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NOTE

BRITISH AND UNITED STATES HATE SPEECH LEGISLATION: A COMPARISON

I. INTRODUCTION

In both the United States and Great Britain, the last few years have been marked by an increase in the number of racist and anti-Semitic incidents in the workplace, on college campuses, and on the streets.¹ These incidents have been coined instances of "hate speech."² The term refers to a broad category of speech which degrades a person or class of people based on a person's race, religion, gender, sexual orientation, or other distinguishing status. Within this larger category, hate speech can be divided into two subdivisions: "speech addressed to the public" and "speech directed at individuals."³

Legislatures in both Great Britain and the United States are struggling for ways to address these repugnant episodes while not infringing on cherished notions of free speech.⁴ In the Race Relations Act of 1965,⁵ Great Britain targeted racist

1. Bryan Appleyard, *Still in the Swastika's Shadow*, THE SUNDAY TIMES (London), Oct. 14, 1990, § 3, at 5; Howell Raines, *London Police Faulted as Racial Attacks Soar*, N.Y. TIMES, Mar. 24, 1988, at A1.

2. See Mari J. Matsuda, *Legal Storytelling: Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2321 (1989).

3. Jon Wiener, *Letter*, 77 ACADEME 35 (1991).

4. See *Austria Offers Legislation to Make it Easier to Prosecute Neo-Nazis*, N.Y. TIMES, Jan. 24, 1992, at A3.

5. Race Relations Act, 1965, ch. 73, § 6(1) (Eng.). Penalties for a conviction are steep: a maximum of two years' imprisonment or a fine of £1000, or both. *Id.* § 6(3). While hatred based upon religion is noticeably missing from the law, the Public Order Act, 1936 (POA 1936) and its progeny were all used to punish anti-

hate speech of the first subdivision: "speech addressed to the public." Partly to fulfill its obligations under the United Nations International Convention on the Elimination of All Forms of Racial Discrimination,⁶ the British made it illegal for a speaker or a publisher to incite people to racial hatred. Premised on the notion that such public and persuasive speech enabled Nazism to flourish in the 1930s, this law aimed to curtail racist and anti-Semitic propaganda.⁷

More recently, the British targeted hate speech of the second subdivision: "speech directed at individuals."⁸ In the Public Order Act, 1986 (POA 1986), Parliament made it illegal to use "threatening, abusive, or insulting words" that cause another "harassment, alarm, or distress."⁹ While this law was designed to cover abusive speech in general, it is viewed by the British as another weapon in the fight against racist speech.

The United States has never ratified the International Convention on the Elimination of All Forms of Racial Discrimination and does not have laws which prohibit incitement to racial hatred.¹⁰ Generally, the United States is much more tolerant of racist and other harassing speech than is Great Britain. Unlike the British, the approach in the United States is to deny government the power to "decide what is 'legitimate' speech and what is not."¹¹ Nonetheless, there have been several recent attempts to legislate in the area of racist speech.

Semitic propaganda. Patricia M. Leopold, *Incitement to Racial Hatred*, 1977 PUB. L. 389, 392.

6. United Nations International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, 660 U.N.T.S. 194 [hereinafter *Convention on the Elimination of All Forms of Racial Discrimination*].

7. See *R. v. Relf & Cole*, 1 Crim. App. (S) 111 (1979) (Eng.), discussed *infra* note 50.

8. Public Order Act, 1986, ch. 64, §§ 5-6 (Eng.).

9. *Id.*

10. "The reservation and the failure to ratify the convention separates the United States from an evolving world standard. As discussed below, this position represents an extreme commitment to the First Amendment at the expense of antidiscrimination goals." Matsuda, *supra* note 2, at 2345.

11. See Kenneth Lasson, *Racism in Great Britain: Drawing the Line on Free Speech*, 7 B.C. THIRD WORLD L.J. 161, 167 (1987).

As lawmakers in the United States confront the issue of whether or not to legislate against hate speech, they may choose to learn from the successes and mistakes that the British have made in their twenty-five-year history of incitement and harassment laws. Part I of this paper will describe the history of the British laws, Part II will discuss how similar laws have been dealt with in the United States courts, and Part III will discuss whether it is feasible for the United States to adopt either the British incitement or harassment laws.

II. GREAT BRITAIN'S INCITEMENT AND HARASSMENT LAWS

The history of the British incitement and harassment laws can be traced back to the seventeenth-century offense of seditious libel. This law embodied the concept that those who spread hatred of individuals and groups threaten not only those groups but the security of the government itself.¹² As the incitement and harassment laws developed, the protection of government security became less of a goal, but the emphasis remained on those who incited hatred of other groups.

A. *Seditious Libel*

All of Great Britain's hate speech regulations are premised upon the common law offense of seditious libel. This offense punished the publication of, or the articulation of, words with "an intention to bring into hatred or contempt or to excite disaffection against the person of Her Majesty . . . , or to promote feelings of ill-will and hostility between different classes of [her] subjects."¹³ Since the law punished "bring[ing] into hatred" or "promot[ing] feelings of ill-will," it targeted the speaker who was persuasive enough to convince others of his contempt for the monarchy or of his hatred of a class of its subjects. This law was not, therefore, directly concerned with

12. See ANTHONY LESTER & GEOFFREY BINDMAN, *RACE AND LAW IN GREAT BRITAIN* 345 (1972) [hereinafter *RACE AND LAW*].

13. *Id.*

the harmful effect that words might have on the Queen or one of her subjects.

Although the law was used primarily to punish those who posed a threat to the monarchy, on several occasions it was also used to punish what would today be recognized as hate speech.¹⁴ *R. v. Osborne* concerned the publishers of a pamphlet which asserted that certain Jewish immigrants living in London had killed a woman and her child because the father of the child was a Christian.¹⁵ Following the distribution of the pamphlet, several of the Jews named were beaten and were threatened with death if they did not depart London.¹⁶ The publishers of the anti-Semitic pamphlet were found guilty of seditious libel.¹⁷

Since the turn of the century, prosecutions for seditious libel have rarely succeeded.¹⁸ One of the reasons for the law's ineffectiveness is that, under the common law, the defendant was only guilty if his or her speech led to a direct incitement to violence or public disorder.¹⁹ While racist speech may provide the foundation for future acts of violence against particular groups, it is difficult to prove that one speaker's words directly led to a particular violent episode. Thus, as time went on, Britain's prohibitions on racist speech required less and less of a connection between the speech and violence.

B. The Public Order Act, 1936

In order to address the inadequacies of the sedition laws, in 1936 Parliament passed section 5 of the Public Order Act, 1936 (POA 1936). Like the sedition laws, punishment under the POA 1936 required a nexus between speech and violence. The law provided the following:

14. *Id.*

15. 2 Swanst. 503n (1732), cited in RACE AND LAW, *supra* note 12, at 345.

16. RACE AND LAW, *supra* note 12, at 345.

17. RACE AND LAW, *supra* note 12, at 345.

18. RACE AND LAW, *supra* note 12, at 347.

19. Leopold, *supra* note 5, at 391.

Any person in any public place or at a public meeting to use threatening, abusive or insulting words or behaviour with intent to provoke a breach of the peace or whereby a breach of the peace is likely to be occasioned shall be guilty of an offense.²⁰

A plain reading of the POA 1936 reveals two notable changes from the sedition laws. First, speech could be punished even if it did not provoke actual violence as long as it was "likely" to provoke such violence. Second, mere intent to provoke violence could be punished.

Section 5 proved useful in controlling the rise of British fascism prior to and during World War II.²¹ Police, in disguise, would attend meetings of the British Union of Fascists where they recorded insulting words that were later used in the prosecution of the group's prominent leaders.²² "The result was a definite modification of [f]ascist propaganda with less provocation to Jews and other anti-[f]ascists."²³

In *Jordan v. Burgoyne*,²⁴ a leader of the National Socialist Movement was charged with violating section 5 after making various anti-Semitic remarks while addressing a meeting in Trafalgar Square. Addressing a sizeable crowd of both supporters and hecklers, he proclaimed 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."²⁵ At trial, a "reasonable man" argument was used to acquit Jordan: the judge held that his words "were not likely to lead ordinary reasonable persons attending the meeting . . . to commit breaches of the peace"²⁶ On appeal, however, Lord Parker, C.J. of the Divisional Court rejected the "reasonable man" approach and concluded

20. Public Order Act, 1936, 1 Edw. 8 & 1 Geo. 6, ch. 6, § 5 (Eng.).

21. RACE AND LAW, *supra* note 12, at 351.

22. RACE AND LAW, *supra* note 12, at 351.

23. RACE AND LAW, *supra* note 12, at 351.

24. 2 All E.R. 225 (Q.B. 1963).

25. *Id.* at 226.

26. *Id.*

that Jordan "must take his audience as he finds them."²⁷ Since Jordan's speech resulted in "complete disorder" among his audience, he was convicted of violating section 5 of the POA 1936.²⁸

As time went on, British officials found the incitement laws to be an insufficient obstacle to racist speech making. In the mid-1960s the ultra right wing National Front (NF) began achieving widespread support among the British lower and middle class.²⁹ The group's popularity can be traced to the widespread resentment over the immigration of people of color from Commonwealth countries.³⁰ In their efforts to gain further support, many NF leaders who campaigned for seats in Parliament made insulting comments about the new immigrants.

Since the NF had shifted its focus from disturbing the peace to gaining electoral support, it abandoned its usual calls to violence. The group was primarily concerned with persuading others of its particular brand of racism in order to win votes. Since section 5 of the POA 1936 did not address speech that lacked threats of violence or resulted in violence, many of the members' speeches went unpunished.

In the face of increasing numbers of racist and fascist speeches, elected officials came under pressure to legislate against these types of less virulent hate speech.³¹ Thus, in order to curtail racist speech that did not directly incite people to violence, Britain's laws under the Race Relations Acts of 1965 and 1976 prohibited speech that merely incited people to hatred of racial groups. Like seditious libel and section 5 of the POA 1936, these laws did not directly protect the individual who was the victim of abusive racist speech; rather, they fo-

27. *Id.* at 227.

