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Lessons in Confronting Racist Speech: Good Intentions, Bad Results, and Article 4(a) of the Convention on the Elimination of All Forms of Racial Discrimination

Michael A. G. Korengold

Dese boys be sayin' that we be comin' here to Dartmut an' not takin' the classics. You know, Homa.

The Dartmouth Review

For the white man to ask the black man if he hates him is just like the rapist asking the raped, or the wolf asking the sheep, "Do you hate me?" Our enemy is the white man! Oh, yes, that devil is our enemy.

Malcolm X

Racist expression or "hate speech" is a profoundly degrading and disturbing manifestation of racial tension, particularly when used as a tool of persecution. Racist speech, however, also can be an effective and sometimes necessary means of depicting the racial and social subjugation of one group by another. In their efforts to silence hate speech, governmental bodies throughout the world continually explore new legislative approaches to combat it. These attempts, however, almost completely disregard politically-motivated racist speech, and inevitably intrude upon an individual's right to express herself.

The United Nations adopted Article 4 of the Convention on the Elimination of All Forms of Racial Discrimination as a means of eradicating the manifestations of racial hatred—namely, racist speech and propaganda. Section (a) of Article 4 binds the Racial Discrimination Convention's signatories to enact legislation prohibiting all dissemination of ideas based on

racial superiority or hatred and punishing any person who incites another to racial discrimination.4

A great number of countries have responded to Article 4(a) with legislation that reflects its language and purpose. Evaluating Article 4(a) in light of its subsequent application, however, reveals Article 4(a)'s two principal shortcomings: Article 4(a) invites inconsistent interpretations and its prohibitions directly conflict with principles of free expression.

This Note explores the ways in which Article 4(a) fails to provide an effective guide for international legislation and, ultimately, compromises a fundamental human value—free expression. For these reasons, this Note argues that governmental bodies should avoid complying with Article 4(a). Instead, Article 4(a) should be modified to strike a proper balance between free expression and protection from racist hate speech.

Part I of this Note briefly traces the background of Article 4(a) and exposes its troublesome aspects through an examination of the United Kingdom's statutory and jurisprudential experience with the article. Part II offers a view of racist speech that links it to other forms of radical expression integral to a diverse democracy. Part III suggests specific modifications to Article 4(a) that appropriately balance an individual's right to express herself and restrictions on racially-motivated hate speech. This Note concludes that Article 4(a), so modified, should be used as a model racist speech law.5

I. ARTICLE 4(a)

The systematic genocide practiced during World War II caused the international community to recognize the necessity

4. Id.
5. This Note is limited to an examination of Article 4(a) and laws that comply with its provisions; hopefully, it will contribute to an understanding of how racist speech regulation can work in any context. Although the United States's experience is outside the scope of this Note, the significant debate in this country regarding the constitutionality of racist speech laws, and the best approach to regulating such conduct must be acknowledged. An exhaustive list of authors is impractical, but the following works have contributed greatly to this discussion: Richard Delgado, Campus Antiracism Rules: Constitutional Narratives in Collision, 85 NW. U. L. REV. 343 (1991); Charles R. Lawrence III, Acknowledging the Victim's Cry, ACADEME, Nov.-Dec. 1990, at 10; Robert Post, Racist Speech, Democracy, and the First Amendment, 32 WM. & MARY L. REV. 267 (1991); Mari J. Matsuda, Public Response to Racist Speech: Considering the Victim's Story, 87 MICH. L. REV. 2332 (1974). In addition, the United States Supreme Court recently examined racist speech regulation in R.A.V. v. City of St. Paul, 112 S.Ct. 2538 (1992).
of enacting positive measures to prevent its reoccurrence. This manifestation of racism shocked the world and provided the catalyst for the proliferation of national anti-discrimination legislation. National legislation, however, was far from effective. The rash of anti-semitic incidents in Europe during the 1960's demonstrated the inadequacies of relying on nations to enact effective legislation. Pressure to create internationally binding legislation mounted.

A. THE ADOPTION AND DRAFTING OF ARTICLE 4(A)

International desire to prohibit incitement to racial hatred and discrimination gained momentum after the genocide in Nazi Germany was revealed. The United Nations led the effort to adopt internationally binding legislation against racist speech. To implement this policy, the U.N. adopted the Racial Discrimination Convention, which came into effect on January 4, 1969. It directed the Committee on the Elimination of Racial Discrimination to implement the policy. Lerner, supra note 6, at 45-46. This pattern of anti-semitism became known as the "swastika epidemic." Id.

Many countries of the Third World supported the call for United Nations legislation, viewing it as an opportunity for increased protection of their national identities. Id. at 46.

As early as 1949, the U.N. Commission on Human Rights considered, though ultimately rejected, an article prohibiting incitement to violence on racial, national or religious grounds. Matsuda, supra note 5, at 2342 n.108.

Racial Discrimination Convention, supra note 3. The United Nations adopted the Racial Discrimination Convention 106 votes to zero, with only Mexico abstaining. Lerner, supra note 6, at 47. Mexico later changed its abstention to an affirmative vote. Id.


cial Discrimination to implement the Convention.11

Article 4(a) provides:

States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of


By 1964 the Sub-Commission had drafted a proposal consisting of ten articles and a preamble and sent it to the Commission on Human Rights. LERNER, supra note 6, at 47. The Commission on Human Rights adopted the substantive provisions of the Sub-Commission's recommendations. Id. The Economic and Social Council added a U.S.-proposed article on anti-semitism as well as articles concerning the Convention's implementation, before submitting the proposal to the Third Committee on July 30, 1964. Id.

