

2007-11

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Bryan, I. (2007) 'Unpalatable in Word or Deed: Hostility, Difference and Free Expression', *Crimes and Misdemeanours: Deviance and the Law in Historical Perspective*, 1(2), pp.126-153. Available at: <https://pearl.plymouth.ac.uk/handle/10026.1/8826>  
<http://hdl.handle.net/10026.1/8826>

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SOLON Crimes and Misdemeanours  
University of Plymouth

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## UNPALATABLE IN WORD OR DEED: HOSTILITY, DIFFERENCE AND FREE EXPRESSION

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### Abstract

This article conducts a review of the principal tools used in English criminal law, from the early modern period to the present, to impose limits on free expression, particularly the freedom to exhibit 'hate', in pursuit of social order and to police the boundaries at which the acceptable is segregated from the unacceptable. Against this historical backdrop, the article assesses the controversial Racial and Religious Hatred Act 2006, pointing to (dis)similarities with the preceding Bill and with the incitement to racial hatred measures on which the 2006 Act is modelled. The discussion also explores whether, in light of European and domestic human rights law, the English law of blasphemy should be abolished. It continues with an evaluation of how far existing public order legislation, regarding 'racially or religiously aggravated' offences, are adequate to cover the ground addressed not only by the newly enacted incitement to religious hatred offences but also both the older incitement to racial hatred legislation and the common law as to blasphemy. It is argued that conflict over the mobilisation of criminal law to promote public civility is intrinsic not only to criminal law past and present but also to any pluralist polity committed to addressing social inequality.

**Keywords:** blasphemy, incitement to racial hatred, public order law, Race and Religious Hatred Act 2006

### Introduction

Whilst the last successful prosecution for blasphemous libel took place in 1979,<sup>1</sup> that the English law of blasphemy subsists in a modern, democratic, pluralistic, multicultural, multi-faith and largely secular society, continues to stimulate

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<sup>1</sup> The prosecution — initiated by Mary Whitehouse, secretary of the National Viewers and Listeners Association — was brought against Gay News Ltd, publishers of *Gay News*, and Denis Lemon, its editor. The publication complained of, a poem written by Professor James Kirkup, entitled 'The Love that Dares to Speak its Name', which describes the fantasies of a Roman centurion as he removed the body of Christ from the cross, and accompanying illustration, appeared in the June 1976 edition of the periodical. The trial jury, by a majority of ten to two, found the defendants guilty of blasphemy libel. The convictions were upheld by the Court of Appeal, *R v Lemon* [1978] 3 WLR 404, and the House of Lords, *Whitehouse v Lemon* [1979] AC 617; 2 WLR 281; 1 All ER 898.

considerable attention.<sup>2</sup> The recurrent debate has centred upon whether the common law as to blasphemy should be retained, abolished without replacement or replaced by broader-based legislation which would extend the law to embrace non-Christians.<sup>3</sup> The debate resurfaced when — prompted by an escalation in verbal abuse and physical violence against Muslims and perceived Muslims following the 11 September 2001 terrorist attacks in New York and Washington DC<sup>4</sup> — the then Home Secretary, David Blunkett, reportedly intimated that along with plans to introduce legislation criminalising incitement to religious hatred, consideration would be given to abolishing the blasphemy laws.<sup>5</sup>

Introduced in the House of Commons on 12 November 2001, the Anti-Terrorism, Crime and Security Bill included, at Part 5, measures that would penalise incitement to religious hatred. The Bill was scrutinised by the Joint Committee on Human Rights,<sup>6</sup> before which David Blunkett indicated the proposed incitement to religious hatred offence would not be employed as a vehicle to abolish the blasphemy laws.<sup>7</sup>

The incitement to religious hatred provisions of the Anti-Terrorism, Crime and Security Bill were, however, withdrawn after encountering opposition from the House

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<sup>2</sup> See, for example, Law Commission, Working Paper No. 79, *Offences Against Religion and Public Worship* (London: HMSO, 1981); Law Commission, Report No. 145, *Offences Against Religion and Public Worship* (London: HMSO, 1985); S. Poulter, "Towards Legislative Reform of the Blasphemy and Racial Hatred Laws" [1991] *Public Law* 371; S. Ghandi and J. James, "The English Law of Blasphemy and the European Convention on Human Rights" (1998) 4 *European Human Rights Law Review* 430; I. Bryan, "Suffering Offence: The Place, Function and Future of the Blasphemy Laws Revisited" (1999) 4(3) *Journal of Civil Liberties* 332; House of Lords Select Committee on Religious Offences in England and Wales, House of Lords papers - Session 2002-03 (London: Stationery Office, 2003).

<sup>3</sup> See, generally, Hypatia Bradlaugh Bonner, *Penalties Upon Opinion: Or, some records of the laws of heresy and blasphemy* (London: Watts & Co, 1912); C. Kenny, "The Evolution of the Law of Blasphemy" (1922) 1 *Cambridge Law Journal* 127; G.D. Nokes, *A History of the Crime of Blasphemy* (London: Sweet & Maxwell, 1928); L. W. Levy, *Treason Against God: A History of the Offense of Blasphemy* (New York: Schocken, 1981); St. John Robilliard, *Religion and the Law: Religious Liberty in Modern English Law* (Manchester: Manchester University Press, 1984) pp. 29-45; N. Walter, *Blasphemy Ancient and Modern* (London: Rationalist Press, 1990); R. Webster, *A Brief History of Blasphemy: Liberalism, Censorship and 'The Satanic Verses'* (Southwold: Orwell Press, 1990); L. W. Levy, *Blasphemy: Verbal Offenses Against the Sacred from Moses to Salman Rushdie* (New York: Alfred A. Knopf, 1991); D. Lawton, *Blasphemy* (Hemel Hempstead: Harvester, 1993); J. Marsh, *Word Crimes: Blasphemy, Culture and Literature in Nineteenth-Century England* (Chicago: University of Chicago Press, 1998); D. Nash, *Blasphemy in Modern Britain: 1789 to the Present* (Aldershot: Ashgate, 1999); D. Nash, *Blasphemy in the Christian World: A History* (Oxford: Oxford University Press, 2007).

<sup>4</sup> See House of Lords Select Committee on Religious Offences in England and Wales, *ibid.* 95; C. Allen and J. Nielsen, *Summary Report on Islamophobia in the EU after 11th September 2001* (Vienna: European Monitoring Centre for Racism and Xenophobia, 2002). See also N. Ahmed, F. Bodi, R. Kazim and M. Shadjareh, *The Oldham Riots: Discrimination, Deprivation and Communal Tension in the United Kingdom* (London: Islamic Human Rights Commission, 2001).

<sup>5</sup> See *The Daily Telegraph*, 4 October 2001, p. 28; *Independent on Sunday*, 7 October 2001, p.3; *The Independent*, 15 November 2001, p. 11; *The Guardian*, 15 November 2001, p. 14; *The Independent*, 18 November 2001 p. 29.

<sup>6</sup> Joint Committee on Human Rights, Second Report, 2001-02 Session, HL Paper 37/HC 372 (London: Stationery Office, 2001).

<sup>7</sup> *Ibid.*, Minutes of Evidence, Examination of Witnesses, Question 49, 14 November 2001.

of Lords.<sup>8</sup> Nevertheless, and following two further failed attempts to legislate against inciting religious hatred — first, by Lord Avebury in a Private Member's Bill,<sup>9</sup> and, secondly, by the Government under the Serious Organised Crime and Police Bill<sup>10</sup> — the Government made clear that it remained committed to introducing an incitement to religious hatred offence,<sup>11</sup> and that legislation in this regard would not be contingent upon the abolition of the law as to blasphemy.<sup>12</sup>

On its return to power following the 2005 General Election, the Labour Government, in May of that year, re-introduced proposals designed to extend the racial hatred offences in Part III of the Public Order Act 1986 to cover stirring up hatred against persons on religious grounds.<sup>13</sup> The proposals, which replicate those that had been included in the earlier Serious Organised Crime and Police Bill and which the Government was forced to abandon in consequence of concerted opposition from the House of Lords preceding the 2005 General Election, were presented to the House of Commons as the Racial and Religious Hatred Bill on 09 June 2005. The proposed legislation was subsequently debated in the House of Lords where, at committee stage, the Government suffered heavy defeats.<sup>14</sup> Although the Government sought to overturn the amendments the Lords had secured against its proposals, the Government suffered two further defeats when the Bill returned to the Commons on 31 January 2006.<sup>15</sup>

Had the controversial Bill been enacted in the terms originally proposed, the legislation would have provided for the criminalisation of incitement to religious hatred on the basis of the legislative formula, in Part III of the Public Order Act 1986, which criminalises incitement to racial hatred. Accordingly, the incitement to religious hatred measures the Government supported would have been grafted onto the 1986 Act.<sup>16</sup> As a result of amendments conceded to the Bill, however, congruence

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<sup>8</sup> See HC Deb., 13 December 2001, Cols 1112-1115; M. Zander, "The Anti-Terrorism Bill – What Happened?" (2001) 151(7013) *New Law Journal* 1880; M. M. Idriss, "Religion and the Anti-Terrorism, Crime and Security Act 2001" [2002] *Criminal Law Review* 890.

<sup>9</sup> The relevant provisions of Lord Avebury's Bill were identical to those withdrawn from the Anti-Terrorism, Crime and Security Bill (see HL Deb., 30 January 2002, Cols 315-318). The Private Member's Bill also contained proposals for the abolition of the common law as to blasphemy.

<sup>10</sup> 2004-05 session, April 2005.

<sup>11</sup> See, for example, HL Deb., 5 April 2005, Cols 595-596.

<sup>12</sup> See HC Deb., 7 February 2005, Col 1224.

<sup>13</sup> The Labour Party, in its 2005 election manifesto, pledged to introduce legislation to deal with religious hatred (*Labour Party Manifesto 2005: Forward not back* pp.111-112).

<sup>14</sup> See HL Deb., 25 October 2005, Cols 1122-1139; 08 November 2005, Cols 510-512.

<sup>15</sup> HC Deb., 31 January 2006, Col 244; see also R. Whitaker, "Ping-Pong and Policy Influence: Relations Between the Lords and Commons, 2005-06" (2006) 59(3) *Parliamentary Affairs* 536-545. The Bill, as amended, received Royal Assent on 16 February 2006.

<sup>16</sup> See HL Deb., 25 October 2005, Cols 1070-1101; 31 January 2006, Col 192.

between the incitement to racial hatred provisions of the Public Order Act 1986 and the religious hatred provisions of the Racial and Religious Hatred Act 2006 is less pronounced than the Government had intended.