28. *Id.*

29. ARYEH NEIER, *DEFENDING MY ENEMY* 149-50 (1979).

30. *Id.* at 150. During the mid-1960s, at least 100,000 people of Asian or African origin migrated to Great Britain each year. *Id.*

31. Leopold, *supra* note 5, at 393. A petition signed by 140,000 citizens called for incitement legislation. Leopold, *supra* note 5, at 393 n.21.

cused on the speaker who was likely to persuade others of his or her racist views.

C. The Race Relations Act, 1965

Great Britain was not alone in its call for laws that punished racist propaganda. In 1963 the General Assembly of the United Nations adopted the Declaration on the Elimination of All Forms of Racial Discrimination to respond to an increase in the appearance of swastikas around the world.³² As a party to the ensuing International Convention on the Elimination of All Forms of Racial Discrimination, Great Britain agreed to "declare an offense punishable by law all dissemination of ideas based on racial superiority or hatred"³³

In 1965 Parliament passed section 6 of The Race Relations Act, 1965 (RRA 1965). Under section 6, a person is guilty of incitement to racial hatred 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 which are threatening, abusive or insulting, being matter or words likely to stir up hatred against that section on grounds of colour, race or ethnic or national origin.³⁴

Section 6 of RRA 1965 is notable in several respects: first, it reverts back to the seditious libel standard in that it requires that the speaker have the "intent" to stir up hatred;³⁵ second,

32. See RICHARD B. LILICH & FRANK C. NEWMAN, *INTERNATIONAL HUMAN RIGHTS* 130 (1979).

33. Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 6, art. 4(a). Under article 20 of the International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 20, 999 U.N.T.S. 171, 178, Great Britain was already obligated to undertake the necessary steps to prohibit "any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence." *Id.*

34. Race Relations Act, 1965, ch. 73, § 6(1) (Eng.).

35. It will be remembered that the POA 1936 required a finding of *either* the

it punishes only the cruder forms of speech; third, it targets only public racist commentary; and, finally, the use of the law to combat racist speech requires the consent of the Attorney General.

1. Intent to Stir Up Hatred

The new intent requirement made it very difficult for the Crown to win convictions under the RRA 1965. The inherent difficulty in proving that someone intends to stir up racial hatred was illustrated in a case involving the prosecution of four members of the Racial Preservation Society for their publishing of a newspaper entitled *Southern News*.³⁶ The newspaper declared as its goal the "return of people of other races from this 'overcrowded island' to 'their own countries.'"³⁷ In defending against the claim that they intended to incite racial hatred, the authors argued that their newspaper had educational value as a means for addressing important social issues.³⁸ Because the prosecutors were unable to prove that the defendants had the intention to instill in the populace any hatred of immigrants, the authors were acquitted.³⁹

The failure to convict the publishers of the *Southern News* highlights one of the dangers lurking behind the incitement laws. The failed prosecution gave "a measure of respectability to racialists and their organisations After the unsuccessful prosecution in the *Southern News* case, there was an increase in that type of quasi-educational racist literature."⁴⁰

intent to incite to violence or the likelihood of violence being brought about through the particular speech. See discussion *supra* part II.B.

36. See *Race Act Not a Curb*, THE TIMES (London), Mar. 28, 1968, at 2 [hereinafter *Race Act Not a Curb*] (discussing unreported *Southern News* case); *Four Cleared in Race Act Trial*, THE TIMES (London), Mar. 28, 1968, at 2 [hereinafter *Four Cleared in Race Act Trial*]. Many decisions over prosecutions brought under the incitement laws were not published in either the official or unofficial British reporters.

37. See Longacre, *The Race Relations Act of 1965: An Evaluation of the Incitement Provision*, 11 RACE 125 (1969), cited in Lasson, *supra* note 11, at 169.

38. See Lasson, *supra* note 11, at 169.

39. See *Race Charge Dropped*, THE TIMES (London), May 1, 1968, at 4.

40. Leopold, *supra* note 5, at 398, (citing Dickey, *English Law and Incitement*

Moreover, the case gave immense news coverage to an otherwise insignificant newspaper. Indeed, upon acquittal, the authors reprinted the issue of *Southern News* that was the subject of the case and sold it as a "Souvenir Edition—The Paper the Government Tried to Suppress."⁴¹

2. Cruder Forms of Speech

Section 6(a) of the RRA 1965 targets the same type of speech ("threatening, abusive or insulting") that was proscribed under the POA 1936. Thus, the law applies only to the cruder forms of racist expression. As the cases bear out, the "crudeness" of particular words varies over time.⁴² The first conviction under section 6 came in 1967 against Colin Jordan, the aforementioned leader of the National Socialist Movement who had been convicted under the POA 1936.⁴³ Jordan had been arrested after publishing and distributing a pamphlet entitled *The Coloured Invasion* in which he asserted that "[t]he presence of this [c]oloured million in our midst is a menace to

to *Racial Hatred*, 11 RACE 311, 321-327 (1969)).

41. RACE AND LAW, *supra* note 12, at 371.

42. John Kingsley Read was tried in January 1978 for telling an audience that he was under a court injunction prohibiting slurs against colored immigrants and, therefore, would talk about "niggers, wogs, and coons." NEIER, *supra* note 29, at 155. Read also spoke of the death of a young Asian, saying, "[o]ne down one million to go." NEIER, *supra* note 29, at 155. Read was acquitted by an all-white jury after the judge instructed the jury that the term "nigger" was harmless. When he attended schools in Australia, the judge explained, he was nicknamed "nigger" because "he sang songs in an aboriginal language. Spectators in the courtroom greeted the acquittal with applause." NEIER, *supra* note 29, at 155; Geoffrey Bindman, *What Happened to Racial Incitement*, 87 LAW SOC'Y GAZETTE 25 (1990).

In a modern example of the same type of speech, Bill Galbraith, a Cheltenham businessman who called a black Conservative parliamentary candidate, John Taylor, a "bloody nigger," "is to face prosecution for alleged incitement to racial hatred." Peter Vidor, *Race Hatred Case Filed Against Cheltenham Tory*, THE TIMES (London), Apr. 13, 1991, at 3.

43. *Colin Jordan Gaoled for 18 Months*, THE TIMES (London), Jan. 26, 1967, at 9 [hereinafter *Colin Gaoled*]; see also RACE AND LAW, *supra* note 12, at 368.

our nation."⁴⁴ Jordan was sentenced to eighteen months imprisonment.⁴⁵

Racist groups have been able to avoid operation of the incitement laws by "expressing their views without overt threats, abuse or insults."⁴⁶ The two cases described above vividly illustrate this phenomenon. In 1967 Colin Jordan served eighteen months for publishing *The Coloured Invasion*; whereas, in 1968, the authors of *Southern News* went unpunished for calling for the "return of people of other races from this 'overcrowded island' to 'their own countries.'"⁴⁷ Both of these editorials conveyed the same message, yet the publishers of the more recent publication went unpunished.

3. Public Occasions

Section 6 of the RRA 1965 maintains the same focus on public hate speech that was established in the original common law offense of seditious libel. Thus the law applies only to written materials or words spoken on a public occasion.⁴⁸ One-on-one instances of racial harassment, therefore, are not covered by the law. The emphasis on public speech shows that the goal of the statute is not to protect the feelings of those against whom racism is directed. Instead, the focus is on the "speech's likely effect on its presumed consumers—those most likely to be persuaded by it."⁴⁹

This emphasis is consistent with the UN's attempt to deal with Nazi-like propaganda.⁵⁰ Indeed, when proposing the bill

44. Colin Gaoled, *supra* note 43, at 9.

45. Colin Gaoled, *supra* note 43, at 9.

46. RACE AND LAW, *supra* note 12, at 370.

47. RACE AND LAW, *supra* note 12, at 370.

48. David Kretzmer, *Freedom of Speech and Racism*, 8 CARDOZO L. REV. 445, 501 (1987).

49. *Id.* at 500.

50. See *R. v. Relf & Cole*, 1 Crim. App. (S) 111, 114 (1979) (Eng.). In this case, Relf and Cole were sentenced to prison for having published leaflets containing derogatory comments made toward members of the West Indian London community. One such leaflet was entitled "Notice Wog Nuisance" and read, "[o]wing to

to the House of Commons, the Home Secretary explained that section 6 was "designed to deal with more dangerous, persistent and insidious forms of propaganda campaigns—the campaign which, over a period of time, engenders hate which begets violence."⁵¹ Congruous with this emphasis, the prosecution of seventeen-year-old Christopher Britton failed.⁵² Britton, a "wretched little youth," had placed racist bulletins ("Blacks Not Wanted Here") at the front door of a member of Parliament, and wrapped one of them around a beer bottle which he then hurled through the official's glass front door.⁵³ The Court of Appeal, Criminal Division, held that a member of Parliament did not constitute a member of the "public at large" as described in section 6(a).⁵⁴ Lord Parker, C.J. went on to note that he did not believe that Parliament envisioned the prosecution of such small scale offenders, even if Britton's actions were technically violative of section 6.⁵⁵

While the emphasis in section 6 on speech addressed to the public prevents prosecutors from wasting time on insignificant cases,⁵⁶ this emphasis also has its detrimental as-

an increase in the nuisance caused by unsupervised wogs on this estate, a wog warden has been engaged, and wogs not wearing a collar bearing the owner's name and address, will be taken to Leamington Police Station." *Id.* at 113. Another leaflet was entitled "Jungle News" and stated that London had suffered "400 crimes a month by a gang of muggers." *Id.* at 112.

To justify the prison sentence, Judge Lawton compared Relf and Cole's pamphlets to Nazi propaganda. While comparing the "lies" found in "Jungle News" to the repetition of lies concerning Jews in Nazi Germany, he remarked that, "the constant repetition of lies might in the end lead some people into thinking that the lies are true." *Id.* at 114.

51. See generally Rt. Hon. Sir Frank Soskice, Q.C., M.P., *Second Reading Debate*, in 711 *Hansard*, cols. 926-43, cited in RACE AND LAW, *supra* note 12, at 368.

52. *R. v. Britton*, 1 All E.R. 486 (Q.B. 1967).

53. *Id.*

54. *Id.* at 487.

55. *Id.* at 488.

