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A Genealogy of
the ‘Stirring Up Hatred’ Offences
of England and Wales

Thesis submitted for the degree of Doctor of Philosophy

Birkbeck, University of London

School of Law

Jennifer Karen Neller

April 2020

I declare that the material presented in this thesis is my own.

Signed:

Printed: Jen Neller

Abstract

This project constructs a genealogy of Parts III and IIIA of the Public Order Act 1986, which prohibit the stirring up of hatred on grounds of race, religion or sexual orientation. The aim is to investigate the contexts and rationales that produced these offences in order to understand a) how they came to be stratified across three identity categories and b) how those identity categories were delineated and c) what it means for hate speech legislation to be classified as public order law. This investigation was conducted through a critical discourse analysis of relevant parliamentary Hansard, from 1936 to 2013. By producing contextualised knowledge of how these specific offences *have* been justified, the analysis moves beyond abstract debates about whether hate speech legislation *can* be justified.

The project pays close attention to the ways in which parliamentarians constructed identities and distinguished between the valued population that they sought to protect, on the one hand, and those who were variously alienated and deemed threatening to that population, on the other. The research points to a number of problematic logics underpinning the offences, including an insistence on viewing identities as fixed and objective, a tendency to view groups as having separate and conflicting interests, the dominance of majoritarian over egalitarian rationales, and persistent myths about the foreign or aberrant – rather than systemic – nature of hatred. The problematisation of racialised identities also emerges as a consistent theme throughout the different debates, exposing the nationalist fantasies at play in representations of a uniquely tolerant and inclusive British culture. These logics of differentiating and ordering identities that have shaped the current stirring up hatred offences must be confronted in discussions about their future if we wish them to meaningfully challenge – rather than reproduce – inequalities and exclusions.

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Abbreviations

ATCSA	Anti-Terrorism, Crime and Security Act 2001
BNA	British Nationality Act 1981
BNP	British National Party
BUF	British Union of Fascists
CJA	Coroners and Justice Act 2009
CJIA	Criminal Justice and Immigration Act 2008
CJPOA	Criminal Justice and Public Order Act 1994
col	Column
CPPCG	Convention on the Prevention and Punishment of the Crime of Genocide
CPS	Crown Prosecution Service
DPP	Department of Public Prosecutions
EAT	Employment Appeal Tribunal
ECHR	European Convention of Human Rights
EHRC	Equality and Human Rights Commission
HC	House of Commons
HL	House of Lords
ICCPR	International Covenant on Civil and Political Rights
ILP	Independent Labour Party
LBC	London Borough Council
LGBT	Lesbian, gay, bisexual and transgender
MP	Member of Parliament
MPS	Metropolitan Police Service
MSSCA	Marriage (Same Sex Couples) Act 2013
NCCL	National Council for Civil Liberties
PF	Procurator Fiscal

PMA	Public Meeting Act 1908
POA36	Public Order Act 1936
POA63	Public Order Act 1963
POA86	Public Order Act 1986
RRA65	Race Relations Act 1965
RRA76	Race Relations Act 1976
RRAs	Race Relations Acts
RRHA	Racial and Religious Hatred Act 2006
s	Section
SCA	Serious Crime Act 2007
SO	Sexual orientation
SOCPA	Serious Organised Crime and Police Act 2005

Introduction

The regulation of hate speech is controversial all over the world. For some, hate speech laws help to prevent social divisions from being exploited and exacerbated, and are therefore imperative for a safe and fair society. For others, hate speech laws are counterproductive and unjustifiable infringements of freedom of expression. After decades of debate, little progress seems to have been made in reconciling these two perspectives. Furthermore, productive discussion on the topic is often frustrated by a lack of clarity surrounding the terms of the debate. The words ‘hate speech’ are rarely used within legal texts, but commentators use them variously to discuss ideas about threats, insults, offence, harassment, incitement, extremism, radicalisation, political correctness, bullying and trolling.

Within this melee, a distinction between two types of hate speech is important for understanding the scope of this thesis. First, there is speech where a perpetrator directly targets a victim. This is regulated by laws on harassment, threats and malicious communications, for example. Second, there is speech where a perpetrator seeks to spread hatred of a target group among third parties. This thesis focuses on the second type of law, which in England and Wales is located in Parts III and IIIA of the Public Order Act 1986. These provisions proscribe the stirring up of hatred on grounds of race, religion or sexual orientation, and are therefore referred to as the ‘stirring up hatred’ offences.

This thesis does not aim to produce a convincing answer as to whether or not laws such as the stirring up hatred offences should exist, but rather emerges from frustration with academic claims about the objective and universal value or fallacy of hate speech laws. In contrast, this thesis looks closely at the specific contexts within which the stirring up hatred offences were

produced and the logics that shaped them into their current form. In doing so, we move beyond the abstract and perennial debate on whether hate speech laws *should* exist to produce contextualised and specific knowledge on why they *do* exist. Such knowledge will enable a deeper understanding of the stirring up hatred offences in the present, which will in turn enable a more informed discussion of what is possible and desirable for their future – questions which the Law Commission is asking for the second time in five years at the time of writing.¹

This introductory chapter begins by setting out the main features of the current stirring up hatred offences and situating them in relation to other provisions of domestic law and relevant instruments of international law. I then discuss some of the terminological challenges of talking about hate speech, before setting out the structure of this thesis.

The legislation

The stirring up hatred offences

The first ‘stirring up hatred’ offence was a prohibition on the incitement of racial hatred enacted in the Race Relations Act 1965. In 1976, this offence was relocated to become s 5A of the Public Order Act 1936. The racial hatred offence was then re-written during the comprehensive review of public order law that produced the Public Order Act 1986 (POA86). Since then, Part III of the POA86 has prohibited the use of threatening, abusive or insulting words or behaviour to stir up racial hatred across a range of media, including written, spoken, broadcast and performed material. Section 18(1) sets out the formula for the offence in relation to words, behaviour and written material, which is then replicated for other media:

¹ Law Commission, “Review into Hate Crime Announced.”

A person who uses threatening, abusive or insulting words or behaviour, or displays any written material which is threatening, abusive or insulting, is guilty of an offence if—

- (a) he intends thereby to stir up racial hatred, or
- (b) having regard to all the circumstances racial hatred is likely to be stirred up thereby.

A new Part IIIA was added to the POA86 by the Racial and Religious Hatred Act 2006. These reforms introduced offences of stirring up religious hatred that cover the same range of media as the racial hatred offences. However, the religious hatred offences were introduced with a narrower threshold: the words or behaviour must be threatening (abusive or insulting does not suffice) and intent to stir up hatred must be proved. Stirring up hatred on grounds of sexual orientation was then added to Part IIIA by the Criminal Justice and Immigration Act 2008, with offences on this ground also subject to the narrower threshold. Section 29B(1) is now as follows:

A person who uses threatening words or behaviour, or displays any written material which is threatening, is guilty of an offence if he intends thereby to stir up religious hatred or hatred on the grounds of sexual orientation.

The application of different thresholds according to the grounds on which hatred is stirred up results in inconsistent and excessively complex law. This thesis aims to understand the conditions that produced this complexity through attention to three aspects of the stirring up hatred offences. First, there is the question of why the provisions are premised on notions of race, religion and sexual orientation. How was a need to refer to specific axes of difference in the legislation established? In what ways were these categories found to be intelligible in this context and how were they delineated? What is it about the stirring up of hatred on these grounds that warrants legislation, compared to other grounds?

Second, there is the separation of and distinction between racial hatred in Part III and hatred on grounds of religion and sexual orientation in Part IIIA. The racial hatred offences are broader, and thus easier to convict under, as the act in question can be insulting or abusive, rather

than necessarily threatening, and intent does not necessarily need to be proved. This is problematic as hatred against some religious groups (Jews and Sikhs) can be classified as racial hatred, but hatred against other religious groups (e.g. Muslims, Christians, Buddhists, etc.) cannot, and would therefore instead be subject to the narrower religious hatred threshold. Additionally, clauses on the “protection of freedom of expression” have been included in relation to religious hatred (s 29J) and hatred on grounds of sexual orientation (s 29JA), but not in relation to racial hatred. What is the rationale behind such differential treatment of these categories?

Third, there is the location of the stirring up hatred offences within the POA86 and their consequent framing as public order offences. As such, they have been separated from anti-discrimination measures in the legal taxonomy. What is the rationality of this public order framing? What does it mean for hatred to be understood as a public order issue? How does this affect how the offences are interpreted and what we might expect from them?

Domestic context

To understand the stirring up hatred offences in the context of domestic legislation, they can be considered in relation to three overlapping policy areas: hate crime, public order and incitement.

HATE CRIME

While stirring up racial hatred has been an offence in England and Wales since 1965, the terms ‘hate speech’ and ‘hate crime’ did not enter into common usage until the 1990s. Since then, the stirring up hatred offences have often been grouped under the banner of ‘hate crime law.’ The other measures included in this category are:

- racially or religiously aggravated offences under the Crime and Disorder Act 1998;

- enhanced sentencing when an offence demonstrated or was motivated by hostility on the grounds of race, religion, sexual orientation, disability or transgender identity under the Criminal Justice Act 2003; and
- recording when incidents are perceived as motivated by hostility or prejudice based on race, religion, sexual orientation, disability or transgender identity.²

Therefore, if a person verbalises their hostility on particular grounds while committing an offence, hateful speech can result in an aggravated charge or enhanced sentence. Additionally, any of these offences or incidents can be comprised only of speech, such as in the case of threats or harassment. However, there are two important distinctions between the stirring up hatred offences and the other hate crime provisions. First, the stirring up provisions create independent offences, while the aggravated offences and enhanced sentencing provisions modify existing ones. Under these hate crime provisions, if hostility on protected grounds cannot be proved, the act in question is still punishable under parallel offences. In contrast, if acts were intended and/or likely to stir up hatred on grounds other than race, religion or sexual orientation, those acts would be legal. Second, the stirring up offences do not require an individually identifiable victim; they address hatred against groups. Thus, as they address more diffuse harms, we can see how the stirring up offences might fit within ‘public order’ law. This fit can be examined through a comparison with ss 4, 4A and 5 of the Public Order Act 1986, all of which can be subject to racial or religious aggravation or enhanced sentencing provisions.

PUBLIC ORDER

The different ways in which hate speech is addressed by the POA86 can be understood through Gregory Gordon’s distinction between three types of hate speech: general hate speech, harassment and incitement. Section 4 of the POA86 creates an offence of using threatening, abusive or insulting conduct with the intention of either causing a person to fear that violence will be used

² Law Commission, “Case for Extending,” 3-5.

against them or of provoking a person to use violence. This offence is inchoate, which means that it is not necessary for the fear or provocation of violence to actually have been achieved. Rather, such a result need only have been an intended outcome of the conduct. Conversely, s 4A creates a choate offence, whereby, through the use of threatening, abusive or insulting conduct, a perpetrator must have both intended *and caused* someone harassment, alarm or distress. Within Gordon's taxonomy, both provisions can be classified as 'harassment offences' as they prohibit types of speech that are spoken directly to an individually identifiable victim.³

Section 5 of the POA86 prohibits the use of threatening or abusive conduct that is likely to cause a person harassment, alarm or distress.⁴ Section 5 is an inchoate offence, but can be classified within Gordon's taxonomy as addressing 'general hate speech' because, unlike s 4 and s 4A, the person who is at risk of being caused harassment, alarm or distress need not be the intended audience of the speech. An example of such general hate speech would be the display of an offensive poster that is likely to cause distress to people passing by.

The stirring up hatred offences do not address either harassment or general hate speech offences, as, under Parts III and IIIA of the POA86, neither the intended audience of the speech nor anyone who happens to witness it needs to find it problematic. The issue in the stirring up hatred offences is not that an audience might be alarmed by hateful speech, but rather that they might agree with it and thus be incited to hate others. Therefore, such speech is classified as 'incitement' in Gordon's taxonomy.

INCITEMENT

The stirring up hatred offences are often referred to as 'incitement to hatred' offences, both in academic and political discourse and within the provisions themselves. For example, the phrase

³ Gordon, "Hate Speech and Persecution."

⁴ While s 5 originally pertained to conduct that was threatening, abusive or insulting, the word 'insulting' was removed by the Crime and Courts Act 2013 due to concerns that it conveyed an excessive restriction on freedom of expression.

‘incitement to hatred’ was provided as a description of the stirring up racial hatred offence in the margin of the Race Relations Act 1965 and was used as the heading for the relevant sections of the Race Relations Act 1976 and the Public Order Act 1936. However, the language of incitement was not included when the racial hatred offence was revised in the POA86. The phrase ‘stirring up,’ which has been a consistent element of the offences, can be traced to the common law offence of sedition.⁵ In the 1947 case of *R v Caunt*, seditious libel was defined as publication “with the intention of promoting violence by stirring up hostility and ill-will between different classes of His Majesty’s subjects.”⁶ Here, we see a longstanding connection between the language of ‘stirring up’ and public order concerns.⁷ ‘Stirring up hatred’ and ‘inciting hatred’ seem to be synonymous: both terms are commonly understood as referring to speech that aims to encourage an audience to hate a particular group, and both terms signify an inchoate offence. Thus, incitement offences aim to prevent – rather than react to – the harms that certain types of speech can cause and are premised on the notion that moral culpability for such speech is not determined by the subsequent actions of others.⁸

However, the stirring up hatred offences should be distinguished from other legal uses of the term ‘incitement,’ i.e. the common law prohibition on incitement to commit an offence, which was replaced with a statutory offence of ‘encouraging’ crime by the Serious Crime Act 2007. The distinction is important because that which is incited in the context of the stirring up provisions is not, by itself, criminal conduct: it is not an offence to hate groups on the basis of their race, religion or sexual orientation, but it is an offence to incite others to do so.⁹ For this reason, the omission of the language of incitement from Parts III and IIIA of the POA86 – and from the Serious Crime

⁵ See Malik, “Extreme Speech and Liberalism.”

⁶ The offences of sedition and seditious libel were abolished by the Coroners and Justice Act 2009.

⁷ Malik, “Extreme Speech and Liberalism

⁸ Timmerman, “Incitement,” 826.

⁹ Hare, “Crosses, Crescents and Sacred Cows,” 533; Goodall, “Challenging Hate Speech,” 213.

Act 2007 – can be seen as helpful for reducing confusion between these various applications of ‘incitement.’¹⁰

International context

International law can drive the enactment of domestic legislation and can provide an external benchmark for its evaluation. It is therefore relevant to consider whether international law can provide any insight into the particularities of the stirring up hatred provisions and the discourse that surrounds them.

FREEDOM OF EXPRESSION

When international law is cited in debates on hate speech legislation, it is most often with regards to the compatibility of such legislation with international provisions on freedom of expression. These provisions are found in Article 10 of the European Convention on Human Rights (ECHR) and Article 19 of the International Covenant on Civil and Political Rights (ICCPR).¹¹ However, neither iteration presents freedom of expression as absolute and both instruments permit speech to be curtailed by law where necessary to protect individual rights (the rights or reputations of others) or collective wellbeing (national security, public order, or public health or morals).¹² ECHR case law confirms that domestic legislation may be used to combat hate speech, but must not preclude materials that merely “offend, shock or disturb the State or any sector of the population.”¹³

¹⁰ This confusion is discussed further in Chapter Nine.

¹¹ See also Article 19 of the Universal Declaration of Human Rights

¹² Article 10(2) ECHR; Article 19(3) ICCPR.

¹³ *Handyside v United Kingdom* 1976, para 49. See also *Gündüz v Turkey* 2003, para 41. Controversially, Article 17 ECHR has also been used to exclude hate speech from the free speech protections of Article 10: see Foster, “Racist Speech,” 94; Cannie and Voorhoof, “Abuse Clause,” 83; Buyse, “Dangerous Expressions,” 495; Hare, “Crosses, Crescents and Sacred Cows,” 529-30; Lobba, “Holocaust Denial.”

DUTY TO LEGISLATE AGAINST RACIAL AND RELIGIOUS HATE SPEECH

In addition to permitting hate speech legislation, certain international instruments require its enactment to some extent. Perhaps the earliest of such instruments is the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (CPPCG), Article 3(c) of which states that “direct and public incitement to commit genocide” shall be punishable.¹⁴ While incitement to commit genocide is clearly a more specific and more extreme activity than stirring up hatred, this provision sets a precedent for international inchoate speech offences. A closer parallel to the stirring up hatred offences can be found in Article 20 ICCPR. While Article 19 ICCPR specifies permissible justifications for restricting freedom of expression, Article 20 creates a positive duty on states as follows:

1. Any propaganda for war shall be prohibited by law.
2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

The UN Human Rights Committee (HRC) has repeatedly stated that Articles 19 and 20 ICCPR are compatible and complementary.¹⁵ However, sixteen countries (including the UK) have formally either reserved the right not to introduce any new legislation pursuant to Article 20 or rejected the prohibition on war propaganda.

The Convention on the Elimination of all Forms of Racial Discrimination (CERD)¹⁶ places broader and more comprehensive obligations on states party to legislate against incitement to racial hatred. Article 4 CERD places three obligations on states parties: 1) to make all dissemination of ideas based on racial superiority or hatred and all incitement to racial violence or discrimination punishable by law; 2) to make organisations and organised propaganda activities

¹⁴ Article 3(c) CPPCG, 1948.

¹⁵ Human Rights Committee, “Article 20,” para 2; Human Rights Committee, “Article 19,” paras 50-2.

¹⁶ Adopted in 1965, ratified by the UK and entered into force in 1969.

that promote and incite racial discrimination illegal; and 3) to prohibit the promotion or incitement of racial discrimination by public authorities and public institutions.

At the European level, the 2008 Council Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law is binding upon Member States. Article 1(1(a)), in conjunction with Article 3, obliges Member States to criminalise:

publicly inciting to violence or hatred directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin.

Article 1(2), however, significantly weakens this mandate by permitting states to choose only to punish the offences stipulated in Article 1(1) insofar as they are “carried out in a manner likely to disturb public order.”¹⁷

DUTY TO LEGISLATE AGAINST HATE SPEECH ON OTHER GROUNDS

Clauses related to harmful speech can also be found in several UN conventions that pertain to other axes of difference, beyond race and religion. While the CERD requires states to prohibit the dissemination of racist ideas, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) goes further in requiring states to take *all appropriate measures* to eliminate prejudices, stereotypes and practices that are based on ideas of the inferiority of one or the other sex (Article 5(a)). Similarly, the Convention on the Rights of Persons with Disabilities (CRPD)¹⁸ requires states to adopt “appropriate measures... to combat stereotypes, prejudices and harmful practices relating to persons with disabilities.”¹⁹ However, the requirement to take “appropriate measures” provides a weaker legal mandate than the CERD’s requirement to “declare an offence punishable by law.” It is noteworthy that in all three of these instruments, states are called upon to address speech that is not necessarily directly connected with violence. However,

¹⁷ see Hare, “Free Speech and Incitement,” 392-3.

¹⁸ Adopted 2006, entered into force in 2008 and ratified by the UK in 2009.

¹⁹ Article 8(b).

these discrepancies between measures applying to different identity categories – and the absence of measures pertaining to other categories – create a ‘hierarchy of hate’ within the UN legal framework.²⁰

This brief survey conveys a loose and uneven patchwork of international law, within which there is a clear mandate to legislate against incitement to racial and religious hatred, albeit with reservations available, and a clear mandate to combat, in some way, sexist and ableist hate speech. The stirring up racial and religious hatred provisions are thus broadly compatible with international obligations both to safeguard freedom of expression and to address incitement to these types of hatred. Indeed, it is apparent that, as Erik Bleich argues, combating incitement to racial hatred has always been the initial concern in international law and the cause on which there is the greatest degree of international consensus.²¹ Against this backdrop, the stronger prohibition on stirring up racial hatred under Part III of the POA86, compared to hatred on grounds of religion or sexual orientation under Part IIIA, and the absence of other categories, does not seem so peculiar. There may also be scope within the more extensive and open-ended category lists of non-discrimination clauses, such as Article 26 ICCPR, to infer that hate speech legislation pertaining to other grounds is compatible with international law.²² However, the inclusion of sexual orientation and the absence of grounds of sex and disability in the stirring up hatred offences cannot be explained through reference to international legal standards. Understanding the particular configuration of identity categories within the stirring up hatred provisions therefore requires attention to the domestic contexts in which they were enacted.

²⁰ Alkiviadou, “Legal Regulation of Hate Speech.”

²¹ See Bleich, “From Race to Hate.”

²² In the Human Rights Committee’s views on the 1994 case of *Toonen v Australia*, ‘sex’ in Article 26 was considered to include sexual orientation. Additionally, gender identity and disability have been identified as within the scope of Article 26. See International Commission of Jurists 2010, 15; Quinn and Degener, “United Nations Human Rights Instruments,” 54.

The language

Talking about hate

Hatred and hate speech are difficult to talk about; they are contextual, subjective and widely varying phenomena that are, perhaps, too vague to be appropriate subjects of criminal law.²³ However, we can see from the above that ‘hate speech’ is not a legal term in either international law or the domestic law of England and Wales. It is therefore important to distinguish general discourse on hate speech law, which may be viewed as a broad and comparative category of law, from analysis of the relevant legal texts and corresponding parliamentary discourse, in which the term is rarely used. The fact that the language of ‘stirring up hatred’ is particular to the UK²⁴ need not be seen as undermining its legitimacy, but rather indicates that it is a product of particular historical, legal and democratic contexts.²⁵ Indeed, it is inevitable that interpretations of ‘hatred’ will vary between the different social contexts in which the term is given meaning.²⁶ The identification of certain speech as hate speech can be premised on a wide array of factors, with perhaps many more relating to the context than the content of the speech,²⁷ but it is precisely this surplus of possible meanings that prompts this project. Since a definition of hatred is not widely agreed upon or clearly established in international law, we can question its intelligibility in relation to the stirring up hatred offences, how it has been demarcated and articulated, and why particular types of hatred were accepted or rejected as legitimate legal concerns.

²³ Weinman, “State Speech vs. Hate Speech”; Oyediran, “United Kingdom’s Compliance,” 247. See also Goodall, “Incitement to Religious Hatred,” 100-5; Martin, “Rhetorical Satisfactions of Hate Speech,” 126.

²⁴ Part III – but not Part IIIA – of the POA86 applies to Scotland as well as England and Wales. Part III of the Public Order (Northern Ireland) Order 1987 uses language of “stirring up hatred or arousing fear.”

²⁵ Bleich, *Freedom to be Racist?*, 8.

²⁶ Grattet and Jenness, “Reconstitution of Law,” 897; Perry, “Missing Pieces,” 160; Christians, “Expert Worrkshop,” 18; Hall, “Hate Crime.”

²⁷ Martin, “Rhetorical Satisfactions of Hate Speech,” 137.

Additionally, the classification of hatred as an emotion has led to assertions that the law should not be seeking to regulate such intimate fields of human experience and that emotion should be beyond the jurisdiction of the law. Aside from overlooking the ways in which passion, remorse and other emotions are embedded within law,²⁸ such arguments also rarely consider the actual requirements of the legislation, within which, in the case of the stirring up hatred offences, the emotion of hatred plays a relatively minor role alongside the use of threatening, abusive or insulting conduct and the determination of intent and/or likelihood. It should be remembered, also, that it is not the hatred of the defendant that is directly at issue in a charge of stirring up hatred. However, even when we consider the emotion of a speaker's audience, there may be some difficulty in determining the emotion that is likely to be elicited. 'Hate' has been argued to be a misnomer in the context of hate speech and hate crime.²⁹ For example, Anthony Buyse argues that conflict may be escalated by speech that encourages an audience to fear rather than to hate.³⁰ The significance of fear is also recognised in Northern Irish legislation, which prohibits "acts intended or likely to stir up hatred or arouse fear,"³¹ and fear is emphasised in other non-legal terms that are common in discourse on hate speech, including homophobia, xenophobia and Islamophobia.³² In turn, such language of phobia in these contexts may be understood as denoting a far wider array of negative attitudes or emotions than just fear, including suspicion, disdain, contempt, disgust, anger and hostility.³³

²⁸ Although Duff and Marshall argue that, while the criminal law gives certain emotions an *exculpatory* role, "it does not typically give specific emotions an *inculpatory* role." Duff and Marshall, "Criminalising Hate?," 115.

²⁹ Jacobs and Potter, *Criminal Law and Identity Politics*, 11; Walters and Brown, "Causes and Motivations," 11. In disagreement, see Brudholm, "Hatred Beyond Bigotry," 56.

³⁰ Buyse, "Words of Violence."

³¹ Part III, Public Order (Northern Ireland) Order 1987.

³² In relation to homophobia, see Duggan, "Homophobic Hate Crime," 88-89; and Fox, "Hatred and Intolerance." In relation to Islamophobia, see The Runnymede Trust, *Islamophobia*, 1 and 4; Halliday, "'Islamophobia' Reconsidered"; and Bleich, "What is Islamophobia?"

³³ Bleich, "Defining and Researching Islamophobia," 182.

When it comes to writing about debates on the stirring up hatred provisions, there is a choice to be made between using only the legal terminology, so as to be as precise as possible, or also using the non-legal language of hate speech and phobias that is spoken in the debates themselves. The latter approach has been adopted in this thesis, partly due to the more concise writing style that it enables and partly because the analysis is concerned with the how the stirring up hatred provisions were spoken about. For example, instead of referring to religious hatred against Muslims in every instance, ‘Islamophobia’ offers a useful shorthand that reflects the contemporary labelling of the problem. The term is not perfect, however, as it may replicate some of the essentialising and polarising tendencies that it is used to describe.³⁴ ‘Islamophobia’ should therefore be read critically and as overlapping with racism,³⁵ much like the term ‘antisemitism.’³⁶ A stronger dissonance exists in the use of ‘homophobia’ as a shorthand for hatred on grounds of sexual orientation, as this metonym refers only to hatred on grounds of homosexuality. However, the term homophobia still accurately reflects the scope of contemporary discussions, where the distinction between sexual orientation and homosexuality was often elided. Therefore, homophobia may be the more apt term to use in analysis of the debates, even though it does not fully align with the legal text, as it more accurately reflects what was actually being discussed.

Talking about identity groups

As noted above, the text of the stirring up hatred offences does not refer to identity groups, i.e. specific groups with which individuals may identify or be identified, such as Jews or persons of colour. The legislation refers instead to grounds of race, religion or sexual orientation, which

³⁴ Halliday, “‘Islamophobia’ Reconsidered.”

³⁵ Bourne, “Right Definition for the Right Fight.”

³⁶ The term ‘antisemitism’ is perhaps equally as contentious in current political discourse, due to debates over the parameters of its definition.

pertain to everyone: everyone has a race, a religion (or lack thereof)³⁷ and a sexual orientation.³⁸ The language of identity categories, however, has been used variously to refer to both groups and grounds. For the purpose of this thesis, identity categories are used to refer to axes of differentiation such as race, religion, sexual orientation and gender, and thus equate to grounds. Groups are then those who are identified as sharing a particular characteristic associated with a category. For example, homosexuals may be treated as a group that is defined in relation to the category of sexual orientation, lesbians may be treated as a group that is defined by both sexual orientation and gender, and lesbians of colour may be treated as a group that is defined by sexual orientation, gender and race. Groups are therefore more or less flexible in how they are constructed for particular purposes and the meanings that are attributed to them, both by those claiming membership and from outside.

While Islamophobia and homophobia might be useful shorthand terms despite the ways in which they are often used inaccurately, the term ‘racial group’ is perhaps less useful. While this term is widely used within the debates that are studied in this project, it can easily be replaced with ‘racialised group’ in discussion. This is preferable because it does not imply that certain groups possess a biological or otherwise inherent characteristic of being ‘racial,’ but instead draws attention to the processes by which groups are demarcated as such and are positioned in relation to others. This is not to deny that race exists, but rather to emphasise the extent to which it is a real phenomenon with real implications that is social and imposed, rather than objective and innate. This approach also facilitates analysis of how groups are racialised differently within as well as between standard racial classifications, such as how religion or class might affect the racialisation of ostensibly ‘white’ groups.³⁹ Similarly, where appropriate, the term ‘minoritized groups’ is used instead of ‘minority groups.’ This is to reflect the extent to which belonging to a minority can be

³⁷ S 29A of the POA86 clarifies that religious hatred “means hatred against a group of persons defined by reference to religious belief or lack of religious belief.”

³⁸ Bell, *Policing Hatred*, 181.

³⁹ See Garner, “Moral Economy of Whiteness,” 447-8.

contingent on the way in which group boundaries are drawn. For example, the racist fear that white people will become a minority in the UK is based on a particular configuration of group boundaries whereby a 'white' person can beget a 'non-white' child, but a 'non-white' person can never beget a 'white' child.⁴⁰ The preference for the terms 'racialised group' and 'minoritized group' is thus an attempt to maintain a vigilant scepticism and critical interrogation of representations of 'groupness,'⁴¹ in order to highlight the processes by which people are othered, marginalised, excluded, disadvantaged or otherwise negated.

The project

The aims and ambitions of this project can be considered from both a narrow and a wide perspective. From a narrow perspective, the aim is to produce knowledge about the current form of the stirring up hatred offences of England and Wales. It is hoped that this knowledge will contribute to academic and governmental debates about these offences and about hate speech legislation more broadly. Rather than arguing for or against their existence, this project aims to interrogate the stirring up offences so that a contextualised understanding of the arguments and ideas that produced the current offences can be laid bare upon the table around which they are evaluated.⁴² It is only by making such aspects of the law visible that they can be challenged and alternatives can be imagined.⁴³ From the wider perspective, this project is also a timely opportunity for reflection. All good students of postmodernity know better than to reproduce assumptions about a linear and universal trajectory of progress, but it is difficult not to feel that there has been

⁴⁰ Use of the term 'non-white' should also be understood as reflecting – not endorsing – binary framings within parliamentary discourse.

⁴¹ Brubaker, "Ethnicity without Groups."

⁴² Fairclough, *Critical Discourse Analysis*, 7.

⁴³ Fairclough, *Critical Discourse Analysis*, 33; Foucault, "Nietzsche, Genealogy and History," 50; Valverde, "Beyond Discipline and Punish," 220-1; Roth in Box and King, "'T'ruth is Elsewhere," 756)

a loss of direction in light of current political situations.⁴⁴ Therefore, there is perhaps a particular contemporary need for genealogical analyses that might contribute to a clearer sense of exactly what it was that we might have been labelling as progress, or as progressiveness, and the ways in which current directions can be seen as aberrations or continuations. While this project is focused on one rarely used and perhaps fairly insignificant subset of legal provisions, it speaks to wider issues of identity, difference, governance, peace and equality. Indeed, processes of differentiation and ordering (in terms of both placing in a hierarchy and enforcing a notion of ‘good’ order) form the dual interests that shape this project. There is surely a need for careful consideration and new insight into these issues as national and international struggles to determine our direction of travel rage on.

Chapter overview

Chapter Two of this thesis surveys academic literature on hate speech and on the use of identity categories in legislation. The debates mentioned at the beginning of this chapter on whether or not hate speech should be legislated against are comprehensively examined but are ultimately found to be unhelpful for understanding the particularities of the stirring up hatred offences. The chapter then looks beyond the hate speech canon to considered wider literature on identity categories and the challenges raised by naming them in legislation. While a handful of scholars have considered this issue in relation to hate speech, there is a much more extensive body of literature examining identity categories in relation to hate crime legislation and in relation to identity politics in general. Overall, this chapter sets out the academic terrain upon which this project aims to build and illuminates many of the hurdles and pitfalls that it must navigate to do so.

⁴⁴ Trump. Brexit. Crises in public services, poverty and homelessness in the UK. Relentless humanitarian crises linked to migration, authoritarianism and climate change across the world.

Chapter Three draws from a range of academic disciplines to establish a theoretical foundation for understanding how the stirring up hatred offences were justified and contested. First, the concept of rhetoric is explored as a means of understanding why particular arguments for or against the enactment or amendment of the provisions might be more or less persuasive. Particular emphasis is placed on the rhetorical elements of *logos*, which is considered in relation to Foucault's concept of governmentality, and *pathos*, which is considered in relation to affect and psychoanalytic theory. Building on these insights, attention then turns to the role of ideological values – such as freedom, public order, equality, democracy and dignity – as indexes for shared morality. Links between logos, pathos, ideology and the construction of identities within parliamentary argumentation are then considered. Here, it is not the objective existence of identities that is of interest, but rather the processes of differentiation that seek to define the characteristics of 'our' community and thereby demarcate its boundaries. Concepts of 'imagined communities,' biopolitics, fantasy and *ressentiment* are drawn upon to explore such processes of differentiation.

Chapter Four establishes a methodology for constructing a genealogy of the stirring up hatred offences through critical discourse analysis. It is argued that a genealogical study examining the parliamentary discourse within which the offences were formed is an effective and practicable means of producing knowledge about their current particularities. The concept of discourse and the requirements for conducting a critical discourse analysis are then examined. The chapter also sets out the processes for selecting, collecting, coding and analysing the discourse. The substantive analysis of this data is arranged chronologically in Chapters Five to Nine. Consequently, Chapters Five and Seven focus on the public order questions, while Chapters Six, Eight and Nine focus on the enactment of the racial, religious and sexual orientation provisions, respectively.

The genealogy begins in Chapter Five with the enactment of the Public Order Act 1936 (POA36). This Act is chosen as a point of departure as it represents the birth of nationwide public order legislation and therefore set a precedent against which later public order provisions would

be gauged. For example, the debates covered the advantages and challenges of enacting generic legislation in response to specific problems, i.e. the specific challenges presented by Fascist and anti-Fascist clashes on the streets of London. Although the POA36 makes no reference to particular identity categories, it was discussed whether measures should explicitly refer to race and/or religion in order to ensure that Jews would benefit from the legislation as intended.

Chapter Six skips along the timeline to the 1960s and 70s, by which time questions of minority and racial identity had come to refer to very different populations and a more disparate array of concerns. The Race Relations Act 1965 (RRA65) was the first legislation in the UK to explicitly deal with racism, albeit in limited areas, and s 6 of the Act introduced the offence of stirring up racial hatred under the subheading of ‘Public Order.’ A decade later, the Race Relations Act 1976 (RRA76) widened the threshold of the offence and relocated it to s 5A of the POA36. This chapter examines the processes of differentiation, and of racialisation and deracialisation, that shaped the stirring up racial hatred offence.

Chapter Seven examines the enactment of the Public Order Act 1986. The POA86 was enacted with the aim of rationalising and ordering a range of public order offences that were scattered across common law and the statute book. With regards to stirring up racial hatred, it extended the provisions to apply to different media. Of greater interest here, however, is how the rubric of public order within which these provisions are situated differed from the POA36 and how this related to new ways in which difference was being constituted, ordered and policed.

Chapter Eight unravels the complex debates preceding the enactment of the Racial and Religious Hatred Act 2006, which added Part IIIA on stirring up religious hatred to the POA86. Parliamentarians had been suggesting that religious hatred should be explicitly included since the passage of the POA36. However, in the 1983 judgment of *Mandla v Dowell-Lee* a discrepancy was confirmed between the inclusion of purportedly mono-ethnic religions (such as Jews and Sikhs) within the scope of the racial hatred offences and the exclusion of purportedly multi-ethnic religions (such as Muslims and Christians). This chapter analyses how the categories of race,

ethnicity and religion were constructed, why religion was not added until the 21st century and why, when it was added, it was added in a separate part of the POA86 with a narrower threshold.

The final substantive chapter, Chapter Nine, investigates the addition of sexual orientation to Part IIIA of the POA86, via the Criminal Justice and Immigration Act 2008. While there is an obvious overlap between notions of racial and religious identity and their association with distinct communities, sexual orientation lacks many of the qualities that these categories share. In particular, it is not obvious that stirring up hatred on grounds of sexual orientation could, or is likely to, threaten ‘public order’ to the same extent or in the same way as racial or religious hatred. This chapter seeks to establish the ways in which stirring up hatred on grounds of sexual orientation was rationalised as both a coherent and a necessary addition to the POA86.

In the concluding chapter, knowledge produced by the substantive chapters is consolidated. The main findings that emerged throughout the course of the research are drawn together and analysed in light of what they cumulatively reveal about the current stirring up hatred offences. Here, continuities in how processes of differentiation and ordering have both shaped and operated through the law are applied to tell new stories about the functions and ethos of the offences. Brief reflections are provided on what this means for movements to expand and reform the stirring up hatred offences, with a particular focus on their potential to contribute to an inclusive and redistributive equality agenda.

Literature Review

Introduction

This chapter aims to situate the project within the relevant academic literature and to identify its unique contribution to current debates. While the focus of this thesis is the stirring up hatred provisions of England and Wales, a wider net is cast here in order to ensure that the project takes account of as many relevant insights as possible. This literature review therefore spans legal, criminological, philosophical, sociological and anthropological academic disciplines and, predominantly, UK, US, Australian and Canadian jurisdictions.

The chapter is divided into two main sections. The first section considers arguments that theorists have put forward in favour of and in opposition to legislating against hate speech. Making a convincing case either way is not an objective of this project; however, in searching for relevant literature on hate speech and in talking about my research, I have found the question of whether hate speech may be legitimately circumscribed by law to be ubiquitous. This question, which essentially considers the scope of free speech, has been hotly debated for decades with much ink being spilled on the so-called hate speech ‘dilemma’¹ or ‘controversy.’² It is almost inevitable, therefore, that a project on hate speech legislation must engage with this literature, understand its contours and, in some way, position itself in relation to it.

¹ Boyle, “Overview of a Dilemma”; Cohen, “More Censorship”; Massaro, “Equality and Freedom of Expression.”

² Walker, *Hate Speech*; Delgado and Yun, “Neoconservative Case”; West, “Words that Silence?”

Due to the largely abstract approach of the literature on whether governments *should* legislate against hate speech, little attention has been paid to the ways in which governments *have* legislated. Even where empirical evidence has been collected, this has mostly been to justify hate speech legislation in general rather than to critically examine its specificities. In particular, the choice to shape hate speech offences, such as the stirring up hatred offences, around hatred on certain grounds remains largely uninterrogated within the standard debates on free speech. There are a few exceptions, however, that examine the stratification of hate speech legislation by identity categories. This work is reviewed in the second section of this chapter, alongside insights drawn from literature on hate crime and identity politics, where the use of identity categories in law has been examined more extensively.

Hate speech legislation is often talked about as a type of hate crime legislation, but here I treat them as distinct to enable clear analysis of the different issues and approaches that they can encompass. To refer to both, I use the term anti-hate legislation.

Should governments legislate against hate speech?

The question of whether or not governments should legislate against hate speech has drawn academic attention for decades. However, as it has largely been addressed as an abstract and timeless question, the fundamentals of the debate have changed little over time. Therefore, this section of the literature review is organised thematically rather than chronologically. The section begins with what Guy Carmi calls the ‘classical model’ of free speech defences, which argue against hate speech legislation and are concerned with notions of truth, democracy and autonomy.³ These arguments against hate speech legislation are considered first because free speech can be seen as the default or the ‘rule’ to which hate speech legislation is an exception. Additionally, liberal free speech defences are so prominent within the literature that, to a large extent, they set

³ Carmi, “Dignity,” 969-970.

the terms of the debate such that anyone seeking to justify or examine hate speech legislation must first rebut them. Once these free speech defences and their critiques are dealt with, arguments in favour of legislation based on the harmfulness of hate speech are surveyed. This is followed by analysis of objections to hate speech legislation that are more engaged with the specificities of such law. These positions question the culpability of speakers for harms that might result from their speech and whether hate speech legislation is an effective remedy for the problems it is enacted to address.

‘Classical’ defences of free speech

J. S. Mill’s 1859 work *On Liberty* is often taken as a starting point in literature on free speech.⁴ Mill argued against the censorship of opinions on the basis that the truth and value of an opinion can only be determined once it has been subjected to vigorous and earnest contestation.⁵ Additionally, Mill argued that:

though the silenced opinion be an error, it may, and very commonly does, contain a portion of truth; and since the general or prevailing opinion on any subject is rarely or never the whole truth, it is only by the collision of adverse opinions that the remainder of the truth has any chance of being supplied.⁶

Thus, prohibiting the expression of any opinion is inimical to the pursuit of truth. A variation of Mill’s truth argument can be found in Oliver Wendell Holmes’ enduring notion of a ‘free marketplace of ideas.’⁷ Holmes presented the view that competition within a metaphorical market,

⁴ For example, Weinstein, *Hate Speech*, 4; Brink, “Millian Principles”; Dworkin, “Foreword,” vii. See also, Gross and Kinder, “Collision of Principles,” 445; Neu, *Loving Our Enemies*, 164.

⁵ Mill, *On Liberty*, 50.

⁶ Ibid.

⁷ *Abrams v United States* (1919) 250 US 616, 630. For more recent support of the marketplace defence, see Baker, *Human Liberty and Freedom of Speech*; and Volokh, “In Defense of the Marketplace of Ideas.

where all ideas may be freely expressed and countered, provides the best means of establishing which ideas are the most truthful and valuable. Deferring to this US constitutional tradition, subsequent authors have argued that the benefit of allowing prejudice and hatred to be expressed is that it can then be effectively countered. Thus, it is often argued that the best response to hate speech is ‘more speech,’ not less.⁸

Free speech has also been exalted as essential to the realisation of democratic values. Indeed, many defences of free speech can be found in the 2009 book *Extreme Speech and Democracy*, edited by Ivan Hare and James Weinstein. For example, Weinstein advances an argument of popular sovereignty to explain his opposition to hate speech legislation:

If the people are the ultimate source of political authority, they must be able to speak to each other about all matters within the scope of this authority, that is, on all matters of public concern. If, to the contrary, the government were able to prohibit speech on the ground that it will persuade the populace to formulate erroneous public policy, then the government, not the people, would be the ultimate sovereign.⁹

Weinstein thus presents hate speech legislation as a means of pre-empting, and thereby undermining, democratic outcomes, despite the fact that hate speech legislation itself tends to be a product of democratic systems and that popular sovereignty is nevertheless maintained through the ability of a population to vote out a government. Similar positions have been presented by Ronald Dworkin, who argues that the legitimacy of the law over an individual is dependent upon the ability of that individual to express their views on it,¹⁰ and Robert Post, who argues that free speech, including hate speech, is essential for deliberative democracy and the development of

⁸ Brandeis in *Whitney v California* (1927) 274 US 357, 377; Heinze, “Viewpoint Absolutism and Hate Speech,” 554; Hentoff, *Free Speech for Me*, 167; Malik, “Extreme Speech and Liberalism,” 106-107; Neu, *On Loving Our Enemies*, 159 and 161. See also Modood, “The Liberal Dilemma,” 4.

⁹ Weinstein, “Extreme Speech, Public Order, and Democracy,” 9.

¹⁰ Dworkin, “Foreword,” vii. See also Young, *Justice and the Politics of Difference*, 34.

democratic collective will.¹¹ Here, the legitimacy of the outcomes of democracy is argued to be undermined by the exclusion of certain voices or topics from democratic processes. Additionally, Post, Dworkin, Hare and C. Edwin Baker have all argued that restrictions on hate speech undermine the self-determination, dignity, formal autonomy or ‘moral independence’ of individuals.¹² However, little attention is paid by these authors to the extent to which hate speech itself might have similar effects on individuals, might be detrimental to democracy or might distort the functioning of the ‘free marketplace’ of speech.

The classical free speech defences are quintessentially associated with the absence of hate speech legislation in the US and are therefore sometimes referred to as free speech or First Amendment absolutism. However, such views do not necessarily advocate that speech should never be criminalised: exceeding some threshold of harm or threat is often (although not always) acknowledged as justifying legal intervention. In the US, this threshold was established in 1919 as speech that creates a “clear and present danger,” which was ruled in 1969 to mean speech that incites “imminent lawless action.”¹³ This position recognises that words can produce consequences for which a speaker may be deemed culpable: “The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic.”¹⁴ Again, this approach can be traced to Mill, whose famous example is the distinction between writing that corn-dealers are starvers of the poor in the press and saying so to an excited mob in front of a corn-dealer’s house.¹⁵ Here, both the content and the context of the speech are important for determining whether the state may restrict speech. The same may also be said of the stirring up hatred

¹¹ Post, “Racist Speech,” 322.

¹² Respectively, Post, “Racist Speech”; Dworkin, *A Matter of Principle*, 353 and “Foreword,” viii; Baker, “Autonomy and Hate Speech,” 143; and Hare, “Extreme Speech,” 80 and “Crosses, Crescents and Sacred Cows,” 532.

¹³ *Schenck v United States* (1919) 249 US 47; *Brandenburg v Ohio* (1969) 395 US 444, 447.

¹⁴ *Schenck v United States* (1919) 249 US 47, 52.

¹⁵ *On Liberty*, 52. For a critique of Mill’s consequentialist approach, see Cohen-Almagor, “Mill’s Boundaries.”

provisions, with the difference being that the subsequent unlawful action justifying the restriction (e.g. violence, discrimination, outbreaks of public disorder) need not be as imminent nor as directly incited. The US and UK positions, therefore, can be seen as branches that draw from the same Millian roots, rather than as entirely opposed.¹⁶

Conversely, some scholars have argued that the content of speech should not be a factor in whether or not it is restricted, and thus that the ideas and sentiments expressed by speech can never be harmful enough by themselves to warrant legislative intervention. For example, Eric Heinze argues that restrictions on speech are acceptable only when they are applied without regard to the viewpoint that is expressed, such as a restriction that would penalise any speech through a megaphone at 3am in a residential area.¹⁷ Heinze calls this ‘viewpoint absolutism,’ although this position is more commonly referred to among US commentators as the doctrine of ‘viewpoint neutrality’ or ‘content neutrality.’

The arguments presented so far take the common approach that the question of whether governments should legislate against hate speech is a philosophical problem that can be resolved in the abstract. The question is viewed as solvable through the application of purportedly universal values such as freedom, democracy and autonomy, rather than as variable according to cultural, historical and political contexts.¹⁸ In jurisdictions where hate speech legislation is not present or is minimal, this provides insight into the possible justifications for such absences. However, in relation to jurisdictions where hate speech legislation has been enacted, such approaches seek to impose ‘universal’ grounds for judging and evaluating hate speech legislation in a somewhat imperialist fashion. In contrast, this project adopts a critical approach to hate speech legislation, which draws from the position that “critical theory rejects as illusory the effort to construct a

¹⁶ See Brown, “Racial and Religious Hatred Act 2006”; Heinze, “Wild-West Cowboys,” 187.

¹⁷ “Viewpoint Absolutism and Hate Speech,” 547-8. See also Hare, “Crosses, Crescents and Sacred Cows,” 530-1.

¹⁸ See Reid, “Regulating Hate Speech.”

universal normative system insulated from a particular society.”¹⁹ It is therefore the specific and contextualised enactment of hate speech legislation in the UK parliament that forms the focus of this project and that renders the classical, and often US-centric, free speech defences of limited relevance.

Furthermore, all of the works presenting classical free speech defences that I have encountered in my research appear to be authored by white male scholars. This might lead us to question why the classical free speech defences appear to be most popular with this demographic and the extent to which such arguments – although couched in universal terms – might align with their particular interests.²⁰

Critiques of the ‘free marketplace’ of ideas

US critical race theorists writing in the 1990s, feminists and other scholars have argued that the ‘free marketplace’ of ideas is mythological.²¹ Or, even if the free marketplace is viewed as an ideal rather than a reality, it has been argued that it is premised on false assumptions about the neutrality of the system and the capacity of an objective ‘truth’ to prevail. For example, Charles Lawrence argues that,

The American marketplace of ideas was founded with the idea of racial inferiority of non-whites as one of its chief commodities, and ever since the market opened, racism has remained its most active item in trade.²²

¹⁹ Young, *Justice and the Politics of Difference*, 5.

²⁰ See Malik, “Extreme Speech and Liberalism,” 119; Bourdieu, *Language and Symbolic Power*, 132.

²¹ Powell, “Mythological Marketplace of Ideas.”

²² C. Lawrence, “If He Hollers Let Him Go,” 77. See also Tsesis, “Dignity and Speech,” 508: “proslavery thought monopolized the Southern marketplace of ideas.”

Similarly, Richard Delgado and David Yun argue that “Free speech, like all marketplace activities, benefits those who are currently life's winners.”²³ From a feminist perspective, Catherine MacKinnon also argues that,

it becomes obvious that those with the most power buy the most speech, and that the marketplace rewards the powerful, whose views then become established as truth.²⁴

Truth, here, is viewed as a subjective product of power rather than as something neutral and objective that can be revealed. Power imbalances are thus viewed as constituting the domain of speech just as any other forum of society, and it is these imbalances and inequalities that are protected by calls to uphold the marketplace and, indeed, by its representation as ‘free.’²⁵

If it is accepted that the marketplace of ideas is a majoritarian and uneven playing field which cannot, as such, produce neutral truths,²⁶ an alternative to hate speech legislation could be to increase market access for those who are currently disadvantaged. Thus, Malik argues that the state should work to facilitate the speech of disadvantaged minorities by building their discursive capacity to respond to hate speech.²⁷ In this way, the state may be able to compensate for some of the imbalances in the marketplace of ideas in a positive way that does not silence or penalise any viewpoints.²⁸ The end goal here is not to ascertain truths, but rather to work towards the realisation of the core values of liberal democracy, such as pluralism, egalitarianism and freedom of expression.

²³ Delgado and Yun, “Neoconservative Case,” 892.

²⁴ MacKinnon, *Only Words*, 102.

²⁵ Duff and Marshall, “Criminalizing Hate?,” 124.

²⁶ Delgado and Yun, “Neoconservative Case,” 1824; Pathak, *The Future of Multicultural Britain*, 10.

²⁷ Malik, “Extreme Speech and Liberalism,” 106-107.

²⁸ See also Heinze, “Review Essay,” 596 and Dworkin, “Foreword,” viii.

A limitation with the positive ‘more speech’ solution arises if certain types of speech are actively inhibiting and/or devaluing certain voices that might otherwise contribute;²⁹ or, in other words, if some speech can be detrimental to more speech.³⁰ For example, Lawrence states that racist insults “aim to silence, not to initiate dialogue.”³¹ Recently, the effectiveness of such silencing has been illuminated by research into the self-censorship of women who have been subjected to online misogyny.³² In relation to more traditional media, Delgado and Yun argue that hate speech is often delivered in such a way that it is impossible to meaningfully respond to it, either because it is a poster or graffiti of unknown authorship³³ or because it is an insult or epithet that is not open to rational argument.³⁴ Furthermore, perspectives in both critical race theory and recent feminism have pointed to the personal risk involved in challenging hate speech. Where hate speech forms “a discourse of power, dominance and control,”³⁵ responding with ‘more speech’ is likely to escalate rather than diffuse the situation,³⁶ with potentially grave consequences in face-to-face situations.³⁷ Additionally, as Emma Jane notes in relation to online misogyny, the talk back/free marketplace solution to hate speech places the burden and responsibility of defending themselves onto those who are targeted, who may then be blamed for not responding ‘correctly’: they may be further victimised and held responsible for such victimisation because they ‘fed the

²⁹ See Tsesis, “Dignity and Speech,” 517-8.

³⁰ Brison, “Autonomy Defense of Free Speech,” 325 and 335-336.

³¹ C. Lawrence, “If He Hollers Let Him Go,” 68. See also the Equality and Human Rights Commission, “Freedom of Expression,” 17.

³² Filipovic, “Blogging While Female,” 303; Citron, “Cyber Civil Rights,” 69-70; Jane, “Understanding E-Bile,” 536; Amnesty International, “#ToxicTwitter,” 46-52; Ging and Siapera, “Introduction,” 515-524; Gardiner, “Terrible Way to Go to Work.”

³³ Richard Delgado and David Yun, “Pressure Valves and Bloodied Chickens: An Analysis of Paternalistic Objections to Hate Speech Regulation,” *California Law Review* 82 (1994): 884.

³⁴ Delgado and Yun, “Pressure Valves and Bloodied Chickens,” 1820. See also Delgado, “Words that Wound,” 108.

³⁵ Reddy in Lillian, “Thorn by Any Other Name,” 732.

³⁶ C. Lawrence, “If He Hollers Let Him Go,” 69; Lillian, “Thorn by Any Other Name,” 735; Jane, “Understanding E-Bile,” 536.

³⁷ Delgado and Yun, “Pressure Valves and Bloodied Chickens,” 884.

trolls.’³⁸ Even if it is possible to meaningfully counter hate speech with more speech, this represents additional labour, which is often extremely time-consuming and emotionally exhausting, and which falls disproportionately on women and minoritized groups.³⁹ In light of such analyses, participation in the marketplace of ideas appears not to be free, but rather to exact a wide range of costs, with the effect that certain groups of people and certain ideas are disproportionately priced out of the market. If these are dismissed as the ‘bad’ ideas that the ‘natural’ operation of the marketplace has rejected, then the marketplace must be seen as ruthlessly majoritarian and thus as a prime tool for the reproduction of privilege and power, rather than as a paragon of freedom and fairness. By analysing the arguments that have produced the stirring up hatred offences, this project seeks to trace the influence of these two visions of the marketplace and the corresponding perspectives that non-regulation either leads to freedom and fairness or entrenches power imbalances and oppression.

The position that hate speech silences certain speakers and ideas has been used to argue that restrictive measures, as well as measures facilitating wider access, may be required to engender a more equal and diverse marketplace. In this vein, Jeremy Waldron points out that interventions in markets may be justified to facilitate the smooth functioning of the system.⁴⁰ For example, defamation laws aim to address certain distortions viewed as damaging to the marketplace of ideas, so hate speech laws could be justified on the same basis. This resonates with the critical race perspective that good hate speech legislation “will make room for more speech than it chills,”⁴¹ and, ultimately, “will better preserve free speech.”⁴² Correspondingly, then, this

³⁸ Jane, “Understanding E-Bile,” 539. See also Erentzen, Schuller and Gardner, “Model Victims of Hate.”

³⁹ Jane, “Gendered Cyberhate,” 577 and 587; Ringrose and E. Lawrence, “Remixing Misandry,” 691; Gardiner, “Terrible Way to Go to Work,” 595.

⁴⁰ Waldron, *Harm in Hate Speech*, 156; See also, Rowbottom, “Extreme Speech,” 167.

⁴¹ C. Lawrence, “If He Hollers Let Him Go,” 70.

⁴² Matsuda, “Public Response to Racist Speech,” 35. See also Tsesis, “Dignity and Speech”; Fiss, *The Irony of Free Speech*, 16; Citron, “Cyber Civil Rights,” 98; West, “Words that Silence?”

project seeks to trace the influence of the views that regulation is either an illegitimate interference that leads to distortions or a legitimate means of correcting distortions.

The harmfulness of hate speech

In addition to subverting the marketplace metaphor, advocates of hate speech legislation have argued that legal restrictions are legitimate in response to the particular harmfulness of hate speech to individuals and communities.

HARMS TO INDIVIDUALS

US critical race theorists such as Matsuda, Lawrence and Delgado in the 1993 edited volume, *Words that Wound*, are among those who have argued that speech is capable of having discernible negative effects on both individuals and society as a whole.⁴³ On the individual level, Lawrence describes hate speech as a “verbal slap in the face,”⁴⁴ reflecting the extent to which the impact of hate speech is immediate, bodily and unavoidable. The ensuing effects on the individual are described by Delgado as injuring the ‘dignity and self-regard’ of a victim,⁴⁵ which Lawrence claims can result in long-lasting fear and debilitating anxiety.⁴⁶ Matsuda further describes the detrimental impact upon an individual’s personal security and liberty in their daily lives in an environment where they are oppressed.⁴⁷ Waldron largely continues this line of argument in his 2012 monograph, *The Harm in Hate Speech*, where he asserts that hate speech damages the standing of individuals and thereby places them on an uneven footing in society.⁴⁸

⁴³ See also ECRI, “General Policy Recommendation No. 15,” 21.

⁴⁴ C. Lawrence, “If He Hollers Let Him Go,” 68.

⁴⁵ Delgado, “Words that Wound,” 90.

⁴⁶ C. Lawrence, “If He Hollers Let Him Go,” 74. See also Meyer, “Evaluating the Severity,” 981.

⁴⁷ Matsuda, “Public Response to Racist Speech,” 17. See also Stanko, *Everyday Violence*; Mason, “Image of the Stranger,” 838-9.

⁴⁸ Waldron, *Harm in Hate Speech*.

Among the literature attesting to the effects of hate speech on individuals, a 2003 paper by Philip Rumney stands out both for its focus on empirical evidence and its concern with experiences in the UK. Rumney cites a range of evidence that paints a picture of the severe emotional and physical distress that victims of racist speech have suffered, including stress, suicidal thoughts among children, reluctance to leave the house and miscarriage.⁴⁹ This correlates with the findings of empirical research on the greater impact on victims of bias-motivated crime than non-bias-motivated crime.⁵⁰ More recently, online hate speech has been found to produce similar effects and affects.⁵¹ Jane has also conceptualised gendered cyberhate as a form of workplace harassment that has considerable consequences for women participating in the online labour market.⁵² In more theoretical works, Judith Butler speaks of the extent to which “one can be ‘put in one’s place’ by such speech,”⁵³ and Andy Harvey argues that hate speech may constitute an individual to some degree, “even if it does not (cannot) succeed in totally defining that person.”⁵⁴ Indeed, Simon Thompson refers to Axel Honneth’s concept of misrecognition to argue that incitement to hatred of religious groups “undermines their opportunities for self-realization.”⁵⁵

Thus, in contrast to the classical free speech defenders, this literature suggests that it is hate speech rather than hate speech legislation that has a negative impact on individual autonomy. Others, inverting the arguments of ‘free speech defenders,’ have explicitly framed hate speech as an interference in human rights of victims, including the rights to dignity, equality, participation

⁴⁹ Rumney, “The British Experience,” 131-4.

⁵⁰ Iganski, “Hate Crimes Hurt More”; McDevitt et al., “Consequences for Victims.”

⁵¹ For example, see Amnesty International, “#ToxicTwitter”; Jane, “Gendered Cyberhate as Workplace Harassment and Economic Vandalism,” *Feminist Media Studies* 18, no. 4 (2018); and Danielle Keats Citron, “Cyber Civil Rights,” *Boston University Law Review* 89 (2009): 61-129.

⁵² Emma A. Jane, “Gendered Cyberhate.”

⁵³ Butler, *Excitable Speech*, 4.

⁵⁴ Harvey, “Regulating Homophobic Hate Speech,” 195.

⁵⁵ Thompson, “Freedom of Expression,” 228.

in public life and freedom of expression.⁵⁶ The difference between these contrasting positions on whether it is hate speech or hate speech legislation that is the most harmful to individuals seems to turn on whether these rights and values are viewed from the perspective of those who would communicate hateful views or from the perspective of those who would be disadvantaged by such speech. How these arguments are attached to different groups or identities, especially during legislative processes, remains under-investigated.

HARMS TO SOCIETY

At the societal level, Matsuda, Lawrence and Delgado discuss how hate speech acts as a ‘mechanism of subordination’⁵⁷ that reinforces social hierarchies.⁵⁸ In this vein, Matsuda describes hate speech as not merely reflecting a reality of social inequality, but as sustaining and even constituting it.⁵⁹ Illustrating this, Delgado and Yun point to how hate speech combines with stereotypes of minoritized groups that are disseminated through a range of media, affecting how such groups are perceived and treated in daily interactions.⁶⁰ Speech is thus deemed not only to have powerful effects on the psyche of individual victims, but as also capable of affecting the societal structures that all individuals are either advantaged or disadvantaged by.⁶¹ Expanding on this, Alexander Tsesis uses numerous examples from history to argue that hate speech has precipitated exclusion, intimidation and many of the worst instances of mass violence. From slavery to genocides and mass expulsions, hate speech has played a role by spreading stereotypes and myths about particular groups that serve to legitimate violence against them in the minds of

⁵⁶ McGonagle, Expert Paper, “Council of Europe against Online Hate Speech,” 4-5; Tsesis, “Dignity and Speech,” 499 and 508-9; Gelber, “Freedom of Political Speech; Duff and Marshall, “Criminalizing Hate?,” 139.

⁵⁷ Matsuda, “Public Response to Racist Speech,” 36. See also MacKinnon, *Only Words*, 12. See also, Mills, “Efficacy and Vulnerability,” 267.

⁵⁸ C. Lawrence, “If He Hollers Let Him Go,” 74.

⁵⁹ In Butler, *Excitable Speech*, 17. See also Ahmed, “Organisation of Hate,” 359.

⁶⁰ Delgado and Yun, “Neoconservative Case,” 1813.

⁶¹ C. Lawrence, “If He Hollers Let Him Go,” fn43.

the perpetrators. Tsesis therefore argues that, rather than contributing to the democratic milieu, “Hate speech is a rallying cry that aims to subvert democracy by persuading listeners to treat disparaged groups unequally and unfairly.”⁶² This has been demonstrated by empirical studies finding that exposure to hate speech increases participants’ prejudice and decreases their empathy towards a targeted group.⁶³ It has also been found that an awareness of a history of hate crimes can increase the impact of hate speech on victims.⁶⁴ These studies and Tsesis’s examples suggest, as Thompson argues,⁶⁵ that incitement to hatred can be classified as an ‘accumulative harm.’⁶⁶ The argument here is that regulation can be justified not by the severity of harm directly caused by individual instances of hate speech, but by the combined harm of many such instances, like the regulation of millions of small emissions in order to protect the quality of the environment that we all share.⁶⁷

As with empirical research on the effects on individuals, theory on the societal effects of hate speech resonate with theory on the societal effects of hate crime. In particular, Barbara Perry has argued that hate crime is a form of oppression that is perpetrated in order to reinforce the ‘proper’ positions of particular groups in society.⁶⁸ Hate crimes have therefore been described by Perry and others as ‘message crimes,’⁶⁹ which are communications “not of individual values or

⁶² Tsesis, “Dignity and Speech,” 520. See also Gelber, “Freedom of Political Speech”; and Thompson: “Freedom of Expression and Hatred of Religion,” 228: “if that group is held in contempt by at least some members of society, it will be difficult for it to make that contribution. It will not be taken seriously, and its collective opinions will be derided and dismissed”.

⁶³ Soral, Bilewicz and Winiewski, “Exposure to Hate Speech”; Harris and Fiske, “Dehumanized Perception.”

⁶⁴ Jon Garland and Paul Hodkinson, Garland and Hodkinson, “F**king Freak!”

⁶⁵ Thompson, “Freedom of Expression and Hatred of Religion.”

⁶⁶ Feinberg, *Harm to Others*, 225-232. This is also referred to as an “environmentally-mediated harm” by Joshua Cohen, “Freedom of Expression,” 231.

⁶⁷ Waldron, *Harm in Hate Speech*, 97.

⁶⁸ Perry, *In the Name of Hate*, 10. See also Bell, *Policing Hatred*, 10.

⁶⁹ Perry, *In the Name of Hate*, 29; Matsuda, “Public Response to Racist Speech,” 5.

sentiments, but of culturally normative values of domination and subordination.”⁷⁰ One rationale for enacting both hate speech and hate crime legislation, then, is to counteract the message of inferiority with a state-sponsored message that the targeted group is valued and that their degradation is unacceptable.⁷¹ In this sense, anti-hate legislation itself is a communicative response that functions as ‘more speech’ – indeed, when prosecutions are few and far between it may be little more.⁷²

Taking these arguments, experiences and research findings into account, this project examines the extent to which the stirring up hatred offences were viewed as a response to individual harms, to societal harms of inequality and oppression, and to accumulative harms, as well as the value that was placed on the legislation’s communicative or symbolic function.

Contingency and culpability

Having reviewed the ‘classical’ defences of free speech, their critiques and some of the justifications for hate speech legislation, this section and the following section consider scholarship on some of the more practical challenges that might arise if we accept that hate speech causes sufficient harm to justify legal interventions.

A recurring issue within hate speech literature is whether or not there is a meaningful distinction between speech and action. On the one side, free speech defenders argue that it is important to recognise that speech, or at least the content of speech, is distinct from conduct;⁷³ on

⁷⁰ Perry, “Missing Pieces,” 159.

⁷¹ Jenness and Grattet, *Making Hate a Crime*, 3 and 179; F. Lawrence, *Punishing Hate*, 168; Mason, “Hate Crime as a Moral Category”; Westbrook, “Vulnerable Subjecthood,” 6; Duff and Marshall, “Criminalizing Hate?,” 133.

⁷² Sandberg and Doe, “The Strange Death of Blasphemy,” 985; Goodall, “Incitement to Religious Hatred.”

⁷³ E.g. Heinze, “Viewpoint Absolutism and Hate Speech”; Haiman, *Speech Acts*, 3; Weinman, “State Speech vs. Hate Speech,” 4.

the other side are critics who seek to challenge the clearness or salience of such distinctions in practice.⁷⁴ However, for Butler, the crucial question is the extent to which the outcomes of speech are determinable or knowable by the speaker, as this determines whether or not they should be held legally culpable.⁷⁵ In her 1997 book, *Excitable Speech*, Butler examines Austin's distinction between illocutionary speech, which produces an effect through and in the very moment of the speech act, and perlocutionary speech, where an effect follows as a result of the speech.⁷⁶ Butler considers the distinction between illocutionary and perlocutionary speech to be "tricky and not always stable."⁷⁷ She argues that the effects of speech depend on factors that precede and exceed the speech act and that, regardless of their intentions, a speaker therefore cannot control the effects their speech will have. This leads Butler to conclude that law is not an appropriate means of combatting hate speech, but rather that listeners should take control of the effects of hate speech by re-signifying hurtful language.⁷⁸ Her prime example of this is the adoption of the word 'queer' by LGBT movements, whereby pejorative meanings now have to compete with proud and positive uses of the word.⁷⁹

The argument that speakers should not be liable for the *effects* of their speech does not necessarily preclude hate speech legislation such as the stirring up hatred offences, which is

⁷⁴ E.g. Matsuda, "Public Response to Racist Speech, 23: "The deadly violence that accompanies the persistent verbal degradation of those subordinated because of gender or sexuality explodes the notion that there are clear lines between words and deeds,"; C. Lawrence, "If He Hollers Let Him Go," 62: "Racism is both 100% speech and 100% conduct"; Rosga, "Deadly Words," 249: "there can be no cordoning off of language from violence"; MacKinnon, *Only Words*, 12-13: "Law's proper concern here is not with what speech says, but with what it does...Discrimination does not divide into acts on one side and speech on the other"; and Butler, *Excitable Speech*, 10: "speaking is itself a bodily act."

⁷⁵ See also Haiman, *'Speech Acts'*, 11; and Ahmed "Organisation of Hate," 361.

⁷⁶ Butler, *Excitable Speech*, 3.

⁷⁷ *Ibid.*, 44.

⁷⁸ See also Baker in Waldron, *The Harm in Hate Speech*, 168-70. Sara Ahmed also questions culpability for hate speech on the basis that its effects are not fully determined: Ahmed, "Organisation of Hate," 361.

⁷⁹ Butler, *Excitable Speech*, 14. For examples in the context of misogyny, see Ringrose and E. Lawrence, "Remixing Misandry."

premised on the *content* of the speech (that it is threatening, abusive or insulting), on the *intent* of the speaker, and/or on the *likely* effects of the speech. The concepts of intent and likeliness, and their independence from actual outcomes, are crucial here. In the case of the stirring up offences – and other inchoate offences – the actual effects of the speech are not a necessary ingredient in determining a speaker’s culpability. While hate speech legislation in general may be justified on the basis of harm caused, the *actus reus* and *mens rea* of individual culpability are both separate from such effects.⁸⁰ This is highlighted in Delgado’s argument that what is reprehensible about hate speech is not the causation of a potentially unforeseeable injury, but the attempt to exploit an apparent susceptibility.⁸¹

Furthermore, we might disagree with Butler’s negation of the extent to which the act of speaking may itself be an oppressive act, regardless of how it is received or what its effects may be. Thus, McGowan argues, racist or sexist speech not only *causes* racial or gender oppression (perlocution), but often it also *is* racial or gender oppression (illocution).⁸² Or, as Rae Langton argues, hate speech can be viewed as simultaneously perlocutionary and illocutionary if we view incitement as an illocutionary act that produces perlocutionary effects.⁸³ Thus, the wrongness of hate speech resides in what it instantiates (rejection, exclusion, unworthiness), rather than its contingent effects.⁸⁴ Regardless, hate speech legislation may still be justified on the basis of an ‘environmental’ or ‘accumulative’ argument, i.e. that culpability need not require that an individual has directly caused a grave harm, only that they intended or knew that they were likely to contribute to such a harm.

Furthermore, just as the effects of their hate speech cannot be known to the speaker, the same is true for attempts to ‘talk back.’ Thus, Butler’s solution of re-signifying pejorative terms

⁸⁰ See Bakalis, “Victims of Hate Crime,” 726-7.

⁸¹ Delgado, “Words that Wound,” 105.

⁸² McGowan, “Oppressive Speech,” 406.

⁸³ Langton, “Beyond Belief,” 75-6.

⁸⁴ Duff and Marshall, “Criminalizing Hate?,” 123.

can be subjected to many of the same criticisms as calls for more speech. On the one hand, Butler recognises that hurtful words often draw their power from traumatic histories,⁸⁵ and that,

certain kinds of utterances, when delivered by those in positions of power against those who are already subordinated, have the effect of resubordinating those to whom such utterances are addressed.⁸⁶

On the other hand, Butler does not seem to recognise how such histories and relationalities can limit the extent to which a person's attempts to re-signify pejorative terms will be effective,⁸⁷ nor the extent to which re-signification as a solution places a burden on victims. In this way, hate speech disadvantages certain sections of society precisely because they must always expend a portion of their energy engaging with and seeking to counter notions that they are inferior or perverse.

The efficacy of legislation

This section considers arguments against the criminalisation of hate speech on the basis that legislation is an ineffective means of dealing with hate and inequality in society. There are a number of variations within this area of literature. First, several scholars argue that hate speech legislation is more likely to exacerbate than ameliorate the problem. For example, Baker claims that bigots and extremists are pushed 'underground' by hate speech legislation, where they are less easy to identify and monitor, and thus where they pose a greater threat due to the clandestine nature of their operations.⁸⁸ Haiman adds that the feeling of being silenced can frustrate volatile

⁸⁵ Butler, *Excitable Speech*, 36.

⁸⁶ *Ibid.*, 26.

⁸⁷ Mills, "Efficacy and Vulnerability," 268-9.

⁸⁸ Baker, "Autonomy and Hate Speech," 152. Delgado and Yun ("Neoconservative Case," 1817-8) also attribute this 'bellwether' position to Carter (*Reflections of an Affirmative Action Baby*) and D'Souza (*Illiberal Education*). See also Heinze, "Review Essay."

parties and drive them to use more extreme means of communicating their hateful messages.⁸⁹ Free speech thus provides a ‘pressure valve,’ which enables hate to be vented in *relatively* harmless ways, reducing the risk that it will build up and erupt more violently.⁹⁰ Curiously, this suggests that society is best protected by permitting groups to spread their hatred, precisely because those groups are inclined towards violence; the spread of hatred is not directly linked to the commission of violence in this line of reasoning. Several scholars have also argued that penalising hate speech is counterproductive because it elevates the prominence of the speaker and their messages through media interest in such cases.⁹¹ This runs the risk of creating ‘martyrs’ out of people who are prosecuted for expressing their beliefs,⁹² even when such prosecutions are unsuccessful.⁹³

Crossing into a strand of literature more concerned with structural inequalities, Malik also claims that hate speech legislation can entrench the ‘asymmetry of power’ by ultimately criminalising rather than protecting minoritized groups and strengthening associations between certain types of difference and criminality.⁹⁴ Additionally, Malik traces the roots of the stirring up hatred offences to sedition laws, where the mantra of ‘public order’ was used to repress expressions of difference and dissent both within the UK and in the colonies.⁹⁵ Thus, some authors claim that attempts to combat hate can never be fully effective so long as they are enacted and enforced within a biased legal system. For example, Matsuda describes how the over-

⁸⁹ Haiman, *Speech Acts*, 32. See also Baker, “Autonomy and Hate Speech,” 152.

⁹⁰ Hentoff, *Free Speech for Me*. See also Martin’s representation of antagonistic political speech as sublimations of violence, although always with the possibility that speech will instigate rather than replace violence if conflicts are not resolved. Martin, “Rhetorical Satisfactions of Hate Speech,” 129.

⁹¹ Heinze, “Viewpoint Absolutism and Hate Speech,” 552; Malik, “Extreme Speech and Liberalism,” 103; Haiman, *Speech Acts*, 33. See also Lasson, “Racism in Great Britain,” 164-5.

⁹² Baker, “Autonomy and Hate Speech,” 149; Heinze, “Review Essay,” 600; Hare, “Crosses, Crescents and Sacred Cows,” 533.

⁹³ Malik, “Extreme Speech and Liberalism,” 103.

⁹⁴ *Ibid.*, 105. See also Goodall, “Challenging Hate Speech,” 225; Lamble, “Queer Necropolitics,” 240; ECRI, “General Policy Recommendation No. 15.”

⁹⁵ “Extreme Speech and Liberalism.”

representation of white, economically privileged, heterosexual males in the creation and interpretation of law leads to biases and the exclusion or under-representation of issues affecting other sectors of the population.⁹⁶ The extent to which racism is embedded in structures and institutions of governance has also been explored in depth by David Goldberg,⁹⁷ while, in relation to trans rights movements, Dean Spade considers how “Legal systems that have official rules of nondiscrimination still operate in ways that disadvantage whole populations.”⁹⁸ Nevertheless, in the context of racism, Matsuda advocates anti-hate legislation with the argument that,

Racism as an acquired set of behaviours can be disacquired, and law is the means by which the state typically provides incentives for changes in behaviour.⁹⁹

Others have argued that hate speech law can be effective, like other law, by engendering shifts in social norms of acceptable behaviour.¹⁰⁰

A further critique of the efficacy of hate speech legislation is that such laws are designed to deal with individual actors and are not able to deal with hateful ideas within mainstream discourse – ideas that may be too ubiquitous for legislation to deal with fairly, consistently or effectively.¹⁰¹ The position here is not that hate somehow operates independently of individual actors but that, as Butler argues, an individual act of hatred should not be seen as occurring independently from societal structures.¹⁰² For Spade, however, the criminal justice system can only comprehend acts of hatred in terms of individual criminality, and in doing so negates any

⁹⁶ Matsuda, “Public Response to Racist Speech,” 47. See also Young, *Justice and the Politics of Difference*, 41; and Franklin, “Good Intentions,” 167.

⁹⁷ Goldberg, *Racist Culture*.

⁹⁸ Spade, *Normal Life*, 29.

⁹⁹ Matsuda, “Public Response to Racist Speech,” 38.

¹⁰⁰ See Strobl, Klemm and Wurtz, “Preventing Hate Crimes,” 635; Campbell, “Independent Review,” 11.