The controversy attending the criminalisation of incitement to religious hatred is, at one level, located in and confined to a single focal point; that of how far free expression might be curtailed justly, by criminal sanction, in order to protect those identified with a particular category of individuals from incited hatred. At another, the furore stimulated by the proposed and enacted incitement to religious hatred offences rests on the defensibility of analogising religious hatred with racial hatred. However, closer scrutiny reveals the controversy brings a cluster of related themes in to focus. These include such nebulous and contested concepts and constructs as culture, community and citizenship; identity and identification; 'us-ness' and 'they-ness'; legal authority and civic propriety; dissent and toleration; free expression, equality and pluralism. This article seeks to demonstrate these themes are of contemporary *and* historical salience for an understanding of the role played by coercive law in managing interpersonal and intergroup relations. The discussion begins with a review of the principal tools used in English criminal law, from the early modern period to the present, to impose limits on free expression, particularly the freedom to display 'hate', in pursuit of social order. In this way, it is shown that coercive measures, at common law and later by statute, have long served to supervise the boundaries at which the acceptable is segregated from the unacceptable. The article then discusses the Racial and Religious Hatred 2006 Act, its (dis)similarities with the preceding Bill and with the incitement to racial hatred measures on which the 2006 Act is modelled. The discussion also explores whether, in light of European and domestic human rights law, the English law of blasphemy should now be abolished. It goes on to assess how far existing public order legislation, and accompanying sentence enhancement provisions regarding 'racially or religiously aggravated' offences, are adequate to cover the ground addressed not only by the newly enacted incitement to religious hatred offences but also both the older incitement to racial hatred legislation and the common law as to blasphemy. It is argued that contestation over the mobilisation of criminal law to promote public civility and social justice is intrinsic not only to criminal law past and criminal law present but also to any polity committed to addressing social inequality.

## **I: Unpalatable Expression in Early Modern English Law**

The early modern English state had several instruments at its disposal with which to suppress and punish utterances and writings deemed threatening to or hostile of government, its institutions, organs, officials or interests. One such may be seen in the *Scandalum Magnatum* statute of 1275, which provided for the punishment of those who would “be so hardy to cite or publish any false news or tales whereby discord or occasion of discord or slander may grow between the King and his people or the great men of the realm”.<sup>17</sup>

As an alternative to using *Scandalum Magnatum*,<sup>18</sup> royal governments might draw upon laws relating to treason.<sup>19</sup> Having evolved from Germanic and Roman roots,<sup>20</sup> the crime of treason was first placed on a statutory footing in 1352.<sup>21</sup> For the offence to be found, the 1352 statute appears to require the compassing of the monarch’s removal or death by way of an overt act, rather than by words alone. However, both prior to and following the enactment, a wide range of purportedly subversive activities, including dissident expression, were construed and punished as treasonous.<sup>22</sup> Thus, the concepts of treason, traitor and treachery proved sufficiently elastic, under monarchical government, to embrace spoken and written words.<sup>23</sup> Nevertheless, although *Scandalum Magnatum* and the treason laws proved useful in restraining expression and activity seen as possessing the potential to incite loss of confidence in the established institutions of church and state, the law as to criminal libel presented a more efficient instrument of control.<sup>24</sup>

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<sup>17</sup> 3 Ed. I, c. 34 (1275). The statute was re-enacted and refined by successive statutes (2 Rich. II, c. 5 (1378); 12 Rich. II, c. 11 (1388); 1 & 2 P & M, c. 3 (1554); and 1 Eliz., c. 6 (1559)) and repealed by the Statute Law Revision Act 1887. See J. F. Stephen, *A History of the Criminal Law of England*, 3 vols., (New York: Franklin, 1883) vol. 2, pp. 301-302; L. W. Levy, *Legacy of Suppression: Freedom of Speech and Press in Early American History* (Cambridge Mass: Belknap, 1960) pp. 7-8; Law Commission, Working Paper No. 84, *Criminal Libel* (London: HMSO, 1982) 2.2; P. Hamburger, “The Development of the Law of Seditious Libel and the Control of the Press” (1985) 37(3) *Stanford Law Review* 661, pp. 668-669.

<sup>18</sup> For discussion of the difficulties associated with *Scandalum Magnatum*, see Hamburger, *ibid.* See also R. Manning, “The Origins of the Doctrine of Sedition” (1980) 12 *Albion* 99.

<sup>19</sup> W. S. Holdsworth, *A History of English Law* (London: Methuen, 1903-1926) vol. 8, pp. 307-322; J. G. Bellamy, *The Law of Treason in England in the Later Middle Ages* (Cambridge: Cambridge University Press, 1970).

<sup>20</sup> F. Pollock and W. F. Maitland, *The History of English Law* (Cambridge: Cambridge University Press, 1895) vol. 2, pp. 501-502; Bellamy, *ibid.*, pp. 1-14.

<sup>21</sup> 25 Ed., III, c. 2 (1352).

<sup>22</sup> Stephen, *supra.*, n 17, pp. 253, 255-268, 297, 303; Holdsworth, *supra.*, n. 19, vol. 3, pp. 289-293, vol. 8, pp. 302, 322, 326; I. Brant, “Seditious Libel: Myth and Reality” (1964) 39(1) *New York University Law Review* 1; W. T. Mayton, “Seditious Libel and the Lost Guarantee of Freedom of Expression” (1984) 84(1) *Columbia Law Review* 91, pp. 98-102; Hamburger, *supra.*, n. 17, pp. 666-668; Bellamy, *supra.*, n. 19, pp. 14-19.

<sup>23</sup> Holdsworth, *supra.*, n. 19, vol. 8, pp. 307-333; Levy, 1960, *supra.*, n. 17, pp. 10-11; Mayton, *ibid.*, pp. 100-101.

<sup>24</sup> See Holdsworth, *supra.*, n. 19, vol. 5, pp. 207-208; Hamburger, *supra.*, n. 17, pp. 711-759; Manning, *supra.*, n. 18, p. 100.

By the late 1400s, the first printing press had been set up, as had the Court of Star Chamber; and while the former would broaden the availability of the written word, the latter would, through the crime of libel, monitor, discourage and punish matter considered detrimental to established church-state order.<sup>25</sup> Seditious libel evolved in the conciliar court as one of four forms of criminal libel — the others being blasphemous libel, obscene libel and defamatory libel<sup>26</sup> — and was authoritatively formulated in the 1605 case of *De Libellis Famosis*.<sup>27</sup> The defendant, Lewis Pickering, was accused of composing and publishing a poem defaming the recently deceased Archbishop of Canterbury and his successor.<sup>28</sup> Pickering, relying on the common law of defamation,<sup>29</sup> argued, albeit tentatively, he should not be convicted without proof of the falsity of the words in question.<sup>30</sup> The Attorney-General, Edward Coke, countered that a libel against a servant of the crown is a greater offence than one against a private person:

[F]or it concerns not only the breach of the peace, but also the scandal of Government; for what greater scandal of Government can there be than to have corrupt or wicked magistrates to be appointed and constituted by the King to govern his subjects under him? And greater imputation to the State cannot be, than to suffer such corrupt men to sit in the sacred seat of justice, or to have any meddling in or concerning the administration of justice.<sup>31</sup>

Focusing on the supposed effects of seditious libels, enabled Coke to reason, or be understood as having reasoned,<sup>32</sup> that it be immaterial whether the alleged libeller was possessed of a non-malicious intention and that a defendant may not plead the truth or accuracy of the matter as a defence. Thus, the accused was found to have libelled a public official and, by extension, both the crown and its government to a seditious degree.

Following the demise of absolute monarchy, the Court of Star Chamber was abolished in 1641. At the Restoration, the Court of King's Bench inherited the criminal jurisdiction formerly administered by the Star Chamber court and, thereafter,

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<sup>25</sup> Holdsworth, *supra.*, n. 19, vol. 5, p. 208; J. R. Spencer, "Criminal Libel – A Skeleton in the Cupboard" [1977] *Criminal Law Review* 383. See also, Stephen, *supra.*, n. 17, pp. 302-309; Brant, *supra.*, n. 22, pp. 5-14; Mayton, *supra.*, n. 22, pp. 102-106; Hamburger, *supra.*, n. 17, pp. 691-714.

<sup>26</sup> Levy, 1960, *supra.*, n. 17, pp. 9-10; Brant, *supra.*, n. 22, p. 5; Spencer, *ibid.*; Bryan, *supra.*, n. 2, pp. 336-340.

<sup>27</sup> (1605) 5 Co. Rep. 125a; (1606) 77 Eng. Rep. 250.

<sup>28</sup> A. Bellany, "A Poem on the Archbishop's Hearse: Puritanism, Libel and Sedition after the Hampton Court Conference" (1995) 34(2) *Journal of British Studies* 137.

<sup>29</sup> See Holdsworth, *supra.*, n. 19, vol. 5, pp. 205-207.

<sup>30</sup> Bellany, *supra.*, n. 28, pp. 152, 157.

<sup>31</sup> *De Libellis Famosis* (1605) 5 Co. Rep. 125a; (1606) 77 Eng. Rep. 250, p. 251.

<sup>32</sup> See Stephen, *supra.*, n. 17, pp. 304-305; Holdsworth, *supra.*, n. 19, vol. 5, pp. 210-211; Brant, *supra.*, n. 22, pp. 3-4; Bellany, *supra.*, n. 28, pp. 155-157, 162-163.

the law of criminal libel developed in the common law courts.<sup>33</sup> The substantive law regarding criminal libels remained intact immediately after it was assimilated into the common law, since common law judges reserved to themselves the right to determine whether the words at issue contravened the criminal law.<sup>34</sup> The functions of judge and jury at this period were such that the jury was precluded from considering the alleged libeller's intentions and from deciding whether the words prosecuted constituted one or other form of criminal libel. The jury, therefore, was restricted to addressing the factual questions of whether the defendant had published the words at issue and of whether the words carried the meaning attributed to them by the prosecution. Thus, whether the words amounted to a criminal libel was a matter of law rather than fact and, therefore, for the judge to rule upon.<sup>35</sup>

The respective functions of judge and jury in libel trials was, however, repeatedly challenged over the course of the 1700s, with the effect that libel prosecutions became ever more problematic.<sup>36</sup> Increasing dissatisfaction with the prevailing common law stance on the province of judge *vis-à-vis* jury culminated in Fox's Libel Act of 1792,<sup>37</sup> which formally empowered the jury to assess whether the words in question amounted to a libel and to deliver a general verdict on the whole matter put before it.<sup>38</sup>

The 1792 Act notwithstanding, the incidence of libel prosecutions rose significantly over the late 1700s and early 1800s, and began to decline thereafter.<sup>39</sup> The decreasing efficacy of this hitherto favoured means of restricting impermissible expression was accompanied by mounting uncertainty as to the procedural and substantive conditions required to secure conviction. Indeed, it appears the rapid decline in prosecutions was, in large part, actuated by difficulties prosecutors encountered in their attempts to persuade judge and jury that the words complained of were sufficiently scurrilous to constitute either a seditious or a blasphemous libel.

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<sup>33</sup> Stephen, *supra.*, n. 17, pp. 298-395; Brant, *supra.*, n. 22. See also, T. G. Barnes, "Star Chamber and the Sophistication of the Criminal Law" [1977] *Criminal Law Review* 316, pp. 322-323, 326.

<sup>34</sup> See Barnes, *ibid.*; Spencer, *supra.*, n. 25, p. 358.

<sup>35</sup> C. R. Kropf, "Libel and Satire in the Eighteenth Century" (1974) 8(2) *Eighteenth-Century Studies* 153, pp. 157-8.

<sup>36</sup> T. A. Green, "The Jury, Seditious Libel and the Criminal Trial" in Green, *Verdict According to Conscience: Perspectives on the English Criminal Trial Jury, 1200-1800* (Chicago: University of Chicago Press, 1985) pp. 318-355; M. Lobban, "From Seditious Libel to Unlawful Conspiracy: Peterloo and the Changing Face of Political Crime c. 1770-1820" (1990) 10(3) *Oxford Journal of Legal Studies* 307.

<sup>37</sup> 32 Geo. III, c. 60 (1792).