56. In the first year after the 1976 amendment, many of the defendants facing charges of incitement were youths. Roger Cotterrell, *Prosecuting Incitement to Racial Hatred*, 1982 PUB. L. 378, (citing PAUL GORDON, *INCITEMENT TO RACIAL HATRED* (1982)). Many of the defendants are young first-time offenders for whom it is difficult to distinguish "determined political action from mere delinquency." *Id.* at 380.

pects. For instance, several section 6 prosecutions have involved speeches made at Speakers' Corner in Hyde Park.⁵⁷ This part of the park is world-renowned as a place to hear soapbox orators speak on a wide variety of issues of public interest.⁵⁸ Because of the importance of Speakers' Corner as a symbol of free speech, it is a momentous occasion when someone is arrested there simply for speaking.

4. Consent of the Attorney General

To counter criticisms that section 6 would constitute an unjust infringement on free speech, the law requires that no prosecution be brought without the Attorney General's consent.⁵⁹ This requirement was thought to serve two functions. First, in order to avoid biased prosecutions, section 6(3) takes the matter out of the jurisdiction of the local police.⁶⁰ Second, the law rules out potentially frivolous private civil claims of incitement.⁶¹

In some cases, the Attorney General has failed in its charge to prevent biased prosecutions. In the late 1960s, for instance, there were several notable prosecutions of leaders of the Black Liberation Movement. In one case, Michael Abdul Malik (Michael X) was sentenced to twelve months in prison for having asserted that whites are "vicious and nasty people."⁶² At trial Michael X agreed that his speech was offensive

57. Four members of the Universal Coloured People's Association were found guilty of incitement to racial hatred for speeches made in Hyde Park. *Sentences Today on Four Coloured Men*, THE TIMES (London), Nov. 29, 1967, at 3 [hereinafter *Sentences Today*]; *Race Speeches: £270 Fines*, THE TIMES (London), Nov. 30, 1967, at 20. For a discussion of these cases see *infra* part II.C.4.

58. THE NEW COLUMBIA ENCYCLOPEDIA 1298 (William H. Harris & Judith S. Levey eds., 4th ed. 1975) [hereinafter COLUMBIA ENCYCLOPEDIA].

59. Race Relations Act, 1965, ch. 73, § 6(3) (Eng.).

60. R. v. Pearce, 72 Crim. App. 295 (1980) (Eng.).

61. Thorne v. British Broadcasting Corp., 2 All E.R. 1225 (C.A. 1967) (Eng.).

62. R. v. Malik, 52 Crim. App. 140 (1968) (Eng.). For a full account of the speech, see *Bitter Attack on Whites*, THE TIMES (London), July 25, 1967, at 1 [hereinafter *Bitter Attack*]. For an account of the trial, see *Michael X Gives Views on Colour*, THE TIMES (London), Nov. 9, 1967, at 3 [hereinafter *Michael X*]. During his speech, Michael X went on to say,

to whites, but claimed that he should have the right to respond to "certain things that have happened to us as a people."⁶³

In another case, four prominent members of the Universal Coloured People's Association who made speeches at Speakers' Corner, Hyde Park were also convicted of incitement to racial hatred.⁶⁴ The defendants had called on black nurses to give white patients the wrong injections.⁶⁵ In his defense at trial, one of the defendants claimed that "[h]e was merely expressing the frustration of coloured people and was not contravening the Race Relations Act."⁶⁶ It would appear, therefore, that some political speech has been suppressed under the guise of incitement to racial hatred.

The consent requirement has also resulted in the underuse of the law. From 1965 to 1976, the Attorney General gave his consent to prosecute only twenty-one people for alleged offenses under section 6 of the Race Relations Act.⁶⁷ Considering that 106 complaints were sent to the office, it would appear

Killing is a strange thing. Before I killed for the first time I wondered if I would have a conscience. But I slept well. And now I am no longer afraid.

I saw in this country in 1952 white savages kicking black women. If ever you see a white man lay hands on a black woman, kill him immediately. If you love our brothers and sisters you will be willing to die for them.

Bitter Attack, supra. By calling on his followers to kill, Michael X's speech bordered on incitement to violence. Under U.S. law, such speech would not be punishable unless it was intended to incite imminent lawless action and the advocacy was likely to result in such action. See discussion *infra* part III.

63. *Michael X, supra* note 62, at 3.

64. See *R. v. Sawh*; *R. v. Watson*; *R. v. Ghose*; *R. v. Ezekiel* as described in *Sentences Today, supra* note 57, and *Race Speeches: £270 Fines, supra* note 57.

65. *Sentences Today, supra* note 57. In the United States, in *Watts v. United States*, a black draft resister asserted that "[i]f they ever make me carry a rifle, the first man I want to get in my sights is L.B.J." 394 U.S. 705, 706 (1969). Considering the context of the speech (made at an anti-war rally) and the laughter that followed the statement, the Supreme Court rejected the contention that the speaker's words posed a true threat. Rather, the Court held that the speech was "a kind of very crude offensive method of stating a political opposition to the President." *Id.* at 707.

66. *Sentences Today, supra* note 57, at 3.

67. *Leopold, supra* note 5, at 394.

that the Attorney General did not consider the incitement laws to be a top priority.⁶⁸

D. *The Race Relations Act, 1976*

In an effort to make prosecutions for incitement easier, section 70 of the Race Relations Act, 1976 (RRA 1976) discarded the intent requirement.⁶⁹ Thus, convictions could be based upon the mere proof that the speech or publication of "threatening, abusive, or insulting" words was likely to stir up hatred against "any racial group in Great Britain."⁷⁰ This change in the law was designed, in part, to address the difficulty in gaining a conviction in the *Southern News* case.⁷¹

With the passage of RRA 1976, the prosecution no longer had to prove that the defendant had the intent to stir up hatred. Rather, the defendant's intent was inferred from the fact that he had used insulting speech.⁷² In *R. v. Knight*⁷³ the defendant admitted to having published a racist pamphlet, but stated that he had abandoned any plans to distribute it. Even though the pamphlets remained boxed up in Knight's apartment, the trial judge obviously inferred Knight's intent to incite to racial hatred.⁷⁴ Faced with such a certain outcome,

68. Leopold, *supra* note 5, at 394. The National Council for Civil Liberties (Liberty) has proposed making incitement an arrestable offence and has also called for the removal of the Attorney General's consent to prosecution. Lasson, *supra* note 11, at 172. While Liberty has been a staunch supporter of the incitement laws since their inception, its counterpart in the United States, the American Civil Liberties Union (ACLU), often opposes attempts to curb hate speech. *See generally* Iota Xi Chapter of Sigma Chi Fraternity v. George Mason Univ., 993 F.2d 386 (4th Cir. 1993) (counsel for appellees); *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538 (1992) (amicus brief opposing St. Paul's right to curb racist speech submitted by ACLU).

69. Race Relations Act, 1976, ch. 74, § 70 (Eng.). The new legislation also moved those provisions of the 1965 Act that dealt with racial incitement back into the 1936 Act. *Id.*

70. Lasson, *supra* note 11, at 171.

71. *See Race Act Not a Curb*, *supra* note 36, at 2; *Four Cleared in Race Act Trial*, *supra* note 36, at 2. *See also*, Race Relations Act, 1976, ch. 74, § 70 (Eng.); Kretzmer, *supra* note 48, at 501.

72. Leopold, *supra* note 5, at 404.

73. 2 Crim. App. (S) 82 (1980) (Eng.).

74. *See id.* Having decided not to distribute the literature, the case against

Knight pleaded guilty to a charge of publishing a racist pamphlet in violation of RRA 1976.⁷⁵

The liberalization of the law proved useful in helping prosecutors to win most of the cases that went to trial under the incitement laws. Many of these involved the publishing of similar types of racist pamphlets. In *R. v. Edwards*,⁷⁶ an editor was convicted of violating the RRA 1976 for having published *The Stormer*, which contained several comic strips including "Billy the Yid," and "Ali the Paki." The former described the alleged "ritualistic practice of Jews in crucifying Christian boys in order to use their blood for their meals."⁷⁷ Convinced that the pamphlet was "clearly one which incited readers to racial hatred," the trial judge sentenced Edwards to twelve months imprisonment.⁷⁸

Despite the new ease with which convictions could be won, the Attorney General consent requirement still hampered the realization of the incitement law's potential. In the period between 1976 and 1981, only twenty-one defendants faced trial on charges of racial incitement.⁷⁹ Even with the relaxation of the government's burden, there were few prosecutions considering the rise in racial strife and violence during that period.⁸⁰

Knight would appear rather weak. Under U.S. legal analysis, the crucial element of mens rea, intent to incite to hatred, was missing and should have resulted in an acquittal. Rather than acquit, the trial judge merely sentenced Knight to a fine rather than imprisonment to account for the lack of distribution.

75. *Id.*

76. 5 Crim. App. (S) 145 (1983) (Eng.).

77. *Id.* at 147.

78. *Id.* at 146. See also *R. v. Relf & Cole*, 1 Crim. App. (S) 111 (1979) (Eng.) (defendants convicted for having published stickers and pamphlets making derogatory statements about blacks and West Indians); *R. v. Morse and Tyndall*, 8 Crim. App. (S) 369 (1986) (Eng.) (defendants convicted for publishing a newspaper tending to stir up racial hatred, called the *British Nationalist*).

79. Lasson, *supra* note 11, at 171.

80. Cotterrell, *supra* note 56, at 378. In 1985 three out of seven prosecutions brought for racial hatred were successful; and in 1986, ten out of twelve succeeded. Robert Silver, *Ban Race Gibes with New Law*, *THE TIMES* (London), June 11, 1991, at 31. In an odd twist, the Attorney General used the incitement law to ban an anti-fascist demonstration in 1977. After three months of negotiations, the At-

E. Public Order Act, 1986

1. Incitement to Racial Hatred

In a further effort to strengthen the incitement laws, Parliament passed Part III of the Public Order Act 1986 (POA 1986).⁸¹ Most importantly, the law invokes standards originally introduced in the POA 1936. Under section 18, the "use of threatening, abusive, or insulting words" is an offense if the speaker: a) intends thereby to stir up racial hatred, or b) having regard to all the circumstances racial hatred is likely to be stirred up thereby.⁸² Now, a person can be punished for either the intent to stir up racial hatred or for using words likely to stir up hatred.⁸³

During the Parliamentary debate over amending the POA, many members sought to strengthen the law further by decreasing the Attorney General's role in the prosecution for incitement.⁸⁴ Facing strong opposition from Prime Minister Thatcher's supporters in Parliament, this initiative finally failed.⁸⁵ However, a compromise measure created new procedures for investigating instances of racial incitement. Under the old measures, an initial police determination was sent directly to the Attorney General for consideration. Under the POA of 1986, the local police send their determination up

torney General lifted its ban on the Anti-Nazi League and let 80,000 people march through London's East End where the National Front had achieved recent electoral success. NEIER, *supra* note 29, at 157.