¹⁰¹ Malik, “Extreme Speech and Liberalism,” 105. See also McGowan, “Oppressive Speech”; Moran, “Affairs of the Heart,” 335.

¹⁰² Butler, *Excitable Speech*, 2. See also Franklin, “Good Intentions,” 168.

institutional or systemic complicity.¹⁰³ Sarah Lamble also makes this point in her 2008 examination of memorial events for transgender victims of violence:

By assigning blame to an individual, the social hierarchies of power that give rise to such violence are left fully and forcefully intact. The sentencing process gives the state an opportunity to confirm the official story: that violence is an exceptional moment, not an everyday one.¹⁰⁴

Such perspectives open up space for studies that examine the particular ways in which institutions “are founded on, and perpetuate, complex hierarchies of power and violence (such as White supremacy, patriarchy, and heteronormativity).”¹⁰⁵ Concurrently, these works encourage critical attention to the assumed identities of those whom the law would criminalise and the extent to which responsibility for hatred is assigned to individual actions or structural factors. This project therefore investigates how the problem of hatred was understood in the passage of the stirring up hatred offences through analysis of how individual and structural factors were approached and how differences were represented.

Identity categories and identification within the law

Moving on from the question of whether hate speech should be legislated against, this section considers a diverse array of literature on the inclusion of identity categories within the law and the ways in which the law produces and valorises particular subjectivities.

¹⁰³ Spade, *Normal Life*, 24. See also Franklin, “Good Intentions,” 168; Rosga, “Deadly Words,” 242.

¹⁰⁴ Lamble, “Retelling Racialized Violence,” 34. See also Fitzpatrick, “Racism and the Innocence of Law,” 123-4; Brown, *States of Injury*, 115.

¹⁰⁵ Lamble, “Retelling Racialized Violence,” 28.

Identity categories and equality before the law

This section begins with the question of whether listing identity categories within legislation creates inequality under the law, as it is here, and specifically in the work of Eric Heinze, that we find an overlap between defences of free speech and attention to identity categories. Heinze argues that a closed list of identity categories in the law will lead to successive demands for more categories to be included on the basis of equality.¹⁰⁶ Either these demands for inclusion are refused and the inequality persists, or they are met and the result is the increasing criminalisation and censorship of speech.¹⁰⁷ Ultimately, Heinze argues, it is not possible for hate speech legislation to conform to the legal principles of both equality and respect for free speech.

The argument that identity category lists are inherently exclusionary has also been made in relation to hate crime. If hate crime legislation has a symbolic purpose of communicating the value of certain oppressed identities and the injustice of their oppression, then surely it simultaneously devalues identities that are not provided such explicit protection and communicates that some acts of hatred are less reprehensible than others.¹⁰⁸ The specification of identity categories has therefore been widely described as creating hierarchies of hate or victimisation.¹⁰⁹ In the context of hate crime, this problem cannot be resolved by adding more identity categories or having an open-ended list (i.e. a list that is explicitly non-exhaustive), not due to concerns that this would lead to excessive censorship as with hate speech legislation, but because it would erase the distinction between hate crimes and non-hate crimes. Yet, it is precisely

¹⁰⁶ Heinze, “Cumulative Jurisprudence.”

¹⁰⁷ This can be characterised as a kind of ‘slippery slope’ argument, variations of which have also been made by Hentoff, *Free Speech for Me*; Baker, “Autonomy and Hate Speech,” 155; Hare, “Crosses, Crescents and Sacred Cows,” 533-4; and Gavin Phillipson and Stop Hate UK in Law Commission, “Should the Current Offences Be Extended?,” 176 and 179 respectively.

¹⁰⁸ Gerstenfeld, *Hate Crimes*, 56; Jacoby in Rainbow, “Sex Doesn’t Matter?,” 76.

¹⁰⁹ Mason, “Victim Attributes in Hate Crime Law,” 169; Schweppe, “Defining Characteristics and Politicising Victims,” 191; Moran, “LGBT Hate Crime,” 266; Hentoff, *Free Speech for Me*, 45; Jacobs and Potter, “A Critical Perspective,” 21; Alkiviadou, “Regulating Hatred.”

this distinction, premised as it is on identity categories, that some commentators view as problematic. For example, Chakraborti and Garland describe how,

approaching the issue of inclusion through the lens of group identity politics merely exacerbates existing problems, creating divisions among communities of identity rather than highlighting the shared nature of their victimization.¹¹⁰

Jacobs and Potter use the term ‘Balkanisation’ to describe this effect, claiming that identity politics encourage individuals to view themselves and others as members of competing groups.¹¹¹

A number of points have been made in response to the notion that identity category lists transgress the principle of legal equality. Firstly, Iris Marion Young argues, in direct opposition to Jacobs and Potter, that “denial of difference contributes to social group oppression.”¹¹² Indeed, it is difficult to imagine how inequality can be addressed without allowing groups to articulate the challenges that they face on the basis of their identities.¹¹³ Young therefore advocates the recognition of differences in ways that respect and normalise them, rather than always associating difference with deviance and marginality.

Moreover, in the context of hate crime law Jeannine Bell makes an important distinction between categories and groups:

Hate crime legislation... protects everyone who has a race, everyone who has a gender, and everyone who has a sexual orientation so long as they are attacked because of their status.¹¹⁴

Therefore, criminalising the stirring up of racial hatred, for example, need not be seen as privileging or excluding anyone: everyone is equally protected from any racial hatred that targets them. However, limited category lists can be viewed as privileging and excluding particular

¹¹⁰ Chakraborti and Garland, “Reconceptualizing Hate Crime Victimization,” 501.

¹¹¹ Jacobs and Potter, “A Critical Perspective,” 8.

¹¹² Young, *Justice and the Politics of Difference*, 10.

¹¹³ Neller, “Need for New Tools,” 78.

¹¹⁴ Bell, *Policing Hatred*, 181.

experiences of hatred, which may amount to much the same in practice. For example, equal protection from racial hatred is of little use to someone who experiences other forms of hatred that are not deemed worthy of a legislative response.¹¹⁵ The hierarchy of victims, then, is the product of a hierarchy of hatreds.¹¹⁶

Alternatively, Kay Goodall argues that it is possible to distinguish meaningfully between categories in order to justify their unequal treatment.¹¹⁷ This reflects the common understanding that the principle of equality does not mandate equal treatment in unlike situations. For example, categories defined by immutable characteristics or groups with a history or current experience of being oppressed could justifiably be afforded greater protection on the basis of greater need.¹¹⁸ Thus, Heinze's dilemma between inequality and excessive censorship can be resolved through the pursuit of substantive rather than formal equality. After all, few would argue today against legislation that specifically prohibits racist discrimination on the basis that it inherently transgresses the principle of equality. The Law Commission also rejected the argument that all grounds should be treated equally in its 2014 report on extending anti-hate legislation, and thereby advised against extending the stirring up hatred offences to include hatred on grounds of disability or transgender identity. Here, the Law Commission argued that sufficient need for including these grounds had not been demonstrated.¹¹⁹ What remains unclear, and what is therefore of interest to this project, is what the criteria are for demonstrating that there is sufficient need for new categories to be included within the stirring up hatred provisions. Insight into this question can be generated through analysis of instances when new categories have been successfully or unsuccessfully proposed for inclusion in the past.

¹¹⁵ Neller, "Need for New Tools," 77.

¹¹⁶ Rainbow, "Sex Doesn't Matter?," 68.

¹¹⁷ Goodall, "Challenging Hate Speech," 219. See also Franklin, "Good Intentions," 163; Cathy Cohen, "Straight Gay Politics"; Garland and Hodkinson, "F**king Freak!"; Walters and Brown, "Causes and Motivations of Hate Crime."

¹¹⁸ Bakalis, "Victims of Hate Crime."

¹¹⁹ Law Commission, "Should the Current Offences Be Extended?," 173.

Which identity categories?

If it is agreed that lists of identity categories are an acceptable legal protocol, the question is then how to determine *which* categories should be listed. Several scholars have grappled with potential rationales for justifying the inclusion or exclusion of different identity categories in anti-hate legislation. In relation to hate crime, Hannah Mason-Bish has explored how hate crimes might have to be reimagined in order for gender-based violence to be included in the UK;¹²⁰ Garland and Hodkinson have argued for the inclusion of subcultures such as goths;¹²¹ Chakraborti and Garland have argued for the expansion of the definition of hate crimes so that vulnerable groups such as homeless people, the elderly, sex workers and addicts can be included;¹²² Schweppe has argued for expansion to include hostility towards members of any identifiable social group;¹²³ and Mason has suggested that lists of identity categories need to be limited in order to prevent child sex offenders from benefitting from Australian hate crime legislation.¹²⁴

In each of these works, the scope of the legislation has been redefined with the aim of accommodating or excluding specific types of hatred or bias. Reversing this approach, Chara Bakalis has adopted a doctrinal method, arguing that the principle of equality should be applied in order to determine which categories should be included.¹²⁵ The concept of equality, Bakalis argues, provides a means of identifying the harm that anti-hate legislation aims to address. The identity categories specified in equality legislation should therefore also be protected under anti-hate legislation. The notion of equality deployed here is thus premised on treating certain forms of hatred consistently across different statutes rather than treating all kinds of hatred the same.

¹²⁰ Mason-Bish, “We Need to Talk about Women.”

¹²¹ Garland and Hodkinson, “F**king Freak!”

¹²² Chakraborti and Garland, “Reconceptualizing Hate Crime Victimization.”

¹²³ Schweppe, “Defining Characteristics and Politicising Victims.”

¹²⁴ Mason, “Victim Attributes in Hate Crime Law.”

¹²⁵ Bakalis, “Victims of Hate Crime.”

Similarly, Alexander Brown has examined five approaches (consistency, practical, formal, functional and democratic) for determining which identity categories should be included in the stirring up hatred provisions, concluding that a combination of all of these approaches would produce the ‘correct’ answer.¹²⁶ Brown identifies a list of ‘core’ characteristics that tend to be supported by all or most approaches (this is broadly aligned with the enhanced sentencing categories of the Criminal Justice Act 2003 plus gender) and a longer list of ‘borderline’ characteristics for which a weaker case for inclusion can be made.¹²⁷ While Brown’s analysis suggests that including some categories will not necessitate the subsequent inclusion of all categories,¹²⁸ he does not explore the practical implications of extending the stirring up hatred provisions to include disability, gender and transgender identity.

The enactment of the offence of stirring up religious hatred in 2006 provoked academic analysis of the extent to which religious hatred could be deemed analogous to racial hatred. For example, Ivan Hare provides a detailed analysis of the specificities of the stirring up religious hatred offence, including questions concerning its enforceability.¹²⁹ However, Hare builds his argument from a ‘First Amendment’ perspective of how the principle of free speech should be applied and proceeds to catalogue the ways in which the UK racial and religious hatred offences fail to meet this external standard. Similarly, Alexander Brown’s analysis of the religious hatred offences measures them against the standards for free speech established by J. S. Mill.¹³⁰ In contrast, Kay Goodall conducts a deeper analysis of the justifications for, objections to and confusion over the religious hatred offence, centring the specific ways in which the offence has been made sense of within the system that produced it.¹³¹ Goodall then considers some of these positions further in light of the extension of the stirring up hatred offences to include grounds of

¹²⁶ Brown, “‘Who?’ Question: Part 1” and “‘Who?’ Question Part 2.”

¹²⁷ Brown, “‘Who?’ Question: Part 2,” 50.

¹²⁸ Ibid., 51. See also Rumney, “The British Experience,” 139; Bleich, *Freedom to be Racist?*, 4.

¹²⁹ “Crosses, Crescents and Sacred Cows.”

¹³⁰ “Racial and Religious Hatred Act 2006.”

¹³¹ “Incitement to Religious Hatred.”

sexual orientation, touching on drivers, media representation and enforcement.¹³² Goodall's analysis thus moves the debate beyond arguments for or against either hate speech legislation in general or the addition of particular categories by providing a nuanced critique of the logics and practicalities of the existing offences.

While the 2014 Law Commission consultation considered the inclusion of hatred on grounds of disability and transgender identity within the stirring up hatred provisions, gender remained conspicuously absent, especially since gender has been discussed in the context of Scottish hate crime law since 2004.¹³³ This could, perhaps, have resulted from an interest in parity between the stirring up provisions and enhanced sentencing provisions, which also do not include gender, but this is in itself a curious omission.¹³⁴ Jenness suggests that, in contrast to sexual orientation, the addition of gender to US hate crime statutes occurred without significant pressures from social movement groups due to the already-established commensurability of race and gender in anti-discrimination legislation.¹³⁵ However, this read-across between anti-discrimination legislation and anti-hate legislation has not occurred in the UK.¹³⁶ Indeed, the CPS believes that misogyny is best addressed within the separate framework of violence against women and girls rather than as a hate crime.¹³⁷

In literature on hate speech, the question of regulating sexist speech is mostly considered in relation to the internet.¹³⁸ Recently, however, attention to sexist speech has been catalysed by

¹³² "Challenging Hate Speech."

¹³³ Campbell, "Independent Review," 34.

¹³⁴ Mason-Bish, "We Need to Talk about Women," 169.

¹³⁵ Jenness, "Managing Difference."

¹³⁶ Neller, "Hate Speech Law and Equality."

¹³⁷ CPS, "Homophobic, Biphobic and Transphobic Hate Crime," 29. For a critique of this division, see Rainbow, "Sex Doesn't Matter?," 70.

¹³⁸ For example, Barak, "Sexual Harassment on the Internet"; Filipovic, "Blogging While Female"; Citron, "Cyber Civil Rights"; Campbell, "Independent Review," 35; Law Commission, "Abusive and Offensive Online Communications," 9-11; contributions to "Online Misogyny," ed. Debbie Ging and Eugenia Siapera, special issue, *Feminist Media Studies* 19, no. 4 (2018).

the recording of misogynist incidents by Nottinghamshire Police.¹³⁹ Inspired by this initiative, Deputy Leader of the Green Party, Amelia Womack, has campaigned for misogyny to be recognised as a hate crime.¹⁴⁰ A forthcoming Law Commission review into hate crime has subsequently been announced, which will consider, among other issues, whether sex, gender characteristics or age should be included within hate crime legislation and whether the stirring up offences should be extended or reformed.¹⁴¹ Regardless of the findings of this review, whether gender is considered in the context of the stirring up offences and whether there is a meaningful government response,¹⁴² concerted consideration of gender in relation to the anti-hate laws of England and Wales will be both novel and long-overdue.

Most forms of misogynist hate speech, such as abuse over social media and street harassment, are addressed to individual women and would not fall within an offence of stirring up misogynist hatred or stirring up hatred on the ground of gender.¹⁴³ However, one area which could be encompassed by such an offence is the proliferation of misogynist communications within the ‘manosphere.’ The manosphere has been defined as “a loose confederacy of interest groups”¹⁴⁴ that is “united by an antagonism towards women, a vehement opposition to feminism, and the production of hyperbolic misogynist discourse,” predominantly online.¹⁴⁵ Academic literature on this discourse is nascent and currently exists across a wide range of disciplines, including media studies, sociology and computational linguistics. As prosecutions for the existing stirring up hatred provisions include offences committed online,¹⁴⁶ the insights provided by this literature could be

¹³⁹ See Mullany and Tricket, “Misogyny Hate Crime.”

¹⁴⁰ Womack, “Win for Women.”

¹⁴¹ Law Commission, “Review into Hate Crime Announced.”

¹⁴² According to the Law Commission’s website, the government has not yet responded to the 2014 hate crime consultation.

¹⁴³ On the difficulty of language in this area, see Campbell, “Independent Review,” 34; Mullany and Tricket, “Misogyny Hate Crime Evaluation Report,” 28-30; Rainbow, “Sex Doesn’t Matter?,” 63-4.

¹⁴⁴ Ging, “Alphas, Betas, and Incels.”

¹⁴⁵ Jane, “Systemic Misogyny Exposed,” 662.

¹⁴⁶ CPS, “Hate Crime Annual Report 2017-18.”

highly relevant to any consideration of whether to extend the stirring up offences to include gender.

Discussion in the literature provides some concerted attempts to determine which categories should be included within the stirring up hatred offences and some arguments for and against the inclusion of further categories. However, it remains unclear how the categories that are currently included came to be so. This project will therefore contribute to these discussions by providing insight into the conditions and arguments that have been successful and unsuccessful in the past, so as to better inform expectations and strategies for future moves to reform.

Recognition versus essentialism

Hate crime legislation has often been characterised as a product of recognition politics or identity politics. The dilemma encompassed by these terms is that, while progress towards equality may require the recognition of differences, such recognition may have the effect of entrenching and essentialising certain notions of ‘otherness’ and reaffirming the very distinctions that have produced inequality.¹⁴⁷ For example, Chakraborti and Garland critique the essentialising function of identity categories, noting the propensity of hate crime laws to fixate on a single feature of a victim’s identity at the expense of recognising a variety of other characteristics that may also have been at play.¹⁴⁸ Others have described this as “the law’s propensity to classify”¹⁴⁹ and its tendency to “deny multiplicity, complexity and ambiguity,”¹⁵⁰ reflecting on the inherent tension between the extent to which identity categories construct an artificial image of coherent, homogenous

¹⁴⁷ See Fraser, “From Redistribution to Recognition?”

¹⁴⁸ Chakraborti and Garland, “Reconceptualizing Hate Crime Victimization,” 509.

¹⁴⁹ Grabham, “Intersectionality,” 186.

¹⁵⁰ Moran and Sharpe, “Violence, Identity and Policing,” 408.

victim groups on the one hand and the uniqueness of an individual victim's social position, past experiences, resilience, etc. on the other.¹⁵¹

Assumptions about the homogeneity of identity groups have been criticised through the concept of intersectionality. The concept was initially developed by black feminist scholars such as bell hooks¹⁵² and Kimberlé Williams Crenshaw¹⁵³ to critique the white, middle class biases of feminism, but has subsequently been applied to analyse how a range of overlapping identifications contribute to distinct experiences of hatred and disadvantage.¹⁵⁴ Scholars have since critiqued intersectional approaches that treat identity categories as 'either/or,' or as simply the sum of different pre-determined categories.¹⁵⁵ In this way, Emily Grabham argues that intersectionality just produces compound categories that still fail to fully represent complex and dynamic inequalities and still occlude the wider contexts in which victim experiences are produced.¹⁵⁶ Sarah Lambie makes a similar point in her observation that gender and sexuality "are read through one another and constitute each other's logic," illustrating that identity categories cannot necessarily be perceived as discrete and separable.¹⁵⁷ Jennifer Sloan Rainbow argues further that intersectional approaches can add to the invisibility important trends:

referring to notions of intersectionality often sidelines the underlying commonality of femaleness that surrounds victims of such hate crimes. Crimes against gay women, female Muslims, disabled women, trans women and women from other racial backgrounds all share the fact that they are women.¹⁵⁸

¹⁵¹ Rosga, "Deadly Words," 224; Moran, "LGBT Hate Crime," 268; Rainbow, "Sex Doesn't Matter?," 71.

¹⁵² bell hooks, *Ain't I a Woman?*

¹⁵³ Kimberlé Williams Crenshaw, "Beyond Racism and Misogyny."

¹⁵⁴ For example, see Meyer, "Evaluating the Severity."

¹⁵⁵ Mason, "Image of the Stranger"; Moran and Sharpe, "Violence, Identity and Policing."

¹⁵⁶ Grabham, "Intersectionality."

¹⁵⁷ Lambie, "Retelling Racialized Violence," 30.

¹⁵⁸ Rainbow, "Sex Doesn't Matter?," 73.

The challenge for anti-hate legislation is therefore to be responsive to individuality and dynamism on the one hand and to commonalities and patterns of hatred on the other. We can question how this tension has been recognised and negotiated in legislative processes.

Another critique of the predication of law on lists of identity categories is the extent to which victim status may become attached to certain groups through the work that is done to campaign for their inclusion. Wendy Brown argues that identity politics – the claiming of rights based upon the ownership of certain characteristics – only makes sense against a comparator norm, which in contemporary Western politics is a white, bourgeois, able-bodied, heterosexual, male norm.¹⁵⁹ ‘Identity’ is thus premised on exclusion from a dominant group, with the trauma and frustration of that exclusion centralised to an extent that limits a group’s emancipatory ambitions.¹⁶⁰ Jenness and Broad note such investments in trauma in both feminist and gay and lesbian activism, where to be a woman or to be gay is presented as to be inherently at risk.¹⁶¹ Laurel Westbrook has also examined this phenomenon in relation to narratives of violence within transgender activism:

These stories portrayed transgenderists as always vulnerable to attack and told trans people that, even if they are not currently afraid of violence, they should be.¹⁶²

This reflects Nancy Fraser’s argument that claims for recognition of victimisation can entrench a group’s status as ‘other’ and thereby result in the naturalisation of the systems that construct them as outsiders in the first place.¹⁶³ Thus, instead of recognising and revalorising a group while

¹⁵⁹ Fraser, “From Redistribution to Recognition?,” 61. See also Berlant, *Queen of America*, 1.

¹⁶⁰ See Jenness and Grattet, *Making Hate a Crime*, 10.

¹⁶¹ Brown, *States of Injury*, 417.

¹⁶² Westbrook, “Vulnerable Subjecthood,” 18.

¹⁶³ See Fraser, “From Redistribution to Recognition,” 74; Keenan, “Bringing the Outside(r) In,”

maintaining its position as distinct from a core norm,¹⁶⁴ Fraser advocates the reconstitution of the core norm to incorporate the disadvantaged group as equal constituents.¹⁶⁵

While arguments for more nuanced attention to individual factors make sense in relation to hate crime legislation, the absence of individual victims of incitement to hatred render such approaches inapplicable to the stirring up hatred offences, which only address hatred that targets groups.¹⁶⁶ Further investigation is required, however, to understand the ways in which the enactment of these provisions has been driven by ideas about identity and the extent to which they have been shaped by demands for recognition, investments in victimhood and exclusionary approaches to difference.

Interpellating victims and villains

So far, almost all of the literature considered in this chapter has focused on theoretical arguments concerning anti-hate legislation. This final subsection, while far from devoid of theoretical perspectives, considers the smaller portion of literature that considers how anti-hate legislation *has* been enacted and implemented, and the implications arising therefrom.

Several scholars have examined the social construction of ‘hate crime’ by considering the range of factors beyond the legislative text that affect whether or not an incident is identified as such. In particular, Jeannine Bell,¹⁶⁷ Elizabeth Boyd et al,¹⁶⁸ and Ryken Grattet and Valerie Jenness¹⁶⁹ have all undertaken empirical studies on the implementation of hate crime statutes in the US, finding that the exercise of discretion within different police units has led to considerable

¹⁶⁴ See Moran, “Invisible Minorities,” 431.

¹⁶⁵ Fraser, “From Redistribution to Recognition?” See also, Rainbow, “Sex Doesn’t Matter?,” 78.

¹⁶⁶ Neller, “Need for New Tools,” 83.

¹⁶⁷ Bell, *Policing Hatred*.

¹⁶⁸ Boyd, Berk and Hamner, “Motivated by Hatred or Prejudice.”

¹⁶⁹ Grattet and Jenness, “Reconstitution of Law in Local Settings.”

variation in approaches to identifying hate crimes.¹⁷⁰ Jenness has also considered the role of social movement organisations in the inclusion of specific identity categories within hate crime statutes,¹⁷¹ while Leslie Moran has considered what might be occluded by such demands for criminal justice responses to hate.¹⁷² Theorising different responses to incidents, Mason has argued that labelling a crime as a hate crime depends on the “forms of emotional thinking that are capable of coding its perpetrators as morally bankrupt and its victims as the undeserving objects of prejudice.”¹⁷³ Thus, Mason argues, the extent to which we feel compassion for a victim affects the extent to which we view the crime against them as deserving of the greater stigma and penalties that come with being classified as a hate crime. This connects with well-established academic notions of innocent ‘ideal victims’¹⁷⁴ and deviant ‘folk devils.’¹⁷⁵ Critiquing the binarism of such roles, Sarah Lambale notes that,

By predicating political strategies on innocent victimhood, violence against individuals who deviate from the ideal becomes less visible and more tolerable.¹⁷⁶

Moran notes how LGBT persons may be perceived as such deviating or ‘bad’ victims, observing that “When you are taken to be a 'bad victim' perpetrators become victims and victims become perpetrators.”¹⁷⁷ This victim-villain inversion is perhaps most clearly demonstrated by the ‘homosexual advance defence’ that is still operational in some states of the US and Australia, under which acts of lethal violence in response to a non-violent homosexual advance can be

¹⁷⁰For a review of knowledge on the enforcement of penalty-enhancing statutes, see Franklin, “Good Intentions.”

¹⁷¹ Jenness, “Managing Difference,.” See also, Jenness and Grattet, *Making Hate a Crime*; Jenness and Broad, *Hate crimes*.

¹⁷² Moran, “Affairs of the Heart.”

¹⁷³ Mason, “Hate Crime as a Moral Category,” 252.

¹⁷⁴ Christie, “The Ideal Victim.”

¹⁷⁵ Cohen, *Folk Devils*.

¹⁷⁶ Lambale, “Retelling Racialized Violence,” 27.

¹⁷⁷ Moran, “LGBT Hate Crime,” 269.

prosecuted as a lesser offence by reason of provocation.¹⁷⁸ Other examples may be found in white nationalist discourse about immigrants¹⁷⁹ and in reactions to the online abuse of feminists.¹⁸⁰

Additionally, Moran considers how focusing on a ‘stranger danger’ image of perpetrators constructs the policing of hate crimes as,

a heroic battle between good and evil where evil is always already assumed to be separate and apart and where good order is an achievable end point.¹⁸¹

This has the effect, Moran argues, of focusing police attention on certain types of incident that occur in certain public spaces, leading to the disregard of alternative experiences of violence.¹⁸²

This corresponds with observations of a popular shift away from viewing perpetrators with compassion and towards demonising and excluding them.¹⁸³

However, Paul Johnson and Robert Vanderbeck identify different dynamics in their examination of debates preceding the enactment of the offence of stirring up hatred on grounds of sexual orientation in 2008. They examine how religion and sexual orientation were presented as in a competitive relationship by those objecting to the proposed offence. In such representations, the police were viewed as excessively defensive of sexual orientation to the detriment of vulnerable Christians seeking to express their beliefs.¹⁸⁴ Thus, it was argued that ‘the heroic battle between good and evil’ had gone wrong and the language of rights and equalities was adopted to argue that certain minorities would be victimised by hate speech laws. This suggests that, when undermining compassion for victims is no longer a viable strategy, evoking compassion for

¹⁷⁸ See, for example, Mison, “Homophobia in Manslaughter”; Fox, “Hatred and Intolerance,” 164.

¹⁷⁹ Ahmed, “Organisation of Hate,” 345.

¹⁸⁰ See Marwick and Caplan, “Drinking Male Tears.”

¹⁸¹ Moran, “Invisible Minorities,” 433.

¹⁸² See also Mason, “Image of the Stranger,” 839; Stanko, *Everyday Violence*, 3.

¹⁸³ Garland, *The Culture of Control*, 10; Franklin, “Good Intentions,” 167; Duff and Marshall, “Criminalizing Hate?,” 131.

¹⁸⁴ Johnson and Vanderbeck, *Law, Religion and Homosexuality*, chap. 5.

perpetrators and emphasising their rights can be an effective alternative. This project therefore pays close attention to how particular identity groups are represented as innocent or dangerous, how they are constructed in relation to each other and the extent to which certain types of difference are deemed to produce wholly separate and competing interests. It also seeks to understand how Johnson and Vanderbeck's findings, which form part of a wider study of the relationship between religion and sexual orientation in law, fit into the history of the stirring up hatred offences and the rationalities that underpinned them up to this point.

Conclusion

As indicated by ongoing variation in legislative approaches and persistent controversy, there is no convincing universal conclusion on the extent to which hate speech should be regulated by the law. Indeed, it appears that it is not possible to objectively resolve such a debate through the application of inherently subjective values, reasoning and moral judgements. Therefore, the literature that argues against legislation such as the stirring up hatred offences has not been found to conclusively demonstrate that such legislation should be abolished on principle and, consequently, has not been found to negate the value of conducting a closer examination of the specific provisions in question. Nevertheless, the first section of this literature review provides useful insight into arguments for and against the enactment of hate speech legislation. In particular, it illuminates a divide, whereby arguments against such legislation primarily focus on its potential effects on people whose speech might be limited by it, while arguments for such legislation primarily focus on the effects of hate speech. Correspondingly, hate speech is often viewed as either an act of individual expression or as the product and reproduction of structures of oppression. Thus, purportedly universal values such as free speech, autonomy and dignity are considered variously in relation to potential perpetrators or potential victims of hate speech, and equality is understood as either a formal goal of equal treatment or a substantive goal of equal

opportunities. In analysing the passage of hate speech legislation, it is therefore important to critically analyse references to universal values by speakers on all sides of the debate, paying particular attention to how such rhetoric might obscure the situatedness of an argument and the differentiations on which it is premised.

While Heinze, Bakalis, Brown and Hare have produced a small pocket of scholarship that considers the question of identity categories within hate speech legislation, these remain essentially normative works that seek a means of determining the ‘correct’ answer to the legislative problem. Goodall’s thorough response to Heinze through a close reading of the stirring up hatred legislation and its implementation underscores the need for careful contextualised analysis. In this way, assumptions about the legislation can be unravelled and reassessed. Similarly, Johnson and Vanderbeck’s analysis of Hansard exposes how the sexual orientation provisions were shaped by assumptions about different identity groups. It is therefore with Goodall’s and with Johnson and Vanderbeck’s work that this project is most closely aligned in terms of both focus and methodology. This project aims to build upon their insights by systematically tracing the themes and issues that they illuminate throughout the history of the offences and by viewing these developments through a particular analytical lens concerned with processes of differentiation and concepts of public order.

In order to expand on Goodall’s and Johnson and Vanderbeck’s work, this project also engages with other literature reviewed in the second section of this chapter. The quandaries surrounding the use of identity categories in legislation that are illuminated here are directly relevant to the task of understanding of the particularities of the stirring up hatred offences. In particular, it is of interest how lawmakers have navigated the tension discussed in the literature between recognising difference so as to pursue substantive equality goals on the one hand and the risk of essentialising, segregating and marginalising groups through designations of differentness on the other. Additionally, this body of literature demonstrates the need for attention to the stories that lawmakers and the law tell about different identity groups and the visions of society that they

depict. This speaks to wider issues in criminal law about the desire for clear narratives of innocent victims, deviant perpetrators and, consequently, an unambiguously righteous justice system. By analysing the narratives constructed around the stirring up hatred offences, the ways in which they were shaped by the construction of particular subjectivities and relationalities can be identified and critiqued.

This chapter also identifies the topic of online hate speech as a burgeoning interdisciplinary field that is engaging with salient political and social contexts. Rapid developments in the form and substance of online interactions have provoked a litany of new questions about the benefits, risks and practicalities of regulating online speech. In particular, there is a significant feminist subset of this literature examining misogynist online hate speech, including material that could be classed as stirring up hatred if grounds of gender were to be included within these offences. Such literature largely falls beyond the scope of this project, which is limited to producing knowledge on the existing offences. However, this project provides insights that will be valuable to the assessment of any reforms that might be proposed in the future, including in relation to online hate speech.

Chapter Three

Theoretical framework

Introduction

The bricoleur, says Lévi-Strauss, is someone who uses “the means at hand,” that is, the instruments he finds at his disposition around him, those which are already there, which had not been especially conceived with an eye to the operation for which they are to be used and to which one tries by trial and error to adapt them, not hesitating to change them whenever it appears necessary, or to try several of them at once, even if their form and their origin are heterogenous—and so forth.¹

In order to make a distinct and productive contribution to the existing literature on hate speech legislation, this project constructs a detailed genealogy of the stirring up hatred offences and adopts a particular focus on processes of differentiating and ordering populations and subjectivities. Specifically, the substantive research analyses parliamentary debates conducted prior to the enactment and amendment of the stirring up hatred offences.² This chapter explores some of the issues raised in Chapter Two in greater depth with the aim of laying the theoretical foundations for this research. As no single theory adequately attends to all of the relevant themes, a diverse array of scholarship is drawn upon and stitched together to form a patchwork of theory – a *bricolage* – that underpins the methodology and analysis of subsequent chapters. This chapter divides the relevant issues into three sections, but attention is paid to the intersections and relationships throughout. Each section therefore aims to build upon what went before.

¹ Derrida, “Structure, Sign and Play,” 360.

² The methodology is considered in detail in Chapter Four.

The first section of this chapter considers how appeals are made to rationality and to emotion in the rhetoric of political discourse. It is argued that examining what was considered to be persuasive in the discussion of legislative reforms provides insight into how those reforms, and the particular problems that they respond to, were made sense of and why they were or were not deemed important at that time. The second section then considers the use of ideological values. Chapter Two reveals these values, their abstracting and universalising tendencies and their varied – sometimes contradictory – usage as a factor that frustrates productive scholarly debate. However, when viewed as a part of the discursive data that is to be examined, ideological values provide insight into what was deemed in a particular context to be good, desirable and worthy of pursuit. Furthermore, attention to the use of values may illustrate how some of the ideological tensions that emerged from the literature review have been dealt with in the legislative process, such as the perennial tensions between freedom and equality and between freedom and order. The last section then turns to questions related to identity, exploring a range of theories that can be used to highlight and make sense of processes of differentiation and identification within parliamentary discourse.

Rhetoric

This project is premised on the notion that knowledge of what was found to be persuasive in parliament – and what was found to be unpersuasive or insufficiently urgent – will illuminate the factors that brought the stirring up offences into being and shaped them into their current form. While the mechanisms of discursive persuasion or the generic conditions of persuasive success or failure are not the central interests of this study per se, they are of relevance when they directly contribute to the formation of the stirring up hatred provisions. Some examination of rhetoric – the art of persuading and motivating others – is therefore a relevant contribution to the theoretical *bricolage*.

Classical studies of rhetoric recognise three strategies that a speaker might use to persuade their audience: *ethos* (appeals to authority or character), *logos* (appeals to reason), and *pathos* (appeals to emotion).³ Ethos is evident in parliamentarians' references to literary works, prior debates, rulings, other legislation and legal authorities, for example. For the most part, speakers' attempts to bolster their standing in a debate provide little insight into how particular issues were perceived. However, where speakers position themselves or opponents as members of a particular group, this might provide some understanding of how that group was constructed and valorised. Logos and pathos are considered below in further depth.

Logos

What were the logics that justified the enactment and amendment of the stirring up hatred offences? What was deemed 'common sense' and (un)reasonable by parliamentarians in their advocacy or rejection of the offences, in whole or in part? In order to be persuasive, a politician must be perceived as rational, as having a clear grasp of the situation and as making diagnoses, connections, extrapolations and conclusions that their audience can understand and follow. Conclusions are presented as evident, as 'natural' and as 'common sense,' while opponents' arguments are denounced as unsubstantiated, illogical and flawed. An audience is thus invited to see a situation in the 'correct' way and to support the most 'logical' course of action in response.⁴ Simultaneously, the contours of a speaker's logic will be shaped by how they anticipate their speech will be received – what they believe their audience will find plausible and convincing.⁵ This is perhaps especially so for MPs, for whom reputation and eliciting support – both inside and outside of Westminster – is paramount. Therefore, while parliamentary speeches aim to influence public opinion, they also, to some extent, reflect it and seek to emphasise the extent to which they

³ Finlayson, "Ideology and Political Rhetoric," 206-208.

⁴ Ibid., 208.

⁵ Martin, "Capturing Desire."

are manifestations thereof.⁶ Parliamentary debates can thus be viewed as an ‘index’ for different ideologies and for the limits of plausibility in relation a particular topic at a particular time.⁷

Aspects of Foucault’s concept of governmentality can be used here to further our understanding of logos. Governmentality has been described as a portmanteau of ‘governance’ and either ‘rationality’ or ‘mentality.’⁸ It questions the reasoning behind specific means of governing a country (politics), a household (economics), the self (morality),⁹ or presumably any other social field that people might seek to exert a degree of control over. As this project is concerned with the enactment and amendment of national legislation, it is the governance of a country – or rather the nations of England and Wales – that are at issue. Foucault argued that, at this level, coercive measures are no longer taken in the defence of a sovereign but must instead be justified as for the wellbeing of the population.¹⁰ To trace the logic of the parliamentary debates, then, we might question how the relevant population was demarcated, what was deemed to be in its best interests and how the enactment or amendment of the stirring up hatred offences was presented as either furthering or impeding these interests.

Pathos

Emotion has often been perceived as the opposite of reason and as a source of irrationality, disruption and distortion in the pursuit of truth.¹¹ However, logos and pathos can also be viewed as far more intertwined, with emotion making a valid and unavoidable contribution to knowledge

⁶ Johnson and Vanderbeck, *Law, Religion and Homosexuality*, 4-5. See also Ilie, “Identity Co-Construction in Parliamentary Discourse,” 58; Thompson, “To See Ourselves,” 91.

⁷ Lunny, *Debating Hate Crime*, 3; Johnson and Vanderbeck, *Law, Religion and Homosexuality*, 4; Thompson, “To See Ourselves,” 92.

⁸ Dean, *Governmentality*, 24.

⁹ Foucault, “Governmentality,” 91-92.

¹⁰ Foucault, *History of Sexuality*, 137.

¹¹ Marcus, “Emotions in Politics,” 233 and 237.

and rhetoric,¹² and with “thought as felt and feeling as thought.”¹³ George Marcus distinguishes two approaches to studying emotion in politics. One approach considers emotion as inherent within the personality of individuals. Here, politics is viewed as an expression of personal emotions, which orient how politicians respond to situations and make decisions. As with ethos, this personal dimension is of limited concern to this project. Conversely, the second approach emphasises “the emotion that is attached to external events, symbols, situations, individuals, or groups, in order to provoke a reaction in the audience.”¹⁴ This concept of emotions as circulating and getting attached or ‘stuck’ to certain subjects and objects corresponds with Sara Ahmed’s notion of ‘affective economies.’ Here, Ahmed is not concerned with the psychological states of individuals, but with social and cultural practices that construct certain things as subjects or objects of emotion, e.g. as worthy of compassion, as hateful or as fearsome.¹⁵ As Tamara Vukov argues, this social approach to affect is “crucial to questions of governmentality because of its mobilizing social power, the force it carries in relation to the regulatory and structural rationalities of governance.”¹⁶ While, ostensibly, it is the social circulation and attachment of affects that is of greater interest to this project, some psychoanalytic theory is useful for understanding how and why such attachments are made and unmade.¹⁷ In particular, the role of desire in the effectiveness of an argument is pertinent to this end.

James Martin claims that “capturing desire is one of the primary rhetorical challenges in politics.”¹⁸ The importance of resonating with an audience’s desires, he argues, is illustrated by the presence of long-standing beliefs that cannot be altered by evidence alone. “The fulcrum for changing such beliefs – such as hatred for foreigners, a longing for authority, or anger towards

¹² *Ibid.*, 232.

¹³ Williams, *Marxism and Literature*, 132.

¹⁴ *Ibid.*, 222.

¹⁵ Ahmed, *Cultural Politics of Emotion*, 9. See also Lunny, *Debating Hate Crime*, 9.

¹⁶ Vukov, “Imaging Communities through Immigration Policies,” 339.

¹⁷ See Martin, “Capturing Desire,” 144.

¹⁸ Martin, “Capturing Desire,” 143.

women – is desire, not knowledge.”¹⁹ Thus, in order to address a hatred for foreigners that is motivated by a fear of being displaced, for example, the desire for a secure sense of belonging must be attended to. However, such a task is disadvantaged by the extent to which, in the affective economy, negative emotions such as hatred, fear and resentment have become ‘stuck’ to the concept of ‘foreigners.’²⁰ Furthermore, although emotions can motivate cooperative as well as antagonistic behaviour, negative messages such as those stoking fear have been found to garner more attention.²¹ Negative affects may therefore be ‘stickier,’ and thus more rhetorically effective, than positive ones.

With regards to topics such as immigration, we also see the extent to which desires and affects may need to be referenced obliquely in order to conform to contemporary standards of acceptability.²² Thus, for more nefarious purposes, desire for a sense of belonging can be tapped into, and anti-foreigner sentiment stoked, through coded terms such as ‘community cohesion,’ ‘tradition’ and ‘ordinary,’ especially in combination with strategic uses of ‘our’ and ‘we.’²³ These concepts, with their particular affective resonances, evoke and invite investment in a shared vision, a fantasy of what was and what could be, a sense that an imagined and idyllic completeness has been unfairly taken or lost,²⁴ and a notion that returning to that imagined past would resolve contemporary anxieties.²⁵ Slavoy Žižek argues that such fantasies do not merely emerge in the image of our desires, but rather provide coordinates for our desires; they are common reference points that teach us what is desirable and that demarcate socially acceptable ambitions within which we can recognise and align our desiring selves.²⁶ Thus, following Jacques Lacan, the function of fantasies is not to satisfy an audience’s desires, but to sustain those desires, often by

¹⁹ Ibid., 148.

²⁰ See Martin, “Capturing Desire,” 144.

²¹ Marcus, “Emotions in Politics,” 227 and 232-233.

²² Ibid., 148; Reeves, *British Racial Discourse*.

²³ See Thompson, “To See Ourselves,” 104.

²⁴ Martin, “Rhetorical Satisfaction of Hate Speech,” 135.

²⁵ Yates, *Political Culture, Emotion and Identity*, 6.

²⁶ Žižek, *Plague of Fantasies*, 7.

constructing an external obstacle to their fulfilment.²⁷ In this way, fantasies enable desires to be moulded, channelled, shared and tapped into for rhetorical ends.

Ideological values

For the purposes of this project, I use the term ideology to refer to the normative articulation of social fantasies, i.e. to shared understandings of what is good and desirable. Shared understandings of goodness are encapsulated within parliamentary speeches by references to values such as equality, freedom (of expression, or liberty more generally), security, peace, dignity, etc. Ideological values serve to index virtue within a discourse and therefore act as Žižek's coordinates in the construction and sustenance of social fantasies and, correspondingly, in legitimising or delegitimising certain arguments. References to the value of 'public order' are of particular interest to this project due to the consistent and seemingly unquestioned positioning of stirring up hatred as a public order offence.

A shared understanding of what is good or desirable can be used in a speech to identify a problem, i.e. something is described as problematic because it lacks, threatens or violates a particular value. A shared understanding of what is good and desirable therefore inevitably entails a shared understanding, on some level, of what is harmful or threatening. As knowing what something is requires knowing what it is not,²⁸ it is not necessary to always draw a distinction between the two sides of the coin: the same meaning is conveyed regardless of whether a problem is framed as public disorder or as a lack of public order, as inequality or a lack of equality, or as injustice or a lack of justice. As constantly referring to both the positive and negative framings would be impractical, the relevant concepts are mostly referred to as positive values throughout

²⁷ Martin, "Capturing Desire," 152 and 155; Žižek, *Plague of Fantasies*, 43.

²⁸ Derrida, "Difference," 285.

this thesis, with the understanding that they inherently encompass notions of their negative counterparts.

The negotiation of values forms a substantial part of parliamentary debates through questions on how best to produce, protect or restore a value, whether particular means of pursuing a value are cost-effective or whether the pursuit of one value might be unacceptably detrimental to another value. Therefore, while ideology is sometimes referred to as the hidden assumptions or ‘background knowledge’ of a discourse,²⁹ it is viewed here as both backgrounded and foregrounded deference to certain values that are assumed to hold a shared moral currency, a persuasive weight or a mobilising force. We can call this quality the ‘rhetorical capital’ of values, borrowing from Piki Ish-Shalom’s adaptation of Bourdieu’s work to consider not only the social capital accumulated by individuals, but also that which is attached to certain symbols that individuals can use strategically in their communications.³⁰ Ideology, then, is understood as the rhetorical capital that values are imbued with; it is the non-contentious foundation (freedom is good) to which more contentious positions are anchored in the hope of enhancing their perceived legitimacy.

However, while it might be unanimously agreed that a value is good, there may remain dissensus over how it should be pursued. A discussion can therefore play out with participants referring to the same value to justify opposing positions. W. B. Gallie describes such values as ‘essentially contested concepts,’³¹ which are characterised by a linguistic and normative elasticity that enables a value such as freedom to be cited on both sides of an argument.³² Thus, the defence of freedom may be argued by one speaker to justify the enactment of hate speech laws (freedom from hate) and by another speaker to justify their opposition to hate speech laws (freedom of speech). Or, the promotion of public order may be argued by one speaker to justify anti-

²⁹ Paltridge, *Discourse Analysis*, 29; Fairclough, *Critical Discourse Analysis*, 33.

³⁰ Ish-Shalom, “Rhetorical Capital of Theories.”

³¹ Gallie, “Essentially Contested Concepts.”

³² See Orwell, “Politics and the English Language.”

discrimination legislation but by another to justify widening police powers. References to the same value by speakers with conflicting positions show that, while that value's precise meaning and application may be contested, the importance and rhetorical capital of that value is *uncontested*. Ideology, then, involves the fetishization of concepts such as freedom, democracy, equality, peace, order and dignity as inherently 'good,' as saturated with righteousness in the affective economy, even though – or perhaps because – their exact meaning is contested. It is because freedom, for example, is invoked across party lines and national boundaries, and because it therefore represents a kind of fundamental consensus, that it has such powerful rhetorical capital. However, this level of consensus is only possible due to the elasticity of the concept, which can encompass a wide range of different and contradictory interpretations and applications. Whatever the course of action, it must be advocated in the name of freedom; but the name of freedom can be invoked to justify all things.³³

In the most extreme discursive exploitations of a value's flexibility, a speaker may seek to benefit from its rhetorical capital while advocating the opposite to the normal meaning of that value, blurring the lines between what it is and what it is not. Such utterances fulfil the definition of Orwell's term 'doublethink,'³⁴ which Cohen describes as "doing one thing in the name of its opposite."³⁵ For example, the value of freedom can be invoked to justify restrictions on freedom,³⁶ or the protection of the peace may be invoked as a justification for measures that are decidedly unpeaceful. Doublethink within parliamentary discourse provides an extreme example of the imperfections of rhetoric and how the fantasies that are assembled and the desires that are tapped into can never be made fully coherent or perfectly aligned with the advocated action. The desire

³³ Bognetti makes a similar point in relation to dignity: "Human dignity has been used to express underlying philosophical beliefs of quite different kinds for the purpose of reinforcing them with its powerful appeal" (Carmi, "Dignity," 983).

³⁴ Orwell, *Nineteen Eight-Four*.

³⁵ Cohen, *Deportation is Freedom!*, 21.

³⁶ Brown, *States of Injury*, 5.

for coherence and intelligibility,³⁷ however, and the affective power of fetishized values, can fill in many of the gaps that might otherwise render an argument logically unconvincing.

While references to values such as freedom, equality or security are used to legitimate a particular decision or to justify a particular course of action, the legitimating power that they hold is connected to other contemporary values, interests and fears that are deemed relevant in a given context. Therefore, such values do not provide orators with a stable rhetorical capital and may vary in their justificatory efficacy over time and according to a range of contextual factors. For example, as illustrated in Chapter Two, freedom is perhaps the most commonly referenced value in contemporary debates about hate speech legislation. Attention to the use of ideological values therefore leads us to consider whether freedom has always been a dominant concern in relation to hate speech, whether it has always been viewed as an uncontested good and how it has been weighed against other values. Such variations in the indexing of virtue can be traced through parliamentary debates as values are referenced with more or less frequency and with more or less success at particular moments and in relation to certain topics. Alongside and entwined with an affective economy, then, ideological values can also be seen as circulating and as getting ‘stuck’ to particular objects and subjects. Indeed, the rhetorical capital of a value may depend on the affects that have become attached to it (e.g. freedom/pride or public disorder/fear), with these couplings then attaching to particular fantastical identities (e.g. proud free nation or disorderly fearsome youth).

Identities

One explanation for how the same ideological value (nominally) can be used to justify opposing positions, without resorting to the conclusion that the value is so flexible that it is semantically

³⁷ Derrida, “Structure, Sign and Play,” 352; Martin, “Capturing Desire,” 147.

meaningless, might lie in how the value is framed with different populations in mind.³⁸ I do not use the term ‘population’ here to refer exclusively to the residents or citizens of a particular nation-state, but rather to various ‘imagined communities’³⁹ that a speaker might refer to, such as ‘the public,’ ‘minority communities,’ ‘young people’ and ‘ordinary citizens.’ The identity-focused approach of this study is thus concerned not only with the selection of specific identity categories for protection under hate speech legislation, but also the processes of differentiation and identity construction within the narratives that argue for and against such legislation. Discussion on identification is organised here under four subheadings: the first borrows Benedict Anderson’s concept of ‘imagined communities’; the second turns to Foucault’s concept of ‘biopolitics’; the third further considers how ‘fantasies of difference’ are constructed and deployed; and the fourth considers Nietzsche’s concept of *ressentiment*.

Imagined communities

Arguments for the enactment or amendment of legislation are built around some notion of who it is believed that the legislation will protect and who it is believed that it will restrict and censure. For example, hate speech legislation may be advocated on the basis that one particular group of people are vulnerable (e.g. racialised minorities) and another group are dangerous (e.g. right-wing extremists), or it may be opposed because one group of people (e.g. Asian immigrants) pose risks to society and another group (e.g. white Britons) should not be punished for expressing their opinions. Thus, when ‘freedom’ is used to advocate hate speech legislation what is referred to might be freedom from hatred for a particular victim population, while the use of ‘freedom’ to oppose hate speech legislation might refer to the freedom of expression of ‘the majority.’ The value of freedom can thus be used to legitimise conflicting positions because it is applied to the interests of differently constructed, although potentially overlapping, populations. Considering

³⁸ See Mahmud, “Colonialism and Modern Constructions of Race,” 1222.

³⁹ Anderson, *Imagined Communities*.

how different populations are constructed by a speaker can therefore illuminate how their reference to a particular ideological value functions to justify their position, and whose interests they wish the law to uphold. This project thus aims to identify which values are imbued with rhetorical capital and how that capital is used to back certain populations; or, conversely, how investment in a certain representation of a population affects the ways that values are used in law-making discourses.

Identity is not viewed here as an amalgamation of objective characteristics, such as skin colour or country of origin, nor as a possession that has a stable existence and significance as individuals carry it with them between different spaces.⁴⁰ Instead, identity is viewed as articulations⁴¹ and performances⁴² of ‘groupness,’⁴³ ‘imagined communities,’⁴⁴ ‘fictions of unity’⁴⁵ and “common principles of vision and division.”⁴⁶ Group identities are thus treated as existing “only in and through our perceptions, interpretations, representations, categorizations and identifications.”⁴⁷ Identities are claimed, ascribed and brought into existence by “act[s] of social magic,” by persuasion, recognition and misrecognition;⁴⁸ it is these acts and processes that are of interest, rather than their products per se. Identifications – both of the self and of the ‘other’ – are central to the kinds of speech that might be classified as hate speech, but are also at play in parliamentary constructions of and responses to hate speech.

Understanding group identities as expressions of fantasy and desire in no way negates their capacity to be powerfully influential. In emphasising the constructed, dynamic and fictive nature

⁴⁰ Erel refers to this as a ‘rucksack approach’ in relation to cultural capital. Erel, “Migrating Cultural Capital.”

⁴¹ Hall, “Who Needs Identity?,” 27; Anthias, “Intersections and Translocations,” 214.

⁴² Butler, *Gender Trouble*.

⁴³ Brubaker, “Ethnicity without Groups.”

⁴⁴ Anderson, *Imagined Communities*.

⁴⁵ Werbner, “Fiction of Unity.”

⁴⁶ Bourdieu, *Language and Symbolic Power*, 224.

⁴⁷ Brubaker, “Ethnicity without Groups,” 174.

⁴⁸ Bourdieu, *Language and Symbolic Power*, 223.

of identities, I seek to encapsulate the notion that processes of identification do not only describe certain ‘imagined communities’ but, in doing so, can also interpellate them, i.e. bring them into being, reinforce them or reframe them in meaningful ways.⁴⁹ Processes of identification are rhetorical strategies for defining or renegotiating – and thereby constituting – the entities at play and, concurrently, for foreclosing alternative subject formations and the voices that might articulate them.⁵⁰ Law can therefore be seen as not only responding to pre-existing identity categories – as governing differences – but as also reproducing them and contributing to their conceptual existence, their intelligibility and their consequence⁵¹ – as governing through differentiation. Consequently, how categories and identities are constituted in parliamentary discourse can contribute to the distribution of resources, social capital and even the distribution of life and death, both through the enactment and implementation of laws and policies and through myriad other ways in which identity translates into privileges and disadvantages in society.

Biopolitics

Identifications of the self and of the other necessarily occur simultaneously. As noted in relation to ideological values, any concept of what something is can only be understood in relation to what it is not.⁵² A process of identification is therefore a process of differentiation: to claim to be something is also to claim not to be its opposite; to evoke a notion of ‘us’ or ‘belonging’ is to simultaneously evoke notions of ‘not us’ or ‘not belonging.’⁵³ Equally, any description of ‘them’

⁴⁹ Bourdieu, *Language and Symbolic Power*, chap. 10; Young, “Moral Panic,” 7. Butler uses the term ‘inaugurative,’ but this suggests the genesis of something new or a beginning, whereas ‘constitutive’ can also allude to processes of *reconstituting* and better reflects the operation of multiple competing and imperfectly accumulating interpellations that shape and reference each other. Butler, *Excitable Speech*, 3.

⁵⁰ Butler, *Gender Trouble*, 21.

⁵¹ Butler, *Gender Trouble*, xxxi; Sokhi-Bulley, “Human Rights,” 231.

⁵² Derrida, “Difference,” 285.

⁵³ Hook, “Affecting Whiteness.”

necessarily involves differentiation from ‘us’: even if it is said that ‘they are just like us,’ it is still maintained that ‘they’ are, in some definitive way, not ‘us.’ The delineation of any group unavoidably determines who is to be left outside of that group; a group can only become intelligible through an understanding of its boundaries and the presence of a ‘constitutive outside.’⁵⁴

Returning to the concept of governmentality, measures that are justified on the basis that they enhance the life and wellbeing of a population – known as biopolitics – must define the scope of that population. Here, governmentality refers to the “power relation which creates and regulates the subjects and populations it purports to govern.”⁵⁵ Campbell and Sitze thus describe Foucault’s notion of biopolitics as “a sort of ‘game’ in which nothing less than the species itself, the species as a living entity, is ‘at play’ or ‘at stake.’”⁵⁶ The concept of biopolitics is therefore helpful for illuminating how different arguments advocating or opposing the stirring up hatred provisions reflect different perspectives as to how the ‘species’ should be delineated, what it is that threatens it and the nature of the relationship between the two.

The biopolitical metaphor has been extended through the concept of immunity,⁵⁷ whereby an immune system (government) must distinguish between the healthy body (population) and the disease (threat) in order to provide effective protection. In the act of identifying something as not only ‘other,’ but a risk, disease or pollutant, correcting or excising that other becomes a logical solution and the identity of the self becomes framed in opposition to it.⁵⁸ As Donna Haraway explains,

⁵⁴ Butler, *Bodies that Matter*, 8; Hall, “Who Needs Identity?,” 17.

⁵⁵ Sokhi-Bulley, “Human Rights,” 231. For an example of such simultaneous interpellation and regulation of legal subjects, see Smart, *Law, Crime and Sexuality*, chap. 4.

⁵⁶ Campbell and Sitze, “Biopolitics: An Encounter,” 11.

⁵⁷ Esposito, “Immunization Paradigm.”

⁵⁸ Lamble, “Queer Necropolitics,” 231.

the immune system is a plan for meaningful action to construct and maintain the boundaries for what may count as self and other in the crucial realms of the normal and the pathological.⁵⁹

Thus, the concern of biopolitics with maintaining and facilitating life orders populations in such a way that incurs a simultaneous thanatopolitics or necropolitics⁶⁰ for those who are viewed as a threat to the good of the population rather than as constituent of it.⁶¹ In crude terms, a distinction is drawn between victims, or the ‘valued community’⁶² whose lives must be protected and facilitated, and villains, or those who the population must be protected from and whose lives may be sacrificed or discarded.⁶³ Biopolitical measures are therefore necessarily, at best, indifferent to life beyond the parameters of the population or, at worst, targeting for destruction any life outside of the population that might be deemed a threat to it. In this sense, populations are not coterminous with national citizenship or territorial residence as a whole, but rather with the identification of good citizens or members who are deemed worthy of protection from a variety of polluting or corrupting others.

Fantasies of difference

According to Foucault’s concept of disciplinary power, laws do not only keep a population in line through policing and law enforcement, but also through their determination of what is acceptable, desirable, normal or worthy of protection,⁶⁴ and concurrently their construction of what is unacceptable, undesirable, abnormal, suspicious, deviant, perverse, etc. This not only produces prevailing understandings of what is acceptable and unacceptable behaviour, but also creates

⁵⁹ Haraway, “Biopolitics of Postmodern Bodies,” 204.

⁶⁰ Mbembe, “Necropolitics.”

⁶¹ Stanescu, “Beyond Biopolitics,” 141-2.

⁶² Anderson, *Us and Them?*

⁶³ Foucault, *Society Must Be Defended*, 241; Lamble, “Queer Necropolitics,” 243.

⁶⁴ Duncan, “Law’s Sexual Discipline,” 327.

acceptable and unacceptable subjects;⁶⁵ it interpellates subjects who are unacceptable, undesirable, abnormal, suspicious, deviant, perverse, etc. and who are thus designated as sources of shame, disgust, resentment, hatred, fear, etc. Sarah Lambie has described this process in relation to sexual identity as follows:

State recognition of the respectable, enlightened and worthy sexual citizen is thus produced through the reproduction of a dangerous Other who offers a scapegoat for the insecurities and vulnerabilities produced by the contemporary political economic order. The co-production of these figures works to entrench the dividing line between those who are marked for life and vitality versus those ushered into abandonment and death.⁶⁶

Here, Lambie captures how identities are produced, not through the recognition of objective differences, but in response to fantasies about what we are on the one hand and what we would like to view as external to ourselves, i.e. the source of our own fears and vulnerabilities, on the other. The claim to a coherent identity is thus the expression of a desire: the desire to be some things and not others.⁶⁷ To sustain a desired identification of ‘us’ as loving subjects, worthy of pride and compassion, undesirable qualities such as hatred must be externalised and attributed to ‘others,’ who are worthy of our fear, disgust and contempt.⁶⁸ Even when ‘we’ hate, it must not be because ‘we’ are hateful, but rather because ‘they’ are so dangerous or depraved that hatred is a reasonable and natural reaction to their unreasonable and unnatural ways.⁶⁹ Thus, in order to protect a certain vision of ourselves, fantasies of difference are constructed so that there is an

⁶⁵ Foucault, *Discipline and Punish*, 170)

⁶⁶ Lambie, “Queer Necropolitics,” 246.

⁶⁷ “Coherence in contradiction expresses the force of a desire.” Derrida, “Structure, Sign and Play,” 352.

⁶⁸ Iris Marion Young makes this point in relation to oppression: “In dominant political discourse, it is not legitimate to use the term oppression to describe our society, because oppression is the evil perpetrated by the Others.” Young, *Justice and the Politics of Difference*, 41.

⁶⁹ Ahmed, “Organisation of Hate,” 345-6.

exterior on which we can blame our problems, our negative feelings and the non-fulfilment of our desires.⁷⁰ In turn, this justifies the distribution of biopolitics and necropolitics.

Additionally, it is through biopolitics that the law becomes concerned, not only with reacting to extremism, for example, but with governing the population in ways that proactively aim to identify and police *potential* extremists.⁷¹ It is perhaps in this field of prevention that attempts to govern difference – e.g. to combat extremism – not only result in but actually necessitate governance through differentiation – e.g. constructing an image of extremist subjects so that they can be recognised and ‘managed’ before acts of extremism are committed.⁷² This is especially problematic in light of the above-mentioned symbolic power of discourses to constitute the divisions and groupings that they describe.⁷³ The problems diagnosed in biopolitical discourses are not, therefore, nameable individuals who must be disciplined, but rather the welfare scroungers, the football hooligans, the non-English-speakers or, more urgently, the terrorists and extremists.⁷⁴ These are the deviant populations, the ‘savages’⁷⁵ and the ‘folk devils’⁷⁶ that are constructed as detrimental to the good, ordinary, normal, majority population. In turn, this drives the affective economy, providing blueprints for fantasies of difference that influence which affects get stuck to which bodies. As noted in Chapter Two, this manifests in how individuals in similar circumstances are responded to differently according to how well they fit the model of an ‘ideal victim,’ worthy of compassion and support, or an ‘ideal perpetrator,’ worthy of suspicion and punishment.

⁷⁰ Martin, “Rhetorical Satisfactions of Hate Speech,”

⁷¹ See Zedner, “Pre-Crime and Post-Criminology” and McCulloch and Pickering, “Pre-Crime and Counter-Terrorism.”

⁷² See Tyler, *Revolting Subjects*, 3-4.

⁷³ Bourdieu, *Language and Symbolic Power*, 127.

⁷⁴ Sears, “Symbolic Politics,” 114. See also Anderson, *Us and Them?*

⁷⁵ Mutua, *Human Rights*.

⁷⁶ Cohen, *Folk Devils*.

Ressentiment

Nietzsche developed the concept of *ressentiment* to theorise the normative play through which domination and persecution can be accepted as a just course of action.⁷⁷ Essentially, this begins with the hatred of an other who is believed to possess something which is desired by the subject but is unattainable to them. The subject's powerlessness to fulfil their desire is dealt with psychologically by repressing it and imbuing it with immorality. Those who are perceived as powerful are subsequently rendered immoral, while powerlessness and not-having are framed as virtuous characteristics. Thus, "morality springs from and compensates powerlessness."⁷⁸ Nietzsche developed his theory of *ressentiment* to explain Judeo-Christian extolment of suffering and self-denial, explaining that this moral framework resulted from the *ressentiment* of Hebrew slaves towards their Roman masters. Thus having to wait became the virtue of patience (casting the master who does not have to wait as impatient), or not being able to take revenge became the virtue of forgiveness (which he who punishes lacks).⁷⁹ Once the identities of the self and the other have been abstracted and morally counterposed as good and evil, actions taken by the good against the evil can logically be framed as just: "what they are demanding is not called retribution, but 'the triumph of justice'; what they hate is not their enemy, oh no! they hate 'injustice.'"⁸⁰ Arguments for or against legislation can respond to this desire for moral righteousness by adopting clear-cut and simplified narratives of a "heroic battle between good and evil."⁸¹

Examining contemporary Western society, Wendy Brown describes how frustration and *ressentiment* are produced by the paradoxes of liberalism. She argues that the dual liberal promise of individual liberty and equality are incompatible: either commitments to equality are resented for the compromises that they place on freedom, or commitments to freedom are resented for the

⁷⁷ *Genealogy of Morals*.

⁷⁸ Brown, *States of Injury*, 44.

⁷⁹ Nietzsche, *Genealogy of Morals*, 28.

⁸⁰ *Ibid.*

⁸¹ Moran, "Invisible Minorities," 433.

compromises that they place on equality.⁸² According to Brown, liberalism casts the subject as self-made, masking the extent to which they are situated within and produced by a variety of power dynamics. As the failure to obtain everything that capitalism promises is inevitable for most people, the source of the self-made individual's failure can either be located internally, compounding the misery of the subject, or it can be located externally and attributed to factors that have impeded the subjects' self-realisation.⁸³ Resentment, anger and the desire for revenge are the affective results of externalising blame for suffering and powerlessness.

In more subtle discourse, then, biopolitics operates not through the identification of an external risk or disease, but through the valorisation of the imagined self. Here, the demarcation of the population body and consequent exclusion of 'others' is more implicit, often through reference to a shared history, shared values or a shared 'Britishness,' for example. In particular, the notion of 'British values' serves to attach purportedly universal ideological values, such as freedom, democracy and tolerance, to a particular identity to the extent that 'Britishness' is deemed to be transgressed should these values be infringed.⁸⁴ The sense of injury to an identity – to a way of being – here is greatly facilitated by the affective marriage of 'British values' with pride in social fantasies of national greatness, and thus by a sense of denied fulfilment. Simultaneously, such a framing has the effect of externalising blame for the failure to achieve such greatness: if freedom of expression, democracy and tolerance are British values, then the forces against which they must be defended must be non-British. Such ordering draws on and reproduces familiar but only indirectly articulated dichotomies between civilised British populations and savage foreigners. Thus, the association of certain 'universal' values with particular identities is a covert means of differentiating 'us' from 'them' – of valorising 'us' and devalorising 'them' – and of dividing and ordering while maintaining a plausible deniability of

⁸² Brown, *States of Injury*, 67.

⁸³ Ibid.

⁸⁴ Hook, "Affecting Whiteness."

racism.⁸⁵ Other examples might include discourses on integration, which interpellate a valued community on the one hand and those who are failing to fit into it on the other, blaming those who are marked as different for a host of social ills and demanding that ‘they’ do more to integrate with ‘us.’ As though in Kafka’s ‘Before the Law,’ such discourse gives the impression of leaving a door open for outsiders to become insiders that in reality they may never fully qualify to pass through; they may never be able to shift all that is stuck to them.⁸⁶

Conclusion

This chapter has sought to establish the theoretical underpinnings of the approach that this project takes to producing knowledge on particular aspects of the stirring up hatred offences. This bricolage of theory is by no means a complete or comprehensive theory on rhetoric, governmentality, affect, desire, ideological values, identity or difference. However, this chapter explores the applications and interactions of these concepts and catalogues an array of ideas that can be used to interrogate and make sense of the relevant parliamentary debates. In particular, while notions of desire, fantasy, ideology, resentment, etc. may have a clear and straightforward relevance to understanding hate speech, I have aimed to show that they are also relevant for understanding the enactment of legislation against hate speech. Indeed, understandings of who ‘we’/‘they’ are cannot be convincingly contested without an alternative narrative about who ‘we’/‘they’ are, and any governance activity is dependent on some notion of who is being governed and what is in their best interests.

Furthermore, the discursive construction of imagined communities and victim and villain identities is particularly relevant to the stirring up hatred offences due to their inchoate character and the lack of requirement that any potential victim be present or actually harmed. Without actual

⁸⁵ Liu and Mills, “Modern Racism.” See also Hook, “Affecting Whiteness” and Bourdieu’s use of the term ‘euphemism’ in *Language and Symbolic Power*, 170.

⁸⁶ See Chakraborty, “Integrate, Migrants are Told.”

victims, the intelligibility of a victim group may be built upon the way in which a group is constructed as an object of hatred within the offending speech. While a legislature or a prosecution may seek to revalorise the group in question, the group must necessarily be understood as different on grounds of race, religion or sexual orientation in order for such a prosecution to occur. There is therefore ample space for fantasies to circulate in the gaps between the myriad overlapping differences and commonalities between individuals on the one hand and the discrete categories and groups that are (re)produced by the law on the other. Attention to these fantasies – their affective resonances, their fetishization of ideological values, and the ways in which they demarcate and order populations – will provide insight into the questions of how race, religion and sexual orientation have been understood in relation to the stirring up hatred offences.

Methodology

Introduction

So far, this thesis has identified three aspects of the stirring up hatred offences that have not been explained in the existing literature: how they came to be premised on race, religion and sexual orientation, why the offences differ between these categories and why they are classified as public order offences. It has also been established that a critical, *a posteriori* approach is necessary for the production of knowledge on these particularities of the offences, as opposed to the abstract, universalist and normative approaches that dominate the hate speech literature. A critical approach requires a detailed consideration of the contexts in which the stirring up hatred offences were enacted and amended so as to understand the narratives that shaped them, including the logics, affects, values, fantasies and identifications that made them politically viable at the time and against which they can be evaluated in the present. To this end, the first section of this chapter examines how critical discourse analysis can be used to construct a genealogical ‘history of the present.’ This involves consideration of what discourse is and how parliamentary debates can be analysed to answer the research questions and produce new knowledge about the stirring up hatred offences. The second section of this chapter sets out the methods of data collection and processing that comprise the practical design of the research project. As with the theoretical framework set out in Chapter Three, elements are borrowed from different methodological doctrines in order to craft a bespoke research design that will be both practicable and effective.

Constructing a legal genealogy through critical discourse analysis

Genealogy and problematisation

The methodology for this project can be described as a Foucauldian ‘history of the present,’¹ or genealogy, which entails “using history as a means of critical engagement with the present.”² More than being simply synonymous with a normal historical study, which might investigate the past in order to reveal the ‘true’ origins of something, a genealogy aims to investigate the past in order to disrupt current assumptions:

The search for descent is not the erecting of foundations: on the contrary, it disturbs what was previously considered immobile; it fragments what was thought unified; it shows the heterogeneity of what was imagined consistent with itself.³

Thus, a genealogy of the stirring up hatred offences will not merely expose their history, but, in doing so, will enable a rethinking of their existence in the present. The present phenomenon is not fetishized as an inevitable destiny of historical processes or seen as possessing an inevitable truth or stability. The existence of a smooth, linear narrative is rejected so that the present can instead be viewed as the product of contradictions, compromises and errors,⁴ and of the strategic fetishization of some things and the consignment of others to Orwellian ‘memory holes.’⁵ For example, in Grattet and Jenness’s study of the emergence of hate crime laws in the US, they found that, far from possessing a stable and self-evident meaning, agencies seeking to create hate crime policies were faced with a “surplus of legal meaning” attached to the term ‘hate crime.’⁶ Ensuing

¹ Foucault, *Discipline and Punish*, 31.

² Garland, “History of the Present,” 367.

³ Foucault, “Nietzsche, Genealogy and History,” 82.

⁴ Foucault, “Nietzsche, Genealogy and History,” 76, 81 and 88; and Foucault, *The Archaeology of Knowledge*, 155.

⁵ Cohen, *Deportation is Freedom!*, 18.

⁶ Grattet and Jenness, “Reconstitution of Law,” 917.

policies thus required a process of selection, rejection and amalgamation that rendered them far from the inevitable result of the conditions in which they were produced.

David Garland identifies the starting point of a genealogical project as a diagnosis of a present issue: if the purpose of a genealogy is to rethink the present, it is first necessary to identify a present phenomenon that we wish to rethink.⁷ The Law Commission's 2014 and forthcoming investigation into the expansion of the stirring up hatred offences demonstrate that there is a contemporary appetite for re-examining these provisions. In particular, there is a recognition that the current selection of identity categories and the disparity between the stirring up hatred category list and those specified in other anti-hate and anti-discrimination legislation is awkward at best. The aim of this project's genealogy is therefore not so much to reveal the contingency of legislative provisions that are already contested, but rather to examine the specific conditions under which the stirring up offences, and especially their stratification according to specific identity categories and their classification as public order offences, became intelligible as an expedient solution to particular contemporary problems. In this way, more effective contestations of the assumptions, boundaries and frames of current debates about them might be enabled.

Processes of identifying something as a problem can be referred to as either diagnosis or problematisation⁸ and can form both the motivation and the object of a genealogical research project. Thus, identifying the current shape and location of the stirring up hatred offences as curious and unexplained can be labelled the motivational problematisation of this project. In response to this, a genealogy can be constructed from the analysis of parliamentary problematisations, i.e. from questioning how particular problems were framed as necessitating the enactment and amendment of the stirring up hatred offences. In Foucault's words, the aim is,

⁷ Garland, "History of the Present," 378-9.

⁸ Foucault, "Polemics, Politics and Problematizations."

a movement of critical analysis in which one tries to see how the different solutions to a problem have been constructed; but also how these different solutions result from a specific form of problematization.⁹

A genealogy can therefore be described as a “history of problematisations.”¹⁰ As the identification of a problem relies on a notion of how things *should* be, problematisations can be viewed as expressions of the fantasies and desires discussed in Chapter Three. Within this, and attending to this project’s interest in identifications, we might place a particular emphasis not only on *what* has been identified as problematic within the relevant parliamentary debates, but also *who* has been presented as problematic.¹¹ This corresponds with the strand of governmentality that is concerned with the interpellation of subjects of governance, and especially biopolitical distinctions between valued communities on the one hand and either ‘problem communities’ or deviant individuals who are to blame for certain social problems on the other.

In some instances, diagnoses of a problem and the attribution of responsibility for that problem is simultaneous, especially where particular types of people are deemed to be problematic by themselves, such as in some speeches on Fascism/fascists or illegal immigration/illegal immigrants. Here, a particular category of people is deemed undesirable to the extent that no further problem beyond their presence needs to be identified in order to communicate the need for a solution. In other instances, however, the problem and the supposed cause may not be presented as so self-evident. For example, it might be agreed that the problem at hand is the eruption of riots, but speakers might attribute the blame to different groups of people, to particular government policies or to wider structural issues such as unemployment or discrimination. Attention to speakers’ representations of problems, attributions of blame and advocacy of solutions therefore provides a means of untangling narratives to focus on who or what was viewed as undesirable and

⁹ Ibid., 389.

¹⁰ See Borch, *Foucault, Crime and Power*.

¹¹ Buyse, “Words of Violence,” 789. See also Douglas, *Risk and Blame*.

excessive and who or what was viewed as valuable and at risk in the discourses that shaped the stirring up hatred offences.

Discourse and context

Foucault stated that genealogy “requires patience and a knowledge of details, and it depends on a vast accumulation of source material.”¹² Such source material could take many forms and a full Foucauldian ‘dispositif’ of discourses, architectures and institutions involved in the production of ‘hate speech’ as a contemporary concept is beyond the scope of this thesis. Instead, this project aims to produce a specifically legal genealogy based only on the particularities of the stirring up hatred offences. As such, it is confined to two forms of discourse: at its most basic level, this project traces the evolution of the legislative text of the stirring up hatred offences. Then, in order to interrogate the meanings of those legal texts, systematic analysis is undertaken of the formal parliamentary debates within which their existence and particularities were negotiated. Such attention to discourse, and the treatment of law as discourse, does not preclude understanding law as something that is practiced and performed by those who obey, enforce, disregard, subvert or adjudicate it. Nor does the analysis of parliamentary discourse negate an appreciation of the ways in which law is produced and reproduced outside of the legislature. However, a focus on parliamentary debates at key moments of legislative enactment and amendment enables the collection of relatively discreet, accessible and comparable data on the discourse that most directly determined the content of the relevant legal texts. Such debates, with all their rhetoric and symbolic power, provide a window into what was deemed problematic, persuasive and powerful at key moments.¹³ By identifying the reproduction and contestation of different affective attachments, fetishized values and imagined communities within these debates, a deep

¹² Foucault, “Nietzsche, Genealogy and History,” 76-7.

¹³ Jenness, “Managing Differences,” 553. See also Johnson and Vanderbeck, *Law, Religion and Homosexuality*, 4-5; Ilie, “Identity Co-Construction in Parliamentary Discourse,” 58; Thompson, “To See Ourselves,” 91.

understanding can be produced of how the provisions were justified and how justifications changed over time.