<sup>38</sup> See Levy, 1960, *supra.*, n. 17, pp. 249-253; Green, *supra.*, n. 36; Lobban, *supra.*, n. 36, pp. 320-321, 329-330, 349-350; P. Harling, "The Law of Libel and the Limits of Repression, 1790-1832" (2001) 44(1) *The Historical Journal* 107.

<sup>39</sup> See Kenny, *supra.*, n. 3, pp. 134-140; Lobban, *supra.*, n. 36, p. 321; Harling, *ibid.*, pp. 108-111. See also Stephen, *supra.*, n. 17, pp. 362-376; Levy, 1960, *supra.*, n. 17, pp. 252-258.



In short, the proposition that culpability did not require consideration of whether the defendant was possessed of malicious intent and the contention that the prosecuted words necessarily carried a tendency to provoke a breach of the peace were increasingly subject to challenge.<sup>40</sup>

Stephen, in responding to ambiguities concerning the contours of the existing law, advanced that seditious libel consisted in the publication of oral or written words with seditious intent.<sup>41</sup> He defined seditious intent as:

... an intention to bring into hatred or contempt, or to excite disaffection against the person of, Her Majesty, her heirs and successors, or the Government and Constitution of the United Kingdom, as by law established, or either House of Parliament, or the administration of justice, or to excite Her Majesty's subjects to attempt otherwise than by lawful means the alteration of any matter in Church or State by law established, or to raise discontent or disaffection amongst Her Majesty's subjects, or to promote feelings of ill-will and hostility between different classes of Her Majesty's subjects.<sup>42</sup>

This delineation of the offence, which was later accepted in the 1886 case of *R v Burns*,<sup>43</sup> came to be understood as requiring an intention on the part of the accused not merely to promote feelings of ill-will and hostility but rather to incite violent disorder for the purpose of disturbing constituted authority.<sup>44</sup> The considerable evidential difficulties presented by the accepted formulation of the common law offence,<sup>45</sup> brought two corollaries. First, prosecutions and the threat of prosecutions for seditious libel ceased to function as the primary means through which government might restrain expression and activity considered destructive of its interests.<sup>46</sup> Second, the law relating to public order came to be preferred over seditious libel to punish expression fomenting or likely to foment public discord.<sup>47</sup>

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<sup>40</sup> See Stephen, *supra.*, n. 17, p. 359; Lobban, *supra.*, n. 36, pp. 323-324, 348; Harling, *supra.*, n. 38, pp. 110-134. Several leading cases dating from the 1820s point to a judicial concern to provide the fact-finding jury with assistance regarding the definitional elements of seditious libel, see, for example, *Burdett* (1820) 4 B & Ald 95; *Cobbett* (1831) 2 St Tr NS 789; *Vincent* (1839) 9 Car & P 91; *Collins* (1839) 9 Car & P 456; *Lovett* (1839) 9 Car & P 462; *Sullivan* (1868) 11 Cox CC 44. For consideration of whether a breach of the peace element survives as an ingredient of the blasphemy laws, see *R v Lemon* [1978] 3 WLR 404 (Court of Appeal) pp. 410, 412; Law Commission, Working Paper, *supra.*, n. 2.3.3-3.4, 6.2; Law Commission, Report, *supra.*, n. 2, para. 2.19.

<sup>41</sup> J. F. Stephen, *A Digest of the Criminal Law* (London: Macmillan, 1877) Article 91.

<sup>42</sup> *Ibid.*, Article 93.

<sup>43</sup> (1886) 16 Cox CC 355, at p. 360.

<sup>44</sup> See *Collins* (1893) 9 C & P 456; *Aldred* (1909) 22 Cox CC 1; *R v Caunt* (1947) (unreported) discussed in E. Wade, "Seditious Libel and the Press" (1948) 64 *Law Quarterly Review*, 203; *Boucher v R* (1951) SCR 265; *Chief Metropolitan Stipendiary Magistrate, ex parte Choudhury* [1991] 1 All ER 306.

<sup>45</sup> See D. Williams, *Keeping the Peace: The Police and Public Order* (London: Hutchinson, 1967) pp. 198-203; Law Commission, Working Paper No. 72, Second Programme, Item XVIII, *Codification of the Criminal Law: Treason, Sedition and Allied Offences* (London: HMSO, 1977) .69-77.

<sup>46</sup> See Lobban, *supra.*, n. 36; Williams, *ibid.*, pp. 198, 202-203. For discussion of the various statutory incitement and sedition offences enacted to protect state institutions from insurrections, to preserve

It would appear, then, that during the period from when jurisdiction over criminal libels was first inherited by the common law courts to the mid 1700s, the substantive law as to both blasphemous and seditious libels did not vary appreciably. From around the late 1700s, however, judicial rulings on the constituent elements of blasphemous libel served to transform the offence.<sup>48</sup> By the end of the 1800s, blasphemous libel had mutated from a crime which penalised any attack or criticism, regardless of how reasonably expressed, on the established church or fundamental tenets of Christianity, to one where criminal liability would arise only where the words prosecuted had not been expressed in sufficiently sober and temperate terms.<sup>49</sup> It also appears that while the law regarding blasphemous libel received modification chiefly through judicial intervention, adjustments to seditious libel were brought about or formalised by the largely procedural amendments effected by Fox's Libel Act 1792, Lord Campbell's Libel Act 1843,<sup>50</sup> and the Criminal Evidence Act 1898.<sup>51</sup>

Neither a lack of judicial activism in the common law of seditious libel nor an absence of legislative activity in blasphemous libels is being suggested here. The weighting is, rather, one of emphasis since the Acts of 1792, 1843 and 1898 influenced all criminal libels, and judicial activity is visible in both seditious and blasphemous libels. However, while judges were instrumental in the formulation of a more identifiable and specific *mens rea* requirement for seditious libels, judicial attempts to establish a distinct mental element for blasphemous libels proved futile, in that the offence survives as one of strict liability.<sup>52</sup> The amalgam of statutory and judicial adjustments to the composition and compass of libel offences, nevertheless, contributed to the decline of seditious libel, blasphemous libel and indeed public mischief

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public tranquillity and to punish those who would urge disloyalty in state agents, see T. Bunyan, *The History and Practice of the Political Police in Britain* (London: Friedmann, 1976) pp. 28-36. See also Williams, *ibid.*, pp. 179-197; C. Townshend, *Making the Peace: Public Order and Public Security in Modern Britain* (Oxford: Oxford University Press, 1993) pp.94-104; Law Commission, Working Paper No. 72, *supra.*, n. 45. 79-89.

<sup>47</sup> See Lobban, *supra.*, n. 36, pp. 321-352; Williams, *supra.*, n. 45, p. 155.

<sup>48</sup> A statute of 1697 (9 & 10 Will. III, c. 32) made it an offence for any person, having been educated in, or having made a profession of, the Christian religion to assert or maintain views contrary to the Christian religion (see Stephen, *supra.*, n. 17, pp. 468-469; C Kenny, *supra.*, n. 3, pp. 120-121; Nash, 1999, *supra.*, n. 3, pp. 28-29). There having been few, if any, prosecutions alleging violation of its provisions and having been deemed obsolete by the Law Commission in the 1960s, the statute, otherwise known as the Blasphemy Act, was repealed by s. 13, Schedule 4, Part I of the Criminal Law Act 1967 (see Law Commission, Working Paper, No 79, *supra.*, n. 2, para. 2.24).

<sup>49</sup> See Kenny, *supra.*, n. 3, pp. 136-142; Bryan, *supra.*, n. 2, pp. 340-342.

<sup>50</sup> For a judicial evaluation of the significance of the 1843 Act, see *R v Holbrook* (1878) QBD 42. See also Law Commission, Working Paper No. 84, *supra.*, n. 17.2.10-213.

<sup>51</sup> Section 1(1) of the Criminal Evidence Act 1898 rendered defendants competent to testify as a witness in their own defence.

<sup>52</sup> See *Whitehouse v Lemon* [1979] AC 617; Law Commission, Working Paper No 79, *supra.*, n. 2, para. 6.3; Bryan, *supra.*, n. 2, pp. 343-347.

prosecutions.<sup>53</sup> With the common law found wanting, concerns to better segregate expression and conduct that ought to be tolerated from expression and conduct which potentially or actually disturbs public order, would be policed through legislation.

## II: Incitement to Racial Hatred

Various, often local, public order measures and, in due course, the Public Order Act 1936 appealed to government in its efforts to better regulate provocative expression and conduct liable to provoke a breach of the peace.<sup>54</sup> While the activities of the British Union of Fascists and the violence these activities occasioned between members of the British Union of Fascists and their Jewish, communist and anti-fascist opponents in London and elsewhere — together with difficulties encountered by law enforcement personnel in dealing with the violence — provided the immediate impetus for the 1936 Act, the legislation assisted in the supervision and control of deeds and words threatening to the domestic tranquillity of the nation state and its political process.<sup>55</sup>

Framed to penalise unacceptable conduct and expression without limiting freedom of movement, association and expression unduly,<sup>56</sup> the 1936 Act criminalised the wearing of uniforms for political purposes; proscribed the formation of paramilitary organisations; prohibited the possession of offensive weapons at public meetings; and provided the police with powers to alter the route of, or prohibit, marches, processions and assemblies likely to lead to a breach of the peace. The Public Order Act 1936 also made it an offence, under section 5, for any person in any public place or any public meeting to use ‘threatening, abusive or insulting’<sup>57</sup> words or behaviour

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<sup>53</sup> Citing *R v Higgins* (1801) 2 East 5, wherein Lawrence J observes, at p. 21, that “All offences of a public nature ... as tend to the prejudice of the community, are indictable”, the Court of Appeal in *R v Manley* [1933] 1 KB 529 declared ‘committing an act tending to the public mischief’ an extant common law offence (see W. T. S. Stallybrass, “Public Mischief” (1933) 49 *Law Quarterly Review*, 183). However, in *DPP v Withers* [1975] AC 842 the House of Lords held that public mischief and conspiracy to cause public mischief were unknown to the law.

<sup>54</sup> See Lobban, *supra.*, n. 36, pp. 339-352; Williams, *supra.*, n. 45, pp. 14-15, 155-157; Townshend, *supra.*, n. 46, pp. 104-111.

<sup>55</sup> R Benwick, *Political Violence and Public Order: A Study of British Fascism* (London: Allen Lane, 1969) pp. 193-263; Townshend, *supra.*, n. 46, pp. 81-111; C. Cross, *The Fascists in Britain* (London: Barrie, 1961); R. Thurlow, *Fascism in Britain: A History, 1918-1985* (Blackwell, 1987) pp. 92-118; C. Knowles, “Labour and Anti-Semitism” in R. Miles and A. Hizacklea (eds), *Racism and Political Action in Britain* (London: Routledge, 1979) pp. 50-71.

<sup>56</sup> See Townshend, *supra.*, n. 46, pp. 104-111; Benwick, *ibid.*, pp. 239-246; Thurlow, *ibid.*, pp. 112-118.

<sup>57</sup> For difficulties associated with according the term ‘threatening, abusive or insulting’ an unambiguous meaning for the purposes of s. 5 of the 1936 Public Order Act, and for successor offences resting on ‘threatening, abusive or insulting’ words or behaviour, see deliberations and decision of the House of Lords in *Brutus v Cozens* [1972] 2 All ER 1279; 3 WLR 521; [1973] AC 854. See also *Simcock v Rhodes* (1977) 66 Cr App R 192; *Parkin v Norman* [1983] QB 92; *Masterson v Holden* [1986] 1 WLR 1017.

with intent to provoke a breach of the peace or whereby a breach of the peace was likely to be occasioned.