81. Public Order Act, 1986, ch. 64, § 18 (Eng.).

82. Public Order Act, 1986, ch. 64, § 18(a)-(b) (Eng.). Section 18(5) of the Act creates the following exception:

A person who is not shown to have intended to stir up racial hatred is not guilty of an offense 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.

POA 1986, § 18(5).

83. Section 18(3) allows the police to "arrest without warrant anyone he reasonably suspects is committing an offense under this section."

84. 89 PARL. DEB. H.C. 859 (1986), *cited in* Lasson, *supra* note 11, at 172.

85. Lasson, *supra* note 11, at 172-77.

through the hierarchy of the Crown Prosecution Service where further investigations may be undertaken.⁸⁶ Perhaps it was thought that with these further investigations, a stronger case would be presented to the Attorney General and, therefore, there would be a greater likelihood that the case would get the Attorney General's consent.⁸⁷ One danger of the new procedures, however, is that they create more levels at which the police may decide to forego prosecution before the case even reaches the Attorney General.⁸⁸

For unknown reasons, there have been only three prosecutions for incitement to racial hatred since passage of the POA 1986.⁸⁹ The first prosecution took place in 1988 and resulted in a suspended sentence for a "soapbox orator" who had made a racist speech and had distributed racist literature.⁹⁰ The second prosecution, also in 1988, resulted in the conviction of a neo-Nazi who posted anti-Semitic stickers on lamp-posts.⁹¹ As of the end of 1990, sixteen more cases were being investigated by the police for possible prosecution.⁹²

Since its first enactment in 1965, Great Britain has been trying to make the incitement law more effective by changing technical weaknesses in the law.⁹³ Since the recent reforms in 1986, there have been further calls to make prosecution of the law even easier. For instance, Eldred Tabachnik, Q.C., has made "far-reaching" proposals for reform of POA 1986.⁹⁴ He aims to pass "a new law to penalise [sic] racial 'vilification,' a lesser form of attack than incitement to racial hatred."⁹⁵ Con-

86. Bindman, *supra* note 42, at 26.

87. Bindman, *supra* note 42, at 26.

88. Bindman, *supra* note 42, at 26.

89. Bindman, *supra* note 42, at 27.

90. Bindman, *supra* note 42, at 27.

91. Bindman, *supra* note 42, at 26.

92. John Winder, *More Racist Papers Being Published*, THE TIMES (London), Dec. 4, 1990, at 6.

93. Bindman, *supra* note 42, at 26.

94. Robert Silver, *Ban Race Gibes with New Law*, THE TIMES (London), June 11, 1991, at 31.

95. *Id.* Such a law would proscribe even the utterance of racist insults, without any inquiry into the words' harassing or annoying effect.

sidering the incitement law's relative ineffectiveness despite repeated revisions, it is unlikely that further reforms will make it more effective.

2. Harassment

With a completely different focus, Parliament, in 1986, also made punishable verbal or symbolic speech that was intended and likely to harass another person. Under the POA 1986 section 5,

- (1) [a] person is guilty of an offense if he
 - (a) uses threatening, abusive or insulting words or behaviour, or disorderly behaviour, or
 - (b) displays any writing, sign or other visible representation which is threatening, abusive or insulting within the hearing or sight of a person likely to be caused harassment, alarm, or distress thereby.

And section 6 provides:

- (4) A conviction under this section requires that the accused is aware that [the speech or conduct] may be threatening, abusive, or insulting.⁹⁶

Although the new law prohibits the same type of speech as the incitement laws (threatening, abusive or insulting), the law addresses hateful speech used in a very different context.⁹⁷ Unlike the bans on incitement to hatred, which seek to reduce persuasive speech, this new law targets hate speech that is directed at a particular individual. Thus, the law focuses on

96. Public Order Act, 1986, ch. 64, §§ 5-6 (Eng.).

97. Under § 5(2), an offense 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 writing, sign or other visible representation is displayed, by a person inside a dwelling and the other person is also inside that or another dwelling. Public Order Act, 1986, ch. 64, § 5(2) (Eng.). This provision ensures that the law will not be used for instances of domestic verbal abuse. Gavin McFarlane, *Public Order—Reform Against a Dark Background*, 83 LAW SOC'Y GAZETTE, 278, 279 (1986).

the effect that speech has on the individual victim of abusive speech.⁹⁸

The legislative history of the law reveals that it was introduced to address a variety of hurtful speakers. These include "disturbors in the common parts of blocks of flats," and "persistent shouters of abuse or obscenities at people queuing for public transport, halls, and cinemas."⁹⁹ By introducing the bill to Parliament, however, the Home Secretary said he hoped section 5 would be used in cases of racial abuse.¹⁰⁰

When it was introduced, some feared that the harassment law would unduly infringe upon cherished notions of free speech. Cathy Lloyd, of Liberty,¹⁰¹ noted that social protest often involved the "use of abuse and insults" but argued that "public protest helps to ensure that a steady process of peaceful social change is achieved."¹⁰² Recent interpretations of the law, however, show that the law will not be used to punish speech unless the intent of the speaker is specifically to harass a particular individual.

In *DPP v. Clarke*,¹⁰³ Lord Justice Nolan refused to convict Michael Edward Clarke of harassment because it was not proven that he subjectively intended to harass the complainants. Clarke was accused of harassment for having carried a picture of an aborted fetus while protesting outside of a licensed abortion clinic. The prosecution argued that Clarke must have been aware that his conduct would harass the cli-

98. Section 5 also has a much smaller penalty than that for incitement: Section 5 "is given a guideline fine of £100." Stephen Gold, *And You Shall Be Guided By Your Association*, 139 NEW L.J. 1338, 1338 (1989).

99. Stephen Gold, *Order, Order*, 137 NEW L.J. 256, 256 (1987).

100. Bindman, *supra* note 42, at 25. See also "Hate Speech" and *Freedom of Expression*, HUMAN RIGHTS WATCH 7 (Mar. 1992) (on file with author) [hereinafter HUMAN RIGHTS WATCH].

101. See *supra* note 68 for a description of Liberty, the British counterpart of the American Civil Liberties Union.

102. Brother-in-Law, *The Queen's Peace*, 83 LAW SOC'Y GUARDIAN GAZETTE 2495, 2495 (1986).

103. See *Objective Test for Reasonable Conduct Defense*, THE TIMES (London), Aug. 27, 1991, at 25 [hereinafter *Objective Test*] (discussing unreported *Clarke* case).

ents at the clinic. The judge rejected an objective test that would have inferred Clarke's intent to harass from the circumstances of the protest.¹⁰⁴ According to Lord Justice Nolan, the words "is aware that it may be threatening, abusive, or insulting" in section 6(4) demanded nothing less than an inquiry into the subjective intent of the defendant.¹⁰⁵

To date, the harassment statute has only been used to prosecute persons who assault traditional standards of public decency. In one case, the defendant was convicted for harassment of a police officer during an arrest.¹⁰⁶ Other cases have been brought against men for kissing in the street¹⁰⁷ and against abortion activists who display fetuses at demonstrations.¹⁰⁸

Section 5 has the potential for punishing racist speech that is not covered by the incitement laws. It is hard to predict at this early stage what types of conduct or speech will be the focus of the Crown's prosecutions. However, Lord Justice Taylor has expressed a willingness to convict soccer spectators who subject non-white players to "obscenities."¹⁰⁹

104. *Id.*

105. *Id.* See also Gold, *supra* note 99, at 256.

106. D.P.P. v. Orum, 153 J.P. 85 (1988) (Eng.).

107. See generally Mike Seabrook, *Homosexuality and the Police*, 142 NEW L.J. 325, 325 (1992).

108. *Objective Test*, *supra* note 103. The charges were dismissed by Lord Justice Nolan and Mr. Justice Rougier of the Queen's Bench Division. *Id.*

Local police are acting to stamp on a rash of obscene T-shirts and hats in the Lincolnshire coastal towns of Skegness and Mablethorpe. Some hats with male genitalia as decoration have been seized and passed to the Crown Prosecution Service for advice and possible action against the wearers. Any charges will be under the Public Order Act 1986 § 5(1).

Keep Your Shirt Off, 137 NEW L.J. 581, 581 (1987). See also D.P.P. v. Fidler, *Proving Compulsion in Watching and Besetting*, THE TIMES (London), Aug. 27, 1991, at Features sec.; McConnell v. Chief Constable of the Greater Manchester Police, 1 All E.R. 423 (C.A. 1990) (Eng.); Chappell v. D.P.P., 89 Crim. App. 82 (1988) (Eng.); and D.P.P. v. Orum, 153 J.P. 85 (1988) (Eng.).

109. Quentin Cowdry, *Doubts Emerge on Taylor Report*, THE TIMES (London), Feb. 6, 1990, at 40.

F. Summary of British Hate Speech Legislation

As can be seen, Great Britain's attempts to ban hateful speech have taken many forms: the alien and sedition laws banned speech that provoked violence; the POA 1936 banned abusive speech that was intended to or resulted in incitement to violence; the RRA 1965 banned abusive speech that was intended to and was likely to incite to racial hatred; the RRA 1976 banned abusive speech that was likely to incite to racial hatred; and the POA 1986 banned speech that was either intended to or was likely to result in an incitement to racial hatred. Finally, the POA 1986 also banned abusive speech that was intended to harass and resulted in the harassing of a particular individual. The viability of these laws in the United States will be discussed after a description of current First Amendment doctrine.