Discourse is both a slippery and a ubiquitous term, as it may be used at the micro level to refer to any text, or at the macro level to refer to groupings of texts that share a certain form, subject matter, authorship and/or time or place of origin. Discourse analysis can therefore be described as the analysis of texts in order to produce knowledge about discursive patterns and developments. Within *critical* discourse analysis, and post-structuralism more generally, study of the social, cultural and political context in which a text was produced is deemed essential to meaningful analysis of that text.¹⁴ Thus, for the critical analysis of legal discourse, it is important to recognise that “the meaning and content of law is determined within the social field it was designed to regulate.”¹⁵ This ‘social field’ can be examined at a variety of different levels,¹⁶ ranging from the specific positioning of a speaker and their relationship to their audience,¹⁷ to broader social factors that provide common reference points between speakers,¹⁸ and relations that determine “who speaks and under what conditions they speak.”¹⁹ Furthermore, it can also be important to consider who does not speak and under what conditions they do not – or cannot – speak.²⁰ For example, in parliamentary debates, there are formal rules on who may speak, when, how and what about.²¹ However, referring to research by Shaw, Deborah Cameron highlights the extent to which these rules are regularly broken, and the extent to which male MPs are more likely to avail themselves of such formally proscribed opportunities to influence the course of debates

¹⁴ Van Dijk, “Critical Discourse Analysis,” 435; Luke, “Beyond Science and Ideology Critique,” 100; Wodak, “Introduction,” 12.

¹⁵ Edelman in Grattet and Jenness, “Reconstitution of Law,” 901. See also Goodrich, *Legal Discourse*, 120.

¹⁶ Wodak, “Introduction,” 13.

¹⁷ Chilton and Schäffner, “Discourse and Politics,” 216.

¹⁸ Fairclough, *Critical Discourse Analysis*.

¹⁹ Goodrich, *Legal Discourse*, 157.

²⁰ Golder, “Distribution of Death,” 100.

²¹ Chilton, *Analysing Political Discourse*, 94-5.

than female MPs.²² Such behavioural differences between speakers may be considered alongside the changing levels of diversity within parliament²³ to form an appreciation of representative context.

Pluralism

One criticism that has been levelled at critical discourse analysis is the tendency for researchers to uncritically accept singular interpretations of social, political and historical context. Therefore, a deeper critical examination of legal discourse requires attention to interdiscursivity and intradiscursivity, through which an appreciation of plurality can be fostered.

The concept of interdiscursivity refers to how discourses reference one another and have porous borders. For example, legal discourse draws upon concepts from medical discourse such as insanity and trauma, and concepts from political discourse such as public order and extremism.²⁴ All discourses, as Derrida suggests,²⁵ can therefore be viewed as *bricolage* – as a patchwork of concepts that have been appropriated from potentially disparate sources. Additionally, within a discourse, the notion of intertextuality encapsulates the perspective that “all texts are linked to other texts, both in the past and in the present.”²⁶ The meaning of a single text is therefore never fixed, as it will be adapted and reevaluated as it is spoken in new circumstances, interpreted from new perspectives and invoked for new purposes.

The concepts of intradiscursivity and intratextuality describe plurality within discourses and texts. Intradiscursivity is the consideration of one aspect of a discourse in relation to other aspects of it. For example, if the parameters of a discourse are defined by a particular subject matter in a particular language and within a given time period, intradiscursivity refers to the

²² Cameron, *Working with Spoken Discourse*.

²³ See Audickas and Cracknell, “UK Elections Statistics,” s 2.6.

²⁴ Bennet, *Cuts and Criminality*, 17.

²⁵ Derrida, “Structure, Sign and Play.”

²⁶ Wodak, “Introduction,” 3.

relationships between different texts and ideas that meet these criteria. This might show how different elements of a discourse have developed within a time period or it might highlight certain contemporaneous agreements or disagreements within the topic. Intratextuality is the same concept at a more micro level, wherein relationships between the different elements of a text are considered.²⁷ The concepts of intradiscursivity and intratextuality underscore that discourses and texts are composed of tensions and contradictions, which various elements of the discourse itself may recognise or overlook, problematise or minimise.²⁸ It may be possible to identify Hegelian dialectical patterns of thesis, antithesis and synthesis, but there are also likely to be unresolved tensions, misunderstandings and less productive interactions.²⁹ Thus, while orthodox legal scholarship seeks coherence within the law, constructing wholes out of fragments,³⁰ analysis of both interdiscursivity/textuality and intradiscursivity/textuality foregrounds the law's contingencies and incoherencies,³¹ and thus provides a means by which cohesive narratives of present phenomena can be disrupted.

Power

Foucault observed that discourses are not only constrained, shaped and made possible by their social, historical and political realities, but that they also operate as a power that constitutes their 'social field':

Discourse is not simply that which translates struggles or systems of domination, but is the thing for which and by which there is struggle, discourse is the power which is to be seized.³²

²⁷ Goodrich, *Legal Discourse*, 148.

²⁸ Bennet, *Cuts and Criminality*, 18

²⁹ Norrie, *Law and the Beautiful Soul*, 10.

³⁰ Collier, "Family Law and Gender," 51; Bennet, *Cuts and Criminality*, 17.

³¹ Norrie, *Law and the Beautiful Soul*, 8; Valverde, "Questions of Security," 16.

³² Foucault, "The Order of Discourse," 52-53.

Discourse can therefore be seen as the domain in which actors compete to shape how we perceive ourselves and our place in the world, where we have come from, who ‘we’ are and are not, the future we should aspire to and how we might achieve it. This reality-shaping power of discourse, by which groups can be made and unmade,³³ is described by Pierre Bourdieu as ‘symbolic power,’

a power of constituting the given through utterances, of making people see and believe, of confirming or transforming the vision of the world and, thereby, action on the world and thus the world itself, an almost magical power which enables one to obtain the equivalent of what is obtained through force (whether physical or economic), by virtue of the specific effect of mobilization.³⁴

Attempts to promote particular narratives – to manufacture and sell particular fantasies of ‘truth’ and ‘common sense’ – therefore comprise a core technique of governance. Indeed, this power was captured by George Orwell’s famous statement that “Who controls the past controls the future. Who controls the present controls the past.”³⁵ While individuals have agency to reject the ideas and demands communicated by a text and to think and behave in opposition to a discourse, this agency is affected and influenced (as opposed to outright controlled) by dominant discourses. There is thus a duality to subjectivity, whereby individuals are subjected to the power and discourses of others but also possess the power to act and contribute to discourses.³⁶ Furthermore, legal constraints on agency do not only operate through the threat of sanctions: legal discourse also influences – or disciplines – subjects through subtle but effective messages about what is acceptable, desirable or normal behaviour,³⁷ and thereby “limits and frames the minds and bodies of individuals in accordance with its content.”³⁸ Therefore, Foucault argued that:

We must cease once and for all to describe the effects of power in negative terms: it 'excludes', it 'represses', it 'censors', it 'abstracts', it 'masks', it conceals'. In fact,

³³ Bourdieu, *Language and Symbolic Power*, 127.

³⁴ *Ibid.*, 170.

³⁵ Orwell, *Nineteen Eight-Four*, 32.

³⁶ Nielsen, *Foucault, Douglas, Fanon, and Scotus*, 17.

³⁷ Duncan, “Law’s Sexual Discipline,” 327.

³⁸ Bennet, *Cuts and Criminality*, 19.

power produces; it produces reality; it produces domains of objects and rituals of truth.³⁹

Thus, the power of legal discourse should not be perceived only as a repressive force that is operated by the powerful against the powerless; such discourse also produces these relations and identities, and degrees of power are also exercised upon it by those whom it constitutes as its subjects. A critical discourse analysis of the law therefore entails consideration of the variety of power dynamics that both contribute to law's production and which it, intentionally or unintentionally, reproduces. This can be achieved through analysis of the governmentality of the law, i.e. by paying attention to *how* law is used as a technique of control and influence.

The production of legal texts is bound by rules regulating the processes by which law may be written and by whom, and who may interpret it and with what degree of discretion. Such rules constrain the shape of legal discourse and exclude many actors, ideas and forms of expression from its domain. This exclusion is described by Goodrich as a means of safeguarding the authority of legal discourse over its mystified subjects.⁴⁰ As the complex language of legal texts functions to deny the majority of the population access to legal meanings, legal knowledge is entrusted to a highly-trained, elite minority to whom the rest must defer.⁴¹ There is therefore a distinct power dynamic at play in how the languages of the law and the laws of the legal language⁴² – including those exercised within parliament – seek to authoritatively interpret and diagnose certain social phenomena, and to marginalise alternative interpretations and diagnoses.⁴³

In confluence with viewing subjects as both acting and acted on, Vanderbeck and Johnson describe parliamentary debates as “important platforms from which public opinion on key social issues is both shaped and reflected.”⁴⁴ To fully appreciate this, it is necessary to take account of

³⁹ Foucault, *Discipline and Punish*, 194.

⁴⁰ Goodrich, *Legal Discourse*, 183.

⁴¹ *Ibid.*, 87.

⁴² Stone, Wall and Douzinas, “Introduction,” 5.

⁴³ Smart, *Law, Crime and Sexuality*, 4. See also Bourdieu, *Language and Symbolic Power*, 138.

⁴⁴ Vanderbeck and Johnson, “If a Charge was Brought,” 655.

the distinct position of parliamentary discourse within society. The notion of democratic representation is central to the perceived authority of parliament to create laws and thus to the perceived authority of the laws themselves. The credibility and efficacy of parliamentary discourse is therefore reliant not only on its internal logic, but also on its intertextual and interdiscursive coherence. Parliamentarians – and especially MPs who hope to be re-elected – are under pressure to respond to a variety of other texts within their speeches, potentially including letters from their constituents, institutional documents, committee reports, newspaper articles and other speeches made by their peers. Such speech must, to some extent, engage with and respond to the demands of these texts in order to be seen as a relevant and persuasive contribution to the discourse. Consequently, critical discourse analysis of such speech should be attentive to intertextual references and deferences so as to trace the circulation of ideas and economies of power.

Reflexivity

If all texts are viewed as more or less strategic insofar as they construct a particular narrative in order to pursue a particular objective, then a high level of methodological reflexivity is required from the critical discourse analyst. The concept of interdiscursivity demands that a researcher be conscious of the constructive, rather than descriptive, project that they engage in. Even the initial task of defining the research topic as a cogent, coherent and ‘researchable’ object⁴⁵ can be seen as an act of construction that is as much shaped by social, political, institutional and personal contexts as the texts that are to be studied. Thus, not only does the study of the discourse become a part of that discourse (when an academic ‘contributes to the field’), but the discourse that the study becomes a part of may be uniquely demarcated by the study itself.

Additionally, a Foucauldian appreciation of plurality and rejection of singular truths and metanarratives requires a certain level of modesty from a researcher in terms of their ambitions and expectations: instead of discovering *the truth*, they might hope to establish a convincing

⁴⁵ Fairclough, *Critical Discourse Analysis*, 5.

perspective,⁴⁶ and instead of finding *the answer* they can only hope to construct an answer that is deemed valid within their society's current standards of knowledge production. Thus, a genealogical project does not seek a timeless truth, but amounts to a historical examination that is consciously shaped by the particular concerns of the present and, indeed, the particular concerns of the researcher. While I might aspire to the ideal of producing an objective and dispassionate genealogy, it perhaps goes without saying that this thesis is shaped not only by the resources available to me and my intellectual limitations, but also by my political leanings. It would be dishonest for me to claim to be neutral on matters such as racial hatred and to be unmoved by the texts that I read on such issues. However, viewing the researcher's activities as constructive rather than archaeological, as particular rather than universal and as political rather than objective does not render them invaluable or impotent. Nor does labelling this study as critical signal that it is a project of 'trashing' in the tradition of US critical legal studies;⁴⁷ critical is not taken as synonymous with rejection. Critical understandings of legal discourses as composed of contradictions and partialities need not deny the capacity of such discourses to produce substantive effects, and the same might be hoped for the critical academic text.

Practical methods

According to Kaefer, Roper and Sinha, "qualitative studies often lack a detailed account of data collection procedures, steps involved in the analysis process, and how those lead to specific results and conclusions."⁴⁸ This section aims to provide such detail.

⁴⁶ Foucault, "Nietzsche, Genealogy and History," 90.

⁴⁷ Stone, Wall and Douzinas, "Introduction," 5.

⁴⁸ Kaefer, Roper and Sinha, "Software-Assisted Qualitative Content Analysis," 14.

Data collection

Legislation and the precise form that it takes is debated in parliament prior to its enactment. As noted above, these debates provide rich data on how legislation was justified and contested by those who had the power to propose, amend, obstruct and pass it into law, and thus provides a snapshot of what was deemed problematic and persuasive at particular moments. Parliamentary Hansard is also a convenient source of data as it is produced to a thorough and consistent standard and is freely available online. However, transcribed discourse will always be an incomplete representation of a spoken debate. In its performance, a spoken discourse contains many elements that are not captured within a transcription, including gestures, facial expressions, eye contact, intonation and the volume and speed of delivery.⁴⁹ For the purposes of this study, though, the words alone are likely to convey sufficient meaning, as the data is primarily of interest due to the ideas about values and identities that were communicated, rather than the oratorical techniques that made the delivery of such ideas more or less effective.

Relevant Hansard text has been collected from debates preceding the enactment of six acts that have shaped the current stirring up offences. These are:

- the Public Order Act 1936, which introduced an offence of using threatening, abusive or insulting conduct that is conducive to a breach of the peace;
- the Race Relations Act 1965, which introduced the offence of stirring up racial hatred;
- the Race Relations Act 1976, which incorporated the racial hatred offence within the Public Order Act 1936 and amended it to remove the need to prove intent;
- the Public Order Act 1986, which reformulated the stirring up racial hatred offence;
- the Racial and Religious Hatred Act 2006, which amended the Public Order Act 1986 to include acts intended to stir up religious hatred;
- the Criminal Justice and Immigration Act 2008, which amended the Public Order Act 1986 to include acts intended to stir up hatred on the grounds of sexual orientation.

⁴⁹ Van Dijk, *Prejudice in Discourse*, 5.

Attention has also been paid to debates where changes to the offences were proposed but were unsuccessful, such as attempts to include an offence of stirring up religious hatred in the Criminal Justice and Public Order Act 1994, the Anti-Terrorism and Security Act 2001, and the Serious Organised Crime and Police Act 2005. The failed attempts to introduce reforms in these acts are as illustrative of contemporary attitudes and approaches towards a prohibition on stirring up religious hatred as the eventual enactment of these offences.

The Hansard text has been selected and captured from three different online platforms. Debates in the House of Commons and the House of Lords up to the year 2005 can be easily searched and accessed via <http://parlipapers.proquest.com>. The entry of key terms, making use of Boolean operators and wildcard characters, and the selection of a date range in the platform's advanced search tool produces a list of debates. The text of each debate can be opened and a browser search function (ctrl + f) can then be used to identify how frequently the search terms occur in each debate and whether they are used in a relevant context. For example, the term 'racial hatred' occurs frequently within debates on various colonies, which needed to be screened out. Where a debate is held to be relevant, all or sections of it were copied into an MS Word document and saved in Rich Text Format so that it could then be imported into the coding software (see below).

Debates occurring after 2005 were sourced using the advanced search function provided by www.theyworkforyou.com. While the debates can be accessed and screened on this platform, it does not provide accurate Hansard column numbers, which are required for proper referencing. The platform does, however, provide a link to the Hansard text on www.parliament.co.uk. This site presents the text of the debates with clear column indicators, but does not provide an effective text search function, requiring the two platforms to be used in tandem. As with earlier debates, this text was then copied into an MS Word document and imported into the coding software.

Qualitative content analysis (QCA)

A quantitative analysis of a discourse assesses the frequency and/or distribution of certain words and phrases within a text or series of texts. While this enables the production of statistics and ‘concrete’ findings, such a purely quantitative approach cannot provide sufficient sensitivity to nuance and meaning to meet the objectives of this project. However, as Philipp Mayring notes, quantitative and qualitative methodologies need not be opposed.⁵⁰ Through coding and text searches, textual data can be viewed quantitatively in order to highlight certain thematic condensations or patterns, and thus to identify excerpts for deeper qualitative comparison and analysis. Therefore, while quantitative approaches cannot replace the need for all of the selected data to be read and coded manually, the production of quantifiable data through coding enables targeted data retrieval that would not otherwise be possible across such a quantity of texts. Furthermore, manual coding – i.e. attributing excerpts of text to certain categories – enables unexpected contributions and unusual ways of saying things to be captured and compared.

It is also possible to combine deductive and inductive approaches.⁵¹ A deductive approach requires the prior formulation of research objectives and clear ideas about the themes and concepts that will need to be investigated in order to fulfil them. Coding categories are therefore predetermined and eligible units of text are systematically identified. Such an approach enables the development of a coding scheme that is carefully tailored to meet the research objectives, but that offers little flexibility in terms of responsiveness to unanticipated factors that emerge as significant during the research process.

With an inductive approach, which is often used as part of a grounded theory strategy, categories are not predetermined but are formulated as they occur to the analyst while they read over the source materials. Therefore, the categories are not targeted towards testing a certain hypothesis or meeting certain objectives, but are composed in response to the texts themselves. A

⁵⁰ Mayring, “Qualitative Content Analysis,” 7-8.

⁵¹ Kaefer, Roper and Sinha, “Software-Assisted Qualitative Content Analysis,” 10.

purely inductive approach would not be appropriate for pursuing the specific research objectives of this project. However, it may be beneficial to allow scope for inductive development of the coding taxonomy to ameliorate the lack of flexibility that would be imposed by a purely deductive approach.

Such a combination of approaches can be incorporated within the methodological framework of qualitative content analysis (QCA). A core aspect that distinguishes QCA from other methodological frameworks is the combination of flexibility, both in terms of tailoring the research design to the specific research question and adapting it in response to unanticipated findings, and rigour, whereby any adjustments to the research design must be tested and applied systematically to the entire source materials.⁵² Conducting a QCA research project is thus a dialectical process and can be described as following the pattern of a ‘hermeneutical spiral.’⁵³ Here, a researcher enters the project with certain knowledge of the topic and expectations of the text. As the text is read and analysed, the researcher modifies their preconceptions, and in turn modifies their approach to analysing the text. Each time the approach to analysing is modified, the researcher must start their analysis over so that the same approach is applied to all of the source materials. While this spiral may be seen as an ideal way of synthesising deductive and inductive methods, it may not be practical where there are time pressures and a large quantity of text to be analysed, as in this project. Consequently, while this model was aspired to and implemented as far as possible, revisions to the methodology or the application of revisions to the entire corpus of source material were not always deemed to be practical, nor absolutely necessary for meeting the research objectives. In particular, as this study examines texts produced across eight decades, it would not necessarily have been appropriate or helpful to apply to the older texts an approach that had been modified in response to more recent texts.

⁵² Mayring, “Qualitative Content Analysis,” 39.

⁵³ *Ibid.*, 27.

The establishment of a category-based coding system is integral to QCA, as this facilitates systematic data processing and enhances the comparability of the results.⁵⁴ Once it had been established that this project would use a primarily, although not exclusively, deductive approach, a pilot study sampling texts from both ends of the time span and concerning different types of hatred was used to create an initial coding taxonomy. The following lists the initial, top-level coding categories and provides an indication of the sub-categories that they encompass:

- Speech (types of speech referred to, including form and content)
- Categories (different identity groups that are referred to, how they are perceived (e.g. vulnerable or dangerous) and how groups are compared)
- Enforcement (mentions of effective or ineffective enforcement, excessive or insufficient penalties)
- Evidence (types of evidence used by a speaker, such as anecdotal or statistical)
- Frames (whether an issue is framed as public or private)
- Ideological values (long list of values including democracy, diversity, equality, freedom of expression, freedom of religion, public order, security, etc.)
- Legal values (comments on the quality of law, e.g. legal certainty, coherence and proportionality)
- Other related laws (other laws referred to, including international treaties)
- Publicity (consideration of the effects of media publicity)
- Violence (references to different types of violence)

This taxonomy was modified as new themes or prominent sub-themes came to light during the analysis process. The purpose of the coding exercise, however, was not to produce beautifully organised quantitative data spanning the scores of texts analysed, but rather to assist with tracing certain threads within and between texts, and seeing how they overlap, diverge or are tangled up with one another. Indeed, due to the complexities of both the English language and the topics that

⁵⁴ Ibid., 40.

are being debated, the creation of neat and pristine data would be a construction far removed from the messy realities of speech and argumentation.

Qualitative discourse analysis software (QDAS)

This project has benefited enormously from software that has been developed to support qualitative discourse analysis (QDAS). The benefits of using such software can be summarised as follows:

- convenient storage of large volumes of data
- easy retrieval of specific data through search functions
- easy editing of coding taxonomy and decisions
- clarity through consistent formatting and visibility of data
- transparency through recording of actions
- fast and reliable quantitative analysis

While the advantages are largely uncontested, the potential disadvantages and risks of using QDAS warrant deeper consideration. Firstly, there may be some practical downsides to QDAS. Some of the software packages that are available are very expensive and some are very complex, potentially taking a long time to master.⁵⁵ However, the time needed to master coding by computer is likely to be no longer than that needed to master manual coding, while the vastly reduced time needed to code and retrieve the data unequivocally tips the scales in favour of using QDAS.

A number of free software options were available at the start of this project, including QDA Miner Lite, QCAmap, Coding Analysis Toolkit (CAT) and Aquad. In addition to the financial benefits of such options, the ease of accessing free software means that they can all be tested and explored in order to determine which is best suited to the study and the researcher. For this study, these free options and temporary free access to Nvivo were trialled and assessed

⁵⁵ Kaefer, Roper and Sinha, “Software-Assisted Qualitative Content Analysis,” 5.

according to their general user-friendliness, ability to accommodate a flexible coding taxonomy, ease of importing and coding data, provision of useful tools for searching and comparing data, and level of user support available. In light of these criteria, Nvivo was found to be the most usable and useful software. As a student license is also affordable, Nvivo was selected.

Non-technical challenges in using QDAS may stem from the ways in which using such software could affect the research process and the researcher's interaction with the data. There is the risk that "the relative ease of software-assisted coding can reduce critical reading and reflection,"⁵⁶ Furthermore, the software can become a distraction for the researcher, potentially leading to 'coding fetishism.' As Lyn Richards explains, "when computers code so easily, the novice researcher is easily encouraged to keep coding, so the act of coding becomes an end in itself."⁵⁷ Overcoming this challenge requires the retention of a sharply instrumental view of coding as ancillary to the analysis and theorising that it enables. Additionally, Richards' observations suggest that the revision of the coding taxonomy should not only be towards greater complexity; the notion should be entertained that revisions towards greater simplicity may also be beneficial. To this end, any decisions on the development of the taxonomy should be based solely on whether a change could genuinely be helpful towards meeting the research objectives.

Conclusion

This chapter argues that undertaking a critical discourse analysis of relevant parliamentary debates can produce new insights into the particularities of the stirring up hatred offences. In particular, a genealogical study, executed with attention to the framing of problems, the attribution of blame and the advocacy of solutions, will enable continuities and divergences in parliamentary constructions of populations and identity characteristics to be traced. Regarding the practical

⁵⁶ Ibid.

⁵⁷ Richards, "Qualitative Computing," 269.

methods of constructing a genealogy, I have emphasised the need for both focus and flexibility to ensure that a large quantity of discursive data can be processed in an effective and meaningful way, as well as for a realistic and reflexive approach to what can be achieved through discourse analysis. I have argued that undertaking a primarily deductive coding of selected Hansard debates, with the use of qualitative discourse analysis software, will enable the effective processing of a large and varied volume of texts, from which it will be possible to draw out common themes as well as contradictions, dissensus and divergences. The findings from applying this methodology are discussed in the next five chapters.

Peace and Liberty

Public Order Act 1936

Public Order Act 1936, s 5:

Prohibition of offensive conduct conducive to breaches of the peace

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

Introduction

Why start a genealogy of the stirring up hatred offences with legislation enacted in 1936, almost three decades before the first offence of stirring up hatred was enacted? The Public Order Act 1936 (POA36) was the first nationwide public order legislation. As such, the parliamentary discourse preceding its enactment is of interest to this project for the ways in which public order, under which the stirring up hatred offences have always been positioned, was initially rendered intelligible, salient and a suitable topic of national legislation. Additionally, core elements of s 5 of the POA36 can be found in the current stirring up hatred offences: namely, “threatening, abusive or insulting words or behaviour” and the dual limbs of intent and likelihood. Beginning the genealogy with the POA36 therefore provides some background understanding of how these elements were argued to be appropriate (or inappropriate) means of addressing contemporary problems. Alongside analysis of this continuity, the textual discontinuity between s 5 of the

POA36 and the stirring up hatred provisions is also of interest, i.e. the shift from provoking a breach of the peace to stirring up hatred on particular grounds. Although the text of the POA36 referred to neither specific identity groups nor identity categories, the debates were saturated with processes of identification. Therefore, knowledge produced in this chapter of how the POA36 came to be phrased in generic terms provides a counterpoint for understanding why more specific language referring to hatred on particular grounds was enacted in later legislation.

Of course, context is key to understanding how such different legislative approaches came about. The POA36 was enacted in response to concerns about the rising power and militarisation of fascist organisations, particularly Sir Oswald Mosley's British Union of Fascists (BUF).¹ Various aspects of the BUF's activities – the wearing of political uniforms, processions designed to intimidate and offend particular communities, speeches designed to arouse hatred within the audience, the violent stewarding of meetings – were described by the Home Secretary as a threat to British liberties and the peace.² Violence against hecklers had been reported at BUF meetings around the country, including an especially brutal display of power at the Olympia stadium in London on 7th June 1934.³ Then, on 4th October 1936, Mosley's attempt to lead a BUF march through Jewish areas of the East End was confronted by a large anti-Fascist resistance that the police were unable to overcome. The resulting clashes between protesters and the police, known as the Battle of Cable Street, is remembered to this day as a popular victory against Fascism, but was presented by Mosely as an indictment of the Government's ability to maintain order.⁴ In his address at the state opening of parliament on 3rd November 1936, King Edward VIII announced the Public Order Bill, as follows :

My Ministers have come to the conclusion that the existing law requires amendment in order to deal more effectively with persons or organisations who provoke or cause

¹ Simon, "Memorandum by the Home Secretary."

² Simon, HC 16 Nov 1936, cols 1349-50.

³ Ibid., 5; Ewing and Gearty 2001, 281.

⁴ Bernays, HC 16 Nov 1936, col 1392.

disturbances of the public peace. A Bill for strengthening the law without interfering with legitimate freedom of speech or assembly will be submitted to you.⁵

Themes expressed here of peace and freedom – their representation as self-evident and neutral values and, consequently, the abstracted question of how the law should intervene to balance them – permeated parliamentary debates. The Bill progressed through parliament in less than a month and received royal assent on 18 December 1936.

In this chapter, discussion of liberty, peace and public order is structured around three discursive features that are outlined in Chapter Four: identifying problems, attributing blame and advocating solutions. Thus, the first section examines how parliamentarians discussing the Public Order Bill identified and communicated issues as problematic. Three problematised issues are considered here: risks of violence, antisemitism/racism and violations of liberty. The second section then examines where responsibility for the problem was placed. The question of culpability – how blame should be distributed between the speaker who incites and the listener who responds – was a major point of disagreement in the debates preceding the enactment of the POA36 (henceforth referred to as the POA36 debates). While the Bill was obviously heralded as a solution, the third section examines the different ideas that were expressed about whether the Bill would be effective and whether it should address racism explicitly.

The primary data analysed in this chapter consists of seven excerpts from the parliamentary Hansard that records the discussion and amendment of the Public Order Bill, from 4 November to 15 December 1936. While basic information on specific excerpts is provided in footnotes, further detail on this data is compiled within the ‘References’ section at the end of the thesis. Information in the footnotes is provided in the following format:

surname of the speaker, location (HC or HL) and date of the debate, Hansard column number.

⁵ HL 3 Nov 1936, col 4.

Where multiple references are listed in one footnote, ‘ibid.’ is used to cite material from the same debate as the preceding reference.

While the first national Public Order Act was enacted in 1936, the prospect of introducing such legislation had been discussed in government committees for some time. Additionally, a precedent for inchoate offences relating to potential breaches of the peace had been established in case law and local by-laws. These factors contributed to the ways in which parliamentarians (and others) made sense of the Public Order Bill in 1936 and therefore warrant a brief exposition here, prior to the three substantive sections of this chapter.

Case law

The 1882 case of *Beatty and Others v Gillbanks* considered appeals against charges of assembling “unlawfully and tumultuously ... in public thoroughfares ... to the disturbance of the public peace.”⁶ The appellants were leaders of the Salvation Army, whose regular processions had attracted opposition and antagonism from an organisation referred to as the Skeleton Army. The appellants were found to have been assembling for a lawful purpose and without intent to act unlawfully, and it was held that it was insufficient to bring charges on the basis that they knew that their assembly would be opposed and that such opposition would be likely to lead to a breach of the peace. Of particular interest, though, was Field J’s statement that a party *would* be liable if a breach of the peace by another party was the “natural consequence” of their actions, as “every one must be taken to intend the natural consequences of his own acts.”⁷ This was confirmed 20 years later in *Wise v Dunning*, where a Protestant lecturer was bound over for gestures and language that were highly insulting to Roman Catholics and were both calculated to and were successful in causing breaches of the peace.⁸ Additionally, at the time of the POA36 debates a

⁶ [1882] 9 QBD 308.

⁷ Ibid., 314.

⁸ [1902] 1 KB 167.

common law power for police officers to take action to “prevent apprehended breaches of the peace” had recently been affirmed in the cases of *Thomas v Sawkins*⁹ and *Duncan v Jones*.¹⁰

In addition to establishing a legal precedent for prohibiting insulting speech that would naturally lead to breaches of the peace, an important – and often overlooked – distinction between incitement and provocation was established in *Wise v Dunning*:

The appellant did not at that meeting commit any breach of the peace, nor incite his supporters to do so, but by his language above mentioned he in fact provoked other persons present to do so. At this meeting the appellant asked his own supporters not to assault any one.¹¹

Thus, incitement was understood as an attempt to induce supporters to commit certain acts, while provocation was understood as an attempt to induce retaliation from an opposition. While this distinction was not uniformly upheld throughout this case, it is useful for analysing how the problem was framed in the POA36 debates.

Local by-laws

Charges in *Wise v Dunning* had been brought under s 149 of the local Liverpool Improvement Act 1842, which established that it was an offence to “use any threatening, abusive, or insulting Words or Behaviour with Intent to provoke a Breach of the Peace, or whereby a Breach of the Peace may be occasioned.” This provision was identical to s 54(13) of the Metropolitan Police Act 1839, which was identified as the precursor of s 5 of the POA36.¹² Indeed, s 5 of the POA36 differs only in that the word “may” has been changed for “is likely to.” Section 5 of the POA36 was therefore framed as introducing a common standard in place of local by-laws and increasing the penalties

⁹ [1935] 2 KB 249.

¹⁰ [1936] 1 KB 218.

¹¹ *Ibid.*, 169.

¹² Somervell, HC 16 Nov 1936, col 1430.

in recognition of the seriousness of contemporary disturbances.¹³ However, the question of why the Metropolitan Police Act had not been enforced against the BUF, asked by Conservative MP Robin Turton,¹⁴ was not answered.

Draft public order legislation

A Preservation of Public Order Bill was first drafted in 1921 and then redrafted in 1926. The 1926 Bill aimed to codify the common law on sedition, to define sedition and to introduce summary convictions for seditious offences. The broader motivation for the Bill was to address perceived risks posed by strikes and by Communist propaganda, especially that aimed at members of the armed forces.¹⁵ Of particular interest from the 1926 Bill is the definition of ‘seditious intention,’ which includes the intention to “promote feelings of ill-will and hostility between different classes of His Majesty’s Subjects in such manner as to endanger the peace, order or good government of any part of His Majesty’s dominions.”¹⁶ At the time, the 1926 Bill was not recommended for consideration in parliament as it was believed that, outside of an emergency situation, it would be too contentious to introduce legislation that could be seen as infringing on freedom of expression. Indeed, the Cabinet Committee on Public Order suggested that “the mere introduction of such a Bill might precipitate industrial crisis.”¹⁷ Instead, the Committee recommended that the draft be kept as a contingency that could be “brought forward if and when an emergency arises and offers a favourable opportunity for legislation.”¹⁸ While this might seem to suggest that the situation in

¹³ Simon, HC 16 Nov 1936, col 1362; Harris, *ibid.*, col 1378; Hamilton-Temple-Blackwood, HL 11 Dec 1936, col 747.

¹⁴ HC 16 Nov 1936, cols 1429-30.

¹⁵ See Cabinet Public Order Committee, “Report.” The latter problem was addressed by the Incitement to Disaffection Act 1934; the former problem, while not cited as a justification in parliament, was addressed by the POA36, as demonstrated by its use to arrest miners and break a strike at Harworth Colliery shortly after its enactment (Strauss, HC 15 Dec 1937, col 1240).

¹⁶ Clause 2(2)(d).

¹⁷ Cabinet Public Order Committee, “Report,” 399.

¹⁸ Cabinet, “Conclusions,” 221.

1936 constituted such an emergency, the content of the POA36 was quite different and made no mention of sedition. Indeed, s 5, which prohibits conduct conducive to a breach of the peace, refers to neither sedition nor the promotion of ill-will or hostility.¹⁹ By rejecting the language of sedition, the POA36 perhaps framed public order as more about the protection of ‘the public’ and less about the protection of the government. This fits with Foucault’s assertion that coercive measures increasingly needed to be justified by a biopolitical rationale, i.e. as for the wellbeing of the population.²⁰ The change in language could therefore indicate an attempt to make what would become s 5 appear more politically neutral and benevolent, rather than representing a more fundamental shift in legislative intent.

The other provisions of the POA36 include: a prohibition on wearing political uniforms (s 1), a prohibition on quasi-military organisations (s 2), police powers to impose conditions on processions in order to preserve public order (s 3) and a prohibition on offensive weapons at public meetings and processions (s 4). Additionally, s 6 added powers to s 1 of the Public Meeting Act 1908, so that a police officer could require someone to provide their name and address if they were acting in a “disorderly manner for the purpose of preventing the transaction of the business for which the meeting was called.”²¹ This provision was also viewed by the Conservative Government as desirable in 1926, suggesting that the 1936 Bill provided a long-awaited opportunity for its introduction.

¹⁹ Curiously, Home Secretary John Simon did not mention the prohibition on acts conducive to a breach of the peace in his summary of the legislation to the Cabinet. Simon, “Public Order Bill.”

²⁰ Foucault, *History of Sexuality*, 137.

²¹ There was some confusion between s 5 and s 6 in parliamentary debates, with discussion of the former often turning to the conduct of audience members at political meetings.

The problem

From its title, we might infer that the Public Order Act was enacted to address disruptions to public order. However, a definition of public order was not provided within the Act itself, nor explicitly within the speeches that introduced it to parliament. Overall, the value and desirability of public order was not contested and was assumed to be well-established by virtue of its use in common law and in s 54(13) of the Metropolitan Police Act 1839 (even though in the latter a breach of the peace was originally considered to mean an assault rather than a larger scale commotion).²² However, the banning of political uniforms, which could be said to make members of the public more ‘orderly,’ suggests that not all forms of order were seen as equal. Similarly, what amounted to a breach of the peace was not clearly established.²³

For the most part, the “the evils which the Bill seeks to correct”²⁴ were located in the East End of London, where Labour Co-operative MP Dan Chater stated that “within the last year the conditions have entirely changed.”²⁵ Independent Labour Party (ILP) MP Campbell Stephen also described “special circumstances... in view of the terror in the East End for which the British Union of Fascists have been responsible.”²⁶ Therefore, in addition to gleaning insight into the language of the Bill, this section also seeks to understand what it was about the activities of the BUF and recent events in the East End that were found to warrant a legislative response.

²² Select Committee on Metropolitan Police Officers, “Report from the Select Committee,” 46.

²³ The Law Commission argued in 1983 that the concept remained too vague for use within a statutory offence that carries heavy penalties (Law Commission, “Offences Relating to Public Order,” 46). See also Williams, *Keeping the Peace*, 116; Stone, “Breach of the Peace.”

²⁴ Simon, HC 16 Nov 1936, col 1349.

²⁵ HC 16 Nov 1936, col 1384.

²⁶ HC 16 Nov 1936, col 1393.

Risks of violence

Within the parliamentary debates, a breach of the peace was predominantly presented as a disturbance that erupted at a particular event. This specificity and immediacy is suggested by the use of the words ‘occasioned’ and ‘provoke’ within s 5, and it is indeed provocation rather than incitement that is foregrounded in this framing. Referring to a proposed amendment to add “calculated to excite racial or religious prejudice” to clause 5, Labour Party MP Sir Richard Stafford Cripps argued that “intent to provoke a breach of the peace” referred only to such immediate outbreaks of disorder:

Suppose some persons addressed a meeting at which no Jews were present and attempted to excite feeling against the Jews. That would not lead to any liability to a breach of the peace at the meeting, no Jews being there to resist any such attack. ... the language ... is not used with intent to provoke a breach of the peace at the meeting, but with the intent that people shall go out and do something, perhaps on the next day against the Jews. That might well come within the words of the Amendment, but I do not think it could come within the words “with intent to provoke a breach of the peace.”²⁷

Here, it was suggested that for a person to be charged with intending to provoke a breach of the peace, disorder must be likely to erupt in front of the speaker. This was the view taken by a police inspector shortly after the enactment of the POA36, in relation to a Fascist speaker whose crowd was mostly comprised of Fascist sympathisers. As no Jews appeared to be present, the inspector decided that arresting the speaker would have been more likely to initiate disorder than allowing the meeting to proceed (although the inspector was later reprimanded for this approach).²⁸ It was therefore possible to interpret s 5 as permitting flagrant antisemitic speech – and even incitement to violence – provided that no Jews or anti-Fascists were present to be provoked.²⁹

²⁷ HC 26 Nov 1936, col2 648 and 649. There was some confusion in this discussion as to whether the amendment would supplement or replace the breach of the peace criteria.

²⁸ Channing, *Police and Public Order Law*, 142-3. Cf. Chapter Six, fn40.

²⁹ *Ibid.*, 151.

For others, it was the longer-term risk to the peace that the law should address, moving beyond the common law duty to intervene in instances where a breach of the peace was anticipated there and then:

While the persons at such meetings may be in agreement with the views thus expressed, and while there may be no breaches of the peace at those meetings, language of that kind may have the effect of sending men and women into the streets to create very serious disorder.³⁰

The issue here is the incitement to hatred and violence of like-minded individuals, rather than the provocation of retaliation against the speaker. This suggests a broader view of ‘the peace’ that is not confined to the absence of violence at a particular event. For example, Labour MP James Henry Hall referred to “peace and amity” within certain areas,³¹ whereby peace is used to mean something more akin to good community relations. The confinement of such perspectives, for the most part, to the debate on the unsuccessful amendment on racial and religious prejudice indicates the extent to which the Bill prioritised outbreaks of disorder that were costly in terms of police resources,³² rather than forms of incitement to hatred and violence that might have longer-term consequences. This analysis is supported by the absence of language pertaining to disadvantage, discrimination, dignity or equality in the debates, except for a couple of instances where antisemitic narratives were expressly contested. Furthermore, there was no explicit mention of recent incidents of antisemitic violence that were likely to have been encouraged by Fascist

³⁰ Banfield, HC 26 Nov 1936, col 649. See also Chater: “I am convinced that this constant preaching night after night, this implanting of the idea in the minds of the people that practically all their troubles are due to the Jews who reside there, must sooner or later lead to an outbreak of disorder directed especially to the pillage and destruction of Jewish property” (HC 16 Nov 1936, col 1386); and Turton: “The trouble in the side streets of Whitechapel is caused not by people dressed in uniform, but by the hooligans who are prompted by what the Fascists tell them to hurl abuse at young Jews” (ibid., col 1428).

³¹ HC 26 Nov 1936, col 644.

³² Chater, HC 16 Nov 1936, col 1385; Beaumont, ibid., col 1448. The substance of the amendment is discussed on page 127.

diatribes, such as a raid on Jewish shops in the East End committed one week after the Battle of Cable Street (*Glasgow Herald*, 12 October 1936).

Short of outbreaks of violence, the arousal of fear of violence was also treated as problematic. In these positionings, Jews were more clearly framed as victims, rather than as potentially violent reactants. Labour MP Daniel Frankel, who was himself a Jewish resident of the East End, was among those who emphasised the fear that had been created by Fascist parades and provocations, and situated this within the wider European context,

is the House surprised if the Jews are afraid? They know what has occurred to their race in Germany, and they know that the Fascist movement there started more or less as it started in this country. It is no use saying it can never happen in England. You cannot say that to people whose relatives and those near to them have been tortured and persecuted as they have been and are still being in Germany. The Jews in the East End of London are only one generation removed from those who were persecuted in Russia, Hungary and Poland. They are the sons and daughters, and in many cases the same people.³³

Similarly, during the second reading of the Bill in the House of Commons, Home Secretary Sir John Simon emphasised that the arousal of “reasonable terror in the minds of ordinary people” should carry more weight than the purported intentions of a speaker.³⁴ This approach again suggests that public order and peace can be understood as more than just the absence of violence:

³³ HC 4 Nov 1936, col 164. See also Turton: “I know a street in Whitechapel where there is a Jewish family who have not been out for three weeks, because the remainder of the street is inhabited by men who have lately left prison and who are now adherents of the Fascist party” (HC 16 Nov 1936, col 1340); Morrison: “when a crowd of these uniformed people are marching with military precision through that East End of London shouting, “Down with the dirty Jews,” every Jew down there knows that it is a source of danger to him. Every Jew instinctively feels the possibility of a pogrom” (ibid., col 1460); and Isaacs: “For centuries the shadow of the pogrom rested on their daily lives ... These age-old inborn fears die slowly, but they were almost extinct from long lack of fuel. Then comes this new movement and it is just those dying embers that these recent demonstrations were designed to rekindle and to exploit” (HL 11 Dec 1936, cols 754-5).

³⁴ Also “the terror in the East End” (Stephen, HC 16 Nov 1936, col 1394).

it is not only actual physical security, but also the *feeling* of security. There is an obvious – although widely disputed – connection between the likelihood of violence and the experience of fear, but there is a temporal disparity in the way that these two phenomena were referred to in the debates. While fear was discussed as something that lingers – “fears die slowly”³⁵ – a breach of the peace was predominantly described as something that would be confined to a particular event, the likelihood of which a police officer would have to determine in the moment. Thus, although the generation of fear within sectors of the public was cited as a justification for the Bill,³⁶ this is not directly addressed in the text of the resulting legislation.

Antisemitism and racism

While the immediate risk of outbreaks of violence in response to a speech or demonstration was presented as the primary problem to which the Bill responded, antisemitism and racism were also presented as problematic in and of themselves. In these framings of the problem, more emphasis was placed on the content of the speech than on how it was reacted to. For example, Communist MP Willie Gallacher sought to distinguish the activities of the Fascists from commonplace heckling:

The case is different, however, when an organisation comes out with deliberate and calculated provocation directed against any particular section of the community on grounds of religion or race.³⁷

Thus, it was not just any provocation that was presented as problematic – as perhaps some degree of provocation is integral to any politics³⁸ – but specifically provocation that deliberately targets

³⁵ Isaacs, HL 11 Dec 1936, cols 755.

³⁶ “if there is fear of public disorder it is important that necessary and adequate powers should be conferred on the police” (Somervell, HC 16 Nov 1936, col 1471).

³⁷ HC 4 Nov 1936, col 209.

³⁸ As stated by Kingsley Griffith, “You are not entitled to legislate against an expression of opinion just because it is provocative” (HC 16 Nov 1936, col 1411).

sections of the community on the basis of their race or religion. During the second reading of the Bill, Labour MP J. R. Clynes placed further emphasis on the specificity of racist speech:

Racial abuse is perhaps the most provoking and improper of all. It arouses passions deeper than class or party criticism can, no matter how sharp that criticism may be... If I may take my own case to illustrate it further, I would remain unmoved, and I think I usually do, if I am denounced for being a Socialist, but if I were denounced for being an Irishman, I would regard that as an attack upon my parentage and not upon my politics.³⁹

Racism was thus considered by some to be beyond the ordinary and acceptable aggravations of political debate, and thus as so exceptionally provocative as to warrant a legislative response. As Jews were consistently characterised as a race throughout the POA36 debates, the term ‘racial abuse’ was certainly intended to encompass antisemitism.

Violations of liberty

Liberty was the most prominent – as well as perhaps the most abstract – concern raised by Lords and MPs during the debates preceding the enactment of the POA36. Indeed, MPs broadly preferred the protection of liberty as a justification for the Bill over the protection or obstruction of any particular group of people or any particular activities. For example, in his introduction the Home Secretary stated that the topic of the Bill “is a very important topic, for it touches our essential liberties” and he described the Bill as seeking to address behaviours that “are threatening to undermine essential British liberties.”⁴⁰ However, while the value of liberty was uncontested, speakers had different ideas about what it meant: whether liberty is freedom from state interference

³⁹ HC 16 Nov 1936, col 1370.

⁴⁰ HC, 16 Nov 1936, cols 1349 and 1350. See also Lovat-Fraser: “We are all most anxious at all times to promote liberty and freedom and we are rightly jealous of any attempt to lessen the freedom that we enjoy, but that will not happen under this Bill. It is introduced to promote freedom, and it will have that result” (HC 16 Nov 1936, col 1433).

or whether it is something facilitated by the state; whether it is present at all times unless it is violated or whether “Liberty only arises when people are saying something which is very provocative.”⁴¹ There were also different ideas about whether the liberty at risk was a collective good or an individual right. In other words, the subject of protection was sometimes presented as the political order, because “Liberty can only exist in a society in which law and order prevail,”⁴² and at other times as those individuals whose particular liberties were deemed to be at risk.

The high frequency with which liberty was referred to in the debates reflects the fact that it was cited as a core value in arguments both justifying and objecting to the Bill, either outright or in part. A collective framing of liberty is evident within the Home Secretary’s opening to the second reading and is clearly expressed within the text of s 2 on the prohibition of quasi-military organisations, where the subject of protection is ‘the Crown.’ In his discussion of this clause, Simon referred to parliament as “this home of liberty,” suggesting that threats to the contemporary political institutional arrangement were tantamount to threats against liberty, and thereby, in Foucauldian terms, connecting the protection of the sovereign with the wellbeing of the population.⁴³ In relation to speech, the Attorney General, Sir Donald Somervell, also demonstrated an institutional concept of liberty in his closure of the second reading:

Law and order constitute the basis upon which society and particularly democratic society – the expression of free opinion and the power and the right of criticising the Government – rest and the methods against which this Bill is aimed are methods calculated to disturb the peace and striking at the foundation of true liberty.⁴⁴

⁴¹ Kingsley Griffith, HC 16 Nov 1936, col 1411.

⁴² Somervell, HC 16 Nov 1936, col 1472. See also, “in a care for our liberties and in a care for public order, ... one very largely depends upon the other” (Clynes, HC 16 Nov 1936, cols 1368-9); “the maintenance of public order, which, after all, is the foundation of political liberty” (Bernays, *ibid.*, col 1391).

⁴³ HC 16 Nov 1936, col 1355.

⁴⁴ HC 16 Nov 1936, cols 1472-3.

Here, it is ‘democratic society’ and ‘true liberty’ which were to be protected, as though these were things that manifestly existed and were self-evidently recognisable. Such reification of abstract concepts appears to have been a technique for increasing their rhetorical capital, and thus for lending extra legitimacy to the argument. Additionally, the elevation of ‘law and order’ to the top of the hierarchy of values suggests that liberty is limited to that which does not infringe upon order. However, such abstract permutations bring us no closer to understanding what ‘order’ is, and thus where that line should be drawn.

Observations about other European states were made in several instances to emphasise that a reified notion of liberty as a collective good was at stake and that its survival relied on the resilience of the contemporary political order. For example, in his introduction to the second reading in the House of Lords, Lord Blackwood stated that:

The evils are not of great extent, but if we allow them to pass unchecked we have the example of many great countries before us to show that liberty is gradually whittled away and finally destroyed.⁴⁵

Examples were drawn from Germany, Spain, Russia, Italy and Greece to argue for the need to act preventatively to defend democracy and liberty against dictatorship. Thus it was claimed that stronger governance was required for the collective good:

You saw the position of the Social Democrats in Germany. They went on obstinately playing the democratic game when shots were being fired at the referee and when a powerful section of the spectators were determined that no game should be played at all. You cannot conduct a fair match when one side is playing with a ball and the other with bombs and, if democracy is to survive, it must be conducted according to definite and recognised rule.⁴⁶

⁴⁵ HL 11 Dec 1936, cols 748-9.

⁴⁶ Bernays, HC 16 Nov 1936, col 1388. See also Labour MP Ernest Thurtle: “I am prepared, the situation in the world being what it is and the situation of democracy being what it is, here and there to sacrifice a certain amount of liberty I have hitherto enjoyed in order to see that democratic government

Here, traditions of liberty, as embodied within democracy, are not only presented as compatible with enhanced state powers, but as dependent upon them. There was thus a notion that, in the face of serious threats, liberty and democracy may need to be restricted in order to be protected. It was along this line of reasoning that several parliamentarians expressed their support of the Bill with regret that such measures had become necessary.⁴⁷ Indeed, several speakers recognised the existence of a paradox that lies within the concepts of both liberty and democracy: as Conservative MP Vyvyan Adams phrased it, “liberty implies the paradox that there must be no license to attack freedom.”⁴⁸

Opponents of the Bill focused much more on notions of individual liberties. The main distinction between advocates and opponents of the Bill in this respect was the point at which they considered that the exercise of liberty becomes the ‘abuse of liberty’⁴⁹ or license.⁵⁰ For some, following J. S. Mill, freedom should be curtailed only when its exercise is directly harmful to others.⁵¹ For instance, Liberal MP Frank Kingsley Griffith stated:

is more firmly established in this country” (HC 16 Nov 1936, col 1435). Independent Labour MP Andrew MacLaren responded that this was “one of the most stupid fallacies I have ever heard” (ibid., col 1442).

⁴⁷ See Kingsley Griffith, HC 16 Nov 1936, col 1407; Snell, HL 11 Dec 1936, col 749; and Isaacs, ibid., col 751.

⁴⁸ HC 16 Nov 1936, col 1439. See also, Pritt: “After all, liberty consists in a sense of a series of minor restrictions on liberty” (HC 23 Nov 1936, col 76); and Simon: “The preservation and the exercise of our liberties depend, I think, largely on our willingness to accept necessary restraints for the purpose of safeguarding the essentials of freedom” (HC 16 Nov 1936, col 1368).

⁴⁹ See Labour MP Clynes: “When liberty of speech stretches to the length of insulting the dead and denouncing a race, it is time to curtail it” (HC 16 Nov 1936, col 1370); and Conservative MP Levy: “We are all very zealous about liberty, and we are endeavouring to stop the abuse of liberty” (HC 23 Nov 1936, col 97).

⁵⁰ See Labour MP Frankel: “freedom must not be translated into licence or into an expression of hatred or of arousing the worst desires in people” (HC 4 Nov 1936, col 164); Lord Advocate Cooper: “the proper method of approach is not to regard it as a Bill for curtailing the liberties of the subject, but as a Measure for vindicating the liberties and privileges of the ordinary law-abiding citizen against those who are taking an unreasonable and improperly exaggerated view of their rights” (HC 16 Nov 1936, col 1418-9); and Lord Snell: “the crude racial war, the drilled military conduct of political meetings is not liberty as we have understood it, but licence” (HL 11 Dec 1936, col 749).

⁵¹ See Chapter Two.

I think the only cases in which we are entitled to interfere are not the cases of people who are merely provocative, but the cases where their behaviour has reached such a point that a continuance of it will be a denial of liberty to other people. That is the only test.⁵²

Similarly, when the bill arrived in the House of Lords, the Marquess of Reading (Lord Isaacs) stated:

Those of us who sit upon these Benches are still impenitent believers in the liberty of the individual as the only basis of civilised society worthy of the name, and we should view jealously and with disfavour any attempt further to encroach upon that liberty. But we prefer to look upon this Bill less as restricting liberty than as repressing abuses of liberty... There is an old maxim known to the law that a man shall so use that which is his own as not to damage that which is another's. That is, perhaps, no bad test of the scope and basis of individual liberty. Liberty is not licence to make one's neighbour's life a burden to him or to disturb the public peace.⁵³

Although the identities of the individuals who would suffer from abuses of liberty were not specified, such justification on the basis of harms to individuals allows greater scope for the consideration of harms to minoritized groups than justifications that assume everyone's liberty is best served by the preservation of parliamentary democracy. References to individual liberties suggested that the activities of the Fascists had caused a disequilibrium that required legal redress for the benefit of those whose liberties had been especially endangered by Fascist excesses. For example, this notion of equality is evident in Kingsley Griffith's statement that "We do not mind if [political opinion] is expressed in vigorous language as long as each side allows that liberty which they claim for themselves."⁵⁴ Perhaps, then, a notion of equality is the key to understanding when liberty may be enhanced by constraint.

⁵² HC 16 Nov 1936, col 1411.

⁵³ HL 11 Dec 1936, col 752.

⁵⁴ See also Morrison: "It has, however, always been said that freedom of speech and of expression must take reasonable account of other people's freedom as well" (HC 16 Nov 1936, col 1454).

In the positions put forward in opposition to the Bill, it was argued that it was the very compromising of liberty in the name of its protection that would herald its destruction; but here it was the liberties of the individual rather than the liberty embodied in parliamentary democracy that was held to be sacrosanct. The state duty with regard to liberty was therefore represented as a negative duty not to restrict the freedom of the people. This opposition between the powers of the state and the freedom of the people was expressed particularly strongly in the House of Lords debates by Lord Phillimore:

After all, it is on the face of it unlikely that the Executive will be the best guardian of the liberty of the individual. The natural propensity of all Executives is to strengthen their own powers, not to protect the individual citizen.⁵⁵

The concern for freedom, then, is for those who would speak, rather than those who might be affected by that speech, or even those who might wish to speak back. Thus, the freedom to speak was not accompanied by any responsibility of the speaker in parliamentary arguments opposing the Bill. For example, Conservative MP Edward Turnour stated that “It would be an intolerable abuse of public liberty if people were not permitted to make speeches which showed either racial or religious prejudice.”⁵⁶ There is a distinction here that continues to be drawn upon by those who oppose hate speech legislation in the 21st century, and especially those who frame their objections as a defence of the First Amendment of the US Constitution: the distinction between what is said and how it is said. By placing the sole onus on the methods of communication, this distinction negates analysis of the effects of a speech, and liberty in this context is considered in isolation of issues such as power and equality.

⁵⁵ HL 11 Dec 1936, col 765.

⁵⁶ HC 26 Nov 1936, col 640.

Blame

Varied understandings of the problem that the Public Order Bill was to address unsurprisingly led to variations in how responsibility for the problem was assigned. In particular, whether it was speeches or reactions to them that were deemed to be the crux of the problem determined whether responsibility for public disorder was attributed to speakers or listeners. Additionally, where speeches were viewed as problematic, the distinction between problematising the content of the speech or the mode of its delivery determined whether blame was attributed to those producing certain content – i.e. Fascists – or those employing certain methods – i.e. any group that could be labelled ‘extremist.’ This section considers the construction of more or less ‘villainous’ identities in the attribution of responsibility for purported risks to public order.

Fascism: a foreign aberration

In order to justify the proposed legislation, Fascism needed to be presented not only as a threat to public order but also as sufficiently novel and urgent to warrant new legislation. This was achieved in two ways: by othering Fascist ideology as foreign and by contrasting Fascist antisemitism with a harmonious multicultural norm. These two methods leveraged negative attitudes towards foreignness through the externalisation of blame on the one hand, and, concurrently, pride in a fantasy of national tolerance and civility on the other.⁵⁷

Representations of Fascism as foreign, “alien,”⁵⁸ “un-British”⁵⁹ and “anti-British”⁶⁰ were aided by the recentness of its emergence on the British political scene. A search of the Millbank

⁵⁷ See the Home Secretary, John Simon: “the grand characteristic of British political life is its tolerance. All the things which we prize—freedom of opinion, freedom of speech and freedom of meeting—are all based on our conception of political and civic toleration” (HC 16 Nov 1936, col 1350).

⁵⁸ Clynnnes, HC 16 Nov 1936, col 1369; Adams, *ibid.*, col 1439.

⁵⁹ Adams, HC 16 Nov 1936, col 1440.

⁶⁰ Strabolgi, HL 15 Dec 1936, col 885.

database confirms that the terms ‘Fascist’ and ‘Fascism’ did not enter into parliamentary debates until 1923, when the fringe Fascisti movement began to emerge in London.⁶¹ Additionally, these terms were spoken fewer than 20 times a year until 1934, the year of the turbulent BUF meeting at Olympia. Comparisons with activities abroad also provided a means of associating Fascism with foreign practices. Thus, Liberal MP Robert Bernays explained during the second reading of the Bill in the House of Commons, that:

The British Fascists are adopting exactly the same tactics as the Nazis in Germany. The Nazis went out like the British Fascists with their banners and their uniforms and their route marches deliberately to provoke the Communists to riot, and, like the British Fascists, when they had succeeded in doing it and turned the streets into a shambles, they mocked the Central Government because they were unable to maintain peace, and in the end they were able to pose as the only party that could restore the order that they themselves had destroyed.⁶²

Antisemitism was also identified – and thereby externalised – as an element of these destructive foreign politics. For example, Labour MP James Henry Hall argued that:

It was not until the Fascists discovered that they had no message for the British people and were unable to get a response from the British people, that they copied the methods of foreign political forces, taking from them the worst features, with the idea of finding a rallying ground for their own political philosophy. The new stunt was not based on real enmity or animosity against the Jewish people; it was assimilated anger, assimilated detestation, developed purely with the object of creating adherents to their cause.⁶³

⁶¹ On the Fascisti movement, see Ewing and Gearty, *Struggle for Civil Liberties*, 276.

⁶² HC 16 Nov 1936, col 1392. See also Kingsley Griffith: “The black shirts were straining the existing letter of the law in the hope that other people would thereby be encouraged to break it and on them the blame would fall” (HC 16 Nov 1936, col 1407).

⁶³ HC 26 Nov 1936, cols 644-5.

Other MPs also referred to antisemitism as a cynical tactic rather than a core ideology of the BUF, drawing on the contrast between Mosley's comments denouncing antisemitism in 1933 and the deeply antisemitic tenor of his later articles in BUF publication *The Blackshirt*.⁶⁴

By ascribing antisemitism and intolerance to “foreign doctrines,”⁶⁵ members of parliament glossed over any homegrown antisemitism and xenophobia, creating a narrative where British tolerance and civility was under threat from foreign savagery. In this way, innocent and deviant identities were clearly delineated along racial lines. This moral distinction between ‘them’ and ‘us’ is somewhat ironic considering that it is premised on the same antipathy towards foreignness that Mosley used to stir up hatred against Jews, whom he described as ‘foreign’ and ‘anti-British.’⁶⁶ Additionally, MPs seem to have overstated the extent to which Jewish and Gentile communities had previously coexisted harmoniously in the East End in order to strengthen their case for legislating against purportedly aberrant Fascist activities.⁶⁷ For example, the image of “perfect harmony”⁶⁸ and of communities that “lived in peace and amity together”⁶⁹ consigned attacks on Jews and Jewish businesses during World War One to Orwellian memory holes.⁷⁰ In particular, a large disturbance broke out in Bethnal Green in September 1917. Antisemitism was also evident in parliament at the start of the 20th century, with the Aliens Act 1905 enacted to restrict the immigration of impoverished Jews who were fleeing persecution in Eastern Europe.⁷¹ The Aliens Restriction Act 1914 and the Aliens Restriction (Amendment) Act 1919 also passed

⁶⁴ Morrison, HC 16 Nov 1936, col 1463; Isaacs, HL 11 Dec 1936, col 754. See also Ewing and Gearty, *Struggle for Civil Liberties*, 278.

⁶⁵ Simon, HC 16 Nov 1936, col 1350.

⁶⁶ Mosley, *Fascism*.

⁶⁷ Lewis, *Illusions of Grandeur*, 91.

⁶⁸ Turton, HC 16 Nov 1936, col 1430.

⁶⁹ Hall, HC 26 Nov 1936, col 645.

⁷⁰ Such attacks were fuelled by beliefs that Jews were evading conscription while profiting from war-related business opportunities. Cesarani, “Embattled Minority,” 71.

⁷¹ Brustein, *Roots of Hate*, 149; Hepple, “Race Relations Acts,” 249; Herman, *An Unfortunate Coincidence*, 33. See also Anderson, *Us and Them?*, 37.

amid considerable expressions of antisemitism and xenophobia in parliament.⁷² However, the fantasy of a tolerant and civilised British society and the desire to feel proud and righteous was enough to overwrite such inconvenient counternarratives, enabling Fascism to be pilloried as both a new and an characteristically un-British threat.

“Whether of the Right or of the Left”

While presenting Fascists as new and exceptionally problematic troublemakers was expedient for many supporters of the Bill, others were less intent to single them out and less discriminate in their attribution of blame for public disorder. Certain activities and methods of organisation were denounced regardless of whether they were “of the Right or of the Left,” with Fascism and Communism viewed as equally problematic and often as equally foreign.⁷³ In particular, some Conservative MPs were less inclined to view the Fascists as exceptional as their own politics brought them into greater conflict with Communists. Thus, Vyvyan Adams presented it as a pleasing result that “we are going to take measures which will have the effect of destroying Fascism, and we shall incidentally and simultaneously damage the prospects of Communism at the same time.”⁷⁴ In the context of political meetings especially, Conservative MPs argued that it was Communist activities that should be suppressed. For example, Edward Fleming both played down the threat presented by Fascists, whom he described as recently defected Conservatives that he still considered as friends, and emphasised instead “what we suffer occasionally from the Communists in this country,” stating that “we must take care that they shall be regulated in every possible way.”⁷⁵ Additionally, Conservative MP Commander Bower described the violence he had

⁷² Defries, *Conservative Party Attitudes to Jews*, 85-7.

⁷³ Blackwood, HL 11 Dec 1936, cols 742-3. See also Simon, HC 16 Nov 1936, col 1349; Cazalet, HC 15 Dec 1936, cols 1257-8.

⁷⁴ HC 16 Nov 1936, col 1440.

⁷⁵ HC 4 Nov 1936, cols 190-1.

experienced from Labour supporters,⁷⁶ and Labour MP Herbert Morrison described problems he had encountered with Conservatives at his meetings,⁷⁷ indicating a broad political desire to legislate against general “organised rowdyism.” This phrase, which was used by four different speakers during the second reading of the Bill in the Commons, depoliticised the problem as an issue of behaviour rather than as related to the antisemitic content of BUF doctrine.

Communist MP Willie Gallacher responded to Fleming, first by describing the extent to which politicians from any political party might expect to face unruly audiences, and second by distinguishing the behaviour of the Fascists from this commonplace heckling: referring to provocation on grounds of religion or race, he argued that “It is not the right of public meetings that is at issue, but a question of deliberate provocation.”⁷⁸ This attention to provocation attends to the power dynamics at play. While Conservatives in power or seeking political power through election were concerned to protect themselves and their platforms from disruptive opposition, those who were more concerned with bringing change to the class order viewed such heckling and disruptions as a right of reply for those outside the political power structure. Indeed, it seems as though some Conservative MPs coveted the methods deployed by the BUF to staunchly defend their platform through the physical removal of hecklers.⁷⁹ Representations of those holding meetings as ‘victims’ replicated Mosley’s narrative: where Mosley argued that he was defending free speech through the aggressive stewarding of meetings, MPs argued that they would defend liberty and peace through enhanced police powers to apprehend disruptive audience members. As a Communist MP, such proclamations regarding free speech likely struck Gallacher as deeply hypocritical given the extent to which Communist meetings and activities had been subjected to rigorous surveillance and disruption by the Security Service and the Special Forces.⁸⁰

⁷⁶ HC 16 Nov 1936, col 1403.

⁷⁷ HC 16 Nov 1936, col 1455.

⁷⁸ HC 4 Nov 1936, col 209

⁷⁹ See Scaffardi, *Fire Under the Carpet*, 71.

⁸⁰ Ewing and Gearty, *Struggle for Civil Liberties*, 284-7.

The attribution of blame was therefore affected by whether the problem was viewed as certain kinds of speech and behaviour or certain reactions to it. For example, Conservative MP Michael Beaumont stated that “it takes two to make a row ... if one side offers provocation the other side has to take active measures to resent it before there is trouble.”⁸¹ Here, it seems as though the greater responsibility for any resultant conflict falls on the listener who is provoked rather than the speaker who provoked them. This was emphasised through Beaumont’s depiction of resentment as intentional; there is little notion here of the “natural consequences” of a speech described in *Beatty and Others v Gillbanks*. Beaumont referred mostly to ‘anti-Fascists’ as the instigators of disturbances, but left scope within this framing for representations of Jews as troublemakers rather than victims. While Conservative MP Commander Bower’s description of Jews as “Oriental races” who “find it necessary to assault and provoke the police”⁸² was not typical, Jews were consistently referred to as a distinct race throughout the debates. Bower went on to state that “We are, however, law-abiding citizens,”⁸³ creating a loaded division between ‘we’ who are good citizens and Jews who are not. This representation was directly countered by Gallacher: “An hon. Member talked about them being Orientals. They are British citizens, and as good British citizens as hon. Members opposite.”⁸⁴ There was therefore considerable tension between representations of Jews as foreign and as British, as victims and as problems, and between understandings of ‘British’ as exclusive or as inclusive of different races. Indeed, it seems that widespread dislike for Fascism and the easy characterisation of Fascists as corrupted by foreign influences brought more sympathy and protectiveness for Jews than if they had been under attack from political factions that were better established, less overtly disruptive and more widely seen as ‘British.’

⁸¹ HC 16 Nov 1936, col 1445.

⁸² HC 23 Nov 1936, col 68.

⁸³ *Ibid.*

⁸⁴ HC 23 Nov 1936, col 73.

Structural causes

ILP MP Andrew MacLaren was exceptional for his consideration of social disparity in his opposition to the Bill. He referred to the role of unemployment in the rise of Fascism as follows:

Bands of men on the Thames Embankment down and out, and no one looks at them. Along come the black shirts and they become a unity in the State. They are given a uniform. Men who know nothing about economics are suddenly lifted into a mass movement, and are given some force and dignity in the State. That is how these things are growing. From the gutters and destitution of the State are found the recruits for these armies.⁸⁵

Indeed, the idea that harsh economic conditions precipitated the rise of Fascism is widely accepted in later analysis of Hitler's ascendance. MacLaren's position thus suggested that liberty can be restricted by material conditions. Consequently, MacLaren argued that the Bill would be ineffective because it would not address the root causes of Fascism and public disturbances, stating that,

If the House is determined to keep democracy and liberty flourishing in this country of ours... I beg it not to make, by a device of this kind, perhaps the mistake which will put a strait-jacket on democracy, but rather to get back to the root problems that create the necessity for this superficial Bill. Make democracy clean, make it invincible, make it something worth boasting about by clearing out of society poverty, destitution, the maldistribution of wealth, the slowness of the machinery of government; make it a little more swift in giving expression to the popular will.⁸⁶

Thus, MacLaren argued that Fascism was a symptom of weak democracy and weak economic governance, and that it was a home-grown problem rather than a novel threat of foreign origins. Contrary to objections that the Bill represented an excessive interference by government, then, this socialist objection argued that the government was not intervening in the right ways.

⁸⁵ HC 16 Nov 1936, col 1442.

⁸⁶ HC 16 Nov 1936, cols 1443-4.

Solutions

Provocative legislation?

Although Fascism was widely – although not universally – agreed to be the problem that necessitated the Bill, it was argued that the Bill should be non-partisan. Legislating against “the methods, not the creed”⁸⁷ was argued to be necessary for an even-handed response and for the protection – rather than repression – of liberty. Additionally, legislating more specifically against Fascist organisations was rejected on the grounds that it could have the effect of turning convicted Fascists into martyrs of state persecution. As Conservative MP Michael Beaumont explained,

if this House passes partisan Bills, which are accepted as such, it will be the biggest advertisement and the biggest boost for the British Union of Fascists that they have ever had.⁸⁸

Thus, it was by framing Fascist activities (uniforms, aggressive stewarding of meetings, use of threatening, abusive and insulting language and behaviour) as objective, apolitical threats to public order that the Bill could be presented as politically impartial:

The Bill does not seek to exterminate any new political creed but only to suppress methods used for the propagation of that creed, and then not because those methods are repugnant to the great mass of public opinion, but because they are dangerous to public order.⁸⁹

⁸⁷ Simon, HC 16 Nov 1936, col 1350.

⁸⁸ HC 16 Nov 1936, col 1444. Conservative MP Robert Turton also expressed this concern in relation to including Clause 1: “By doing so you will be making martyrs out of the Fascist movement, making a clown into a martyr” (HC 16 Nov 1936, col 1428).

⁸⁹ Isaacs, HL 11 Dec 1936, col 752. See also Labour MP Herbert Morrison: “We must recognise that, if it is to be dealt with, the Bill cannot be framed in terms for dealing with a particular political organisation. It must be in terms to deal with the prevention of public disorder and the maintenance of order” (HC 16 Nov 1936, cols 1464-5).

Nevertheless, the BUF did argue that the Bill unfairly targeted them, while Communists protested that their activities were unfairly limited as a side-effect (*The Times*, 22 Jun 1937).

Similarly, the risk that taking the wrong action could be more detrimental to public order than taking no action at all was present in hostility between the Left and the police – especially the Special Branch. Police protection of Fascist meetings and refusals to act against Fascist violence (for example their refusal to *enter* the Olympia stadium despite evidence of violent disorder), and their readiness to crack down on Communist activities (for example their refusal to *leave* a peaceful Communist Party meeting in South Wales a couple of months later) made a police presence provocative in certain situations.⁹⁰ Another example concerns a meeting held by Mosley in the Royal Albert Hall on 22nd March 1936. Although there was a police presence around and within the building, police refused to enter the auditorium when complaints of violence against audience members were raised. Meanwhile, a reportedly peaceful anti-Fascist gathering in Thurloe Square was broken up by a police baton charge.⁹¹ Similarly, the police were perceived as willing to use force against protesters in order protect the interests of the BUF in the October 1936 Battle of Cable Street. Such incidents contradict parliamentary narratives that the current legislation was inadequate and undermine arguments that an apolitical solution was necessary for an apolitical problem. Thus, some argued that authorising further police actions would be counterproductive.⁹²

Specifying grounds

For those with Communist allegiances or sympathies, the potential that non-Fascist groups would be restricted by a law that the racist activities of Fascist groups had made necessary was

⁹⁰ Strauss, HC 15 Dec 1937, cols 1241-2; Goodhart, “*Thomas v. Sawkins*”; Ewing and Gearty, *Struggle for Civil Liberties*, 105 and 284-7.

⁹¹ Scaffardi, *Fire Under the Carpet*, 118-28; NCCL, *Disturbances of Thurloe Square*.

⁹² Clynes, HC 16 Nov 1936, col 1371; see also NCCL, *Disturbances of Thurloe Square*.

unacceptable. ILP MP Campbell Stephen subsequently introduced an amendment (mentioned above) at the House of Commons committee stage that would have narrowed the focus of the Bill and introduced identity categories. Had the amendment passed, s 5 would have read as follows:

Any person who in any public place or at any public meeting uses threatening, abusive or insulting words or behaviour *calculated to excite racial or religious prejudice* whereby a breach of the peace is likely to be occasioned, shall be guilty of an offence. (emphasis added)

In his introduction to this amendment, Stephen framed it as an attempt to legislate as narrowly and effectively as possible against the specific problems that the Bill aimed to address:

Until the events in the East End there has been nothing to make urgent any demand for an alteration of the present law. In these circumstances I think it is well to maintain the old position and deal only with the new circumstances which have arisen. The difficulty has occurred owing to the attempt to excite racial and religious prejudice, and I see grave dangers if the Clause is unduly extended.⁹³

Opponents of the amendment argued that it would be both too broad and too narrow. It would be too broad because the amendment encompassed speech that was calculated to excite racial or religious prejudice but was not *intended* to provoke a breach of the peace. This was perceived by some as effectively placing a ban on any criticism of religion.⁹⁴ An explanation of the distinction between criticising a religion and creating prejudice against a group of people provided by George Buchanan, also of the ILP, was not found sufficiently convincing, foreshadowing the next seven decades of opposition to provisions on incitement to religious hatred.⁹⁵ On the other hand, it was argued that the amendment would be too narrow as it would omit language and behaviour that was intended to provoke a breach of the peace but that did not deal with the specific subject of race or religion: the Attorney-General argued that specifying racial and religious prejudice would be

⁹³ HC 26 Nov 1936, col 638.

⁹⁴ e.g. Naylor, HC 26 Nov 1936, col 651.

⁹⁵ HC 23 Nov 1936, col 641

arbitrary, rather than finding it to be the crux of the issue at hand.⁹⁶ Indeed, this narrower focus would likely exclude much of the disturbance of political meetings that some parliamentarians identified as justifying Clause 5. The amendment was rejected, leaving speakers on the Left concerned that the Bill would lead to increased suppression of agitations on the grounds of class, industrial interests or politics. Indeed, given the intentions of the preceding draft Preservation of Public Order Bill, such suppression seems unlikely to have been merely an unforeseen side-effect.

Conclusion

While the introduction of national public order legislation was novel, s 5, in the context of existing case law and local by-laws, was not. Nevertheless, it proved highly controversial in parliament due the perception that it would enhance police powers to interfere in the liberties of the subject. The Government's justification for the Public Order Bill did not rely on the generation of a sense of emergency or the portrayal of a situation of a grave injustice. Rather, the Bill was advocated as preventative, with examples drawn from other countries to illustrate the danger of failing to respond promptly to such risks. The often referred to troubles in the East End of London were therefore treated as a problem that did not necessarily warrant legislative intervention by itself, but that was a harbinger of far greater problems to come if action was not taken at this stage.⁹⁷ While sympathy was expressed for the fear and intimidation experienced by Jews, emerging threats to the government, or rather the entire system of governance, were, on balance, presented as more pressing and more deserving of legislative intervention.

⁹⁶ HC 26 Nov 1936, col 643.

⁹⁷Although the swiftness with which the Public Order Bill was introduced and passed after the Battle of Cable Street suggests that it may have been more of a direct catalyst than the Government was willing to admit.