Finally, the Third Committee adopted a proposal excluding reference to specific forms of hatred or discrimination. Id. The proposal, submitted by Greece and Hungary, ameliorated the controversy surrounding the article on anti-semitism. Id. Specific reference to apartheid, the system of racial discrimination and segregation practiced in South Africa, however, was not eliminated. LERNER, supra note 6, at 52. Despite this remaining ambiguity, the Third Committee submitted its report to the General Assembly. Id. at 47.

As of 1990, 128 countries have ratified the Convention, including all major powers except the United States and Japan. Id. at 45. Although the United States signed the Racial Discrimination Convention on September 28, 1966, the U.S. did not ratify the Convention and therefore is not bound by its dictates. NATAN LERNER, THE U.N. CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION 200 (1980).

11. Racial Discrimination Convention, supra note 3, arts. 8-15, 660 U.N.T.S. at 224-34. The Racial Discrimination Convention consists of a Preamble and 25 articles divided into three parts. Part I includes definitions of racial discrimination and the signatories' obligations; part II's provisions concern the implementation of the Convention; and part III consists of final clauses. LERNER, supra note 6, at 47.

Article 1 defines racial discrimination as "any distinction, exclusion, restriction or preference based on race, color, descent, or national or ethnic origin [which impairs] human rights and fundamental freedoms." Racial Discrimination Convention, supra note 3, art. 1, 660 U.N.T.S. at 216. The term "national origin" created a problem of interpretation. Some drafters believed it should be limited to the citizens or holders of passports issued by a state, others believed it should include groups bound by a common ethnicity, heritage, or culture. LERNER, supra note 6, at 49.

Article 3 condemns racial segregation; Article 5 enumerates fundamental rights that states must protect, such as freedom of speech. Racial Discrimination Convention, supra note 3, arts. 3, 5, 660 U.N.T.S. at 218-22.
Human Rights and the rights expressly set forth in article 5 of this Convention, inter alia;
(a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof.12

Application of Article 4(a)'s incitement and dissemination provisions raises different concerns. The dissemination provision concerns solely the speaker's conduct; dissemination is illegal even if no one receives the message. Alternatively, the incitement provision looks to the listener's violent or discriminatory reaction to the racist speech.13 Both provisions reflect the drafters' collective attempt to prohibit racist expression before any violence or racial discrimination actually occurs.14

12. Racial Discrimination Convention, supra note 3, art. 4, para. a., 660 U.N.T.S. at 220. The rest of Article 4 provides that State Parties:
(b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;
(c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.


13. This Note defines an act of racial discrimination as one legitimately proscribable by the state, such as bias-motivated assault.

14. This preemptive approach goes to the heart of the tension between a state's legitimate desire to prevent violence and its desire to protect free expression, despite free expression's potential to provoke violence. See Lerner, supra note 10, at 51.

The adoption of the Racial Discrimination Convention bound the ratifying states, within their legal and constitutional frameworks, to implement its dictates. Unless a nation submitted a reservation to Article 4(a), ratification compelled it to enact Article 4(a)'s specific provisions. A number of countries that the Committee judged to be in compliance with the dictates of Article 4(a) had preexisting legislation that met the Committee's criteria. For example, Upper Volta submitted to the Committee the text of three 1959 laws which together satisfied the requirements of Article 4(a). U.N. Comm. on the Elimination of Racial Discrimination, Positive Measures Designed to Eradicate All Incitement To, or Acts of Racial Discrimination, Agenda Item 24, at 6, U.N. Doc. CERD/2, U.N. Sales No. E.88.XIV.2 (1986). Yugoslavia demonstrated compliance with Article 4(a) by its Constitutional provisions on dissemination and incitement, which also were codified in its 1977 Criminal Code. Id., Agenda Item 26, at 6. Zaire demonstrated its pre-existing compliance with a 1966 law imposing penalties for all forms of discrimination including incitement, propaganda, and financing. Id., Agenda Item 32, at 7.

Several other countries responded to the Racial Discrimination Convention by amending previously existing legislation to meet the requirements of Article 4(a). These countries include France, India, Iran, Senegal, and the Soviet Union. Id., Agenda Items 41-62, at 9-14. For example, France ratified the
All in all, Article 4 was "one of the most difficult and controversial [provisions] of the [Racial Discrimination] Convention." Several delegates considered Article 4(a) regressive and believed it could not be squared with United Nations guaranties of free expression. Ultimately, many of the convention's signatories—particularly those who opposed the dissemination provision—ratified the convention with specific reservations to Article 4(a).

Convention on July 28, 1971; one year later it passed the Act of July 1, 1972 which amended 1881 legislation to prohibit defamation and insults on account of race, ethnic group, nation, or religion and to prohibit persons from "incit[ing] discrimination, hatred or violence" based on such characteristics. Id., Agenda Item 41, at 9-10.

In what is perhaps the best example of full compliance, the Netherlands responded to the Racial Discrimination Convention by amending the Netherlands Penal Code to fine anyone publicly expressing views "insulting to other persons or groups on account of their race, religion or conviction." Id., Agenda Item 39, at 9.