III. REGULATION OF HATE SPEECH IN THE UNITED STATES

Legislative bodies and courts in the United States are much more tolerant of hate speech than their counterparts in Great Britain. In fact, the First Amendment¹¹⁰ was created in direct response to the British sedition laws which made criticism of the government illegal.¹¹¹ While a few categories of

110. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

111. *But see generally* JAMES MORTON SMITH, *FREEDOM'S FETTERS: THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES* (1956) (discussing the Alien and Sedition Acts passed in 1798). *See also* *New York Times v. Sullivan*, 376 U.S. 254 (1964). Under the Acts, the President had the power to imprison or deport aliens suspected of activities posing a threat to the national government. They were eventually abandoned by Congress and President Jefferson. In describing Madison's condemnation of the law, Brennan wrote:

His premise was that the Constitution created a form of government under which "The people, not the government, possess the absolute sovereignty." The structure of the government dispersed power in reflection of the people's distrust of concentrated power and of power itself at all

speech including obscenity, defamation, and fighting words may be regulated because of their constitutionally proscribable content, the United States Supreme Court has used the First Amendment to strike a number of federal and state restrictions on speech that would fall under the definition of "hate speech."¹¹²

Given the current state of First Amendment law, therefore, it is unlikely that the United States Senate will ratify the UN Convention on the Elimination of all Forms of Racial Discrimination. Although the United States signed the Convention, it did so with the following caveat:

The Constitution of the United States contains provisions for the protection of individual rights, such as the right of free speech, and nothing in the Convention shall be deemed to require or to authorize legislation or other action by the United States of America incompatible with the provisions of the Constitution of the United State of America.¹¹³

Congress has never ratified the Convention because of article 4 of the Convention. As described above, article 4 would require the United States to "declare an offense punishable by law all dissemination of ideas based on racial superiority or hatred."¹¹⁴

A. *The "Fighting Words" Doctrine*

In *Chaplinsky v. New Hampshire*, the United States Supreme Court held that "fighting words" are not protected by

levels. This form of government was "altogether different" from the British form under which the Crown was sovereign and the people were subjects.

Id. at 274, (citing 4 ELLIOT'S DEBATES 569-70).

112. *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2540 (1992).

113. Nathaniel L. Nathanson & Egon Schwelb, *The United States and the United Nations Treaty on Racial Discrimination*, 8 STUDIES IN TRANSNAT'L LEGAL POL'Y 85 (1975). Signature does not bind the United States to the treaty until the signing is ratified.

114. See NATAN LERNER, *THE U.N. CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION* (1980); see also *supra* note 33.

the First Amendment.¹¹⁵ Fighting words have been defined as those words that, "by their very utterance inflict injury or tend to incite an immediate breach of the peace."¹¹⁶ In *Chaplinsky*, a Jehovah's Witness who called a city marshall a "God damned racketeer . . . a damned fascist," was convicted under a statute that provided that "no person shall address any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place."¹¹⁷ In upholding the conviction, the Supreme Court held that "[r]esort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the [Constitution]."

There are two parts to the fighting words doctrine. The first involves words that "inflict injury," and the second involves words that "tend to incite an immediate breach of the peace." Prohibiting the latter is consistent with the holding of *Brandenburg v. Ohio*, in which the Supreme Court held that government can prohibit words likely to "incite imminent lawless action."¹¹⁸

In *Brandenburg v. Ohio*,¹¹⁹ the leader of a Ku Klux Klan group was convicted under an Ohio Syndicalism statute which made illegal "advocacy of the duty of crime." Brandenburg had led a Ku Klux Klan meeting that was filmed and shown on television. At the meeting, a cross was burned and Brandenburg stated that "[p]ersonally, I believe the nigger should be returned to Africa, the Jew returned to Israel."¹²⁰

The Supreme Court focused on other words spoken by Brandenburg that day: "[I]f the President . . . continues to suppress the white race . . . it's possible that there might have to be some revengeance [sic] taken."¹²¹ In striking the Ohio

115. 315 U.S. 568, 574 (1942). Under First Amendment analysis, when a type of speech is not protected by the First Amendment, government is free to censure it.

116. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

117. *Id.* at 569.

118. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

119. *Id.*

120. *Id.* at 446.

121. *Id.*

statute, the Court found that Brandenburg's words were not likely to result in any "revengeance" being taken any time in the near future. The Court held that speech may only be restricted if it is intended to incite imminent lawless action and if the advocacy is likely to result in such action.¹²² By prohibiting speech that did not pass this test, the statute under which Brandenburg was convicted was found to be unconstitutionally overbroad.¹²³

The other part of the fighting words doctrine allows government to prohibit words that "by their very utterance inflict injury." Theoretically, this doctrine allows the government to condemn speech regardless of its nexus to any violence or lawless action.¹²⁴ In the recently decided case *R.A.V. v. City of St. Paul*,¹²⁵ the Supreme Court held that these fighting words can be regulated because of "their constitutionally proscribable content."¹²⁶ The Court went on to state that government cannot regulate fighting words based on "hostility or favoritism toward a nonproscribable message that they contain."¹²⁷

122. *Id.* at 447. The Supreme Court has held that "true threats" foretell the imminence of violence to a degree that they can be punished by law. *Watts v. U.S.*, 394 U.S. 705 (1969). As the American Civil Liberties Union recently noted, "[G]eneralized comments can often be answered through debate in a way that targeted threats against specific individuals simply cannot." Brief *Amicus Curiae* of the American Civil Liberties Union at 7, *R.A.V. v. City of St. Paul*, 112 S.Ct. 2538 (1992) [hereinafter ACLU Amicus Brief]. See also 18 U.S.C. § 241 which makes it a crime to "conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same . . ."; *Shackelford v. Shirley*, 948 F.2d 935 (5th Cir. 1991).

Restrictions on verbal invasions of privacy have also been found constitutional by the Supreme Court. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975).

123. Under both state and federal constitutional law, a statute is unconstitutionally overbroad if it substantially infringes upon protected free speech even though legislative intent may have been to restrict unprotected speech. *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973).

124. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

125. 112 S. Ct. 2538, 2543 (1992).

126. *Id.* at 2540, 2545.

127. *Id.* at 2538, 2540, 2545.

In *R.A.V.*, a teenage boy burned a cross on the front lawn of black family in St. Paul, Minnesota. Although it did not attribute any specific statements to the boy himself, the prosecution contended that he and his cohorts made reference, prior to the cross burning, to "skinhead trouble" and "burning some niggers."¹²⁸ The boy was charged with violating the St. Paul bias motivated disorderly conduct ordinance which provides:

Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm, or resentment in others on the basis of race, color, creed, religion, or gender commits disorderly conduct and shall be guilty of a misdemeanor.¹²⁹

Justice Scalia, writing for the majority, found that the ordinance violated the long-standing principle of content neutrality and, further, that the ordinance discriminates against speech that espouses unacceptable viewpoints.

The Court agreed with defendant that the ordinance is content based and therefore in violation of the Constitution. The reasoning is based on the fact that the ordinance only outlaws certain types of bias motivated speech and not others. The Court noted that government cannot prohibit speech which addresses only disfavored subjects such as race, color, creed, religion, and gender.¹³⁰

While content based laws prohibit broad categories of speech (*e.g.*, political speech), a viewpoint-based law sanctions a particular view (*e.g.* endorsement of the Democratic Party), while prohibiting another (*e.g.* an endorsement of the Republican Party).¹³¹ Viewpoint based regulations have never passed

128. ACLU Amicus Brief, *supra* note 122, at 2.

129. St. Paul, Minn. Leg. Code, City Ordinance § 292.01 (1990). Many states have adopted similar laws. *See e.g.*, ILL. CONST. art. 1, § 20; FLA. STAT. §§ 876.17-.20 (1987); N.C. GEN. STAT. §§ 14.12-.14 (1986); OKLA. STAT. tit. 21, §§ 1301-1306 (1981). *See Matsuda, supra* note 2, at 2346.

130. *R.A.V.*, 112 S. Ct. 2538, at 2540, 2545 (1992).

131. *Boos v. Barry*, 485 U.S. 312 (1988).

constitutional muster.¹³² By prohibiting language that opposes racial tolerance, the Court argued, the drafters of the St. Paul ordinance were motivated by a desire to suppress opinions that they considered repugnant.¹³³ While these goals are laudable, the Court found that they could be achieved through less speech-restrictive means. The Court specifically noted that the defendant could have been prosecuted under Minnesota's laws attacking "terroristic threats."¹³⁴

A United States district court used reasoning similar to that of *R.A.V.* to strike the University of Wisconsin's (UW) hate speech code. To address an increasing number of racist and sexist incidents on campus, the University of Wisconsin adopted regulations that prohibited speech which

- 1) Is racist or discriminatory;
- 2) Is directed at an individual;
- 3) Demeans the race, sex, religion, color, creed, disability, sexual orientation, national origin, ancestry or age of the individual addressed; and
- 4) Creates an intimidating, hostile or demeaning environment for education, university-related work, or other university-authorized activity.¹³⁵

Since part 4 of the regulation did not confine its prohibition to speech that would incite a violent reaction, the trial court argued, it regulated speech that was outside the confines of the fighting words doctrine.¹³⁶ For authority, the district judge cited *Gooding v. Wilson*.¹³⁷ In *Gooding*, the Supreme Court

132. *FCC v. Pacifica*, 438 U.S. 726, 745, *reh'g denied*, 439 U.S. 883 (1978).

133. 112 S. Ct. 2538, 2547 (1992). *See also* ACLU Amicus Brief, *supra* note 122, at 4.

134. 112 S. Ct. at 2541. As discussed below, "true threats" are not entitled to constitutional protection. *Watts v. United States*, 394 U.S. 705, 708 (1969). Certainly, the burning of a cross and making references to some "skinhead trouble" and "burning some niggers" would constitute a threat to the lives of the black family targeted in *R.A.V.*

135. WIS. ADMIN. CODE § UWS 17.06(2).

136. *U.W.M. Post, Inc. v. Board of Regents of the Univ. of Wis. Sys.*, 774 F.Supp. 1163, 1171 (E.D. Wis. 1991).