Threats to the system of governance were extrapolated to make biopolitical justifications (based on the wellbeing of the population) through the concept of liberty, as it was pronounced that the liberty of the subject can only be upheld when public order is maintained. The concept of liberty, then, was confined to the freedom to do things that do not disrupt ‘order,’ with the disruptive exercise of freedom rendered an ‘abuse of liberty.’ Within this narrative, retaliation against racism was framed as no less problematic – and perhaps even more so – than racist marches; all forms of disruption were depoliticised and cast as equally troublesome. This illustrates how disruptive resistance by anti-Fascists was required to galvanise parliament into enacting the POA36. If those who were offended by Fascism had simply stayed away from Fascist meetings and refrained from holding counter-demonstrations – as they were encouraged to by Jewish and Labour leaders⁹⁸ and by the violent reprisals that they received – there would have been no urgency to legislate against Fascist activities. However, the depoliticisation of public disorder meant that the resulting legislation did not directly address racism and could be used against other forms of provocative speech.

Eruptions of disorder in the East End, however, produced a degree of ‘interest convergence’⁹⁹ between Jews (who were intimidated and at increased risk of attack) and the Government (who were concerned that their ability to maintain the peace and, ultimately, to govern was being publicly undermined). It was expedient, therefore, for ministers to express sympathy towards Jews and to condemn Fascists for their antisemitism. However, in the demonization of Fascists, they were described as adopting foreign ideologies and methods, and as not only un-British but as anathema to Britishness. In its justification of the POA36, Parliament therefore leveraged the very same xenophobic sentiments and fears – the very same fantasies of difference – that underpin antisemitism.

⁹⁸ Frankel, HC 4 Nov 1936, col 162; Weston, “Fascists and Police Routed”; Scaffardi, *Fire Under the Carpet*, 117.

⁹⁹ D. Bell, “Brown v. Board of Education.”

Race and Order

Public Order Act 1963 and Race Relations Acts 1965 and 1976

Race Relations Act 1965, s 6(1):

A person shall be guilty of an offence under this section if, with intent to stir up hatred against any section of the public in Great Britain distinguished by colour, race, or ethnic or national origins—

- a) he publishes or distributes written matter which is threatening, abusive or insulting; or
- b) he uses in any public place or at any public meeting words which are threatening, abusive or insulting,

being matter or words likely to stir up hatred against that section on grounds of colour, race, or ethnic or national origins.

Public Order Act 1936 (as amended by the Race Relations Act 1976), s 5A(1):

A person commits an offence if—

- a) he publishes or distributes written matter which is threatening, abusive or insulting; or
- b) he uses in any public place or at any public meeting words which are threatening, abusive or insulting,

in a case where, having regard to all the circumstances, hatred is likely to be stirred up against any racial group in Great Britain by the matter or words in question.

Introduction

This chapter explores the parliamentary debates that preceded the enactment of three different Acts with a view to understanding how stirring up racial hatred was initially rendered a public order issue and an intelligible subject of criminal legislation. These Acts are: the Public Order Act 1963 (POA63), where the Conservative government rejected proposals to introduce an offence of incitement to racial hatred; the Race Relations Act 1965 (RRA65), where the Labour government first enacted an offence of stirring up racial hatred; and the Race Relations Act 1976 (RRA76), which amended the racial hatred offence and relocated it to s 5A of the Public Order Act 1936 (POA36). Full debates and excerpts on the enactment of these provisions have primarily been selected for coding and analysis according to their relevance to the stirring up racial hatred provisions. However, second readings have been coded in their entirety as these provide the most comprehensive coverage of the issues relevant to each bill as a whole. This provides important contextual insight into the emergence and development of parliamentary interest in domestic ‘race relations.’

While structuring according to problem, blame and solution framings provided a helpful means of organising the analysis of debates in Chapter Five, consideration of these discursive features is instead integrated throughout this chapter. This allows for a more thematic approach to the analysis of the data, which spans a much longer time period and is consequently much more complex. This chapter is divided into two main sections. The first substantive section considers how racial hatred and public order were conceptualised in relation to each other, paying particular attention to the ideological values that were leveraged to justify or discredit legislative intervention. The second section then focuses on the discursive processes of identification that parliamentarians engaged in to make sense of racial hatred and the race relations provisions. This begins with analysis of how race was delineated as a legal category, before applying some of the theory set out in Chapter Three to consider how racism was sanitised and sublimated within the discourse, alongside the polarisation and moralisation of white and non-white identities.

Before entering into the substantive analysis of the data, an overview of the three Acts in question and the contexts in which they were enacted is provided. This contextual information sets the scene with regards to contemporary ideas about race and identity in the UK.

After World War II

The atrocities of World War II did not herald an end to antisemitism. Austerity and heightened xenophobia in the late 1940s saw Jews stereotyped as taking more than their share and corrupting the culture that British servicemen had fought to protect.¹ In 1948, Oswald Mosley formed the Union Movement, bringing together four more or less Fascist movements. Antisemitism remained central to his politics, but was now combined with opposition to Commonwealth immigration.² Similar movements were also gaining prominence, such as Colin Jordan's White Defence League, which formed in the 1950s with the slogan 'Keep Britain White.' However, emerging details about the extent of the Holocaust gave anti-Fascists new resolve, spurring some to launch campaigns of violent opposition against Fascist demonstrations.³

During this time, the law did little to curb antisemitic or racist speech. The editor of the *Morecambe and Heysham Visitor*, James Caunt, was tried for seditious libel in 1947 for inciting violence against Jews, but the charge was found to be disproportionate and he was acquitted. As a result, Caunt was championed as a hero of free speech, Fascists were emboldened in their publication of antisemitic views and prosecutors were discouraged from bringing charges.⁴ Also in 1947, the prosecution under s 5 POA36 of Jeffrey Hamm, a key Fascist provocateur, merely led

¹ Macklin, *Very Deeply Dyed in Black*, 41.

² Channing, *Police and Public Order Law*, 92.

³ Beckman, *The 43 Group*; Copsey, *Anti-Fascism in Britain*, 83; Macklin, *Very Deeply Dyed in Black*, 43-4.

⁴ Macklin, *Very Deeply Dyed in Black*, 47; Younger in Channing, *Police and Public Order Law*, 150-151.

to his being bound over to keep the peace, despite the fact that he was already bound over at the time.⁵

The 1958 ‘race riots’ in Nottingham and West London ushered in a new consciousness of racial diversity⁶ and disrupted Britain’s international image as a liberal beacon of anti-racism and equality.⁷ Consequently, Labour MP Frank Tomney announced that “for the first time Great Britain has a colour problem at home.”⁸ However, the problem of racism in Britain had already been discussed by anti-imperialist and civil rights activists for over a decade.⁹ A more accurate statement than Tomney’s, then, would be that the 1958 disorders represented the first time that white elites were forced to take note of a ‘colour problem’ in the UK; it was the first time that racist discrimination and violence was framed as a public order issue, and thus as more than just a problem for ‘coloured’ people.

The media portrayed the race riots as the result of an ‘alien’ presence within British cities – the result of large-scale post-war immigration from Commonwealth nations – combined with a growing trend of working-class youth delinquency, obscuring the broader context of ingrained societal and institutional racism.¹⁰ Subsequently, a strong current of the discourse on how to prevent further disorder centred on immigration controls,¹¹ which were introduced in the Commonwealth Immigrants Act 1962. Indeed, Carter, Harris and Joshi have argued that, to garner popular support for enacting immigration controls, the Conservative government purposefully induced a ‘moral panic’ by claiming that black immigrants were predisposed to criminal lifestyles.¹² In contrast, Kenetta Hammond Perry has described how the government sought to

⁵ Renton, *Fascism, Anti-Fascism and Britain*, 125.

⁶ Hiro, *Black British, White British*, 205.

⁷ Perry, *London is the Place for Me*, 101.

⁸ HC 5 Dec 1958, col 1589.

⁹ Perry, *London is the Place for Me*, 51-2.

¹⁰ Osgerby, *Youth Media*, 57; Perry, *London is the Place for Me*, 121.

¹¹ Perry, *London is the Place for Me*, 123; Hiro, *Black British, White British*, 205-6.

¹² Carter, Harris and Joshi, “1951-55 Conservative Government,” 7.

present the disturbances in Nottingham and Notting Hill internationally as relatively minor, as contrary to British traditions of equality and with race as only one possible means of understanding the violence.¹³ Racial equality was thus presented externally as a core characteristic of Britishness in order to uphold a moral high ground in the Commonwealth and beyond, while racial minorities were being blamed domestically for the consequences of discrimination against them.

Legislation against the colour bar in the UK was first proposed by the Colonial Office in 1941.¹⁴ Then, in the 1950s several private members bills were brought with the aim of prohibiting racial – and often religious – discrimination.¹⁵ For example, a Colour Bar Bill was presented by Labour MP Reginald Sorensen in 1950¹⁶ but did not receive a second reading, and anti-discrimination bills were brought, to no avail, by Labour MP Fenner Brockway on an annual basis from 1956 to 1964.¹⁷ Pressure for such legislation grew following the fatal stabbing of a black man, Kelso Cochrane, in 1959. Despite police narratives that robbery had been the primary motivation for the attack, black rights activists and Commonwealth leaders presented his murder as racially motivated and called upon the UK government to take measures against racism.¹⁸

The Public Order Act 1963 (POA63)

The reluctance of the Conservative government to pass legislation that would specifically prohibit incitement to racial hatred was demonstrated in the 1963 amendment of the POA36. The POA63 was precipitated by several incidents where Fascist meetings were met with strong opposition and resulted in outbreaks of disorder. Debates on the POA63 were especially concerned with the case of Colin Jordan and John Tyndall, who gave speeches on 1 July 1962. Their organisation, the

¹³ Perry, *London is the Place for Me*, chap. 3.

¹⁴ Sherwood, “White Myths, Black Omissions,” 50.

¹⁵ See Hepple, “Race Relations Acts,” 249.

¹⁶ HC 17 Nov 1950, col 2044.

¹⁷ see also Walston, HL 14 May 1962, from col 439.

¹⁸ See Perry, *London is the Place for Me*, chap. 4.

National Socialist Movement, advocated the freeing of Britain from Jewish control and the repatriation of non-white immigrants, with Jordan asserting that “more and more people every day ... are opening their eyes and coming to say with us: Hitler was right.”¹⁹ On that day, anti-Fascist objections escalated into fighting that led to 20 members of the crowd being arrested (*The Times*, 2 July 1962). Jordan was convicted under s 5 of the POA36 (*The Times*, 21 August 1962), but he was granted an appeal at Quarter Sessions on the basis that the words he had used “were highly insulting but were not likely to lead ordinary reasonable persons attending the meeting in Trafalgar Square to commit breaches of the peace by committing assaults.”²⁰ However, at the Queen’s Bench on 19 March 1963, the conviction was held with the finding that “a speaker must take his audience as he finds them.”²¹ This seems to affirm that the law was not concerned with the offensiveness of the speech per se, but only with the likelihood that violence would immediately ensue.

In 1963, the Government refused to amend the long title of their Public Order Bill to enable a prohibition on incitement to racial hatred to be discussed.²² The subsequent POA63 did not introduce any new offences; rather, it increased penalties for offences under s 5 of the POA36 and s 1 of the Public Meeting Act 1908.

The Race Relations Act 1965 (RRA65)

Conservative MP Peter Griffiths achieved infamy by winning the constituency of Smethwick from Labour in the 1964 general election with the slogan “If you want a nigger for your neighbour, vote Labour.”²³ However, Labour narrowly won a parliamentary majority with a manifesto that

¹⁹ In *Jordan v Burgoyne* [1963] 2 All ER 225, 226.

²⁰ *Ibid.*

²¹ *Ibid.*, 227.

²² Hobson, HC 9 July 1963, col 1156.

²³ Griffiths’ racist campaign led the Labour Prime Minister Harold Wilson to describe him as a “parliamentary leper” (HC 3 Nov 1964, col 71), which the Leader of the House of Commons raised a motion against as “a cruel and unmerited slight on lepers” (Bowden, HC 5 Nov 1964, cols 366-7).

promised to “legislate against racial discrimination and incitement in public places.” The resulting Race Relations Act 1965 was deemed disappointing by many activists and MPs alike due to its limited scope, with discrimination only prohibited in places of public resort and not the more pressing areas of employment or housing.²⁴ Furthermore, it was viewed as disingenuous due to its coincidence with increased restrictions on Commonwealth immigration.²⁵ However, the RRA65 nevertheless signalled the beginning of legal recognition and redress of racial inequality in Great Britain.

Section 6 of the RRA65 made it an offence to disseminate written matter or to use threatening, abusive or insulting language in a public speech whereby the perpetrator both intended and was likely to “stir up hatred against a section of the public distinguished by colour, race or ethnic or national origins.” Significantly, this provision represented a cleavage from the 1936 criteria relating to breaches of the peace. Indeed, it was argued that it could be difficult to determine whether a breach of the peace was intended or likely to be occasioned by some of the materials that were identified as problematic, such as racist leaflets.²⁶ The absence of this language indicates a shift in concern from whether the *context* of certain expressions might provoke immediate disorder to whether the *content* of certain expressions might incite hatred. Section 7 of the RRA65 extended s 5 of the POA36 to written and visual material. Here, as in the original POA36 provision, a breach of the peace must have been either intended or likely to be occasioned. Sections 6 and 7 comprised a portion of the RRA65 that was subtitled ‘Public Order.’

The RRA65 was amended in 1968 to expand the prohibition on discrimination to the areas of housing, employment, education, advertisements and the provision of public goods and services. The 1968 Act also expanded the definition of discrimination to include segregation but did not make any changes to the racial hatred provision. However, just as the RRA65 coincided

²⁴ Perry, *London is the Place for Me*, 193.

²⁵ Wild, “Black was the Colour of our Fight,” 45.

²⁶ Soskice, HC 3 May 1965, col 937.

with Labour's commitment to intensify immigration restrictions, this 1968 amendment was accompanied by the Commonwealth Immigration Act 1968. This legislation responded to concerns that British passport-holding Asians would move to the UK on mass from their East African homes as they lost their rights to reside under 'Africanisation' policies of these newly independent countries.²⁷ The Commonwealth Immigration Act 1968 restricted the automatic right to enter and reside in the UK to Commonwealth citizens who themselves, their parents or their grandparents had been born in the UK, effectively enabling a distinction between white and non-white settlers in East Africa.²⁸ This was later ruled to be unlawfully discriminatory by the European Commission of Human Rights.²⁹

The Race Relations Act 1976 (RRA76)

The RRA76, which repealed the RRA65, was the product of intensified interest in race relations as it became recognised that a considerable portion of the non-white population had, by this time, been born in the UK. Thus, it was increasingly recognised as erroneous to conflate race and immigration. The RRA76 made several changes to enforcement mechanisms, the most significant of which established that individuals could take complaints directly to court, rather than having to go through the Race Relations Board.³⁰ The Act also expanded the prohibition on discrimination to acts that have discriminatory effects, regardless of discriminatory motive (indirect discrimination), and expanded the definition of 'race' to include nationality and citizenship, after the House of Lords ruled that these were not encompassed by 'national origins'.³¹

²⁷ Hiro, *Black British, White British*, 224-5.

²⁸ *Ibid.*, 227.

²⁹ *East African Asians v UK* (1973) 3 EHRR 76.

³⁰ The Race Relations Board and the Community Relations Commission were merged under the RRA76 to form the Race Relations Commission.

³¹ *Ealing London Borough Council v Race Relations Board*, [1972] AC 342.

In relation to racial hatred, a white paper on ‘Racial Discrimination’³² and the ensuing debates were influenced by Lord Justice Scarman’s inquiry into the Red Lion Square disorders of 15 June 1974. The disorders in question consisted of clashes between demonstrators and police, which arose from a situation where both the right-wing National Front and left-wing organisation Liberty had booked rooms for meetings at the same time within the same building. There was some miscommunication about the routes that the police determined the groups should take to the venue, with the resulting conflicts leading to the death of a student and numerous injuries to both police and protesters. Lord Scarman’s report largely absolved the police of allegations of brutality, but suggested that the requirement of proving intent under s 6 of the RRA65 undermined the enforceability of the provision.³³ The issue of intent was therefore prominent in discussions of the stirring up hatred provision, with the criterion being removed by the Bill, added back in by the House of Lords and then removed again by the House of Commons. This disagreement reflects the ongoing controversy over culpability for speech and the extent to which freedom of expression should be limited by law, which is investigated throughout the next section of this chapter.

Visions of order

The location of the stirring up racial hatred offence under a subheading of ‘public order’ in the RRA65, and the RRA76’s relocation of the offence to s 5A of the POA36, suggest that it was the risk that racial hatred posed to public order which formed the primary justification for its criminalisation. Applying the findings of Chapter Five, we might therefore expect any justification based on sympathy for direct victims of hatred to be buttressed by the perception of wider risks to order, to society and maybe even to ‘Britishness,’ while arguments against the provision focus on the civil liberties of those who might face charges under it. While understandings of public order

³² 1975, Command Paper No. 6234.

³³ ‘Red Lion Square Disorders of 15 June 1974,’ 35.

may have evolved over the decades since the enactment of the POA36, the 1960s see the introduction of a new framework within which the public order debate takes place, namely ‘race relations.’ This section examines contemporary understandings of public order and race relations and the relationship between them with regards to the offence of stirring up racial hatred. Three themes that recurred through the relevant debates are used to structure this analysis: risks of violence, freedom of speech and equality.

Risks of violence

The value of ‘order’ continued to hold high rhetorical capital in the 1960s and 70s and was frequently used both to justify and to contest the RRAs. Among proponents of the racial hatred provision, risks to the peace remained a central rationale. This was made clear when the Home Secretary, Sir Frank Soskice, introduced the 1965 Race Relations Bill to the House of Commons. Initially, in relation to discrimination, he stated:

Basically, the Bill is concerned with public order. Overt acts of discrimination in public places, intensely wounding to the feelings of those against whom these acts are practised, perhaps in the presence of many onlookers, breed the ill will which, as the accumulative result of several such actions over a period, may disturb the peace.³⁴

Here, discrimination itself is not described as ‘ill will’; rather, the problem is that discrimination *produces* ill will. In other words, it was the ill will of the victims of discrimination rather than that of the perpetrators that was deemed threatening to the peace. This echoes perspectives in the POA36 debates that presented retaliation against antisemitism as at least as problematic as antisemitic speeches and intimidatory marches. Thus, it was threats to ‘the peace’ rather than threats to racialised people that warranted legislative intervention. Equally, the connection to

³⁴ HC 3 May 1965, col 927.

violence was emphasised in advocacy of the racial hatred offence. Referring specifically to the racial hatred provisions of the 1965 Bill, Soskice claimed that “When hatred has been stirred up history, unfortunately, shows only too clearly that violence and disorder are probably not far away.”³⁵ A preventative rationale was also put forward in the debates on the 1976 Race Relations Bill, with, for example, Home Secretary Roy Jenkins stating that “racial hatred contains the seeds of violence.”³⁶ Some references to the potential for violence, however, were explicit in their representation of racialised groups, rather than ‘the peace,’ as potential victims of such violence and as worthy of legislative intervention. For example, in both sets of race relations debates, as well as in the 1963 public order debates, several speakers referred to the Holocaust as an extreme example of the violence that stirring up racial hatred can lead to.³⁷

If the primary rationale of the stirring up racial hatred offence was the prevention of violence – much like the POA36 – why did the RRAs discard the ‘breach of the peace’ criterion? Here we should note that in addition to diverging from the language of ‘a breach of the peace,’ the word ‘provoke’ was replaced with ‘stir up’ and the racial hatred offence was labelled in the margin of the RRA65 as ‘incitement to racial hatred.’ The significance in this shift in language may therefore lie in the distinction between provocation and incitement that was noted in *Wise and*

³⁵ *ibid.*, col 938.

³⁶ HC 4 March 1976, col 1564. See also, Newens: “One of the actual and potential causes of violence in this country is racial hatred. For that reason, we must oppose the incitement of racial hatred” (HC 8 July 1976, col 1954-5); and John: “it will make the law against racial hatred ... a proper sanction against it so that we may eradicate it and the violence that surely follows it” (HC 27 October 1976, col 652).

³⁷ For example, Binns: “a neo-Fascist can stand up in any public place and incite a mob to racial hatred and even, in many cases, get away with inciting mobs to racial violence. It is this kind of freedom that led to the gas chambers of Auschwitz and the attempt to exterminate a whole race of people” (HC 3 May 1965, col 1003); Rose: “The end product of racial hatred is not merely the hatred itself. It is the gas chamber and the racial war.” (HC 4 March 1976, col 1639); and Janner: “although in fact everybody knew that there was intent on the part of the villainous Fascists of that time they could not be prosecuted. It is hard for me to speak about this, because it ultimately resulted in the murder and torture of some six million Jewish people” (HL 15 Nov 1976, col 1096).

Dunning,³⁸ whereby the former refers to immediate retaliation and the latter refers to the spreading of hateful ideas, which may precipitate violence more indirectly. Compared to the problem in 1936 of overtly antisemitic and militaristic activities provoking disorder on the streets, the outbreaks of violence with which the various RRA debates were concerned was more likely to be viewed as a consequence of hatred being stoked over time. This could indicate a broadening of public order governmentality towards more holistic and preventative approaches. However, it may also be that the controversial racial hatred provision was simply labelled as a public order offence in order to increase the perception that it was consistent with an established and widely accepted legal programme.

When an imminent breach of the peace was the threshold at which law enforcement could intervene, the only option available to those seeking to resist the propagation of hatred was to threaten violence. As Lord Soper explained in support of the RRA65:

under the present law... the only way a Jewish audience can prevent an anti-Semitic speaker at a public meeting from saying vile things about the Jews is by showing signs of being provoked into a breach of the peace.³⁹

Thus, although the provision was still justified on the basis of the potential that violence could erupt in the future, under the RRA65, law enforcement could intervene to curtail the propagation of hatred without the need for audience members to behave disruptively and thereby risk being penalised under the strengthened Public Meeting Act 1908. The police now had a clear power to shut down a speech where the audience may have been in complete agreement with the speaker, on the basis that what they agreed with were expressions of racial hatred.⁴⁰

³⁸ [1902] 1 KB 167 – see Chapter Five, page 104.

³⁹ HL 2 Aug 1965, col 85.

⁴⁰ However, the Commission for Racial Equality noted in 1980 that this was not always the case in practice: “In the Kingsley-Read case (which was brought under the Race Relations Act 1965), it was argued that he was speaking to a group of his own supporters and that therefore the circumstances were such that hatred was not likely to be stirred up; his listeners were already ‘corrupted.’ Later in 1978, in *R. v Jones and Cole*, the prosecution witnesses averred in cross-examination that the words spoken were

For those opposed to legislating against racial hatred, the exclusion of the ‘breach of the peace’ criterion abrogated a core safeguard of s 5 POA36, and therefore as crossed the line between maintaining order and practicing censorship:

“This Bill would make the police censors of speech. The essential test – a breach of the peace – is missing from Clause 3... If this Clause becomes law it will make the police the arbiters of free speech when there is no threat to law and order.”⁴¹

Values were thus ranked by some parliamentarians so that only a narrow conception of risks to public order (i.e. proximate and imminent eruptions of violence) could be prioritised above freedom of speech. Such views showed regard for neither the non-violent impacts that the propagation of racial hatred might have, such as hostility and discrimination, nor the prospect that expressions of racial hatred might spur listeners to commit violent crimes or other offences at a later date. Furthermore, such transgression of freedom of speech was itself presented as likely to result in public disorder. For example, Conservative MP Nicholas Budgen stated: “If it be that the ordinary people of Britain cannot talk about their problems, sometimes in a robust or an offensive way, unhappily their only resort is to violence.”⁴² Thus, just as advocates of the racial hatred provisions argued that they were needed to prevent outbreaks of violence, opponents of the provisions argued that they would be wholly counterproductive to this end.

so extreme and so distressing that they were counter-productive and, in the witnesses’ view, raised sympathy amongst uncommitted listeners. The defendants were both acquitted on this charge.” (in Home Affairs Committee, “The Law Relating to Public Order,” 90).

⁴¹ Brooke, HC 3 May 1965, cols 966 and 7. See also Bell: “The real issue is that for the first time, except in the field of blasphemy ... we shall be making the expression of certain views unlawful even though their expression is not likely to lead to a breach of the peace” (HC 3 May 1965, col 986); and Lloyd: “The crucial point was made in a leading article in The Times of 8th April ... [I]t was as follows: ‘judging the criminality of utterances by reference to their subject matter and content, rather than by reference to their likely effect upon public order the Clause is in short an instrument of potential censorship’” (ibid., col 1037).

⁴² HC 26 Oct 1976, col 630.

Freedom of speech

As in the POA36 debates, the POA63 debates included discussion on the scope of free speech in relation to s 1 of the Public Meeting Act 1908, which prohibits acting “in a disorderly manner for the purpose of preventing the transaction of the business for which [a] meeting was called.” Here, the Government faced strong opposition to its proposed reforms, which ultimately equalised the penalties applicable to s 1 of the Public Meeting Act and s 5 of the POA36. For the Conservative Government,

These two offences, the abuse of free speech and the deliberate attempt to eliminate free speech by breaking up public meetings, are no more than different sides of the same coin... They both aim to destroy democratic government, to bring down public order and to eliminate the right of free speech.⁴³

However, the Government position was contested on the grounds that a person who deliberately provokes an audience should face a greater portion of the responsibility for any consequences than audience members who react. In his argument against equal penalties for the two offences, Labour MP Barnett Janner also resisted the elevation of free speech above other values:

The peaceful citizen... is expected to acquiesce in the name of one right, freedom of speech, in the face not only of insults but of oral and written advocacy of a policy which would destroy all the other fundamental rights set out in the Declaration [of Human Rights], a policy advocating not only discrimination but all that went with Hitlerism... If certain individuals lack this tremendous self-restraint and find themselves unprotected from the law from the utmost insult and provocation, it is surely inequitable that they should be penalised as severely as the persons whose deliberate provocation has led to retaliation.⁴⁴

⁴³ Balniel, HC 30 July 1963, col 274. See also, the Attorney-General: “The maximum penalties are fixed equally for the two offences, as it is as shocking to abuse the right of free speech as it is to prevent free speech, and within those two categories the extreme cases ought to be dealt with upon an equal basis” (Hobson, HC 9 July 1963, col 1152).

⁴⁴ Janner, HC 30 July 1963, col 331. Janner’s reference to ‘Hitlerism’ was in response to Colin Jordan’s proclamation at Trafalgar Square on 2 July 1962 that ‘Hitler was right.’ Conservative MP Tom

The difference between these two perspectives thus pivoted on whether disturbing a meeting was framed as a deliberate disruption of public order or a natural and rational response to deliberate provocation. Additionally, following in the tradition of Communist MP Willie Gallacher discussed in Chapter Five, Janner’s position made a qualitative distinction between certain types of speech, i.e. between the advocacy of genocide and the forceful rejection of such a position.⁴⁵ Labour MP Jack Mendelson was also particularly clear on the distinct problem of racist speech:

If a person argues that somebody is inherently evil because of his racial origin, he is insinuating into the minds of his audience a criminal intent, because the only solution to cure the evil is the physical destruction of the racial minority.⁴⁶

Others argued that people had a right to defend themselves against hateful speech, or even had a democratic duty to speak up against Fascism, and should not, therefore, be penalised for doing so. For example, Labour MP Leo Abse emphasised the stakes from a Jewish perspective: “Acquiescence and silence have always led to extermination.”⁴⁷

Freedom of speech was also a prominent theme in relation to the criterion of intent. In response to arguments that the RRA65 would infringe upon freedom of speech, analogies were drawn between the structure of the racial hatred provision and s 5 POA36 to suggest that the criteria of the offence were sufficiently stringent. Thus, the inclusion of intent was said to “make it clear that ordinary discussion, even if misinformed, will not be caught by the section, but only the person deliberately pursuing a course of conduct.”⁴⁸ Then, in the RRA76 the Labour

Iremonger also referred to this phrase when he claimed “that to speak those words is a greater offence than to be violent on hearing them” (HC 1 Aug 1962, col 641). See also Conservative MP Trevor Skeet: “It is quite unreasonable to suppose that, if inflammatory statements are made, those who listen will not retaliate or react. When certain things are said, they have a right of self-defence” (HC 3 Aug 1962, col 1035).

⁴⁵ Including by persons whom the government had drafted into the army for the very purpose of violently opposing such ideology – see Lubbock, HC 3 Aug 1962, col 1045.

⁴⁶ HC 30 July 1963, col 292.

⁴⁷ HC 30 July 1963, col 310.

⁴⁸ Stonham, HL 26 July 1965, col 1011.

Government removed the criterion of intent from the racial hatred offence. This followed Lord Scarman's statement in his 1975 report on the Red Lion Square disturbances that the provision,

needs radical amendment to make it an effective sanction, particularly, I think, in relation to its formulation of the intent to be proved before an offence can be established.⁴⁹

Predictably, the suggestion that intent should no longer be required elicited accusations that the Government was encroaching on freedom of speech.⁵⁰ The argument was also made that mens rea is an integral element of British criminal law, and that to make an exception for stirring up racial hatred was contrary to the principle of liberty and to the fundamental principles of the British legal order.⁵¹ However, this point was countered through comparison with s 5 POA36, under which *either* intent or likelihood of occasioning a breach of the peace needs to be demonstrated.⁵²

In contrast to these legalistic arguments, Lord Janner focused not on the effects of downgrading intent but on the consequences of leaving the requirement in the provision. From Janner's perspective, the inability to prosecute Fascists for stirring up racial hatred because intent could not be proven, "ultimately resulted in the murder and torture of some six million Jewish

⁴⁹ 1975, 35.

⁵⁰ See, for example, Bell, HC 4 March 1976, cols 1938-9.

⁵¹ For example, Stanbrook: "That requirement on the police and prosecution is vital to liberty but it is that requirement which the Government are seeking to drop in the Bill" (HC 27 October 1976 col 635); and C. Lawrence: "why are they not speaking up now on a clause which takes away the fundamental principle which protects the liberty of the individual in our society, namely the requirement in all serious crime for there to be proved beyond any doubt an intention to commit an evil act?" (HC 27 October 1976, col 639). See also Stanbrook, HC 4 March 1976, col 1565; Hailsham, HL 20 July 1976, col 742 and HL 4 October 1976, col 1048; Bell, HC 27 October 1976, col 640; Alison, *ibid.*, cols 646-7.

⁵² Jenkins, HC 4 March 1976, col 1564; Harris, HL 20 July 1976, col 738. Other criminal offences that do not require intent to be proved were also cited. For example: "One does not have to show that a motorist who is speeding has an intent to injure other people. It follows naturally from the act of speeding that he is a potential danger to other motorists and perhaps to himself" (Rose, HC 27 October 1976, col 632).

people.”⁵³ Here, thirteen years after making such an argument in the POA63 debates, Janner was again challenging the primacy of free speech by prioritising the protection of life.

Another way in which the sanctity of free speech was contested by proponents of the stirring up hatred provision was through the representation of hatred as a disease or a poison. For example, Liberal MP Eric Lubbock argued that ‘obnoxious opinions’ are “poisonous and could damage the minds of those who hear them.”⁵⁴ In addition to suggesting the harmfulness of hatred and the extent to which it exceeds the bounds of normal speech transactions, this metaphor placed the government in a clear position of responsibility through a connection with public health. In contrast, however, where the language of madness was used in arguments against a bill, persons preaching hateful propaganda were described as a ‘lunatic periphery’ in order to downplay the threat that they posed.⁵⁵ For example, Conservative MP Selwyn Lloyd stated that:

In this part of the Bill we have the case of the fanatics, the exhibitionists, those in need of psychological treatment who would relish being prosecuted and who would like to have a fuss made about all this.⁵⁶

Here, racial hatred was presented as a marginal aberration within a tolerant society, despite the wealth of evidence (as supplied below) of how mainstream racist attitudes were.

Equality

While several speakers essentially prioritised the freedoms and interests of their white constituents, including those who argued in favour of the stirring up provision on the grounds that

⁵³ HL 15 November 1976, col 1096.

⁵⁴ HC 3 Aug 1962, col 1044. Labour MP John Mendelson also described vitriolic public speeches as efforts to “poison the minds of people” and as “poisonous situations” (HC 30 July 1963, cols 291 and 292), and Labour MP Paul Rose described Fascist ideology as ‘poison’ and ‘racialist cancer’ (HC 27 May 1966, col 930).

⁵⁵ Lord Elton, HL 26 Sep 1965, col 1041.

⁵⁶ HC 5 May 1965, col 1038.

it would be conducive to ‘the peace,’ others presented the principle of equal treatment as a primary objective. In the RRA65 debates, Lord Brockway, who was a prominent anti-colonialism and anti-discrimination campaigner, was particularly notable in this respect:

I believe that the adoption of this Bill will be a great step forward towards what is, after all, a fundamental human principle of life: that when a child is born it is not the pigment of the skin which makes that child sacred; it is the life within. ... Only when we recognise the equality of us all shall we really be a human society.⁵⁷

Labour MP Donald Chapman also countered a majoritarian approach to justice in his advocacy of the Bill:

The right hon. Member for Monmouth said that there were no widespread abuses of this kind. I do not care about that. If cruelty is inflicted on one person by making him the subject of race hatred, that is sufficient to assert his right to live here in peace and freedom. One person is enough, because all we are asserting in this Clause is a man's right, despite the colour of his skin and the nation from which he originated, to live here peacefully without hate being stirred against him because of his origin.⁵⁸

Such emphasis on individual rights and equality enabled certain speakers to advocate on the behalf of minoritized groups without either deferring to the interests of a wider (whiter) public or seeming paternalistic.⁵⁹ These perspectives expose the absence of the principle of equality in the speeches of others, including those who referred more vaguely to ‘fair’ treatment.⁶⁰

In the RRA76 debates, Labour MP Paul Rose took a broad view of the effects of incitement and explicitly separated the stirring up provision from justifications based on violence alone:

⁵⁷ HL 26 July 1965, cols 1048-9.

⁵⁸ HC 3 May 1965, col 1027.

⁵⁹ This can be contrasted with the statement by Lord Somers that “If it had not been for the white man, they would still be living in the jungle. They owe a great deal to the white man, and the best of them appreciate it” (HL 26 July 1965, col 1052).

⁶⁰ Lloyd, HC 3 May 1965, col 1034; Braine, *ibid.*, col 992.

What is important here is that one is not stifling free speech and one is protecting the right of a citizen, not merely against violence but against vilification. A citizen surely has a right to protection against vilification on the basis of his pigmentation or racial or ethnic origin – perhaps even more of a right to protection against accusations of being a thief or a rogue under the law of libel and slander.⁶¹

The harm that the incitement to hatred provision would address was not, therefore, conceptualised as a harm to a disembodied notion of ‘public order,’ but rather as harm to the rights of individuals. This comes close to a notion of dignity, although this is neither a word nor a concept that played much of a role in the RRA debates. Lord Harris also referenced harms beyond physical disturbances or violence, but did so on a more collective level:

there can be no doubt about the damage which abusive racist language can do to race relations and harmony and the whole cohesion of our society. Our reluctance to interfere with the individual's right to speak his mind, however obnoxious his views, must be weighed against this damage.⁶²

In the perspectives of both Rose and Harris, there is a sense that racist speech produces harms that are not addressed by other laws; the purpose of the stirring up racial hatred provision was therefore viewed not only as the prevention of other, mostly violent, offences, but as a remedy to an issue that was problematic by itself. Such an approach engenders concern for the broader experiences of minoritized individuals, and not only at the point at which they are conceived of as actual or potential victims of violence.

In justifications for extending anti-discrimination legislation, the values of equal rights and equal opportunities were cited repeatedly; yet there was relatively little mention of the impact that incitement to hatred might have on equality. Instead, ‘harmonious race relations’ were invoked – a phrase that is more prescriptive than ‘public order,’ but considerably less so than

⁶¹ HC 27 October 1976, col 632.

⁶² HL 4 October 1976, 1049.

‘equality.’⁶³ Therefore, it appears that the link between stirring up hatred and risks of public violence was articulated to facilitate the passage of both Race Relations Bills, but at the expense of a more holistic understanding of the impacts of hatred or a broader conception of public order that could encompass equal rights, justice and dignity – and not just the absence of violence.

Differentiating identities

In the POA36 debates, it was widely agreed that Fascists were the primary instigators of the problem at hand. With their foreign ideology and their aggressive tactics, they were easily presented as deserving subjects of criminal legislation. While Fascists also featured in the POA63 and RRA debates, the stirring up racial hatred provision provoked concerns that it would criminalise a wider, more ‘ordinary,’ portion of the population. Additionally, the range of victim identities was wider, with Jews joined uneasily by other racialised minorities and immigrants. This section examines the processes of identification that were at play within the POA63 and RRA debates, starting with the construction of ‘race’ as a legal category.

‘Race’ in the law

In the POA63 debates, the Conservative Government echoed debates on the POA36 in roundly rejecting an explicit prohibition on incitement to hatred on grounds of race. In his introduction to the second reading, Home Secretary Henry Brooke criticised an amendment proposed by Conservative MP Tom Iremonger to add “words inciting hatred of any racial group” to s 5 POA36:

His Bill would introduce into our law the concept of race, a concept which is quite alien to the law as it stands, and, I would say, long may it remain so. The law now is

⁶³ Smith, HC 4 Mar 76, col 1591; Thorpe, HC 3 May 1965, col 998; Amendment No. 26, HC 8 July 1976; Thomas, *ibid.*, col 1950; Rossi, *ibid.*, col 1967; Hooson, HC 27 Oct 1976, col 634.

equal in its application to all men. It knows no distinction of race between one citizen and another. I have no desire to be the Home Secretary who first introduces into our law the concept that some of my fellow citizens are to be singled out for special protection or distinction from others because of the race to which they belong.⁶⁴

Brooke's assertion that race was, at that point, "alien to the law" overlooked the extent to which race had been an overt topic in colonial legislation administered by the UK in other countries and – more covertly – in the recent Commonwealth Immigrants Act 1962.⁶⁵ However, it was not Brooke's representation of British law that was contested by other parliamentarians. Labour MP George Brown was quick to counter Brooke as follows:

It seems to me that there is no reason to oppose this suggestion on the ground that it is specially designed for a particular group. It is specially designed to protect us all against this kind of abuse, insult and offensive attack.⁶⁶

While Brown's position suggests that all subjects of the law have a race which could conceivably be discriminated against, Brooke's argument suggests that the term 'race' applies only to "some of my fellow citizens," and that the use of this term therefore differentiates subjects before the law. It is this very perspective of Brooke's, however, that presents a divisive approach, as it treats race as an objective – and presumably biological – attribute that some people have and others do not.

Opponents of specifying race also argued that incitement to racial hatred was in fact already amply prohibited under s 5 of the POA36 (as demonstrated by the conviction of Tyndall

⁶⁴ HC 9 July 1963, col 1059.

⁶⁵ Racial distinctions were also endorsed in the Special Restriction (Coloured Alien Seamen) Order of 1925 and in military regulations, such as the Manual of Military Law 1914, which specified that "Commissions in the Special Reserve of Officers are given to qualified candidates who are natural born or naturalised British subjects of pure European descent" (198).

⁶⁶ HC 9 July 1963, col 1066.

and Jordan) or by the common law on sedition and seditious libel.⁶⁷ In response, Labour MPs argued that the law on sedition was rarely enforced (as demonstrated by the trial of James Caunt in 1947) and represented too broad a restriction on speech for rigorous enforcement to be desirable.⁶⁸ The existing offence under s 5 of the POA36 was also argued to be in need of clarification, as demonstrated by the granting of appeals to Tyndall and Jordan, and because “a decided case is not so clear and firm a guide as words written into an Act of Parliament.”⁶⁹ However, the question of writing race into the law through an incitement provision became moot in the RRA65 debates, since the stirring up racial hatred offences were proposed alongside provisions against racial discrimination. Resistance to this Bill was generally along the lines that legislation, and particularly criminal sanctions, would be an ineffective or even a divisive means of tackling hatred and discrimination. However, issues of categorisation were raised over the definition of race set out in the Bill and the merits of including religion.

Distinguishing religion

The RRA65 prohibited certain acts that discriminate or stir up hatred on grounds of “colour, race, or ethnic or national origins.” During the second reading of the Bill in the House of Commons it was apparent that the scope of these terms was not self-evident. Early in the second reading, Conservative MP Bernard Braine asked the Home Secretary, Sir Frank Soskice:

Would he say whether the word ‘ethnic,’ in this connection, covers those British citizens who are of the Jewish faith, because it is widely held by many authorities

⁶⁷ See Brooke, HC 8 Nov 1962, col 1159; HC 30 May 1963, col 1547; Dilhorne, HL 30 June 1963, col 1585; Hobson, HC 9 July 1963, cols 1153 and 1154; Soskice, HC 3 May 1965, col 940; Hailsham, HL 20 July 1976, col 742.

⁶⁸ Greenwood, HC 9 July 1963, col 1077; Weitzman, *ibid.*, col 1094.

⁶⁹ Iremonger, HC 9 July 1963, col 1071.

that Jewish citizens are of British race and, therefore, would not be covered by this particular provision?⁷⁰

This contrasts with the POA36 debates, where Jews were consistently described as a distinct race. Soskice clarified that the Bill was intended to encompass discrimination and hatred against Jews, but was unconvincing in his attempts to explain how:

I would have thought a person of Jewish faith, if not regarded as caught by the word ‘racial’ would undoubtedly be caught by the word ‘ethnic,’ but if not caught by the word ‘ethnic’ would certainly be caught by the scope of the word ‘national,’ as certainly having a national origin.⁷¹

At this point, the Hansard records that Honourable Members interrupted with calls of ‘no.’ The difficulty here is that if the Government wished discrimination and hatred against Jews to be encompassed by the term ‘ethnic or national origins,’ then other religious groups might also be included in this way, potentially leading to the de facto inclusion of religious discrimination in general. Alternatively, if Jewishness is conceptualised as both a race and a religion, antisemitism might be defended on the basis that it targeted the Jewish religion rather than their race. As Labour MP Bernard Floud explained:

If we do not [specifically deal with religious discrimination], we will find that religion can be used as a loophole for evading provisions about race, not only as regards Jews, but as regards Moslems or Hindus.⁷²

⁷⁰ HC 3 May 1965, col 952. See also St John-Stevas later on in the second reading: “Is there not a danger that, by leaving out any reference to religion, the Bill labels the Jewish community as a racial and ethnic minority? Surely this would be most unacceptable to the Jewish community” (HC 3 May 1965, col 959). The importance of ensuring that Jews were covered by the Bill was also raised earlier by Braine (*ibid.*, col 932) and Buck (*ibid.*, cols 1029-30).

⁷¹ HC 3 May 1965, cols 932-3.

⁷² HC 3 May 1965, col 970. See also Jewish Labour MP Barnett Janner: “We must not give a person who is a scurrilous abuser the right to get free from the net by claiming that he did not mean to attack Jews as a race, but was talking about the Jewish religion” (HC 3 May 1965, col 960); and Lord Brockway: “I was not suggesting that there was discrimination of religion. I was suggesting that there is discrimination against Jews and discrimination against Asians, and that that discrimination – that is, in

Thus, while the Government of 1965 was clear that Jews were regarded as victim-subjects whom the RRA65 was intended to protect, whether they would be protected against all forms of antisemitism and the extent to which adherents to other religions would be protected was unclear. When debating the RRA76 eleven years later, Labour MP Paul Rose suggested that the concerns expressed by Floud and others had been warranted, as he claimed that right wing organisations were indeed inciting hatred against religious identities in order to circumnavigate the racial hatred provisions and target minoritized groups.⁷³

Several Lords and MPs argued in favour of specifying religion within the RRAs, not only to clarify the scope of the legislation in relation to Jews, but also on the basis that religious hatred is equally as problematic and harmful as racial hatred.⁷⁴ Yet for others, race and religion were distinct issues and should be treated as such: “There is all the difference in the world between attacking a section of the public because of the colour of their skins and attacking them because, say, they subscribe to the Thirty-Nine Articles.”⁷⁵ The distinction here is between what a person is, in terms of biology and immutable characteristics, and what a person chooses to be, in terms of religious beliefs, political convictions and corresponding behaviours, for example. It was thus through the purported immutability of race that it was perceived as an appropriate and sufficiently circumscribed subject of legal protection.⁷⁶

employment and in many other ways – might be justified on the ground of their religion rather than on their race, if religion is not included in the Bill” (HL 26 July 1965, col 1051).

⁷³ HC 4 Mar 1976, col 1648. See also Lord George-Brown, HL 27 Sep 1976, col 52.

⁷⁴ e.g. Janner, HC 9 July 1963, col 1086; Floud, HC 3 May 1965, 972; Weatherill, HC 16 July 1965, col 1008; Rose, HC 4 Mar 1976, col 1638.

⁷⁵ Dingle Foot, HC 3 May 1965, col 1043.

⁷⁶ See Mendelson: “if one attacks a person because he is black or because he is Jewish one is attacking him for qualities which are inherent in him and for qualities – and this is the essential point – which he cannot change” (HC 9 July 1963, col 1132); Soskice: “the disfigurement which can arise from inequality of treatment and incitement to feelings of hatred directed to the origins of particular citizens, something for which they are not responsible” (HC 3 May 1965, col 926); Williams: “He does not seem to have drawn the distinction which is crucial for freedom of speech, the distinction of the freedom to question a doctrine or an opinion or a belief, and the freedom to attack someone for something to which

The coverage of religious groups under the RRA76 remained uncertain until 1983,⁷⁷ when the House of Lords ruled on whether refusing to permit a Sikh pupil to wear a turban to school constituted racial discrimination. In *Mandla v Dowell Lee* the judgment focused on establishing an objective definition of an ethnic group and determining whether Sikhs fit that definition, rather than whether discrimination had resulted from prejudice against the appellant's *perceived* ethnic difference.⁷⁸ The Lords ruled that Sikhs comprise an ethnic group because they belong to a "separate and distinct community." In ruling that a shared religion, among other criteria, can contribute to ethnicity, ethnicity was not defined as an immutable characteristic. The ruling therefore undermines arguments that use immutability as a means of distinguishing race from religion and for justifying different treatment accordingly. Additionally, the criterion of a separate and distinct community suggests that, ironically, protection could be premised on the kind of non-integration for which 'immigrant' groups have been vehemently and consistently criticised, while more integrated groups might find it difficult to use the category of ethnicity to obtain redress. Furthermore, by asserting categorically that Sikhs are an ethnic group, the case of *Mandla* suggests that the struggle to provide the desired protections while remaining true to the text of the law, and the tendency to reify race and ethnicity as objective properties, resulted in precisely the protection of specific identity groups that Henry Brooke disparaged in 1963.

he cannot conceivably make any difference. No black man, no Jewish person, no Hindu – I should not have said Hindu – can take thought and change that fact about himself" (HC 3 May 1965, col 1018); Chapman: "It has nothing to do with opinions, it has nothing to do with criticising people for their beliefs, it has nothing to do with the great freedom of speech on those matters which we have defended for centuries in our community. It is a simple matter of defending something, defending a person who has no responsibility for the thing he has been criticised, namely, the colour of his face" (HC 3 May 1965, col 1028); Avebury: "whether this vice of racial discrimination is so much worse than any other sort that it demands special treatment. I should have thought the answer to that was unequivocally, "Yes", because in any other tort the victim is not in a position where he cannot alter the characteristics which give rise to the offence in the first place" (HL 20 July 1976, cols 749-50).

⁷⁷ As illustrated by an exchange regarding turbans between Lord Avebury (HL 27 Sep 1976, cols 33-4) and Lord Hailsham (*ibid.*, col 53).

⁷⁸ 2 AC 548.

Racialisation and deracialisation

Compared with the POA36 debates, the primary focus of the POA63 and RRA debates shifted from the provocation of Jews to the notion of an ‘immigration problem.’⁷⁹ For example, in the same sentence, Conservative MP Peter Griffiths referred to the Jewish population as “a stable part of the community” in contrast to “future mass immigration,” which he presented as an immanent and fearsome prospect.⁸⁰ Also signalling this shift in focus, the Solicitor-General, Sir Dingle Foot, said of the RRA65 that:

What we seek to do in the Bill is to prevent arising in this country in relation to the coloured immigrants the kind of situation which arose in relation to the Jews in this country in 1935 and 1936.⁸¹

Thus while opponents of the Bill, like Griffiths, sought to differentiate between the experiences of Jews and Commonwealth immigrants, proponents drew upon similarities between the treatment of the two groups and referred to the Holocaust to emphasise the potentially monstrous consequences of failing to act.⁸²

While in the POA36 debates it was mostly Fascism rather than Jewry that was criticised for being foreign and un-British, in the RRA debates the fears and disdain associated with foreignness were applied to immigrants, and to persons of colour by association. Indeed, Fascism and right-wing extremism were no longer characterised as foreign, but were now viewed as a domestic problem, and even as an unfortunate but natural reaction to the presence of ‘foreigners.’ As suspect outsiders, immigrants were portrayed considerably less favourably in the RRA65 and

⁷⁹ Soskice, HC 3 May 1965, col 942; Bell, *ibid.*, col 987; Binns, *ibid.*, col 1003 and 1008; Stonham, HL 26 July 1965, col 1014.

⁸⁰ HC 3 May 1965, col 1013.

⁸¹ *ibid.*, col 1047.

⁸² See Floud and Janner, HC 3 May 1965, col 969; Binns, *ibid.*, col 1003; Rose, HC 4 Mar 1976, col 1639.

RRA76 parliamentary discourse than Jews had been in the POA36 debates. Indeed, colour and foreignness were frequently conflated in the construction of a ‘problem’ demographic. This divisive racialisation of immigrants was embedded within the Labour Government’s approach to race relations, as expressed in the 1965 white paper:

This policy has two aspects: one relating to control on the entry of immigrants so that it does not outrun Britain’s capacity to absorb them; the other relating to positive measures designed to secure for the immigrants and their children *their* rightful place in *our* society.⁸³

The designation of British society as ‘ours’ and not ‘theirs’ suggested that ‘their rightful place’ within it might not be as equal and constituent members, even for the many Commonwealth citizens who had been raised and educated under British rule and for their children who may have been born in the UK.⁸⁴

Some parliamentarians sought to exculpate themselves and their institutions of racism by problematising immigrants and referring to racial prejudice as ‘natural.’⁸⁵ This ‘classic doublethink’⁸⁶ (racism is not racist) was exemplified by Lord Elton’s assertion that:

Wherever there has been mass immigration there is widespread and deep seated resentment – not prejudice against the colour of the immigrants, but resentment against their overwhelming numbers, against their sudden arrival, and against the varied social evils to which, not the individual immigrant but the mass immigration itself inevitably gives rise.⁸⁷

⁸³ “Immigration from the Commonwealth,” 2, emphasis added.

⁸⁴ Perry, *London is the Place for Me*, 48. Conservative MP Selwyn Lloyd emphasised the conditionality of ‘fair’ treatment: “We shall not get the right psychological frame of mind in this country to deal with them fairly unless we see to it that their numbers are not added to. But their children are a totally different proposition. They will be much easier to assimilate” (HC 3 May 1965, col 1034).

⁸⁵ Milverton, HL 26 Jul 1965, col 1036; Powell, HC 4 Mar 1976, col 1584; Stokes, *ibid.*, col 1642; Monson, HL 20 July 1976, col 802; Hailsham, HL 15 Nov 1976, col 1061.

⁸⁶ Cohen, *Deportation is Freedom!*, 20.

⁸⁷ Elton, HL 26 July 1965, col 1037-8.

While stating that racial prejudice was not the problem, Lord Elton communicated clearly to his audience that those whose ‘overwhelming numbers’ gave rise to ‘social evils’ were distinguishable by the colour of their skin. Indeed, in the preceding speech Lord Milverton had stated that “Such resentment is not fundamentally racial prejudice at all; it is merely that the accident of colour marks out the newcomer and easily identifies him.”⁸⁸ This is contradictory, as assuming that a person of colour is a ‘newcomer’ is, by definition, racial prejudice.

By conflating skin colour with foreignness and various social problems, the interests of victims of racial discrimination or incitement to racial hatred could be separated from those of the British population, alienated and marginalised. This attitude is exemplified in the statement by Labour MP John Binns that,

we must make sure that once the immigrants are working in our community they are not exploited and used as cheap labour to lower the living standards of the British working people.⁸⁹

Here, there is no empathy for those who may be exploited, only concern that such exploitation may be detrimental to the interests of (non-migrant) ‘British’ people. Conservative MP Ronald Bell provided a further example of this attitude, this time in relation to housing:

Of course, we all condemn unfair treatment. Very often on these occasions people are protecting their material interests ... Sometimes they are wrong about their interests and standards being threatened. Sometimes they are right, because in the case of property, for example, everybody knows that if, in fact, a street is taken over by a coloured population then undoubtedly the value of property in it declines very rapidly.⁹⁰

⁸⁸ Ibid., col 1035.

⁸⁹ HC 3 May 1965, col 1007.

⁹⁰ HC 3 May 1965, col 987.

Here, the purported effect of immigration on the value of property owned by white persons – an effect which is the result of prejudice – is prioritised above the ability of immigrants to access housing.

Through the more or less implicit racialisation of immigrants, immigration could be used to discuss issues pertaining to race without using language that might be discredited as racist. This often amounted to the technique of ‘deracialisation,’ whereby “discourse, which, at face value, makes no use of racist or racial categories, can be used with racial effect or to disguise racial intent.”⁹¹ For example, immigrants were described as a ‘flood,’⁹² a burden,⁹³ a “Yellow Peril”⁹⁴ and “a nuisance or an irritation to the people among whom they settle.”⁹⁵ On two occasions, speakers linked immigrants to elevated rates of tuberculosis,⁹⁶ while in other instances a risk to public health was implied through references to immigrants’ poor sanitary standards.⁹⁷ This is a particularly extreme and literal manifestation of immunity rationality within the debates, and one which provided a ‘scientific alibi’ for racial differentiation, to the negation of factors such as poor quality and overcrowded housing.⁹⁸ Indeed, overcrowded and segregated living conditions were presented as evidence that immigrants were incapable of meeting British sanitary standards and integrating, rather than as the result of the widespread refusal of ‘respectable’ white landlords to rent to black tenants and the subsequent exploitation of racialised groups by unscrupulous landlords who would charge exorbitant rates for dilapidated and overcrowded accommodation.⁹⁹

⁹¹ Reeves, *British Racial Discourse*, 4.

⁹² Binns, HC 3 May 1965, col 1005; Milverton, HL 26 July 1965, col 1034.

⁹³ Fisher, HC 23 Mar 1965, col 390; Lloyd, HC 3 May 1965, col 1033-4.

⁹⁴ Griffiths, HC 3 May 1965, col 1013.

⁹⁵ Milverton, HL 26 July 1965, col 1036.

⁹⁶ Binns, HC 3 May 1965, col 1005; Elton, HL 26 July 1965, col 1040.

⁹⁷ Binns, HC 3 May 1965, cols 1005 and 1007; Lloyd, *ibid.*, cols 1032 and 1034; Milverton, HL 26 July 1965, col 1034.

⁹⁸ Bivins, *Contagious Communities*, 3 and 223.

⁹⁹ Perry, *London is the Place for Me*, 85.

Yet, such social problems were framed as the inevitable results of immigration, and as unrelated to discrimination or social policy.¹⁰⁰

Such negative representations of immigrants were much less common in the RRA76 debates, but discussion of immigration controls continued to be deemed relevant to the topic of race relations. For example, making the link directly, Conservative MP William Whitelaw stated that “if illegal immigration and over staying were to be taking place on any substantial scale they would destroy any race relations policy.”¹⁰¹ In Whitelaw’s framing, immigrants remain responsible for public feelings towards racialised groups. Furthermore, perhaps as a result of intensified immigration controls under the Commonwealth Immigrants Act 1968 and the Immigration Act 1971, Whitelaw’s statement exemplifies an emerging focus on *illegal* immigration. This suggests that, as the population of UK-born persons of colour grew, it became more difficult to mask racist attitudes by using immigration as a proxy. A shift in language to illegal immigration was therefore required to maintain the necessary degree of respectability for mainstream politics – it was not the race of the immigrants that was objected to, but their violation of British law. Illegality thus became a new lens through which minoritized groups could be considered ‘suspect,’ revealing how strategies of deracialisation are only effective for so long as there is a ‘legitimate’ form of discrimination that can be referred to as a proxy.

On the whole, racism did not go unchallenged in the RRA debates and was contested more strongly in the RRA76 debates. However, while flagrantly racist speeches tended to be flagged as exceptional and challenged almost immediately, the racialisation of immigrants, references to immigration as a proxy for race, the rendering of non-white subjects as foreign and subsequent rebuttals of these ideas tended to form the ‘normal’ exchange of ideas within the body of the debates. Indeed, challenges to the relevance of immigration to the discussion of race relations were

¹⁰⁰ Carter, Harris and Joshi, “1951-55 Conservative Government,” 9-10. See also Cohen, *Deportation is Freedom!*, 94 and 101.

¹⁰¹ HC 4 March 1976, col 1569.

presented as general comments, as it would have been deeply impractical to attempt to respond to each of the many instances in which immigration or citizenship was either racialised or used to deracialise a racist argument. This suggests that sanitising racist ideas was a successful means of bringing them into mainstream discourse and that restrictions on racist speech therefore failed to halt the communication of racist ideas. Nevertheless, as language became increasingly sanitised into the 1970s, the flagrantly racist nature of the ideas being expressed also diminished.

Whiteness and *ressentiment*

The rapid growth of a group of ‘others’ who could be distinguished as ‘coloured’ led to the compounding of a counterposed ‘white’ identity. While describing British people as ‘white’ was nothing new, previously this descriptor had mostly been used to distinguish colonisers from the colonised. From the 1950s, however, whiteness became an operative identity in domestic politics. Then, in the 1970s, when it became recognised that the growing population of UK-born persons of colour meant that immigration was no longer an adequate proxy for race, terms such as ‘native’ and ‘indigenous’ Britons came into circulation to justify the entitlement of the white population without referring explicitly to colour. Additionally, ‘British,’ ‘ordinary’ or ‘our’ people were generally assumed to be white.¹⁰² For example, the “kindly, just and wise British people,”¹⁰³ “my constituents,”¹⁰⁴ “reasonable and sensible people”¹⁰⁵ and “our people... the ordinary man or woman”¹⁰⁶ were all presented as white through a more or less implicit contrast with non-white subjects or immigrants. Additionally, the emergence of the term ‘white majority’ in the RRA76

¹⁰² See Olson (2008, p.709) for analysis of “whiteness as norm” in the context of the US civil rights movement.

¹⁰³ Thorneycroft, HC 3 May 1965, col 955.

¹⁰⁴ Binns, *Ibid.*, col 1006.

¹⁰⁵ Griffiths, *ibid.*, cols 1012.

¹⁰⁶ Stokes HC 4 Mar 1976, col 1645.

debates further reproduced the myth of homogenous, normative and uniquely important white interests.

Nietzsche's model of *ressentiment*, as set out in Chapter Three, can be applied to shed light on the moral and emotional dynamics of the emergence of whiteness and indigeneity as an identity. In particular, the construction of a white/non-white binary can be seen as overlaid with other binaries, such as civilised/uncivilised (as illustrated through references to hygiene standards), belonging/not-belonging (as illustrated in the conflation of colour and immigration, and references to 'ordinary' people), and even pure/polluting (as illustrated by ideas about national greatness under threat). Each of these binaries serves to associate whiteness with positive affects related to pride and nostalgia on the one hand and non-whiteness with negative affects such as fear and disgust on the other. In this way, through the abstracted Nietzschean narrative of virtuous victim versus depraved villain, whiteness also represented morality and entitlement.

Joel Olson extended the notion of white victimhood through the concept of a 'virtuous middle' identity in his study of Republicanism in the US.¹⁰⁷ This middle population was portrayed in Republican discourse of the 1960s as besieged from above by self-serving and out of touch elites and from below by the immoral and uncivilised rabble. Olson argues that by normalising the virtuous middle as white in political discourse, resentment over the perceived loss of white privilege was mobilised for political gain. In 1960s and 1970s Britain, a similar effect can be seen in representations of a virtuous (white) working class, which was presented as threatened from below by immigrants/minorities who "will never learn English,... will never change their customs or their religious practices, their cooking habits or their sanitary standards," and disregarded from above by out of touch politicians who "have not had any actual personal physical experience of the problems involved."¹⁰⁸ In this way, opponents of the RRAs constructed the "the poor old

¹⁰⁷ Olson, "Whiteness and the Polarization of American Politics."

¹⁰⁸ Lloyd, HC 3 May 1965, col 1034. See also Binns, HC 3 May 1965, col 1006; and Bell, HC 8 July 1976, col 1719.

English working class”¹⁰⁹ as dual victims – victims of changes caused by immigration on the one side and of race relations legislation that would further disempower them on the other. Conservative MP Nicholas Budgen painted an especially clear picture of a hard-done-by, virtuous – and implicitly white – working class in 1976:

[The Race Relations Bill] will cause further resentment as it grants yet further rights to the immigrant minority. It will be one more affront, not to the middle class who are here [in parliament] but to the ordinary British people who have to bear the brunt of immigration and who have done so with decency and dignity.¹¹⁰

This is a particularly clear example of the distinction that was made between deserving and undeserving populations.

The notion of virtuous white victims was supported by contrasting representations of racialised minorities/immigrants as powerful and privileged. For example, in his infamous ‘Rivers of Blood’ speech, Enoch Powell presented the idea that “In this country in 15 or 20 years' time the black man will have the whip hand over the white man”¹¹¹ and described the immigration situation as “like watching a nation busily engaged in heaping up its own funeral pyre.”¹¹² Here, Powell constructed the problem as urgent and almost apocalyptic in order to mobilise support for his anti-immigration stance. Popular notions of a powerful black sexuality that threatened the dominance of white men and the purity of white women,¹¹³ and black sexual deviance that threatened the

¹⁰⁹ Stokes, HC 4 Mar 1976, col 1644.

¹¹⁰ HC 4 Mar 1976, col 1634.

¹¹¹ This echoes an earlier speech by Labour MP Frank Tomney: “Present population trends throughout the world show that the coloured races will exceed the white races in a few years' time in the ratio of no less than five to one” (HC 5 Dec 1958, col 1589).

¹¹² Powell, “Rivers of Blood.” See also, Conservative MPs Dudley Smith: “the time has now come to call a final halt to immigration as we have known it. Unless we do, we shall find the sands of time running out even faster than we imagine” (HC 4 Mar 1976, col 1595); and John Stokes: “Englishmen will once again have suffered a defeat in their own land” (HC 10 Oct 1976, col 636).

¹¹³ Perry, *London is the Place for Me*, 108-9 and 114.

sanctity of the population as a whole,¹¹⁴ were largely absent from the Hansard data, except in Lord Milverton's assertion that:

the resident population ... looks askance at the excessive fertility of these immigrants, and it fears miscegenation.¹¹⁵

In other examples, fear of immigrant extremism was stoked¹¹⁶ and immigrants were described as receiving special treatment¹¹⁷ or a disproportionate share of resources.¹¹⁸ The fears and resentment of the white working class were subsequently presented as reasonable in the face of grave threats to their biological, cultural and material interests. Such lines of argumentation based on polarised interests presented the RRAs as 'reverse discrimination,' whereby:

Under the Bill, our people will be unfairly discriminated against and will face new offences. It is the newcomer, the immigrant, who will have the privileges and will be able to claim a right to them.¹¹⁹

Thus, by constructing an image of immigrants as powerful and privileged, their credibility as victims – or even as individuals – was undermined. Furthermore, by presenting the white working class as righteous and victimised, it was suggested that good race relations required placating and appeasing the white working class rather than the reduction of inequality, discrimination or prejudice.¹²⁰

¹¹⁴ Cohen, *Deportation is Freedom!*, 60-61.

¹¹⁵ HL 26 July 1965, col 1035.

¹¹⁶ Griffiths, HC 3 May 1965, col 1011; Powell, "Rivers of Blood."

¹¹⁷ Griffiths, HC 3 May 1965, col 1014; Elton, HL 26 July 1965, col 1039; Powell, HC 4 Mar 1976, col 1585; Bell, HC 8 July 1976, col 1718. See also Powell, "Rivers of Blood."

¹¹⁸ Lloyd, 3 May 1965, col 1034; Powell 1968.

¹¹⁹ Stokes, HC 4 Mar 1976, cols 1958-9. Another example: "If there ever was a Bill to enforce racial discrimination it is this, since it gives the coloured man all the rights, privileges and pre-eminences from which the white man is debarred" (Somers, HL 26 July 1965, col 1054).

¹²⁰ See Lord Twining: "I fear that the more effectively the provisions of this Bill are administered, the more will those of our people who are affected resent them; and this could lead to a worsening of race relations, and feelings could be exacerbated" (HL 26 July 1965, cols 1049-50).

Arguments advocating the appeasement of white working class *resentiment* were criticised by those who refuted a binary division of interests. Proponents of the RRAs pointed out that a large proportion of racially minoritized groups were also working class and experienced many of the same concerns and frustrations as white working-class families. For example, Labour MP Marcus Lipton described urban problems such as crime and poor living conditions as “nothing at all to do with race relations or with whether people are black or white,” but as solely the result of economic deprivation.¹²¹ It was commonly recognised that where there was urban deprivation it was racially minoritized groups who bore the worst of it. Thus, the narrative of a powerful enemy was contested through the representation of immigrants and racially minoritized groups as disadvantaged and disempowered. This framing was supported by the 1975 Racial Discrimination white paper, which described a “vicious downward spiral of deprivation” for racial minorities.¹²²

Conclusion

The RRA65 has often faced criticism for its limited scope, difficulties with enforcement and its relationship with immigration policy. While reiterating the significance of acknowledging racial discrimination and hatred as issues worthy of legislative intervention, this chapter has illuminated additional limitations in how the offence of stirring up racial hatred was understood. Firstly, a limitation can be seen in the construction of race as a concrete and objective category, rather than as subjective means of differentiating. This is seen not only in the notion that race is opposed to ‘whiteness,’ but is also reflected in inflexible views of identity, where non-whiteness was treated as a permanent indicator of outsider status. The desire for clearly delineated and inflexible categories is also especially problematic when it comes to determining the relationship between race and religion. Such approaches to identity in relation to the stirring up hatred offences have

¹²¹ HC 4 Mar 1976, col 1610.

¹²² Home Office, “Racial Discrimination,” 3.

persisted intractably into the 21st century and remain problematic (see Chapter Eight). However, the representation of race as immutable can also be seen as strategically advantageous, as it enabled racial hatred and discrimination to be portrayed as especially unjust.

A second limitation lies in the focus on public order. Responses to the stirring up of racial hatred were essentially polarised according to whether racial prejudice or racial diversity were identified as the root of poor race relations, and thus the source of risks to public order. While those in favour of the provision portrayed racial minorities as victims of poisonous hatreds and referred to the Holocaust to warn where incitement to hatred can lead, those opposing it portrayed the increasing presence of non-white subjects in Britain as a threat to the health and prosperity of the white working class. In this latter framing, a clear biopolitical narrative was employed, whereby it was the 'white,' 'native' population that was in need of protection from external contaminants. Here, non-white subjects were often portrayed as inherently different to white Britons and were rarely credited with agency or individuality. Fantasies of innate white entitlement and superiority could therefore be drawn upon to portray racial animosity as 'natural.' As Bourdieu points out, the designation of such responses as natural reflects a desire to maintain a previous state of power relations,¹²³ i.e. the domination of white Britons over non-white foreigners, ideally carried out in faraway lands. Even among justifications for the RRAs, the notion that white and non-white interests were distinct was prominent; non-white subjects were frequently considered in terms of how they behaved and were treated within 'our' society, rather than being perceived as constituent members of that society with equally valid concerns and interests. While some MPs did emphasise the rights of minoritized groups and their entitlement to equal treatment and regard, these speeches were notable exceptions within a discourse that overwhelmingly prioritised the interests of 'the white majority.'

¹²³ *Language and Symbolic Power*, 222.

With regards to the significance of the public order framing, it is apparent that neither the rationale of maintaining public order nor that of facilitating harmonious race relations necessarily equate to the pursuit of equality or a true anti-racism agenda. Indeed, if the racial hatred offence was never really seen as a provision for the pursuit of equality, this may explain why it was separated from anti-discrimination legislation by the RRA76. Alternatively, applying the label of 'public order' could be seen as a strategic measure to enhance acceptance of the controversial criminal provision. Regardless, a rift between what might be characterised as essentially Conservative and Labour approaches to public order is apparent. The 'Conservative approach' focused on the immediate outbreak of disorder and sought to penalise any 'troublemakers': people should be free to say what they want so long as everyone behaves in an orderly manner. This fits with the view that 'ordinary' (white) British people are essentially good and that racism is only a problem when it leads to disturbances of the peace. The 'Labour approach,' on the other hand, suggested that more than just the peace should be protected, and that the problem lay not only in the provocative nature of a speech, but also in the very ideas that were being expressed. This suggests an inclination to consider the longer-term effects of propagating racial hatred on public order, as well as less resistance to holding 'ordinary' (white) people accountable. Here, there was scope for the harmfulness of racial hatred to be prioritised above the status quo of white entitlement. However, this often fell short of calling for equal consideration of the interests and concerns of all British citizens.

Chapter Seven

Class and Control

Public Order Act 1986

Public Order Act 1986, s 18(1):

A person who uses threatening, abusive or insulting words or behaviour, or displays any written material which is threatening abusive or insulting, is guilty of an offence if–

- a) he intends thereby to stir up racial hatred, or
- b) having regard to all the circumstances racial hatred is likely to be stirred up thereby.

Introduction

In 1986, the concerns motivating the Government to enact new public order legislation were considerably broader than those that induced the swift enactment of the original Public Order Act fifty years earlier. Far right demonstrations were still a concern, but so too were a variety of other types of ‘disorder,’ including labour strikes, football hooliganism, youth delinquency, animal rights activism and anti-apartheid and anti-nuclear protests.¹ There was also a concern to codify public order law, which at the time included a number of common law offences, so as to “remove a substantial number of anomalies and uncertainties from the present law.”² The case for such codification was made by the Law Commission in a 1983 report, which included a draft Criminal Disorder Bill. This draft bill lay the foundations for ss 1-4 of the more positively titled Public

¹ See Home Office, “Review of Public Order Law,” 2.

² Law Commission, “Offences Relating to Public Order,” 11.

Order Act 1986 (POA86). Reflecting the far broader objectives of the POA86, the debates preceding its enactment were considerably lengthier and more wide-ranging than those preceding the Public Order Act 1936 (POA36). However, the stirring up racial hatred provisions were fleshed out in Part III of the Bill with relatively little contention, especially in comparison with the controversy provoked by provisions in Part I ('New Offences') and Part II ('Processions and Assemblies').

The unquestioned inclusion of the stirring up hatred provisions within the POA86 reaffirmed their status as public order offences.³ Understanding the public order project within which these offences were – and continue to be – situated is therefore important for understanding how the racial hatred provisions were made sense of at the time and the context into which the religious and sexual orientation offences were later introduced.⁴ At this juncture of the genealogy, then, the parliamentary debates reveal more about this public order context of the stirring up hatred offences than about the delineation of the identity categories by which they are currently stratified. Nevertheless, this chapter investigates how particular interpellations and valorisations of different groups were used to shape understandings of public order as the Bill passed through parliament. Additionally, the POA86 is contextualised within the neoliberal rationality that defined Conservative governance in the 1980s, and that continues to dominate, so as to ensure that future discussions on the reform of the stirring up hatred provisions critically analyse rather than unthinkingly reproduce the assumptions that shaped them.

Before the more detailed analysis of the Act and the preceding debates, this introductory section provides a brief outline of the political and legal context within which the POA86 debates took place. The main analysis is then divided into three sections. The first focuses on what is now s 5 of the POA86, which provides insight into the expansion of the law and order agenda and, by virtue of encompassing speech acts, is important for understanding the scope of the stirring up

³ Wolffe, "Values in Conflict," 86.

⁴ See Valverde, "Questions of Security."

hatred offences.⁵ The second section then considers the offences in Part II of the POA86 on processions and assemblies to further examine the approach taken to balancing rights and interests in relation to public order. The third section then turns to Part III of the POA86 to examine how particular ideas about race were reinforced and how the racial hatred provisions were perceived as fitting in with the new public order regime.

Thatcherite neoliberalism

Margaret Thatcher was elected in 1979 at a time of economic crisis and appetite for political change: “stories of ‘mugging’ and increased street crime, militant trade unionism, chronic industrial disputes, and long lines of unemployed workers eventually convinced many British voters that the politics of social democratic centrism had had its day.”⁶ Reflecting this, the 1986 Public Order Bill was confidently introduced as an innovative solution,⁷ in contrast to the emphasis in 1936 on continuity with established common law and local by-laws. The problems of the day were identified by Thatcher’s election campaigns as economic crisis and rising criminality.⁸ The blame for these conditions was placed on permissive economic policies and the failure of Labour governments to effectively disincentivise and discipline law-breakers.⁹ The solution, which Thatcher was elected to implement, was tough leadership that would liberalise the markets and

⁵ See Chapter Eight for analysis of how these provisions were later confused by opponents of the stirring up of religious hatred offences.

⁶ Garland, *Culture of Control*, 97.

⁷ Hind, HC 13 January 1986, cols 840-1.

⁸ The perception of a rising tide of crime was not confined to Conservative politicians. There were 15 mentions of high or increasing levels of crime within the Hansard examined for this chapter. See Pearson, *Hooligan*, chap. 1.

⁹ Terrill, “Thatcher’s Law and Order Agenda,” 433.

bring criminals, unions, the workshy, scroungers and other (poor/lower class) moral deviants into line with national interests.¹⁰

What this meant in terms of class, was increased freedoms for the wealthy as the state withdrew from economic regulation, and increased punishment of the poor as the state intensified its law enforcement apparatus.¹¹ Or, in the words of Loïc Wacquant, the “erasing of the economic state, dismantling of the social state, and strengthening of the penal state.”¹² In Parliament, Plaid Cymru MP Dafydd Thomas described the POA86 as “part of the new Right's policy to roll back the state in every area of life except coercion and control.” Thomas argued that this would lead to further disorder, which would in turn lead the Government to seek further repressive powers, and thus “the spiral of repression will be increased.”¹³

Other laws introduced by Thatcher's government in the areas of policing and industrial relations in the first half of the 1980s contributed to a perspective that the POA86 was part of a broad, systematic reform of law and order legislation.¹⁴ With regard to police powers, the Police and Criminal Evidence Act 1984 significantly increased powers to search, arrest and detain. Here, the use of qualifiers such as ‘serious,’ ‘reasonable’ and ‘likely’ within the Act granted wide discretion to police in the use of such powers.¹⁵ With regard to industrial relations, Thatcher employed a step-by-step law and policy strategy to weaken the position of trade unions:¹⁶ in 1980, welfare benefits were cut for the families of strikers; the Employment Act 1980 removed

¹⁰ Taylor, “Law and Order, Moral Order,” 298; Sim, Scraton and Gordon, “Introduction,” 60; Garland, *Culture of Control*, 99-100; Dixon, “Protest and Disorder,” 91.