Some countries passed legislation presumably to comply with Article 4(a), but did not meet the Committee's criteria. For example, in contemplation of signing the Racial Discrimination Convention, Finland enacted legislation which adequately implemented the dissemination provision, but not the provision on incitement. Id., Agenda Items 35-40, at 8-9.

15. LERNER, supra note 10, at 43. The text was "the outcome of a difficult compromise after hours, and even days, of discussion, drafting and redrafting." Id. at 47 (quoting statement of Mr. Lamptey, a delegate from Ghana).

16. Id. Some representatives objected to any regulation of expression. Id.

17. Article 20(2) permits reservations to the Convention provided they are not "incompatible with [its] object and purpose." Racial Discrimination Convention, supra note 3, 660 U.N.T.S. at 236. As of 1980, twelve countries had submitted reservations to Article 4. LERNER, supra note 14, at 156-62. For example, although Australia ratified the Racial Discrimination Convention in 1975, it did so with a reservation to Article 4. AUSTRALIAN HUMAN RIGHTS COMMISSION, INCITEMENT TO RACIAL HATRED: THE INTERNATIONAL EXPERIENCE, OCCASIONAL PAPER No. 2 1 (1982) [hereinafter HUMAN RIGHTS PAPER No. 2]. Hence, it is not illegal in Australia to incite others to racial discrimination or to disseminate ideas advocating racial discrimination or violence. Id.

Some of the reservations appeared to conflict with post-World War II treaties binding various nations to prohibit fascist organizations' propaganda. See Schweib, supra note 10, at 1054; Reisman, supra note 10, at 49.

The United States submitted a reservation that may ensure that the U.S. Supreme Court can follow the U.S. Constitution in the event that there is a conflict between Article 4(a) and the First Amendment. Jordan J. Paust, Re-reading the First Amendment in Light of Treaties Proscribing Incitement to Racial Discrimination or Hostility, 43 Rutgers L. Rev. 565, 567-68 (1991). But see Jones, supra note 6, at 457-58 (arguing that a reservation is unnecessary since only an absolutist interpretation of the First Amendment would protect speech that Article 4(a) condemns).

Some countries made general, superfluous reservations to Article 4, often simply reiterating the limitations contained in the Article itself. For example, the United Kingdom restated the Article's provision that all laws passed in contemplation of Article 4 would be drafted "with due regard to the principles
II. ARTICLE 4(a)'S CONTROVERSIAL PROVISIONS

The United Kingdom's experience in enacting legislation complying with Article 4(a) is instructive.\textsuperscript{18} The British Race Relations Act addresses the same issues as Article 4(a) and is embodied in the Universal Declaration of Human Rights and expressly set forth in article 5 of the Racial Discrimination Convention.\textsuperscript{18} LERNER, \textit{supra} note 10, at 157-60.

18. For legislative bodies in the United States, the United Kingdom's history is particularly useful given the cultural, historical, and political identity between the two countries.

Great Britain's legislative initiatives in the area of regulating racist speech began with Section 5 of the Public Order Act of 1936, which was specifically enacted to wipe out the British Union of Fascists. HUMAN RIGHTS PAPER NO. 2, \textit{supra} note 17, at 4 n.6. Section 5 of the Public Order Act provides that "[a]ny person who in any public place or at any public meeting uses threatening, abusive or insulting words or behaviours 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 offence." Jordan v. Burgoyne, All E.R. 225, 227 (1963); see also David Kretzmer, \textit{Freedom of Speech and Racism}, 8 CARDOZO L. REV. 445, 498-99 (1987).

The movement to criminalize racist speech gained prominence in the early 1960's. HUMAN RIGHTS PAPER No. 2, \textit{supra} note 17, at 4. In 1963, when Parliament revised the Public Order Act, the Conservative government proposed, but ultimately rejected, a clause prohibiting incitement to racial hatred. \textit{Id}. In the following year's election, however, the Labour Party campaigned on this issue and pledged to criminalize speech intended or likely to cause racial hatred or public disorder. \textit{Id}.

Ultimately Parliament amended the Public Order Act by enacting section 6 of the Race Relations Act of 1965, a comprehensive attempt to control the vestiges and manifestations of racial discrimination throughout the U.K. \textit{Id}. at 4-6. Section 6(1) of the Race Relations Act of 1965 provides:

A person shall be guilty of an offence under this section 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 origins.

Race Relations Act, 1965, ch. 73, § 6(1) (Eng.). A person convicted under the Race Relations Act faces a maximum sentence of two years imprisonment. \textit{Id}., § 6(3). The statute, however, requires the Attorney General's consent to any prosecutions under the law, ostensibly as an added safeguard protecting against intrusions into free expression. \textit{Id}; \textit{see also} Jones, \textit{supra} note 6, at 468-69.

Although the United Kingdom deposited its document of ratification with the Committee on March 7, 1969, it had criminalized racial hatred four years earlier with the passage of the Race Relations Act. LERNER, \textit{supra} note 10, Appendix 4 at 247. Even before passage of the Act, however, courts used the common law to restrict racist hate speech. For example, causes of action for libel and defamation provided common avenues for relief. HUMAN RIGHTS PAPER No. 2, \textit{supra} note 17, at 4; \textit{see also} Jones, \textit{supra} note 6, at 467-68.
complies with its requirements, although it is not identical. The most significant distinction between the two is that the British law does not punish pure expression; rather, it punishes incitement only. While Article 4(a) prohibits "all dissemination of ideas based on racial superiority or hatred," the Race Relations Act punishes only that dissemination which is "likely to stir up hatred" on the basis of race, color, ethnicity, or national origin.