When contrasted with the common law of sedition and public mischief, prosecutions and the prospect of prosecution for transgressing section 5 appear to have had considerable success in placing constraints on the use of words designed to incite, or having the effect of inciting, violent manifestations of hatred.<sup>58</sup> That said, as the provision targeted incitement to public violence generally and addressed violence motivated by racial hatred only obliquely, campaigners during the late 1950s and early 1960s petitioned strenuously to modify section 5.<sup>59</sup> The Conservative Government was not, however, persuaded of a pressing need to amend section 5 in order to provide for the criminalisation of incitement to racial hatred.<sup>60</sup> It preferred instead to increase the maximum penalty for the section 5 offence through the Public Order Act 1963.<sup>61</sup> Committing itself to the introduction of legislation prohibiting incitement to racial hatred whilst in opposition, the newly elected Labour Government gained Parliamentary support for such provision to be included in Britain's first anti-discrimination legislation, the Race Relations Act 1965.<sup>62</sup> Section 6(1) of the 1965 Act was unprecedented in providing that an offence is committed if any person, "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) publishes or distributes written matter which is threatening, abusive or insulting; or (b) uses in any public place or at any public meeting words which are threatening, abusive or insulting, being matter or

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<sup>58</sup> See *Jordan v Burgoyne* [1963] 2 All ER 225; 2 QB 744; 2 WLR 1045; A. F. Dickey, "English Law and Incitement to Racial Hatred" (1968) 9(3) *Race* 310, pp. 316-317; P. M. Leopold, "Incitement to Hatred – The History of a Controversial Criminal Offence" [1977] *Public Law* 389, pp. 390-393.

<sup>59</sup> See A. Lester and G. Bindman, *Race and Law* (Harmondsworth: Penguin, 1972) pp. 107-122. For discussion of obstacles to securing convictions under s. 5 of the Public Order Act 1936, see Williams, *supra.*, n. 45, pp. 157-169.

<sup>60</sup> For an account of 'race relations', of 'white' concerns as to 'coloured' immigrants and of the methods employed to manage community tensions in the UK at this time, see C. Holmes, "Violence and Race Relations in Britain, 1953-1968" (1975) 36(2) *Phylon* 124

<sup>61</sup> Williams, *supra.*, n. 45, pp. 169-172; D. G. T. Williams, "The Police, Public Meetings and Public Order: 1962" [1963] *Criminal Law Review* 149; D. G. T. Williams, "Insulting Words and Public Order" (1963) 26(4) *Modern Law Review* 425; Leopold, *supra.*, n. 58, p. 393.

<sup>62</sup> R. P. Longaker, "The Race Relations Act of 1965: An Evaluation of the Incitement Provision" (1969) 11(2) *Race* 125. While provision for criminalising incitement to racial hatred featured in the Race Relations Act 1965, the primary concern of the 1965 legislation was to respond (albeit tentatively and inadequately) to widespread instances of intolerance and discrimination experienced by mainly though not exclusively non-white sections of the community in such areas as employment, housing and the provision of services. The remedies available to a complaint of unlawful discrimination under the 1965 Act and its successors draw upon the civil rather than the criminal legal process. See B. Hepple, *Race, Jobs and the Law in Britain* (Harmondsworth: Penguin, 2nd ed., 1970) pp. 152-167; D. J. Smith, *Racial Disadvantage in Britain* (Harmondsworth: Penguin, 1977) pp. 310-319; L. Lustgarten, *Legal Control of Racial Discrimination* (London: Macmillan, 1980); L. Lustgarten, "Racial Inequality and the Limits of the Law" (1986) 49(1) *Modern Law Review* 68; M. Banton, "The Race Relations Problematic" (1991) 42(1) *British Journal of Sociology* 115; C. O'Connell, "The Race Relations (Amendment) Act 2000" [2001] *Public Law* 220.

words likely to stir up hatred against that section on grounds of colour, race or national origins.<sup>63</sup>

The measure made threatening, abusive or insulting 'words' *and* 'written matter', when used in a public place with intent to stir up racial hatred, punishable and did so without reference either to an intent to provoke a breach of the peace or to a likelihood of a breach of the peace being occasioned. It, therefore, contrasts with its predecessor, section 5 of the Public Order Act 1936, in that the latter focused upon words and behaviour, not written matter, intended or liable to provoke a breach of the peace.<sup>64</sup> Nonetheless, section 6(1) of the Race Relations Act 1965 proved problematic, generating unease over the legal import of such terms as 'insulting', 'abusive', 'insulting' and 'hatred'; the obligation to prove accused persons intended to incite racial hatred;<sup>65</sup> the absence of a breach of the peace requirement; the stipulation that prosecutions could only take place when conducted by, or with the consent of, the Attorney-General;<sup>66</sup> the use of criminal sanctions either to discourage hatred or to promote harmonious community relations; the value and scope of free speech; the potential for both successful and unsuccessful prosecutions to afford publicity to distasteful views; the absence of provision prohibiting incitement to religious hatred; the alleged reluctance to prosecute offenders; and the extent to which individuals were evading prosecution by the use of more refined and less virulent racial invective.<sup>67</sup>

It was in the light of this unease that provision was made not only for placing a revised incitement to racial hatred offence within the relevant public order legislation rather than within statutes focusing on race relations but also for relaxing the intent to be proved for the offence.<sup>68</sup> Thus, the Race Relations Act 1976, by section 70,

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<sup>63</sup> Section 6 of the Race Relations Act 1965 did not extend to Northern Ireland, where legislation prohibiting incitement to hatred found expression in the Prevention of Incitement to Racial Hatred Act (Northern Ireland) 1970, the Public Order (Northern Ireland) Order 1981 and the Public Order (Northern Ireland) Order 1987. For consideration of attempts to deal with intolerance, discrimination, hatred and violence in Northern Ireland, see Leopold, *supra.*, n. 58, pp. 399-402; G. Hogan and C. Walker, *Political Violence and the Law in Ireland* (Manchester: Manchester University Press, 1989) pp. 7-152.

<sup>64</sup> Section 7 of the Race Relations Act 1965 amended s. 5 of the Public Order Act 1936 by extending the latter's reach, beyond the use of words alone, to include displays, writings, signs and visible representations. Section 5 of the Theatres Act 1968 adopted the wording of section 6 of the Race Relations Act 1965 to penalise incitement to racial hatred by means of public performance of a play.

<sup>65</sup> This obligation was criticised by Lord Scarman in his *Report on the Red Lion Square Disorders of 15 June 1974*, Cmnd. 5919 (London: HMSO, 1974) at para. 125.

<sup>66</sup> Race Relations Act 1965, s. 6(3). See B. M. Dickens, "The Attorney-General's Consent to Prosecutions" (1972) 35(4) *Modern Law Review* 347.

<sup>67</sup> Dickey, *supra.*, n. 58, pp. 321-327; Longaker, *supra.*, n. 62, pp. 143-148, 152-154; Leopold, *supra.*, n. 58, pp. 394-399.

<sup>68</sup> See Home Office White Paper, *Racial Discrimination*, Cmnd 6234 (London: HMSO, 1975).

inserted a section 5A into the Public Order Act 1936, replacing the original section 5 offence. The new section made it an offence for a person (a) to publish or distribute written matter which is threatening, abusive or insulting; or (b) to use in any public place or meeting words which are threatening, abusive or insulting in circumstances where hatred is likely to be stirred up against any racial group in Great Britain.<sup>69</sup> While the revised provision retained the requirement of prosecution only by, or with the consent of, the Attorney-General,<sup>70</sup> it discarded the obligation to prove the accused *intended* to stir up racial hatred. Prosecutions under section 5A were, however, infrequent as difficulties remained over establishing the elements of the offence against accused persons and misgivings continued to be voiced both as to the role of the Attorney-General and as to whether the provision inhibited free expression unnecessarily.<sup>71</sup>

Consequently, section 5A of the Public Order Act 1936 was replaced by the six racial hatred provisions contained in Part III of the Public Order Act 1986.<sup>72</sup> Each of the offences — for which proceedings may not be instituted except by, or with the consent of, the Attorney-General<sup>73</sup> — require an intention to stir up racial hatred or proof that racial hatred was likely, having regard to all the circumstances, to be stirred up.<sup>74</sup> Each also require that the prosecuted words, behaviour or visible representation be ‘threatening, abusive or insulting’.<sup>75</sup> There is no requirement, however, to prove that racial hatred was stirred up and no requirement to prove

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<sup>69</sup> By s. 3(1) of the Race Relations Act 1976 and s. 5A(6) of the Public Order Act 1936, inserted by s. 70 of the Race Relations Act 1976, ‘racial group’ is construed as “a group of persons defined by reference to colour, race, nationality or ethnic or national origins and ... ‘nationality’ includes citizenship”.

<sup>70</sup> Public Order Act 1936, s. 5A(5).

<sup>71</sup> See P. Gordon, *Incitement to Racial Hatred* (London: Runnymede Trust, 1982); R. Cotterrell, “Prosecuting Incitement to Racial Hatred” [1982] *Public Law* 378; Home Office and Scottish Office White Paper, *Review of Public Order Law*, Cmnd 9510 (London: HMSO, 1985). 6.6-6.9.

<sup>72</sup> Public Order Act 1986, ss. 18-23.

<sup>73</sup> Public Order Act 1986, s. 27(1).

<sup>74</sup> Section 17 of the Public Order Act 1986, as amended by section 37 of the Anti-Terrorism, Crime and Security Act 2001, provides that “‘racial hatred’ means hatred against a group of persons defined by reference to colour, race, nationality (including citizenship) or ethnic or national origins”. A group of persons will be a ‘racial group’ for Part III of the Public Order Act 1986 where the criteria advanced by the House of Lords in *Mandla v Dowell Lee* [1983] 2 AC 584 (at p. 562) are satisfied or, following *R v White* [2001] EWCA Crim 216; 1 WLR 1352, where those persons would be regarded as being defined by reference to colour, race, nationality or ethnic or national origins. In *Seide v Gillette Industries Ltd* [1980] IRLR 427, the employment tribunal ruled that ‘Jewish’ referred to both a religious and racial group for the purposes of s. 3(1) of the Race Relations Act 1976. The court in *Mandla*, the leading authority on the meaning of ‘racial group’ under the Race Relations Act 1976, assessed that Sikhs constituted an ‘ethnic group’ (and therefore ‘racial group’). Subsequent cases, applying the *Mandla* criteria, have held Romany Gypsies to be an ‘ethnic group’ (*Commission for Racial Equality v Dutton* [1989] IRLR 8; 1 All ER 306), while Rastafarians (*Dawkins v Department of the Environment* [1993] IRLR 284; [1993] ICR 517) and Muslims (*J. H. Walker v Hussain* [1996] IRLR 11) have not been so characterised.