¹¹ Brake and Hale, *Public Order and Private Lives*, 1; Garland, *Culture of Control*, 99; Wacquant, *Punishing the Poor*, 8.

¹² “Advent of the Penal State,” 81, referring to both US and European neoliberalism. See also, Cohen, “Punitive City.”

¹³ HC 13 Jan 1986, cols 843 and 845. See also Scraton on the “spiral of lawlessness” (“Unreasonable Force,” 182).

¹⁴ Dixon, “Protest and Disorder,” 90.

¹⁵ Scraton, “Unreasonable Force,” 158-9.

¹⁶ Moher, “Trade Unions and the Law.”

protections on secondary picketing and placed conditions on closed shop arrangements; the Employment Act 1982 further limited the scope of lawful industrial action and made unions liable for damages in the event of ‘unlawful action’; and the Trade Union Act 1984 required a legal strike to be supported by a secret ballot.¹⁷ Both the Part II provisions of the POA86, which enable conditions to be placed on lawful assemblies, and the broad powers of arrest established by s 5 can be seen as part of this programme of narrowing the scope for legal industrial action.¹⁸

In contrast to the RRA debates, immigration was hardly mentioned during the passage of the POA86. However, the British Nationality Act 1981 (BNA) is also relevant for understanding the contemporary law and policy landscape into which the POA86 was introduced. This act aligned citizenship status with the restrictive immigration criteria of the Immigration Act 1971 (see Chapter Six). Prior to the BNA, only one type of British citizenship existed: citizenship of the UK and Colonies. The BNA created three categories: British Citizenship for those with a hereditary link to the UK (predominantly white), British Dependent Territories Citizenship for those with a hereditary link to a British dependency (predominantly non-white) and British Overseas Citizenship for anyone who was a citizen of the UK and Colonies prior to the BNA entering into force, but who did not fall into either of the other two categories (such as Asian immigrants to African colonies). The BNA also abolished the rule of *ius soli*, whereby British nationality was automatically granted to persons born on British soil. The Conservative Government presented the BNA as enhancing the security of Britons of colour, both by codifying the rights of those who would be designated British citizens and through the persistent logic that high immigration is detrimental to good race relations.¹⁹ Conversely, the BNA was seen by many

¹⁷ Pyper, “Trade Union Legislation 1979-2010”; Brake and Hale, *Public Order and Private Lives*, 7; Davidson, “New Tort for Mass Picketing,” 164.

¹⁸ See Home Office, “Review of Public Order Law,” 35-6.

¹⁹ For example, see Raison, HC 4 June 1981, col 1188.

as an attempt to curtail black immigration and citizenship and to thereby reinforce the notion that blackness was anathema to Britishness.²⁰

While racialised identities occupied an ambiguous position in the debates on the POA36 and the RRAs as both risky and at-risk subjects, Thatcherism seemed to apply this ambiguity to a far wider portion of the population.²¹ Under the Thatcherite economic and social model, unions, class identities and any other group affiliations were to be superseded by the free and responsible individual and allegiance to the nation.²² Thatcherism, then, evoked the full force of the self-made liberal subject, who is abstracted from social structures and is held to be solely responsible for their own position in society.²³ This responsabilisation of individuals enabled them to be blamed for social problems, which in turn made the enactment of stricter and more punitive measures against individuals a logical response to crime.²⁴ It also facilitated a moral polarisation between hard-working tax-payers on the one hand and criminals, welfare-recipients and protesters who threatened orderly and respectable life on the other.²⁵

The conceptual division between the good and the subversive subject was perhaps most starkly apparent in a speech to Conservative MPs on 19 July 1984, where Thatcher referred to striking miners as the ‘enemy within’ and described them as a threat to liberty equal to that posed

²⁰ Dixon 1983, 164 and 165; Terrill 1989, 434-6. A poster for the Conservative 1983 election campaign bore the image of a black man in a suit and the slogan “Labour says he’s black. Tories say he’s British.” This was criticised for suggesting that being black was undesirable and for precluding the possibility of being both black *and* British (Dixon, “Thatcher’s People,” 165; Shilliam, *Race and the Undeserving Poor*, 129). Merchandise with the image and slogan of this poster is still available from the Conservative Party website at the time of writing.

²¹ Sim, Scraton and Gordon, “Introduction,” 60.

²² Dixon, “Protest and Disorder,” 171

²³ Brown, *States of Injury*, 67; Wacquant, *Punishing the Poor*, 1.

²⁴ Garland, *Culture of Control*, 102.

²⁵ Taylor, “Law and Order, Moral Order,” 310; Cohen, *Folk Devils*, xx1; Scraton, “Unreasonable Force,” 160.

by General Galtieri of the Falklands.²⁶ While the ‘enemy without’ had been defeated in the Falklands War, the battle lines drawn in the war against unions closely aligned with Esposito’s biopolitical immunity metaphor: a part of the population was portrayed as dysfunctional and as placing a strain on the system to the extent that a targeted attack on them was necessary for the population’s overall health and wellbeing. While frames of ‘us and them’ in the discourse surrounding the RRAs were focused on the need to deal with a non-white presence within the white population, Thatcherite discourse presented divisions along class and political lines, whereby the construction of lower-class folk-devils – scroungers, muggers, hooligans and militants – undermined the inter-class affinities that post-World War II collectivist politics and the welfare state had relied on.²⁷

New threats to public order (s 5)

The POA86 repealed Sections 3, 4, 5 and 5A of the POA36, and the common law offences of riot, rout, unlawful assembly and affray. These were replaced with five public order offences ranked in order of their severity: riot (s 1), disorder (s 2), affray (s 3), causing fear or provocation of violence (s 4) and causing harassment, alarm or distress (s 5). Section 5 POA86 is the most minor of the ‘new offences’ in terms of penalties, and also the most controversial. It prohibits disorderly behaviour or the use of words, behaviour or any visible representation which is threatening, abusive or insulting (referred to collectively as ‘disorderly conduct’), which is within in the presence of another person who is likely to be caused harassment, alarm or distress thereby. This

²⁶ See also Thatcher’s association of “vandals on the picket lines” with “muggers on the street,” arguing that the complicity of Labour ministers in the former was also complicity in the latter (in Talyor, “Law and Order, Moral Order,” 298).

²⁷ Garland, *Culture of Control*, 101.

section considers what the parliamentary debates about s 5 tell us about how the concept and scope of public order was understood at this time.

Young savages and vulnerable victims

Sections 4 and 5 of the POA86 replaced s 5 of the POA36,²⁸ which was seen as the charge of choice that police officers could bring when they disapproved of an individual's behaviour or felt that their authority had been disrespected.²⁹ The wide-ranging use of s 5 POA36 had already been noted in the courts in 1973, with Lawton LJ stating that "in recent years there has been a tendency to use the provisions of Section 5 for purposes which were not within the intentions of Parliament."³⁰ Additionally, the charge was brought against around 4,000 striking miners during the 1984-5 dispute, in some instances just for shouting 'scab.'³¹ The 1986 offences did not narrow the potential for such broad applications of criminal law. Conversely, critics have argued that s 5 encompasses conduct that would not previously have been classed as criminal³² and legitimated police practices which had previously been of dubious legality.³³

The concept of a 'breach of the peace' was omitted from the new offences. In addition to finding that the concept was inadequately defined in the legislation and variously interpreted in case law, the Law Commission argued it was too narrow, as it overlooked the impact that certain behaviour could have on persons who were unlikely to be provoked to breach the peace but who may be frightened or intimidated (such as old ladies).³⁴ The new offences were therefore drafted to include this notion of individual harm rather than the more abstract notion of damage to 'the

²⁸ These offences are briefly compared in Chapter One, page 5

²⁹ Oyediran, "United Kingdom's Compliance," 252; Ashworth, "Criminalising Disrespect," 99.

³⁰ *R v Ambrose* (1973) 57 Cr App R 538, 540.

³¹ Thornton, *Public Order Law*, 32; see also Percy-Smith and Hillyard, "Miners in the Arms of the Law," 345.

³² Thornton, *Public Order Law*, 40.

³³ Dixon, "Protest and Disorder," 93.

³⁴ "Offences Relating to Public Order," 46-9.

peace.’ However, the absence of a definition of ‘disorderly’ conduct within the Act led opponents to argue that the new s 5 was nevertheless “too vague and could turn louts and larkers unnecessarily into criminals.”³⁵ The 1985 government White Paper describes disorderly conduct as “minor acts of hooliganism” and presents the offence as a version of the charge of being drunk and disorderly that could be used against sober people.³⁶ The type of behaviour that could be caught by what is now s 5 of the POA86 was described in the White Paper as follows:

Hooligans on housing estates causing disturbances in the common parts of blocks of flats, blockading entrances, throwing things down the stairs, banging on doors, peering in at windows, and knocking over dustbins;

Groups of youths persistently shouting abuse and obscenities or pestering people waiting to catch public transport or to enter a hall or cinema;

Someone turning out the lights in a crowded dance hall, in a way likely to cause panic;

Rowdy behaviour in the streets late at night which alarms local residents.³⁷

Further examples provided in the debates included:

“young 12-year-olds who constantly skateboard outside.”³⁸

³⁵ Kaufman, HC 30 April 1986, col 1063. See also Lord Hutchinson: “There are catch-all provisions in this Bill which will criminalise new areas of public behaviour, will draw young men and women and juveniles into an extended area of delinquency” (HL 13 June 1986, col 523); Lord Graham: “the offences described in Clause 5 extend the power of the police and would place many young people prone to boisterous and extrovert behaviour at risk of arrest” (HL 13 June 1986, col 552) and Lord Donaldson: “we do not want to make criminals out of tiresome young people” (HL 16 July 1986, col 950). Several Lords denounced the vagueness of what is now Section 5: Hutchinson, HL 13 June 1986, cols 525-6; HL 23 Oct 1986, col 225 and HL 29 Oct 1986, col 751; Elwyn-Jones, HL 13 June 1986, col 520; Mischon, HL *ibid.*, col 578; Scarman, HL 16 July 1986, col 938; Broxbourne, *ibid.*, col 948; and Foot, *ibid.*, col 240.

³⁶ “Review of Public Order Law,” 18.

³⁷ *Ibid.*

³⁸ Finsberg, HC 30 April 1986, col 959.

“Blowing whistles, banging dustbin lids and shouting obscenities... long and noisy parties which remain a persistent nuisance and cause distress and harassment to other residents in the area.”³⁹

“thugs who alarm shoppers in shopping precincts and the uncaring hooligans who rush about housing estates, creating noise and mayhem in the early hours of the morning, causing much distress to residents.”⁴⁰

“noise, dustbins being tipped over, bottles being smashed in the street late at night by groups of youths running through the common areas of blocks of flats and the like.”⁴¹

Advocates of s 5 thus argued that the criminal law needed to be extended to protect ‘ordinary’ and vulnerable people who were presented as besieged by hooligans, thugs and unruly youth:

The House will be going to the rescue of a large number of ordinary people if it passes the amendments. We should be concerned primarily with the victims - the elderly, the pregnant women wheeling their prams in areas where they are set upon by hooligans, the black people in white neighbourhoods and, sometimes, the white people in black neighbourhoods, who are confronted by gangs of youngsters who behave in a fashion with which we must deal.⁴²

In particular, the image of out-of-control youths was recurrent, suggesting a newly emerging social problem.⁴³ However, such concern over youth delinquency and social decline was continuous with moral panics that scholars have traced from the Teds of the 1950s to the Mods and Rockers of the 1960s to muggers in the 1970s and the acid house ravers of the 1980s.⁴⁴ Additionally, the problem that s 5 was to address was consistently located within housing estates or tower blocks, lending a class dynamic to the portrayal of both the deviant youth and their defenceless victims. Urban

³⁹ Shaw, HC 30 April 1986, col 962.

⁴⁰ Sinclair, HL 23 Oct 1986, col 228.

⁴¹ Ibid., col 241.

⁴² Griffiths, HC 30 Apr 1986, cols 954-5.

⁴³ Wheeler, HC 13 Jan 1986, col 821; Hayes, *ibid.*, col 832; Hind, *ibid.*, col 840.

⁴⁴ Cohen, *Folk Devils*, xiii; Osgerby, *Youth Media*; Hall et al., *Policing the Crisis*; Pearson, *Hooligan*.

estates were repeatedly portrayed as insecure places where inhabitants suffered from the absence of effective law and order. For example, Conservative MP Jerry Hayes suggested that the Bill would be widely supported, “especially by those who live on housing estates that have been subjected to the spiralling lawlessness of the past 10 years” and “those who are living within council estates and are terrified of opening their doors at night.”⁴⁵ Without questioning how such ‘lawlessness’ had come about, Hayes went on to state that:

The Bill ... is an answer to the cry in the wilderness from many people in council estates who are desperately frightened because their estates have been turned into ghettoes of fear.⁴⁶

Hayes’s narrative conforms neatly to the savages-victims-saviours nexus that Makau Mutua has described in relation to justifications for international interventions, where innocent victims are presented as terrorised by the deviant and backwards among them.⁴⁷ The fantasy of a clear distinction between those who are in need of protection and those from whom protection is needed, even though they occupy the same physical space and socio-economic status, justifies the intervention of the ‘saviour’ state for “the rescue of those who live on our great housing estates and who have been grossly abused.”⁴⁸ Thus, on the one hand, the ‘ideal victim’ status of the ‘respectable’ working classes was emphasised by Conservatives so as to mobilise sympathy: victims were described as “ethnic minority families,”⁴⁹ “innocent lives,”⁵⁰ “the elderly and defenceless,”⁵¹ “the elderly, the poor and the lonely,”⁵² “pregnant women,”⁵³ “the little old lady”⁵⁴

⁴⁵ HC 13 Jan 1986, cols 831 and 832.

⁴⁶ *Ibid.*, col 835.

⁴⁷ *Human Rights*.

⁴⁸ Griffiths, HC 30 April 1986, col 1066.

⁴⁹ Hurd, HC 13 Jan 1986, col 793; Glenarthur, HL 16 July 1986, col 951.

⁵⁰ Hawksley, HC 13 Jan 1986, col 827.

⁵¹ Lyell, *ibid.*, col 853.

⁵² Griffiths, HC 30 April 1986, col 954.

⁵³ *Ibid.*

⁵⁴ Marlow, *ibid.*, col 957.

and “the weak and the vulnerable.”⁵⁵ Parliamentary concern over crime and violence was thus, as advocated by the Law Commission,⁵⁶ blended with concern over *fear* of crime and violence. This notion – as embedded in the text of s 5 – that the distress of vulnerable subjects required a legislative response suggests a broadening of the public order framework beyond eruptions of violence. However, such broadening in relation to s 5 encompasses only distress that might be caused by disorderly conduct, not distress that might have precipitated such behaviour, such as the feeling of having been unfairly targeted by the police, for example;⁵⁷ no such blurring of victim and villain subjectivities was permitted to interfere with culpability. On the other hand, then, those who were blamed were devalued and dehumanised so as to minimise sympathy and maximise support for a law and order solution. For example, potential offenders were described as “a threatening mob of youths,”⁵⁸ “gangs of youths,”⁵⁹ “rat packs,”⁶⁰ “young thugs or louts,”⁶¹ and “uncaring hooligans.”⁶² Incidentally, the terms ‘hooligan’ and ‘thug’ were both initially applied to racialised miscreants. The former initially associated urban social problems with the Irish presence in England in the late 1800s, with the term possibly derived from the Irish surname ‘Houlihan’ or a portmanteau of ‘Hooley’s gang.’⁶³ The latter is derived from the Hindi word ‘thuggee’ which described supposedly hereditary criminal gangs in colonial India.⁶⁴ However, by the 1980s the terms appear to have transitioned from denoting ‘un-English’ behaviour⁶⁵ to denoting the undesirable behaviours of the urban lower classes, especially in the contexts of youth, nationalist

⁵⁵ Elwyn-Jones, HL 13 June 1986, col 520.

⁵⁶ “Offences Relating to Public Order,” 48.

⁵⁷ On this point in relation to s 2 POA86, see El-Enany, “Innocence Charged with Guilt,” 89.

⁵⁸ Hawksley, HC 13 Jan 1986, col 827.

⁵⁹ Hind, *ibid.*, col 840; Shaw, *ibid.*, col 861; Glenarthur, HL 16 July 1986, col 951.

⁶⁰ Griffiths, HC 30 April 1986, col 1066.

⁶¹ Hutchinson, HL 13 June 1986, col 524.

⁶² Sinclair, HL 23 Oct 1986, col 228.

⁶³ Randall, *Kipling’s Imperial Boy*, 98.

⁶⁴ Mahmud, “Colonialism and Modern Constructions of Race,” 1236.

⁶⁵ Pearson, *Hooligan*, 75.

movements and football. If not demonstrably responsible for crime and violence, such figures – especially in their abstract form – were undeniably responsible for fear.

In contrast to the notion of the self-made neoliberal subject, both feminised/racialised/elderly victims and masculinised/youthful villains were characterised as belonging to the urban lower classes and were fixed with a sense of a helplessness.⁶⁶ To be unfortunate enough to be elderly, an ethnic minority or raising a family within a rundown, inner-city estate was to be inherently vulnerable. To be a youth on such an estate, or to adopt the ‘non-respectable’ qualities that disqualify a person from ‘vulnerability,’ was to be inherently problematic and potentially even irredeemable.⁶⁷ Both were presented by advocates of s 5 as powerless to save themselves, and thus as necessitating state intervention.

Counternarratives

In narratives where residents of urban estates were not perceived as helpless, but rather as able to participate in dialogue with the police and as agents with a role to play in finding and executing solutions, the Bill was seen as unnecessary.⁶⁸ Several Labour politicians sought to draw attention to the structural causes of crime and urban decay, to recognise the struggles of discontented constituents and to suggest economic and social rather than solely law and order solutions. For example, MP David Clelland stated in his maiden speech that:

So long as we concentrate more of our time on talking about combating disorder than we do about creating the conditions in which disorder need not occur we are not using our time or our imaginations in the best interests of our children... we cannot ignore the link between rising unemployment, poverty and deteriorating social

⁶⁶ Lower class mothers were presented as victims rather than as problems within the public order discourse, in contrast to discourse surrounding other policy areas, most notably welfare (see, for example, Evans, “Women and the Politics of Austerity”).

⁶⁷ Taylor, “Law and Order, Moral Order,” 313.

⁶⁸ Smith, HC 13 Jan 1986, cols 837-8.

conditions with rising crime, vandalism and unrest, particularly in our inner cities.

We must take measures to cure the disease, not merely treat the symptoms.⁶⁹

Others stated more explicitly that government policy was responsible for the problems that the POA86 sought to address. Referring to both industrial disputes and inner-city deprivation, Dennis Skinner stated that “The Government chose deliberately to cause chaos. As a result, they had to introduce a Bill to try to remedy that chaos.”⁷⁰ Similarly, Plaid Cymru MP Dafydd Thomas argued that:

This is not a public order Bill; it is about extending the control of the state over public disorder. Much of that disorder is created either directly or indirectly by the activities of the state.⁷¹

Thus, the notion of the savage-criminal as the isolated product of their own immorality was disrupted, undermining the extent to which the wider and harsher punishment of individuals appeared as a common-sense solution; s 5 was presented as a provision for punishing the victims of state-manufactured urban deprivation. In particular, although the offence requires the presence of a victim or a potential victim who could have been harmed,⁷² charges could essentially still be brought on the say-so of an officer as a witness did not need to be produced before a court.⁷³ Concern was therefore expressed that the vagueness of the offence amounted to a de facto

⁶⁹ HC 13 Jan 1986, cols 830.

⁷⁰ HC 30 April 1986, col 1067.

⁷¹ HC 13 Jan 1986, col 842. See also Labour MP Clive Soley: “What the Government have done that has been so wicked and that has had such a devastating effect is to rip the sticking plaster off the inner-city areas by making devastating cuts in public expenditure. The Government have created long-term youth unemployment.... In that context, people work while drawing social security benefit, they steal and engage in drug dealing, but the crucial factor is the style of policing.... The police are not the cause of the problems, but they are frequently the trigger.” (HC 13 Jan 1986, col 854). By comparison, the creation of disorder in order to justify stricter law and order interventions was a tactic that the BUF were accused of during the POA36 debates (see Chapter Five).

⁷² Shaw, HC 30 April 1986, col 961; Glenarthur, HL 13 June 1986, col 579 and HL 16 July 1986, col 951; Sinclair, HL 23 Oct 1986, col 242.

⁷³ Hutchinson, HL 23 Oct 1986, cols 238-9 and 244.

resurrection of the recently abolished ‘sus law,’⁷⁴ which enabled police to stop, search and arrest anyone in a public place on suspicion that they were there with the intent to commit a criminal offence. The disproportionate use of this provision in the policing of ethnic minority communities in the 1970s and early 1980s led to campaigns to scrap the law, which – combined with recommendations in Lord Scarman’s report on the 1981 Brixton riots – resulted in the repeal of the sus law in the Criminal Attempts Act 1981.⁷⁵ Opponents of s 5 argued that it left a similarly wide discretion to police, which could lead to equally excessive interference⁷⁶ and racial profiling.⁷⁷ Consequently, it was argued that s 5 would be detrimental to relations between the public and the police⁷⁸ and counterproductive to the pursuit of public order.⁷⁹

Organised Protest (Part II)

Police powers pertaining to processions and assemblies were expanded considerably by the POA86. Section 11 sets out a new requirement for organisers of public processions to provide advance written notice to the police. Section 12 then stipulates an expanded set of justifications for the imposition of conditions on a procession, which normally pertain to the route of a march. In addition to the existing test of apprehending a serious breach of public order, the new justifications include the anticipation of serious damage to property or serious disruption to the life of the community, and the organisation of a procession with intent to intimidate others. These

⁷⁴ S 4 of the Vagrancy Act 1824.

⁷⁵ Vernon, *Modern Britain*, 499. Although Richard Terrill argued that the Criminal Attempts Act actually increased the discretionary authority of the police: “Thatcher’s Law and Order Agenda,” 442.

⁷⁶ Hutchinson, HL 13 June 1986, col 526; Scarman, *ibid.*, cols 539-40.

⁷⁷ Hutchinson, HL 23 Oct 1986, cols 238-9.

⁷⁸ Foot, HC 13 Jan 1986, col 817; MacLennan, *ibid.*, col 826; Kaufman, HC 30 April 1986, col 1065; Hutchinson, HL 16 July 1986, col 943.

⁷⁹ Smith, HC 13 Jan 1986, col 839. See also Lord Elwyn-Jones, who argued that the Bill as a whole imperilled cooperation between the police and the public: HL 13 June 1986, cols 519-20; HL 29 Oct 1986, col 749.

tests are also applicable to the new power under s 14 to impose conditions on assemblies. Here, conditions may be placed on the location, duration and size of meetings of 20 or more people that are held “in a public place that is wholly or partly open to the air” (s 16). There is neither a requirement of advanced notice nor a power to ban in relation to assemblies. The power to prohibit processions, which was previously contained in s 3(2) POA36, is now found in s 13 POA86, and continues to be premised solely on the likelihood that a procession will lead to ‘serious public disorder.’ Two aspects of these developments that provide insight into contemporary understandings of public order are examined in this section: the concept of ‘disruption to the life of the community’ and the scope of intimidation as a justification for imposing conditions on an assembly or a procession.

The life of the community

A large portion of concern over Part II of the Bill was focused on what would be encompassed within the ground of ‘disruption to the life of the community.’ This ground is similar in its breadth and elasticity to the concept of disorderly conduct under s 5 and was thus subject to similar criticism of being too “vague and sweeping”⁸⁰ and granting too wide a discretion to the police. For example, Labour MP Gordon Brown described the measures as “extraordinary and extreme proposals [that] effectively put the traditional rights to free assembly at the discretion of the police” and claimed that “there are as many views as there are policemen as to what constitutes serious disruption to the life of the community.”⁸¹ Also, as with ‘disorderly conduct,’ it was claimed that

⁸⁰ Kaufman, HC 30 April, col 1063. See also Elwyn Jones, HL 13 June 1986, col 522.

⁸¹ HC 16 May 1985 col 516.

the discretion granted to the police by the phrase would have a detrimental impact on relations between the police and the public⁸² and could subsequently exacerbate disorder.⁸³

Examples of ‘disruption to the life of the community’ provided in the White Paper include demonstrations on Oxford Street during business hours, processions through shopping centres on Saturdays and marches through city centres during rush hour. Thus, the White Paper states that,

the proposed test would enable the police to re-route a march if they believed that it was likely to be seriously disruptive to the traffic, the shops or the shoppers.⁸⁴

Examples given in Parliament also included disruptions to shoppers,⁸⁵ as well as delays to public and private transport.⁸⁶ In confluence with decrying these inconveniences, some Lords also argued that protests were unnecessary or improper in contemporary society, where less disruptive forms of expression and representation are readily available.⁸⁷

The notion that such ‘disruptions’ were sufficient harms to be worthy of balancing against the rights of procession, assembly and protest was contested. Referring to anti-apartheid protests, Labour MP Gerald Kaufman argued that “In a democracy, the right peacefully to state a point of view is at least as precious as the right to buy oranges, but the Bill tips the law against that right to state a point of view.” Likewise, Lord Elwyn-Jones suggested that what is now s 12 would prioritise the needs of motorists and traders over the rights of procession and protest.⁸⁸ The class

⁸² For example, Labour MP Gerald Kaufman stated that “it will continue the Government process of making the police the scapegoat for the failure of their employment laws” (HC 16 May 1985, col 509).

⁸³ Elwyn-Jones, HL 13 June 1986, cols 521-2; Russel, *ibid.*, col 570; Hutchinson, HL 13 June 1986, col 526.

⁸⁴ “Review of Public Order Law,” 27.

⁸⁵ Hurd, HC 13 Jan 1986, col 811.

⁸⁶ Hornsby-Smith, HL 16 May 1985, col 1284; Monson, HL 13 June 1986, col 557; Teviot, *ibid.*, col 565; Denning, 6 Oct 1986, col 11; Sinclair, *ibid.*, cols 12-3.

⁸⁷ Somers, HL 16 May 1985, col 1283; Boyd-Carpenter, HL 13 June 1986, col 542; Beloff, *ibid.*, cols 568-9.

⁸⁸ HL 13 June 1986, col 522. See also Lord Mishcon on the constitutional importance of demonstrations: “the power to demonstrate, the right to hold a public assembly, has possibly rescued this

dynamics hinted at in references to the ‘right to buy oranges’ and the rights of motorists were discussed explicitly by Lord Hutchinson, who suggested that police decisions to impose conditions on processions in wealthier areas were likely to be disproportionately influenced by “the values of a middle-class, respectable section of the community.”⁸⁹ Similarly, Labour MP Clive Soley noted that demonstrations were being singled out while disruptions in London were also caused by visiting dignitaries, the lord mayor’s show and the general ineptitude of the Transport Secretary.⁹⁰ Thus, not all forms of disorder were problematised to the same extent.

While claiming to respect the freedoms of peaceful protesters, the Government’s rhetoric drew a clear distinction between demonstrations and demonstrators on the one hand and the ‘ordinary’ life of the community and ‘ordinary’ citizens on the other. This distinction was applied by association to all protesters, who some speakers presented as always separate from and detrimental to ‘the community.’⁹¹ Just as a broad opposition was constructed between hooligan youths and vulnerable elderly people in relation to s 5, an opposition was constructed between “mobs” and “ordinary peace-loving citizens” in relation to Part II of the Bill.⁹² Demonstrators were thus rendered as outsiders against whom the population must be protected, rather than as equal constituents of that population. Furthermore, by indiscriminately portraying all demonstrators as problematic for public order, the specific agendas and motivations of demonstrators were negated, resulting in the depoliticization of both demonstrations and the measures deemed necessary to control them.

country, especially at this moment, from abuses which we would all decry. If noble Lords curtail that right, they do so at the country's peril” (HL 13 June 1986, col 576).

⁸⁹ HL 6 Oct 1986, col 11.

⁹⁰ HC 13 Jan 1986, col 855.

⁹¹ For example, “We are trying to ensure peaceable arrangements between those who want to protest and those who live in communities” (Shaw, HC 13 Jan 1986, col 862). Curiously, Conservative MP Mark Carlile even went so far as to oppose “the rights of the protester and the rights of the individual” (ibid., col 814).

⁹² Monson, HL 16 May 1985, col 1283.

This distinction was noted and objected to by a few members of opposition parties who presented demonstrations as within the scope of – and even constitutive of – the ‘normal’ life of the community. For example, Dafydd Thomas observed as follows:

Under the Bill, a procession or assembly is potentially a serious disruption of the life of the community, but in the Wales and inner city areas that I know it would be strange if manifestations did not take place. Resistance is often part of the life of the community, because the community is often threatened by the policies of economic and social disorder.⁹³

Moreover, a right to be disruptive was defended, with some MPs noting that the effectiveness of any protest relies on the extent to which attention can be drawn. In particular, MP Kaufman and Lord Soper both noted that a demonstration may be connected to a particular location to the extent that to require it to be moved would be to entirely undermine its expressive power.⁹⁴ Part II of the Bill was therefore argued to attack the essence of the right to political dissent, which was vulnerable to such attack as it only exists in UK law in the negative or residual sense.⁹⁵ Indeed, the absence of the statutory protection called for by the Labour party⁹⁶ may have made it easier for a Government minister to present the freedoms of assembly and protest as potential “weapons of intimidation and harassment.”⁹⁷

⁹³ HC 13 Jan 1986, col 843. See also Labour MP Clive Soley: “The normal life of a democratic community involves the right of assembly and the right to demonstrate” (HC 13 Jan 1986, col 855); Lord Mishcon: “would the noble Lord not agree that the ability to march and demonstrate is all part of a British tradition?” (HL 16 May 1985, col 1283); and Lord Scarman: “Let us bear in mind that in our world today, with its alternative democracy, the right of public demonstration, protest and assembly are all part of the life of the community” (HL 13 June 1986, col 541).

⁹⁴ HC 16 May 1985, col 508 and HL 13 June 1986, col 532.

⁹⁵ Carlile, HC 13 Jan 1986, col 851; Scarman, HL 13 June 1986, col 537.

⁹⁶ Kaufman, HC 30 April 1986, col 1066.

⁹⁷ Shaw, 13 Jan 1986, col 858.

Freedom and intimidation

The 1985 White Paper framed the freedom to hold processions and demonstrations similarly to how liberty in general was presented in the POA36 debates, where the peaceful exercise of liberty was contrasted with the abuse of liberty (see Chapter Five).⁹⁸ The 1985 White Paper went one step further, however, by suggesting that the very absence of powers to control ‘abusive’ marches was damaging to the freedom to hold processions:

The vast majority of processions pass off without incident, but the damage caused by the small minority which are not peaceful goes wider than the immediate disorder on the streets: it leads some people to question the right of others to hold marches at all. ... Marches and processions will be accepted by the wider community if they are satisfied that the police have adequate power to prevent and control disorder, and to ensure that marches are held without causing undue inconvenience to the rights of others.⁹⁹

In this Orwellian doublethink construct, control = freedom, i.e. restricting the exercise of a right is presented as facilitating the exercise of that right. This was expressed by the Home Secretary, Giles Shaw, as follows:

It is not the Bill that weakens the responsible and peaceful exercise of democratic freedoms – on the contrary, it strengthens them. Rather it is those who misuse and twist such rights and their apologists who hide tyranny behind a mask acclaiming liberty who are the enemies of our traditional freedoms.¹⁰⁰

Here, the essentially uncontested value and rhetorical power of ‘freedom’ is leveraged, as measures are legitimated in the name of freedom even when they seek to place explicit limitations

⁹⁸ References specifically to the “abuse” of civil liberties, rights or freedom were occasionally made in the POA86 debates: Carlisle, HC 13 Jan 1986, col 815; Janner, 30 April 1986, col 972; Hutchinson, 13 June 1986, col 524.

⁹⁹ “Review of Public Order Law,” 21.

¹⁰⁰ HC 30 April 1986, col 1069.

on that freedom.¹⁰¹ Additionally, Shaw’s warning regarding the misuse of rights echoed Thatcher’s narrative of an ‘enemy within’ to construct a shadowy other who is identified as the ‘real’ threat. In this way, Shaw succinctly constructed a discrete problem and deflected blame onto an enemy in order to generate the need for a legislative solution.

Echoing a key concern motivating the 1926 Draft Preservation of Public Order Bill, the ‘enemies of freedom’ were widely understood to include picketing strikers.¹⁰² Indeed, Labour MP Dennis Skinner claimed that “the Bill would not have been drafted had it not been for certain incidents, such as the miners’ strike and other industrial disputes, which arose because of Government policy.”¹⁰³ Opponents of s 14 argued that the powers to impose conditions on assemblies would create a criminal law on picketing that “will be a dangerous infringement of civil liberties and the right of peaceful dissent.”¹⁰⁴ Advocates of the provision, meanwhile, assured that it was:

nonsense to suggest that the provisions in Part II of the Bill were any threat to traditional democratic rights, including the right to march, demonstrate, or picket peacefully and lawfully.¹⁰⁵

¹⁰¹ Lord Boyd-Carpenter provided perhaps the one exception to this in his overt prioritisation of order over liberty: “There is so much crime and violence that this is an occasion when it is necessary to shift the balance further in favour of the forces of law and order and therefore to some extent against the liberties of the individual citizen” (HL 13 June 1986, col 545; see also HL 16 July 1986, col 941).

¹⁰² Dixon, “Protest and Disorder,” 5.

¹⁰³ HC 30 April 1986, col 1067.

¹⁰⁴ Kaufman, HC 16 May 1985, col 509. See also Liberal Democrat MP Robert Maclennan: “The additional circumstance, where serious disruption to community life is feared, or where it is feared that an individual could be faced with intimidation or coercion, are unacceptable extensions of that power” (HC 13 Jan 1986, col 825); Lord Elwyn-Jones: “Clause 14 as it now stands imposes rigorous constitutional limitations on public assemblies ... and could bring about a serious diminution of the civil rights of the public to make known their views by peaceful means” (HL 13 June 1986, col 522); and Lord Graham: “All the Bill’s provisions appear to be restrictive of civil liberties and none protects or extends civil liberties. In other words, the Bill is unbalanced” (ibid., col 551).

¹⁰⁵ HL 13 June 1986, col 580. On peacefulness, see also Home Secretary Brittan: “Anyone who is seriously interested in industrial relations being conducted in a peaceful way should wholeheartedly welcome the proposals. Those interested in peaceful picketing have nothing whatever to fear from them”

Stating that lawful protest will not be inhibited is surely tautological, as it was precisely what would and would not be considered lawful that was at issue. Such a statement therefore detracts from the fact that the boundaries of lawfulness were being shifted and thereby enabled the POA86 to be framed as enhancing protections rather than expanding restrictions.¹⁰⁶

The concept of a right to ‘peaceful’ action is also somewhat unclear, as it is dependent on how ‘peace’ is defined and as such may be as open to criticism on the basis of vagueness and subjectivity as ‘disorderly conduct’ and ‘disruption to the life of the community.’ In particular, a distinction was drawn by some MPs between attempts to persuade, which were deemed legitimate, and attempts to intimidate, coerce or compel, which were deemed to cross the boundary into criminal behaviour¹⁰⁷ and even to be “one of the most objectionable assaults on the rights of the individual citizen.”¹⁰⁸ The distinction between persuasion and intimidation can be criticised on three fronts. Firstly, it is not clear that this distinction would always be self-evident.¹⁰⁹ For example, does a large number of picketers demonstrate an intention to intimidate, or does it merely seek to communicate strength of feeling in the hope of more effectively persuading?¹¹⁰ Additionally, it was noted by Conservative MP Ivan Lawrence that intimidation is construed narrowly in the POA86 as it refers only to intimidation that compels someone to do or not to do

(HC 16 May 1985, col 510); and Conservative Minister Giles Shaw: “This Government fully uphold the right of everyone to protest, to march, to assemble, to demonstrate and to picket so long as these activities are carried out peacefully” (HC 13 Jan 1986, cols 858-9). On lawfulness, see also Lord Denning: “We should not allow that peace and good order to be disrupted by law-breaking citizens” (HL 113 June 1986, col 562).

¹⁰⁶ Terrill, “Thatcher's Law and Order Agenda,” 431; Neocleous, *Fabrication of Social Order*, 107-8.

¹⁰⁷ Hurd, HC 13 Jan 1986, cols 796 and 798; Carlile, *ibid.*, col 813; Denning, HL 13 June 1986, col 564.

¹⁰⁸ Brittan, HC 16 May 1985, col 507.

¹⁰⁹ Sinclair, HL 23 Oct 1986, col 248. See Wallington, “Criminal Conspiracy and Industrial Conflict,” 76, on judicial inconsistencies regarding the definition of intimidation.

¹¹⁰ In *Thomas v National Union of Mineworkers (S Wales Area)* [1985] Ind Rel L R 136, Scott J ruled that the mere presence of 60-70 picketers was intimidating under s 7 of the Conspiracy and Protection of Property Act 1875 and could not be classified as peaceful picketing.

something, and does not include the more general form of intimidation that may be caused, for example, by displays of racial hatred.¹¹¹ Secondly, the discursive emergence of a “freedom not to be intimidated”¹¹² seems to contradict the assertions made by opponents of the earlier stirring up racial hatred provisions that freedom of expression should only be limited under the risk of physical altercations (see Chapter Six). Rather than a difference in opinions or an evolution of opinion over time, this can be seen as a fracture in Conservative positions on freedom of expression based on whose expression is at issue: right wing expressions of racism, even in the form of intimidating marches, should not be restricted unless there is a risk of violence, but trade unionist expressions of discontent must be restricted if they can be perceived as intimidating. Indeed, the suggestion that intent to incite racial hatred should be included among the grounds for imposing conditions on processions under s 12 was rejected on the basis that it would be too subjective a test,¹¹³ that such a provision could lead to the de facto banning of certain groups from marching as their mere presence could be deemed provocative to racial minorities,¹¹⁴ and that such a ban might lead to the creation of “martyrs for free speech.”¹¹⁵ Thirdly, coercion was presented

¹¹¹ HC 30 April 1986, col 970.

¹¹² Carlile, HC 13 Jan 1986, col 849. See also Conservative Minister Giles Shaw: “the rights of people to live their lives peacefully and free from violence and intimidation” (ibid., col 858); Conservative MP Eldon Griffiths: “the most important civil liberty of all is the liberty of our people to live in peace; not to be intimidated, not to have their lives disrupted” (HC 30 April 1986, col 1066); Lord Monson: “the right of ordinary peace-loving citizens to go about their lawful business without being intimidated” (HL 16 May 1985, col 1283); and Lord Say: “we are dealing in this Bill with ... the maintenance of the Queen's peace, which enables the ordinary citizen to go unhindered and unmolested about his lawful business” (HL 13 June 1986, col 527).

¹¹³ Brittan, HC 16 May 1985, col 509; Shaw, HC 30 April 1986, cols 978-9.

¹¹⁴ Home Office, “Review of Public Order Law,” 24.

¹¹⁵ Shaw, HC 30 April 1986, col 979. Conservative MP Derek Spencer refuted these arguments, pointing out that intention to incite hatred was not deemed too subjective a test under Part III of the Bill and arguing that if the activities of a particular group are such as to render a group inherently offensive, this is no reason not to place restrictions on that group (HC 30 April 1986, cols 970 and 980). Additionally, the protection of racial minorities through the control of National Front marches was used as a justification for the intimidation ground for imposing conditions on processions under s 12, even though, within the text of this provision, intimidation is construed more narrowly as aiming to compel another to commit or refrain from a particular action. Indeed, Shaw recognised this limitation, stating

as a method only deployed by troublemakers; the Government never described the activities of the police as coercive or intimidating; the police would merely “impose limitations.”¹¹⁶ The use of force and intimidatory techniques were thus presented as the exclusive domain of protesters, which a benevolent police force needed additional powers to ‘nip in the bud.’¹¹⁷

Through repeated references to intimidation and coercion in proximity to picketers, these terms and their associated affects became ‘stuck’ to each other.¹¹⁸ Consequently, the focus on the purported harms of intimidation and coercion in general and decontextualized ways served to depoliticise strike events within parliamentary discourse. Additionally, strikes and pickets were at times mentioned in the same breath as football-related violence¹¹⁹ and National Front marches,¹²⁰ serving to further elide any distinct status or political significance of industrial actions. As Plaid Cymru MP Dafydd Thomas noted:

One of the things that concerns me very much is the way in which, in such debates, all forms of dissent and deviant behaviour are lumped together. ... Dissenters and demonstrators are lumped together as deviants and potential delinquents.¹²¹

Indeed, in the 1985 Home Office white paper “Reviewing Public Order Law,” picketers were obliquely compared to Fascists.¹²² This decontextualization – which Phil Scraton referred to as the

that “perhaps, in clause 12 our definition of ‘intimidation’ may be unduly tied to the concept of coercion” (HC 30 April 1986, col 979).

¹¹⁶ Brittan, HC 16 May 1985, col 507.

¹¹⁷ Brittan, HC 16 May 1985, col 507.

¹¹⁸ Ahmed, “Problematic Proximities.”

¹¹⁹ Brittan, HC 16 May 1985, col 507; Glenarthur, HL 13 June 1986, col 513.

¹²⁰ Glenarthur, HL 13 June 1986, col 582.

¹²¹ HC 13 Jan 1986, col 843. See also Lord Graham: “in my view there is a grave risk that [the Bill] will ... make little distinction between the reprehensible conduct of persons bent on causing violence and ordinary citizens concerned over the direction of certain policies of the Government, who wish to display that concern in public and to oppose those policies” (HL 13 June 1986, col 551).

¹²² “It is worth remembering, 50 years after the passage of the Public Order Act 1936, why that Act was considered necessary: because the right to demonstrate had been turned by the Fascist marchers into an instrument of intimidation and provocation. They have their counterparts today in those whose real aim in demonstrating is not to persuade others of their point of view, but to prevent them by force

collapse of any distinction between ‘normal’ and ‘political’ crime¹²³ – is premised on the myth of a pre-existing peaceful order that certain actions have disrupted and that could be restored by the effective control of such actions. Thus, there is a clear narrative of protesting savages and state saviours, with the victim being, as much as *anyone*, the mythical peace itself. The notion of a breach of the peace therefore remains in the POA86, even if those words are no longer present in the legislative text.¹²⁴ Once all meaningful protests are elided and condemned as potentially unpeaceful, their politics are rendered irrelevant and enhanced powers of control are presented as an appropriate apolitical response to an apolitical problem.¹²⁵

Stirring up racial hatred in the new public order (Part III)

The 1985 Government white paper concluded that the pre-existing racial hatred offence “should continue to be based on considerations of public order” but that certain changes could make it more effective.¹²⁶ Part III of the POA86 now contains six offences relating to incitement of racial hatred. What was previously s 5A of the POA36 was divided into s 18 and s 19 of the POA86. Section 18 prohibits the use of words or behaviour, or the display of written material, which is threatening, abusive or insulting and which is either intended or likely to stir up racial hatred. Section 19 prohibits the publication and distribution of such written material. While such publication or distribution must be to the public or a section of the public (s 19(3)), distribution to members of a private association is no longer specifically exempt as it was under s 5A(6) POA36.

from doing what they have a lawful right to do, or simply to foment disorder” (“Review of Public Order Law,” 2).

¹²³ “Unreasonable Force,” 182.

¹²⁴ As demonstrated by Conservative Minister Giles Shaw, for example: “The philosophy behind it is the desire to ensure that the rights of the minority to protest are preserved, but that the rights of the majority to live peacefully are also preserved” (HC 13 Jan 1986, col 860).

¹²⁵ See Jackson, “Securitization as Depoliticization.”

¹²⁶ “Review of Public Order Law,” 39.

Section 20 then amends the Theatres Act 1968 in relation to performances, and Sections 21, 22 and 23 create new offences relating to recordings, broadcasting and possession of racially inflammatory material respectively.

Each of the Part III offences can be satisfied either through a ‘subjective’ finding that the individual intended to stir up racial hatred or through an ‘objective’ finding that racial hatred was likely to be stirred up by their actions.¹²⁷ This was a significant development: under s 6 of the Race Relations Act 1965 both intent and likelihood had to be proved; under Section 5A of the POA36 only likelihood had to be proved; and under Part III of the POA86 either intent or likelihood could be proved. Although the requirement that prosecutions must attain the consent of the Attorney-General remains (s 27),¹²⁸ the trend of relaxing the burden of proof aimed to address the low number of prosecutions and the high proportion of acquittals for stirring up racial hatred charges.¹²⁹ In particular, dropping the need for likelihood to be proved was argued to be necessary,

to catch material which is circulated to groups of people, such as clergymen, Members of another place and no doubt even ourselves, who are unlikely themselves to be incited to racial hatred.¹³⁰

The option of bringing charges on the basis solely of intent suggests either that these provisions extend beyond the remit of combating public disorder, understood as the absence of violence, or that public order is given a broader interpretation that extends to the exposure of anyone to racist material. This is a significant shift away from the prominence of provocation in the POA36 debates, and in *Jordan v Burgoyne*, where risk to public order was seen to emanate from *reactions* to Fascist activity, rather than directly from the nature of that activity by itself.

¹²⁷ Law Commission, “Case for Extending,” 29.

¹²⁸ see Dixon, “Protest and Disorder,” 96.

¹²⁹ Elwyn-Jones, HL 13 June 1986, cols 522-3; Lasson, “Racism in Great Britain,” 172; Thornton, *Public Order Law*, 61.

¹³⁰ Glenarthur, HL 16 May 1985, col 1282.

The new ability to bring charges under s 18 on the basis of intent to stir up racial hatred did not elicit extensive debate; nor did the comprehensive extension of the offence to various media. Over the 20 years since the Race Relations Act 1965, the legitimacy of dealing with racial hatred within the criminal law had broadly come to be accepted. However, two aspects of the debates on Part III of the Bill warrant closer examination: arguments about the scope of the stirring up hatred offences – i.e. whether religious hatred and/or hatred of gypsies should be explicitly included – and the justifications that were put forward for the offences within the context of the Bill as a whole.

The scope of the stirring up hatred offences

Calls for incitement to religious hatred to be included in Part III of the Bill were made in the context of Northern Irish conflict¹³¹ and in the name of inclusivity.¹³² The Government response that such a provision would be “unenforceable” was predictable. As evinced by previous and subsequent debates on religious hatred and blasphemy laws, introducing provisions on religious hatred within the Bill would have been a controversial and time-consuming move that could have risked side-tracking its passage. The inclusion of religion, Conservative Minister Douglas Hogg thus argued, “would open up too many concepts and too many circumstances in which the law would be required to intervene.”¹³³ The notion that dealing with hatred or discrimination on specific grounds is simply too big a task for the criminal law to become embroiled in echoes earlier, defeated arguments opposing the Race Relations Act 1965 and the Sex Discrimination Act 1975; yet it would be another 20 years before religious hatred would be included in the POA86 (see Chapter Eight).

¹³¹ Mallon, HC 30 April 1986, col 981; Dunleath, HL 13 June 1986, col 548.

¹³² Carlile, HC 13 Jan 1986, cols 851-2; Sayeed, HC 4 Nov 1986, col 827

¹³³ HC 4 Nov 1986, col 828.

There was also some debate in the House of Lords as to whether the definition of a racial group provided in s 17, which was essentially unchanged from that provided under the RRA76, already encompassed or ought to explicitly include gypsies. In introducing an amendment for their explicit inclusion, Lord Elwyn-Jones suggested that gypsies meet the criteria of an ethnic group set out in the case of *Mandla v Dowell Lee*¹³⁴ on the basis of shared origins, history and language.¹³⁵ Elwyn-Jones contrasted the *Mandla* definition of an ethnic group with the definition of a gypsy established in *Mills v Cooper*,¹³⁶ which he suggested erroneously informed the Government's view.¹³⁷ In this case, the Divisional Court had been unable to use the dictionary definition of 'gypsy' as "a wandering race," as to do so would have meant that the legislation in question – the Highways Act 1959 – was racially discriminatory.¹³⁸ Elwyn-Jones therefore argued that the more recent and more general judgment in *Mandla* should apply, and that gypsies should be explicitly included within s 17 so as to clarify the situation and to reflect the extent to which they were targeted by hateful literature.¹³⁹

The amendment was rejected on the basis that 'genuine gypsies' would already be included within the definition of an ethnic group, but that a specific statutory inclusion of gypsies might lead to the extension of the criminal law to hatred against groups that are distinguished by their lifestyle choices (i.e. nomadism) rather than their ethnicity. Referring to the definition of gypsies in the Caravan Sites Act 1968 as "persons of nomadic habit of life," the Earl of Caithness (Sinclair) rejected the amendment on the basis that it would extend Part III to cover "other itinerants and

¹³⁴ [1983] 2 AC 548. See Chapter Six.

¹³⁵ HL 23 Oct 1986, col 168.

¹³⁶ [1967] 2 QB 459.

¹³⁷ HL 23 Oct 1986, cols 168-9.

¹³⁸ *Mills v Cooper*, 467. The Highways Act 1959 was later repealed and replaced by the Highways Act 1980, s 148 of which omitted the direct reference to gypsies that was at issue in *Mills v Cooper*.

¹³⁹ Elwyn-Jones, *ibid.*, col 169. See also Roskill, *ibid.*, col 173; Foot, *ibid.*

travellers” who were not a distinct racial group and thus were not the subjects of *racial* hatred *per se*.¹⁴⁰

This presents the possibility that the law could be considerably more discerning as to the ethnic credentials of a group and may attach more importance to the notion of who constitutes a ‘genuine’ gypsy than the hateful literature that is complained of. The risk, then, is that a case may hinge on the purportedly objective classification of a group rather than on the content or intent of the speech at issue and whether or not a group was portrayed as a race therein. This seems at odds with the new ability under Part III to prosecute on the basis of intent alone. As Lord Pitt pointed out:

the question does not really concern the technical fact of whether a person is a gypsy; it is whether or not he is treated as a gypsy and, as a consequence, having things said about him and them or done to them because they are being treated as gypsies.¹⁴¹

Regardless, however, the distinction between hatred on grounds of being ‘ethnic gypsies’ and hatred on grounds of being a travelling community seems an arbitrary distinction to draw in terms of the experiences of the victims and the risks to public order, just as with the distinction resulting from the *Mandla* judgment between Sikhs and Muslims.¹⁴² The need to restrict the scope of the POA86 to expressions of strictly racial hatred was emphasised, but not rationalised. Indeed, Lord Monson denounced a variety of different forms of hatred as equally harmful, including religious hatred and class hatred, but did not question the limitation of Part III to racial hatred.¹⁴³

¹⁴⁰ HL 23 Oct 1986, col 171.

¹⁴¹ *ibid.*, col 172.

¹⁴² See Modood, “Muslims, Incitement to Hatred and the Law,” 147.

¹⁴³ HL 23 Oct 1986, col 174.

The harms of racial hatred

In the POA86 debates, racially minoritized groups were presented far more consistently as constituents of – and far less as threats to – the population than in the RRA debates. They were thus generally presented as part of the rights-bearing population whose liberties and sensibilities should be protected. The rights, interests and fears of racially minoritized groups could thus be cited for the justification of legislative intervention in their defence, as noted in relation to Part I, just as those of the (white) majority carried sway in previous debates. Racialised minorities were thus interpellated in parliament as helpless victims of non-state racism, the remedy to which lay in more police powers. In relation to Part III, this was evident in a discussion in the House of Lords on racist graffiti, for example, where Lord Mishcon stated:

I know of few things that are more damaging and painful to racial minorities – and especially to the children among those minorities as they walk to school, possibly with a white friend – than [to] see upon the walls, "Out with the wogs" or whatever the wretched graffiti may be.¹⁴⁴

Mishcon's initial argument, at least, was based on emotional harms to individuals, although discussion then turned to the effects of graffiti on 'race relations,' alluding to a more traditional public order justification for laws against racism. In another example, Labour MP Alfred Dubs focused on the emotional harms to individuals rather than any broader public order justification when he referred to racism as a "scourge" that "causes fear and humiliation."¹⁴⁵

Ultimately, however, it was much more common for public order, the peace or race relations to be identified as the underlying and central justifications for Part III of the Bill. For example, Conservative Minister Giles Shaw referred to public order as "the most fundamental common good,"¹⁴⁶ while Labour politician Lord Elwyn-Jones stated that:

¹⁴⁴ HL 23 Oct 1986, col 193.

¹⁴⁵ HC 4 Nov 1986, col 824.

¹⁴⁶ HC 30 April 1986, col 1069.

the stirring up of racial hatred, whether intended or likely, is a very serious matter and almost bound to lead to public disorder or worse. It has indeed all too frequently been a crucial factor in the disorders in some of our inner cities.¹⁴⁷

Similarly, Lord Monson stated that:

I can think of no graver crimes committed in our society at this moment than the ones we are dealing with in Part III as regards their effects upon society. We have seen riots, disturbances, unhappiness, and claims of all kinds as to what people who incite to racial hatred are doing to our nation as a whole.¹⁴⁸

This continued reliance on traditional notions of public order for the justification of the prohibition on stirring up hatred could provide some explanation for the insistence that the offence be strictly limited to racial hatred. Although the offence could now be committed in a range of situations that would be described as private rather than public (i.e. any setting other than a private dwelling), racial hatred was still problematised due to the extent that incitement could manifest in *public* disorder (i.e. riots). Thus, the explicit inclusion of gypsies, for example, is not a priority, as hatred of gypsies does not precipitate race riots or mass protests. The inclusion of religion may similarly have been rejected on some level due to the absence of urban disorders that could be traced to exclusively religious hatreds in the same way that the Brixton or Broadwater Farm riots in 1985, for example, could be connected to racial tensions – or, more specifically, to tensions between racially minoritized groups and the police. It is striking, however, that neither the police nor racial minorities were explicitly identified as responsible for such tensions in the POA86 debates. Conversely, those responsible for stirring up racial hatred and the subsequent disorder were identified simply as ‘racists’,¹⁴⁹ the objective existence and criminality of whom was

¹⁴⁷ HL 23 Oct 1986, col 167.

¹⁴⁸ HL 23 Oct 1986, col 219. See also the Earl of Caithness: “It will be agreed, I hope, that we have struck a reasonable balance between protecting freedom of opinion and protecting against people who seek to stir up racial hatred in a way that threatens the peace and stability of society” (HL 23 Oct 1986, col 191).

¹⁴⁹ Glenarthur, HL 13 June 1986, col 585; Elwyn-Jones, HL 29 Oct 1986, col 750; Sinclair, *ibid.*, col 756.

unquestioned. Thus, racial hatred had shifted from a viewpoint or activity to an identity, with ‘racists’ overlapping with hooligans and thugs in the line-up of culprits responsible for all social problems.

Conclusion

The stirring up offences were a minor concern within the Public Order Act 1986 and passed through Parliament with relatively little controversy. The offences within Part III of the POA86 fit neatly with the Conservative approach of being tough on crime and flushing out the variety of deviants corrupting society; the racist was a figure that clearly belonged within the “spectrum of violence”¹⁵⁰ that the POA86 was to address. There was wider parliamentary agreement on a duty to comprehensively legislate against racial hatred than previously, but the division in motivations noted at the end of Chapter Six persisted, with the justification of quelling disorder in general more prominent than that of attending to the particular injustices faced by minoritized groups. The more novel developments of the POA86 debates pertain to the expansive construction of the public order problem and the polarisation of orderly and disorderly subjects. The POA86 was clearly concerned with a much broader notion of public order than the POA36, as demonstrated by the emphasis on the fear and distress of individuals in the discourse on s 5, the focus on the intimidation and obstruction of individuals in Part II and the new ability to bring charges on the basis of only intent to stir up racial hatred under Part III. The law was no longer to be confined to circumstances in which there was a risk of a breach of the peace, but now encompassed situations where there was a risk of disruption to the life of the community or where alarm was ‘likely’ to be caused. This expansion was justified in Conservative narratives through the polarisation of subjectivities as either ‘respectable’ and in need of protection or ‘evil’ and in need of control.

¹⁵⁰ Scraton, “Unreasonable Force,” 162.

Firstly, then, there was the construct of the individualised subject whose rights should be protected. Although no longer described as the white or ‘indigenous’ majority, the label of ‘ordinary’ persisted, along with all its connotations of morality and virtue. In the POA86 debates, the classification of ‘ordinary’ was primarily defined in opposition to various groups that sought to intimidate, coerce, harass, obstruct or inconvenience the worthy subject, and thus took on a meeker quality than the ‘ordinary people’ of the RRA debates who might respond aggressively to restrictions to their freedoms. In the POA86 debates, the rights of the ‘ordinary’ individual – to work, shop and go about their lives in peace – were elevated above the collective rights to assemble and to demonstrate.¹⁵¹ Freedom was to be secured, then, for the pursuit of activities that conformed with Conservative notions of decency, responsibility and free market capitalism; freedom was not for collective actions, nor indeed for individual actions that might disturb a very quiet and obedient representation of the peace. What this meant for those whom the order disadvantaged, was that they may only seek to change their circumstances within the constraints of the existing order, i.e. through working, voting, writing to their MPs and maybe having a small, quiet gathering on a Sunday afternoon. To act in ways that would challenge or interfere with the existing order was to become an enemy against whom it must be defended.

Secondly, there was the de-individualised and almost uniformly abhorrent villain-group, which was consistently constructed as outside of and in opposition to ‘the community.’ Rather than the concerned individual citizen, they were uncaring mobs, rat-packs and hooligans. Groups such as picketers, teenage skateboarders, football hooligans and National Front marchers were conflated as disturbers of a mythical peace that would exist if only they could be brought into line. This conflation served to delegitimise protests and dissent by invoking the generic folk-devils/savages of the criminal and the hooligan to portray all protesters and dissidents as equally threatening. Depoliticization both of any form of dissent and of the ‘peace’ that was supposedly being disrupted was therefore central to the justification of broad statutory powers for pacification.

¹⁵¹ See in particular Monson, HL 13 June 1986, col 557.

“Good order is the guarantor of freedom because it preserves a balance of rights,”¹⁵² or in other words, the correct balance of rights does not include the freedom to challenge the order that we define as good.

The class/respectability dynamic in these framings was palpable in the contrast between hooligans, picketers and mobs on the one side and shoppers, motorists and holidaymakers on the other. Class was also overtly evident in the spectacle of urban decay, with examples of potential s 5 offences frequently set within housing estates or tower blocks. As the crimes of the wealthy seem never to be framed as a public order issue¹⁵³ – indeed the notion of an upper-class hooligan seems almost oxymoronic – the threat was situated within wild and fearful geographies of the lower classes. Such places were not presented in the Conservative narrative as in need of investment and employment opportunities, though. Rather, urban delinquency and crime should be combatted through stronger law enforcement in such locations. Similarly, the problem of racism was not to be addressed through education or information campaigns, nor through attention to the impacts of political discourses, policies and policing practices, but through the punishment of individual ‘racists’ and ‘extremists.’¹⁵⁴ Under Thatcherite neoconservatism, the solution to disorder was the enforcement of order, or, in other words, the solution to violence *within* the population was violence *against* the population. Here, as noted in relation to the RRA debates in Chapter Six, a logic of immunology seeks to delineate the productive and respectable body politic from unproductive and damaging elements. As health requires the elimination of disease, so order requires the elimination of disorder. Thus, a war on disorder – on disorderly subjects – was not only the means by which order would be achieved, but was also what the Thatcherite vision of order itself looked like: a society without protest or crime not due to organic consensus and contentedness, but due to successful pacification.

¹⁵² Glenarthure, HL 13 June 1986, col 586.

¹⁵³ Kaufman, HC 13 Jan 1986, cols 803-4.

¹⁵⁴ This corresponds with what Jonathan Simon refers to as ‘governing through crime.’

The notion that individuals and ordinary citizens must have their rights and freedoms protected against mobs whose incivility render them deserving of control and punishment echoes a colonial logic of legitimising the uneven application of purportedly universal human rights: “If eligibility for universal rights was conditioned upon recognized subjectivity, claims to these rights could be denied if the subjectivity of some was erased.”¹⁵⁵ The conflation of all protesters with far-right extremists and football hooligans, the depoliticization of protest and the alienation of protesters from their communities can all be seen as techniques for erasing the subjectivity of any person who protests. In the act of protesting, they transition from citizen to mob and from member to enemy of ‘the community.’ Therefore, the public order framing not only polarised orderly and disorderly subjects – the respectable and the disrespectful¹⁵⁶ – but also erased the subjectivities of the disorderly so that they could be denied the rights and freedoms that they sought to exercise in inconvenient ways. While racists were among those disorderly and erased subjectivities, the continuing dominance of a public order rationale for addressing racial hatred meant that it was ‘order’ rather than victims of racial hatred that was ultimately deemed as in need of protection. Therefore, should they protest the order that enabled their victimisation, victims of racial hatred were just as likely as its perpetrators to be deemed disorderly subjects, and probably even more so where they more closely resembled the predetermined image of a lower-class savage.¹⁵⁷

¹⁵⁵ Mahmud, “Colonialism and the Modern Constructions of Race,” 1222.

¹⁵⁶ Andrew Ashworth described s 5 POA86 as ‘Criminalising Disrespect.’ See also Taylor, “Law and Order, Moral Order,” 320.

¹⁵⁷ See Shilliam, *Race and the Undeserving Poor*.

Being and Believing

Racial and Religious Hatred Act 2006

Public Order Act 1986 (as amended by the Racial and Religious Hatred Act 2006), s 29B(1):

A person who uses threatening words or behaviour, or displays any written material which is threatening, is guilty of an offence if he intends thereby to stir up religious hatred.

Introduction

Earlier chapters have shown that moves to include religious hatred alongside racial hatred were made at each point in the development of the stirring up hatred provisions, from a proposed amendment to the Public Order Act 1936 (POA36), to arguments that religion should be explicitly included in the Race Relations Acts (RRAs) in 1965 and 1976, to calls for the inclusion of religious hatred within the Public Order Act 1986 (POA86). When parliament eventually succeeded in adding the stirring up religious hatred offences to the POA86, through the Racial and Religious Hatred Act 2006 (RRHA), the landscape of popular concerns and attitudes had evolved considerably since the POA86's expansion of public order law. Chapter Seven illustrated how the stirring up racial hatred provisions were integrated into the logics of Thatcherite neoconservatism. Two decades later, the UK had transitioned from Conservative to New Labour governance, with questions of diversity, multiculturalism and institutional racism now on the neoliberal agenda. In this context, this chapter examines how religious hatred came to be seen in parliament as a sufficiently pressing issue to warrant inclusion within the stirring up hatred offences, including questions of how it was positioned alongside racial hatred and as a public order issue.

As with previous chapters, this introductory section provides an overview of the legal and political contexts which led to the enactment of the legislation in question. This includes five failed attempts to legislate on stirring up religious hatred between 1994 and 2005, and the reformulation of the Government's Bill by the House of Lords before the RRHA was passed. The next section examines the scope of the RRHA and the arguments that parliamentarians presented on the nature of religious hatred. The final section then considers how parliamentarians made sense of religious hatred in terms of the populations and values at play. In these two substantive sections, Hansard is considered from the passage of both the Serious Organised Crime and Police Act 2005 (SOCPA) and the RRHA, as discussion on the religious hatred provisions spanned these two proximate Bills relatively seamlessly.

Criminal Justice and Public Order Act 1994 (CJPOA)

During the passage of the CJPOA, amendments that would add incitement to religious hatred to the POA86 were proposed. Additionally, one amendment sought to remove the word 'racial' so that it would be an offence to stir up any kind of hatred. These amendments were moved in the context of repeated assertions that the UK was experiencing a 'rising tide' of racism,¹ which seemed to be, in part at least, informed by a recent Home Affairs Committee Report on racial attacks and harassment.² How best to combat racism was discussed at length in the context of rejected clauses to introduce offences of racial harassment and racially motivated violence, yet there was little reflection in parliament on what might be causing the apparent surge in racism. While some speakers mentioned the need to send a message to perpetrators or society in general

¹ Sumberg, HC 12 April 1994, col 37; Irvine, HL 12 July 1994, col 1909. See also Renfrew, HL 12 July 1994, col 1911; Lawrence, HC 12 April 1994, cols 42-3; Vaz, *ibid.*, col 49; Ruddock, *ibid.*, col 60; Seear, HL 12 July 1994, col 1653; Lester, *ibid.*, col 1912; Irvine, *ibid.*, col 1928.

² Home Affairs Committee, "Racial Attacks and Harassment." See Irvine, HL 12 July 1994, cols 1649 and 1922; Beloff, *ibid.*, col 1652.

that racism is unacceptable,³ stronger emphasis was placed on the need to reassure minorities that the government was taking racism seriously.⁴ In relation to an amendment on racially motivated attack, Baroness Seear went so far as to state that “Even if the amendment would be difficult to implement, as many of us recognise, it is important symbolically at this time.”⁵ This gives the impression that ameliorating the dissatisfaction of victims of racism was prioritised over combatting the racism per se. Further evidence of this attitude was supplied in a letter by the Home Secretary to the Lord Privy Seal regarding what became s 60 CJPOA on police powers to stop and search:

The proposed new powers are already being described in the minority press as recreating the discredited "sus" law and there are serious implications for both community relations and to public order if we are unable to present any positive counter-balance. It is therefore important that the Government take the initiative on racial crimes if it is to counteract the belief amongst ethnic minority communities that we do not take their concerns equally seriously.⁶

While the only change brought by the CJPOA in relation to the stirring up hatred offences was to make s 19 POA86 on racially inflammatory publications arrestable, there was an apparent continuity with the enactment of the RRAs in the belief that popular objections to legislation that would disadvantage racially minoritized groups could be tempered with anti-hate legislation; the counter to racist policy was to punish *individuals* who expressed racism. The notion that public order concerns and the concerns of ethnic minorities were distinct and even counterposed also persisted.

³ Kaufman, HC 12 April 1994, col 41; Lawrence, *ibid.*, cols 42 and 43; Abbott, *ibid.*, col 58; Beloff, HL 12 July, col 1652; Irvine, *ibid.*, col 1927; Flather, *ibid.*, col 1940.

⁴ Sumberg, HC 12 April 1994, col 38; Kaufman, *ibid.*, cols 39, 42 and 51; Lawrence, *ibid.*, cols 42-3; Vaz, *ibid.*, col 62; Habgood, HL 16 June 1994, col 1894; Irvine, HL 12 July 1994, col 1910.

⁵ HL 12 July 1994, col 1653.

⁶ Quoted by Ruddock, HC 12 April 1994, cols 60-1.

The problem was also framed as the exclusion of Muslims and other faith groups from the protection of both the common law on blasphemy, which applied only to the Church of England,⁷ and the incitement to racial hatred provisions, which had been judicially interpreted as applying only to Jews and Sikhs.⁸ This situation was characterised as problematic due to the resentment caused by this inequity – rather than the inequity itself – but it was also feared that dissatisfaction could be further provoked if legislation against stirring up religious hatred failed to meet expectations or if it was viewed as pandering to minorities.⁹ Ultimately, the problem was not found to be sufficiently urgent to justify specific provisions on stirring up religious hatred – if it was believed to exist at all.¹⁰

Religious Discrimination and Remedies Bill

In 1998, Labour MP John Austin introduced a Bill on Religious Discrimination and Remedies, which included an offence of incitement to religious hatred.¹¹ Austin’s introduction to the Bill focused largely on Islamophobia¹² and noted the discrepancy between the position of Muslims and that of Sikhs and Jews under the stirring up racial hatred law. Notably, Austin did not supplement his case with the public order justification that played such a prominent role in the enactment of the racial hatred offence. Instead, amplifying what had previously been more marginal lines of reasoning, he referred to religious incitement as a danger to victims’ “material and physical well-being” and as having “a direct and harmful effect on their lives.”¹³ The Bill was not given a second reading.

⁷ *Chief Metropolitan Stipendiary Magistrate, ex parte Choudhury* [1991] 1 QB 429.

⁸ *Mandla v Dowell Lee* [1983] 2 AC 548.

⁹ *Habgood*, HL 16 June 1994, col 1894; *Harries*, HL 12 July 1994, col 1739; *Ferrers*, *ibid.*, col 1749.

¹⁰ See *Ferrers*, HL 16 June 1994, col 1907.

¹¹ HC 3 Mar 1998, cols 859-61.

¹² See Chapter One on the use of this term, page 14.

¹³ HC 3 Mar 1998, col 861.

Anti-Terrorism, Crime and Security Act 2001 (ATCSA)

A greater sense of urgency in relation to religious hatred was present in the aftermath of the 11 September 2001 attacks on the World Trade Centre in New York (9/11). Attention was sharply focused on intensified attacks on, discrimination against and vilification of Muslims, although their experiences were now once again unequivocally framed as a public order issue.¹⁴ Indeed, in relation to the proposed religious hatred provisions, Home Secretary David Blunkett stated that “This is a public order Act, and it is the order that we are talking about.”¹⁵ In relation to the Bill as a whole, much concern was expressed about the erosion of rights and freedoms, but this was countered by a distinction between terrorists, whose rights it is legitimate to curtail, and ‘ordinary people,’ whose rights and freedoms would be safeguarded.¹⁶ This Bill thus continued the trend established by the RRA65, RRA76 and POA86 of carving an increasingly stark biopolitical distinction between the body of the population and the ‘disease.’ The ATCSA was also enacted in the wake of riots across several northern towns, which were largely attributed to ‘racial intolerance.’¹⁷

The Bill originally aimed to make four changes to the law pertaining to the stirring up hatred offences:

- To extend the racially aggravated offences of the Crime and Disorder Act 1998 to include religiously aggravated offences;
- To replace the stirring up racial hatred provisions in Part III POA86 with provisions on stirring up racial or religious hatred;
- To remove the criterion that hatred must be stirred up against a group of persons in Great Britain; and

¹⁴ See, for example, Letwin, HC 26 Nov 2001, col 697.

¹⁵ HC 19 Nov 2001, col 35.

¹⁶ Coaker, HC 19 Nov 2001, col 108.

¹⁷ Lester, HL 10 Dec 2001, col 1171.

- To enhance penalties for stirring up hatred from two to seven years' imprisonment.

Each of these changes was achieved by the ATCSA, except for the prohibition on stirring up religious hatred: this provision was removed by the House of Lords, reinstated by the House of Commons, and then removed again by the Lords. The most common counterargument to including religious hatred provisions was that emergency anti-terrorism legislation was not the correct place for them. In particular, it was argued that creating an offence within anti-terrorism legislation that was primarily framed as necessary for the protection of Muslims would inadvertently reinforce a link between Muslims and terrorism.¹⁸ Although numerous speakers argued that it was inherently divisive or draconian, and Liberal Democrats expressed a preference for a broader equality bill, the provision was essentially deferred by the Lords rather than outright rejected.

The ATCSA debates revealed widespread confusion over the scope of the proposed provisions on incitement to religious hatred. Prominent examples of such confusion included: the use of examples that would not fall within the scope of the religious hatred provisions; confusion between blasphemy law, where it is the religious doctrine that is protected, and incitement to hatred, where it is groups of people who are protected; arguments that the offence required the existence of a threat to public order, despite there being no reference to public order in the text of the provisions; and arguments that the requirement for prosecutions to be authorised by the Attorney General was undemocratic or unprecedented, despite this requirement already existing in relation to the incitement to racial hatred offences. The term 'religious hatred' was also used varyingly by different speakers to mean spreading hatred against a group on grounds of their religion, provoking a religious group¹⁹ or the use of religion (i.e. religious texts or teachings) to spread hatred of a group.²⁰ This variety of interpretations revealed an ambiguity over whether

¹⁸ Letwin, HC 19 Nov 2001, col 46; Cormack, HC 26 Nov 2001, col 713; Buscombe, HL 27 Nov 2001, col 275; Russell, HL 28 Nov 2001, col 423; Dholakia, HL 10 Dec 2001, col 1179.

¹⁹ Gummer, HC 19 Nov 2001, col 83; S. Hughes, HC 26 Nov 2001, col 677.

²⁰ Onslow, HL 27 Nov 2001, col 244.

religious groups would be interpellated as victims or villains by the religious hatred provisions.²¹ Along with a lack of agreement as to whether hatred against Muslims is religious or is actually a form of racial hatred, these areas of confusion lend credence to arguments that the rapid timetable for passing the ATCSA did not enable sufficient consideration of the provisions on stirring up religious hatred.

Religious Offences Bill

In the Religious Offences Bill 2002, Lord Avebury reproduced the stirring up religious hatred provisions that had been removed from the ATCSA, alongside provisions for the abolition of blasphemy and the repeal of other archaic religious offences. In response to wide-ranging concerns in the House of Lords, the Bill was referred to a Select Committee for examination.

The Select Committee on Religious Offences in England and Wales produced a report in 2003, which asserted that Britain is a multi-faith rather than a secular society and noted a need for the law to provide equal protection to people of all faiths and none.²² However, no recommendations were made as to how this should be achieved. In the House of Lords debate on the report, Lord Colville, who had chaired the Select Committee, referred to a narrow gap in the criminal law between the existing law on incitement to commit an offence and Article 10 of the European Convention on Human Rights on freedom of expression.²³ Deputy Home Secretary, Baroness Scotland, stated the government's general position in favour of legislating against stirring up religious hatred to close that gap, but gave no indication as to when this might come to pass.²⁴ The Bill made no further progress through parliament.

²¹ See Dobson, HC 19 Nov 2001, col 53; Alton, HL 10 Dec 2001, col 1175.

²² "Volume I – Report."

²³ HL 22 Apr 2004, cols 446-8.

²⁴ HL 22 Apr 2004, col 476.

Serious Organised Crime and Police Act 2005 (SOCPA)

In the debates preceding the enactment of the SOCPA, as in the debates on the ATCSA, it was argued that the well-intentioned provisions on stirring up religious hatred would do more harm than good in practice or that the SOCPA was not the right place for them. Nevertheless, the provisions on incitement to religious hatred were debated extensively. In April 2005, the House of Lords rejected the provisions on stirring up religious hatred and Prime Minister Tony Blair called the general election of 5 May 2005. The provisions were subsequently dropped in order to secure the smooth passage of the rest of the SOCPA.²⁵

Racial and Religious Hatred Act 2006 (RRHA)

After a resounding victory in the 2005 general election, Labour quickly resurrected the stirring up religious hatred provisions in the form of the Racial and Religious Hatred Bill, following their manifesto commitments to “give people of all faiths the same protection against incitement to hatred on the basis of their religion” and to “balance protection, tolerance and free speech.”²⁶ With the provisions now included in a bill of their own and with a generous allocation of time for debate in the House of Commons Committee, chances of success were greatly improved. However, deep-seated disagreement persisted and fundamentally divergent positions on complex issues emerged.