Under British law the boundaries of the incitement provision are broader than those in Article 4(a). Article 4(a) prohibits only incitement to racial discrimination or to acts of violence, whereas the Race Relations Act prohibits incitement to racial hatred. The distinction is in the proscribed result: hatred is a feeling and, thus, more difficult for a court to evaluate than discrimination, which requires a specific act.

B. THE INCITEMENT AND DISSEMINATION PROVISIONS

During Article 4(a)'s drafting process, the incitement and dissemination provisions caused the most contention. The United Nation's focus on incitement to racial discrimination instead of incitement to racial hatred saved the incitement provision from intolerably compromising free expression.

19. Great Britain submitted a reservation to Article 4(a) when it ratified the Convention in 1969. See supra note 17; Jones, supra note 6, at 471. Some scholars conclude that the British representative believed the reservation championing principles of free expression was completely consistent with Great Britain's Race Relations Act. Id.

20. Racial Discrimination Convention, supra note 3, art. 4, para. a, 660 U.N.T.S. at 220.

21. Race Relations Act, 1965, ch. 73, § 6(1) (Eng.). As is detailed below, however, courts overlook the Act's requirement that the speech be likely to stir up racial hatred; in doing so they effectively ban all dissemination of racist messages, however unlikely that hatred will result. See infra notes 27-28 and accompanying text.

22. The Race Relations Act of 1965 contained a mens rea requirement: to be punished, the speaker must have intended to "stir up hatred." Race Relations Act, 1965, ch. 73, § 6(1) (Eng.). See also Jones, supra note 6, at 468-69. When Parliament amended the 1965 Act by enacting the Race Relations Act of 1976, it deleted the intent requirement. See LERNER, supra note 10, at 198; HUMAN RIGHTS PAPER No. 2, supra note 17, at 8. Under the Act as it stands, it is an offense to use racially-based hate speech, or to publish or distribute material where hatred is likely to be stirred up on the basis of race, regardless of the actor's subjective intent. LERNER, supra note 10, at 199. The word "likely" is not defined.

23. Two drafts of the initial incitement provision were submitted at the start of discussion by the United Nations Human Rights Commission. One prohibited incitement to "racial hatred;" the other, to "racial discrimination." LERNER, supra note 10, at 44. The Commission adopted the latter, diffusing
Prohibiting incitement to racial hatred would punish a person for causing another to hate, a result which is dangerously close to prohibiting the thought or feeling of hatred itself. Criminalization of a specific thought or feeling is precisely the type of viewpoint regulation that compromises the right to free expression. The Commission made a crucial distinction between a state's power to punish acts and its power to punish thoughts or feelings.

The most significant problem in applying Article 4(a)'s incitement provision is determining whether incitement actually will result in racial discrimination. The crux of this problem is identifying a causal relationship between the expression and the resulting discrimination. Balancing the value of free expression against the state's interest in protecting its citizens from discrimination requires that a speaker only be punished when the threat of resulting discrimination is great and immediate. Achieving this balance requires assessing the causal relationship between the speech (the inciting force) and the resulting discrimination (the proscribed act). Temporal and spatial proximity between the inciting force and the proscribed act may be indicators of causality. As the probability that certain speech will give rise to discrimination decreases, the state's interest in proscribing the speech decreases and the rules of debate, not the force of law, should be trusted to protect potential

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24. In addition to its implications for free expression, this result is problematic because it would be difficult to determine whether incitement caused hatred, or something short of hatred, such as "ill-will, hostility or contempt." AUSTRALIAN HUMAN RIGHTS COMMISSION, INCITEMENT TO RACIAL HATRED: THE INTERNATIONAL EXPERIENCE, OCCASIONAL PAPER No. 1 23 (1982) [hereinafter HUMAN RIGHTS PAPER No. 1].

25. That is not to say, however, the prohibition on incitement to racial discrimination as stated in Article 4(a) implicates no free expression values. But under a literal reading, the provision threatens free expression only if interpreted to punish the speaker when there was in fact no likelihood of resulting racial discrimination.

26. This was an issue evaluated and debated when Article 4(a) was drafted. Some representatives argued that the proposed language "likely to cause" was problematic because it gave broad discretion to those applying the law. LERNER, supra note 10, at 44.
listeners.27

Article 4(a)'s incitement provision is less susceptible to blatant viewpoint discrimination than that of the Race Relations Act provision because it more precisely defines the acts that the speech must provoke.28 Of course, an aggressive court still might interpret Article 4(a)'s incitement provision broadly and circumvent its causality standard. A court unwilling to apply the words of the provision faithfully might punish, for example,

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27. Moreover, one must conclude that racial hatred constitutes a real threat to the public peace to justify its criminalization. See HUMAN RIGHTS PAPER NO. 2, supra note 17, at 26. This belief formed the basis for the Race Relations Act, which targets only expression that "over a period of time engenders the hate which begets violence." Id. at 6 (quoting Sir F. Soskice, British Secretary of State, addressing the House of Commons).