137. 405 U.S. 518 (1972).

cited *Chaplinsky* for the proposition that a breach of the peace statute must be limited "to words that have a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed."¹³⁸ Since the UW rule prohibited certain of these "words that wound," it was unconstitutionally overbroad.¹³⁹

R.A.V. v. City of St. Paul sets the stage for any attempt at curbing hate speech through legislation. While *R.A.V.* leaves the door open for legislation that addresses words that "by their very utterance inflict injury," this legislation must not attempt to distinguish words based on a viewpoint repugnant to the drafters. Seemingly, unless legislatures are willing to ban all categories of hurtful speech, such regulations will be found unconstitutional under current Supreme Court fighting words precedent.

B. Defining "Hatred"

Another obstacle for hate speech legislation is the difficulty of definition. The UN Convention on Racial Discrimination would require the United States to outlaw speech that was merely based on "racial superiority or hatred" without regard to any impending violence.¹⁴⁰ A law based on words that connote "hatred" would fail for vagueness under First Amendment analysis.¹⁴¹ In *Collin v. Smith*,¹⁴² hatred was found to be too subjective and difficult to define. In that case, the village of

138. *Id.* at 524.

139. *Id.*

140. Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 6, art. 4. Thus, the United States has not gone beyond what the British had prohibited in 1936 Public Order Act.

141. A law is unconstitutionally vague if a person of average intelligence cannot tell what is prohibited speech and what is not. *Zwickler v. Koota*, 389 U.S. 241 (1967) (citing *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926)); see also *Coates v. Cincinnati*, 402 U.S. 611 (1971); *Jordan v. DeGeorge*, 341 U.S. 223, 231-32 (1951).

142. 447 F. Supp. 676 (N.D. Ill. 1978), *aff'd*, 578 F.2d 1197 (7th Cir. 1978), *cert. denied*, 436 U.S. 953 (1978).

Skokie, Illinois had enacted several ordinances to neutralize a Nazi demonstration.¹⁴³ One of them forbade the dissemination of any materials which promote or incite racial or religious hatred.¹⁴⁴ The district court cited Supreme Court precedent for the proposition that a citizen has the right to "incite unrest, dissatisfaction, and even anger with social conditions."¹⁴⁵ Even if the court were to accept that incitement to hatred was unprotected by the First Amendment, it would be unable to distinguish between speech that incited to "anger with social conditions" and speech that incited to hatred.¹⁴⁶

To illustrate the definitional dilemma, the court noted that the plaintiff neo-Nazis believed that "busing programs," used to integrate schools, posed a threat to the quality of the public school system.¹⁴⁷ They also believed that blacks and Jews were the instigators of busing.¹⁴⁸ The court noted that the neo-Nazis had a right to make this argument.¹⁴⁹ If incitement to hatred were illegal,

at what point does a vehement attempt to arouse public anger at busing become an attempt to incite hatred of blacks and Jews? A society which values 'uninhibited, robust and wide-open debate cannot permit criminal sanctions to turn upon so fine a distinction.¹⁵⁰

Rather than risk infringement on speech that addressed issues of public interest, the First Amendment dictates that society endure speech that incites to hatred.

C. Regulating Offensive Speech

The Supreme Court has also ruled that words that are merely offensive or that merely produce anger, annoyance, or

143. 447 F. Supp. at 680-81.

144. *Id.* at 681.

145. *Id.* at 692 (citing *Terminiello v. Chicago*, 337 U.S. 1 (1949)).

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

alarm are words that warrant First Amendment protection. In *Cohen v. California*,¹⁵¹ the Court addressed the application of a statute which prohibited "maliciously and willfully disturbing the peace or quiet of any neighborhood or person by offensive conduct."¹⁵² Cohen had been convicted of violating the statute after he donned a jacket that bore the legend, "Fuck the Draft." In reversing the conviction, the Court held that "profane, offensive language is nonetheless First Amendment speech" that could not be censored.¹⁵³

Similarly, in *Texas v. Johnson*,¹⁵⁴ the Court confronted a statute that outlawed burning the United States flag. In striking down the statute, the Court held that the intent of the statute was to ban a type of expression because of its "offensiveness" to others, a justification that was rejected in *Cohen*.¹⁵⁵ In dicta, Justice Brennan specifically stated that ideas of racial superiority, offensive as they may be, are protected by the First Amendment.¹⁵⁶ Even concepts "virtually sacred to our Nation," such as the preservation of the integrity of the flag and the equality of the races do not merit exceptions from the First Amendment protections of speech.¹⁵⁷

State courts have followed suit in determining that mere offensiveness of speech is not sufficient for suppression of speech. In *N.Y. v. Dietze*,¹⁵⁸ New York's highest court struck down a statute that proscribed "the use of 'abusive' language with the intent to 'harass' or 'annoy.'"¹⁵⁹ There, the Court of

151. 403 U.S. 15 (1971).

152. *Id.*

153. *Id.* at 25.

154. 491 U.S. 397 (1989).

155. *Id.* at 413-14.

156. *Id.* at 418.

157. *Id.*

158. 549 N.E.2d 1166 (N.Y. 1989); see also *People v. Dupont*, 486 N.Y.S.2d 169 (N.Y. App. Div. 1985); *People v. Grupe*, 532 N.Y.S.2d 815 (N.Y. Crim. Ct. 1988); *State v. Harrington*, 680 P.2d 666 (Or. App. 1984). In *Harrington*, the court voided a statute that punished obscene or abusive language spoken with intent to "annoy or alarm." *Id.* at 669. The court found that such language was protected under both parts of the *Chaplinsky* fighting words doctrine. *Id.* at 670.

159. 549 N.E.2d at 1167 (citing N.Y. PENAL LAW § 240.25(2)). The court of ap-

Appeals found that speech which merely "annoys" cannot be proscribed under the New York or Federal Constitution. Judge Hancock reasoned that language that merely annoys does not "inflict injury" within the meaning of *Chaplinsky*.¹⁶⁰

D. Harassment

One area of hate speech regulation that appears to pass Constitutional muster concerns speech that reaches the level of harassment. The Supreme Court has explicitly held that harassing language and conduct in the workplace is not protected speech.¹⁶¹ Specifically, the Court has held that harassment based on gender or race is a violation of Title VII of the 1964 Civil Rights Act.¹⁶² In *Meritor Savings Bank v. Vinson*, the Court noted that harassment in the workplace can "destroy completely the emotional and psychological stability of minority group workers."¹⁶³ The Court found valid the Equal Employment Opportunity Commission's (EEOC) standard for prohibiting harassment under Title VII. The EEOC finds actionable under Title VII:

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature that has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.¹⁶⁴

peals noted that words which, "by their utterance alone, inflict injury," are punishable under the state and federal constitutional law. *Id.* at 1168. It further noted that a harassment statute could be narrowly written to encompass only these words. *Id.*

160. *Id.*

161. *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986); see also *Gray v. Greyhound Lines, East*, 545 F.2d 169 (D.C. Cir. 1976).

162. *Meritor Savings Bank*, 477 U.S. at 176; see also *Compton v. Borden, Inc.*, 424 F. Supp. 157 (S.D. Ohio 1976); *Cariddi v. Kansas City Chiefs Football Club*, 568 F.2d 87 (8th Cir. 1977).

163. 477 U.S. at 66, (citing *Rogers v. E.E.O.C.*, 454 F.2d 234, 238 (5th Cir. 1971), cert. denied, 406 U.S. 957 (1972)).

164. 477 U.S. at 65 (citing 29 C.F.R. § 1604.11(a) (1985)). This standard is very similar to the University of Wisconsin law struck by the Eastern District of Wisconsin. Some scholars think that such restrictions on harassment should be

The Court went on to note in dicta, however, that some offensive speech and conduct is not severe enough to be labeled harassment under Title VII.¹⁶⁵ For harassment to be actionable, "it must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'"¹⁶⁶

In *Boos v. Barry*,¹⁶⁷ the Supreme Court upheld a ban on harassing speech that occurs outside of the workplace. In *Boos*, the Court rejected a provision of the District of Columbia Code which prohibited, within 500 feet of a foreign embassy, "the display of any sign that . . . tends to bring the foreign government into 'public odium' or 'public disrepute.'"¹⁶⁸ Finding this law to be an unconstitutionally content-based regulation,¹⁶⁹ the Court pointed to less speech restrictive alternatives for achieving the government's interests.¹⁷⁰ For instance, 28 U.S.C. § 112(b)(2) places a ban on a protester's attempts to "intimidate, coerce, threaten or harass" foreign officials. According to the Court, this ban would sufficiently protect the safety and security of foreign dignitaries and officials. One scholar has noted that by inference, 28 U.S.C. § 112(b)(2) is "presumably" constitutional.¹⁷¹ On the other hand, the Court noted, it would be an improper application of the law to use it to protect merely the officials' feelings or sensibilities.¹⁷²

limited to the workplace. See Aryeh Neier and Nan Hunter's comments at Cardozo Law School Symposium on Hate Speech, Nov. 1991.

165. 477 U.S. at 67.

166. *Id.*, (quoting *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982)).

167. 485 U.S. 312 (1988).

168. *Id.*, (citing D.C. CODE § 22-1115).

169. The notion of content neutrality was first elucidated by the Supreme Court in *Police Dep't v. Mosley*, 408 U.S. 92 (1972), which held that, "[above] all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Id.* at 95.

170. *Boos v. Barry*, 485 U.S. at 324-26.

171. JOEL GORA, *THE RIGHT TO PROTEST* 60 (1991).

172. *Boos v. Barry*, 485 U.S. 312 (1988); see generally GORA, *supra* note 171, at 60.

Laws prohibiting harassment outside of the workplace have also been upheld by the lower federal courts.¹⁷³ For instance, the Third Circuit was confronted with the constitutionality of 47 U.S.C. § 223, the federal telephone harassment statute.¹⁷⁴ Defendants in that case argued that the law was content-based in violation of the First Amendment. By banning some types of telephone communication and not others, it was argued, 47 U.S.C. § 223 violated the First Amendment.

