a court or tribunal exercising judicial authority where the report is
published contemporaneously with the proceedings or, if it is not reasonably practic­
able or would be unlawful to publish a report of them contemporaneously, as soon as
publication is reasonably practicable and lawful.
§ 27 Procedure and punishment
(1) No proceedings for an offence under this Part may be instituted in England and
Wales except by or with the consent of the Attorney General.
intact the requirement that the Attorney General consents to prosecutions. Section 17
defines "racial hatred" as that against a group of persons in Great Britain defined by
reference to color, race, nationality (including citizenship) or ethnic or national origins.
Religious groups are not expressly included. Section 18, however, does allow a constable
to "arrest without warrant anyone he reasonably suspects is committing an offense under
this section," which offense again consists of using "threatening, abusive or insulting
words or behavior," by which the user "intends thereby to stir up racial hatred, or . . .
having regard to all the circumstances racial hatred is likely to be stirred up thereby."93

It is much too early, of course, to assess the effect of the new law. It seems rather
clear, though, that its impact remains largely within the discretionary power of the
Attorney General. As in the past, the extent to which he exercises his prosecutorial

(2) For the purposes of the rules in England and Wales against charging more than
one offence in the same count or information, each of sections 18-to-23 creates one
offence.

(3) A person guilty of an offence under this part is liable —
(a) on conviction on indictment to imprisonment for a term not exceeding two years
or a fine or both;
(b) on summary conviction to imprisonment for a term not exceeding six months or
a fine not exceeding the statutory maximum or both.

Annotations: This Part extends to Scotland.

§ 28 Offences by corporations
(1) Where a body corporate is guilty of an offence under this Part and it is shown that
the offence was committed with the consent or connivance of a director, manager,
secretary or other similar officer of the body, or a person purporting to act in any
such capacity, he as well as the body corporate is guilty of the offence and liable to be
proceeded against and punished accordingly.
(2) Where the affairs of a body corporate are managed by its members, subsection (1)
applies in relation to the acts and defaults of a member in connection with his or
management as it applies to a director.

§ 29 Interpretation
In this Part —
"broadcast" means broadcast by wireless telegraphy (within the meaning of the Wireless
Telegraphy Act 1949) for general reception, whether by way of sound broadcasting
or television;
"cable programme service" has the same meaning as in the Cable and Broadcasting
Act 1984;
"distribute, and related expressions, shall be construed in accordance with § 19(3)
(written material) and § 21(2) (recordings);
"dwellings" means any structure or part of a structure occupied as a person's home
or other living accommodation (whether the occupation is separate or shared with
others) but does not include any part not so occupied, and for this purpose "structure"
includes a tent, caravan, vehicle, vessel or other temporary or movable structure;
"programme" means any item which is broadcast or included in a cable programme
service;
"publish", and related expressions, in relation to written material, shall be construed
in accordance with § 19(3);
"racial hatred" has the meaning given by § 17;
"recording" has the meaning given by § 21(2), and "play" and "show", and related
expressions, in relation to a recording, shall be construed in accordance with that
provision;
"written material" includes any sign or other visible representation.

93 Id.
discretion will determine both the strength of the law in determining racism, and its concomitant weakness in inhibiting free speech.

Although the Attorney General's Office supported the new act, and feels that "the law is sufficient — to go further would be very dangerous," it recognizes the limitations on the exercise of its discretion. How, for example, should it handle the case of The Dowager Lady Birdwood, as she bills herself, an elderly woman who publishes a racist periodical called CHOICE? To her way of thinking there is nothing wrong with racial defamation, and indeed, she asserts, "racialism is patriotism." Her publication is almost entirely concerned with "repatriation — that is, sending blacks and Jews back where they came from." Amidst reasonably well-argued editorials for an "all British Britain" are tidbits like these:

There is an Anti-Christian commandment to create a multi-racial hell in Britain in the name of a Zionist, one-world takeover bid.
Advert from the Black paper VOICE
Anyone for AIDS?
I am a 21 year old slim, attractive black bi-sexual girl who would love to meet a similar very pretty girl/guy aged 18-36 for a loving, caring, fun one-to-one relationship. You can be any nationality and like me enjoy pubs, clubs, cinema, theatre, travel. CHOICE says: There are many more like it. WHAT IS THE HEALTH MINISTER DOING ABOUT THIS, AND ABOUT BRITISH FORCES PERSONNEL BEING GIVEN L200 EACH WHEN THEY TAKE LEAVE IN EAST AFRICAN RESORTS?