Many courts have disregarded the fact that no racial discrimination or violence resulted from the defendant's racist speech. Though exceptions exist, if racial discrimination does not result, the likelihood of it occurring was not great. For example, in The Queen v. Relf, a British court acknowledged that the defendant's behavior did not provoke disorder. 1 Cr. App. Rep. Sentencing 111 (Eng. C.A. 1979) (LEXIS, Intlaw library, UK case file). The court nonetheless upheld his 15 month sentence, although suspending the final six months. Id.

Relf was punished because he attempted to stir up racial hatred, even though he failed. See HUMAN RIGHTS PAPER NO. 2, supra note 17, at 7. This result raises the issue of the intent of Article 4(a)'s drafters. Did Article 4(a)'s framers intend to prohibit discrimination by preventing people from advocating it, or did they seek to punish those advocating discrimination regardless of the likelihood that it would occur? Delegates to the Human Rights Commission argued both sides of the issue. See, e.g., LERNER, supra note 10, at 44-45.

The Relf court did not consider whether Relf's incitement was capable of causing others to breach the peace. In fact, the listeners' decision not to retaliate suggests that Relf's speech fell far short of creating a potential for violence, public disorder, or even racial hatred.

Moreover, the Relf court demonstrated its willingness to dispense with a causality test, for it seemed apparent that Relf would not be likely to stir up racial hatred; instead, the court upheld Relf's conviction because of the viewpoint he expressed. At one point the court explicitly acknowledged its reasoning, stating that "constant repetition of lies might in the end lead some people into thinking that the lies are true. It is a matter of recent history that the constant repetition of lies in Central Europe led to the tragedy which came about in the years 1939 to 1945." Relf, 1 Cr. App. Rep. Sentencing at 111.

28. A famous prosecution under the Race Relations Act of 1965 demonstrates the statute's susceptibility to viewpoint discrimination. Michael Abdul Malik, a West Indies native, was prosecuted for verbally attacking whites. The Queen v. Malik, [1968] 1 W.L.R. 353 (Eng. C.A.). Malik spoke in front of seventy to eighty people, stating: "I want to tell you about souls. The black man has soul. The white man has no soul. He is a soulless person. . . . I have been to prison. At first I was terrified but it is a coloured man's job to go to prison. You get to know a lot in prison, a lot that can terrify the white man." Id. at 583-84. Malik demonstrates the Race Relations Act's applicability to a member of a historically disenfranchised racial group.
a racist's written appeal even though the appeal was unlikely to induce discrimination. Nevertheless, courts are far less likely to apply incitement provision to punish a speaker because of her viewpoint. After all, to punish a speaker for her viewpoint, a court need only turn to Article 4(a)-based prohibitions on all dissemination of ideas based on racial superiority or hatred.29 The dissemination component potentially compromises free expression in two ways: first, because its vague terminology allows courts to use the provision to discriminate against minority viewpoints;30 and second, by prohibiting racist expression deserving of protection because of its societal value.31

B. ARTICLE 4(a) CREATES THE POTENTIAL FOR UNEVEN AND DISCRIMINATORY APPLICATION OF THE LAW

Possibly the most troubling aspect of Article 4(a)'s dissemination provision is its susceptibility to viewpoint discrimination, since the state must choose to prosecute speakers under the provision. This prosecutorial discretion, which results from the need to evaluate the content of the speech to determine whether Article 4(a)'s prohibition on dissemination is applicable, has troubling consequences.32 Racist speech by a member of a historically-victimized minority may be silenced because of its potentially explosive consequences, while racist expression by a member of a dominant, historically powerful group could be overlooked as little more than a harmless irritation.33

29. As discussed above, Article 4(a) requires state parties to "declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred." Racial Discrimination Convention, supra note 3, art. 4, para. a, at 220. The votes on this provision were the most highly contested of any during the drafting process. LERNER, supra note 10, at 46.
30. See infra notes 32-34 and accompanying text.
31. See infra notes 41-47 and accompanying text. A literal interpretation of Article 4(a) would criminalize publication of a racist, yet historically significant book such as Adolf Hitler's Mein Kampf, even if meant for a German or European history course. Dissemination of Mein Kampf would certainly violate Article 4(a) because its main themes are racial superiority and hatred. See ADOLF HITLER, MEIN KAMPF (Ralph Manheim trans., 1943).
32. The potential for abuse is greater in applying the dissemination provision than the incitement provision because the dissemination provision requires prosecutors and courts to evaluate the message's content, whereas with incitement, the court need only focus on the likelihood that the message will incite others to racial discrimination or violence. See supra note 23.
33. Chances are small that a public official applying an Article 4(a) law will be from a politically disenfranchised group. The prosecution of Michael Abdul Malik, The Queen v. Malik, [1968] 1 W.L.R., 353 (Eng. C.A.), illustrates how the prosecutorial discretion inherent in Article 4(a)-based dissemination provisions may be applied discriminatorily and demonstrates the Article's poten-
The prosecutorial history of the Race Relations Act suggests that outsiders are disproportionately prosecuted and convicted while dominant group members are acquitted.\textsuperscript{34} Dominant group members benefit from the listener's familiarity and cultural empathy, which minimize the shock of the message.\textsuperscript{35} In cases where the words themselves are ambiguous, the cultural and linguistic history of the outsider will rarely match that of the judge.\textsuperscript{36}

There have been surprisingly few prosecutions under the Race Relations Act;\textsuperscript{37} the few existing cases demonstrate that British courts interpret the Act to effectively meet all of Article 4(a)'s requirements, including the dissemination prohib-

Malik contended that "the meaning of the words that he had used meant something different to him as a West Indian than it would have meant to somebody in [England]." \textsuperscript{[1968] 1 W.L.R. at 355.} In arguing that he had not intended to stir up hatred, Malik assumed that the audience, and the Court, would interpret his words the same way he did. Clearly, that perception was inaccurate.