The Third Circuit, however, held that the telephone harassment statute was not trying to suppress the communication of ideas, but was merely prohibiting abusive conduct.¹⁷⁵ Because the intent of the statute was to protect the victims of harassment, the law did not violate the axiom of content neutrality.¹⁷⁶ Since the statute furthered the substantial government interest of protecting victims of harassment, it was found to be constitutional.¹⁷⁷

E. Summary of U.S. Caselaw on Hate Speech

Any attempt at hate speech legislation in the United States faces a significant obstacle in the First Amendment protection of free speech. Under *R.A.V.*, the Supreme Court virtually closed the door on legislation that seeks to prohibit so-called fighting words that, by their very utterance, inflict injury. The remaining categories of hate speech, namely harassing and threatening, are the only categories which remain open to regulation under current Supreme Court doctrine.

173. In *Collin v. Smith*, the district court left open the possibility of prohibiting harassment: "It bears noting that we are not reviewing here a law which prohibits action designed to impede the equal exercise of guaranteed rights, see e.g. 18 U.S.C. §§ 241, 245, or even a conspiracy to harass or intimidate others and subject them to racial or religious hatred . . . If we were, we would have a very different case." 447 F. Supp. 676 (1978).

174. *United States v. Lampley*, 573 F.2d 783, 785 (3d Cir. 1978).

175. *Id.* at 787.

176. *Id.* The Supreme Court has upheld content based laws that satisfy strict scrutiny. In those cases, the law must be narrowly tailored and necessary to serve a compelling state interest. *Boos v. Barry*, 485 U.S. 312 (1988).

177. *United States v. O'Brien*, 391 U.S. 367 (1968); see also *Lampley*, 573 F.2d at 787.

IV. APPLICABILITY OF BRITISH LAWS IN THE UNITED STATES

Much of the debate on United States hate speech legislation is argued in the abstract. Judges, scholars, and legislators involved in this subject spend considerable time predicting the consequences of such legislation in order to determine whether any law marks the top of the "slippery slope." Fortunately, we have the opportunity to learn from the mistakes of the British as we decide whether to adopt a given measure. The following sections will address the overall benefits and disadvantages of the incitement and the harassment laws and their individual constitutionality were they adopted in the United States.

A. *Incitement to Racial Hatred*

1. Value of the Law in Great Britain

The incitement laws have had a marginal effect on racism in Great Britain. According to Robert Moore, a professor at Liverpool University, "Blacks continue to be the victims of prejudice in housing and employment, and threatened by racially motivated violence Black people remain just as trapped in the lowest-paid, most unpleasant jobs, and the least desirable homes and areas as were their immigrant parents and grandparents."¹⁷⁸ Similar conclusions for the continued prevalence of anti-Semitism have been made. For instance, one study notes that racist motivated violence increased by twenty-five percent from 1989 to 1990; for the same period, anti-Semitic incidents rose by fifty percent.¹⁷⁹

On the other hand, one development over the last ten years in Great Britain is that "organised [sic] British fascist politics have all but collapsed."¹⁸⁰ Arguably, the incitement

178. Thomas Prentice, *United Europe Likely to Affect UK Blacks*, THE TIMES (London), Aug. 30, 1991, at 4.

179. Appleyard, *supra* note 1; see also Raines, *supra* note 1.

180. Appleyard, *supra* note 1. The National Front is essentially nonexistent while the "British National party has about 1,000 members and the British Move-

laws are partially responsible for the demise of these groups. Certainly, the law kept leaders of the National Socialist Movement and the British Nationalist Party in prison at the peak of their careers.¹⁸¹

However, these groups flourished during much of the twenty-five year period that these laws have been in effect. During the first ten years immediately after the inception of the RRA 1965, Great Britain actually saw an increase in the "number of National Front outdoor meetings."¹⁸² In the Greater London council elections of 1977, the "National Front won 119,000 votes, or 5.5 percent of the total votes cast."¹⁸³

Although the old fascist parties may be virtually non-existent, there are signs that organized neo-Nazism is on the rise both in Great Britain and in the rest of Europe.¹⁸⁴ According to Geoffrey Alderman, a University of London Professor of History, sporadic incidents of fascism and the popularity of more organized groups have been increasing in Great Britain in the last few years.¹⁸⁵ Moreover, "there has been a clear increase in the amount of anti-semitic literature in circulation."¹⁸⁶

Many weaknesses of the incitement laws may have been responsible for the continued existence of racist and fascist activity since the laws were developed in 1965. As discussed above, for instance, many racist speakers and publishers were able to elude prosecution by avoiding the "threatening, abusive, or insulting" words proscribed in the incitement laws. By referring to the problems of immigration rather than the

ment perhaps 200." *Id.*

181. See *Jordan v. Burgoyne*, 2 All E.R. 225 (1963) (Eng.) and *supra* text accompanying notes 24-29. See *Colin Gaoled*, *supra* note 43; *R. v. Morse & Tyndall*, 8 Crim. App. (S) 369 (1986) (Eng.).

182. Leopold, *supra* note 5, at 398.

183. NEIER, *supra* note 29, at 149.

184. Even in Germany where the National Socialism is banned outright, neo-Nazism is seeing a comeback. Marc Fisher, *Youthful Face of Germany's Neo-Nazis*, WASH. POST, Mar. 2, 1992, at A1.

185. Appleyard, *supra* note 1.

186. Appleyard, *supra* note 1; John Winder, *More Racist Papers Being Published*, THE TIMES (London), Dec. 4, 1990, at 6.

"Coloured Invasion," some speakers were able to continue to spread their racist views.¹⁸⁷ Indeed, "[c]ode words are easily substituted for explicit references to race."¹⁸⁸

Other factors surrounding the cases that went to trial may have actually benefited the defendants. For instance, the trials produced publicity for little known groups and publications that might have otherwise gone unnoticed.¹⁸⁹ In addition, the prosecutions that resulted in convictions also created martyrs for the cause of national socialism.¹⁹⁰

At a time when incidents of racism are on the rise, it is interesting to note that some black leaders are calling for a repeal of the incitement laws. Nigel Fraser, a member of the Society for Black Lawyers, describe the incitement and other Race Relations laws as "cosmetic" and ineffective in fighting the root causes of racism.¹⁹¹ He and his colleagues argue that "prejudice is a disease too deep-seated to be eradicated by statute."¹⁹²

Considering the marginal success that the incitement laws have had in Great Britain, there is no reason to introduce them in the United States. If the laws have achieved anything, they may have helped reduce the popularity of organized fascist and racist groups and they may have reduced the prevalence of racist newspapers and pamphlets. However, in the United States, the National Socialist Party and the KKK have

187. Indeed, some authors argue that the use of more "sophisticated formulations of their propaganda" has led to an increase in the appeal of racist propaganda." Kretzmer, *supra* note 48, at 507.

188. NEIER, *supra* note 29, at 155.

189. See *Race Act Not a Curb*, *supra* note 36; *Four Cleared in Act Trial*, *supra* note 36.

190. Leopold, *supra* note 5, at 404.

191. George Hill, *Still No Sign of the Melting Pot*, THE TIMES (London), Aug. 20, 1990, at 14.

192. *Id.* While there is some agreement among black leaders that the current laws should be repealed, there is no such agreement on what alternatives Great Britain should turn to to fight racism. Mukhtar Miah, a British born Bengali, would like to see the current laws replaced with laws that are tougher on racial violence. Glory Osaji-Umeaku, a Nigerian born businessman, argues that any special treatment fosters dependent attitudes among minorities and creates resentment in their white neighbors. *Id.*

not been major forces since the 1960s and racist newsletters are not nearly as prevalent in the United States as they are in Great Britain.¹⁹³

2. Problems of Enforcement

The consent of the Attorney General requirement has created two problems that have prevented the incitement laws from realizing their potential in fighting racism. The first problem may be described as a slippery slope dilemma: the incitement laws have been used on occasions that arguably hinder their original goals. Second, the Attorney General has failed to give his consent to prosecute what, to many, seem to be blatant examples of racist speech.

The slippery slope argument posits that a law which may be designed to combat an evil upon which there is almost universal consensus may eventually be used against ideas for which tolerance is required. For this reason, society needs to protect the right to speak freely for even those people we find offensive, even repugnant. As Aryeh Neier, the ACLU's Executive Director during the Skokie trial, once said: "It would be more pleasant for defenders of freedom to rally around the causes of a better class of victims. But if we wait until nice people are victimized, it may be too late. The first place to defend freedom is the first place it is denied."¹⁹⁴ Civil libertarians argue that regulations on free speech should not even be put on the books for the fear that they will be used against the wrong people.¹⁹⁵

Great Britain's incitement laws, though enacted for laudable reasons, have been used to silence those they were seeking to protect. As described above, the prosecution of Michael Abdul Malik put a prominent leader of black nationalism in prison for eighteen months. Though he was arguably preaching hatred of white people, he also was expressing the fundamen-

193. COLUMBIA ENCYCLOPEDIA, *supra* note 58, at 1505.

194. NEIER, *supra* note 29, at 148.

195. NEIER, *supra* note 29, at 148.

tally political message that blacks were not being treated fairly in British society. Because Great Britain claims to be a democracy, his speech was owed more protection. Yet, in a society which has not yet gained a consensus on whether it is possible to be black and British, it seems inevitable that a law as broadly written as the incitement law would be used to prosecute minority group members.¹⁹⁶

The second problem with the Attorney General consent requirement may also have political overtones: the government has foregone the prosecution of incidents of racist speech. Both the Board of Deputies of British Jews and the Commission for Racial Equality have repeatedly criticized the Attorney General's office for refusing to prosecute certain cases.¹⁹⁷ While these groups sometimes have been able to pressure the government to increase the number of prosecutions for incitement, groups which are not typically served by these organizations have no redress.¹⁹⁸

Both overuse and the reported underuse of the incitement laws illustrate the difficulty in leaving far-reaching laws in the hands of politicians. As one scholar noted, speeches that come under the incitement laws "often have strong political overtones, and it should therefore not be in the hands of a politician to decide when to prosecute."¹⁹⁹

196. In Great Britain, the consensus against racism is "precarious." Bindman, *supra* note 42, at 25.

197. Appleyard, *supra* note 1; Frances Gibb, *Prosecutions for Provoking Anti-Semitism to Go Ahead*, THE TIMES (London), Jan. 21, 1991, at 8; *Anti-Semitism*, 88 LAW SOC'Y GAZETTE 11, 11 (1991). "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." Lasson, *supra* note 11, at 178 n.100. "The Commission for Racial Equality is a quasi-governmental agency. The Crown appoints the Commission and funds the agency, which then operates independently." Lasson, *supra* note 11, at 178 n.99.