<sup>75</sup> *Supra.*, n. 57.

either an intention to provoke a breach of the peace or that a breach of the peace was occasioned by the words, behaviour or visible representation at issue.<sup>76</sup>

Although several possible justifications have been suggested as underpinning the scheme adopted in Part III of the Public Order Act 1986,<sup>77</sup> questions remain over the merits and desirability of imposing criminal sanctions on words, behaviour or displays where used with intent to provoke, or deemed likely to provoke, racial hatred.<sup>78</sup> Thus, a favourable assessment would observe that, viewed against earlier racial hatred measures,<sup>79</sup> the offences in Part III consolidate, revise, extend and therefore strengthen the entirely justifiable law penalising incitement to racial hatred.<sup>80</sup>

A less enthusiastic evaluation, however, would view the racial hatred provisions as representing an objectionably fragile settlement between the objectives of safeguarding freedom of expression, protecting citizens characterised as falling within a 'racial group'<sup>81</sup> from violent manifestations of bigotry and of regulating social conduct in pursuit of greater public civility and community cohesion. On this view, the many definitional ambiguities, along with uncertainty as to objectives, structural design, and operation, are symptomatic of difficulties inherent in any legislative attempt to curtail free expression through, or by the prospect of, criminal penalty on the basis that words, activity and matter considered unpalatable, offensive or hostile can be sufficiently 'threatening, abusive or insulting' so as to stimulate racial hatred against a legally recognised 'racial group', even where the words, activity and matter are not shown to have provoked a display of racial hatred or to have occasioned a breach of the peace.<sup>82</sup>

### III: Incitement to Religious Hatred, Blasphemy and Human Rights

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<sup>76</sup> See W. J. Wolfe, "Values in Conflict: Incitement to Racial Hatred and the Public Order Act 1986" [1987] *Public Law* 85.

<sup>77</sup> *Ibid.*, pp. 94-95.

<sup>78</sup> *Ibid.*, pp. 86-95. See also C. McCrudden, "Freedom of Speech and Racial Equality", in P. B. H. Birks, *Pressing Problems in the Law Volume 1: Criminal Justice and Human Rights* (Oxford: Oxford University Press, 1995) pp. 125-148; D. Feldman, *Civil Liberties and Human Rights in England and Wales*, (Oxford: Oxford University Press, 2nd ed., 2002) pp. 1050-1054.

<sup>79</sup> Besides s. 5A of the Public Order Act 1936, s. 5 of the Theatres Act 1968 and s. 27 of the Cable and Broadcasting Act 1984 also made provision for punishing incitement to racial hatred.

<sup>80</sup> See A. T. A. Smith, *Offences Against Public Order* (London: Sweet & Maxwell, 1987) pp. 147-148; McCrudden, *supra.*, n. 78, p. 130.

<sup>81</sup> *Supra.*, n. 74.

<sup>82</sup> See Smith, *supra.*, n. 80, pp. 148-166; A. Sherr, *Freedom of Protest, Public Order and the Law* (Oxford: Blackwell, 1989) pp. 105-107. See also McCrudden, *supra.*, n. 76, pp. 129-131; J. Jaconelli, "Context-Dependent Crime" [1995] *Criminal Law Review* 771, pp.775-777.

Were it enacted without revision, the Racial and Religious Hatred Bill would have added the words 'or religious' to the existing incitement to racial hatred offences. It would also have replaced the provisions in Part III of the Public Order Act 1986 addressing words, behaviour and matter that are either intended or likely, having regard to all the circumstances, to stir up racial hatred, with a requirement that the words, behaviour or matter be either intended to stir up racial or religious hatred or "likely to be seen or heard by a person in whom it is likely that racial or religious hatred would be stirred up".<sup>83</sup> Furthermore, the Bill would have retained the 'threatening, abusive or insulting' formula in the 1986 Act so that 'threatening, abusive or insulting' words, behaviour or matter intended or likely to stir up either racial or religious hatred would be liable to punishment.<sup>84</sup> Amendments secured against the Bill, however, operate so that the provisions of the Racial and Religious Hatred Act 2006 render words, behaviour and material punishable when proved to be both 'threatening' — as distinct from 'threatening, abusive or insulting' — and used with intent to stir up religious hatred. The provisions of the 2006 Act, therefore, differ in several respects from those proposed in the Bill. Indeed, although the title of the Act suggests significant legislative intervention in respect to racial *and* religious hatred, its influence on the former is limited to amending section 24A of the Police and Criminal Evidence Act 1984 so as to exempt the existing racial hatred and the newly enacted religious hatred offences from the power of citizens' arrest.<sup>85</sup>

Before turning to particular sites where the 2006 Act departs both from the Bill and Part III of the 1986 Act, it may be observed that the 2006 Act is consistent with Part III of the 1986 Act, on which it is loosely modelled, in that it too stipulates that no prosecution may proceed except by, or with the consent of, the Attorney-General.<sup>86</sup> Further, while an offence under section 18 of the 1986 Act and under the comparable section of the 2006 Act, section 29B, may be committed in either a public or private place, both sections provide for the saving that no offence is committed where the words or behaviour are used, or material displayed, within a dwelling and not seen or heard by others than those inside that dwelling.<sup>87</sup>

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<sup>83</sup> See Racial and Religious Hatred Bill, Explanatory Notes, para. 15 (<http://www.publications.parliament.uk/pa/ld200506/ldbills/015/en/06015x--.htm>).

<sup>84</sup> *Ibid.*, para. 16.

<sup>85</sup> Racial and Religious Hatred Act 2006, s. 2.

<sup>86</sup> Racial and Religious Hatred Act 2006, s 29L(1).

<sup>87</sup> Public Order Act 1986, s. 18(2); Racial and Religious Hatred Act 2006, s. 29B(2). A similar saving is provided in sections 4(2), 4A(2) and 5(2) of the Public Order Act 1986.



Nonetheless, the key areas of variance between, on the one hand, Part III of the Public Order Act 1986 and the Racial and Religious Hatred Bill and, on the other, the Racial and Religious Hatred Act 2006 can be set out as follows. First, rather than append the words ‘or religious’ to the racial hatred offences in Part III of the 1986 Public Order Act, the 2006 Act inserts a stand-alone Part IIIA into the 1986 Act which provides for a range of offences involving the stirring up of “hatred against a group of persons defined by their religious belief or lack of religious belief”.<sup>88</sup> Second, in criminalising words, behaviour and matter intended — though not those prone or likely — to incite religious hatred, the 2006 Act eschews emulating faithfully the approach taken in Part III of the 1986 to racial hatred. Thus, whereas the racial hatred offences require the prosecution to establish either an intention to stir up racial hatred or demonstrate that racial hatred was likely to be stirred up, the *mens rea* required for the offences introduced under the 2006 Act raise the prospect of criminal liability only where the accused *intends* to stir up religious hatred.<sup>89</sup> Third, the Bill was amended to include a clause which makes specific reference to the protection of free expression.<sup>90</sup>

The dissimilarities between Part III of the 1986 Act and the Racial and Religious Hatred Bill on the one hand, and the Racial and Religious Hatred Act 2006 on the other, are such that the latter can be regarded as an enfeebled attempt to remedy the unsatisfactory position in which the law as to incitement to racial hatred affords a degree of protection to Jews and Sikhs, as racial groups,<sup>91</sup> from hate speech but denies such protection to Muslims and Christians. For that matter, the 2006 Act may also be seen as ill-considered since it overlooks the discriminatory character of the

<sup>88</sup> Racial and Religious Hatred Act 2006, s. 29A. The religious hatred offences are set out in sections 29B to 29F of the 2006 Act. See Racial and Religious Hatred Act 2006, Explanatory Notes (<http://www.opsi.gov.uk/acts/en2006/2006en01.htm>).

<sup>89</sup> In contrast to the stringent *mens rea* requirement in the Racial and Religious Hatred Act 2006, that required by the law of blasphemy, following the majority ruling in *Whitehouse v Lemon*, is so slight — being merely an intention on the part of the accused to publish the words at issue — as to provide for a strict liability offence (see *Whitehouse v Lemon* [1979] AC 617, *per* Lord Diplock, pp. 637-638, *per* Lord Edmund-Davies, p. 656; Law Commission, Working Paper, No 79, *supra.*, n. 2, para. 6.3). The absence from the English blasphemy laws of a *mens rea* component that requires proof of an intention to blaspheme, however, runs contrary to the presumption that a mental element is an essential constituent of all common law offences (see Law Commission, Working Paper, No 79, *supra.*, n. 2, paras. 6.3-6.9, 8.10-8.11; *B v DPP* [2000] AC 428, p. 460, where Lord Nicholls draws on the support of Lord Reid’s judgment in *Sweet v Parsley* [1970] AC 132: ‘[I]t is firmly established by a host of authorities that *mens rea* is an essential ingredient of every offence unless some reason can be found for holding that that is not necessary’ (*ibid.*, pp. 148-149)). See also P. Brett, “Strict Responsibility: Possible Solutions” (1974) 37(4) *Modern Law Review* 417).

<sup>90</sup> Racial and Religious Hatred Act 2006, s 29J: “Nothing in this Part shall be read or given effect in a way which prohibits or restricts discussion, criticism or expressions of antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs or practices of their adherents, or of any other belief system or the beliefs or practices of its adherents, or proselytising or urging adherents of a different religion or belief system to cease practising their religion or belief system.”

<sup>91</sup> *Supra.*, n. 74.

English law of blasphemy. The common law offence of blasphemy, in affording protection from hostility, outrage and insult to the religious sensibilities of Christians alone,<sup>92</sup> is deficient and unsatisfactory.<sup>93</sup> However, the attempt in the 2006 Act, itself a diluted version of the Racial and Religious Hatred Bill, to criminalise displays of hatred directed against a group of persons defined by their religious belief or lack of religious belief, appears as a somewhat desultory consequence of preferring neither to widen the protection afforded under the blasphemy laws so as to embrace non-Christian faiths nor, in the alternative, to abolish the antiquated common law as to blasphemy.

The Law Commission, in its 1981 Working Paper<sup>94</sup> and its 1985 Report,<sup>95</sup> opposed the imposition of criminal sanctions on matter found offensive to the religious feelings of believers under a broadened blasphemy law. A broader-based blasphemy law would, in the Law Commission's view, place excessive restrictions on free expression and exclude from its ambit matter offensive to the deeply-held feelings of those who neither adhere to nor affirm religious faith.<sup>96</sup> For the Law Commission such considerations argued against both the extension and the retention of the common law relating to blasphemy. Nevertheless, the sincere and seemingly pervasive belief that the blasphemy laws should be retained in order to protect the religious sensibilities of Christians, the historically Christian character of the British state and

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<sup>92</sup> See *Gathercole* (1838) 2 Lewin 237 wherein the defendant, the Reverend Michael Cathercole, had been accused of publishing words intended to bring a community professing the Roman Catholic faith into great contempt. He was acquitted of blasphemous libel after the trial judge informed the jury that:

A person may, without being liable to prosecution for it, attack Judaism, or Mahomedanism, or even any sect of the Christian Religion (save the established religion of the country); and the only reason why the latter is in a different situation from the others is, because it is the form established by law, and is therefore a part of the constitution of the country. In like manner, and for the same reason, any general attack on Christianity is the subject of criminal prosecution, because Christianity is the established religion of the country (*ibid.*, 254).

The Law Commission's Working Paper of 1981 — in the light of *Gathercole* (1838) 2 Lewin 237 and *Whitehouse v Lemon* [1979] AC 617; 2 WLR 281; 1 All ER 898 — observes that the protection afforded by the present law of blasphemy does not extend beyond the Christian religion and that denominations other than the established church are protected only to the extent that their fundamental beliefs are those which are held in common with the established church (Law Commission, Working Paper, No 79, *supra.*, n. 2, para. 6.9). Both *Gathercole* and *Whitehouse v Lemon* were relied upon in *Chief Metropolitan Stipendiary Magistrate, ex parte Choudhury* [1991] 1 All ER 306 to support the Divisional Court's conclusion that the English law of blasphemy is confined to the Christian religion. See also Bryan, *supra.*, n. 2, pp. 333-362.