As a Black Nationalist, Malik chose common and effective words to describe his plight to a sympathetic audience. That the court rejected his argument is not surprising. Human nature suggests that a prosecutor may be less tolerant of a radical message involving race if it comes from a group with whom she does not empathize, especially if expressed in an unfamiliar and shocking way. Hence, a prosecutor may target outsiders, while unconsciously overlooking the equally objectionable messages from members of her own dominant group, especially if expressed in a comfortable or familiar manner.

\textsuperscript{34} After Malik's prosecution, four black speakers were convicted and fined for speeches they gave, while four white members of the Racial Preservation Society were acquitted. HUMAN RIGHTS PAPER NO. 2, supra note 17, at 8. For reasons unexplained, the court considered the Society's racist publication unlikely to stir up racial hatred. \textit{Id.} Similarly, British National Party Chairman John Kingsley Read was acquitted after being charged with making an inflammatory speech that appeared to violate the Act. \textit{Id.} at 9.

\textsuperscript{35} Similarly, a speaker may use seemingly innocuous "code words" to communicate a racist message, relying on the listener's familiarity with the speaker or the speaker's message. \textit{See, e.g.,} Debbie M. Price, \textit{Light of a Burning Cross Flickers on Faces Full of Hate}, Chi. Trib., July 1, 1992, § C17 (commenting on the Ku Klux Klan's use of racist "code words").

\textsuperscript{36} Implicit in the Malik court's reasoning is that the court will evaluate a message's content according to the listener's interpretation of the words, rather than the speaker's intended message. \textsuperscript{[1968] 1 W.L.R. 353 at 357; see supra note 28 and 34.} Hence, the circumstances under which the listener receives the message determine the value of the speech itself. Because the judge most likely comes from the dominant group, she will share the dominant listener's interpretation, rather than the defendant's.

\textsuperscript{37} HUMAN RIGHTS PAPER NO. 2, supra note 17, at 35 n.24 (noting only 19 prosecutions under the Race Relations Act between 1965 and 1975).
tion. Courts often hold that the dissemination was likely to stir up racial hatred when such a conclusion seems far-fetched; worse, courts often apply the Race Relations Act as if it prohibited dissemination of all ideas based on racial superiority.

Although the provision prohibiting incitement to racial discrimination is problematic because it may be applied unevenly, it is a proper component of legislation targeting racial hatred. The dissemination provision, however, does not balance the state's legitimate desire to reduce racial hatred against its desire to protect free expression. Hence, it is an intolerable compromise of that value.

II. POSITIVE REASONS FOR PROTECTING THE FREEDOM TO EXPRESS RACIST IDEAS

In addition to the interpretive and practical problems of Article 4(a) laws, two additional criticisms of the provision must be addressed. Both are grounded in the belief that Article 4(a)'s prohibitions are paternalistic: first, society can discern any existing value in racist speech and reject the message if there is none; and second, society's communication channels are such that tolerance tends to neutralize radical messages including racial hate.

Racist speech is a subset of fringe or radical dissent and prohibiting the former unavoidably compromises the latter. Dissent challenges the status quo and seeks change through evolution, reformation, or revolution. Dissent is necessary,
perhaps even the catalyst, to force a society to recognize its heterogeneity; it protects a diverse society from developing a singular and monolithic perspective. The problem is that racist hate groups raise voices of dissent no less than other groups seeking more constructive change.

Some scholars argue that tolerance of fascist ideas is social suicide, because the tolerated groups often seek only repression. Critics of tolerance fear that ideas can too easily ignite action. Their attitude reflects a pessimism in a democracy's ability to reject destructive ideologies.

Unfortunately, ambiguous terminology and prosecutorial discretion chill the expression of all ideas outside the mainstream, particularly those in the gray zone of radical dissent. The result is that dissent at the fringes, perhaps the dissent most capable of effectively challenging the status quo, is to the status quo. For this reason, even the most extreme viewpoints are valuable for their contribution to this process.


43. Like most tools, dissent has the potential to be used for good and bad. For example, good results when recognition of the outsider's perspective leads to greater understanding. The bad, however, results when the dominant group targets the outsider. See Herbert Marcuse, *Repressive Tolerance*, in *A Critique of Pure Tolerance* 81, 100 (2d prtg. 1969). For this reason, some scholars argue that tolerance works in favor of repressive regimes because it allows dissent from the racist right to enter mainstream channels of communication. *Id.* at 89. The value one places on tolerance, however, depends on one's trust in society's ability to reject destructive ideologies. Philosopher Herbert Marcuse, in his critique of tolerance, explained that societal progress "must necessarily be a compromise between a variety of opinions . . . because there is an objective truth which can be discovered." *Id.*

Under Marcuse's theory, the best means of realizing progress is for "all contesting opinions" to be "submitted to 'the people' for its deliberation and choice." *Id.* Because Marcuse believed that repressive forces in society control the channels of communication, he concluded that tolerance was dangerous; fascist messages could get through while constructive radical dissent could not. The author disagrees with Marcuse's conclusion.

