

# THE RIGHT TO BE WRONG

NICOLAS WALTER

I want to make a stand against the laws limiting freedom of expression; and in particular against the law limiting freedom of expression on the subject of race - partly because it happens to be the newest, partly because it is supported by so many people who ought to know better, and finally because it does no good.

Children make an essential distinction between physical and verbal assault:

Sticks and stones  
May break my bones,  
But words will never hurt me.

At a higher level, John Stuart Mill made an essential distinction between actual harm and mere offence in the famous principles of his essay *On Liberty*.

... that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of their number, is self-protection. That the only purpose for which power can rightfully be exercised over any member of a civilised community, against his will, is to prevent harm to others.

Yet mankind, even in this more or less free country, has still not caught up with what our children say all around us, or what our most sensible political philosopher wrote more than a century ago. There are still many laws against words as well as against sticks and stones, liberty is still interfered with beyond the end of self-protection, and power is still exercised over members of this civilised community who do no real harm to others.

My interest in these laws is not that of a professional lawyer who uses them or a professional agitator who abuses them, but that of an ordinary person who finds that he has broken virtually all of them in the normal course of argument and journalism. Indeed it is difficult not to break them, often without knowing it, if you want to say or write anything about anything worth saying or writing anything about. I find it depressing to read a legal textbook or a guide to civil liberties, and to see just how many laws there are to stop someone saying something if someone else doesn't like it, and just how many people there are who want even more laws of this kind. Let me take them in order.

## DEFAMATION

The law of defamation - or personal libel - would make sense if it were a matter of protecting innocent individuals from malicious and inaccurate insult; but it is far more a matter of the rich frightening the poor with civil actions, or of the strong frightening the weak with criminal prosecutions, involving huge costs rather than damages or fines. Ordinary people virtually never get satisfaction from libel proceedings; and, rather than try to make it easier to do so, it would be better to see how other liberal countries manage with a feebler law and a freer press.

There is a legal fiction that defamation involves arousing unjustified hatred, ridicule or contempt; but in practice much hatred, ridicule and contempt is aroused without justification and without

litigation, and much so-called defamation involves nothing more than telling the truth. Whatever lawyers may think, it is obvious to outsiders that defamation should involve a combination of falsehood and damage, and that the remedy should be redress rather than revenge.

## OBSCENITY

The law of obscenity - or sexual libel - would make sense if it were a matter of protecting innocent individuals from intolerable and unavoidable offence; but it is far more a matter of preserving traditional morality against new ideas and of persecuting unpopular minorities. Obscenity is in the eyes of the beholder, and to the pure all things are impure. It is a matter of taste, and what can be said about the taste of people who hunt pornography not to enjoy it, but to condemn it?

There is a legal fiction that an obscene publication is one which tends to deprave or corrupt those into whose hands it is likely to fall; but in practice there is no need to show that anyone has been or will be depraved or corrupted, and what matters is whether magistrates or jurors feel shocked or disgusted. Most of what is prosecuted as obscene neither depraves nor corrupts, and most of what both depraves and corrupts is never prosecuted.

On the other hand, there is the defence of public good, if the obscene publication has literary, artistic, scientific or scholarly merit. Whatever lawyers may think, it is obvious to outsiders that something likely to corrupt or deprave will do so more rather than less effectively if it is well-written or clever or beautiful. In fact the Obscene Publications Acts seem to contain the most contradictory laws even in our crazy legal system and to punish lowbrow taste rather than harmful material.

In addition, the obscenity law is reinforced by such common law offences as "conspiracy to corrupt public morals" and by the lesser but wider offence of indecency, which means whatever offends prevailing standards of decency - a nice knock-down definition which can knock down any sexual expression the authorities don't like.

## BLASPHEMY

The law of blasphemy - or religious libel - would make sense if it were a matter of protecting innocent individuals from intolerable and unavoidable offence; but again it is far more a matter of preserving traditional doctrine against new ideas and of persecuting unpopular minorities. The authorities have wisely been reluctant to use this law for nearly two centuries, so it has generally been left to religious fanatics to use it - once against freethinkers, now against homosexuals. The common law has of course just been successfully resurrected after more than half a century; and with the House of Lords judgement dismissing the *Gay News* appeal this year, it now seems stronger than for more than a century. There is apparently no need to prove any intention to blaspheme, or any tendency to a breach of the peace; all that is necessary is to shock or outrage believers in or sympathisers with the state reli-

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gion, and the situation would be made worse rather than better by extending such protection to all religions.

As with obscenity and indecency, there is the lesser but wider law of profanity. This has fallen out of use, as blasphemy has, but it could be resurrected in the same way.

## SEDITION

The law of sedition - or political libel - would make sense if it were a matter of protecting the community from civil strife; but it too is far more a matter of preserving traditional obedience against new dissent and of persecuting unpopular minorities. This is another bad old law which has fallen out of use, but it too could be resurrected without any difficulty. Meanwhile it operates through other more recent laws - such as those against "incitement to disaffection", or in defence of "official secrets" or "public order"; though at least the cases which the authorities win in the courts of law they lose in the court of public opinion.

## RACE HATRED

But now there is a new branch of the law of sedition - or social libel - in the special area of race. The traditional definition of sedition includes such actions as "to raise discontent or disaffection in Her Majesty's subjects". So incitement to race as well as class hatred could always have been dealt with under the sedition law; indeed it was, in the case of a blatantly antisemitic editor in 1947 - but the prosecution failed. And public incitement to race as well as class hatred could also have been dealt with under the Public Order Act of 1936; indeed this was passed for that very purpose, when the victims were Jewish rather than coloured. Nevertheless, after pressure for thirty years, this form of libel got a law to itself in the Race Relations Acts from 1965 to 1976, all brought in by Labour governments.