<sup>93</sup> See Law Commission, Report No. 145, *supra.*, n. 2, paras. 2.17-2.18, 2.54-2.57; Bryan, *supra.*, n. 2, pp. 346-347.

<sup>94</sup> Law Commission, Working Paper, No 79, *supra.*, n. 2, paras. 8.17-8.22.

<sup>95</sup> Law Commission, Report, No 145, *supra.*, n. 2, paras. 2.20, 2.40, 2.47-2.51. A minority of the Commissioners, though content to concur with the recommendation that the blasphemy laws should be abolished, proposed, in a 'Note of Dissent' attached to the 1985 Report, the common law be replaced with a statutory offence which would 'penalise anyone who published grossly abusive or insulting material relating to a religion with the purpose of outraging religious feelings'.

<sup>96</sup> See Bryan, *supra.*, n. 2, pp. 357-359.

the Christian identity of the preponderance of its citizens,<sup>97</sup> appears to have militated against the speedy implementation of the Law Commission's recommendation that the blasphemy laws be abolished.<sup>98</sup>

Moreover, as the previous century drew to close, proponents of the view that the English law of blasphemy is warranted received additional support from the European Court of Human Rights cases of *Otto-Preminger Institut v Austria*<sup>99</sup> and *Wingrove v UK*.<sup>100</sup> The European Court of Human Rights ruled in these cases that where a state's laws interfere with freedom of expression — as secured under Article 10 of the European Convention on Human Rights (ECHR) — so as to protect its citizens, specifically those of the majority faith, from having their religious feelings outraged and to safeguard their right to freedom of thought, conscience and religion — as secured under Article 9 of the ECHR — such laws are unlikely to be judged arbitrary or excessive. The Court added that a 'margin of appreciation' is accorded to states under which freedom of expression may be infringed in order to protect the religious feelings of Christians from outrage.<sup>101</sup>

However, the European Court of Human Rights' effective endorsement, in *Otto-Preminger* and *Wingrove*, of state laws penalising the causing of offence to the religious feelings of Christians predates the introduction of domestic legislation, the

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<sup>97</sup> For an indication of the strength of feeling opposed to either abolishing or modifying the blasphemy laws, see Law Commission, Working Paper, No 79, *supra.*, n. 2, paras. 7.12-7.21; Law Commission, Report, No 145, *supra.*, n. 2, paras. 2.6-2.13; Poulter, *supra.*, n. 2, pp. 374-376; House of Lords Select Committee on Religious Offences in England and Wales, *supra.*, n. 2, paras. 32-36, 38.

<sup>98</sup> See Law Commission, Report, *supra.*, n. 2, para. 2.56 and 'Note of Dissent' para. 1.1.

<sup>99</sup> *Otto-Preminger Institut v Austria* (1995) 19 EHRR 34. In this case the Court ruled on whether the seizure and forfeiture of a film, *Das Liebeskonzil* (Council in Heaven), by the Austrian authorities, constituted a violation of the right of artistic expression, as protected under Article 10 of the European Convention on Human Rights. The Court accepted that the seizure and forfeiture were aimed at protecting the rights of others, under Article 10(2), adding that in the absence, first, of a uniform conception of the significance of religion and, second, of a comprehensive definition of what constitutes a permissible interference with the exercise of the right to freedom of expression, a wide 'margin of appreciation' is afforded to national authorities as to the necessity of such interference for the protection of the religious feelings of its citizen's from insult.

<sup>100</sup> *Wingrove v UK* (1997) 24 EHRR 1. The Court in this case ruled on whether a refusal by the British Board of Film Classification to issue a certificate licensing a video, *Visions of Ecstasy*, on the ground that the video might infringe the English blasphemy laws, constituted an unnecessary violation of Article 10 (see Nash, 1999, *supra.*, n. 3, pp. 265-276). In its ruling, the Court found the certificate had been legitimately refused as the refusal — an act which amounted to one of prior restraint based on the assumption that Christians would be offended — was aimed at protecting the rights of others, under Article 10(2). The Court added that a wide 'margin of appreciation' is available to states with which to limit freedom of expression in order to protect its citizen's from attacks against their religious convictions.

<sup>101</sup> See S. Stokes, "Blasphemy and Freedom of Expression under the European Convention on Human Rights: The Decision of the Court in *Wingrove v UK*" (1997) 8(2) *Entertainment Law Review* 71; Ghandi and James, *supra.*, n. 2; P. Kearns, "The Uncultured God: Blasphemy Law's Reprieve and the Art Matrix" (2000) *European Human Rights Law Review* 512. See also *Handyside v UK* (1976) 1 EHRR 737, para. 48; *Sunday Times v UK* (No 1) (1979) 2 EHRR 245, para. 59; G. Letsas, "Two Concepts of the Margin of Appreciation" (2006) 26(4) *Oxford Journal of Legal Studies*, 705.

Human Rights Act 1998 (crafted to ensure rights guaranteed under the ECHR are realized directly in British law). The point here is that following the introduction of the Human Rights Act 1998, the prospects for the survival of an enforceable English law of blasphemy would seem slight. This supposition has its grounding in the observation that the ‘margin of appreciation’ doctrine is not available when ‘Convention rights’, secured in domestic law by the 1998 Act, are at issue in a national court.<sup>102</sup> Therefore, should questions over the compatibility of the blasphemy laws with rights protected under the Convention be raised in an English court, that court would have little or no basis for relying on *Otto-Preminger* or *Wingrove* to find the common law as to blasphemy ECHR-compliant.<sup>103</sup>

#### IV: Lesser Hostility and Aggravation

Setting aside the possible efficacy, latent limitations and symbolic significance of the Racial and Religious Hatred Act 2006, the case against the continued retention of the blasphemy offences,<sup>104</sup> that against criminalising religious hatred<sup>105</sup> — and, for that matter, the case against criminalising racial hatred — gains support from the presence of other potentially suitable offences within the Public Order Act 1986. Whilst not directly concerned with incitement to hatred, the offences carry the potential to punish words and deeds impelled by hatred of another. Furthermore, the three pertinent public order offences make no specific requirement for proof of either racial or indeed religious animus and each attract increased penalties where the sentencing court accepts the offender’s conduct reveals an element of racial or religious aggravation.<sup>106</sup>

The first, which supersedes section 5 of the 1936 Public Order Act, is provided for under section 4 of the Public Order Act 1986. This provision renders criminally liable

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<sup>102</sup> See R. Singh, M. Hunt and M. Demetriou, ‘Is there a Role for the “Margin of Appreciation” in National Law after the Human Rights Act?’ (1999) *European Human Rights Law Review* 15; *R v DPP ex parte Kebilene* [2000] 2 AC 326, pp. 380-381 (*per* Lord Hope of Craighead).

<sup>103</sup> The ECHR Articles most relevant to the English law of blasphemy are Article 9 (freedom of thought, conscience and religion), Article 10 (freedom of expression) and Article 14 (prohibition on discrimination). See Poulter, *supra.*, n. 2, pp. 374-375; S. Stokes, “Blasphemy and Free Expression under the European Convention on Human Rights: Two Recent Cases” (1996) 7(2) *Entertainment Law Review* 85. See also Select Committee on Religious Offences, *supra.*, n. 2, para. 20 and Appendix 3, para. 11.

<sup>104</sup> See Bryan, *supra.*, n. 2, pp. 346-360.

<sup>105</sup> Bryan, *supra.*, n. 2, pp. 355-356.

<sup>106</sup> Statutory provision to increase the maximum penalties available to the sentencing court where a defendant’s conduct is proved to have been ‘racially aggravated’ was introduced by Part II of the Crime and Disorder Act 1998. Section 39 of the Anti-Terrorism, Crime and Security Act 2001 added ‘racially or religiously aggravated’ to the group of ‘racially aggravated’ offences in sections 29 to 32 of the 1998 Act. See Idriss, *supra.*, n. 7, pp. 903-910; E. Burney, “Using the Law on Racially Aggravated Offences” (2003) *Criminal Law Review* 28.

the individual who is proved to have (a) used, towards another person, 'threatening, abusive or insulting' words or behaviour; or (b) distributed or displayed, to another person,<sup>107</sup> any visible representation which is 'threatening, abusive or insulting', where it is also proved that the individual did so with intent either to cause the other person to believe immediate unlawful violence would be used or to provoke such violence.<sup>108</sup> The remaining two offences are set out in sections 4A and 5 of the 1986 Act. Section 4A<sup>109</sup> provides that an offence is committed when an individual, with intent to cause another person 'harassment, alarm or distress', uses (a) 'threatening, abusive or insulting' words or behaviour or (b) any visible representation which is 'threatening, abusive or insulting', where it is also proved 'harassment, alarm or distress' was caused. Section 5 is similar to section 4A in three respects. First, it too requires the words or behaviour to be 'threatening, abusive or insulting'.<sup>110</sup> Second, neither section requires the prohibited words or behaviour to be used towards another person. And third, neither section requires proof that the 'threatening, abusive or insulting' words or behaviour gave rise to violence or to the risk that violence may have been provoked or believed likely.<sup>111</sup> However, section 5 differs from section 4A in the respect that the relevant words or behaviour are not required to cause 'harassment, alarm or distress' since it is sufficient 'harassment, alarm or distress' is likely to be caused to a person in whose hearing or sight the words or behaviour occur. Nevertheless, while no explicit reference is made in the statute to public disorder or the threat of disorder being an ingredient of either the section 4A or section 5 offences, a public disorder element appears to have been read into the measures by the courts.<sup>112</sup>

The nature and scope of these three public order offences are such, therefore, as to suggest them capable of punishing the use of words, behaviour and material which arouse violence, the fear of violence or 'harassment, alarm or distress'. Furthermore, the viability of proceedings under section 4, 4A or 5 of the 1986 Act as a functional

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<sup>107</sup> See *Atkin v DPP* (1988) 88 Cr App R 199.

<sup>108</sup> For the meaning of 'immediate unlawful violence', see *R v Horseferry Road Magistrate, ex parte Siadatan* [1991] 1 QB 260.

<sup>109</sup> Section 4A of the Public Order Act 1986 was inserted by section 154 of the Criminal Justice and Public Order Act 1994.

<sup>110</sup> Whether the defendant's words or conduct were 'threatening, abusive or insulting', terms which are to be given their ordinary meaning, is a question of fact to be judged having regard to whether a reasonable member of the public would find the words or conduct threatening, abusive or insulting, see *Brutus v Cozens* [1972] 2 All ER 1297; 3 WLR 521; [1973] AC 854.

<sup>111</sup> See, generally, A. Geddis, 'Free Speech Martyrs or Unreasonable Threats to Social Peace?— "Insulting" Expression and Section 5 of the Public Order Act 1986' [2004] *Public Law* 853.