Of the many scholars who cite the Nazi reign in Germany as proof that propaganda leads to genocide, few acknowledge that the Weimar Republic had an anti-hate propaganda law. It is naive to assert that a better-crafted law could have prevented the horrors of Nazism.

44. *See, e.g.*, *id.* at 109.

45. *Id.* at 94, 110; *see also* Jones, *supra* note 6, at 449 (stating "it is indeed fatuous to expect the successful operation of such a lofty principle [the free trade of ideas] among mere mortal souls"). These critics believe people are not capable of choosing constructive ideologies and that the democratic process does not provide mechanisms that might make this possible. *Id.* at 95. If, however, people are incapable of choosing for themselves, the alternative is a government that makes choices for them.
squelched in favor of protection from racist ideas. Some of this fringe dissent will be racially divisive, but until society receives its message, its legitimacy cannot be determined. Racist speech is not the price a society pays for free expression; rather, it is the price a society pays to hear voices and viewpoints which challenge it to synthesize diverse perspectives, contributing to society's progress.\footnote{46}

Ironically, criminalizing an idea and punishing incitement to racial hatred may ultimately bolster the racist's cause. By prohibiting certain types of expression, a society may unintentionally channel those messages into more peripheral and sometimes dangerous forms.\footnote{47}

Some commentators argue that the best way to control someone is by giving her the illusion that she is free, or in this context, tolerated. The freedom to express racist ideas publically actually may be less effective than an alternative, and perhaps more shocking underground scheme.\footnote{48}

In the context of racist speech, tolerance can effectively diffuse a powerful message, in turn strengthening the status quo.\footnote{49} Unfortunately, the same tolerance that perpetuates the status quo and reduces the power of racist fringe movements also can diffuse messages from constructive fringe movements—that is, desirable dissent.\footnote{50} This is the point at which society's capacity to differentiate between the legitimacy of different perspectives determines what messages will be influen-

\footnote{46} "Progress" may mean many things, but at the very least, it includes an increasing respect for the worth of each individual.

\footnote{47} In fact, racist speech laws lend the racist's message the legitimacy of the legal process and finite judicial resources. In The Queen v. Relf, 1 Cr. App. Rep. Sentencing 111 (Eng. C.A. 1979) (LEXIS, Intlaw library, UK case file), for example, the defendant admitted to the police inspector that he and Relf knew they were violating the Public Order Act: "Yes, that is why we do it, we're challenging the system." Id. See supra note 27 for a discussion of Relf.

\footnote{48} Alternative avenues proliferated in the U.K. in the aftermath of the Race Relations Act of 1965. \textsc{Human Rights Paper No. 2, supra} note 17, at 8. For example, after the Act was passed, those interested in such material formed private racist "book clubs" that were immune from the law. The Act did not stop people from publishing racist materials; nor did it eliminate the racist ideas themselves. Instead, it simply channeled racist expression into less public channels.

\footnote{49} Marcuse, \textit{supra} note 43, at 122-23.

\footnote{50} This analysis incorporates a value judgment, that undesirable dissent which seeks to oppress others on the basis of their race is qualitatively distinct from desirable dissent. Although a racist ideology also seeks to change society, its chief method is the subjugation of others.
tial. Hopefully, tolerance will diffuse racist expression and not block equally radical, yet constructive expression.

III. A PROPOSAL FOR MODIFYING ARTICLE 4(a) AS A MODEL FOR FUTURE RACIST SPEECH LAWS

As countries contemplate racist speech legislation today, they should consider the problems and compromises that have attended Article 4(a). Drawing from these experiences, this Note proposes modifying the Article to ameliorate problems in its application and to protect free expression from intolerable intrusion.

A. THE INCITEMENT PROVISION SHOULD BE MODIFIED AND FAITHFULLY APPLIED

As discussed above, applying the incitement provision has been problematic because courts have been inconsistent in defining standards of causality, and disingenuous in applying them to factual circumstances.\(^{51}\) The language of Article 4(a) which makes "incitement to racial discrimination" punishable should be amended to read "incitement which, given all of the surrounding circumstances, is substantially likely to cause racial discrimination."\(^{52}\)

This higher standard creates a strong presumption in favor of the speaker's right to communicate her message. Only if positive evidence convinced a court that a discriminatory act was substantially likely to result could that presumption be overcome.\(^{53}\) This revision requires that the incitement be more

\(^{51}\) See supra notes 27-28 and 39.
\(^{52}\) With this change, Article 4(a) would read, in part:

\[\text{[State Parties]}\]

(a) Shall declare an offence punishable by law ... incitement which, given all of the surrounding circumstances, is substantially likely to cause racial discrimination, as well as acts of violence or incitement substantially likely to cause such acts against any race or group of persons of another colour or ethnic origin ... .

\(^{53}\) Under this proposal, if racial discrimination or violence actually occurred, the court must focus on the part of Article 4(a) prohibiting those acts; the incitement question need not be addressed. If no discrimination or violence occurred, the court's application of the "substantially likely" standard requires it to examine the surrounding circumstances. The court must evaluate the listener's temporal and spatial proximity to the speaker, the place and manner of delivery, and the listener's ability to retreat or avoid the message entirely. The speaker's message must be substantially likely to cause discrimination. Never, under any application of the incitement provision, should the application of Article 4(a) depend on the speaker's viewpoint.
proximate to the discrimination and defines an explicit causality standard that courts cannot ignore.