For the Attorney General, the key questions are both strategic ("can we get past a jury?") and political ("is it wise to prosecute old ladies?"), and lend themselves only to subjective answers. He must weigh the possibility of winning against "the silliness factor." He must respond to cases brought by sources as diverse as the combined police forces, the Commission for Racial Equality, and the Board of Jewish Deputies. The latter two organizations would both rather see the Attorney General's discretion removed from the law. They recognize that his reluctance to prosecute, based on his feeling that the jury system would not sustain convictions, has been to some extent borne out by experience.

III. INTERNATIONAL DECLARATIONS ON FREEDOM OF EXPRESSION

The distinct possibility remains, of course, that no single piece of legislation could adequately limit racist propaganda without squelching "legitimate" free speech in the

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94 Interview with David Kirk, Senior Principal Legal Advisor to the Attorney General (who handles all racial-hatred complaints), (May 28, 1987).
95 Id.
96 Id.
97 CHOICE, Winter, 1987, at 7. This publication is printed and published by The Dowager Lady Birdwood, Choice Organization, 32a, Anselm Road, London, S.W.6.
98 Interview with David Kirk, supra note 94.
99 The Commission for Racial Equality is a quasi-governmental agency. The Crown appoints the Commission and funds the agency, which then operates independently.
100 The Board of Jewish Deputies is an agency of the United Synagogue organization, and acts as a liaison between the Jewish communities of Great Britain and the government.
101 Interviews with Aubrey Rose, O.B.E. (a former member of the Board of Jewish Deputies) and Francis Deutsch, Legal Director of the Commission for Racial Equality (May 28, 1987).
process. Documents even more fundamental than British laws have been just as difficult to administer when it comes to grappling with racism.

There are numerous international declarations and treaties on human rights which guarantee the freedom of expression, but most of them carry restrictions that are difficult to apply objectively. For example, the International Covenant on Civil and Political Rights reads, in pertinent part:

Everyone shall have the right to freedom of expression; this right shall receive freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

The exercise of the right ... carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary ... for respect of the rights or reputations of others.\textsuperscript{102}

The Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms (EHR) reads similarly:

Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers ....

The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society ... for the protection of the reputation or rights of others.\textsuperscript{103}

Likewise, the American Convention on Human Rights notes:

Everyone shall have the right to freedom of thought and expression ...

... The exercise of the right ... shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary in order to ensure ... respect for the rights or reputations of others.\textsuperscript{104}

In \textit{Handyside v. United Kingdom},\textsuperscript{105} the court decided that a person's freedom of expression would be interfered with by a public authority thus requiring justification under EHR 10 (2), if he is arrested, prosecuted, or punished for having published a book, article, pamphlet, or advertisement. The court observed that, subject to paragraph (2), EHR 10 applies not only to information that is favorably received or to inoffensive ideas, but also to those that offend, shock, or disturb the state or any sector of the population.\textsuperscript{106} Moreover, EHR never places the various governments under an \textit{obligation} to limit the rights and freedoms that it guarantees.

On the other hand, various national courts have said that the award of damages for defamation does not constitute interference by a public authority with freedom of expression.\textsuperscript{107} The philosophical conflict is not new. Indeed the major battles in the

\textsuperscript{102} International Convention on Civil and Political Rights, § § 19(2) and (3) (1976).

\textsuperscript{103} EHR, § § 10(1) and (2) (1953).

\textsuperscript{104} American Convention on Human Rights, § § 13(1) and (2) (1978).

\textsuperscript{105} 1 EHR 737 (1975).