The Bill introduced by the government initially sought to amend Part III of the POA86 so that ‘racial hatred’ would be changed to ‘racial or religious hatred.’²⁷ Therefore, the offence as originally proposed required threatening, abusive or insulting language or behaviour that was intended or likely to stir up religious hatred. Additionally, where intent to stir up religious hatred was not proved, it would have been a defence against the ‘likely limb’ to prove that the defendant

²⁵ Scotland, HL 5 April 2005, col 596.

²⁶ “Britain Forward, Not Back,” 111-112.

²⁷ A slight change to the wording of the likelihood test was also proposed, but ultimately rejected.

was not aware that their language or behaviour might be threatening, abusive or insulting under s 18(5). This was the form in which the Bill was passed from the House of Commons to the Lords. Debate in the Lords' chambers was curtailed by a successful movement in Committee to restructure the Bill so that the religious hatred provisions stood independently in a new Part IIIA of the POA86. A cross-party coalition of Lords argued that this was necessary to enable the racial and religious hatred provisions to be treated differently from the racial hatred provisions without over-complicating Part III.

The separation of the racial and religious offences was one of four amendments proposed by the Lords. The other amendments removed the 'likely limb' so that intent was required, inserted a free speech rider to make it explicit that various types of expression would not be caught, and removed the words 'abusive or insulting' so that only threatening language or behaviour could amount to an offence. The Government accepted the separation of the offences and the addition of the free speech rider, but asked the House of Commons to reject the other two amendments. With regards to the 'likely limb,' a recklessness clause was offered instead, so that the offence would require either intent or recklessness as to whether religious hatred would be stirred up. In two extremely close divisions, the Government was outvoted and the Lords' amendments were all accepted. This was only the second parliamentary defeat for the New Labour Government since 1997, reflecting the level of controversy elicited by the Bill both inside and outside of parliament.²⁸ For the Government, though, the Lords' amendments meant a double weakening of the offence, as now even language *intended* to stir up religious hatred had to be threatening and even *threatening* language had to be shown to have been used with intent. The RRHA received royal assent on 16 February 2006.

²⁸ Goodall, "Incitement to Religious Hatred," footnotes 8 and 10; Meer, "Politics of Voluntary and Involuntary Identities," 77-8.

Defining religious hatred and the scope of the RRHA

The legal gap

The religious hatred provisions were primarily advocated as necessary on the basis that they would correct a source of inequality and injustice. As regularly noted in debates on religious hatred since, the ruling in *Mandla v Dowell Lee* meant that Part III of the POA86 applied to incitement to hate purportedly mono-ethnic religious groups, i.e. Jews and Sikhs, but not religious groups characterised as multi-ethnic, e.g. Christians, Hindus and Muslims. Thus, it was argued that the religious hatred provisions were necessary to correct this anomaly and to ensure that all religious groups could avail themselves of the same legal protections.²⁹ Furthermore, just as Labour MP Bernard Floud predicted in 1965,³⁰ and as Labour MP Paul Rose claimed was occurring already in 1976,³¹ the absence of a specific offence of stirring up religious hatred was found to enable individuals and organisations to circumnavigate the law by directing their racism towards religious groups.³² The existence of literature stirring up hatred against Muslims and broader manifestations of Islamophobia was not disputed in parliament; it was if and how new law should be created in response that elicited extensive debate. Many speakers suggested that there was already sufficient

²⁹ Blunkett, HC 7 Dec 2004, col 1055; Flint, *ibid.*, col 1134; Bryant, *ibid.*, col 1115 and HC 11 July 2005, col 623; Blears, HC 20 Jan 2005, col 400; Stevenson, HL 14 Mar 2005, col 1107; Ramsay, *ibid.*, col 1109 and HL 11 Oct 2005, col 209; Denham, HC 21 June 2005, col 709; Khan, *ibid.*, col 737; Cohen, *ibid.*, cols 741 and 743, and HC 28 June 2005, col 15; Goggins, HC 21 June 2005, col 757 and HC 28 June 2005, cols 4 and 27; Ramsay, HL 11 Oct 2005, col 208-9; Dubs, *ibid.*, col 222; Gould, *ibid.*, col 260. See also Thompson, "Freedom of Expression," 216.

³⁰ HC 3 May 1965, col 970.

³¹ HC 4 Mar 1976, col 1648.

³² Bailey, HC 7 Dec 2004, cols 1122-3; Bryant, *ibid.*, col 1112 and HC 11 July 2005, col 624; Blears, HC 20 Jan 2005, col 394; Heath, *ibid.*, col 406 and HC 7 Feb 2005, col 1202; Harris, HC 20 Jan 2005, col 430 and HC 21 June 2005, col 737; Bhatia, HL 14 Mar 2005, col 1143; Clarke, HC 21 June 2005, col 678; Carmichael, *ibid.*, col 696; Kahn, *ibid.*, col 735; Cohen, *ibid.*, col 743; Goggins, *ibid.*, col 757, HC 30 June 2005, col 98 and HC 7 July 2005, col 645; Dholakia, HL 11 Oct 2005, col 268; Avebury, HL 25 Oct 2005, col 1085; McGovern, HC 31 Jan 2006, col 223. See also Idriss, "Religion and the ATCSA 2001," 895; for examples from the BNP see also Goodall, "Incitement to Religious Hatred," 93-4.

law to deal with this problem and religious hatred more generally,³³ or that any gap within existing legislation was too small to justify new provisions.³⁴ Whereas the stirring up racial hatred provisions had been among the very first provisions dealing with race in 1965, in 2005 there was already s 5 of the POA86 which could deal with threatening, abusive or insulting words or behaviour and which, since the ATCSA, could be aggravated on grounds of religious hatred. In particular, the case of *Norwood v DPP*,³⁵ which resulted in a religiously aggravated conviction under s 5 POA86 for the display of an Islamophobic poster, was cited to support the view that there was already sufficient law.³⁶ Understanding the ways in which the stirring up hatred provisions were distinct from existing law thus proved challenging to speakers on all sides of the debate.³⁷ Those supporting the Bill repeatedly failed to provide relevant examples to illustrate the scope of the Bill,³⁸ while some speakers opposing the Bill failed to note that existing law only dealt with offences against individuals, rather than the inchoate stirring up of hatred against groups,³⁹ or that stirring up hatred legislation aims to *prevent* offences against individuals. As Labour MP Frank Dobson explained:

³³ Prentice, HC 7 Dec 2004, col 1095; Davis, HC 21 June 2005, cols 688-9; Leigh, *ibid.*, cols 689 and 727; Johnson, *ibid.*, col 731; Baron, *ibid.*, col 745; Pritchard, *ibid.*, col 751; Carmichael, *ibid.*, col 696 and HC 28 June 2005, col 9; Streeter, HC 21 June 2005, cols 721-2 and HC 11 July 2005, col 632; Wilson, *ibid.*, col 644; Harris, *ibid.*, col 738 and HC 31 Jan 2006, col 223; Mackay, HL 11 Oct 2005, col 171; Lester, *ibid.*, col 172; Lucas, *ibid.*, col 203; Chan, *ibid.*, col 220; Taylor, *ibid.*, cols 228-9; Falkner, *ibid.*, col 265; Hunt, HL 24 Jan 2006, col 1073; Grieve, HC 31 Jan 2006, col 208; Hayes, *ibid.*, col 225.

³⁴ Selous, HC 7 Dec 2004, col 1124; Lester, HL 14 Mar 2005, cols 1115-6; Carmichael, HC 11 July 2005, col 621; Pritchard, *ibid.*, col 633; Lester, HL 11 Oct 2005, col 175; Scott-Joynt, *ibid.*, col 176; Skidelsky, *ibid.*, col 232; Harris, HC 31 Jan 2006, cols 220-1.

³⁵ [2003] EWHC 1564 (admin).

³⁶ Mackay, HL 14 Mar 2005, col 1111; Lester, *ibid.*, col 1115; Davis, HC 21 June 2005, col 689; Harris, HL 11 Oct 2005, col 248; Grieve, HC 31 Jan 2006, col 194; Harris, *ibid.*, col 223; Grogan, *ibid.*, col 234.

³⁷ See Hare, "Crosses, Crescents and Sacred Cows," 529.

³⁸ As noted by Davis, HC 21 June 2005, col 686; Gummer, *ibid.*, col 708; Streeter, *ibid.*, col 722; Johnson, *ibid.*, col 732; Care, HL 11 Oct 2005, col 193; Turner, *ibid.*, col 201; Lewis, HC 31 Jan 2006, col 200; Grogan, *ibid.*, col 234.

³⁹ As noted by Lord Falconer, HL 11 Oct 2005, col 233.

I am told that if people are abused and assaulted action can be taken against the offenders and they can be prosecuted, but before a prosecution can take place someone has to suffer the spitting, abuse and assault. I want to prevent people from being assaulted and abused.⁴⁰

A clear point of disagreement, rather than confusion, emerged between those who argued that the RRHA was necessary to ensure equal treatment of mono- and multi-ethnic religious groups, and those who argued that they were already treated equally: existing law provided no protection against incitement to religious hatred of any group, but provided protection against incitement to racial hatred for all groups.⁴¹ This position asserted that the kind of hatred that was being stirred up by far-right organisations such as the British National Party (BNP) could properly be characterised as racial rather than religious: “The BNP is not making a theological point, but a racist one.”⁴² Thus, because Islamophobic hatred, for example, does not tend to engage with the tenets or doctrines of Islam, it is essentially a form of racial hatred that should be captured by Part III of the POA86.⁴³ In contrast, expressions of hatred that addressed theology and were thus properly religious in nature were argued to be beyond the remit of the law.⁴⁴ The legal solution that was proposed – which became known as ‘the Lester amendment’ after an amendment to the SOCPA moved by Lord Lester – was to explicitly expand the definition of racial hatred in s 17

⁴⁰ HC 31 Jan 2006, col 216. See also Labour MP Sadiq Khan: “We are talking about hatred creating an atmosphere in which Muslim women – British women, some of them white – wearing a hijab or scarf are spat at, insulted, sworn at and even hit” (HC 21 June 2005, col 735); and Baroness Whitaker: “the point is that the police could prosecute only when this hatred erupted into actual criminal damage – the symptom, not the cause” (HL 11 Oct 2005, col 215).

⁴¹ Harris, HC 11 July 2005, col 624 and HC 11 July 2005, cols 636-7 and cols 612-3; Mackay, HL 14 Mar 2005, col 1111; Carmichael, HC 28 June 2005, cols 6-7; Featherstone, HC 29 June 2005, col 76; Grieve, *ibid.*, col 74, HC 30 June 2005, col 93; and HC 11 July 2005, col 652; Lester, HL 14 Mar 2005, cols 1114 and 1160, and HL 11 Oct 2005, col 174; Peston, HC 11 Oct 2005, col 226; Dholakia, *ibid.*, cols 266 and 268; Leigh, HC 31 Jan 2006, col 207.

⁴² Harris, HC 21 June 2005, col 740. See also Harris, HC 21 June 2005, col 738 and HC 11 July 2005, col 638; and Davies, HC 28 June 2005, col 22.

⁴³ Malik, HC 21 June 2005, col 703; Bryant, HC 11 July 2005, col 626; Harris, *ibid.*, col 637.

⁴⁴ Lester, HL 14 Mar 2005, col 1114-5; Carmichael, HC 11 July 2005, col 620.

POA86 to include the use of religious terms to incite racial hatred.⁴⁵ This, it was argued, would address the problem of coded racism without stymying religious debate, criticism or ridicule.⁴⁶

In response, several reasons were put forward as to why religious hatred “needs to be dealt with in its own right.”⁴⁷ Firstly, the racial diversity of Muslims makes it nonsensical to claim that hatred against them as a group is racial, and the Lester amendment could preclude the possibility of white Muslim victims.⁴⁸ Secondly, religious hatred can be stirred up between religious groups that are not racially different from each other, as in sectarian hatred or hatred against apostates.⁴⁹ Thirdly, religious hatred may be directed more broadly against non-believers, without any racial distinction.⁵⁰ Lastly, whether hatred is racial or religious is not always discernible, as “race, religion and culture are in truth intimately intertwined,” as reflected in the *Mandla* judgment.⁵¹

In Committee in the House of Commons, it was agreed by those arguing both for and against the Lester amendment that it would only clarify the scope of the racial hatred provisions rather than substantively change the existing legal situation. Indeed, case law demonstrated a need for clarity. On the one hand, a conviction for distributing Islamophobic leaflets under the stirring

⁴⁵ Lord Lester’s advocacy of this position sits in curious contrast to his movement of an amendment to the CJPOA in 1994, which sought to replace the words ‘racial hatred’ with ‘hatred.’ In arguing for this amendment, Lord Lester stated that there was a need to ensure that all religious groups would be protected from hatred and that the legislation of England and Wales should be brought in line with that of Northern Ireland (HL 16 June 1994, cols 1890-1).

⁴⁶ Harris, HC 20 Jan 2005, col 418; Davis, HC 21 June 2005, 690; Leigh, *ibid.*, col 728; Grieve, *ibid.*, col 755; Carmichael, HC 28 June 2005, col 10.

⁴⁷ Cohen, HC 21 June 2005, col 743. See also Harries, HL 11 Oct 2005, col 247.

⁴⁸ Blears, HC 7 Feb 2005, col 1222; Whitaker, HL 14 Mar 2005, col 1151; Khan, HC 21 June 2005, col 735 and HC 28 June 2005, cols 8-9; Thornberry, *ibid.*, col 10; Cohen, *ibid.*, col 17; Soulsby, *ibid.*, cols 24-5; Goggins, *ibid.*, col 28, HC 11 July 2005, col 649 and HC 31 Jan 2006, col 194; Falconer, HL 11 Oct 2005, col 169; Ahmed, *ibid.*, col 230; Bassam, *ibid.*, col 276.

⁴⁹ Falconer, HL 11 Oct 2005, col 162; Whitaker, *ibid.*, col 215.

⁵⁰ Clarke, HC 21 June 2005, col 678.

⁵¹ Denham, HC 21 June 2005, col 710. See also Bryant, HC 28 June 2005, col 8; Goggins, *ibid.*, col 29 and HC 11 July 2005, col 649; Ramsay, HL 11 Oct 2005, col 208.

up racial hatred provisions was confirmed in the Scottish case of *Wilson v PF*.⁵² On the other hand, the case of *R v DPP, ex parte Merton LBC* ultimately resulted in the CPS refusing to bring a case under Part III of the POA86 because it was unclear whether hatred against Muslims could be classified as ‘racial hatred.’⁵³ Academic commentators have also suggested that either a more liberal interpretation of the *Mandla* criteria for ethnicity⁵⁴ or recognition of the extent to which the majority of British Muslims are viewed as racially ‘other’⁵⁵ could suffice to afford Muslims protection under the racial hatred provisions. However, opponents of the Lester amendment maintained that it would not close the legal gap that the Bill was designed to plug. While the Lester amendment might have erased the discrepancy in the protection afforded to different religious groups on paper, without classifying Muslims as an ethnic group the extent to which they would be protected from hatred on the basis of their identity as Muslims would have remained uncertain at best.⁵⁶ Moreover, even if it did extend protection to Muslims, sectarian hatred would have continued to fall through the cracks.

To its credit, the Lester amendment was centred on how a victim group was perceived by a perpetrator, rather than an objective, innate understanding of racial identity. However, it also reinforced perceptions of hatred as an issue that concerns only racialised groups. Advocacy of the Lester amendment therefore resonated with views that the stirring up hatred provisions were a form of special treatment for minorities.⁵⁷

⁵² [2005] HCJAC97, 2005 SCCR 686. The initial conviction was in *PF v Wilson* Sh.Ct 24 October 2002, unpublished.

⁵³ (1999) COD 358. There are also examples of employment tribunals ruling that Muslims are not an ethnic group for the purposes of racial discrimination protections: *Nyazi v Rymans Ltd* [1988] EAT/6/88, unreported; *Malik v Bartram Personnel Group* [1990] EAT/4343/90, unreported.

⁵⁴ Idriss, “Religion and the ATSCA 2001,” 910-1; Meer, “Politics of Voluntary and Involuntary Identities.”

⁵⁵ Goodall, “Incitement to Religious Hatred,” 96.

⁵⁶ Bryant, HC 11 July 2005, col 640.

⁵⁷ Grieve, HC 31 Jan 2006, col 214; Saltoun, HL 11 Oct 2005, col 206; Flather, *ibid.*, col 216; Stoddart, *ibid.*, col 260; Plant, *ibid.*, col 264.

The relationship between race and religion

Many opponents of the original Government Bill asserted that race and religion should not be treated the same because race is an immutable characteristic, while adherence to a religion is a choice.⁵⁸ In response, several speakers contested the notion that an individual has such freedom to choose their religion,⁵⁹ or the religious group to which they are perceived as belonging.⁶⁰ Some Labour MPs also pointed out that an individual cannot change the fact that they were born into a certain religion, the religiosity of their upbringing or the religious identity of their family,⁶¹ and that religion may subsequently determine many aspects of cultural life, regardless of personal belief.⁶² Moreover, it may be the element of choice that makes some individuals, such as converts and apostates, targets of hatred.⁶³ Others argued that the ability to change religion was irrelevant, as religion can nonetheless be an integral aspect of an individual's identity⁶⁴ and it was unreasonable to imply that religious hatred could be avoided by changing religion.⁶⁵ Thus, regardless of the mutability of religion, some advocates of the Bill argued that the experience of

⁵⁸ Paisley, HC 7 Dec 2004, col 1075; Hoban, *ibid.*, col 1116; Davis, *ibid.*, col 1065 and HC 21 June 2005, cols 686 and 692; Marshall-Andrews, HC 7 Dec 2004, col 1073 and HC 21 June 2005, col 676; Mackay, HL 14 Mar 2005, cols 1111-2; Lester, *ibid.*, cols 1114-5; Baker, *ibid.*, col 1120; Campbell, *ibid.*, col 1138; Wright, HC 21 June 2005, col 730; Johnson, *ibid.*, col 732; Baron, *ibid.*, col 744; Grieve, *ibid.*, col 754, HC 29 June 2005, col 54 and HC 31 Jan 2005, col 205; Carmichael, HC 21 June 2005, col 700 and HC 11 July 2005, col 618; Davies, HC 28 June 2005, col 20; Pritchard, HC 11 July 2005, col 633; Alton, HL 11 Oct 2005, col 212; Taylor, *ibid.*, col 228; Sutherland, *ibid.*, col 239; Dholakia, *ibid.*, col 269; Wedderburn, HL 25 Oct 2005, col 1099.

⁵⁹ Blears, HC 20 Jan 2005, col 397; Baird, *ibid.*, cols 403-4; Pugh, HC 21 June 2005, col 701; Soulsby, *ibid.*, col 724; Bryant, *ibid.*, cols 691 and 749, and HC 11 July 2005, col 625; Thornberry, HC 29 June 2005, col 55.

⁶⁰ McIntosh, HL 11 Oct 2005, col 241; Harries, *ibid.*, cols 247-8 and HL 8 Nov 2005, col 516.

⁶¹ Khan, HC 21 June 2005, col 735; Goggins, HC 11 July 2005, col 650.

⁶² Bryant, HC 7 Dec 2004, col 1111; Winnick, HC 11 July 2005, col 633.

⁶³ Thornberry, HC 21 June 2005, col 721.

⁶⁴ Hendrick, HC 21 June 2005, col 725; Soulsby, *ibid.*, col 724 and HC 11 July 2005, col 614; Winnick, HC 11 July 2005, col 223.

⁶⁵ Plant, HL 14 Mar 2005, col 1141; Avebury, *ibid.*, col 1154; Dobson, HC 21 June 2005; col 694; Khan, *ibid.*, col 736; Denham, *ibid.*, col 710; Whitaker, HL 11 Oct 2005, cols 214-5; Gould, *ibid.*, col 259; Foulkes, HL 25 Oct 2005, col 1084; see also Meer, "Politics of Voluntary and Involuntary Identities," 77.

being hated for it was equivalent, and produced equivalent harms, to the experience of being hated on grounds of race.

A further argument against the equivalence of race and religion was that criticism (and thus hatred) of race is nonsensical and undesirable in all situations, whereas criticism of religion is part of free speech⁶⁶ and can be rational.⁶⁷ For example, Labour MP Robert Marshall-Andrews stated that:

Nobody can say to me that I ought to be black, white, Chinese or Russian, but there is no shortage of people outside this House, and some inside it, who would have no hesitation in saying that I ought to be Christian, Islamic, or Jewish, particularly if I chose to marry into that faith.⁶⁸

Conservative MP Dominic Grieve explained further that,

racial characteristics are irrelevant to the nature, belief or behaviour of a person. That is in sharp contrast to religious belief, because religion is an underlying philosophical outlook and belief system that colours the way people behave towards others.⁶⁹

Thus, the law should avoid infringing upon all debates where the merits of different religions might be discussed, for example, but is justified in proscribing comparable debates on the merits of different races. The threshold between acceptable criticism and unacceptable hatred might therefore differ between race and religion. This perspective was underscored by widespread

⁶⁶ Harris, HC 20 Jan 2005, col 429; Baron, HC 21 June 2005, col 744.

⁶⁷ Carmichael, HC 21 June 2005, cols 701-2; Grieve, HC 29 June 2005, cols 72-3 and HC 11 July 2005, cols 607-8.

⁶⁸ HC 31 Jan 2006, cols 231-2. See also Lord Mackay: "I would not engage in a conversation with someone seeking to change his race, but one might well do so with someone seeking to change his religion" (HL 14 Mar 2005, col 1112).

⁶⁹ HC 30 June 2005, cols 93-4.

concerns that the religious hatred provisions might criminalise individuals expressing hatred of cults, Satanism, fundamentalism or harmful religious practices.⁷⁰

Concerns about cults stemmed from dissatisfaction with the lack of definition of ‘religion.’ Along with the absence of a definition of hatred, which was often conflated with criticism, this was argued to make the Bill too vague and too liable to exploitation by dubious groups.⁷¹ Indeed, religion was said by some to be more akin to political affiliation than to race, insofar as they both comprise a set of beliefs that may change during a person’s lifetime and should be freely debated.⁷² Moreover, it was suggested that expressing hatred of the BNP or other more nefarious organisations, could fall foul of the Bill if they were to rebrand themselves as religious organisations.⁷³

Advocates of the Bill, however, pointed to the definition established by the European Court of Human Rights, whereby protection under Article 9 ECHR on freedom of religion may only be afforded to belief systems that have “a certain level of cogency, seriousness, cohesion and importance,” the convictions of which “are worthy of respect in a ‘democratic society’” and “are

⁷⁰ Spink, HC 7 Dec 2004, col 1098; Hoban, *ibid.*, col 1117; Grieve, *ibid.*, col 1055 and HC 21 June 2005, col 677; Davis, HC 7 Dec 2004, col 1066 and HC 21 June 2005 col 690; Harris, HC 20 Jan 2005, col 398 and HC 21 June 2005, col 739; Gummer, HC 21 June 2005, col 706; Widdecombe, *ibid.*, col 712; Baron, *ibid.*, col 744; Davis, *ibid.*, col 687; Davies, HC 29 June 2005, col 45; Prisk, *ibid.*, col 47; Carmichael, *ibid.*, col 57; Streeter, *ibid.*, col 67; Dubs, HL 11 Oct 2005, col 223; Onslow, *ibid.*, col 237; Monson, *ibid.*, col 525; Mackay, *ibid.*, cols 70-1 and HL 25 Oct 2005, col 1096; Leigh, HC 31 Jan 2006, col 221; Gove, *ibid.*, col 231.

⁷¹ Grieve, HC 30 June 2005, cols 113 and 114; Taylor, HL 11 Oct 2005, col 229; Sutherland, *ibid.*, col 240.

⁷² Marshall-Andrews, HC 21 June 2005, col 676; Grieve, *ibid.*, cols 677 and 754, HC 28 June 2005, cols 25 and 31-2, HC 29 June 2005, cols 51-2, HC 11 July 2005, cols 603 and 607, and HC 31 Jan 2006, cols 205 and 209; Harris, HC 11 July 2005, col 607; Davies, *ibid.*, col 625; Hunt, HL 25 Oct 2005, col 1073.

⁷³ Grieve, HC 7 Feb 2005, col 1209, HC 21 June 2005, cols 741-2, HC 11 July, col 604 and HC 31 Jan 2006, col 211; D’Souza, HL 14 Mar 2005, col 1117; Davis, HC 21 June 2005, col 690; Davies, HC 29 June 2005, col 45; Lewis, HC 31 Jan 2006, col 211; Gove, *ibid.*, col 231.

not incompatible with human dignity.”⁷⁴ An objective application of elements such as cohesion and compatibility with human dignity, however, may reveal less distinction between a ‘perversion of Islam’⁷⁵ and certain tenets of Christianity than intended. It was also argued that the functioning of the religious aggravation provisions demonstrated that the courts were capable of ruling on religious offences without any need for further definitions.⁷⁶ While responses to concerns over the lack of definition of religion amounted to the claim that ‘we know one when we see one,’ this is consistent with the approach taken to race. The objectivity and intransience of ‘race’ was never questioned, despite being widely held in contemporary scientific circles to be a social rather than a biological category.⁷⁷

Distinguishing between beliefs and believers

One response to concerns over the possible protection of cults and undesirable belief systems under the stirring up religious hatred provisions was that it was believers rather than their beliefs that would be protected. Advocates thus argued that the Bill would allow incitement to hate the sin but not the sinner⁷⁸ and described it as distinct from, rather than an extension of, blasphemy

⁷⁴ *Campbell and Cosans v United Kingdom* (1982) 4 EHRR 1, para. 36, referenced by Goggins, HC 29 June 2005, cols 64 and 69, HC 30 June 2005, col 97 and HC 11 July 2005, cols 631 and 650; Falconer, HL 11 Oct 2005, cols 164 and 167; Bassam, *ibid.*, col 278; Scotland, HL 8 Nov 2005, col 557. However, the ‘democratic society’ and ‘human dignity’ elements of this definition were established in relation to protection afforded to ‘philosophical convictions’ under Article 2 of Protocol 1 to the ECHR, rather than to religious beliefs.

⁷⁵ Mackay, HL 11 Oct 2005, cols 170-1.

⁷⁶ Denham, HC 21 June 2005, col 710; Khan, HC 29 June 2005, col 52; Goggins, *ibid.*, col 69 and 11 July 2005, col 650; Falconer, HL 11 Oct 2005, col 167.

⁷⁷ Goodall, “Incitement to Religious Hatred,” 98; Meer, “Politics of Voluntary and Involuntary Identities,” fn1 and fn4.

⁷⁸ Bryant, HC 21 June 2005, col 747, HC 29 June 2005, cols 59 and 60, and HC 11 July 2005, col 624; Goggins, HC 21 June 2005, col 759, HC 11 July 2005, col 650; and HC 31 Jan 2006, cols 199 and 202; Falconer, HL 11 Oct 2005, cols 163 ad 167-8; Ramsay, *ibid.*, col 207; Avebury, *ibid.*, col 219; Dubs, *ibid.*, col 223; McIntosh, *ibid.*, col 241; Bassam, *ibid.*, col 274.

law.⁷⁹ Those who questioned this approach argued that no such objective distinction could be made, and that to express hatred of a religion is tantamount to expressing hatred of its adherents.⁸⁰ Even if such a distinction could be made in theory, it was frequently both stated and demonstrated that “people misunderstand the Bill.”⁸¹ Lord Parekh pointed to the terminology as a source of such misunderstanding:

the term ‘religious hatred’ is deeply ambiguous. It is unlike the term ‘racial hatred,’ which simply means inciting hatred of a particular racial group. By contrast, ‘religious hatred’ will mean inciting hatred of a body of beliefs, a religion, or of a religious group. ... It should have been called ‘hatred of a religious group.’⁸²

Inciting ‘religious hatred’ can easily be understood as provoking a hateful backlash from religious groups, rather than as stirring up hatred against them. While this distinction was deemed relatively unimportant in relation to provoking a breach of the peace under the POA36 or inciting racial hatred under the RRAs and the POA86, it became much more salient in relation to religious hatred, where there was an even greater concern not to legislate against causing offence.

In an attempt to clarify the objectives of the RRHA, Lord Avebury moved an amendment to abolish blasphemy, arguing that to do so would signal a clear commitment to equality and to protecting only believers, not beliefs.⁸³ While this amendment received considerable support, both

⁷⁹ Clarke, HC 21 June 2005, cols 673 and 681; Goggins, HC 28 June 2005, col 26 and HC 29 June 2005, col 65.

⁸⁰ Widdecombe, HC 21 June 2005, col 705; Grieve, *ibid.*, cols 672 and 754, and HC 31 Jan 2006, cols 208-12; Featherstone, HC 11 July 2005, col 625; Main, HC 31 Jan 2006, col 208; Carmichael, *ibid.*, col 219; Wright, *ibid.*, col 229; Scott-Joynt, HL 11 Oct 2005, col 190; Lucas, *ibid.*, cols 204 and 226; Sutherland, *ibid.*, col 239; Monson, *ibid.*, col 251; Lester, *ibid.*, col 226; Hunt, HL 25 Oct 2005, col 1072; Mackay, *ibid.*, col 1095; Plant, HL 8 Nov 2005, col 529.

⁸¹ Harris, HC 20 Jan 2005, col 416. Among others, see also Labour MP John Denham: “The problem is not primarily the Bill as it stands ... but the way in which it is perceived outside” (HC 21 June 2005, col 711).

⁸² HL 25 Oct 2005, col 1094. See also Thompson, “Freedom of Expression,” 218.

⁸³ HL 8 Nov 2005, cols 520-2. See also Whitaker, HL 11 Oct 2005, col 215; Lester, HL 8 Nov 2005, col 527; Plant, *ibid.*, cols 528-9; Phillips, *ibid.*, col 534.

in speeches and in division, it was also objected to on the basis that abolishing blasphemy in the RRHA could make it seem like the stirring up religious hatred offence was replacing it, thus leading to more rather than less confusion over the scope of the provisions.⁸⁴

Misguided perceptions that the Bill would enable religions to claim protection from insults and offence were presented by different speakers as having five likely outcomes:

- disagreements between faiths and sects would become litigious, leading to increased hostility;⁸⁵
- when vexatious prosecutions were refused, and the narrow scope of the law became apparent, religious groups (and especially Muslims) would feel cheated;⁸⁶
- regardless of whether prosecutions were ultimately brought, the risk of police investigations and prosecution would lead to self-censorship;⁸⁷
- if prosecutions were brought and were successful, they would lend credence to claims of persecution, create martyrs and increase disaffection;⁸⁸ and

⁸⁴ Harries, HL 8 Nov 2005, col 524; Mackay, *ibid.*, col 537; Scotland, *ibid.*, cols 540-1 and 546.

⁸⁵ Davis, HC 7 Dec 2004, col 1066 and HC 21 June 2005, cols 684 and 688; Streeter, HC 21 June 2005, col 722; Baron, *ibid.*, col 745; Pritchard, *ibid.*, col 751; Spink, 31 Jan 2006, col 206; Grieve, *ibid.*; Carmichael, *ibid.*, col 219; Carey, HL 11 Oct 2005, col 194; O’Cathain, *ibid.*, cols 210-1; Wedderburn, HL 25 Oct 2005, col 1083; Alton, *ibid.*, col 1089.

⁸⁶ Davis, HC 21 June 2005, cols 685 and 688; Allen, *ibid.*, col 719; Streeter, *ibid.*, col 723; Harris, *ibid.*, col 739; Wright, HC 11 July 2005, col 617; Lester, HL 11 Oct 2005, col 174; Scott-Joynt, *ibid.*, col 190; Taylor, *ibid.*, col 227; Kennedy, *ibid.*, col 246; Haskel, *ibid.*, cols 250-1.

⁸⁷ Davis, HC 21 June 2005, col 686; Allen, *ibid.*, col 720; Leigh, *ibid.*, col 728; Baron, *ibid.*, col 744; Harris, *ibid.*, col 680 and HC 11 July 2005, col 642; Carmichael, HC 21 June 2005, col 696 and HC 31 Jan 2006, cols 218-9; Heath, HC 11 July 2005, col 617; Davies, *ibid.*, col 617-8; Cox, HL 11 Oct 2005, col 200; Miller, *ibid.*, col 205; Grieve, HC 31 Jan 2006, col 208; Smith, *ibid.*, col 210; Fisher, *ibid.*, col 226; Gove, *ibid.*, col 230.

⁸⁸ Allen, HC 21 June 2005, col 719; Joynt-Scott, HL 11 Oct 2005, col 191; Cassidy, *ibid.*, col 224; Kennedy, *ibid.*, cols 246-7; Grieve, HC 31 Jan 2006, col 213.

- those who felt that their freedom to criticise religions was being curtailed would feel resentful, leading to increased hostility and support for the BNP.⁸⁹

These five prospective outcomes underscore the importance that parliamentarians placed on how the Bill would be perceived by the public.⁹⁰ This aligns with the Government's position since the ATCSA debates of 2001 that the provisions were necessary to signal to Muslim and other minoritized communities that their concerns were taken seriously.⁹¹ Much was therefore made of whether various Muslims groups supported or opposed the Bill, or whether their support was based on an accurate understanding of it. The introduction of the stirring up religious hatred provisions in the RRHA also represented the delivery of a manifesto commitment, leading several opposition speakers to describe the Bill as a cynical attempt to gain Muslim support and votes.⁹² This echoes criticisms of the RRA65, which was also introduced following a Labour Party manifesto commitment and was also presented as something that minorities could perceive as 'for them' (see Chapter Six). The emphasis on perceptions, combined with the clawbacks made by the Lords' amendments, suggests that the RRHA ended up being more symbolism than substance overall.⁹³

Advocates of the Bill sought to counter such concerns – as well as concerns related to intent, the role of the Attorney General and the definition of 'hatred' – by presenting the religious hatred provisions as commensurate with the racial hatred provisions so as to suggest that objections to the latter which proved to be unfounded would also prove to be unfounded in relation to the former.⁹⁴ In particular, the protection afforded to Jews and Sikhs under the racial hatred

⁸⁹ Davies HC 21 June 2005, col 753, HC 28 June 2005, cols 19-20 and 23, HC 11 July 2005, cols 632-3 and HC 31 Jan 2006, col 213; Grieve, HC 28 June 2005, col 20; Taylor, HL 11 Oct 2005, col 228; Stoddart, *ibid.*, col 260.

⁹⁰ See Leigh, HC 21 June 2005, col 728; Gummer, HC 7 Feb 2005, col 1214.

⁹¹ Bryant, HC 11 July 2005, col 640; Ramsay, HL 11 Oct 2005, col 209; Ahmed, *ibid.*, col 230.

⁹² Paisley, HC 21 June 2005, col 718; Johnson, *ibid.*, col 732; Baron, *ibid.*, col 745; O'Cathain, HL 11 Oct 2005, col 209.

⁹³ Sandberg and Doe, "Strange Death of Blasphemy," 985.

⁹⁴ Bailey, HC 7 Dec 2004, col 1122; Blears, HC 20 Jan 2005, cols 399-400; Denham, *ibid.*, col 691; Khan, *ibid.*, cols 734-5; Bryant, HC 28 June 2005, col 19; Goggins, *ibid.*, col 38, HC 30 June 2005,

provisions had not led to a surge of vexatious complaints or censorship,⁹⁵ even in the case of *Behzti*, a play which caused deep offence to the Sikh community in 2004.⁹⁶ This line of argument was strengthened by party political dynamics, whereby both offences would be enacted by a Labour government despite resistance from Conservatives.⁹⁷ Thus, Labour MP Gerald Kaufman argued that:

The problem with interventions by Conservative Members is they are totally unrepresentative of the population as a whole in that hardly any of them are open to the kind of humiliation that many members of our communities are open to. If they were, they would not be criticising this legislation.⁹⁸

Additionally, it was pointed out that similar legislation on religious hatred in Northern Ireland had proved unproblematic.⁹⁹

In response, as well as refuting the comparability of the racial and religious hatred provisions, reference was made to purportedly problematic religious hatred laws enacted in other jurisdictions. These included the Indian Penal Code¹⁰⁰ and the Racial and Religious Tolerance Act 2001 of the Australian state of Victoria, under which it was claimed that religions had taken to

col 98, HC 11 July 2005, col 645 and HC 31 Jan 2006, col 204; Winnick, HC 21 June 2005, col 672, HC 11 July 2005, cols 627 and 632, and HC 31 Jan 2005, cols 209 and 224; Scotland, HL 14 Mar 2005, col 1195 and HL 25 Oct 2005, col 1123; Dubs, HL 11 Oct 2005, col 222; Bassam, *ibid.*, col 277; Parekh, HL 25 Oct 2005, col 1094.

⁹⁵ Winnick, HC 11 July 2005, col 632; Alli, HL 14 Mar 2005, col 1123; Falconer, HL 11 Oct 2005, col 167.

⁹⁶ Jones, HC 7 Feb 2005, col 1214; Malik, HC 21 June 2005, col 704; Starkey, *ibid.*, col 674; Dobson, *ibid.*, col 693; Falconer, HL 11 Oct 2005, col 166; Khan, HC 31 Jan 2006, col 213.

⁹⁷ Winnick, HC 7 Feb 2005, col 1212 and HC 11 July 2005, col 633.

⁹⁸ HC 21 June 2005, col 674.

⁹⁹ Avebury, HL 14 Mar 2005, col 1154; Falconer, HL 11 Oct 2005, col 167; Dubs, *ibid.*, col 222. At the time they would have been referring to Part III of the Public Order (Northern Ireland) Order 1987. The earlier Prevention of Incitement to Hatred Act (Northern Ireland) 1970 also encompassed stirring up hatred on grounds of religious belief.

¹⁰⁰ Lester, HL 14 Mar 2005, col 1113 and HL 11 Oct 2005, col 175; Davis, HC 21 June 2005, col 692; Baron, *ibid.*, col 745.

monitoring each other and bringing legal cases for every perceived insult.¹⁰¹ While the Victorian law is undoubtedly wider than the RRHA, it was argued that an enormous amount of police work and public concern would be generated if the distinction between hating believers and beliefs could not be clearly communicated or upheld in practice.¹⁰²

‘Managing diversity’

If in the POA36 debates Jews were cast as ambivalent victims of antisemitism due to their involvement in public disorder, and the RRA debates cast immigrants as problematic due to their ‘un-Britishness,’ and the POA86 debates described ethnic minorities as poor, meek and vulnerable, each of these framings can be found in relation to Muslims in the RRHA debates. In particular, we see a deep ambivalence with minoritized groups presented as both vulnerable and potentially volatile elements of society. Additionally, these representations took place against a growing disenchantment with the concept of multiculturalism, a renewed interest in the values of tolerance and integration, and the context of a broader New Labour discourse of ‘managing diversity.’¹⁰³ This section explores how these intersecting problematisations shaped responses to the stirring up religious hatred offences.

Vulnerable or dangerous victims

Muslims formed the primary victim group in the RRHA debates due to the extent to which they were viewed as unprotected against a contemporary proliferation of hatred. Islamophobia and the

¹⁰¹ Davis, HC 7 Dec 2004, col 1066 and HC 21 June 2005, col 688; Selous, HC 7 Dec 2004, col 1125; Heath, HC 7 Feb 2005, col 1207; Cox, HL 14 Mar 2005, col 1181 and HL 11 Oct 2005, col 199; Cassidy, HL 11 Oct 2005, col 224; Wedderburn, *ibid.*, col 255; Alton, HL 25 Oct 2005, col 1089; Grieve, HC 30 June 2005, cols 103 and 108-9.

¹⁰² Fisher, HC 31 Jan 2006, col 226.

¹⁰³ Back et al., “New Labour’s White Heart,” 446.

xenophobic narratives spread by the BNP were widely condemned in the debates and there were a cluster of voices denouncing the harmful effects that such discourse has on minoritized groups. Some advocates of the religious hatred provisions presented the unequal situation under the racial hatred provisions as a formal injustice that needed to be righted.¹⁰⁴ Other supporters of the Bill focused on how incitement to religious hatred damages individuals,¹⁰⁵ rather than harming “some higher or general community good.”¹⁰⁶ More specifically, it was argued that the spread of hatred leads to the spread of fear¹⁰⁷ and creates an atmosphere in which the subjects of such hatred face barriers, humiliation¹⁰⁸ and marginalisation.¹⁰⁹ Lord Ahmed was particularly notable for stating that “Because of our ever increasing Islamophobia, young British Muslims are being isolated and disenfranchised,” without then connecting this to any form of security risk,¹¹⁰ while Baroness Corston focused on the value of respect, to which stirring up religious hatred is inimical.¹¹¹ Lord Gould also made a strong case for focusing on inclusivity. Referring to the discrepancy in protection afforded to mono- and multi-ethnic religious groups, Gould stated:

That unfairness cuts deep into the possibility of inclusiveness that must be the start of the process of healing and rebuilding our communities. But it is also about responsibility. ... We cannot demand responsibility from all equally unless we offer rights to all equally.¹¹²

¹⁰⁴ Bryant, HC 7 Dec 2004, cols 1054, 1111 and 1115; Blears, HC 20 Jan 2005, col 400; Malik, HC 21 June 2005, cols 703-4; Denham, *ibid.*, cols 708-9; Goggins, HC 28 June 2005, col 28.

¹⁰⁵ Blunkett, HC 7 Dec 2004, col 1054; Dobson, HC 7 Feb 2005, col 1208; Mahmood, *ibid.*, col 1216; Stevenson, HL 14 Mar 2005, col 1107.

¹⁰⁶ Grieve, HC 30 June 2005, col 114.

¹⁰⁷ Bryant, HC 7 Dec 2004, col 1115; Stevenson, HL 14 Mar 2005, col 1107; Bhatia, *ibid.*, cols 1142-3; Clarke, HC 21 June 2005, col 673; Dobson, *ibid.*, col 692; Goggins, HC 11 July 2005, col 649; Whitaker, HL 11 Oct 2005, cols 214-5.

¹⁰⁸ Kaufman, HC 21 June 2005, col 674.

¹⁰⁹ Bryant, HC 7 Dec 2004, col 1112; Whitaker, HL 14 Mar 2005, col 1151; Khan, HC 21 June 2005, col 735; Whitaker, HL 11 Oct 2005, col 214; Bassam, *ibid.*, col 274; Winnick, HC 31 Jan 2006, col 222.

¹¹⁰ HL 14 Mar 2005, col 1178.

¹¹¹ HL 11 Oct 2005, col 197.

¹¹² HL 11 Oct 2005 col 260.

Such framings, although still rare in parliament, represented a concerted move away from the traditional utilitarian ‘public order’ rationale, where success is measured only by the absence of reported violence, and towards a more inclusive vision of democratic society, where the degradation and marginalisation of religious groups is sufficient injustice to warrant legislative intervention.

Nevertheless, there was also the concern that, if left unchecked, hatred against Muslims would provoke Muslim anger, disaffection and radicalisation; just like in 1936, it was reactions to hatred as much as the hatred itself that were perceived as the source of the problem. This was reflected in the emphasis on the symbolic significance of the religious hatred provisions as a means of appeasing Muslim disaffection rather than necessarily providing effective remedies to Islamophobia. It was also evident in concerns, noted above, that further anger would be provoked if the religious hatred provisions did not provide the anticipated level of protection. Although there was some conscious effort to avoid conflating the ‘terrorism problem’ with a ‘Muslim problem,’¹¹³ the spectre of looming terrorist attacks was present in justifications for measures to address Islamophobia.¹¹⁴ Therefore, although abstract notions of ‘order’ and ‘the peace’ were less common in the RRHA debates than in previous debates on stirring up hatred, risks of outbreaks of violence remained prominent within arguments both for and against the racial hatred provisions. With the shift from riots to terrorism, however, the level of fearsomeness attached to the Muslim identity was perhaps greater than that attached to other victim identities in earlier stirring up hatred debates. Baroness Flather exemplified this in her comment that “I am not sure that the Muslims need protecting. Would we not say at this stage that we need protecting from them?”¹¹⁵

¹¹³ MacKay, HL 14 Mar 2005, col 1111; Ahmed, HL 11 Oct 2005, col 231.

¹¹⁴ See Hannay, HL 11 Oct 2005, cols 256-7; Gould, HL 11 Oct 2005, col 258.

¹¹⁵ HL 11 Oct 2005, col 217.

Tolerance

Aside from the feared repercussions should the RRHA be misunderstood by religious communities, other arguments against the RRHA were premised on the reactions of the ‘majority’ in a revival of the *ressentiment* arguments that were made in opposition to the RRA65. Such positions stemmed from the notion that the RRHA was part of a broad multiculturalism and ‘political correctness’ agenda providing special treatment to minorities and enabling them to live ‘parallel lives.’¹¹⁶ Thus, insofar as the RRHA would be seen as a victory for Muslims,¹¹⁷ it would be seen as a snub by disaffected, working-class white people.¹¹⁸ In line with an independent report on the 2001 riots chaired by Ted Cante, it was this separateness and sense of marginalisation that was viewed as conducive to extreme ideologies on all sides and that thereby increased risks of violence.¹¹⁹ Echoing debates from the 1960s, the RRHA was presented by several commentators as divisive legislation that would be seen as benefiting one community at the expense of the freedoms of “ordinary people.”¹²⁰ The communal separateness that was complained of was thus affirmed and reproduced in parliament, such as in Conservative MP David Davis’s assertion that the debates were about “how we balance a belief in freedom and tolerance with the rights and interests of minorities.”¹²¹

¹¹⁶ Allen, HC 21 June 2005, col 718; Flather, HL 14 Mar 2005, col 1147 and HL 11 Oct 2005, cols 216-7 Stoddart, HL 11 Oct 2005, col 261; Grieve, HC 31 Jan 2005, col 214.

¹¹⁷ O’Brien, cited by Johnson, HC 21 June 2005, col 732 and O’Cathain, HL 11 Oct 2005, col 210.

¹¹⁸ Grieve, HC 21 June 2005, col 753; Saltoun, HL 11 Oct 2005, col 206.

¹¹⁹ Malik, HC 21 June 2005, col 704; Grieve, *ibid.*, col 753; Flather, HL 11 Oct 2005, col 217; Plant, *ibid.*, col 264. Alternatively, Anthias points to studies that suggest welfare and social inequality may be bigger factors in conflict than culture (“Moving Beyond,” 328) and Gillroy argues against racialised depictions of the riots as cultural rather than political (*There Ain’t No Black in the Union Jack*, xxi).

¹²⁰ Davies HC 21 June 2005, col 753, HC 28 June 2005, cols 19-20 and 23, HC 11 July 2005, cols 632-3 and HC 31 Jan 2006, col 213; Widdecombe, HC 21 June 2005, col 713; Grieve, HC 28 June 2005, col 20; Taylor, HL 11 Oct 2005, col 228; Stoddart, *ibid.*, col 260.

¹²¹ Davis, HC 21 June 2005, col 688. See also Stoddart, HL 11 Oct 2005, col 260; Leigh, HC 31 Jan 2005, col 200; Davies, *ibid.*, col 213 and HC 28 June 2005, col 23.

As in debates on the RRAs, an abstract notion of tolerance was presented as part of the national heritage.¹²² However, rather than being presented as something belonging to the British population that immigrants were taking advantage of (although Muslims were still occasionally represented as too demanding¹²³), tolerance was now something that minoritized groups should be practicing when they encounter views with which they disagree.¹²⁴ This reflects the extent to which religion, but not race, was seen as fair game for criticism, as well as the extent to which incitement to hatred was often downplayed as mere criticism or causing offence. Indeed, in parallel with the distinction between beliefs and believers, there was a less-recognised distinction between tolerance of views and tolerance of identities. It was largely agreed that differing religious views should be tolerated rather than outlawed, even when they were offensive. Supporters of the Bill, however, essentially argued for a different threshold of tolerance for believers than for beliefs, on the basis that stirring up hatred against groups of people is inimical to fair debates about their ideas.¹²⁵ This was rejected by several advocates of a ‘free marketplace’ approach to speech, who argued that any new measures restricting speech would lead to, or were symptomatic of, greater intolerance in society.¹²⁶ In this way, it was paradoxically suggested that tolerance is best served by allowing the spread of hatred.

¹²² Davis, HC 7 Dec 2004, col 1065 and HC 21 June 2005, cols 686 and 692; Allen, *ibid.*, col 718; Pritchard, *ibid.*, col 751; Hannay, HL 11 Oct 2005, col 257.

¹²³ See Grieve, HC 31 Jan 2006, col 214; Saltoun, HL 11 Oct 2005, col 206; Plant, *ibid.*, 264.

¹²⁴ Gummer, HC 7 Feb 2005, cols 1213-4 and 1215; Grieve, *ibid.*, col 1210; HC 31 Jan 2006, cols 207 and 212; Hunt, HL 25 Oct 2005, col 1070.

¹²⁵ Blears, HC 20 Jan 2005, cols 398 and 432; Ahmed, HL 14 Mar 2005, col 1178; Corston, HL 11 Oct 2005, col 197; Dobson, HC 31 Jan 2006, col 216.

¹²⁶ Spink, HC 7 Dec 2004, col 1096; Davis, *ibid.*, col 1070 and HC 21 June 2005, col 686; Baron, *ibid.*, cols 745-6; D’Souza, HL 14 Mar 2005, col 1116; Baker, *ibid.*, col 1122; Lester, *ibid.*, col 1113 and HL 11 Oct 2005, col 175; Taylor, *ibid.*, col 229; Hunt, HL 25 Oct 2005, col 1071; Marshall-Andrews, HC 31 Jan 2006, col 232.

In contrast, Labour MP Shahid Malik – who would become Britain’s first Muslim minister in 2007 – argued that inclusive democratic participation requires more than the mere tolerance of different people:

We often talk of our pride in the British tradition of tolerance, but I advise hon. Members to throw tolerance in the bin. When one is cut, one tolerates the pain, and when one misses a train, one tolerates the wait, but those are hardly positive experiences. . . . I do not want to be tolerated, and neither do women or people with disabilities. We need to move to a society that goes beyond tolerance, and which moves towards acceptance.¹²⁷

Thus, different views should be tolerated, but different people should be included.

Within the debates, freedom of religion emerged as a highly nebulous concept. On the one hand, it was argued that the religious hatred provisions would inhibit freedom of religion, as it could catch expressing certain religious beliefs or quoting certain religious texts.¹²⁸ On the other hand, it was argued that the provisions would facilitate freedom of religion by remedying the hatred that made people feel less safe wearing religious attire in public, visiting a place of worship or otherwise manifesting their religion.¹²⁹ Instead of focusing on a freedom that certain groups might lose, this framing focused on a freedom that was currently lacking. As Malik viewed it, “Fundamentally, this Bill is not about abstract notions of freedom of expression, but about very real notions of freedom from oppression.”¹³⁰ Here, Malik seems to be suggesting that claims for

¹²⁷ HC 21 June 2005, col 704.

¹²⁸ Lady Featherstone: “incitement to religious hatred is part of religion itself” (HC 28 June 2005, col 21) and Lord Deasi: “Most religion is involved in hating other religions” (HL 11 Oct 2005, col 236). See also, Harris, HC 20 Jan 2005, col 416; Goodman, HC 7 Feb 2005, col 1207; Johnson, HC 21 June 2005, col 734; Pritchard, *ibid.*, cols 749-50; Carmichael, HC 28 June 2005, col 36; Streeter, HC 30 June 2005, col 89 and HC 11 July 2005, col 630; Chan, HL 11 Oct 2005, col 221; Cassidy, *ibid.*, col 225; Peston, *ibid.*, col 226; Taylor, *ibid.*, col 228.

¹²⁹ Blears, HC 20 Jan 2005, col 394; Ramsay, HL 14 Mar 2005, col 1109; Bryant, HC 28 June 2005, col 21 and HC 11 July 2005, col 623; Whitaker, HL 11 Oct 2005, col 214.

¹³⁰ HC 21 June 2005, col 704. See also Baroness Whitaker: “it is at least as much about freedom from oppression as freedom of expression” (HL 11 Oct 2005, col 214) and Mahmood: “the Bill is not

‘freedom from’ should supersede claims for ‘freedom to.’ While this distinction was not explicitly explored in the debates, it aligns with an emerging willingness – albeit overshadowed by the ‘free marketplace’ advocates – to accept measures that might provoke self-censorship and a creeping reluctance to accord free speech a special, impervious status.¹³¹

Integration

In line with the Cattle report’s prescription of ‘community cohesion,’ some speakers called for greater integration as the solution to religious hatred. This approach may be viewed through Zygmunt Bauman’s theory of anthropoemic and anthropophagic responses to otherness. If in the more anti-immigrant strands of the RRA debates we saw a desire to expel, to vomit from the population body that which is other (anthropoemy), strands of the RRHA debates present the opposite response: if expulsion is not possible (often due to nationality), then there must be integration and ingestion (anthropophagy) to ensure that difference does not compromise the imagined unity of the population body.¹³² Proponents of integration often maintain that there are important differences between integration and assimilation, with the former referring to the incorporation of minorities into social structures and the co-existence of different cultures, and the latter referring to the incorporation of minorities into a dominant culture. As Labour MP Graham Allen phrased it, integration is “not eliminating diversity, but guaranteeing it for all those who are prepared to guarantee it for others.”¹³³ Others, however, have argued that there is often little distinction between the use of the two terms, suggesting that integration may at times be used as

about the curtailment of freedom of speech, but protection for people from abuse and incitement to it” (HC 7 Feb 2005, col 1217).

¹³¹ Bryant: “When it comes to religious hatred, however, a little bit of self-censorship is an extremely good idea” (HC 21 June 2005, col 747); Cohen: “If ... it creates a form of self-censorship against hatred that creates violence, that makes it a good law” (HC 29 June 2005, col 63).

¹³² Bauman, *Life in Fragments*, 163. Cf. excerpt from Selwyn Lloyd in Chapter Six, fn84.

¹³³ HC 21 June 2005, col 718.

a sanitised version of assimilation.¹³⁴ Indeed, some calls for integration prescribed the removal of barriers and concerted social policy,¹³⁵ while others placed the responsibility for integrating solely on minorities,¹³⁶ blaming hatred of difference on difference itself in much the same way as those making anthropoemic repatriation arguments in earlier debates.¹³⁷ Indeed, just as the poor living conditions of racial minorities were blamed on cultural differences in the 1960s (see Chapter Six), so official reports after the 2001 riots presented residential segregation as evidence of ‘dysfunctional communities,’ pointing to problematic cultural preferences or deficiencies rather than economic or political explanations.¹³⁸

Calling for minorities to integrate relies on the myth of a cohesive, relatively homogenous and superior core identity – a nationalism often exalted through notions of ‘traditional’ values¹³⁹ – into which all ‘good’ minorities should naturally desire to integrate.¹⁴⁰ Thus, after Allen’s defence of diversity, an embedded hierarchy is revealed in his statement that “*They* are entitled *in our culture* to think that.”¹⁴¹ Here, ‘they’ are in, and not of, ‘our culture’: the separation between ‘us’ and ‘them’ (that ‘they’ may be deemed responsible for) is reproduced in the call for integration.¹⁴² Often, then, demands for integration place people of colour or visible religious difference under interminable scrutiny as to whether they have integrated enough, whether they

¹³⁴ See Van Dijk, “Political Discourse and Racism,” 57-59; Bowskill et al., “Rhetoric of Acculturation.”

¹³⁵ Chan, HL 11 Oct 2005, col 220.

¹³⁶ Ibid.; Bowskill et al., “Rhetoric of Acculturation,” 805.

¹³⁷ See Honig, *Democracy and the Foreigner*, 2.

¹³⁸ Bagguley and Hussain, “Conflict and Cohesion,” 355.

¹³⁹ Back et al., “New Labour’s White Hear,” 446-7.

¹⁴⁰ See Stoddart, HL 11 Oct, col 261.

¹⁴¹ HC 21 June 2005, col 720. My emphasis.

¹⁴² See also Lord Preston: “most people welcome them and wish to see them fully integrated into our way of life” (HL 11 Oct 2005, 226); McWalter: “That is one of our society’s values, and we bring it to those of different religious persuasions” (HC 7 Dec 2004, col 1106); Slim (referring specifically to Muslims): “Somehow, we must integrate them into the British scene and the British way of life” (HL 14 Mar 2005, col 1170).

have met a standard of integration that is varyingly determined by the dominant culture,¹⁴³ whether they have been sufficiently digested in a manner that affirms the cultural status quo,¹⁴⁴ and whether they are subsequently victims worthy of protection or, perhaps inevitably, risky subjects in need of extra governance.

An alternative, transformative approach was set out by Lord Roberts, who stated that:

the United Kingdom has always been in a state of change—and, historically, we have benefited from changes such as the influx of different people from other parts of the world. That human tapestry has enriched our society in so many ways, not only in the past few years but over many centuries.¹⁴⁵

The model here is of an anthropophagy where the population evolves as it ingests, dismantling the notion of a static and superior core and enabling differences to constitute ‘us.’

Conclusion

While misunderstandings over the scope of the stirring up hatred offences continued from the racial hatred debates of previous decades – such as blurred distinctions between provocation and incitement and between stirring up hatred and causing offence – the attempt in the RRHA to distinguish between beliefs and believers added extra complexity to the religious hatred debates. Nevertheless, the many hours of parliamentary debate that accumulated prior to the passage of the RRHA enabled confusions to be challenged (as well as repeated) and points of genuine disagreement to be refined. In particular, the abstract question as to whether racial and religious hatred are commensurate and require identical legal responses remains open. However, the

¹⁴³ Back et al., “New Labour’s White Heart,” 450; Bagguley and Hussain, “Conflict and Cohesion,” 356.

¹⁴⁴ See Fraser, “From Redistribution to Recognition?”; Keenan, “Bringing the Outside(r) In,” 306.

¹⁴⁵ HL 11 Oct 2005, col 244.

ongoing discrepancy between the treatment of ‘mono-ethnic’ and ‘multi-ethnic’ religious groups resulting from the neutering of the RRHA by the Lords’ amendments is an unsatisfactory outcome to the debates. Under the current law, a public utterance such as “Jews are poisoning our country” need only be shown to be insulting and either likely or intended to stir up hatred, while the statement that “Muslims are poisoning our country” must be shown to be threatening and intended to stir up hatred. With such an example, the qualitative difference between race and religion, or between a purportedly mono-ethnic and multi-ethnic religious group, does not seem to produce any difference in the potential harmfulness of the statement. When parliamentarians accorded importance to ethnicity it was often conflated with skin colour to fit a narrative where ‘race’ is biologically determined and immutable. This negated consideration of the cultural aspects of ethnicity set out in the *Mandla* definition, and thus the extent to which the classification of Sikhs as a racial group was not solely based on their biological distinctness or immutable characteristics. Moreover, it failed to acknowledge the processes of racialisation and othering that give meaning to certain differences,¹⁴⁶ with the potential effect of legitimising forms of cultural racism.

The remaining discrepancy undermines the commitment to equality that the RRHA was supposedly put forward to advance. Indeed, the symbolism that the government emphasised as so desirable was surely eroded – or even inverted – by their failure to equalise legislative protection. In the face of the RRHA’s unpopularity both inside and outside of parliament, equality for different religious groups was sacrificed in the balancing of the fears, disadvantages and humiliation of victims of religious hatred, on the one hand, against the fears of religious persons and comedians of prosecution and the supposed propensity of ‘ordinary’ people to turn to right-wing extremism, on the other. The notion that ‘they’ were too segregated from ‘us,’ – geographically, culturally and in terms of their interests – permeated the debates, echoing the narratives of the BNP¹⁴⁷ and implying that, while religious hatred should be condemned, reducing

¹⁴⁶ Meer, “Politics of Voluntary and Involuntary Identities,” 71.

¹⁴⁷ Bagguley and Hussain, “Conflict and Cohesion,” 362.

conflict and increasing tolerance between communities would be most effectively achieved by reducing the differentness of minorities. Thus, the RRHA is surely a remedy that affirms rather than transforms existing dynamics of marginalisation, existing fantasies of difference and existing hierarchies of hate within the law, if indeed it can be considered a remedy at all.

Being and Doing

Criminal Justice and Immigration Act 2008

Public Order Act 1986 (as amended by the Criminal Justice and Immigration Act 2008), s 29B(1):

A person who uses threatening words or behaviour, or displays any written material which is threatening, is guilty of an offence if he intends thereby to stir up religious hatred or hatred on the grounds of sexual orientation.

Introduction

While parliamentary discussions on racial and religious hatred can be traced back to the 1936 debates, discussions on stirring up hatred on grounds of sexual orientation were largely confined to the 21st century and were primarily raised as an additional area of concern during the religious hatred debates.¹ Parallels can be drawn between the trajectories of the three identity categories, from the *problematism of differences* to the *problematism of hatred* of such differences. In the case of sexual orientation, this transition – from problem to victim, from ‘sexual criminal’ to ‘sexual citizen’ – was rapid: the law moved from criminalising homosexual acts prior to the Criminal Offences Act 1967,² to recognising same-sex rights across a range of policy areas, including housing, adoption and civil partnership, to introducing homophobic hatred as an aggravating factor in sentencing under the Criminal Justice Act 2003. An even swifter change

¹ Hughes, HC 26 Nov 2001, ff col 673; Alli, HL 14 Mar 2005, col 1123; Jones, HC 21 June 2005, col 669; Harris, HC 11 July 2005, col 637.

² Criminal Offences Act 1967.

occurred in relation to speech about homosexuality: local authorities were prohibited from ‘intentionally promoting’ homosexuality and teaching “the acceptability of homosexuality as a pretended family relationship” up until 2003,³ then the offence of stirring up hatred on grounds of sexual orientation was passed just five years later.⁴ Indeed, a comprehensive turnaround from criminalising homosexuals to criminalising incitement to hate homosexuals occurred within the span of many parliamentarians’ careers.⁵ While the addition of sexual orientation to the stirring up hatred offences fits neatly into a trend of extending hate crime measures to new categories, its inclusion within the rubric of ‘public order’ is not an obvious development: in the absence of riots or terrorism connected with sexual orientation, how was stirring up hatred on grounds of sexual orientation conceived of as a public order offence? This chapter explores how the sexual orientation offences were constructed as legally, logically and culturally desirable.

The offence of stirring up hatred on grounds of sexual orientation was added to Part IIIA of the Public Order Act 1986 (POA86) by s 74 and schedule 16 of the Criminal Justice and Immigration Act 2008 (CJIA). The sexual orientation provisions were not part of the original Bill but were introduced by a government amendment. As they were added to Part IIIA of the POA86, rather than Part III, the threshold for the sexual orientation provisions was set at the same level as that of the religious hatred provisions, i.e. language or behaviour was required to be both threatening and intended to stir up hatred. While the Government repeatedly asserted that this was sufficiently clear and narrow,⁶ others argued for the inclusion of a free speech rider, similar to s 29J on religious hatred. A free speech rider was introduced by the House of Lords, resoundingly

³ Local Government Act 2003. An attempt to repeal this provision (s 28) in the Local Government Act 2000 was defeated in the House of Lords.

⁴ See Goodall, “Challenging Hate Speech,” 211-2.

⁵ Several scholars have discussed the concurrent transition in sexual orientation and gender identity activism from seeking freedom from the violence of the law to seeking to co-opt that violence. For example, Moran and Skeggs, *Sexuality and the Politics of Violence and Safety*; Spade, *Normal Life*, 64-5; Haritaworn, “Queer Injuries,” 83.

⁶ Eagle, HC 29 Nov 2007, cols 662-5 and HC 6 May 2008, cols 602-3, 604, 607, 613 and 623; Hunt, HL 7 May 2008, cols 595, 609 and 611; Ward, HC 9 Nov 2009, cols 102, 104-5, 107, 121 and 122.

rejected by the Commons and then insisted upon by the Lords, ultimately forming s 29JA POA86. An attempt to remove s 29JA during the passage of the Coroners and Justice Act 2009 (CJA) was again blocked by the House of Lords.⁷ Although the CJIA received royal assent on 8 May 2008, the sexual orientation provisions did not enter into force until 23 March 2010. Section 29JA was then modified by the Marriage (Same Sex Couples) Act 2013 (MSSCA) to include an explicit exemption for discussion or criticism of same-sex marriage.

The first section of this chapter examines the legal conditions of possibility for the addition of sexual orientation to the stirring up hatred offences. As demonstrated by its absence in the convoluted religious hatred debates, the identification and communication of a clear legal gap is an important element in advocating new legislation. In order for the sexual orientation provisions to be deemed necessary, they had to be shown to be both distinct from and coherent with existing law. The second section then considers the extent to which sexual orientation was perceived as commensurate with the existing categories of race and religion and how this affected the passage of the provisions. The last section then examines the dynamics of alterity and identity formation that were at play in the distinct narratives constructed, on one side, by those opposing the SO hatred provisions and seeking to circumscribe them with the free speech rider and, on the other side, by those advocating the provisions and resisting their circumscription. The data analysed for this chapter include relevant excerpts from parliamentary debates on the CJIA, the CJA and the MSSCA.

Throughout this chapter, sexual orientation is abbreviated to ‘SO’ and hatred on grounds of sexual orientation is abbreviated to ‘SO hatred.’ While this is done partly for the sake of brevity and readability, the latter abbreviation is also a circumnavigation of the linguistic difficulties of

⁷ While the Government asserted that they had deferred proper conclusion of the matter in order to ensure timely royal assent of the CJIA (Straw, HC 26 Jan 2009, col 36), the Government’s return to the issue so soon prompted procedural objections in the House of Lords (Neill, HL 18 May 2009, col 1259; Hylton, *ibid.*, col 1279; Waddington, *ibid.*, col 1223, HL 9 July 2009, col 790; Kingsland, *ibid.*, col 812 and HL 18 May 2009, col 1212; Henley, HL 18 May 2009, col 1294-5 and HL 11 Nov 2009, col 859).

Part IIIA POA86. It was noted in the last chapter that ‘religious hatred’ is an ambiguous phrase with the potential to refer to hatred expressed *by* a religious group as well as hatred *towards* a religious group. However, ‘religious hatred’ mirrors the preceding legal language of ‘racial hatred.’ The legal language used in relation to sexual orientation, however, has always been ‘hatred on grounds of sexual orientation’; the phrase ‘sexual orientation hatred’ was never used, and indeed seems awkward and off-key, not least, perhaps, because hatred expressed *by* sexual minorities was rarely of concern. In the debates, hatred on grounds of sexual orientation was regularly referred to as homophobia or homophobic hatred, reflecting the tension between the desire to produce legislation in general terms (race, religion, sexual orientation) in response to the victimisation of particular groups (persons of colour, Muslims, homosexuals). Thus, while it is acknowledged that ‘SO hatred’ is not an ideal solution, it is a useful shorthand that is at least consistent with the language opted in relation to other categories. The term ‘homophobia’ is also used in this chapter to reflect its common usage in the debates.⁸

The legal gap

S 5 Public Order Act 1986 and s 146 Criminal Justice Act 2003

In articulating the need for new legislation, proponents of the SO hatred offences faced a similar challenge to that faced by proponents of the religious hatred offences a few years earlier. As with religious hatred, s 5 of the POA86, in combination with the potential for offences to be aggravated by hostility based on sexual orientation under s 146 of the Criminal Justice Act 2003, was said to provide sufficient protection against outbursts of homophobic hostility and violence.⁹ Additionally, many speakers referred to a number of instances where police investigation under s

⁸ See also Chapter One, page 14.

⁹ Hollobone, HC 29 Nov 2007, col 662; McCulloch, HL 22 Jan 2008, col 144; Waddington, *ibid.*, col 170 and HL 3 March 2008, cols 923-4.

5 had been over-zealous to suggest that legislation had already gone too far in the curtailment of free speech on the topic of homosexuality or that additional safeguards were required to stop the SO hatred provisions from being similarly misinterpreted.¹⁰ The most frequently mentioned of these incidents were:

- the case of Harry Hammond, a pensioner and evangelist who was arrested and convicted under s 5 of the POA86 due to the offence his anti-homosexuality placard caused to onlookers;¹¹
- Lynette Burrows, an author who was interviewed by the police after she expressed concern about same-sex adoption on the radio;
- Joe and Helen Roberts, pensioners from Fleetwood who received a visit from the police after they wrote to their council to express their disapproval that it had given money to a gay rights organisation (often referred to as ‘the Lancashire case/incident’);
- Pauline Howe, a pensioner from Norfolk who received a visit from police after writing to her council to complain about a gay pride march (often referred to as ‘the Norfolk case/incident’); and,
- in the MSSCA debates, the case of Adrian Smith, a Christian who was demoted by a housing trust after expressing disapproval of same sex marriage on his private Facebook account.¹²

In contrast to the ‘abuses of liberty’ that the POA36 was enacted to address, such incidents were widely referred to as abuses or misuses of law,¹³ presenting a narrative where freedoms were at risk from a state/police culture of ‘political correctness.’ For example, Labour and Co-operative

¹⁰ Grieve, HC 26 Jan 2009, col 53 and HC 9 Nov 2009, col 106; Gray, HC 3 Mar 2009, col 497; Bellingham, *ibid.*, col 498; Waddington, HL 9 July 2009, col 792; Taylor, HC 9 Nov 2009, col 110.

¹¹ *Hammond v DPP* [2004] EWHC 69 (Admin).

¹² *Smith v Trafford Housing Trust* [2012] EWHC 3221 (Ch).

¹³ Waddington, HL 3 Mar 2008, col 926; HL 21 April 2008, col 1366; HL 9 July 2009, col 819, HL 9 Nov 2009, col 792 and 11 Nov 2009, cols 850 and 863; Herbert, HC 6 May 2008, col 605; Grieve, HC 9 November 2009, cols 106, 108 and 121; Taylor, *ibid.*, col 110; Anderson, HL 17 June 2013, col 64; Singh, *ibid.*, col 69. See also Tatchell, “Hate Speech v Free Speech.”

MP David Taylor stated that “Recent cases have shown that a dangerous attitude to gay rights is prevalent among the police and that makes it important to include the free speech clause.”¹⁴ While this resonates with disapproving references to the case of *Norwood* in the religious hatred debates, the problematisation of police attitudes and abilities was far more prevalent in relation to sexual orientation. Also, a continuing pattern of *ressentiment* narratives was apparent, whereby minority rights were presented as disproportionate and oppressive to ‘ordinary people.’ However, by problematising ‘political correctness’ and ‘abuses of law’ rather than any qualities or violent potentials attributed to sexual minorities, a sanitised (and, ironically, politically correct) version of the *ressentiment* narrative was achieved: in contrast to the racial and religious hatred debates, ‘respectable’ and ‘ordinary’ people were rendered as victims without casting the minoritized group in question as a risk to public order.

Each of the incidents listed above occurred under s 5 of the POA86, but the distinction between the s 5 and Part IIIA offences was often elided or downplayed so as to imply that the s 5 incidents demonstrated the dangerousness of an SO hatred offence. In particular, Lord Waddington argued that the definition adopted by Crown Prosecution Service (CPS) policy, whereby a homophobic incident is “any incident which is perceived to be homophobic,”¹⁵ encouraged police to investigate even the most frivolous of complaints.¹⁶ Lord Dear further argued that police were left with no discretion and were effectively compelled to investigate all such complaints for fear of otherwise being labelled homophobic.¹⁷ Lord Waddington’s amendment – the SO free speech rider that became s 29JA – was thus intended to return ‘proper’ discretion to the policing of homophobic hatred.

¹⁴ HC 9 Nov 2009, col 110. See also, O’Cathain, HL 3 Mar 2008, col 933; Monson, HL 21 Apr 2008, col 1370; Mawhinney, HL 17 June 2013, col 27. On representations of the police in the SO hatred debates, see Johnson and Vanderbeck, *Religion and Homosexuality*.

¹⁵ “Homophobic and Transphobic Hate Crime,” 5

¹⁶ HL 18 May 2009, col 1224. See also HL 21 April 2008, col 1366 and HL 7 May 2008, col 597.

¹⁷ HL 9 July 2009, col 802-3 and HL 11 Nov 2009, col 853.

This narrative is interesting for three reasons. Firstly, it overlooks the fact that the CPS definition is only applicable to determining whether a crime should be recorded as homophobic, not to whether a crime has been committed. Under s 5, while all complaints of homophobia must be recorded, only those where an infringement of s 5 may have occurred, independently of any perceived bias motivation, need to be investigated. Secondly and similarly, there would be no cross-application between the CPS policy and the SO hatred offence as Waddington and Dear suggested: the policy would not be applied to the stirring up hatred provisions of Part IIIA, which include no scope for victims or witnesses to define or identify homophobia, and Waddington's free speech rider would not apply to aggravated offences under Part I POA86. In the CJA debates, it was even suggested that Lord Waddington's provision had already curbed excessive policing of spurious complaints,¹⁸ even though it had not yet entered into force and has nothing to do with s 5.¹⁹ Thirdly, the complaint that police officers were not afforded sufficient discretion contrasts concerns raised during the passage of the POA86, thirty years earlier, that s 5 was so broad as to allow police to bring charges merely because they took offence to a person's behaviour. It seems that these powers were problematised anew when they were used against 'respectable' subjects, rather than 'thugs.' The CPS definition is indeed designed to limit police discretion, not to force them to investigate baseless complaints, but to ensure that police take allegations of homophobic hostility seriously in investigations into breaches of s 5 that they would be conducting regardless.²⁰ The discretion that was to be limited, therefore, was the discretion to refuse to acknowledge complaints of homophobia, in a context where sexual minorities had little confidence that the police would take their victimisation seriously.²¹ The CPS policy seeks to mitigate institutional

¹⁸ Dear, HL 9 July 2009, col 802; Butler-Sloss, *ibid.*, col 810; Waddington, HL 11 Nov 2009, col 850. On the assumption that the free speech rider would affect the policing of s 5 offences, see also Tebbit, HL 9 July 2009, col 811; Dear HL 11 Nov 2009, col 853.

¹⁹ As pointed out by Lord Bach, HL 9 July 2009, col 817.

²⁰ CPS, "Homophobic and Transphobic Hate Crime," 9.

²¹ *Ibid* 3, 4. However, research suggests that little progress has been made in this area: See Stonewall 2013, 17-23.

prejudices, as first acknowledged in the context of racial bias in the Macpherson Report in 1999;²² however, in line with all earlier debates examined in this project, actual or potential institutional bias *against* minoritized groups was never recognised by parliamentarians in the SO hatred debates.

In response to the above-mentioned incidents, government ministers emphasised that the SO provisions contained a considerably narrower threshold than s 5 of the POA86, as there would only be an offence where the language or behaviour used was both threatening and intended to stir up hatred on grounds of sexual orientation (as opposed to where threatening, abusive or insulting language or behaviour was used within the hearing or sight of someone who was likely to be caused harassment, alarm or distress).²³ The narrower threshold thus provided the Government with a means of distancing the new SO offence from controversial applications of s 5 to complaints of homophobia, as well as enabling the government to capitalise on the broad consensus that threatening behaviour is beyond the remit of freedom of expression.²⁴ Indeed, it seems unlikely that the government would have been able to pass SO hatred offences set at the same level as the racial hatred offences.