<sup>112</sup> See, for example, *Chappell v DPP* (1988) 89 Cr App R 82; *Norwood v DPP* [2003] EWHC 1564; *Hammond v DPP* [2004] EWHC 69; *Dehal v Crown Prosecution Service* [2005] EWHC 2154; *DPP v Taylor* [2006] EWHC 1202; *R v DPP* [2006] EWHC 1375.

alternative to prosecutions alleging religious hatred, racial hatred or contravention of the blasphemy laws is augmented by two additional considerations. First, the provisions place no express obligation upon the prosecution to establish the prohibited conduct was driven by racial or religious hatred or that the conduct was designed either to vilify, or provoke displays of hatred against, any identifiable social group.<sup>113</sup> Second, as a result of the Crime and Disorder Act 1998,<sup>114</sup> where the prosecution prove a section 4, 4A or 5 offence and also prove the relevant 'ordinary' or 'basic' offence was 'racially or religiously aggravated',<sup>115</sup> the offender will be liable to a higher maximum penalty than that available to the courts for the unaggravated offence.<sup>116</sup>

Moreover, the meaning of 'racial group', for the purposes of racial aggravation,<sup>117</sup> appears to have been given a broader construction than that laid down for racial hatred under Part III of the Public Order Act 1986.<sup>118</sup> Also, 'religious group', for the religiously aggravated offences, refers to 'religious belief or lack of religious belief'.<sup>119</sup> Thus, the compass of sections 4, 4A and 5 of the 1986 Act — with each being subject to increased penalties on proof of being 'racially or religiously aggravated' — would seem to argue against the prosecution of wounding words, behaviour or matter on the basis of contravening an incitement to religious hatred offence, an incitement to racial hatred offence or as infringing the law relating to blasphemy.

## **V: Free Expression, the Reprehensible and Citizenship**

How far it may be argued convincingly that the provisions of the Racial and Religious Hatred Act 2006 are structured with sufficient precision to enable individuals to

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<sup>113</sup> See Bryan, *supra.*, n. 2, pp. 351-355.

<sup>114</sup> Crime and Disorder Act 1998, s. 31 as amended by the Anti-Terrorism, Crime and Security Act 2001, s. 39.

<sup>115</sup> Crime and Disorder Act 1998, s. 28(1): An offence is racially or religiously aggravated ... if - (a) at the time of committing the offence, or immediately before or after doing so, the offender demonstrates towards the victim of the offence hostility based on the victim's membership (or presumed membership) of a racial or religious group; or (b) the offence is motivated (wholly or partly) by hostility towards members of a racial or religious group based on their membership of that group.

<sup>116</sup> Where it is established that an offence was 'racially or religiously aggravated', the sentencing court is expressly required (by s. 153(2) of the Powers of Criminal Courts (Sentencing) Act 2000; s. 39(7) of the Anti-Terrorism, Crime and Security Act 2001; and s. 145(2) of the Criminal Justice Act 2003), first, to 'treat that fact as an aggravating factor' and, second, to 'state in open court that the offence was so aggravated'. See also the Criminal Justice Act 2003, s. 146, for the sentencing court's obligations where an offender demonstrates hostility towards another based on the victim's or another's sexual orientation (or presumed sexual orientation) or disability (or presumed disability).

<sup>117</sup> See Crime and Disorder Act 1998, s. 28(4).

<sup>118</sup> For the construal of 'racial group' in the context of racially aggravated offences see, for example, *DPP v Pal* [2000] Crim LR 756; *R v White* [2001] 1 WLR 1352; *Attorney-General's Reference (No 4 of 2004)* [2005] 1 WLR 2810; *DPP v M* [2004] 1 WLR 2758; and *R v Rogers* [2007] UKHL 8. See n. 74, above, for 'racial group' with regard to the racial hatred offences in Part III of the Public Order Act 1986.

<sup>119</sup> Crime and Disorder Act 1998, s. 28(5). The definition of 'religious group' in the 1998 Act is replicated at section 29A of the Racial and Religious Hatred Act 2006.

regulate their conduct in accordance with the statute, are both appropriate and proportionate to the object pursued and are necessary to meet a pressing social need is highly debatable.<sup>120</sup> Further, while the 2006 Act is demonstrative of a commitment to criminalise incitement to religious hatred, it contrasts so markedly with earlier government-sponsored attempts, in particular the Racial and Religious Hatred Bill, as to cast doubt over its purpose and practical effect. Not only are the offences limited to 'threatening' words, behaviour and matter that are proved to have been *intended* to stir up religious hatred; alleged offenders are provided, under section 29J, with an apparent freedom to insult defence;<sup>121</sup> criminal proceedings may not be instituted unless by, or with the consent of, the Attorney-General;<sup>122</sup> and few complaints are expected to progress to successful prosecution.<sup>123</sup>

Relatedly, the rationale for basing the religious hatred offences on the racial hatred provisions in Part III of the Public Order Act 1986 has not been made clear. Even if the impetus rests in an escalation of incidents of religious hatred, the legislature might reasonably expect to have been provided with compelling and reliable evidence of its extent and, thereafter, to accept fully the contention that expressions of hostility towards individuals on the basis of their religious beliefs raise problems comparable, in kind and or degree, to those that necessitated the introduction of laws penalising the stirring up of racial hatred. Also, if the repeated attempts to affix 'or religious' to the existing incitement to racial hatred offences are to be seen as sincere efforts to punish religious hatred, the paucity of prosecutions and convictions under Part III of the 1986 Act is hardly a feature of the racial hatred provisions which would inspire confidence.<sup>124</sup>

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<sup>120</sup> See I. Hare, "Crosses, Crescents and Sacred Cows: Criminalising Incitement to Religious Hatred" [2006] *Public Law* 521; K. Goodall, "Incitement to Religious Hatred: All Talk and No Substance?" (2007) 7(1) *Modern Law Review* 89.

<sup>121</sup> See HC Deb., 7 February 2005, Cols. 1202-1204; HL Deb., 24 January 2006, Col. 1070.

<sup>122</sup> *Supra.*, n. 86.

<sup>123</sup> See HC Deb., 21 June 2005 Col. 671; 31 January 2006, cols. 194, 196.

<sup>124</sup> Over the period from April 1987, when the Public Order Act 1986 came into effect, to January 2005, there have been 65 prosecutions for offences under Part III of the 1986 Act. Of these 44 resulted in convictions, 5 in acquittals and 6 were discontinued. The remaining 10 cases did not progress to full criminal proceedings (see HL Deb., 31 Jan 2005, Cols. WA4-WA5). The low number of prosecutions may be attributable to such as factors as: infrequent incitement to racial hatred events; difficulties regarding detection and proof; disinclination on the part of complainant, police, Crown Prosecution Service or the Attorney-General to initiate or proceed with a prosecution; and 'institutional racism' may have played a part (see, generally, L. Bridges, "The Lawrence Inquiry - Incompetence, Corruption, and Institutional Racism" (1999) 26(3) *Journal of Law and Society* 298; I. Iganski, "Legislating Against Hate: Outlawing Racism and Antisemitism in Britain" (1999) 19 *Critical Social Policy* 129; L. Ray and D. Smith, "Racist Offenders and the Politics of 'Hate Crime'" (2001) 12(3) *Law and Critique* 203.

The legislation, as proposed and eventually enacted, may have been driven, in part, by concerns that those who use words, behaviour and material ostensibly to express hostility towards others on the basis of their religious beliefs, but in substance to incite racial hatred, evade prosecution for incitement to racial hatred. That being so, rather than introduce incitement to religious hatred legislation, a more appropriate response would be to amend Part III of the Public Order Act 1986 so that 'racial group' status is accorded to individuals who identify themselves as, or are perceived by the alleged offender as, members of a multi-ethnic religious group.<sup>125</sup> Indeed, considered attention might have been given to replacing the requirements for 'racial group' with phrasing drawn from legislation stipulating an offence is committed where the offender demonstrates hostility 'based on the victim's membership of (or presumed membership of) a racial or religious group' or is motivated by hostility towards members of a racial or religious group.<sup>126</sup> The point here is that since 'racial group' and 'religious group' are broadly defined for the purposes of the Crime and Disorder Act 1998, analogous constructions might have been applied to legislation targeting racial and religious hatred. However, given the terrain covered by sections 4, 4A and 5 of the Public Order Act 1986 and given each of these public order offences are subject to a higher maximum penalty when racially or religiously aggravated, principled, robust and closely argued justifications for the Racial and Religious Hatred Act 2006 are difficult to make out.

The provisions in the 2006 Act are, it is claimed, designed to ensure "the criminal law protects all groups of persons defined by their religious beliefs or lack of religious belief from having religious hatred intentionally stirred up against them".<sup>127</sup> The protection from hatred, then, is afforded to the believer (and non-believer) rather than to the belief (or non-belief).<sup>128</sup> To this one might contend that since the blasphemy laws protect the religious feelings of Christians from outrage, the common law and the 2006 Act have such considerable propinquity that case for retaining the law relating to blasphemy has become ever more unsustainable.

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<sup>125</sup> For the current legal meaning of 'racial group', see *supra.*, n. 74.

<sup>126</sup> Crime and Disorder Act 1998, s. 28(1). For discussion of traditional approaches to *mens rea*, where the culpable state of mind is invariably determined without giving prominence to motivation, as against *mens rea* in 'hate crime' legislation, which typically centre on blameworthy motivations and the emotional states that attend them, see H. M. Hurd, 'Why Liberals Should Hate "Hate Crime Legislation"' (2001) 20(2) *Law and Philosophy* 215. See also I. Hare, "Legislating Against Hate — The Legal Response to Bias Crime" (1997) 17(3) *Oxford Journal of Legal Studies* 415. For the argument that 'hate crime' legislation is justified when weight is accorded to culpable motives and values, see D. M. Kahan, "Two Liberal Fallacies in the Hate Crimes Debate" (2001) 20(2) *Law and Philosophy* 175.

<sup>127</sup> Racial and Religious Hatred Act 2006, Explanatory Notes, para. 9 (<http://www.opsi.gov.uk/acts/en2006/2006en01.htm>).

<sup>128</sup> See Racial and Religious Hatred Act 2006, s. 29A; HC Deb., 07 February 2005, Col. 1224.



The freedom of expression safeguard, at section 29J of the Racial and Religious Hatred Act 2006, also warrants further comment. Since both the racial hatred provisions in Part III of the Public Order Act 1986 and the religious hatred provisions of the 2006 Act must, in keeping with all domestic legislation, be read and given effect in a way that is compatible with Convention rights,<sup>129</sup> the necessity for the inclusion of such a free expression clause is open to dispute. Whilst its insertion may well have been intended as no more than an overt declaration of the importance of free expression, it is likely to lend support to the impression that the statute is to be understood as requiring free expression principles to prevail when challenged by words, conduct or matter alleged to be both 'threatening' and used with intent to stir up religious hatred. However, as free expression necessarily comprises both freedom from that considered offensive and freedom to cause offence,<sup>130</sup> section 29J is liable to operate so that the provisions of the 2006 Act collapse in upon themselves.

Sensitivity in early-modern, modern and late-modern governments to matters perceived as inimical to, or in defiance of, the established socio-political order have often induced the use of coercive laws to restrict freedom of expression. The deployment of the *Scandalum Magnatum* statute of 1275, the treason laws and, in turn, the law of criminal libel — blasphemous, obscene, defamatory and seditious — may be seen as being impelled by concerns to protect the state, its officials and institutions from matter thought scurrilous, destabilising and tending to foment discord among the citizenry. A freedom to exchange views could not be permitted to extend to expressions and activity deemed subversive of government, its affairs or reputation.