198. A Gypsy, who was unable to bring any legal action, eventually took her case to the European Court. Her case was denied. J.P. Gardner & S. Dolle, *European Commission of Human Rights—Report on the 180th Session*, 83 LAW SOC'Y GUARDIAN GAZETTE 2827, 2827 (1986).

199. Leopold, *supra* note 5, at 404. Another scholar noted that,

Once the statute is on the books, authorities who passively fail to prosecute under it are accused of indifference to racist poison. If however

Considering the problems the British have had in enforcing these laws, the United States should forego adopting them. Consider, for the moment, if such a law were on the books in Louisiana and David Duke had been elected its governor. The broad terms "hatred" and "incite" have the potential of being used against what most people of the United States would consider to be valid political protest, but someone such as David Duke would consider un-American.

3. Constitutionality of the Incitement Laws in the United States

Even if our elected officials agreed to pass laws that prohibited incitement to racial hatred, these laws would be struck down in the federal courts as violative of the First Amendment. As described above, prohibitions on speech of this sort are only constitutional if they fall into a very narrow category of unprotected speech. Racist speech, can only be protected if it is likely to produce "imminent lawless action,"²⁰⁰ or if it constitutes harassment.²⁰¹

The incitement law, as it now stands, asks only if the defendants "intended" to incite racial hatred or if, by their speech, racial hatred was likely to be incited.²⁰² The connection between persuading *X* to hate *Y* and the likelihood that *X* will commit a violent act against *Y* is very tenuous and uncertain. The fact that *X* may now hate *Y* does not mean that he or she is "likely" to act violently toward *Y*. The law would therefore not pass the *Brandenburg* test that requires that violence not only be "likely," but also "imminent."

they do prosecute anyone, they are accused of biased and selective prosecution. It is not clear that the resulting controversies over the use or non-use of the law do much to promote racial tolerance.

Robert Gordon, *Law and Disorder*, 64 IND. L.J. 803, 812 n.18 (1988-1989).

200. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). See also *supra* text accompanying notes 118-22.

201. *Boos v. Barry*, 485 U.S. 312 (1988).

202. Public Order Act, 1986, ch. 64, § 18 (Eng.).

The current United States Supreme Court interpretation of the fighting words doctrine asks whether a person's speech is so abusive that the person towards whom the insults are directed is likely to start a fight with the speaker.²⁰³ The incitement law, however, does not inquire into the result of racist language on the victim of speech, but looks to the third party who might be persuaded by the speech. Imagine, for instance, if X, a white man, was using abusive language to berate Y, a black man, and no one else was within X's earshot. X would not be guilty of incitement to racial hatred since there was no one around whom he could persuade of his racist views. While X's use of fighting words might be proscribed under the First Amendment as harassment, it would not be violative of the incitement law. Thus, the instances where the incitement law may be used do not fit into the fighting words exception to the First Amendment.

Were the Supreme Court to uphold a prohibition on speech that incited to racial hatred, it would have to carve out a new exception to free speech under the First Amendment. Considering the current wave of anti-politically-correct speech sentiment, the chances that the present conservative Court would make an exception for disenfranchised groups are next to nil. Moreover, there is widespread agreement among scholars—including those who champion harassment codes—that hateful speech directed toward the public should be protected speech.²⁰⁴ For this type of speech, there is a consensus in the United States that the best way to combat racist speech is to let racists broadcast their ideas.²⁰⁵ There is a fear that suppressing groups like the Klan will only force them "to choose more violent and clandestine means of obtaining its goals."²⁰⁶

203. *Brandenburg*, 395 U.S. at 447.

204. See Matsuda, *supra* note 2, at 2357; Wiener, *supra* note 3. (1991).

205. Matsuda, *supra* note 2, at 2352 n.165.

206. Matsuda, *supra* note 2, at 2352 n.165.

B. Harassment Laws

1. Value of Great Britain's Section Five of The Public Order Act, 1986

Section 5 of the POA 1986 targets a type of speech that was never addressed in any of the versions of the incitement laws. Namely, section 5 seeks to protect the person who is harassed through the use of "abusive, threatening, or insulting" language.²⁰⁷ As envisioned by the Home Secretary, section 5 would be used to punish those who use verbal assaults and abusive words in order to degrade or humiliate particular individuals on the basis of their membership in minority groups.²⁰⁸

This new law holds great promise for two reasons. First, it is less likely that harassing speech will be confused with political speech. For instance, when Michael Abdul Malik proclaimed that "[t]he black man has soul. The white man has no soul. He is a soulless person,"²⁰⁹ he could not be convicted of harassing any individual, even if his speech could be seen as insulting and therefore inciting to racial hatred.

The incitement law, with its broad application, has been used to suppress speech whose main goal was to express a political message. The harassment laws, on the other hand, are designed to prohibit speech that it is intended to cause harm to an individual. Rather than focusing on innocuous speeches at Speakers' Corner in Hyde Park or on harmless pamphlets, this law will likely focus on protecting people from abuse in residential neighborhoods, schools, and the workplace.

Second, the Attorney General is not required to consent to a prosecution of section 5. By taking away the consent requirement, there are less chances that the law will be used to serve narrow partisan interests of elected officials. Thus, the Direc-

207. Public Order Act, 1986, ch. 64, § 5 (Eng.).

208. Bindman, *supra* note 42, at 25.

209. *R. v. Malik*, 52 Crim. App. 140 (1968) (Eng.).

tor of Public Prosecutions is free to seek convictions based on the investigative work of the local police.²¹⁰

2. Constitutionality of Harassment Laws in the United States

There is a chance that section 5 of the Public Order Act 1986 would be found constitutional under current First Amendment doctrine. As discussed above, there is a narrow exception available to the government when it seeks to prohibit harassing speech.²¹¹ This exception is available to prohibit words that "by their very utterance inflict injury or tend to incite an immediate breach of the peace,"²¹² or words that "create an abusive working environment."²¹³

Most of section 5 of the POA 1986 fits into this narrow exception created by the Supreme Court. The one difficulty is found in section 5(1) which includes a prohibition on speech that causes "alarm or distress."²¹⁴ Speech which merely causes "alarm or distress" would probably not merit prohibition under *Cohen v. California*²¹⁵ and *Texas v. Johnson*.²¹⁶

With the deletion of this portion of section 5, the harassment law, as it stands, would fit into current First Amendment analysis. Most importantly, the law does not specifically prohibit speech that describes a person's "colour, race, nationality (including citizenship) or ethnic or national origins"²¹⁷ as does the incitement law. Since the harassment law prohibits all "threatening, abusive or insulting"²¹⁸ speech regardless of its

210. Bad relations between blacks and the police may still provide a political element to the prosecution or non-prosecution of harassment. See, e.g., David Moran, *Oh Henry*, *NEWSDAY*, Aug. 20, 1991, at 51.

211. See *supra* notes 161-77 and accompanying text.

212. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

213. *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986) (quoting *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982)).

214. Public Order Act, 1986, ch. 64, § 5(1) (Eng.).

215. 403 U.S. 15 (1971).

216. 491 U.S. 397 (1989).

217. Public Order Act, 1986, ch. 64, § 3 (Eng.).

218. Public Order Act, 1986, ch. 64, §§ 5-6 (Eng.).

focus, it would probably be found content neutral and therefore constitutional.²¹⁹

V. CONCLUSION

Both the United States and Great Britain have recently experienced a marked increase in the number of racist and anti-Semitic incidents in the workplace, on university campuses, and on the streets.²²⁰ More and more, these incidents are seen to deprive victims of hate speech of their "personal security and liberty as they go about their daily lives."²²¹ These words of abuse, intended merely to harass, are not deserving of First Amendment protection. It is possible that legislation similar to the British laws that target harassment could pass United States Constitutional muster. Section 5 of the POA 1986 and similar content neutral laws in the United States, perhaps, can address incidents of hate speech while leaving important protections of free speech intact.²²² Scholars and legislators in the United States should monitor the current British experimentation with laws that target harassing speech. So far, the British harassment law has not been used to address racist hate speech. In fact, it has been used to help control political protesters and gays in their public activities.²²³

219. See *United States v. Lampley*, 573 F.2d 783 (3d Cir. 1978). Because the intent of the telephone harassment statute was the protection of the victims of harassment, the law did not violate the axiom of content neutrality. *Id.*

220. Elinor Langer, *The American Neo-Nazi Movement Today*, 251 THE NATION 82 (1990).

221. Matsuda, *supra* note 2, at 2321. The ACLU Policy Statement on Free Speech and Bias on College Campuses would allow colleges and universities to enact "disciplinary codes aimed at restricting acts of harassment, intimidation and invasion of privacy . . . when directed at a specific individual or individuals and when intended to frighten, coerce, or unreasonably harry or intrude upon its target." See Nadine Strossen, *Frontiers of Legal Thought II The New First Amendment: Regulating Racist Speech On Campus: A Modest Proposal?*, 1990 DUKE L.J. 484, 571, (citing ACLU Policy Statement, § 3, Oct. 13, 1990).

222. Appleyard, *supra* note 1; Raines, *supra* note 1, at A1.

223. See *supra* notes 107-08 and accompanying text.

As can be seen from the British experience, it is very difficult to legislate in the area of hate speech, even speech that rises to the level of harassment, because of the tendency to squelch free speech and public dialogue. The British experience with hate speech legislation has made further and further inroads into cherished legal notions of free speech,²²⁴ due process²²⁵, and have all but ignored the need to prove mens rea in seeking convictions.²²⁶ Moreover, with recent increases in racist incidents in Great Britain in the last few years, the incitement laws have seemingly had very little effect.

It seems clear from the history of the British laws that mere legislation of speech will not adequately change deep-rooted prejudice. Only education and economic development that seeks to change attitudes and inequalities in both British and United States societal structures will have a lasting effect on eradicating prejudice.

Nathan Courtney

224. See *supra* note 95.

225. See *supra* note 83.

226. See *supra* note 74.