The Public Order Act bans "threatening, abusive or insulting words or behaviour", but only in a public place and only when a breach of the peace is likely to be caused. The Race Relations Acts go much further. They include provisions not just to deal with racial discrimination by pressure and agreement, but also to deal with incitement to racial hatred by prosecution and imprisonment. This part of the law is disguised as an amendment to the Public Order Act, though it goes beyond public order; and it is limited by allowing cases to be brought only by consent of the Attorney General, which has restricted its use.

The 1965 Act banned "threatening, or insulting" words uttered or published with "intent to stir up hatred" against any race. During the twelve years it was in force, there were only seventeen prosecutions (several involving more than one person) and only eleven convictions. These cases involved both White and Black racists, including such well-known figures on each side as Colin Jordan and Michael Abdul Malik.

The rate of both prosecutions and convictions fell after a few years, with the change from a Labour to a Conservative government. But the law was strengthened after a few more years, with the change back from a Conservative to a Labour government, the element of intent being removed. The 1976 Act bans "threatening, abusive or insulting" words uttered or published "in a case where, having regard to all the circumstances, hatred is likely to be stirred up against any racial group in Great Britain". (For some reason the Act doesn't apply to Northern Ireland.) The definition of "racial group" covers colour, race, nationality, citizenship, and ethnic or national origin.

Since the 1976 Act came into force two years ago, there have been only a dozen prosecutions, and some acquittals in the face of the evidence. This has led to more proposals to make the law even stronger and wider, although that would make it even more unpopular, and although that is unlikely to happen with a change back from a Labour to a Conservative Government. The previous Attorney-General, who was criticised from the left for allowing prosecutions under the Incitement to Disaffection Act and the Official Secrets Acts. There have been suggestions that the decision could be made by the Director of Public Prosecutions or by the police, or even that private prosecutions should be allowed; that cases should be taken out of the unreliable hands of juries; that the law should cover not just incitement to hatred but incitement to hostility or prejudice, or even damage to good race relations.

## REPEAL THE RACE RELATIONS ACT

I think that the solution lies in the opposite direction, and I suggest that the law should be repealed. I am depressed that so many people who oppose the enforcement of political, religious and sexual orthodoxy by law support the enforcement of social and racial orthodoxy. (I suppose the next step will be to extend the Sex Discrimination Act to cover incitement to sex hatred.) I am depressed to find that opposition to this law comes mainly from the right, from people who believe not so much in freedom of expression as in freedom for racism. In theory it seems to make sense to say about something unpleasant that there ought to be a law against it, but in practice such laws generally do more harm than good. For fifty years a few people who believe in civil liberty as well as racial equality have warned that such a law would indeed be harmful, and I think it is time to listen.

It is argued that the law draws a line and sets an example; I argue that it draws the wrong line by directing attention at a few extremist racists, and that nothing is gained by making an example of Colin Jordan and Michael Abdul Malik in the 1960s, or of Kingsley Read and Martin Webster in the 1970s. It is argued that racial hatred led to the slavery of Blacks in America and the extermination of Jews in Germany; I argue that there is no evidence of such an effect here and now, and that our problem is not overt but covert racism. It is argued that racists should not be allowed to express their views; I argue that everyone should be allowed to express any view, and that the time to take action is when views lead to actions. It is argued that freedom should not be given to those who threaten freedom. I argue that this is the test of freedom.

It is argued that juries are reluctant to convict racists because of common racism; I argue that it might be because of common sense - that ordinary people can see the absurdity of using the law against states of mind and the danger of turning it against all sorts of things from Professor Eysenck's research to Dave Allen's jokes (or this article). It is argued that the law against racial discrimination needs to be balanced by a law against racial hatred; I argue that the constructive work of the Race Relations Acts in educating people out of discrimination is not supported by but undermined by their negative work in punishing people for prejudice. It is argued that racist parties should not be allowed to hold public meetings or to make political broadcasts; I argue that all organisations should have the same freedom of expression, right or left, nice or nasty. It is argued that racial hatred is a bad thing; I argue that, although this is true, it is not illegal, and that incitement to racial hatred should not be illegal either. It is argued that some things go beyond what is acceptable; I argue that, although this is true, it is a matter of social morality rather than political censorship.

The criminal law of racial as of all other kinds of libel creates not repentant sinners but defiant martyrs. Punishing racists makes both them and us worse rather than better, projecting onto scapegoats the guilt for the prejudice which pervades our society, pointing at other people's beams to hide our own motes. The punishment and prevention of racism are not complementary but contradictory; what keeps racism alive is not what a person like Robert Relf says or what the National Front does but what is said and done to them - not their pathological actions but our equally pathological reactions. I have no doubt that the law against incitement to racial hatred has increased rather than decreased racial hatred, has polarised rather than pacified the two sides, and has made this country more intolerant rather than more tolerant. More people have been hurt and killed in race riots since than before the Race Relations Acts, and more will be killed if we don't learn to behave sensibly.

I would say that it is time to grow up and get up to date, if I didn't think that our children and our ancestors seem to have much more sensible ideas on this subject. But I do say that we have been making a mistake for fourteen years, that freedom of speech means the freedom to say unspeakable things, that liberty means licence and freedom is real only when it is abused, that we must learn that mere words don't harm anyone, and that we should turn to the much more serious evils in our midst. Above all, the way to get rid of racism is not to make laws against it, but to take away the reasons for it.