This proposed modification makes Article 4(a) more precise and removes the discretion and potential for abuse inherent in the current version. Moreover, it removes the potential for disingenuous application by courts seeking to punish an objectionable message. With this change, the state's power to proscribe the incitement is directly derived from the state's power to proscribe the resulting discrimination. Incorporation of the "substantially likely" standard ensures that incitement will be punished only if resulting discrimination is truly a danger.

B. THE DISSEMINATION PROVISION SHOULD BE DELETED FROM ARTICLE 4(a)

The dissemination provision of Article 4(a) compromises principles of free expression and invites an inherently discriminatory application that suppresses the outsider voice. Because these negative aspects greatly outweigh the positive values of the provision, Article 4(a)'s proscription of "all dissemination of ideas based on racial superiority or hatred" should be deleted. Without the dissemination provision, Article 4(a)'s structure is more cohesive, logical, and effective as a provision banning incitement to racial discrimination and violence.

With these changes, Article 4(a) attempts to protect citizens from injury resulting from racial discrimination, when that injury is the substantially likely result of racist speech. This proscription applies equally to the racist who seeks to publicly persecute and the political activist who uses racially explosive rhetoric. It allows all speakers, however, freedom to express their ideas, short of causing discrimination or violence. When those dangers are not present, the listener's ability to retreat or shout back replaces the state's police role. With the proposed changes the balance shifts to protecting the often valuable messages that use racially-divisive language to communicate alienation or subjugation. The state no longer will paternalistically evaluate the content of a speaker's message. All groups will communicate using the same channels, whereupon society's members can accept or reject various ideas as they wish.

54. See supra Part I.B.
C. THE PRIVATE HARASSMENT EXCEPTION

Although tolerance generally diffuses the power of the racist's message, this is not the case when the racist uses hate speech intentionally to intimidate and injure a specific person or persons in a private setting. Hence, an overriding exception to any racist speech law, including Article 4(a) in its current or modified form, should outlaw this use of racist speech.

Expression employed to harass an individual has no value. A society's ability to distill the value of any given message presupposes that the message is widely available. When a racist message is delivered in private, especially when it is directed at a particular individual, society is unable to evaluate the message's worth. Absent from the message is any attempt to convince another of one's ideas.55

The depth of the victim's injury from private, verbal racist assault is another significant reason to distinguish between public and private speech.56 The pain that one suffers as the immediate, intended victim of hate speech may be far more severe than that of one whose status as a victim results from membership in a historically-oppressed racial group.57

A court should inquire whether a violation of a racist speech law has occurred by asking whether a conventional law punishing the intentional injury of another is applicable; if so, it will usually indicate that the speaker was within the private harassment exception. In these circumstances, courts need not consider Article 4(a) laws in any capacity; instead they should look to the laws that prevent one person from injuring another. Article 4(a) will provide no refuge for the criminal who transgresses such laws.

55. Even some supporters of an absolutist position on First Amendment issues concede that private defamation does not deserve protection. See, e.g., Alexander Meiklejohn, The First Amendment Is an Absolute, 1961 Sup. Ct. Rev. 245, 258-59; Jones, supra note 6, at 449. One rationale for this exception is that private defamation involves no political, governmental, social, or educational aspect or value whatsoever. Meiklejohn, supra at 257-63.

56. The terror that a person, family or group suffers as the target of racial hatred has been extensively documented. See generally Richard Delgado, Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling, 17 Harv. C.R.-C.L. L. Rev. 133 (1982). The victim of racial hatred feels self-hate that can lead to chemical dependency or suicide, as well as hypertension, recurring nightmares, and post-traumatic stress disorder. Matsuda, supra note 5, at 2336.

57. A cross burning in a public park is a reminder of racial terror. A cross burning in an African-American family's front yard, however, conveys more than racial hatred—it is a specific threat.
CONCLUSION

Racist speech is different from other forms of expression that some find objectionable. Hate speech attacks the self-esteem of the individual by attempting to humiliate and ostracize her on account of her immutable characteristics. For that reason, it tests the international community's resolve to punish injurious speech without intolerably infringing upon the right of all people to freely express their ideas.

Article 4(a) of the Racial Discrimination Convention was an understandable international response to the genocide that occurred during World War II and the escalating pace of racist attacks in the war's aftermath. Yet, with the benefit of historical perspective, the western democracies that have passed laws in compliance with Article 4(a) have neither provided greater security from racist hate speech, nor a tangible tool for improving race relations. In fact, Article 4(a) laws have criminalized a segment of expressive activity and placed the discretion to implement its ban in the hands of the state. The jurisprudence that has developed around these laws has left a trail of confusion about how the laws are to be defined, interpreted, and applied. Worse, cases interpreting Article 4(a) laws have demonstrated the state's propensity for applying racist speech laws against the outsider.

This Note makes four proposals. First, the dissemination provision should be eliminated from Article 4(a), leaving the Article as a prohibition of incitement to racial discrimination or acts of violence. Second, the incitement provision should be amended to prohibit only incitement substantially likely to cause racial discrimination or violence. Third, where racist speech is directed at a specific individual with the intent to injure or intimidate her, an exception should be made to the protection accorded expression. Most important, legislative bodies throughout the world should study proposed modifications in light of the international experience when responding to the ever-increasing movement to pass laws outlawing racist speech.