The common law offence of incitement and the Serious Crime Act 2007

As in debates on the religious hatred provisions, opponents of the SO offences argued that they were not necessary because incitement to violence or to commit other offences was already prohibited.²⁵ The Serious Crime Act 2007 (SCA) abolished the common law offence of incitement (s 59) and replaced it with offences of encouraging or assisting an offence (ss 44, 45 and 46). This

²² “Stephen Lawrence Inquiry.”

²³ Eagle, HC 6 May 2008, cols 600, 602-3, 605, 613 and 623, and HC 3 Mar 2009, col 498; Ward, HC 9 Nov 2009, cols 101, 104 and 121; Bach, HL 9 Jul 2009, cols 814 and 817. See also, Alli, HL 7 May 2008, col 601; Lester, HL 9 July 2009, col 797.

²⁴ See Straw, HC 26 Jan 2009, col 37; Hunt, HL 7 May 2008, col 611.

²⁵ Crossman (Liberty), HC 18 Oct 2007, col 129; Horrocks (Evangelical Alliance), *ibid.*, col 148; Monson and Tebbit, HL 3 Mar 2008, col 940.

meant, Lord Waddington argued, that the issue of incitement had been thoroughly dealt with prior to the CJIA debates.²⁶ Responses to such views on incitement in earlier stirring up hatred debates pointed out that hatred is not a crime and that the stirring up offences therefore sought to address the spread of hatred (which could precipitate violence or other crimes) rather than direct incitement to violence, which was already prohibited (see Chapters Six and Eight). However, Ben Summerskill, the chief executive of lesbian, gay and bisexual rights advocacy group Stonewall, drew a novel distinction when he was questioned as a witness during the House of Commons Public Bill Committee. When asked whether the police could take action against incitement to violence in homophobic lyrics under existing law, Summerskill stated that they had not been able to,

because they have to make the connection between the incitement and a specific offence that takes place. So, they would have to have someone who carried out a homophobic attack saying, “I was encouraged to do so by this specific individual,” and the encouragement would have to be specific to the victim or an identifiable group of people. An identifiable group of people might be six lesbians who all lived in one house. If someone said, “We’ll attack the inhabitants of that residence,” there would then be an identifiable connection.²⁷

The first part of Summerskill’s argument here is misleading as both the common law offence of incitement and the SCA offence of encouragement that replaced it are inchoate offences. This means that the incited or encouraged act need not actually take place; the act of inciting/encouraging is sufficient. The second part of the argument, that the target must be a specific individual or identifiable group rather than lesbians in general, for example, seems more credible due to the narrowness of the relevant offences under the SCA.²⁸ Furthermore, it seems

²⁶ HL 22 Jan 2008, cols 269-70, HL 3 Mar 2008, col 924, HL 7 May 2008, col 613 and HL 9 July 2009, cols 818-9. See also D’Souza, HL 9 July 2009, col 794.

²⁷ HC 16 Oct 2007, col 79.

²⁸ The provisions refer to intending to encourage *an* offence or believing that *the* encouraged offence(s) will be committed, and intent to encourage cannot be proved by showing only that encouragement to commit an offence was a foreseeable consequence of the actions in question (contra *Beatty v Gillbanks*). However, this interpretation is difficult to verify from the text of the law. The House

that encouragement to commit a crime under the SCA must also be addressed to a specific individual, as each example provided in a preceding 2006 Law Commission report involved a *direct interaction* between the person who encouraged and the person who was encouraged regarding a *specific act*.²⁹ Therefore, the broadcasting of hateful lyrics to a general audience does not seem to be covered by the SCA.

Summerskill's interpretation of the law on incitement to violence, which was accepted by the Government,³⁰ directly contradicted the interpretation expressed not only in the religious hatred debates, but also by Peter Tatchell, a prominent LGBT rights campaigner whose article opposing the SO hatred provisions was cited in parliament.³¹ Tatchell stated that incitement to violence against homosexuals by "Jamaican artists" was not prosecuted in the UK due to inadequate enforcement rather than inadequate law. Unfortunately, these contrasting views as to whether more legislation would solve the problem of incitement to homophobic violence were not comprehensively examined in parliament; Tatchell's article was referred to alongside an article by Matthew Parris³² primarily to demonstrate that the SO hatred provisions were not unanimously supported by 'the gay community.'³³ However, it was Summerskill's understanding of the legal gap that shaped the SO hatred debates by enabling the discussion to focus on overt incitement to violence to an extent that would have been viewed as misleading in the religious hatred debates.

of Commons Justice Committee, citing several academics and agreeing with the Court of Appeal's judgment in *R v Sadique* [2011] EWCA Crim 2872, concluded that Part II of the SCA was 'complex,' 'difficult to understand' and 'tortuous' ("Post-Legislative Scrutiny," 12).

²⁹ "Inchoate Liability for Assisting and Encouraging Crime." See also Ministry of Justice, "Serious Crime Act 2007."

³⁰ Eagle, HC 29 Nov 2007, col 663.

³¹ Tatchell, "Hate Speech v Free Speech."

³² Parris, "I Oppose a 'Gay-Hate' Law."

³³ Dobbin, 9 Jan 2008, col 451; Stoddart, HL 22 Jan 2008, col 169; Waddington, *ibid.*, col 171; O'Cathain, HL 3 Mar 2008, col 932; Moran, HL 18 May 2009, col 1274; Butler-Sloss, 9 July 2009, col 810. Conservative MP Philip Hollobone did refer to these articles in more depth: HC 29 Nov 2007, cols 684-5.

The commensurability of categories

Mutability

While sexual orientation had already gained legal currency as a legitimate category through inclusion in anti-discrimination and hate crime legislation,³⁴ some equivalence between sexual orientation and race and religion was sought in order to ensure that the addition of the former could be justified within the logics of the current offences. As Lord Lester phrased it,

The Government faced a difficult policy choice on what do to on homophobic speech. Is it more like race and ethnicity, or more like religion? Does the stirring up of hatred against someone because of their sexuality attack their common humanity—what they are born with, or are as a human being—or is it an attack on ideas and beliefs akin to religion?³⁵

It was argued in the religious hatred debates³⁶ as well as the SO hatred debates³⁷ that sexual orientation was a suitable category to add to the stirring up offences because sexual orientation, like race, is an immutable characteristic. In line with the racial and religious hatred debates, these arguments invoked essentialist understandings of both sexual orientation and race,³⁸ treating both as identities that are objectively knowable and negating any sense of subjectivity, flexibility or contingency. The offence refers to “hatred against a group of persons defined by reference to sexual orientation,” which seems to acknowledge the role of a speaker in defining the boundaries of the group to which they refer. Indeed, threatening language could potentially be caught by this

³⁴ cf Jenness on the addition of gender to US hate crime law (“Managing Difference and Making Legislation,” 564).

³⁵ HL 7 May 2008, col 599.

³⁶ Carmichael, HC 21 June 2005, col 701; Harris, HC 11 July 2005, col 637; Dubs, HL 11 Oct 2005, col 222.

³⁷ D. Turner, HC 8 Oct 2007, col 115; Salter, HC 9 Jan 2008, col 448; Herbert, *ibid.*, col 452; Harris, HC 6 May 2008, col 617; M. Turner, HL 3 Mar 2008, col 930; Lester, HL 9 July 2009, col 796. Only the Lord Bishop of Winchester, Michael Scott-Joynt, argued that legislation should not be enacted on the assumption that sexual orientation is innate (HL 9 July 2009, cols 805-6).

³⁸ Johnson and Vanderbeck, *Law, Religion and Homosexuality*, 160.

definition if it was used to stir up SO hatred against groups determined by a wide array of behaviours, feelings and identifications. Yet, in the debates, sexual orientation was often reduced to homosexuality, homosexuals were often referred to as gays, and all were treated as innate and homogeneous identities. The only acknowledgement of heterogeneity came from the argument that not all homosexuals supported the provisions, yet this opposition between white male representatives (*Summerskill v Tatchell and Parris*) was premised on the notion that ‘they’ represented a distinct interest group, even if ‘they’ could not agree how best to pursue ‘their’ interests.

Despite the purported equivalence of sexual orientation and race, universal support was expressed for the Government’s decision to draft the SO hatred provisions at the narrower threshold of the religious hatred offences. Rather than opposing this decision, the characterisation of sexual orientation as immutable was instead largely used in arguments against the inclusion of the SO free speech rider – i.e. arguments that a free speech rider was only necessary in the religious hatred offences because they dealt with beliefs rather than innate characteristics. In particular, Lord Lester relied on this argument in his rejection of the SO free speech rider, despite having authored the corresponding religious hatred provision.³⁹ Others, however, characterised the SO free speech clause as concerned with the protection of religious expression and therefore as necessary for the same reasons as the religious free speech rider.⁴⁰ Those in favour of the SO free speech rider also argued that it would be anomalous – or even a “glaring and dangerous inconsistency”⁴¹ – to have a rider in the religious offences but not an SO counterpart, often overlooking the absence of such a provision in the racial hatred provisions. Thus while *sexual orientation* was argued to be commensurate with race as an innate personal characteristic, *hatred*

³⁹ HL 7 May 2008, col 599; HL 18 May 2009, col 1246.

⁴⁰ McCulloch, HL 22 Jan 2008, col 143; Widdecombe, HC 6 May 2008, col 601; Falkner, HL 7 May 2008, col 607.

⁴¹ Waddington, HL 7 May 2008, col 598.

on grounds of sexual orientation was more frequently compared to religious hatred as an issue entangled in religious belief.

Rather than any particular characteristic of sexual orientation, the establishment of the SO offence at the narrower threshold seems to reflect the extent to which the morality of homosexuality, unlike race, was viewed as a controversial and contestable topic.⁴² Liberal Democrat MP Evan Harris thus rationalised the stricter threshold for SO hatred as follows:

it perhaps requires less protection because there is a great deal of sincerely held, often religious, opinion that extends to sexual orientation that does not—generally speaking, in this country, thank goodness—extend to race.⁴³

Here, the ‘sincere’ and religious nature of much SO hatred is presented as affording it special dispensation. This creates a hierarchy of hatred wherein religion somehow renders hatred more respectable and less criminal.⁴⁴ While Harris claimed that ‘religious opinion’ does not similarly extend to race, the use of religious doctrine to propagate racism is far from unheard-of and would nevertheless be subject to the wider threshold of the racial hatred provisions. There is, therefore, something about the particular relationship between religion and sexual orientation that resulted in religious opinion being prioritised here but not in relation to race.

In making sense of the threshold imposed on the SO hatred offence it should perhaps also be remembered that both intent to stir up hatred and the likelihood that hatred would be stirred up were required in the original 1965 iteration of the incitement to racial hatred offence, and it was only as attitudes changed over time that this threshold was lowered. There is therefore a kind of procedural consistency to the introduction of new categories at a higher threshold. Once on the statute book, there is the potential for the threshold of the religious and SO offences to be lowered over time, as occurred with the racial offences, even if their entanglement with questions of religious freedom make this seem unlikely at present.

⁴² See Wintemute, “Religion vs. Sexual Orientation,” 137.

⁴³ HC 6 May 2008, col 617.

⁴⁴ See Johnson and Vanderbeck, *Law, Religion and Homosexuality*, 156.

Being and doing

Another way in which the different thresholds between the racial hatred and SO hatred offences were rationalised was through a distinction between what a person *is* and what a person *does*. This distinction paralleled that between what a person *is* and what they *believe* that was constructed in the religious hatred debates. Speakers taking this approach asserted that while sexual orientation might be beyond an individual's control, their sexual conduct is not.⁴⁵ This position was especially common in arguments supporting the SO free speech rider. Section 29JA provides that:

In this Part, for the avoidance of doubt, the discussion or criticism of sexual conduct or practices or the urging of persons to refrain from or modify such conduct or practices shall not be taken of itself to be threatening or intended to stir up hatred.

Thus, while race is not connected to any particular activities (excluding the widely-overlooked cultural aspects of ethnicity),⁴⁶ narrower thresholds and free speech riders for the religious and SO offences are justified by their connection to certain practices or conduct, criticism of which should be unequivocally beyond the criminal law.

Advocates of the SO free speech rider argued that it would help to minimise incidents of excessive policing by specifying, “for the avoidance of doubt,” what was beyond the purview of the SO hatred provisions.⁴⁷ In contrast, others repeatedly asserted that the offence was perfectly clear that only threatening speech that was intended to stir up hatred was prohibited, and that the

⁴⁵ Dobbin, HC 9 Jan 2008, col 449; Herbert, *ibid.*, col 453 and HC 6 May 2008, col 607; McCulloch, HC 22 Jan 2008, cols 144-5; Waddington, HL 32 Mar 2008, col 924; Mackay, HL 7 May 2008, col 605; Lester, HL 9 July 2009, col 796.

⁴⁶ See Idriss, “Religion and the Anti-Terrorism, Crime and Security Act 2001,” 910-1.

⁴⁷ Dobbin, HC 9 Jan 2008, col 449-50; Grieve, *ibid.*, col 455; Herbert, *ibid.*, col 453 and HC 6 May 2008, cols 605-7; Widdecombe, *ibid.*, col 601; G. Howarth, *ibid.*, col 621; Clarke, 21 April 2008, col 1369; Armstrong, HL 7 May 2008, col 606; Waddington, HL 3 Mar 2008, col 926 and HL 9 July 2009, cols 791-2; D’Souza, *ibid.*, col 794; Tebbit, *ibid.*, col 798; Grieve, HC 9 Nov 2009, col 107; Taylor, *ibid.*, col 110.

free speech rider was a ‘wrecking amendment’⁴⁸ that provided a loophole,⁴⁹ causing confusion as to the scope of the offence and sending the message that the government was not serious about bringing prosecutions under it.⁵⁰ Therefore, just as with the distinction between beliefs and believers, the extent to which hatred of a person’s sexual activities can be separated from hatred of their sexual orientation is pivotal to the intelligibility of the SO hatred offences. Liberal Democrat MP David Howarth described the difficulty of making this distinction in practice:

Urging someone to refrain from particular sexual conduct sounds okay, but it can easily become a code or euphemism for something that, in context, really is threatening.⁵¹

Arguments promoting the SO free speech rider are also subject to the same critique as those discussed in Chapter Eight in relation to religious hatred – i.e. that they negate the criteria of intent. This effect was generally produced by eliding incitement to hatred with expression of criticism and/or by eliding incitement to hatred with the provocation of offence. For example, Lord Elton stated that, “the object of [this] legislation, as I understand it, is to take out the heat of the encounters between people with different views about sexual orientation,”⁵² and Conservative MP Philip Hollobone asked of the SO hatred offence, “is this not, therefore, a charter for people to be even more offended—to be outraged in fact?”⁵³ By minimising the harm that the SO provisions sought to address as the causing of offence – an approach which was aided by references to the incidents of misguided policing under s 5 – the provisions could then be dismissed as politically

⁴⁸ Bercow, HC 26 Jan 2009, col 53.

⁴⁹ Eagle, HC 9 Jan 2008, col 455, HC 6 May 2008, col 601 and HC 3 Mar 2009, col 497; Harris, HC 6 May 2008, col 607; D. Howarth, *ibid.*, col 610; Harris, *ibid.*, col 619 and HC 9 Nov 2009, cols 107 and 116 and 117; Thomas, HL 3 Mar 2008, col 928; Hunt, *ibid.*, col 942 and HL 21 Apr 2008, col 1376; Bach, HL 18 May 2009, col 1206-7 and HL 9 July 2009, col 814; Lester, *ibid.*, cols 797 and 798; M. Turner, *ibid.*, col 793 and HL 11 Nov 2009, col 852; Ward, HC 9 Nov 2009, cols 103 and 121.

⁵⁰ Smith, HL 7 May 2008, col 605 and HL 11 Nov 2009, col 856; Hunt, HL 21 Apr 2008, col 1374; Massey, HL 9 July 2009, col 804; V. Howarth, *ibid.*, col 807; Lester, *ibid.*, col 809; Thomas, *ibid.*, col 811.

⁵¹ HC 9 May 2008, col 610.

⁵² HL 21 Apr 2008, col 1369.

⁵³ HC 21 Nov 2007, cols 691-2.

correct nonsense that was being pushed onto the government agenda by powerful interest lobbies.⁵⁴ This dismissal of concerns and fears relating to the incitement of homophobic hatred enabled the harms of unwarranted visits from the police under different legal provisions to be presented as more pressing. Thus, sometimes, it was not even that one group's fears of persecution were balanced against another's,⁵⁵ but that one group's fears were diminished and erased.

SO hatred and public order

An alternative means of assessing the equivalence of race, religion and sexual orientation was to focus on how hatred on these grounds affects public order. In this respect, the tenor of the SO hatred debates was different to that of the earlier stirring up hatred debates; parliamentary discourse on the SO provisions presented a more direct link between expressions of hatred and acts of violence against individuals and were considerably more preoccupied with violence overall. This reflected the novel understanding that incitement to violence is within the scope of the stirring up hatred provisions (due to Ben Summerskill's interpretation of existing incitement/encouragement law), which facilitated the framing of homophobic hatred as a public order issue.

In the religious hatred debates, a sense of urgency and severity was generated by references to riots and urban disturbances that were framed as resulting from intercommunal hatred and the existence of proximate communities living 'parallel lives' (see Chapter Eight). Such a framing was not available to advocates of the SO hatred provisions. Despite references to 'the gay

⁵⁴ Stoddart, HL 22 Jan 2008, col 169 and HL 3 Mar 2008, col 935; Hylton, HL 18 May 2009, col 1279; Anderson, HL 9 July 2009, col 799; Scott-Joynt, *ibid.*, col 806; Dear, HL 11 Nov 2009, col 853.

⁵⁵ See, for example, D'Souza: "Is censorship justified in the interests of equality and dignity of the individual? The answer here must be yes, but I would argue strongly that such restrictions must be very carefully weighed as to their effect on the values underlying free speech" (HL 9 July 2009, col 794), and Scott-Joynt: "I share with him a horror of the fact that people are attacked, beaten up and killed because others believe them to be homosexual or because they are homosexual. That is manifestly wrong and wicked. But, as the noble Lord said, many others live increasingly in anxiety and fear" (HL 11 Nov 2009, col 857).

community,’ sexual orientation lacks the aspects of heredity, ‘ghettoization’ and foreignness that produce a ‘recognisable risk’ to intercommunal relations and public order. In other words, the geographically disparate and undeniably British ‘gay community’ does not fit the model of an ambiguous victim community, who – like the Jews of the 1930s, the Commonwealth immigrants of the 1950s and 60s, and the Muslims of the 2000s – might riot if they are provoked or feel that their interests are neglected.⁵⁶ In the absence of this ‘risky community’ framing, the ability to generate a sense of urgency through references to severe and even fatal levels of *individual* harm⁵⁷ may have been crucial to the enactment of the SO hatred provisions. In this way, public order interventions in hate speech became less overtly about population-level (biopolitical) concerns of multiculturalism, integration and the wellbeing of ‘the public’, and a little more about protecting individuals from violence in public spaces (‘on the streets’). However, this was more of a slight widening of scope than a paradigm shift, as shown below.

Alterity in victim and villain identities

While homosexuals were viewed relatively unambivalently as victims (albeit occasionally as over-demanding victims with disproportionate political influence), other victim and villain identities were also at play in the SO hatred debates. Opponents of the provisions (and advocates of the SO free speech rider) primarily focused on the potential impact of the SO hatred provisions on Christians. The narrative here mirrored that of the white working-class *ressentiment* explored in

⁵⁶ Brown, “Who? Question: Part 2,” 49.

⁵⁷ Bryant, 8 Oct 2007, col 59; Summerskill (Stonewall), HC 16 Oct 2007, cols 76 and 84; V. Howarth, HL 3 Mar 2008, col 934; Whitaker, *ibid.*, col 936; Thomas, *ibid.*, col 938 and HL 9 July 2009, col 811; D. Howarth, HC 6 May 2008, cols 609 and 612; D. Turner, HC 7 Oct 2008, col 116; Massey, HL 9 July 2009, col 804; M. Turner, *ibid.*, col 793, HL 3 Mar 2008, col 930, HL 21 Apr 2008, col 1369 and HL 11 Nov 2009, cols 851-2; Bach, *ibid.*, col 863; Smith, *ibid.*, col 855, HL 21 Apr 2008, col 1371 and HL 7 May 2008, col 604.

relation to the racial hatred offences in Chapter Six. Jon Bialecki describes the phenomenon of Christian *ressentiment* in a US evangelical context as:

[a] contradictory structure of feeling, where one is at once set upon and yet still automatically always in the right, and where ethical position and value are also thought of as set up in contrast to an opposing formation and population.⁵⁸

This section first considers Christian identity and then examines the construction of an ‘opposing formation.’

Christian privilege and *ressentiment*

Christian victimhood was constructed through repeated references to the aforementioned incidents of ‘over-zealous’ policing of s 5 POA86. Here, the elderly status of those involved was often leveraged to draw on stereotypical images of vulnerability and harmlessness.⁵⁹ Victims and potential victims of the offences, i.e. Christians, were also portrayed as ‘ordinary’ and ‘law-abiding.’⁶⁰ Through juxtaposition, such framings alluded to the perceived abnormality and transgressiveness of non-heterosexual subjects (especially in the MSSCA debates), as well as mirroring prior references to ‘ordinary’ people by opponents of the racial hatred provisions and distinguishing such persons from the supposedly extraordinary figure of the criminal. However, rather than the potentially volatile white working classes of previous debates, the Christian brand of ordinariness was attributed an unwavering virtue and an entitled status: Christians were

⁵⁸ “Eschatology, Ethics, and *Ēthnos*,” 50.

⁵⁹ Ferres, HL 3 Mar 2008, col 931; Clarke, HL 21 Apr 2008, col 1368 and HL 7 May 2008, col 605; Grieve, HC 26 Jan 2009, col 52; Widdecombe, HC 9 Nov 2009, col 119.

⁶⁰ Widdecombe, HC 9 Nov 2009, col 119; Shannon, HC 28 Feb 2013, col 291; Anderson, HL 9 July 2009, cols 799 and 800 and HL 17 June 2013, col 63; Mawhinney, *ibid.*, cols 28 and 46; Singh, *ibid.*, col 69.

described as ‘respectable,’⁶¹ ‘decent,’⁶² and ‘leading,’⁶³ and their beliefs were described as ‘legitimate’⁶⁴ and ‘sincere.’⁶⁵ While some espoused context as crucial for determining a violation of the SO hatred offence,⁶⁶ assurances that Christians would not be caught by the provisions were repeatedly called for. For example, Lord Waddington stated that,

In plain words, it should be clear in the Bill who will be caught by its provisions and that a Christian expressing strong views will not be caught.⁶⁷

Additionally, while fears of homophobic violence stemming from the spread of hatred were sometimes played down by opponents of the SO hatred provisions as ‘offence,’ much was made of purported Christian fears and trauma related to being approached by the police⁶⁸ and the general need to respond to their feelings.⁶⁹ This has been highlighted by Johnson and Vanderbeck, who document the dissonance in the SO hatred debates between descriptions of Christianity and

⁶¹ Butler-Sloss, HL 9 July 2009, col 810; Dear, HL 11 Nov 2009, col 854.

⁶² Dear, HL 3 Mar 2008, col 932; Anderson, HL 9 July 2009, cols 799 and 800 and HL 17 June 2013, col 63.

⁶³ Dobbin, HC 9 Jan 2008, col 451; Selous, HC 6 May 2008, col 600.

⁶⁴ Horrocks (Evangelical Alliance), HC 18 Oct 2007, col 153; Hollobone, HC 29 Nov 2007, col 684; Waddington, HL 3 Mar 2008, col 924; Grieve, HC 9 Nov 2009, col 106 and 108; Loughton, HC 28 Feb 2013, col 301.

⁶⁵ Herbert, HC 6 May 2008, col 607; Cormack, *ibid.*, cols 612 and 614; Harris, *ibid.*, col 617.

⁶⁶ Ward, HC 9 Nov 2009, col 104; Eagle, HC 29 Nov 2007, col 665.

⁶⁷ HL 3 Mar 2008, col 926. See also, McCulloch, HL 22 Jan 2008, cols 144-5; Ferres, HL 3 Mar 2008, col 931; Harris, HC 8 Oct 2007, col 122 and HC 6 May 2008, col 617. A notable exception can be found in MP Desmond Turner’s reference to hate speech on “allegedly Christian websites” (HC 8 Oct 2007, col 116).

⁶⁸ Ferres, HL 3 Mar 2008, col 931; O’Cthain, *ibid.*, col 933; Knight, HL 21 Apr 2008, col 1373; Clarke, *ibid.*, col 1368 and HL 7 May 2008, col 605; Waddington, *ibid.*, col 597; Anderson, HL 21 Apr 2008, col 1373 and HL 9 July 2009, cols 799 and 800; Cormack, HC 6 May 2008, col 602; Taylor, HC 9 Nov 2009, col 111; Scott Joynt, HL 11 Nov 2009, col 857.

⁶⁹ Eagle, HC 29 Nov 2007, col 663; Dobbin, HC 9 Jan 2008, col 450; Gray, HC 26 Jan 2009, col 105; Williamson, HL 9 July 2009, col 804; Doughty, HC 16 July 2013, col 1045. See also Vanderbeck and Johnson, “If a Charge was Brought,” 657.

Christians as oppressed and the extent to which Christians and their speech were actually granted special dispensation.⁷⁰

There is a stark contrast between the ways in which religion was presented in the SO hatred debates and in the religious hatred debates. As discussed in Chapter Eight, the religious hatred offence had to account for the fact that religions and religious people incite hatred against each other and therefore had to be capable of falling within the scope of the provisions. Also, in the religious hatred debates the primary victim group that the provisions sought to assist were Muslims – a racialised group widely perceived as more or less foreign. Muslims were quintessentially ambivalent victims and religion was an ambivalent phenomenon that encompassed a variety of harms and hatreds, including homophobia.⁷¹ In the SO hatred debates, however, where there was concern to exclude Christians from the scope of the offence, xenophobia towards ‘foreign’ religions was replaced with identification with and nostalgia for a more Christian nation.⁷² The ambivalence and caution surrounding depictions of religion and religious adherents was therefore drastically reduced.

Since homosexuals were set out as unambivalent victims in the SO hatred debates and association with homophobia was uniformly resisted,⁷³ the purported threat to Christians was located in the law itself, its over-zealous enforcement and an emerging but powerfully repressive anti-Christian culture. For example, Lord Waddington stated that, “there is, right now in this country, an intolerance of Christians of a sort that I never thought I would see.”⁷⁴ In parallel with

⁷⁰ *Religion and Homosexuality*, 161.

⁷¹ See Harris and Bryant, HC 11 July 2005, col 625.

⁷² See, for example, Anderson, HL 3 Mar 2008, col 63.

⁷³ Johnson and Vanderbeck, *Religion and Homosexuality*, 6.

⁷⁴ HL 18 May 2009, col 1225. See also Lord Bishop Scott-Joynt: “It seems that the Government believe that others' rights trump those of people of faith when there appears to be some tension between the two” (HL 9 July 2009, col 806); and Conservative MP Gerald Howarth: “it is extraordinary how we have moved in a short space of time from observing centuries of established Church of England teaching to questioning that teaching. ... those of us who now seek to defend that original teaching are regarded almost as pariahs” (HC 6 May 2008, col 620). Scott-Joynt also referred to a “dominant political orthodoxy,” accusing the government of excessive authoritarianism.

this, a connection was drawn between Christianity and the wellbeing of society overall – often via the uncontested value of free speech – in order to make a broader, majoritarian and more biopolitical argument for the SO free speech rider. Thus, Lord Bishop McCulloch stated that:

The churches are concerned that the offence should clearly exclude from its scope the expression of traditional Christian teaching ... Frankly, freedom to advance those convictions is part of life in a free society.⁷⁵

In this narrative, it was not just individual Christians who were at risk of harassment and oppression, but British culture and ‘tradition’ more generally that was at risk of being eroded by harmful secular influences.⁷⁶ It was through rhetoric around tradition that notions of Christian exceptionalism merged with notions of Christian nationalism, and a threat to religious freedoms was framed as a threat to the nation, a way of life and a shared morality.⁷⁷ A kind of doublethink was at play here, whereby Christianity was presented as both a cultural majority⁷⁸ and a threatened minority,⁷⁹ and therefore as both central to the values and cohesion of society and a weakened and innocuous victim of certain corrupted elements of that society.⁸⁰ The positioning of religion and homosexuality as necessarily in conflict, and therefore as necessarily producing competing interests that needed to be balanced, was very rarely questioned.⁸¹

⁷⁵ HL 22 Jan 2008, col 144. See also, Scott-Joynt, HL 11 Nov 2009, col 857.

⁷⁶ See DUP MP Jim Shannon: “New intolerance has emerged that effectively penalises historic orthodoxies and social consensus” (HC 28 Feb 2013, col 291).

⁷⁷ Conservative MP Nick Herbert encapsulated this frame in relation to the abolition of the blasphemy offences: “It is still true, as was said in 1676 by Lord Chief Justice Hale, that Christianity is “parcel of the laws of England.” It may not be as much parcel as it was then, but it is true that Christianity is integral to the Constitution.” (HC 9 Jan 2008, col 452; cf Munby J in Cooper and Herman, “Property Logic of Equality Law,” 69). See also, Anderson, HL 17 June 2013, col 63; Jakobovits in Wintemute, “Religion vs. Sexual Orientation,” 130; and Cooper and Herman, “Property Logic of Equality Law,” 75.

⁷⁸ Scott-Joynt, HL 3 Mar 2008, col 929; Waddington, HL 18 May 2009, col 1225; Singh, HL 17 June 2013, col 67; G. Howarth, HC 16 July 2013, col 1050.

⁷⁹ Butler-Sloss, HL 7 May 2008, col 600 and HL 17 June 2013, cols 61 and 65; Anderson, *ibid.*, cols 62-3; Singh, *ibid.*, col 69.

⁸⁰ Bialecki, “Eschatology, Ethics, and *Ēthnos*,” 50-1.

⁸¹ See Jivraj, “Stopping a Racist March”; Cooper and Herman “Property Logic of Equality Law,” 74. Intersectionality of religion and sexual orientation was acknowledged by Ben Summerskill (HC 16

Alienating homophobia

Aside from the occasional intimidating or inept police officer, the villain identities in the SO hatred debates fell into two clear groups: British extremists and foreign bigots.⁸² With regard to the former, the British National Party (BNP) represented a familiar villain group. Composed of ‘skinheads,’⁸³ they were a recognisable risk that provided parliamentarians with a means of associating ‘real’ homophobia (rather than sincerely held religious beliefs) with extremist ideology.⁸⁴ In this way, like racism in the POA86 debates, homophobic bigotry was located outside of ‘the community,’ the valued population and ‘civilised society.’ Thus, while those arguing for an SO free speech rider claimed that it was necessary for the protection of Christian pensioners, those opposing it claimed that it would protect extremists – the true homophobic villains.⁸⁵ This association of hatred with extremism served to alienate homophobia from parliament: if ‘real’ homophobia is an extremist ideology, and parliament is, of course, against extremism, then the myth is fabricated that parliament is against, and in no way complicit in, homophobia. In this binary framing, parliamentary voting records on sexual minority rights and ‘respectable’ expressions of homophobic attitudes are occluded.⁸⁶

However, although the BNP were a contemporary concern among parliamentarians due to their recent electoral successes,⁸⁷ without credible risks of riots (as at previous junctures of the

Oct 2007, col 78), Baroness Turner (HL 21 April 2008, cols 1369-70 and Lord Smith (HL 11 Nov 2009, col 855).

⁸² This observation was also made by Johnson and Vanderbeck, *Law, Religion and Homosexuality*, 162.

⁸³ Garnier, HC 29 Nov 2009, col 671; Harris, HC 9 Nov 2009, cols 115 and 117.

⁸⁴ Bryant, HC 8 Oct 2007, col 59; D. Turner, *ibid.*, col 116; Harris, HC 6 May 2008, cols 617-8 and HC 9 Nov 2009, col 116; M. Turner, 9 July 2009, col 793.

⁸⁵ Thomas, HL 3 Mar 2008, cols 928; Massey, HL 9 July 2009, col 804; Harris, HC 9 Nov 2009, col 116.

⁸⁶ See Vanderbeck and Johnson, “If a Charge was Brought,” 657.

⁸⁷ The BNP more than doubled their council seats in the 4 May 2006 local council elections. Wheeler, “Will BNP Election Gains Last?,” *BBC News*, 5 May 2006, http://news.bbc.co.uk/1/hi/uk_politics/4968406.stm. See also Conservative MP Charles Walker, who referred to “a BNP problem in my constituency” (HC 16 Oct 2007, col 78).

stirring up offences), it would have been politically unwise to present the SO hatred offences as targeting the BNP, and to thereby risk fuelling their discourses of white working-class *ressentiment*.⁸⁸ Therefore, had the BNP been the only villain identity in play, it seems less likely that the political trade-off of the SO hatred offences, between gaining queer votes and losing right-wing votes, would have been deemed worthwhile.

Alongside examples from BNP leaflets, the most influential examples of the type of harm that the SO hatred provisions would address were the violent rap and reggae lyrics that Ben Summerskill of Stonewall quoted during the House of Commons Public Bill Committee. A brief excerpt for illustrative purposes reads:

Another single is a song called “Roll Deep”, of which the key chorus is “Roll deep motherfucka, kill pussy-sucker”, which is a reference to lesbians. It continues “Tek a Bazooka and kill batty-fucker”, which means, “Take a rocket launcher and shoot gay men dead.”⁸⁹

Such lyrics were also cited by Lord Hunt and Conservative MP John Bercow during the SO hatred debates,⁹⁰ and by Lord Alli and Bercow to make a case for adding SO hatred in earlier debates.⁹¹ By keenly demonstrating the violence of contemporary homophobic speech, these lyrics provided a clear illustration of the kind of threatening language that advocates of the SO hatred provisions sought to address – evidence that had been lacking in the religious hatred debates. However, it can also be argued that the focus on rap and reggae music leveraged racial fears and the available folk devils of black criminals.

The Jamaican patois of all the homophobic lyrics cited in the debates mark them as products of a foreign culture. Citing the lyrics therefore facilitated a racialisation of homophobic hatred, constructing it as a foreign cultural problem that is, again, external to ‘civilised’ British

⁸⁸ See Crossman (Liberty) HC 18 Oct 2007, col 127.

⁸⁹ HC 16 Oct 2007, cols 75.

⁹⁰ Respectively HL 3 Mar 2008, col 940 and HC 26 Jan 2009, col 36.

⁹¹ Respectively HL 14 Mar 2005, col 1123 and HC 21 June 2005, col 689.

society.⁹² Thus, while those arguing against the SO hatred provisions invoked popular tropes of innocence and vulnerability in their claims that elderly Christian traditionalists would be unfairly criminalised, the homophobic lyrics invoked practically the exact opposite identity in order to argue that the provisions were urgently needed. For example, Baroness Turner stated that,

It may be argued that some songs, for example, do not really mean very much – they are simply songs – but they emerge from a culture, mostly in the Caribbean, that is deeply homophobic and where violence and murders on such grounds are commonplace.⁹³

In this narrative, the contemporary power of colonial logics is revealed through the diametric opposition between foreign black savages and modern British civilisation. The rap lyrics tap into an array of white conservative fears, from the fears of youth delinquency and urban decay that dominated the POA86 debates and that have become ‘stuck’ to black genres of music,⁹⁴ to fears of black criminality and broader cultural/moral degradation that stretch back to the 1950s, at least.⁹⁵ Just as an elderly white Christian fits the image of a ‘ideal’ victim, so a black rap artist fits the stereotype of a dangerous criminal.⁹⁶ Consequently, there was no parity in how these identities were treated: there was no concern that a decent young artist might find themselves subject to police intimidation for expressing sincerely held views on homosexuality through the creative medium of rap. In contrast to the dispensation afforded to elderly Christians, the un-Britishness of the rap artists rendered their subjectivities erasable and thus their rights as equal citizens null.⁹⁷ Thus, the ‘sincerely held beliefs’ of white Christians were unquestioningly treated as less dangerous than artistic expressions through a medium that is characterised by hyperbole and

⁹² See Baroness Turner: “We do not want a society in which gay and lesbian people fear for their lives, as unfortunately occurs in some societies in other countries” (HL 9 July 2009, col 793). See also Gilroy, “The Myth of Black Criminality,” 48.

⁹³ HL 9 July 2009, col 793.

⁹⁴ Kubrin and Nielson, “Rap on Trial,” 187-8.

⁹⁵ See Hall et al., *Policing the Crisis*, 327; Sherwood, “White Myths, Black Omissions”; Shilliam, *Race and the Undeserving Poor*.

⁹⁶ Hall et al., *Policing the Crisis*, 200-1.

⁹⁷ Mahmud, “Colonialism and the Modern Constructions of Race,” 1222.

exaggerated violence, i.e. a medium where what is sung might be understood by both artists and fans as fiction rather than sincere belief.⁹⁸ Indeed, as Conservative MP Edward Garnier argued, “Surely the temperate expression of incitement is much more effective than the intemperate.”⁹⁹ This is not to excuse or downplay the harmful potential of violent fictions, but rather to draw attention to how differently racialised lyrics were depicted given that the bible passage of Leviticus 20:13 expresses much the same sentiment.¹⁰⁰ This difference in treatment reflects a fantasy of absolute difference between British culture and foreign culture, the civilised and the uncivilised, the citizen and the criminal, and, implicitly, white subjectivity and black subjectivity.¹⁰¹ The upshot is that any homophobia in ‘our’ culture is an innocuous expression of liberal freedoms, whereas it is the homophobia of ‘their’ illiberal cultures that is responsible for incidents of violence.

By locating homophobia in foreign savagery – as antisemitism was located in foreign doctrines in the POA36 debates – the issue was also elevated beyond ‘merely’ the effects of hatred on a minority, which were repeatedly described as needing to be balanced against universal and fundamental free speech rights.¹⁰² Instead, homophobic hate speech was framed as a symptom of external cultural threats to British society and thus as a pressing concern for the population as a whole, just as the risk of riots and terrorism made racial and religious hatred salient to the white ruling classes. While the effects on individuals were not disregarded – homophobic attacks, threats and hatred were widely and sometimes passionately condemned – the case for introducing SO hatred offences within public order legislation was strengthened by references to population-level concerns.

⁹⁸ Kubrin and Nielson, “Rap on Trial,” 197-9.

⁹⁹ HC 16 Oct 2007, col 82. See also Thompson, “Freedom of Expression,” 220.

¹⁰⁰ “If a man lies with a male as with a woman, both of them have committed an abomination; they shall be put to death; their blood is upon them” (New Revised Standard Version).

¹⁰¹ See Chow in Johnson, “Questioning the Fantasy of Difference,” 62.

¹⁰² See Cooper and Herman: “law’s tendency to reduce the conflict to one of determining the right

balance between competing interests” (“Property Logic of Equality Law,” 74).

In biopolitical terms, by presenting a racialised and externalised image of homophobia, Summerskill and others simultaneously positioned acceptance of homosexuality as *within* British culture. If homophobic hatred can be attributed to an external ‘evil’, then in order to construct itself as ‘good’ British culture must be defined in opposition as tolerant, accepting and protecting of homosexuals.¹⁰³ This fits into what Jasbir Puar has termed homonationalism, where governments selectively use the protection or violation of LGBT rights as a barometer for civilisation, a measure of the worthiness of foreign subjectivities, and even a justification for war.¹⁰⁴ The very act of legislating against SO hatred, whereby homosexuals are ‘folded into’ the valued population, becomes a mark of differentiation between British civilisation and foreign savagery, and thereby draws a veil over historical, contemporary, institutionalised and culturally embedded oppressions of sexual minorities in Britain. The effectiveness of the lyrics in parliament therefore lay not only in the shock factor of their content, but also in the extent to which they leveraged racialised tropes of foreign savagery to construct a compelling ‘good v evil’ narrative, and thus provided an opportunity to reaffirm – through the enactment of the SO offences – the benevolence and progressiveness of British culture. Meanwhile, the SO free speech rider ensured that the kinds of homophobia emanating more directly from the white Christian foundations of British culture would remain untouched.

Conclusion

From the analysis of the SO hatred debates set out in this chapter, it is possible to identify the combination of conditions that enabled sexual orientation to be viewed as a suitable category for inclusion in the stirring up hatred offences, as well as the conditions that meant sexual orientation was afforded a lower level of protection than race. Advocacy for adding sexual orientation

¹⁰³ Bialecki, “Eschatology, Ethics, and Ethnos,” 52.

¹⁰⁴ Puar, *Terrorist Assemblages*.

encountered similar challenges as religion insofar as there was considerable controversy over whether hatred on such grounds was a suitable subject for legal intervention. However, these challenges were also qualitatively different in relation to sexual orientation as they did not stem from the purported mutability of the category, but rather from concerns to protect a ‘respectable’ tradition of condemning certain sexual behaviours. The addition of sexual orientation also faced the extra challenge of generating a sufficient sense of urgency for new public order legislation in the absence of credible threats to ‘the peace,’ such as the risk of riots, intercommunal hostilities and terrorism that precipitated the racial and religious hatred offences.

The first step towards enacting the SO hatred offences was making them intelligible as a public order issue through a reinterpretation of the generic law on incitement. Expansion of the stirring up offences was thus facilitated by a contraction of what other areas of law were understood to already cover. Here, the legal gap that the stirring up offences fill was extended from the somewhat vague and indirect notion of incitement to hatred to the more directly threatening – and emotively powerful – phenomenon of incitement to violence. Grattet, Jenness and Curry’s finding that social movement organisations are a key ingredient in the criminalisation of hate on specific grounds seems to be supported in the enactment of the UK SO hatred provisions,¹⁰⁵ as both the understanding of the legal gap and the main evidence used in support of the offences were provided by Ben Summerskill of Stonewall.

Once the legal gap had been identified, the SO offences were shaped by the interaction of relatively distinct narratives of advocacy and opposition. These narratives deferred to broadly the same criteria:

- the extent to which sexual orientation is analogous to race and/or religion;
- the level of social consensus;
- the extent to which the provisions are necessary for the protection of individuals;
- the extent to which the provisions are necessary for the protection of the population.

¹⁰⁵ “Homogenization and Differentiation of Hate Crime Law,” 301.

While advocates of the offence emphasised that sexual orientation is commensurate to race on the basis that both are immutable characteristics, advocates of the free speech rider relied on a distinction between being a certain sexual orientation, which should be protected from hatred, and doing certain sexual activities, which should be excluded from that protection. This distinction was also relevant to the consensus condition, as while the offence's advocates drew from universal condemnation of homophobic violence, its detractors emphasised dissensus – and the right to express disagreement – over the acceptability of homosexual activities. This latter argument provides an explanation for the drafting of the SO offences at the lower level of protection, in line with the more recent and controversial religious hatred offences rather than the more established and widely accepted racial hatred offences.

The third and fourth conditions formed the main battlefield where the SO hatred offences were shaped. The individual rights of sexual minorities and religious adherents to live free from fear were pitched against each other. The case for protecting sexual minorities was bolstered with statistics and anecdotal tales of violence, while the case for limiting that protection revolved around the purported threat posed to 'ordinary,' 'decent' and elderly Christians. The polarisation of identities on the basis of religion, sexual orientation and age crudely divided identities in a manner that left no space for appreciations of intersectionality or overlapping interests. The crucial play, however, came in the construction of a population-level threat. While the homosexual and Christian victim identities were largely accepted, there was no strong villain identity in this narrative on which to hang a sense of population-level threat. The case can be made, therefore, that the SO free speech rider was included due to the portrayal of Christians as worthy of special legal protection, but the SO hatred offence overall was enacted in large part due to the perceived threat posed by illiberal foreign cultures.

What this suggests in terms of the broader approach to identifying certain categories as appropriate for legal protection against the stirring up of hatred, is that the law can be shaped to accommodate the fears of and to ameliorate potential harms to individuals occupying a socially privileged position – the 'ordinary' people, the majority, those whose identities are typically

understood to be white, British and ‘traditional.’¹⁰⁶ But in order to enact legislation to protect minoritized groups from hatred, it helps to have a biopolitical rationale – a threat not only to individuals with certain characteristics, but to the wellbeing or integrity of the population as a whole, or to the dominant culture to which fantasies of national ‘sameness’ are attached. What is needed is the invocation of a threat that is salient to ‘ordinary’ people too, and a distinguishable criminal subjectivity that is ‘erasable’ in terms of its access to the rights and dispensations afforded to the protected population. It is these logics, which run through the justifications for the racial and religious hatred offences and for the POA86 as a whole, that the SO hatred offences are most powerfully aligned with, rather than a primary concern for the wellbeing of victims of hatred.

¹⁰⁶ See Bialecki, “Eschatology, Ethics, and Ethnos,” 53.

Conclusion

This project sets out to contribute to existing literature on the stirring up hatred offences of England and Wales by constructing a genealogy of the parliamentary discourses which shaped them. Where other scholarship has tended to treat hate speech law as a generic subject of philosophical critique, sought to appraise the offences in relation to ‘universal’ values, or focused on the dynamics of a particular legislative moment, this project has produced a broad picture of the continuities and shifts in how the stirring up hatred offences have been rationalised. Additionally, the systematic analysis of Hansard debates and supporting resources has been conducted with a particular focus on processes of differentiating and ordering subjects. Thus, by examining narratives of victimhood and criminality, and corresponding ideas about proper social order, insight is provided not only into *what* the legislative reforms aimed to achieve (‘peace,’ ‘order,’ ‘community cohesion,’ ‘tolerant’ society) but also *whom* they aimed to protect and *whom* they demonised or invalidated in the process.

This project began with three questions about the current stirring up hatred offences: why do they specify hatred on the grounds of race, religion and sexual orientation, why does the scope of the offences vary between these categories and what is the significance of their categorisation as public order offences. Answers to these questions have been found to be complex and intertwined. Chapter Four explains that the purpose of a genealogy is not to trace a smooth trajectory of a phenomenon from the past to the present, but to unearth contingencies that can be used to unsettle present assumptions. Thus, rather than producing tidy answers to the research questions, this concluding chapter reflects on what this project has succeeded at unsettling and what implications this might have for future reforms of the stirring up hatred offences. The first

section highlights problematic approaches to delineating the scope of the offences in order to disrupt the notion that hate speech legislation ameliorates rather than entrenches harmful patterns of differentiation. However, rather than replicating Jacobs and Potter's 'Balkanisation' critique of US hate crime law, where writing identity categories into the law is presented as inevitably divisive,¹ the specific classifications and essentialisms of the stirring up hatred offences are shown to be embedded within fantasies of difference and sameness, myths of national identity, affects of fear and *ressentiment*, and ideas about good order, innocence, culpability and deviance. These dynamics are then explored throughout the rest of the chapter.

The second section disrupts the representation of hatred as an aberration that is either an exception within British society or a foreign incursion. Here, the research illustrates how fantasies of British righteousness divert scrutiny from the ways in which British history and representations thereof are implicated in the reproduction of prejudices and hatreds. Additionally, by disrupting the narrative binary of British/normal/good/loving versus foreign/pathological/evil/hating, the appropriateness of imposing ever-more punitive sanctions on individuals can be questioned. The third section disrupts the gloss of neutrality achieved by the language of 'balancing' rights and the depoliticisation of 'order.' The research demonstrates that such balancing is never objective or apolitical, but rather serves to abstract the interests at play and thus to conceal the ways that groups are affected differently by the outcome. In the final section, it is ultimately argued that many of the logics that have shaped the offences so far must be exposed, confronted and rejected if hate speech legislation is to contribute towards a more meaningfully inclusive British society.

¹ "A Critical Perspective," 8.

Law's propensity to classify²

In the literature review for this project (Chapter Two), a tension was observed between recognising and essentialising difference. On the one hand, inequality cannot be addressed without considering the characteristics that render certain people more likely to experience hatred and discrimination. For example, racism cannot be addressed without acknowledging that racial differentiation is a phenomenon that affects the lives of individuals and the functioning of society. On the other hand, the risk is then that certain identity categories come to be viewed as indexes of otherness and marginality by themselves, and thus the significance and meanings attributed to certain differentiations come to be presented as fixed and inherent. The challenge for the law, therefore, is to respond to processes of differentiation and ordering within society without treating categories and groups as objective, inevitable or static. In other words, the challenge is to problematise certain forms of differentiation (i.e. those that essentialise and disadvantage certain groups) without reproducing, reinforcing and legitimising such divisions. This project illuminates how, although the stirring up hatred offences might at first appear to be inclusive and flexible, they have been used in ways that delineate and essentialise group identities in practice. This section first draws attention to how the scope for legal classification is written into the text of the offences and then sets out how the “propensity to classify” has manifested in their interpretation and application.

A mandate for classifying groups within the text of the offences?

A common criticism of anti-hate legislation, as put forward by Heinze and Jacobs and Potter,³ is that it exacerbates inequality by affording special victim status to particular identity groups. From a cursory examination of the current text of the stirring up hatred offences, this appears to be a misguided critique: the legislation refers to hatred on the grounds of particular identity categories,

² This phrase is borrowed from Emily Grabham, “Intersectionality,” 186.

³ Heinze, “Cumulative Jurisprudence”; Jacobs and Potter, *Criminal Law and Identity Politics*.

which anyone might be subjected to, not hatred against particular groups. However, analysis of parliamentary debates indicates that the offence of stirring up racial hatred was enacted in response to antisemitism and hatred against Commonwealth immigrants, the religious hatred offences predominantly responded to hatred against Muslims and the SO hatred offences responded to hatred against gay men and lesbians. This is unsurprising as there will always be power imbalances and histories that render hatred against certain groups more prevalent, more problematic and subsequently of greater legislative concern. Nevertheless, the language of ‘racial hatred,’ ‘religious hatred’ and ‘hatred on the grounds of sexual orientation’ would seem to avoid legally reifying groups experiencing victimisation at a particular time and attributing an indelible victim status to them. However, the legislative definitions of the types of hatred at issue do not uphold this promise to classify only the hatred, but instead defer to the characteristics of particular groups. Under the current iteration of the POA86:

- “‘racial hatred’ means hatred against a group of persons defined by reference to colour, race, nationality (including citizenship) or ethnic or national origins” (s 17);
- “‘religious hatred’ means hatred against a group of persons defined by reference to religious belief or lack of religious belief” (s 29A); and
- “‘hatred on the grounds of sexual orientation’ means hatred against a group of persons defined by reference to sexual orientation (whether towards persons of the same sex, the opposite sex or both)” (s 29AB).

Thus, in order to determine if certain threatening, abusive or insulting words or behaviour are intended or likely to stir up racial hatred, for example, the assumption in parliament has been that it is necessary to determine whether the hatred targets a ‘racial group,’ i.e. a group that can be defined by reference to the subcategories listed in s 17.

While the longer history of the racial hatred offences has meant that there has been more parliamentary discussion on the scope of these provisions, the question of the precise scope of “a

group of persons defined by reference to their religious belief’ is at least as unclear. This was demonstrated by concerns that cults and other dubious organisations might be afforded protection by the religious hatred provisions. Similarly, the definition of hatred on grounds of sexual orientation that is provided in s 29AB of the POA86 seems at first glance to be inclusive in its encompassing of hatred against heterosexual, homosexual or bisexual groups. However, by referring to these groups in brackets, the legislation seems to determine that, for the purposes of the offence, heterosexual, homosexual and bisexual are the only sexual orientations; the possibility of prosecuting the stirring up of hatred on grounds of asexual or pansexual orientation, for example, is foreclosed.⁴

There is still some scope in the text of the offences for flexibility to be maintained: “defined by reference to” could mean defined within the speech in question, rather than defined according to some purportedly objective standard. The issue here would be whether a speaker stirs up hatred against a group that *they* define by reference to race, religion or sexual orientation. Thus, the focus would be entirely on the contents of the speech. Such an approach would be aligned with hate crime provisions, where the emphasis is placed on how a perpetrator perceived their victim, rather than on the victim’s ‘true’ identity. In practice, such an approach might prove difficult due to the extent to which persons stirring up hatred use coded language to sanitise their speech and maintain a plausible deniability of bigotry. Nevertheless, the legislature and the judiciary have taken the approach that only groups that can ‘objectively’ be defined by reference to race, religion or sexual orientation can be protected. Thus, while the text of the offences allows scope for flexibility, in practice this has merely meant that the decision as to which groups are protected has been deferred to the courts, and perhaps also to the everyday decisions made by potential complainants, police officers and the CPS.⁵

⁴ Goodall, “Challenging Hate Speech,” 213.

⁵ For example, see *R v DPP, ex parte Merton LBC* (1999) COD 358.

Classifying groups in practice

The attempt to discern which groups are sufficiently defined by their race, religion or sexual orientation to qualify as targets of the respective forms of hatred results in the legitimisation of narratives that present difference as objective, fixed and self-evident. While the aim of classifying groups in this instance is their protection from having hatred incited against them – rather than the justification of their subjugation – the notion that the state has the ability and the authority to discern the essence of different sections of the population and to include or exclude them accordingly has clear colonial overtones.⁶ Here, the stirring up hatred offences aim not only to govern the differentiations produced by the population, but to govern *through* differentiation.

Three examples are demonstrative. First, there was the sometimes awkward and never fully rationalised⁷ treatment of Jews as a racial group. It was never necessary to specify the precise credentials of Jewishness that rendered Jews within the scope of the racial hatred offence because the offence was created, *inter alia*, to address antisemitism. Thus, from its inception, the scope of the racial hatred offence was determined by parliamentary edict as to who qualified as a racial group. The notion that groups either are or are not racial, and that the functioning of the racial hatred offence relies on such classifications, required further elaboration when the inclusion of groups who had not been the intended beneficiaries of the legislation came into question.

Second, then, there was the decision that Sikhs are a racial group (and the insistence that Muslims are not). Although the *Mandla* case concerned anti-discrimination legislation, the notion that the ethnic – and therefore racial – credentials of a group can be objectively and conclusively appraised was uncritically accepted within subsequent parliamentary debates on the stirring up hatred offences. Indeed, much of the nuance of the *Mandla* ruling was overlooked in the debates

⁶ El-Enany, *(B)ordering Britain*, 12.

⁷ See page 152.

on the stirring up hatred offences, with the matter reduced to the finding that Sikhs are a mono-ethnic religious group and therefore a racial group, while multi-ethnic religious groups, such as Muslims, are not racial groups. In *Mandla*, seven criteria for ethnicity were produced, of which only one – common geographical area of origin or common ancestry – alluded, in part, to a biological connection. Indeed, the necessity of being “drawn from what in biological terms was common racial stock” was ruled out.⁸ Thus, as racial hatred includes hatred of a group defined by reference to their ethnic origins, it is technically broader than hatred based on supposedly immutable biological factors and encompasses forms of ‘cultural racism.’ Yet this gets lost and confused in the differentiation between mono- and multi-ethnic religions that was so prevalent in the discussion on incitement to religious hatred, where the cultural elements of ‘ethnicity’ were routinely overlooked. In the context of anti-discrimination legislation, the classification of Sikhs as an ethnic group became irrelevant with the enactment of a prohibition on religious discrimination that is commensurate to the prohibition on racial discrimination. Conversely, the ongoing discrepancy between the racial hatred and religious hatred offences perpetuates the need to police a boundary between mono- and multi-ethnic religious groups. While opponents of the religious hatred offence argued that *racial* hatred against Muslims would fall within the racial hatred offences, this remains problematic (as explained in Chapter Eight) and this claim was neither substantiated nor supported by other parliamentary debates, as exemplified by discussions on the inclusion of gypsies.

Third, then, was the debate over whether hatred against gypsies qualifies as racial hatred. This debate occurred during the passage of the Public Order Act 1986 and therefore took place after the *Mandla* judgment but before the inclusion of religious hatred had begun to be debated in earnest. The debate about gypsies concluded that ‘genuine’ gypsies would be protected under the racial hatred provisions, but other travelling communities would not be and should not be. The

⁸ Lord Fraser, *Mandla and another v Dowell Lee and another* [1983] 2 AC 548, 549 and 564.

crux, therefore, was not whether travelling communities had been racialised during an attempt to stir up hatred against them, but whether the law racialised them by finding that they qualified as an ethnic group under the *Mandla* criteria; only those classified as ‘genuine’ gypsies would be protected against the stirring up of racial hatred against them. Thus, while the text of the legislation ostensibly avoids essentialising and reifying victim groups, this is exactly how the law operates in practice.

The more recent religious and SO hatred offences seem equally open to such challenges and classificatory responses. In relation to religious hatred, much concern was expressed during the passage of the offence that ‘cults’ might gain protection, suggesting that the question of whether a certain group qualifies as a ‘genuine’ religious group might arise in the future. Similarly, a court could find that it is required to determine whether a group is defined by reference to sexual orientation. For example, if a threatening article subjected drag queens to homophobic hatred and the logics of the *Mandla* case were applied, then a court would assume that only homosexuals can be subjected to homophobic hatred and would therefore be required to pass judgment on whether drag queens constitute a group of persons defined by reference to their sexual orientation.⁹ It should suffice that the article in question characterises drag queens as homosexual and seeks to stigmatise them accordingly, but this is not how the stirring up hatred offences have so far been applied.

Fantasies of difference and sameness

The notion that it is appropriate for a particular group to be legally classified as ‘defined by reference to’ race, religion or sexual orientation fixes and legitimises certain social differentiations

⁹ Incidentally, this is an inversion of the principles of defamation law: in this scenario, a finding by the court that the speech in question was *inaccurate* with regards to its characterisation of a group would *decrease* the likelihood that the author would be found to be liable.

and the significances attached thereto. In other words, the current (mis)functioning of the stirring up hatred offences compounds the fantasies of difference and sameness that they are supposedly intended to address. This project shows how such fantasies are implicated in the moralisation of the self/other dichotomy and how this, in turn, leads to the externalisation and individualisation of hatred. These findings are explored and further analysed within this section.

The ‘normal’ population

The legal classification of groups was rationalised and often justified through the construction of particular subjectivities within parliamentary narratives. Thus, identity groups were essentialised and overdetermined both in terms of their binary classification (as conclusively either defined by reference to race/religion/sexual orientation or not) and in terms of the views and qualities that were attributed to their members. Particular identity groups were depicted by both advocates and opponents of the stirring up hatred offences as valued subjects to be protected (the body politic) or problematic subjects to be managed. On the one hand, identities that were associated with Britishness and good citizenship were described in the debates as ‘white,’ ‘British,’ ‘indigenous,’ ‘ordinary,’ ‘decent,’ ‘the community,’ ‘workers,’ ‘residents,’ ‘tax-payers,’ ‘pensioners’ and ‘Christians.’ On the other hand, a range of varyingly problematised identities were labelled as ‘foreign,’ ‘immigrant,’ ‘illegal,’ ‘extremist,’ ‘racist,’ ‘thugs,’ ‘youth,’ ‘lunatic,’ ‘protesters’ and ‘fanatics.’ Thus, the former list represents that which was taken to be ‘normal life,’ steeped in ‘tradition’ and moral righteousness, while the latter represents a variety of deviations, which, in order to protect ‘normal life,’ should either be expelled (anthropoemy) or disciplined into conformity (anthropophagy).

Analysis in this project shows how many parliamentarians have struggled to fully incorporate racialised groups into the ‘normal’ population body. In the various RRA debates especially, terms such as ‘white,’ ‘majority,’ ‘indigenous’ and ‘ordinary’ entered into the

discourse as speakers attempted to police the racial boundaries of an entitled population. Here we see clearly how the protected population came to be defined through exclusion, i.e. through the designation of racialised identities as less entitled and as therefore always needing to prove their worth. Thus, it is not only the life of the normative identity that is to be protected, but also the higher status of that identity in relation to others and the advantages that this affords. The zero-sum politics of *ressentiment* were therefore deployed by opponents of the stirring up hatred provisions to argue that the privileged rights and culture of the majority were at risk from legislation that would afford rights to minoritized groups. This dynamic was as clear in the arguments that defended the rights of white citizens to express their racism in the 1960s as it was in the arguments that defended the rights of Christians to express their homophobia in the 21st century.

Race, class and the othering of hatred

In the earlier debates of the 1960s and 1970s, it was relatively common for the protected population to be imagined as virtuous through the attribution of negative qualities and affects to racialised ‘outsiders,’ and for racial hatred to be portrayed as an unfortunate but natural consequence of racial difference. Within such arguments against the RRAs, Commonwealth immigrants were presented as a risk to public health, a nuisance and as inherently and irreconcilably different from ‘ordinary’ people. Additionally, the racialised population was often deindividuated, reproducing the notion that ‘they’ all behaved the same and shared an agenda that was in conflict with ‘the majority.’ Thus, any indiscretion committed by a person of colour could be read as evidence of the undesirable nature of all non-white people.

The debates examined in this project show that such racialised differentiation has become more specific and less pronounced, but remains a feature of more recent parliamentary discourse on hate speech. This can be seen during the 21st century debates on religious hatred in the treatment

of Muslims as a homogenous and problematic group and the diagnosis that urban disturbances resulted from the failure of minoritized groups to adequately integrate. Thus, certain factions still presented the presence of difference as the source of hatred. Such difference was not necessarily deemed to be immutable and biological, but was now framed as a cultural or an ‘attitude’ problem: ‘they’ should try harder to fit in with ‘us.’ Additionally, the portrayal of ‘real’ homophobic hatred as a product of foreign cultures in the SO hatred debates revealed an avid readiness to attribute hatred to racialised groups, especially in contrast to staunch resistance against the possibility of criminalising white Christian homophobia.

While the treatment of racialised identities with a degree of ambivalence and suspicion is a theme that runs throughout the span of this project, ‘white’ identities also came to be viewed as sources of hatred from the 1980s.¹⁰ These problematised identities were the “lunatic fringe” and the ‘thugs’ whose bigotry, violent tendencies and failures to meet neoliberal standards of socioeconomic success (i.e. their lower-class status) rendered them outside of ‘respectable’ British society. As ‘undeserving’ outsiders, they were the prime targets and *raison d’être* for the enhanced disciplining and controlling functions of public order law. While not overtly racialised in terms of skin colour, the neoliberal responsabilisation of individuals produced a notion that the lower classes possess innate and inherited deficiencies. In order for the deregulation of the markets and the dismantling of the welfare state to be promoted as fair, it must be believed that everybody can benefit if they are willing to work hard and take responsibility, i.e. if they are ‘deserving.’ Consequently, the failure to benefit – the failure to earn enough to acquire the trappings of respectability – must be blamed on poor work ethics and irresponsibility, i.e. being ‘undeserving.’¹¹

Thus, hatred and bigotry have been presented both as the inevitable consequence of ‘too much’ difference and, more recently, as among a number of undesirable characteristics of the

¹⁰ Shilliam, *Race and the Underserving Poor*, 133.

¹¹ See Shilliam, *Race and the Underserving Poor*, 115-8.

degenerate lower classes; both racialised groups and lower class ‘thugs’ have been presented as culturally predisposed to hostility towards difference. This awkward combination of responsabilising individuals on the one hand, but viewing certain communities as predisposed to intolerance, hatred and extremism – and therefore as legitimate targets of heightened law enforcement – on the other, typifies the ‘deracialised’ stereotyping that is encapsulated in the term ‘cultural racism.’ Here, it is purported that the problem is not racial difference, but cultural difference, yet it is only those who are racialised – either by their skin colour or by the signifiers of their lower class status – whose behaviours are attributed to culture and whose cultures are thereby essentialised and found to be lacking. Thus, this project disrupts the notion that anti-hate legislation currently functions as a means of recognising and revalorising marginalised and disadvantaged identity groups. Indeed, the logics of the stirring up hatred offences seem to reinforce rather than challenge the salience of race and class in our collective imagination of what a criminal looks like. While differences on the grounds of race, religion and sexual orientation are rendered acceptable and more or less protected by the stirring up hatred offences, these provisions have been interpreted in ways that almost exclusively problematise the behaviours of individuals from certain marginalised communities.

The myth of the tolerant nation

The need to marginalise sources of unacceptable hatred through processes of racial and class differentiation, and therefore to abject hatred and hateful subjects from respectable society, can be understood as a manoeuvre to protect the myths and fantasies that are attached to – and which are constitutive of – the ‘normal’ population. A common response among those opposed to the stirring up hatred provisions, has been to denounce the notion that ‘ordinary’ people could be criminalised thereby or otherwise deterred from exercising their freedom of expression. The ‘ordinary’ person, who was always implicitly ‘white’ and ‘respectable,’ was formulated definitively as the valued population that criminal law should protect, not target. Thus, expressions of racism by white

workers and home-owners in the 1960s were framed as ‘natural,’ the ridicule of religions by the white middle classes in the early 21st century were presented as within comedic freedoms, and expressions of homophobia by middle class Christians were described as ‘sincere beliefs.’ In each instance, it was deemed imperative that such expressions be excluded from the scope of the provisions, as especially demonstrated by the inclusion of the free speech riders (ss 29J and 29JA).

The exoneration of the ‘ordinary’ person, the respected artist and the Christian pensioner reinforces notions of what the ‘real’ threat does and does not look like. It was rarely suggested that it would be acceptable for Christian preachers to fall within the scope of the stirring up hatred provisions, and the individual Christians referred to in the SO hatred debates were presented as elderly, respectable and vulnerable; they were not labelled as hateful or intolerant. Rather, they were implicitly ‘folded into’ the often-repeated myth that Britain is, historically and quintessentially, a tolerant nation. This can be contrasted with Conservative MP John Marshall’s opening speech in a 1994 adjournment debate on racism and antisemitism.¹² Marshall began by reciting the mantra that “The United Kingdom has a long history of tolerance.” He then goes on to describe the “cancer” of racism and antisemitism and to attribute it to “Muslim fundamentalists,” “a small minority of mindless, militant Muslims,” “anti-semitic thugs” and “deranged, evil individuals.” The message that is conveyed here, and by the cumulation of many such representations throughout many debates over many decades, is that hatred is an aberration from a benevolent and tolerant norm,¹³ which can be resolved through the punishment of a few perverse individuals. Well-recognised masculine folk devils – the foreign fundamentalist, the

¹² HC 31 Mar 1994, cols 1115-7.

¹³ For example, “Racial discrimination – discrimination on grounds of colour – is absolutely loathsome and highly uncivilised. But I can only hope that this legislation does nothing to jeopardise the splendid reputation which this country has always had for tolerance regarding race relations” (Whyte-Melville-Skeffington, HL 20 July 1976, cols 817-8).

skinhead extremist – are evoked repeatedly to mark hatred as something exceptional, extreme and worthy of criminal sanctions.¹⁴

The fearsome evil of such ‘ideal perpetrators’ appears to have effectively deflected scrutiny from institutional complicities and the prospect that hatred might be a more everyday product of, rather than threat to, ‘Britishness.’¹⁵ Indeed, the fixation on classifying populations (examined above) and the narrative of a righteous conquest of civilised British values over barbarian hatreds echo the colonial differentiations through which understandings of ‘Britishness’ were initially moulded – differentiations that were deployed to justify the ruthless subjugation and sometimes genocide of racialised subjects. In the debates on the stirring up hatred offences, just as in colonial narratives, ‘Britishness’ is always the saviour and never the problem; it is always in need of protection and reinforcement and never in need of introspection or amendment. The complex and more or less subtle ways in which hatreds circulate through populations and become stuck in/on certain people is negated in favour of a ‘whitewashed’ and ‘pinkwashed’ fantasy of pristine righteousness. Thus, in more recent debates, any inference that introspection might be required was denounced by opponents of the stirring up hatred provisions as over-zealous ‘political correctness,’ thereby dismissing claims of oppression and suffering as ‘over-sensitivity.’¹⁶

Concomitantly references to British history and tradition performed a differentiating and excluding function. As Derek Hook argues, the exaltation of the values attributed to the majority culture and the celebration of traditions that racialised groups are perceived as confronting rather than inheriting, “work to assert certain exclusionary relations of cultural/national/historical

¹⁴ Ahmed, “Problematic Proximities,” 122.

¹⁵ See Malik, “Extreme Speech and Liberalism,” 102; El-Enany, *(B)ordering Britain*, 10.

¹⁶ See Brown, *Regulating Aversion*, 16. This resonates with Sara Ahmed’s work on complaint: “if you bring racism up you are understood to bring racism into existence. ...A complaint is thus framed as a failure of integration” (“Complaint as Feminist Pedagogy,” 20 and 24).

ownership and privilege.”¹⁷ Here we see how the cultural essentialism of ‘non-normative’ groups is married to the cultural essentialism of the ‘normal’ population through the fantasy of an essentially homogenous, benevolent, entitled and static ‘core’ population. The repetition of the myth that Britain is traditionally tolerant is appealing to those who identify as British as it provides coordinates for our desires to be morally vindicated and confident in our (superior) status in the world order, and subsequently produces positive affects of pride and belonging. In doing so, however, this myth erases not only innumerable instances of violent and institutionally sanctioned discrimination, but also the extent to which racial conquest and white supremacy were the very means by which Britain – the nation, the imagined community, the global economic actor, the ‘civilised’ culture – was made possible. The erasure of this history obscures its persistence in the present.¹⁸ The myth of the tolerant nation therefore functions as an ‘affective technology’ that reinforces the moral righteousness of the white British identity and absolves it of guilt, shame, uncertainty and ambiguity.¹⁹ The erasing power of the myth can also be observed in relation to the SO hatred offences, which were heralded as affirmation of Britain’s tolerance, despite the fact that homosexual acts were criminal a little over fifty years previously. Here, there would seem to be no plausible deniability of the complicity of legal institutions in the reproduction and legitimation of hatred, yet homophobia was no less framed as an aberration, located in foreign cultures or otherwise beyond the parameters of ‘civilised’ British society.

This analysis further supports a critical approach to claims that anti-hate legislation meaningfully recognises and revalorises disadvantaged and minoritized identity groups. While the stirring up hatred provisions might legitimate certain ways of being different from the ‘normal’ population, it does not address the distinction between ‘normal’ and ‘not-normal’; rather, the surrounding discourse often reinforces a distinction between those who are tolerant and those who

¹⁷ “Affecting Whiteness.”

¹⁸ See El-Enany, *(B)ordering Britain*, 6.

¹⁹ Hook, “Affecting Whiteness.” See also Puar, *Terrorist Assemblages*, 24; Crenshaw, “Race to the Bottom,” 57.

are tolerated. As Wendy Brown notes, “discourses of tolerance affirm difference and thereby naturalise existing power dynamics, instead of questioning the power dynamics that produce conceptions of difference in the first place.”²⁰ The insistence that marginalised groups should not be targets of overt campaigns of hatred does not, therefore, liberate them from processes of differentiation that continue to render them ‘other,’ potentially threatening and never completely and unconditionally ‘British.’ This is plain from the characterisation of Muslims as segregated and intolerant by some speakers during debates on the religious hatred offenses. At this time, the solution to racial tensions of ‘community cohesion’ communicated that ‘they’ are not enough like ‘us.’²¹ Revalorisation, then, insofar as it is an effect of the stirring up hatred provisions, is limited: it does not equate to the inclusion or enfranchisement of minoritized groups to the extent that they become incorporated as equal constituents within the valued, ‘normal,’ ‘deserving’ population; it does not address the institutionally entrenched fantasies of difference and sameness that perpetuate differentiation and exclusion,²² nor the corollary structures of unequal distribution.²³ Instead, the stirring up hatred offences have been co-opted in the task of reaffirming those fantasies, the myth of the tolerant British nation and the existing ‘order.’²⁴

Public order as a conceit of neutrality

So far, it has been argued that the stirring up hatred offences are complicit in the differentiation and essentialisation of both ‘the majority’ and minoritized groups. However, this complicity in the ordering of subjects is obscured, firstly by proclamations of concern for minoritized groups and denouncements of hatred, and secondly by the myth of the tolerant British nation that locates

²⁰ *Regulating Aversion*, 16.

²¹ Shilliam, *Race and the Undeserving Poor*, 123.

²² *Ibid.*, 36; Fraser, “From Redistribution to Recognition.”

²³ Spade, *Normal Life*, 50 and 61.

²⁴ See Puar, *Terrorist Assemblages*.

hatred in pathological folk devils operating on the fringes of ‘deserving’ society. Thirdly, as argued in this section, such ordering is masked by a “conceit of neutrality,”²⁵ whereby issues are framed as pertaining to public order or other ‘fundamental’ values in order to abstract the partisan interests and power relations at play.

Public order as the site of interest convergence

A certain level of affective intensity is required to motivate the passage of criminal law; this tends to involve contempt and disgust towards ‘perpetrators’ and compassion towards ‘victims.’²⁶ While a hegemonic disgust of racism, bigotry and homophobia developed and intensified throughout the time span of the research, facilitated first by the Holocaust and then by the sustained demonisation of ‘evil’ perpetrators, compassion for the victims of these hatreds has not developed in tandem. Thus, while deploring hatred and intolerance, opponents of the various stirring up hatred provisions argued that new legislation was not really needed because the harms it would protect against were not severe enough (‘mere offence’), because the supposed victim group was disproportionately powerful and therefore did not require protection (*ressentiment* narratives) and/or because the protections of the proposed legislation may be extended to dubious groups (e.g. cults). Each of these beliefs undermined compassion for victim groups and thereby undermined the extent to which their experiences of hatred were deemed worthy of legislative intervention. While numerous parliamentarians expressed compassion for victims of hatred, in terms of a threshold needed to pass legislation there seems to have been a consistent deficit of compassion throughout the life of the stirring up hatred offences. This deficit in compassionate legislative impetus, however, was compensated for by justifications based on broader fears, not just fears *for* the targets of hatred but fears *of* public disorder. This is not necessarily the fear that the spread of hatred will lead to personal experiences of violence, but refers instead to parliamentary anxieties

²⁵ Brown, *Regulating Aversion*, 7.

²⁶ Mason, “Hate Crime as a Moral Category.”

over the loss of control – and perhaps the loss of electoral support – that outbreaks of public disorder might represent. Such concerns over public order therefore provide the source of interest convergence, whereby the stirring up of hatred against minoritized groups is configured as a problem for the ruling classes.

Additionally, it is through these public order concerns that the powerfulness and volatility of the targets of hate speech contributes to, rather than undermines, the case for enacting stirring up hatred offences. We can see this clearly from concerns over anti-Fascist responses to antisemitic provocation in the POA36 debates and from concerns over race riots in the RRA and RRHA debates. Thus, even though the language of provocation that was used in s 5 POA36 was replaced with the language of incitement in the stirring up hatred offences, concerns about the disorderly reactions of the targets of hatred remained almost as prominent as concerns about those who might be inspired to hate. In the religious hatred debates of the 21st century, just as in the public order debates of 1936, the nature of the hatred – the extent to which it entrenches and exacerbates inequalities or the extent to which it violates principles of human dignity, for example – seemed to be less decisive than the perceived risk that it would provoke outbreaks of public disorder.