Correlative with the emergence and promulgation of liberal democratic conceptions of governance and of free expression, seditious libel evolved in the common law courts from a crime without a clearly specified *mens rea* element to one which obliged prosecutors to prove the accused intended to incite violence or public disorder and, thereby, to subvert constituted authority. Nevertheless, by the beginning of the twentieth century, the common law of seditious libel, blasphemous

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<sup>129</sup> Human Rights Act 1998, s. 3 and s. 6. See also Human Rights Act 1998, s. 12(4) and s. 13(1) which enjoin courts to have particular regard to the Convention right to free expression and that to freedom of thought, conscience and religion.

<sup>130</sup> See *Handyside v UK* (1976) 1 EHRR 737, para.49; *Redmond-Bate v DPP* [2000] HRLR 249, para. 20.

libel and public mischief had lost status as effective weapons in the nation state's armoury directed to inhibit and punish reprehensible expression.

Constructed in large part to codify the common law of sedition, section 5 of the Public Order Act 1936 reproduced the requirement for proof that the prosecuted words, behaviour or material were used either with intent to incite public disorder or in circumstances where public disorder was likely. Thus, the public order legislation placed emphasis on the preservation of public order and sought to restrict free expression only to the extent necessary to meet that object. However, founded upon common law principles and premised upon idealised understandings of nationhood, shared national identity and citizenship,<sup>131</sup> the 1936 Act was ill-equipped to deal with the growing presence of discernibly 'alien' communities and the demonstrations of hatred that attended post-1945 'black' migration.<sup>132</sup> Throughout this period — during which incitement to racial hatred offences were first introduced into UK law under the Race Relations Act 1965, were later amended and restructured as Part III of the Public Order Act 1986 — polarised positions have been articulated as to the utility of seeking, by criminal sanction, to curtail and discipline expression judged as objectionable *and* as intended or likely to provoke violent displays of racial hatred.<sup>133</sup>

A similar polarisation of views is evident in the debates surrounding the racially or religiously aggravated offences and the Racial and Religious Hatred Act 2006.<sup>134</sup> However, little or no attention is given in those debates to the challenges any such legislation encounters in a pluralist nation state that seeks 'social cohesion' on the basis of common and generally accepted values, and to 'accommodate' or 'integrate' manifold communities — closely or loosely characterised by reference to a variety of shared and distinctive cultural, historical, political, civic, collective and individual

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<sup>131</sup> See, generally, K. Fierlbeck, "Redefining Responsibility: The Politics of Citizenship in the United Kingdom" (1991) 24 (3) *Canadian Journal of Political Science* 575; P. J. Conover, I. M. Crewe and D. D. Searing, "The Nature of Citizenship in the United States and Great Britain" (1991) 53 *Journal of Politics* 800; Z. Bauman "Soil, Blood and Identity" (1992) 40(4) *The Sociological Review* 675; A. Stewart, "Two conceptions of citizenship" (1995) 46 *British Journal of Sociology* 63; K. Kumar, "Nation and Empire: English and British National Identity in Comparative Perspective" (2000) 29(5) *Theory and Society* 575.

<sup>132</sup> C. Walters, "'Dark Strangers in Our Midst': Discourses of Race and Nation in Britain, 1947-1963" (1997) 36(2) *Journal of British Studies* 207; K. Paul, "From Subjects to Immigrants: Black Britons and National Identity", in R. Weight and A. Beach, eds., *The Right to Belong: Citizenship and National Identity in Britain, 1930-1960* (London: Tauris, 1998); R. Hansen, *Citizenship and Immigration in Post-War Britain: The Institutional Origins of a Multicultural Nation* (Oxford: Oxford University Press, 2000); J. Solomos, *Race and Racism in Britain* (Basingstoke: Palgrave Macmillan, 3rd ed., 2003) pp. 40-47; I. R. G. Spencer, *British Immigration Policy Since 1939: The Making of Multi-Racial Britain* (London: Routledge, 1997); R. Winder, *Bloody Foreigners: The Story of Immigration to Britain* (London: Abacas, 2004).

<sup>133</sup> See Dickey, *supra.*, n. 58; Leopold, *supra.*, n. 58; Longaker, *supra.*, n. 62; Gordon, *supra.*, n. 71; Cotterrell, *supra.*, n. 71; Wolffe, *supra.*, n. 76; McCrudden, *supra.*, n. 78.

<sup>134</sup> See Hare, *supra.*, n.120; Goodall, *supra.*, n. 120.

identities and emotional attachments — within the wider British polity. The common law of blasphemy, the incitement to racial hatred offences, legislation making offences subject to a higher maximum penalty when motivated by hostility and the incitement to religious hatred legislation should be seen, then, in socio-legal and historical context. When so viewed, it becomes evident these penal measures are to operate within a rapidly changing highly disparate and complex society. It is a society that has sought to steer a difficult path between competing concerns. That is, on the one hand, the promotion of commonly-held values, norms of acceptability, participatory citizenship, cohesiveness and belonging under constructions of a unitary national identity and, on the other, the pressures of devolution, disengagement, individualism, self-exclusion, involuntary exclusion, multiple identifications and fear or loathing of 'other'.<sup>135</sup>

## **Conclusion**

Historically, nation states have made use of repressive laws not only to minimise disharmony, civil disorder and conflict within society but also to assist in the project to develop a cohesive and, therefore, manageable society. The project has not been discarded by late-modern nation states.<sup>136</sup> Rather it has been forced to respond to the pressures, politics and discourses of globalisation, identity, citizenship, civil or human rights, autonomy, tolerance, respect, and equality *with*, not dichotomised from, difference.

Contestation over whether restricting free expression, by criminal sanction, to protect particular citizens from violent displays of hatred is, then, to be expected. The contention reaches beyond conflicting perspectives on what may be deemed sufficiently unpalatable to warrant criminalisation and beyond the contested boundaries at which the acceptable is to be demarcated from the intolerable. It fastens on to, or engages with, issues relating to the defence of the nation state from internal and external threats to peace, stability, security and economic prosperity. It is also located in the assertion of historical, cultural, linguistic, religious, spatial and existential bonds for a cohering national identity. It entails, furthermore, questions over the role of law in securing individual rights and in the preservation of privileges

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<sup>135</sup> See L. Colley, "Britishness and Otherness: An Argument" (1992) 31(4) *Journal of British Studies* 309; B. Dixon and D. Gadd, "Getting the Message? 'New' Labour and the Criminalisation of 'Hate'" (2006) 6(3) *Criminology and Criminal Justice* 309, pp. 313-312; B. Parekh, "Defining British National Identity" (2000) 71 *Political Quarterly* 4; C. Johnson, "The Dilemmas of Ethnic Privilege" (2002) 2(2) *Ethnicities* 163.

<sup>136</sup> See Fierlbeck, *supra.*, n. 127; V. Bader, "Citizenship and Exclusion: Radical Democracy, Community and Justice" (1995) 23(2) *Political Theory* 211; Kumar, *supra.*, n. 131.

ensuing from national citizenship.<sup>137</sup> Yet appeals to visions of a unitary, indivisible and sovereign nation state, to a distinct national identity and to national citizenship have an inherent inverse: the assertion of forms of 'othering' with regard to individuals and groups viewed as ineligible for full citizenship. Indeed, the volatility of this dynamic is revealed in conceptions of national citizenship which endeavour a stable equilibrium between the affirmation of diversity and difference, on the one hand, and the principle of equal and universal rights, on the other.<sup>138</sup>

Whilst it is clear that law may be mobilised both to maintain and to reduce social inequality, the symbolic function of legislating against that deemed unpalatable and injurious to public order should not be overlooked. In affording those citizens who might be affronted or subjected to physical violence protection from unpalatable expression, the nation state proclaims its socio-legal commitment to the values of pluralism, equality (in respect of treatment, opportunity and outcomes) and deliberative democracy. Yet freedom of expression admits of *freedom from* unpalatable expression and accepts a degree of *freedom to* employ unpalatable expression. This compels, once again, the question of how far the freedom to employ objectionable expression or to express hate should be fettered by criminal penalty (rather than deterred by non-legal instruments and moral appeals for civility, moderation, mutual respect and so on). It also compels the further question of whether criminal sanctions provide the most appropriate means through which to confront words, behaviour and material hostile to another on the basis of their religious sensibilities, to those deemed to constitute a 'racial group' or to 'persons defined by reference to religious belief or lack of religious belief'.<sup>139</sup> The blasphemy

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<sup>137</sup> See, generally, T. Modood, "Establishment, Multiculturalism and British Citizenship" (1994) 65 *The Political Quarterly* 53; W. Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Clarendon, 1995); N. R. Fyfe, "Law and Order Policy and the Spaces of Citizenship in Contemporary Britain" (1995) 14(2) *Political Geography* 117; Bader, *ibid.*; B. Wright, "Quiescent Leviathan? Citizenship and National Security Measures in Late Modernity" (1998) 25(2) *Journal of Law and Society* 213; Parekh, *supra.*, n. 135.

<sup>138</sup> See M. Viroli, *For Love of Country: An Essay on Patriotism and Nationalism* (Oxford: Clarendon, 1995); A. T. Baumeister, *Liberalism and the 'Politics of Difference'* (Edinburgh: Edinburgh, 2000); S. L. Roach Anleu, *Law and Social Change* (London: Sage, 2000).

<sup>139</sup> For discussion of characterisations, forms, perceptions, the incidence and the policing of 'hate crime', see, for example, P. Iganski, "Why Make 'Hate' a Crime?" (1999) 19(3) *Critical Social Policy* 386; B. Levin, "Hate Crime: Worse by Definition" (1999) 15 *Journal of Contemporary Criminal Justice* 6; S. Phillips and R. Grattet, "Judicial Rhetoric, Meaning-Making and the Institutionalization of Hate Crime Law" (2000) 34(3) *Law & Society Review* 567; H. M. Hurd, "Why liberals should hate 'hate crime legislation'" (2001) 20(2) *Law and Philosophy* 215; Ray and Smith, *supra.*, n. 124; E. Stanko, "Re-conceptualising the Policing of Hatred: Confessions and Worrying Dilemmas of a Consultant" (2001) 12(3) *Law and Critique* 309; L. J. Moran, "Affairs of the Heart: Hate Crime and the Politics of Crime Control" (2001) 12(3) *Law and Critique* 331; S. Ahmed, "The Organisation of Hate" (2001) 12(3) *Law and Critique* 345; R. J. Boeckmann and C. Turpin-Petrosino, "Understanding the Harm of Hate Crime" (2002) 58(2) *Journal of Social Issues* 207; G. Mason, "Hate Crime and the Image of the Stranger" (2005) 45(6) *British Journal of Criminology* 837; B. Dixon and D. Gadd, *supra.*, n. 135.

laws, Part III of the Public Order Act 1986, the racially and religiously aggravated offences and the provisions of the Racial and Religious Hatred Act 2006 are instances in which these questions have not been provided with adequate answers. Nevertheless, the racial hatred, the penalty enhancement and the religious hatred offences purport to restrict free expression in order to protect citizens from either incited or actual manifestations of violent hatred. The English law of blasphemy, by contrast, restricts free expression only to protect the religious sensibilities of Christians from intemperate, affronting expression. Since the blasphemy laws postulate that the religious feelings of Christian citizens are more worthy of protection than the religious and non-religious feelings of others, this highly irregular feature of the criminal law can hardly be considered appropriate or desirable in a modern pluralist state.