\textsuperscript{106} Id. \textit{See also} Street v. New York, 394 U.S. 576 (1969).

\textsuperscript{107} \textit{See}, e.g., Jagan v. Burnham, 20 WIR 96 (Ct. App., Guyana, 1973).
western world over “freedom of speech” began centuries ago. The English Bill of Rights in 1688 provided that legislators be protected both within and outside the halls of Parliament and the American Bill of Rights guaranteed that freedom to all citizens. Article II of the French declaration des droits de l’homme et du citoyen provides that, “The unrestrained communication of thoughts or opinions being one of the most precious rights of man, every citizen may speak, write and publish freely, provided he be responsible for the abuse of this liberty, in the cases determined by law.”108

Most modern constitutions, even those of restrictive regimes like the Soviet Union, carry similar provisions, but always with restrictions that render them entirely subjective.109 And, in fact, a new British Bill of Rights, proposed in 1987 to incorporate the European Convention on Human Rights into British law, failed in both the popular press and Parliament.110 This serves as further evidence, perhaps, that a liberty as fundamental as free speech cannot be easily legislated. Thus it may well be that a civil action, in the form of a suit for group libel or racial defamation, is the most effective remedy.

IV. A CIVIL REMEDY FOR GROUP LIBEL

Several countries have attempted to legislate a group-libel action, some even in their penal codes. In France, an organization whose “aim [is] the defense of human rights or the combatting of racial discrimination is . . . entitled to initiate proceedings under the penal code in cases of incitement to discrimination, segregation, hatred or violence against ethnic or racial groups or members of such groups.”111 Belgium has a similar law.112 In Italy, members of the Jewish community were awarded damages following successful prosecution of neo-Nazis for publicly praising genocide.113 In Switzerland, the Federation of Swiss Jewish Communities was able to get the government to ban the distribution of an anti-Semitic book on the grounds that it was insulting to Jews.114

Even before enactment of the current English law attempting to strengthen the government's ability to crack down on overt racism, misgivings were being expressed about its practicality. As one commentator noted:

[T]he British Law, despite legislative attempts to strengthen it, has been largely ineffective in stemming the considerable increase in racist propaganda emanating in the main from neo-Nazi groups and directed against ethnic minorities and immigrant groups . . . . the failure comes not from any lack of purpose or skill in draftsmanship, but because the present law has set itself the enormously difficult and impractical task of altering, through coercion, public and private attitudes [of] racism in a country in which the right

108 Declaration des droits de l’homme et du citoyen, Art. II.
112 Gewirtz, supra note 68 at 375.
113 Italian Law No. 962, Prevention and Punishment of the Crime of Genocide, October 9, 1967.
to dissent or to express any opinion no matter how obnoxious, without let or hindrance, is considered the inalienable prerogative of every subject of her Majesty's realm.\textsuperscript{115}

It is not difficult to recognize the weaknesses of the current system, under which minority groups are left without redress for even the most egregious defamations which, were they directed at individuals, could yield substantial monetary damages.\textsuperscript{116} On the other hand, by shifting the responsibility for initiating an action away from the Attorney General and to the victims of verbal abuse, the issue is taken out of the political arena and permitted a greater chance of success.\textsuperscript{117}

V. CONCLUSION

Given the continued requirement of the Attorney General's consent to prosecution, it seems unlikely that racist speech in Great Britain will be more vigorously controlled under the newest (1987) incitement statute. However, it is too early to assess the new law's impact.

Similarly, in view of popular misgivings over any restraint on expression, it appears even more unlikely that a group-libel action will soon be available, regardless of how desirable or even necessary its purpose may be.

The British are on firm moral ground in seeking to draw a clear line between free speech and racism. But until they become more resolute in suppressing short-sighted political considerations, they are destined to failure in trying to practice the noble principle they preach.

\begin{footnotesize}
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\item \textsuperscript{115} GEWIRZ, supra note 68 at 376.
\item \textsuperscript{116} Id. at 381
\item \textsuperscript{117} Id.
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