In relation to SO hatred, the influence of public order concerns is less apparent, making the inclusion of the SO hatred offence within public order legislation appear anomalous. There was, from some quarters, a deficit in compassion, as homosexuals were viewed as belonging to a powerful lobby (i.e. were not weak enough to be ideal victims) and were viewed as being provocative (i.e. were not innocent or discrete enough to be ideal victims). However, advocates of the SO provisions were not concerned about outbreaks of public violence, only that homosexuals would continue to be subjected to sporadic incidents of violence in public. The affective quota required to pass the legislation was instead fulfilled by the fearsomeness of an ideal perpetrator (black rap artists) and anxieties that British culture might be corrupted. Thus, rather than protecting ‘the peace’ from large-scale disturbances, greater emphasis was placed on protecting cultural

‘order’ by enforcing the boundary between the mythical tolerant British nation and its uncivilised ‘constitutive outside.’²⁷ This suggests that, in adding hatred on grounds of sexual orientation, the stirring up of hatred offences have diverged from previous notions of ‘public order’. However, the significance of this divergence seems limited by the persistence of features that are firmly rooted within conventional logics of public order legislation, such as interest convergence, the alienation of hateful subjectivities and the essentialisation and marginalisation of certain identity groups.

The convergence of interests in prohibiting the stirring up of hatred sees interests in addressing harms caused to minoritized groups co-opted by interests in preserving the peace, ‘order’ and therefore the status quo.²⁸ By responding to hatred only insofar as it poses a risk to ‘order,’ the maintenance of which is supposedly a universal interest, the law can avoid acknowledging or grappling with histories and politics of differentiation and inequality.²⁹ Attention is thus diverted from the reasons for the protest or the content of the speech.³⁰ Such an approach would no doubt be preferred by those who advocate a content or viewpoint ‘neutral’ approach to the regulation of speech. However, the depoliticisation of disorder – whether in the form of protest, disorderly conduct or stirring up hatred – amounts to a disinterest in whether structures of oppression and inequality are being challenged or reinforced.

Dividing and balancing rights and interests

The conviction that all ‘deserving’ people are invested in the maintenance of public order, and even that public order is a foundational prerequisite for the enjoyment of rights, established racial and religious hatred as a problem that concerns ‘society.’ Introducing a racial hatred offence under the subheading of ‘public order,’ as in the RRA65, can thus be seen as a strategy for broadening

²⁷ Butler, *Bodies that Matter*, 8; Hall, “Who Needs Identity?,” 17.

²⁸ See Neocleous, *Fabrication of Social Order*, 110; Keenan, “Bringing the Outside(r) In,” 305.

²⁹ Bourdieu, *Language and Symbolic Power*, 167.

³⁰ See El-Enany, “Innocence Charged with Guilt”; Goodall, “Challenging Hate Speech,” 225-6.

its appeal beyond ‘minority interests’ and enhancing its perceived legitimacy. That such a strategy was available at that time, however, reflects the extent to which public order itself had become accepted as a suitable subject of national legislation since the enactment of the POA36. The vision of public order set out in the comparatively modest POA36 was one of lively contention but with protections against outbreaks of violence. In contrast, the debates preceding the enactment of the POA86, which certainly did not indicate that the public order paradigm had attained an uncontested status, included descriptions of public order as a far more expansive entitlement of ‘the public’ not to be distressed or disturbed. Indeed, according to the more extreme perspectives expressed in the POA86 debates, British society was sufficiently advanced that there was simply no need for disruptive protest marches or demonstrations. This notion of public order can therefore be seen as premised on the myth of a natural and harmonious state of existence that would be realised if only certain problems could be overcome, or rather if only certain troublesome people could be adequately controlled. Current public order law therefore aspires to a static and subdued state of being, rather than to establish the boundaries of acceptable behaviour in a society that is naturally fractious and volatile.

As discussed in Chapter Seven, by viewing ‘orderliness’ as something in which the ‘deserving’ population is invested and to which they are entitled, those who are ‘disorderly’ – whether in the economic sense of not being ‘hard-working’ or successful enough or in the behavioural sense of acting in ways that are not respectable – are hewn from ‘the public’ and framed as its enemies. The crime against public order is no longer that of ‘breaching the peace,’ but is now one of obstructing the realisation of a desired way of life; it is a crime against the imagined community, of which the offender is no longer a valued member. The division of subjects into good and bad, victim and villain, orderly and disorderly, leads to the negation of histories, politics, intersections and liminalities, and thereby enables the uncompromised responsabilisation of individuals and the exoneration of the state from all complicity in social problems; the state is forced to intervene only as a reluctant saviour of the deserving population.

The neoliberal understanding of public order can therefore be seen as entangled in the stratification of subjectivities and the abjection of hatred/hateful subjects that is discussed above.

The apparent propensity of parliament to frame identity groups as discrete and to present them as in competition either with ‘the majority’ or with each other is insightful regarding the ways in which decisions about rights and interests have been made. Minoritized groups were either ‘folded into’ the protected population as deserving victims or ‘folded out’³¹ as excessive agitators – and sometimes both simultaneously – depending on whether they were deemed to be supporting or challenging the public order agenda. However, this approach has been obscured by repeated assertions that there must be a fair ‘balance’ between the rights and interests at issue. The research shows that such balancing was increasingly conducted in abstract and universalising terms that were disassociated from the groups whose rights or interests were at issue. Thus, power dynamics were erased from the balancing act and the resulting conclusions were presented as non-partisan, rational and universal. This took different forms in the different clusters of debates, which are worth reviewing here.

In the RRA65 debates, there was a sense that the right to free speech needed to be balanced against “the abhorrence which we all feel in matters of this kind.”³² Twenty years after the end of World War II, racial hatred could not easily be abstracted and viewed as a matter for ‘neutral’ balancing. While the RRA65 was presented as essentially concerned with public order in the sense of violence on the streets, the spectre of the Holocaust exemplified shared interests in containing racial hatred. In the RRA76 debates, a greater conflict of interests between identity groups was presented through the notion that there must be a balance between the rights of racialised people and the control of their immigration or between “the need for an effective sanction against racial incitement and individual freedom.”³³ Here, the interests of racialised groups in ‘fair’ treatment

³¹ Puar, *Terrorist Assemblages*.

³² Sharpies, HC 27 May 1966, col 944.

³³ Wells-Pestell, HL 20 July 1976, col 826.

were ‘balanced’ against the interests of the ‘white majority’ in the preservation of an exclusive British culture. Or, in other words, fears of racism were balanced against racist fears. In the POA86 debates, the balance became couched in a more abstract language of rights: a balance must be struck between public order and individual freedoms, or between the right to demonstrate and the right to go about one’s business unimpeded. Thus, the identities and politics of those whose interests are at issue are entirely written out of the equation, which pitted individual (selfish) interests against the purportedly universal and fundamental value of ‘order.’ The effect of this framing was to load the balance against anyone who might challenge the existing order in any way, including both racist and anti-racist activists, and in favour of those whose interests lie in preserving the existing order.³⁴

The tangled web of positions regarding the religious hatred offences was perhaps facilitated by the difficulty of clearly delineating ‘insider’ and ‘outsider’ interests. The balance between religious freedom and freedom of speech presented a tricky overlap between the interests of (civilised, British, white) Christians and other (uncivilised, foreign, non-white) religions, which made it difficult to protect the former without conceding too much to the latter, or to dismiss the concerns of the latter without simultaneously undermining the position of the former. If we apply the above analysis regarding the abjection of hatred from the valued population and its attachment to marginalised others, the ‘balance’ needed to problematise the intolerance of racialised and/or lower class bigots, but permit the free expression of middle class performers and clergymen, while remaining ostensibly ‘neutral.’ Thus, ‘minority interests’ were pitted against ‘our’ free speech, and the British tradition of tolerance was pitted against ‘their’ free speech. Viewing the challenge of legislating against religious hatred in this way provides an alternative explanation for the narrower scope of the religious hatred offences compared to the racial hatred offences and the

³⁴ See Neocleous, *Fabrication of Social Order*, 110.

inclusion of the free speech rider. The resulting compromise produced offences that could be used against abject groups, but which ‘respectable’ white Britons need not fear.³⁵

In the SO hatred debates, clear divisions between group interests were restored. Once more, the rights of minoritized groups were weighed against the universal value of free speech in a purportedly neutral balancing act. However, this abstraction of the issues through the language of rights masked the extent to which those rights were attached to particular groups with a particular history, i.e. sexual minorities that have been demonised, criminalised and marginalised, on the one hand, and Christian groups that have been exalted as central to British culture and that have been instrumental in the demonisation of homosexuals, on the other. Such a binary framing also erases any overlap in interests, not only negating the possibility of intersecting religious and homosexual identities but also as though sexual minorities are opposed to and have no investment in free speech. Similarly to the religious hatred debates, then, the challenge of the SO hatred provisions was to address the homophobic hatred of racialised and/or lower-class bigots without compromising the free speech of middle-class Christians. As noted earlier in this chapter, this became viable through the racialisation of potential offenders in combination with the narrow scope of the provisions and the free speech rider. Indeed, this reading of the debates is not contradicted by the fact that the first (and so far only) prosecution for stirring up hatred on grounds of sexual orientation resulted in custodial sentences for three Muslim defendants.³⁶

This analysis illustrates how positioning the rights and interests of minoritized and historically subjugated groups against the abstracted rights and interests of a fantastically righteous majority was presented as a fair and rational response to perceived conflicts. Values such as ‘freedom’ and ‘order’ have been shown to be fickle and prone to being co-opted to provide rhetorical weight and a conceit of neutrality to the interests of ‘the majority.’ Rather than being a means of reaching a decision, then, the rhetoric of balancing might cynically be viewed as a means

³⁵ Malik, “Extreme Speech and Liberalims,” 105.

³⁶ *R v Ali, Javed and Ahmed* 2012 WL 608645.

of legitimising certain outcomes – including the enactment of legislation that is in the interests of minoritized groups when they are found to converge with interests attributed to ‘the majority’ – and thus as a means of simultaneously masking and endorsing majoritarianism.

Implications for future reforms

At the time of writing, the Law Commission’s latest investigation into the adequacy of protection afforded by hate crime legislation is at the ‘pre-consultation’ phase. One aspect of this investigation is “to consider the specific statutory incitement of hatred offences under the Public Order Act 1986 and to make recommendations on whether they should be extended or reformed,” with ‘extension’ here referring to the addition of further identity categories.³⁷ In light of scholarship such as that of Nancy Fraser and Dean Spade,³⁸ we might take as a starting point for such consideration the question of what we want the stirring up hatred offences to do: do we wish them to confer ‘recognition’ or to facilitate some form of redistribution? Do we wish them to ameliorate the more overtly nasty effects of the system, or do we want them to facilitate a redesigning of the system? In this final section, it is posited that hate speech legislation has the potential to contribute to a more inclusive and equitable society and it is briefly considered what the findings of this project prescribe in order for such a potential to be reached.

Redefining ‘order’?

If we wish for the offences to continue to pursue a public order agenda, we must be clear about what public order means and cautious of assuming that it is self-evidently ‘good.’ This project demonstrates that, as pointed out by Mark Neocleous among others, ‘order’ has historically

³⁷ Law Commission, “Hate Crime,” <https://www.lawcom.gov.uk/project/hate-crime/>.

³⁸ Respectively, “From Redistribution to Recognition?” and *Normal Life*.

referred to the established distribution of privileges and entitlements in society; it is therefore inherently opposed to freedoms (of speech, assembly, protest) to challenge the status quo.³⁹ If we wish to pursue a politics of substantive equality *and* public order, then, this will require a considerable break with contemporary understandings of the latter term, i.e. it will require redefining what is understood as ‘good order’ to include the potential for redistribution and to exclude marginalisation. ‘Good order’ must not be about paternalistic demands for ‘integration,’ ‘cohesion’ and ‘tolerance,’ but about facilitating the full participation and enfranchisement of every member of society as equal constituents. Moreover, ‘good order’ cannot simply mean ‘orderliness’ and successful pacification; it cannot be politically neutral. ‘Good order’ should not, therefore, require all disturbances to be punished equally, but should punish those that seek to exclude, disenfranchise and entrench inequality while allowing for those that seek to include, enfranchise and redress inequality. In this way, the stirring up hatred legislation could conceivably contribute to a meaningful redistributive agenda.

To some extent, the work required here may have been initiated with the ability to prosecute stirring up hatred on the basis of intent and the addition of the SO hatred offence, both of which widened the concept of public disorder to encompass harms beyond direct threats to ‘the peace.’ Thus, the inclusion of SO hatred seems to allow for other categories, such as gender, transgender identity and disability, to be included within a public order framing by analogy. However, framing the stirring up hatred offences as public order offences continues to risk shifting discussions away from the specific harms – private as well as public – experienced by groups targeted by hatred. While several of the justifications made for the religious and SO hatred offences moved away from traditional public order rationales to focus more on harms to individuals, further work is required to shift the affective register attached to the rubric of public order away from fear and towards compassion.

³⁹ *Fabrication of Social Order.*

Confronting colonial logics I: unfixing identities

The pursuit of equality would also require addressing the current inequitable treatment of different identity categories and the preoccupation with establishing ‘genuine’ membership of particular groups. The distinction between hatred targeting adherents of a purportedly mono-ethnic religion and hatred targeting adherents of a multi-ethnic religion is not only untenable under the requirement of formal equality to treat like situations alike, but is also deeply problematic due to the extent to which it entrenches the types of differentiation that anti-hate legislation is supposed to address. The assessment of a group’s ethnic credentials for the purpose of establishing their legal rights is indefensible and reveals the extent to which technologies of governance honed in the colonies persist in the present. The discrepancies between the racial and religious hatred provisions and the approach of premising the offences on the identity of the targeted group rather than the content of the hatred are therefore urgent matters for reform.

If the current approach of treating identity groups as objectively discernible and fixating on their ‘authenticity’ persists, then the addition of further categories may lead to the further consolidation of divisions, ‘hierarchies of victimisation’ and regulation of identity group membership. Without addressing ‘the law’s propensity to classify,’ new categories will undergo attempts to be objectively delineated and new inclusions will simultaneously produce new exclusions. In order to avoid this, the rationale of the entire suite of stirring up hatred offences would need to be consciously overhauled to refocus on the properties of the incitement.

Confronting colonial logics II: myth-busting

The addition of the SO hatred offences exemplified the risk that advocating the ‘folding in’ of one group may coincide with the ‘folding out’ of another, and may therefore be premised on the reinforcement of an ‘us’ and ‘them’ divide. Strategically, appealing to the myth of a tolerant

British nation and fears that it might be corrupted by uncivilised foreign influences would seem to be the most effective means of advocating the expansion of the stirring up hatred offences. Indeed, the allure of such familiar narratives may be difficult to avoid: the binary associations of benevolent, tolerant, white, Britishness on the one hand and suspicious, intolerant, non-white, foreignness on the other are so well rehearsed within discourse surrounding hatred that such framings can be evoked with oblique and perhaps unintentional allusions. Associations between identities, values and affects that have become stuck will thus continue to operate within the discourse unless they are explicitly challenged through efforts to revalorise, to ‘un-essentialise’ and to ‘unstick.’ Such efforts must resist the compulsion to externalise hatred and to view it as an aberrant pathology to which abject ‘others’ are susceptible but to which the ‘respectable’ white middle classes are immune. This risk is perhaps most apparent in relation to misogyny, where advocacy of women’s rights has already coincided with the demonisation of other cultures,⁴⁰ but could also manifest in relation to other categories.

In order to resist civilisational narratives and the entrenchment of ‘normal’/‘deviant’ binaries, the myth of the tolerant nation must be confronted. An inclusive agenda cannot be pursued alongside the notion that British society is ‘naturally’ peaceful and virtuous, and that such a state can be returned to through the anthropophagy or anthropoemy of ‘enemies within.’ Equally, an inclusive agenda cannot be pursued alongside the notion that British ‘tradition’ is superior and unerringly righteous. Discussions on what we want from the stirring up hatred offences must therefore involve introspection and reflexivity and they must be open to implicating British culture and institutions.

⁴⁰ Puar, *Terrorist Assemblages*, 5-6.

Efficacy and proportionality

In allowing for consideration of institutional and societal complicities, we should also question the extent to which criminalising individuals for incidents of hate speech is the most effective means of facilitating equality and inclusion. This is not to suggest that such criminalisation is necessarily always inappropriate or inimical to such ends (although abolitionist arguments also warrant consideration), but to challenge the value and proportionality of applying potentially long prison sentences – often to racialised and marginalised individuals – so as to deter the stirring up of hatred and to convey the message that it is unacceptable.⁴¹ While the symbolic function of anti-hate legislation may be important for recognition and as a formal denouncement of hatreds, such laws are not widely understood by the public. Additionally, such formal gestures are substantially undermined by the incidence of stereotyping and scapegoating within political discourse and mainstream media, as well as the prevalence of hate speech online. We might therefore question whether the current stirring up hatred offences address the most potent instances of incitement to hatred.⁴² The Rabat Plan of Action, a UN document resulting from a series of expert workshops, could provide some useful guidance here. The Plan sets out six criteria for consideration in the criminalisation of hate speech, which can be summarised as: the social and political context of the expression; the status of the speaker; the intent of the speaker; the content of the expression; the extent and magnitude of the expression; and the likelihood and imminence of harm occurring as a result. Attention to the status of the speaker in particular might help to shift the focus of the offences from demonised outsiders to those who are likely to be more influential, even if – or perhaps precisely because – they and their language appear more ‘respectable.’

Additionally, responding to concerns that long prison sentences are ineffective deterrents, that heavy-handedness could bolster resentment and that it is counterintuitive for minoritized

⁴¹ See Lamble, “Queer Necropolitics.”

⁴² See Malik, “Extreme Speech and Liberalism,” 105.

groups to call for further expansions of police powers,⁴³ the stirring up hatred offences should perhaps be considered alongside other, non-custodial and extra-legal responses to hatred and proactive programmes. This should not in any way be a ‘downgrading’ of the issue, but rather a genuine and concerted effort to establish the most effective means of preventing and responding to a wide spectrum of hate speech, and with a view to facilitating inclusion and enfranchisement rather than merely ‘peace.’

Prognosis

As shown in Chapter Two, many commentators consider any form of hate speech legislation to be inherently problematic, primarily due to concerns over freedom of speech and/or the divisiveness of incorporating identity categories within the law. This project does not aim to quell or displace such perspectives, nor their ripostes, and nor is a case made for or against the inclusion of further specific identity categories. Instead, this project shines a light on various factors that should be confronted in future discussions on the provisions. Indeed, the critique of the stirring up hatred offences that is consolidated within this final chapter does not indicate an overall conclusion that they should be abandoned. For one thing, a degree of criminalisation of incitement to hatred is required under international law. Moreover, in terms of the symbolic functions of law, the reversal of protections against hate speech would be a very dangerous message to send. However, there is a lot of work to be done if the current stirring up hatred offences are to be reformulated in such a way as to pursue a redistributive equality agenda, avoid the essentialisation of identity groups and the segregation of ‘their’ interests, and focus on the most influential sources of hatred. Moreover, it feels as though such work, with all its introspection and critique of ‘Britishness,’ is against the current tide of mid-Brexit nationalism. Indeed, it would be unsatisfying for any reforms to be co-opted as evidence of the superior virtue of Britishness and/or to be passed as a consolation for

⁴³ See Spade, *Normal Life*.

enhanced immigration controls or discriminatory measures, as has occurred in the past. Equally, however, the current political climate makes careful introspective and inclusion-oriented work all the more necessary and urgent.

References

Hansard

Public Order Act 1936

House	Stage	Excerpt	Session/volume	Date
Lords	Pre-introduction	King's speech	1936-37/103	3 Nov 1936
Commons	Pre-introduction	Excerpt on s 5	1936-37/317	4 Nov 1936
Commons	Second reading	Full	1936-37/317	16 Nov 1936
Commons	Committee stage	Excerpt on s 1	1936-37/318	23 Nov 1926
Commons	Committee stage	Excerpt on s 5	1936-37/318	26 Nov 1936
Commons	Committee stage	Excerpt on s 5	1936-37/318	7 Dec 1936
Lords	Second reading	Full	1936-37/103	11 Dec 1936
Lords	Committee stage	Excerpt on s 5	1936-37/103	15 Dec 1936
Commons	Post-hoc	Full	1937-38/330	12 Dec 1937

Public Order Act 1963

House	Stage	Excerpts/topic	Session/volume	Date
Commons	Motion for leave to bring in a bill	Full	1961-62/664	1 Aug 1962
Commons	Questions to the Home Secretary	Question on the future amendment of the Public Order Act	1961-62/664	2 Aug 1962
Commons	Adjournment debate	Full debate on the limits of freedom of speech	1961-62/664	3 Aug 1962
Commons	Questions to the Home Secretary	Question on the future amendment of the Public Order Act	1962-63/666	8 Nov 1962

Commons	Statement by the Home Secretary	Full	1962-63/678	30 May 1963
Lords	Pre-introduction	Full	1962-63/250	30 May 1963
Lords	Second reading	Full	1962-63/250	20 June 1963
Lords	Committee	Full	1962-63/251	3 July 1963
Commons	Second reading	Full	1962-63/680	9 July 1963
Commons	Third reading	Full	1962/63/682	30 July 1963

Race Relations Act 1965

House	Stage	Excerpts/topic	Session/volume	Date
Commons	Pre-introduction	Excerpts in anticipation of the RRA	1964-65/709	23 Mar 1965
Commons	Second reading	Full	1964-65/711	3 May 1965
Commons	Amendments and third reading	Excerpts on ethnicity and churches as public places, third reading in full	1964-65/716	16 July 1965
Lords	Second reading	Full	1964-65/278	26 July 1965
Lords	Amendments	Excerpts on Clauses 6 and 7	1964-64/269	2 Aug 1965
Commons	Adjournment debate	Full	1966-67/727	4 May 1966
Commons	Adjournment debate	Full	1966-67/729	27 May 1966

Race Relations Act 1976

House	Stage	Excerpts/topic	Session/vol	Date
Commons	Second reading	Full	1975-76/906	4 Mar 1976

Commons	Amendments and third reading	Excerpt on incitement to hatred clause	1975-76/914	8 July 1976
Lords	Second reading	Full	1975-76/373	20 July 1976
Lords	Committee	Excerpt on incitement to hatred clause	1975-76/374	4 Oct 1976
Lords	Amendments and third reading	Excerpt on incitement to hatred clause	1975-76/375	15 Oct 1976
Commons	Consideration of Lords' amendments	Excerpt on incitement to hatred amendments	1975-76/918	27 Oct 1976
Lords	Consideration of amendments rejected by the Commons	Excerpt on incitement to hatred amendments	1975-76/377	15 Nov 1976

Public Order Act 1986

House	Stage	Excerpts/topic	Session/volume	Date
Commons	Discussion of White Paper	Full	1984-85/79	16 May 1985
Lords	Review	Full	1984-85/463	16 May 1985
Lords	Address in Reply to Her Majesty's Most Gracious Speech	Excerpt on the forthcoming Public Order Bill	1984-85/468	12 Nov 1985
Commons	Second reading	Full	1985-86/89	13 Jan 1986
Commons	Third reading	Excerpts on Clauses 1, 3, 4, 5, 17, 18, 19, 24 and Schedule 2	1985-86/96	30 Apr 1986
Lords	Second reading	Full	1985-86/476	13 June 1986
Lords	Committee	Excerpts on Clauses 4 and 5	1985-86/478	16 July 1986

Lords	Committee	Excerpts on Clause 12 and Schedule 2	1985-86/480	6 Oct 1986
Lords	Report	Full	1985-86/481	23 Oct 1986
Lords	Third reading	Comments on the Bill's passing	1985-86/481	29 Oct 1986
Commons	Consideration of Lord's amendments	Excerpt on Part III	1985-86/103	4 Nov 1986

Criminal Justice and Public Order Act 1994

House	Stage	Excerpts/topic	Session/volume	Date
Commons	Report	Excerpts on racial harassment	1993-94/241	12 Apr 1994
Lords	Committee	Excerpts on intentional harassment, alarm or distress (s 4A POA86) and incitement to religious hatred	1993-94/555	16 June 1994
Lords	Report	Excerpts on racially motivated violence and incitement to religious hatred	1993-94/556	12 July 1994

Crime and Disorder Act 1998

House	Stage	Excerpts/topic	Session/volume	Date
Lords	Committee	Excerpts on religiously aggravated offences	1997-98/585	12 Feb 1998

Religious Discrimination and Remedies Bill

House	Stage	Excerpts/topic	Session/volume	Date
Commons	First reading	Full	1997-98/307	3 Mar 1998

Anti-Terrorism, Crime and Security Act 2001

House	Stage	Excerpts/topic	Session/volume	Date
Commons	Second reading	Excerpts on Part 5	2001-02/375	19 Nov 2001
Commons	Committee	Full	2001-02/375	26 Nov 2001
Lords	Second reading	Excerpts on Part 5	2001-02/629	27 Nov 2001
Lords	Committee	Excerpts on Part 5	2001-02/629	28 Nov 2001
Lords	Committee	Excerpts on Part 5	2001-02/629	4 Dec 2001
Lords	Report	Excerpt on Part 5	2001-02/629	10 Dec 2001
Commons	Consideration of Lords' amendments	Full	2001-02/376	13 Dec 2001
Lords	Consideration of Commons' responses	Excerpt on Clause 39 of Part 5	2001-02/629	13 Dec 2001

Religious Offences Bill

House	Stage	Excerpts/topic	Session/volume	Date
Lords	Second reading	Full	2001-02/631	30 Jan 2002
Lords	Debate on Select Committee report	Full	2003-04/660	22 Apr 2004

Serious Organised Crime and Police Act 2005

House	Stage	Excerpts/topic	Session/volume	Date
Commons	Second reading	Excerpts primarily on religious hatred	2004-05/428	7 Dec 2004
Commons	Committee	Full	2004-05/429	20 Jan 2005
Commons	Report	Full	2004-05/430	7 Feb 2005

Lords	Second reading	Excerpts on religious hatred	2004-05/670	14 Mar 2005
Lords	Committee	Excerpt on the withdrawal of Clause 124	2004-05/671	5 Apr 2005

Racial and Religious Hatred Act 2006

House	Stage	Excerpts/topic	Session/volume	Date
Commons	Second reading	Full	2005-06/435	21 June 2005
Commons	Committee	Full	2005-06/435	28 June 2005
Commons	Committee	Full	2005-06/435	29 June 2005
Commons	Committee	Full	2005-06/435	30 June 2005
Commons	Report	Full	2005-06/436	7 July 2005
Lords	Second reading	Full	2005-06/674	11 Oct 2005
Lords	Committee	Full	2005-06/674	25 Oct 2005
Lords	Report	Full	2005-06/675	8 Nov 2005
Lords	Third reading	Full	2005-06/677	24 Jan 2006
Commons	Consideration of Lords' amendments	Full	2005-06/442	31 Jan 2006

Criminal Justice and Immigration Act 2008

House	Stage	Excerpts/topic	Volume/sitting	Date
Commons	Second reading	Excerpts on incitement to hatred on the grounds of sexual orientation	Vol 464	8 Oct 2007
Commons	Public Bill Committee	Excerpts on incitement to hatred on the grounds of sexual orientation	2 nd sitting	16 Oct 2007

Commons	Public Bill Committee	Excerpts on incitement to hatred on the grounds of sexual orientation	4 th sitting	18 Oct 2007
Commons	Public Bill Committee	Excerpts on incitement to hatred on the grounds of sexual orientation	15 th and 16 th sitting	29 Nov 2007
Commons	Report	Excerpt on blasphemy and incitement to hatred on the grounds of sexual orientation	Vol 470	9 Jan 2008
Lords	Second reading	Excerpts on incitement to hatred on the grounds of sexual orientation	Vol 698	22 Jan 2008
Lords	Committee	Excerpt on adding a free speech rider to the incitement to hatred provisions	Vol 699	3 Mar 2008
Lords	Report	Excerpts on prohibiting the association of homosexuality with child sex offences and adding a free speech rider to the incitement to hatred provisions	Vol 700	21 Apr 2008
Commons	Consideration of Lords' amendments	Excerpt on adding a free speech rider to the incitement to hatred provisions	Vol 475	6 May 2008
Lords	Consideration of Commons' reasons	Excerpt on adding a free speech rider to the incitement to hatred provisions	Vol 701	7 May 2008

Coroners and Justice Act 2009

House	Stage	Excerpts/topic	Session/volume	Date
Commons	Second reading	Excerpts on repealing s 29JA	Vol 487	26 Jan 2009
Commons	Public Bill Committee	Excerpts on repealing s 29JA	12 th sitting	3 Mar 2009

Lords	Second reading	Excerpts on repealing s 29JA	Vol 710	18 May 2009
Lords	Committee	Excerpts on repealing s 29JA	Vol 712	9 July 2009
Commons	Consideration of Lords' amendments	Excerpts on repealing s 29JA	Vol 499	9 Nov 2009
Lords	Consideration of Commons' reasons	Excerpts on repealing s 29JA	Vol 714	11 Nov 2009

Marriage (Same Sex Couples) Act 2013

House	Stage	Excerpts/topic	Session/volume	Date
Commons	Committee	Excerpts on, <i>inter alia</i> , amending s 29JA POA86	8 th sitting	28 Feb 2013
Lords	Committee	Full	Vol 746	17 June 2013
Commons	Consideration of Lords' amendments	Full	Vol 566	16 July 2013

UK Legislation (chronological)

Vagrancy Act 1824

Metropolitan Police Act 1839

Liverpool Improvement Act 1842

Conspiracy and Protection of Property Act 1875

Public Meetings Act 1908

Manual of Military Law 1914

Emergency Powers Act 1920

Special Restriction (Coloured Alien Seamen) Order of 1925

Incitement to Disaffection Act 1934

Public Order Act 1936

Highways Act 1959

Commonwealth Immigrants Act 1962

Public Order Act 1963

Race Relations Act 1965

Sexual Offences Act 1967

Caravan Sites Act 1968

Commonwealth Immigrants Act 1968

Theatres Act 1968

Race Relations Act 1968

Incitement to Hatred Act (Northern Ireland) 1970

Immigrants Act 1971

Race Relations Act 1976

Employment Act 1980

British Nationality Act 1981

Criminal Attempts Act 1981

Employment Act 1982

Trade Union Act 1984

Police and Criminal Evidence Act 1984

Public Order Act 1986

Public Order (Northern Ireland) Order 1987

Local Government Act 1988

Trade Union and Labour Relations (Consolidation) Act 1992

Criminal Justice and Public Order Act 1994

Protection from Harassment Act 1997

Crime and Disorder Act 1998

Human Rights Act 1998

Malicious Communications Act 1998

Anti-Terrorism, Crime and Security Act 2001

Adoption and Children Act 2002

Employment Equality (Religion or Belief) Regulations 2003

Local Government Act 2003

Criminal Justice Act 2003

Civil Partnership Act 2004

Serious Organised Crime and Police Act 2005

Racial and Religious Hatred Act 2006

Equality Act 2006

Terrorism Act 2006

Serious Crime Act 2007

Criminal Justice and Immigration Act 2008

Coroners and Justice Act 2009

Marriage (Same Sex Couples) Act 2013

Crime and Courts Act 2013

Other Legislation (chronological)

Indian Penal Code 1860

Convention on the Prevention and Punishment of the Crime of Genocide 1948

European Convention on Human Rights 1950

Convention on the Elimination of all Forms of Racial Discrimination 1965

International Covenant on Civil and Political Rights 1966

Convention on the Elimination of All Forms of Discrimination against Women 1979

Racial and Religious Tolerance Act 2001 (Victoria, Australia)

Convention on the Rights of Persons with Disabilities 2006

Council Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law 2008

UK Cases (alphabetical)

Beatty v Gillbanks [1882] 9 QBD 308.

Brutus v Cozens [1973] AC 854.

Chief Metropolitan Stipendiary Magistrate, ex parte Choudhury [1991] 1 QB 429.

Duncan v Jones [1936] 1 KB 218.

Ealing London Borough Council v Race Relations Board, [1972] AC 342.

Hammond v DPP [2004] EWHC 69 (Admin).

Jordan v Burgoyne [1963] 2 All ER 225.

Kamara v DPP [1973] 2 All ER 1242.

Malik v Bartram Personnel Group [1990] Employment Appeal Tribunal decision no. 4343/90, unreported.

Mandla and another v Dowell Lee and another [1983] 2 AC 548.

Mills v Cooper [1967] 2 QB 459.

Norwood v Department of Public Prosecutions [2003] EWHC 1564 (admin).

Nyazi v Rymans Ltd [1988] Employment Appeal Tribunal decision no. 6/88, unreported.

Procurator Fiscal v Wilson Sh.Ct 24 October 2002, unpublished.

R v Ali, Javed and Ahmed [2012] WL 608645.

R v Ambrose [1973] 57 Cr App R 538.

R v Department of Public Prosecutions, ex parte London Borough Council of Merton (1999) COD 358.

R v Caunt [1947].

R v Jones [1974] 59 Cr App R 120.

R v Sadique [2011] EWCA Crim 2872.

Smith v Trafford Housing Trust [2012] EWHC 3221 (Ch).

Thomas v National Union of Mineworkers (S Wales Area) [1985] Ind Rel L R 136.

Thomas v Sawkins [1935] 2 KB 249.

Wilson v Procurator Fiscal [2005] HCJAC97, 2005 SCCR 686.

Wise v Dunning [1902] 1 KB 167.

Other Cases (alphabetical)

Abrams v United States (1919) 250 US 616, 630.

Brandenburg v Ohio (1969) 395 US 444.

Campbell and Cosans v United Kingdom (1982) 4 EHRR 1.

East African Asians v United Kingdom (1973) 3 EHRR 76.

Gündüz v Turkey, 4 December 2003. Judgment, App. No. 35071/97.

Handyside v United Kingdom, 7 September 1976. Judgment, App. No. 5493/72.

Schenck v United States (1919) 249 US 47.

Toonen v Australia, 4 April 1994. Communication No. 488/1992, UN Doc CCPR/C/50/D/488/1992(1994).

Whitney v California (1927) 274 US 357.

Authorities and government documents

Cabinet Public Order Committee. “Report.” 25 March 1926, National Archives ref. CAB 24/179/36.

Cabinet. “Conclusions of a Meeting of the Cabinet Held at 10, Downing Street, S.W.1 on Wednesday, March 31st, 1926, at 11:30 A.M.” National Archives reference CAB 23/52/14.

Cantle, T. (Home Office). “Community Cohesion: A Report of the Independent Review Team” (2001,).

Crown Prosecution Service. “Policy for Prosecuting Cases of Homophobic and Transphobic Hate Crime.” (2007),
https://www.cps.gov.uk/sites/default/files/documents/legal_guidance/htc_policy.pdf.

Crown Prosecution Service. “Homophobic, Biphobic and Transphobic Hate Crime - Prosecution Guidance” (2017) <https://www.cps.gov.uk/legal-guidance/homophobic-biphobic-and-transphobic-hate-crime-prosecution-guidance>.

Crown Prosecution Service. “Hate Crime Annual Report 2017-18” (2018)
<https://www.cps.gov.uk/publication/hate-crime-report-2017-2018>.

Equality and Human Rights Commission. “Freedom of Expression” (2015)
<https://www.equalityhumanrights.com/en/publication-download/freedom-expression-legal-framework>.

European Commission on Racism and Intolerance. “ECRI General Policy Recommendation No. 15 on Combatting Hate Speech.” CRI(2016)15, 8 December 2015. <https://rm.coe.int/ecri-general-policy-recommendation-no-15-on-combating-hate-speech/16808b5b01>.

Home Affairs Committee. “Racial Attacks and Harassment.” Third Report, Session 1993/4, HC 71, Vol. 1 (1994).

Home Office. “Review of Public Order Law.” Cmnd. 9510 (1985).

House of Commons Justice Committee. “Post-legislative scrutiny of Part 2 (Encouraging or assisting crime) of the Serious Crime Act 2007.” HC 639 (2013).

Human Rights Committee. General Comment No. 11, “Article 20.” 29 July 1983.

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/download.aspx?symbolno=INT%2fCCPR%2fGEC%2f4720&Lang=en.

Human Rights Committee. General Comment No. 34, “Article 19: Freedoms of Opinion and Expression.” UN Doc CCPR/C/GC/34, 12 September 2011.

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/download.aspx?symbolno=CCPR%2fC%2fGC%2f34&Lang=en.

“Immigration from the Commonwealth.” Cmnd. 2739 (1965).

Labour Party. “The New Britain,” party manifesto (1964),

<http://labourmanifesto.com/1964/1964-labour-manifesto.shtml>.

Labour Party. “Britain Forward, Not Back,” party manifesto (2005),

<http://www.politicsresources.net/area/uk/ge05/man/lab/manifesto.pdf>.

Law Commission. “Offences Relating to Public Order,” Law Com No 123 (1983).

Law Commission. “Inchoate Liability for Assisting and Encouraging Crime.” Law Com No 300 (2006), <https://www.lawcom.gov.uk/document/inchoate-liability-for-assisting-and-encouraging-crime-report/>.

Law Commission. “Hate Crime: Should the Current Offences Be Extended?” Law Com No. 348 (2014), <https://www.lawcom.gov.uk/project/hate-crime-completed-report-2014/>.

Law Commission. “Hate Crime: The Case for Extending the Existing Offences.” Law Com No. 213 (2013), <https://www.lawcom.gov.uk/project/hate-crime-completed-report-2014/>.

Law Commission. “Abusive and Offensive Online Communications: A Scoping Report.” Law Com No 381 (2018), <https://www.lawcom.gov.uk/abusive-and-offensive-online-communications/>.

Law Commission. “Law Commission Review into Hate Crime Announced” (2018), <https://www.lawcom.gov.uk/law-commission-review-into-hate-crime-announced/>.

Macpherson, William. “The Stephen Lawrence Inquiry.” Cm. 4262-I (1999).

Ministry of Justice. “Serious Crime Act 2007: Implementation of Part 2.” Circular No. 2008/04 (29 September 2008).

“Racial Discrimination.” Cmnd. 6234 (1975).

Pyper, Douglas. “Trade Union Legislation 1979-2010.” House of Commons Library, 26 January 2017, Briefing Paper No. CBP 7882, <http://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7882#fullreport>.

Scarman, Leslie. “Red Lion Square Disorders of 15 June 1974.” Cmnd. 5919 (1975).

Select Committee on Metropolis Police Officers. “Report from the Select Committee on Metropolis Police Officers with Minute of Evidence, Appendix and Index” (29 June 1837).

Select Committee on Religious Offences in England and Wales. "Volume I – Report." HL 95-1 (2003).

Simon, John. "Public Order Bill: Memorandum of the Home Secretary." 3 November 1936, National Archives reference CAB 24/265/10.

United Nations High Commissioner for Human Rights, "Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence." UN Doc: A/HRC/22/17/Add.4 (2013), http://www.ohchr.org/Documents/Issues/Opinion/SeminarRabat/Rabat_draft_outcome.pdf

Bibliography

Addis, Adeno. "On Human Diversity and the Limits of Toleration." In *Ethnicity and Group Rights*, edited by Will Kymlicka and Ian Shapiro. New York: New York University Press, 1997.

Agamben, Giorgio. *Homo Sacer: Sovereign Power and Bare Life*. Stanford: Stanford University Press, 1998.

Ahmed, Sara. "The Organisation of Hate." *Law and Critique* 12 (2001): 345-365.

Ahmed, Sara. "Problematic Proximities: Or Why Critiques of Gay Imperialism Matter." *Feminist Legal Studies* 19 (2011): 119-132.

Ahmed, Sara. *The Cultural Politics of Emotion*. Edinburgh: Edinburgh University Press, 2014.

Ahmed, Sara. "Complaint as Feminist Pedagogy." *Annual Review of Critical Psychology* 15 (2018): 15-26.

Althusser, Louis. "Ideology and Ideological State Apparatuses." In *Lenin and Philosophy and Other Essays*, translated by Ben Brewster. New York: Monthly Review Press, 1971.

- Alkiviadou, Natalie. "Regulating Hatred: Of Devils and Demons?" *International Journal of Discrimination and the Law* 18, no. 4 (2018): 218-236.
- Alkiviadou, Natalie. "The Legal Regulation of Hate Speech: The International and European Frameworks." *Croatian Political Science Review* 55, no. 4 (2018): 203-229.
- Amnesty International, "#ToxicTwitter: Violence and Abuse Against Women Online" (2017)
<https://www.amnesty.org/download/Documents/ACT3080702018ENGLISH.PDF>.
- Anderson, Benedict. *Imagined Communities: Reflections on the Origins and Spread of Nationalism*. 2nd edn. London and New York: Verso, 2006.
- Anderson, Bridget. *Us and Them? The Dangerous Politics of Immigration Control*. Oxford: Oxford University Press, 2013.
- Anthias, Flora. "Intersections and Translocations: New Paradigms for Thinking about Cultural Diversity and Social Identities." *European Educational Research Journal* 10, no. 2 (2011): 204-217.
- Anthias, Flora. "Moving Beyond the Janus Face of Integration and Diversity Discourses: Towards an Intersectional Framing." *The Sociological Review* 61 (2013): 323-343.
- Ashworth, Andrew. "Criminalising Disrespect." *Criminal Law Review* (February 1995): 98-100.
- Audickas, Lukas and Richard Cracknell, "UK Election Statistics: 1918-2018: 100 years of Elections," House of Commons Briefing Paper No. CBP7529 (2018)
<https://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7529#fullreport>.
- Back, Les, Michael Keith, Azra Khan, Kalbir Shukra and John Solomos. "New Labour's White Heart: Politics, Multiculturalism and the Return of Assimilation." *Political Quarterly* 73, no. 4 (2002): 445-454.

- Bagguley, Paul and Yasmin Hussain. "Conflict and Cohesion: Official Constructions of 'Community' around the 2001 'Riots' in Britain." In *Returning (to) Communities: Theory, Culture and Political Practice of the Communal*, edited by Stefan Herbrechter and Michael Higgins. Amsterdam and New York: Rodopi, 2006.
- Bakalis, Chara. "The Victims of Hate Crime and the Principles of the Criminal Law." *Legal Studies* 37, no. 4 (2017): 718-738.
- Baker, C. Edwin. *Human Liberty and Freedom of Speech*. New York and Oxford: Oxford University Press, 1989.
- Baker, C. Edwin. "Autonomy and Hate Speech." In *Extreme Speech and Democracy*, edited by Ivan Hare and James Weinstein. Oxford: Oxford University Press, 2009.
- Barak, Azy. "Sexual Harassment on the Internet." *Social Science Computer Review* 23, no. 1 (2005): 77-92.
- Bauman, Zygmunt. *Life in Fragments*. Oxford: Blackwell, 1993.
- Beckman, Morris. *The 43 Group: Battling with Mosley's Blackshirts*. Stroud: History Press, 2013.
- Bell, Derrick A. "Brown v. Board of Education and the Interest-Convergence Dilemma." *Harvard Law Review* 93, no. 3 (1980): 518-533.
- Bell, Jeannine. *Policing Hatred: Law Enforcement, Civil Rights, and Hate Crime*. New York and London: New York University Press, 2002.
- Bennett, Theodore. *Cuts and Criminality: Body Alteration in Legal Discourse*. Farnham, Surrey and Burlington, VT: Ashgate, 2015.
- Berlant, Lauren. *The Queen of America Goes to Washington City*. Durham, NC and London: Duke University Press, 1997.

- Bialecki, Jon. "Eschatology, Ethics, and Ēthnos: Ressentiment and Christian Nationalism in the Anthropology of Christianity." *Religion and Society* 8, no. 1 (2017): 42-61.
- Bivins, Roberta. *Contagious Communities: Medicine, Migration, and the NHS in Post War Britain*. Oxford: Oxford University Press, 2015.
- Bleich, Erik. *The Freedom to be Racist? How the United States and Europe Struggle to Preserve Freedom and Combat Racism*. Oxford: Oxford University Press, 2011.
- Bleich, Erik. "What Is Islamophobia and How Much Is There? Theorizing and Measuring an Emerging Comparative Concept," *American Behavioral Scientist* 55, no. 12 (2011): 1581-1600.
- Bleich, Erik. "Defining and Researching Islamophobia." *Review of Middle East Studies* 46, no. 2 (2012): 180-189.
- Bleich, Erik. "From Race to Hate: A Historical Perspective." In *Hate, Politics, Law: Critical Perspectives on Combating Hate*, edited by Thomas Brudholm and Birgitte Schepelehn Johansen. New York: Oxford University Press, 2018.
- Borch, Christian. *Foucault, Crime and Power: Problematisations of Crime in the Twentieth Century*. Abingdon and New York: Routledge, 2015.
- Bourdieu, Pierre. "The Forms of Capital." In *Handbook of Theory and Research for the Sociology of Education*, edited by John Richardson. New York and London: Greenwood Press, 1986.
- Bourdieu, Pierre. *Language and Symbolic Power*, edited by John B. Thompson, translated by Gino Raymond and Matthew Adamson. Cambridge: Polity, 1991.
- Bourne, Jenny. "The Right Definition for the Right Fight." Institute of Race Relations, 23 May 2019. <http://www.irr.org.uk/news/right-definition-for-the-right-fight/>.

- Bowskill, Matt, Evanthia Lyons and Adrian Coyle. "The Rhetoric of Acculturation: When Integration Means Assimilation." *British Journal of Social Psychology* 46, no 4 (2007): 793-813.
- Boyd, Elizabeth A., Richard A. Berk and Karl M. Hamner. "'Motivated by Hatred or Prejudice': Categorisation of Hate-Motivated Crime in Two Police Divisions." *Law and Society Review* 30, no. 4 (1996): 819-850.
- Boyle, Kevin. "Overview of a Dilemma: Censorship versus Racism." In *Striking a Balance: Hate Speech, Freedom of Expression and Non-Discrimination*, edited by Sandra Coliver (London: Article 19 / Colchester: Human Rights Centre, University of Essex, 1992).
- Boyle, Kevin. "Hate Speech – The United States Versus the Rest of the World?" *Maine Law Review* 53, no. 2 (2001): 487-502.
- Box, Richard C. and Cheryl Simrell King. "The 'T'ruth is Elsewhere: Critical History." *Administrative Theory and Praxis* 22, no. 4 (2000): 751-771.
- Brake, Michael and Chris Hale. *Public Order and Private Lives: The Politics of Law and Order*. Oxford and New York: Routledge 1992.
- Brink, David O. "Millian Principles, Freedom of Expression and Hate Speech." *Legal Theory* 7, no. 2 (2001); 119-157.
- Brison, Susan J. "The Autonomy Defense of Free Speech." *Ethics* 108 (1998): 312–339.
- Brown, Alexander. "The Racial and Religious Hatred Act 2006: A Millian Response." *Critical Review of International Social and Political Philosophy* 11, no. 1 (2008): 1-24.
- Brown, Alexander. *Hate Speech Law: A Philosophical Examination* (New York and London: Routledge, 2015).

- Brown, Alexander. "The 'Who?' Question in the Hate Speech Debate: Part 1: Consistency, Practical, and Formal Approaches." *Canadian Journal of Law and Jurisprudence* 29, no. 2 (2016): 275-320.
- Brown, Alexander. "The 'Who?' Question in the Hate Speech Debate: Part 2: Functional and Democratic Approaches." *Canadian Journal of Law and Jurisprudence* 30, no. 1 (2017): 23-55.
- Brown, Wendy. *States of Injury: Power and Freedom in Late Modernity*. Princeton: Princeton University Press, 1995.
- Brown, Wendy. *Regulating Aversion: Tolerance in the Age of Identity and Empire*. Princeton: Princeton University Press, 2005.
- Brubaker, Rogers. "Ethnicity without Groups." *European Journal of Sociology* 43, no. 2 (2002): 163-189.
- Brudholm, Thomas. "Hatred Beyond Bigotry." In *Hate, Politics, Law: Critical Perspectives on Combating Hate*, edited by Thomas Brudholm and Birgitte Schepelehn Johansen. New York: Oxford University Press, 2018.
- Brustein, William I. *Roots of Hate: Anti-Semitism in Europe before the Holocaust*. Cambridge: Cambridge University Press 2003.
- Butler, Judith. *Bodies that Matter: On the Discursive Limits of 'Sex.'* New York and London: Routledge, 1993.
- Butler, Judith. *Excitable Speech: A Politics of the Performative*. New York and London: Routledge, 1997.
- Butler, Judith. *Gender Trouble*. 2nd edn. New York and London: Routledge, 2007.

- Buyse, Anthony. "Dangerous Expressions: the ECHR, Violence and Free Speech." *International and Comparative Law Quarterly* 63, no. 2 (2014): 491-503.
- Buyse, Anthony. "Words of Violence: 'Fear Speech,' or How Violent Conflict Escalation Relates to the Freedom of Expression." *Human Rights Quarterly* 36, no. 4 (2014): 779-797.
- Cameron, Deborah. *Working with Spoken Discourse*. London and Thousand Oaks, CA: Sage, 2001.
- Campbell, Alistair. "Independent Review of Hate Crime Legislation in Scotland: Final Report" (2018) <https://www.gov.scot/publications/independent-review-hate-crime-legislation-scotland-final-report/>.
- Campbell, Timothy C. and Adam Sitze. "Biopolitics: An Encounter." In *Biopolitics: A Reader*, edited by Timothy C. Campbell and Adam Sitze. Durham: Duke University Press, 2013.
- Cannie, Hannes and Dirk Voorhoof. "The Abuse Clause and Freedom of Expression in the European Human Rights Convention: An Added Value for Democracy and Human Rights Protection?" *Netherlands Quarterly of Human Rights* 29, no. 1 (2011): 54-83.
- Carmi, Guy. "Dignity - The Enemy from Within: A Theoretical and Comparative Analysis of Human Dignity as a Free Speech Justification." *University of Pennsylvania Journal of Constitutional Law* 9 (2007): 957-1001.
- Carter, Bob, Clive Harris and Shirley Joshi. "The 1951-55 Conservative Government and the Racialisation of Black Immigration." University of Warwick Policy Papers in Ethnic Relations No. 11 (1987).
- Cesarani, David. "An Embattled Minority: The Jews in Britain During the First World War." In *The Politics of Marginality: Race, the Radical Right and Minorities in Twentieth Century*

- Britain*, edited by Tony Kushner and Kenneth Lunn. Abingdon and New York: Frank Cass, 1990.
- Chakraborti, Neil and Jon Garland. "Reconceptualizing Hate Crime Victimization through the Lens of Vulnerability and 'Difference.'" *Theoretical Criminology* 16, no. 4 (2012): 499-514.
- Chakraborty, Aditya. "Integrate, Migrants are Told. But Can They Ever Be Good Enough for the Likes of Blair?" *The Guardian*, 24 April 2019, <https://www.theguardian.com/commentisfree/2019/apr/24/migrants-tony-blair-british-racism-victims>.
- Channing, Iain. *The Police and the Expansion of Public Order Law in Britain, 1829-2014*. Abingdon: Routledge, 2015.
- Christians, Louis-Léon. "Expert Workshop on the Prohibition of Incitement to National, Racial or Religious Hatred: Study for the Workshop on Europe." OHCHR, 2011. https://www.ohchr.org/documents/issues/expression/iccpr/vienna/viennaworkshop_backgroundstudy_en.pdf.
- Christie, Nils. "The Ideal Victim." In *From Crime Policy to Victim Policy: Reorienting the Justice System*, edited by Ezzat A. Fattah. Basingstoke: Macmillan, 1986.
- Chilton, Paul. *Analysing Political Discourse: Theory and Practice*. London and New York: Routledge, 2004.
- Chilton, Paul and Christina Schäffner. "Discourse and Politics." In *Discourse as Social Interaction*, edited by Teun A. van Dijk. London, Thousand Oaks and New Delhi: Sage, 1997.
- Citron, Danielle Keats. "Cyber Civil Rights." *Boston University Law Review* 89 (2009): 61-129.

- Cohen, Cathy J. "Straight Gay Politics: The Limits of an Ethnic Model of Inclusion." In *Ethnicity and Group Rights*, edited by Ian Shapiro and Will Kymlicka. New York and London: New York University Press, 1997.
- Cohen, Johnathan. "More Censorship or Less Discrimination? Sexual Orientation Hate Propaganda in Multiple Perspectives." *McGill Law Journal* 46 (2000): 69-104.
- Cohen, Joshua. "Freedom of Expression." *Philosophy and Public Affairs* 22, no. 3 (1993): 207-263.
- Cohen, Stanley. "The Punitive City: Notes on the Dispersal of Social Control." *Contemporary Crises* 3, no. 4 (1979): 339-363.
- Cohen, Stanley. *Folk Devils and Moral Panics: The Creation of the Mods and Rockers*. 3rd edition. London: Routledge 2002.
- Cohen, Steve. *Deportation is Freedom! The Orwellian World of Immigration Controls*. London and Philadelphia: Jessica Kingsley, 2006.
- Cohen-Almagor, Raphael. "J. S. Mill's Boundaries of Freedom of Expression: A Critique." *Philosophy* 92, no. 4 (2017): 565-596.
- Collier, Richard Stanley. "Family, Law and Gender: A Study of Masculinity and Law." PhD diss., University of Leicester, 1990.
- Cooper, Davina and Didi Herman. "Up Against the Property Logic of Equality Law: Conservative Christian Accommodation Claims and Gay Rights." *Feminist Legal Studies* 21, no. 1 (2013): 61-80.
- Copsey, Nigel. *Anti-Fascism in Britain*. Basingstoke and London: Palgrave Macmillan, 2000.
- Crenshaw, Kimberlé Williams. "Beyond Racism and Misogyny: Black Feminism and 2 Live Crew." In *Words that Wound: Critical Race Theory, Assaultive Speech and the First*

Amendment, edited by Mari J. Matsuda, Charles Lawrence, Richard Delgado and Kimberlé Williams Crenshaw. Boulder, CO and Oxford: Westview Press, 1993.

Crenshaw, Kimberlé Williams. "Race to the Bottom: How the Post-Race Revolution Became a Whitewash." *The Baffler* 35 (2017): 40-57.

Crown Prosecution Service. "Hate Crime Annual Report 2017-18" (2018)
<https://www.cps.gov.uk/publication/hate-crime-report-2017-2018>.

Crown Prosecution Service. "Homophobic, Biphobic and Transphobic Hate Crime - Prosecution Guidance" (2017) <https://www.cps.gov.uk/legal-guidance/homophobic-biphobic-and-transphobic-hate-crime-prosecution-guidance>.

D'Aoust, Anne-Marie. "Ties that Bind? Engaging Emotions, Governmentality and Neoliberalism: Introduction to the Special Issue." *Global Society* 28, no. 3 (2014): 267-276.

Davidson, Alan. "A New Tort for Mass Picketing: The Thomas Case and its Implications for Australia: Part One." *Western Australia Law Review* 18, no. 1 (1998): 138-166.

Dean, Mitchel. *Governmentality: Power and Rule in Modern Society*. 2nd edition. Los Angeles: Sage, 2010.

Defries, Harry. *Conservative Party Attitudes to Jews: 1900-1950*. London and Portland: Frank Cass, 2001.

Delgado, Richard. "Words that Wound: A Tort Action for Racial Insults, Epithets, and Name Calling." In *Words that Wound: Critical Race Theory, Assaultive Speech and the First Amendment*, edited by Mari J. Matsuda, Charles Lawrence, Richard Delgado and Kimberlé Williams Crenshaw. Boulder, CO and Oxford: Westview Press, 1993.

- Delgado, Richard and David Yun. "Pressure Valves and Bloodied Chickens: An Analysis of Paternalistic Objections to Hate Speech Regulation." *California Law Review* 82 (1994): 871-892.
- Delgado, Richard and David Yun. "The Neoconservative Case against Hate-Speech Regulation: Lively, D'Souza, Gates, Carter, and the Toughlove Crowd." *Vanderbilt Law Review* 47, no. 6 (1994): 1807-1825.
- Derrida, Jacques. "Structure, Sign and Play in the Discourse of the Human Sciences." In *Writing and Difference*, translated by Alan Bass. London: Routledge, 2001.
- Derrida, Jacques. "Difference." In *Literary Theory: An Anthology*. 2nd edition, edited by Julie Rivkin and Michael Ryan. Maiden, Massachusetts: Blackwell Publishing, 2004.
- Dixon, David. "Thatcher's People: The British Nationality Act 1981." *Journal of Law and Society* 10, no. 2 (1983): 161-180.
- Dixon, David. "Protest and Disorder: The Public Order Act 1986." *Critical Social Policy* 7, no. 19 (1987) 90-98.
- Douglas, Mary. *Risk and Blame*. London: Routledge 1992.
- Douglas, Mary. *Purity and Danger: An Analysis of Concepts of Pollution and Taboo*. London and New York: Routledge, 2003.
- Duff, R. A. and S. E. Marshall. "Criminalizing Hate?" In *Hate, Politics, Law: Critical Perspectives on Combating Hate*, edited by Thomas Brudholm and Birgitte Schepelern Johansen. New York: Oxford University Press, 2018.
- Duggan, Marian. "Homophobic Hate Crime in Northern Ireland." In *Hate Crime: Concepts, Policy and Future Directions*, edited by Neil Chakraborti. Abingdon: Willan Publishing, 2010.

- Duncan, Sheila. "Law's Sexual Discipline: Visibility, Violence, and Consent." *Journal of Law and Society* 22, no. 3 (1995): 326-352.
- Dworkin, Ronald. *A Matter of Principle*. Cambridge, MA and London: Harvard University Press, 1985.
- Dworkin, Ronald. "Foreword." In *Extreme Speech and Democracy*, edited by Ivan Hare and James Weinstein. Oxford: Oxford University Press, 2009.
- Easton, Susan. "Pornography as Incitement to Sexual Hatred." *Feminist Legal Studies* 3 (1995): 89-104.
- El-Enany, Nadine. "'Innocence Charged with Guilt': The Criminalisation of Protest from Peterloo to Millbank." In *Riot, Unrest and Protest on the Global Stage*, edited by David Pritchard and Francis Pakes. London: Palgrave Macmillan, 2014.
- El-Enany, Nadine. *(B)ordering Britain: Law, Race and Empire*. Manchester: Manchester University Press, 2020.
- Erel, Umut. "Migrating Cultural Capital: Bourdieu in Migration Studies." *Sociology* 44, no. 4 (2010): 642-660.
- Erentzen, Caroline, Regina A. Schuller and Robert C. Gardner. "Model Victims of Hate: Victim Blaming in the Context of Islamophobic Hate Crime." *Journal of Interpersonal Violence* (2018) <https://doi.org/10.1177/0886260518805097>.
- Esposito, Roberto. "The Immunization Paradigm." *Diacritics* 36, no. 2 (2006): 23-48.
- Esposito, Roberto. 'Biopolitics,' in *Biopolitics: A Reader*, edited by Timothy C. Campbell and Adam Sitze. Durham: Duke University Press, 2013.
- Evans, Mary. "Women and the Politics of Austerity: New Forms of Respectability." *British Politics* 11, no. 4 (2016): 438-451.

- Ewing, Keith D. and Conor Anthony Gearty, *The Struggle for Civil Liberties: Political Freedom and the Rule of Law in Britain, 1914-1945*. Oxford: Oxford University Press, 2001.
- Fairclough, Norman. *Critical Discourse Analysis: The Critical Study of Language*. 2nd edition. London: Routledge, 2013.
- Feinberg, Joel. *The Moral Limits of the Criminal Law: Volume 1: Harm to Others*. New York: Oxford University Press, 1987.
- Filipovic, Jill. "Blogging While Female: How Internet Misogyny Parallels Real-World Harassment" *Yale Journal of Law and Feminism* 19, no. 1 (2007): 295-303.
- Finlayson, Alan. "Ideology and Political Rhetoric." In *The Oxford Handbook of Political Ideologies*, edited by Michael Freeden, Lyman Tower Sargent and Marc Stears. Oxford: Oxford University Press.
- Fish, Stanley. *There is No Such Thing as Free Speech: And It's a Good Thing, Too*. New York: Oxford University Press, 1994.
- Fiss, Owen M. *The Irony of Free Speech*. Cambridge, MA and Oxford: Harvard University Press, 1996.
- Fitzpatrick, Peter. "Racism and the Innocence of Law." *Journal of Law and Society* 14, no. 1 (1987): 119-131.
- Foucault, Michel. *The Archaeology of Knowledge*, translated by Alan Sheridan. New York: Pantheon Books, 1972.
- Foucault, Michel. *The History of Sexuality: Volume 1: An Introduction*, translated by Robert Hurley. London: Allen Lane, 1979.
- Foucault, Michel. "The Order of Discourse." In *Untying the Text: A Post-Structuralist Reader*, edited by Robert Young. Boston and London: Routledge and Kegan Paul, 1981.

- Foucault, Michel. "Nietzsche, Genealogy, History." In *Language, Counter-Memory, Practice: Selected Essays and Interviews*, edited by Paul Rabinow. New York: Pantheon Books, 1984.
- Foucault, Michel. "Polemics, Politics and Problematizations: An Interview with Michel Foucault." By Paul Rabinow, in *The Foucault Reader*, edited by Paul Rabinow. New York: Pantheon Books, 1984.
- Foucault, Michel. "Governmentality." In *The Foucault Effect: Studies in Governmentality*, edited by Graham Burchell, Peter Miller and Colin Gordon. Chicago: University of Chicago Press, 1991.
- Foucault, Michel. *Discipline and Punish: The Birth of the Prison*. 2nd edition, translated by Alan Sheridan. New York: Vintage Books, 1995.
- Foucault, Michel. *Society Must Be Defended*, edited by Mauro Bertani and Alessandro Fontana, translated by David Macey. New York: Picador, 2003.
- Foster, Steve. "Racist Speech and Articles 10 and 17 of the European Convention on Human Rights." *Coventry Law Journal* 10, no. 1 (2005): 91-95.
- Fox, Christopher. "It's Hatred and Intolerance Not Fear." *Gay and Lesbian Issues and Psychology Review* 5, no. 3 (2009): 160-166.
- Franklin, Karen. "Good Intentions: The Enforcement of Hate Crime Penalty-Enhancement Statutes." *American Behavioral Scientist* 46 (2002): 154-172.
- Fraser, Nancy. "From Redistribution to Recognition? Dilemmas of Justice in a 'Post-Socialist' Age." *New Left Review* 212 (1995): 68-93.
- Gallie, W. B. "Essentially Contested Concepts." In *The Importance of Language*, edited by Max Black. Englewood Cliffs, NJ: Prentice-Hall, 1962.

- Gardiner, Becky. “‘It’s a Terrible Way to Go to Work’: What 70 Million Readers’ Comments on The Guardian Revealed about Hostility to Women and Minorities Online.” *Feminist Media Studies* 18, no. 4 (2018): 592-608.
- Garland, David. *The Culture of Control: Crime and Social Order in Contemporary Society*. Oxford: Oxford University Press, 2002.
- Garland, David. “What is a ‘History of the Present’? On Foucault’s Genealogies and their Critical Preconditions.” *Punishment and Society* 16, no. 4 (2014): 365-384.
- Garland, Jon and Paul Hodkinson. “‘F**king Freak! What the Hell Do You Think You Look Like?’: Experiences of Targeted Victimization Among Goths and Developing Notions of Hate Crime.” *British Journal of Criminology* 54, no. 4 (2014): 613-631.
- Garner, Steve. “The Moral Economy of Whiteness: Behaviours, Belonging and Britishness.” *Ethnicities* 12, no. 4 (2012): 445-464.
- Gelber, Kartharine. “Freedom of Political Speech, Hate Speech and the Argument from Democracy: The Transformative Contribution of Capabilities Theory.” *Contemporary Political Theory* 9, no. 3 (2010): 304-324.
- Gerstenfeld, Phyllis B. *Hate Crimes: Causes Controls and Controversies*. 3rd edition. Thousand Oaks, CA: Sage, 2013.
- Gilks, Mark. “The Security-Prejudice Nexus: ‘Islamist’ Terrorism and the Structural Logics of Islamophobia in the UK.” *Critical Studies on Terrorism* (2019)
<https://doi.org/10.1080/17539153.2019.1650874>.
- Gillroy, Paul. “The Myth of Black Criminality.” *Socialist Register* 19 (1982): 47-56.
- Gillroy, Paul. *There Ain’t No Black in the Union Jack: The Cultural Politics of Race and Nation*. Oxford and New York: Routledge, 2002.

- Ging, Debbie. "Alphas, Betas, and Incels: Theorizing the Masculinities of the Manosphere." *Men and Masculinities* (2017) <https://doi.org/10.1177/1097184X17706401>.
- Ging, Debbie and Eugenia Siapera. "Introduction: Special Issue on Online Misogyny." *Feminist Media Studies* 18, no. 4 (2018): 515-524.
- Goldberg, David Theo. *Racist Culture: Philosophy and the Politics of Meaning*. Oxford: Blackwell, 1993.
- Golder, Ben. "The Distribution of Death: Notes Towards a Bio-Political Theory of Criminal Law" In *New Critical Legal Thinking*, edited by Matt Stone, Illan rua Wall and Costas Douzinas. London: Birkbeck Law Press, 2012.
- Goodall, Kay. "Incitement to Religious Hatred: All Talk and No Substance?" *Modern Law Review* 70, no. 1 (2007): 89-113.
- Goodall, Kay. "Challenging Hate Speech: Incitement to Hatred on Grounds of Sexual Orientation in England, Wales and Northern Ireland." *International Journal of Human Rights* 13 no. 2-3 (2009): 211-232.
- Goodhart, A. L. "Thomas v. Sawkins: A Constitutional Innovation." *The Cambridge Journal of Law* 6, no. 1 (1936): 22-30.
- Goodrich, Peter. *Legal Discourse: Studies in Linguistics, Rhetoric and Legal Analysis*. London: Macmillan Press, 1987.
- Gordon, Gregory. "Hate Speech and Persecution: A Contextual Approach." *Vanderbilt Journal of Transnational Law* 46, no. 2 (2013): 303-373.
- Grabham, Emily. "Intersectionality: Traumatic Impressions." In *Intersectionality and Beyond: Law, Power and the Politics of Location*, edited by Emily Grabham, Davina Cooper, Jane Krishnadas and Didi Herman. Abingdon and New York: Routledge-Cavendish, 2009.

- Grattet, Ryken, Valerie Jenness and Theodore R. Curry, "The Homogenization and Differentiation of Hate Crime Law in the United States, 1978 to 1995: Innovation and Diffusion in the Criminalization of Bigotry." *American Sociological Review* 63, no. 2 (1998): 286-307.
- Grattet, Ryken and Valerie Jenness. "The Reconstitution of Law in Local Settings: Agency Discretion, Ambiguity, and Surplus of Law in the Policing of Hate Crime." *Law and Society Review* 39, no. 4 (2005): 893-941.
- Gross, Kimberly A. and Donald R. Kinder. "A Collision of Principles? Free Expression, Racial Equality and the Prohibition of Racist Speech." *British Journal of Political Science* 28, no. 3 (1998): 445-471.
- Haiman, Franklyn S. *'Speech Acts' and the First Amendment*. Carbondale, IL: Southern Illinois University Press, 1993.
- Hall, Nathan. *Hate Crime*. 2nd edn. London and New York: Routledge, 2013.
- Hall, Stuart, Chas Critcher, Tony Jefferson, John Clarke and Brian Roberts, *Policing the Crisis: Mugging, the State and Law and Order*. London and Basingstoke: Macmillan Press, 1978.
- Hall, Stuart. "Who Needs Identity?" In *Identity: A Reader*, edited by Paul du Gay, Jessica Evans and Peter Redman. London: Sage Publications, 2000.
- Halliday, Fred. "'Islamophobia' Reconsidered." *Ethnic and Racial Studies* 22, no. 5 (1999): 892-902.
- Hare, Ivan. "Crosses, Crescents and Sacred Cows: Criminalising Incitement to Religious Hatred." *Public Law* (2006): 521-538.

- Hare, Ivan. "Extreme Speech Under International and Regional Human Rights Standards." In *Extreme Speech and Democracy*, edited by Ivan Hare and James Weinstein. Oxford: Oxford University Press, 2009.
- Hare, Ivan. "Free Speech and Incitement to Hatred on Grounds of Disability and Transgender Identity: The Law Commission's Proposals." *Public Law* (2015): 385-394.
- Haraway, Donna J. "The Biopolitics of Postmodern Bodies: Constitutions of Self in Immune System Discourse." In *Simians, Cyborgs and Women: The Reinvention of Nature*. New York: Routledge, 1991.
- Haritaworn, Jin. "Queer Injuries: The Racial Politics of Homophobic Hate Crime in Germany." *Social Justice* 37, no. 1 (2010): 69-89.
- Harris, Lasana T. and Susan T. Fiske. "Dehumanized Perception: A Psychological Means to Facilitate Atrocities, Torture, and Genocide?" *Zeitschrift für Psychologie* 219, no. 3 (2011): 175-181.
- Harvey, Andy. "Regulating Homophobic Hate Speech: Back to Basics about Language and Politics." *Sexualities* 15, no. 2 (2012): 191-206.
- Heinze, Eric. "Viewpoint Absolutism and Hate Speech." *Modern Law Review* 69, no. 4 (2006): 543-82.
- Heinze, Eric. "Cumulative Jurisprudence and Human Rights: The Example of Sexual Minorities and Hate Speech." *International Journal of Human Rights* 13 (2009): 193-209.
- Heinze, Eric. "Wild-West Cowboys Versus Cheese-Eating Surrender Monkeys: Some Problems in Comparative Approaches to Hate Speech." In *Extreme Speech and Democracy*, edited by Ivan Hare and James Weinstein. Oxford: Oxford University Press, 2009.

- Hentoff, Nat. *Free Speech for Me – But not for Thee: How the American Left and Right Relentlessly Censor Each Other*. New York: Harper Collins, 1992.
- Hepple, B. A. “The Race Relations Acts, 1965 and 1968.” *University of Toronto Law Review* 19, no. 2 (1969): 248-257.
- Herman, Didi. *An Unfortunate Coincidence: Jews, Jewishness, and English Law*. Oxford: Oxford University Press, 2011.
- Herron, Rachel. “The Role of Parliamentary Rhetoric in Facilitating the Racial Effect of the Stop and Search Powers in Section 44 of the Terrorism Act 2000.” In *Law and Language: Current Legal Issues: Volume 15*, edited by Michael Freeman and Fiona Smith. Oxford: Oxford University Press, 2013.
- Honig, Bonnie. *Democracy and the Foreigner*. Princeton and Oxford: Princeton University Press, 2001.
- Hook, Derek. “Affecting Whiteness: Racism as Technology of Affect.” London: LSE Research Online, 2007. <http://eprints.lse.ac.uk/archive/00000956>.
- hooks, bell. *Ain't I a Woman? Black Women and Feminism*. London: Pluto Press, 1982.
- Hiro, Dilip. *Black British, White British*. London: Eyre and Spottiswoode, 1971.
- Idriss, Mohammad M. “Religion and the Anti-Terrorism, Crime and Security Act 2001” *Criminal Law Review* (November 2002): 890-891.
- Iganski, Paul. “Hate Crimes Hurt More.” *American Behavioral Scientist* 45, no. 4 (2001): 626-638.
- Ignatiev, Noel. *How the Irish Became White*. New York and London: Routledge, 1995.

- Ilie, Cornelia. "Identity Co-Construction in Parliamentary Discourse." In *European Parliaments Under Scrutiny: Discourse Strategies and Interaction*, edited by Cornelia Ilie. Amsterdam and Philadelphia: John Benjamins Publishing Company, 2010.
- Ish-Shalom, Piki. "The Rhetorical Capital of Theories: The Democratic Peace and the Road to the Roadmap." *International Political Science Review* 29, no. 3 (2008): 281-301.
- Jackson, Will. "Securitization as Depoliticization: Depoliticization as Pacification." *Socialist Studies* 9, no. 2 (2013): 146-166.
- Jackson, Will, Joanna Gilmore and Helen Monk, "Policing Unacceptable Protest in England and Wales: A Case Study of the Policing of Anti-Fracking Protests," *Critical Social Policy* 39, no. 1 (2019): 23-43.
- Jacobs, James B. and Kimberly Potter. "Hate Crimes: A Critical Perspective." *Crime and Justice* 22 (1997): 1-50.
- Jacobs, James B. and Kimberly Potter. *Hate Crimes: Criminal Law and Identity Politics*. New York: Oxford University Press, 2001.
- Jane, Emma A. "'Your a Ugly, Whorish, Slut': Understanding E-Bile." *Feminist Media Studies* 14, no. 4 (2014): 531-546.
- Jane, Emma A. "Systemic Misogyny Exposed: Translating Rapeglish from the Manosphere with a Random Rape Threat Generator." *International Journal of Cultural Studies* 21, no. 6 (2018): 661-680.
- Jane, Emma A. "Gendered Cyberhate as Workplace Harassment and Economic Vandalism." *Feminist Media Studies* 18, no. 4 (2018): 575-591.

- Jenness, Valerie. "Managing Differences and Making Legislation: Social Movements and the Racialization, Sexualization, and Gendering of Federal Hate Crime Law in the US, 1985-1998." *Social Problems* 46, no. 4 (1999): 548-571.
- Jenness, Valerie and Kendal Broad. *Hate crimes: New Social Movements and the Politics of Violence*. New Brunswick and London: Aldine Transaction, 1997.
- Jenness, Valerie and Ryken Grattet, *Making Hate a Crime: From Social Movement to Law Enforcement*, New York: Russell Sage Foundation, 2001.
- Jivraj, Suhraiya. "Stooping a Racist March: Activism Beyond the Incommensurability of (Homo)Sexuality and Religion." In *Decolonizing Sexualities: Transnational Perspectives*, edited by Sandeep Bakshi, Suhraiya Jivraj and Silvia Posocco. Oxford: Counterpress, 2016.
- Johnson, Helen. "Questioning the Fantasy of Difference." *ARIEL* 32, no. 1 (2001): 53-67.
- Johnson, Paul and Robert M. Vanderbeck. *Law, Religion and Homosexuality*. Oxford and New York: Routledge, 2014.
- Kaefer, Florian, Juliet Roper and Paresha Sinha. "A Software-Assisted Qualitative Content Analysis of News Articles: Examples and reflections." *Forum: Qualitative Social Research* 16, no. 2 (2015) <http://dx.doi.org/10.17169/fqs-16.2.2123>.
- Keenan, Sarah. "Bringing the Outside(r) In: Law's Appropriation of Subversive Identities." *Northern Ireland Legal Quarterly* 64, no. 3 (2013): 299-316.
- Kubrin, Charis E. and Erik Nielson. "Rap on Trial." *Race and Justice* 4, no. 3 (2014): 185-211.
- Lamble, Sarah. "Retelling Racialized Violence, Remaking White Innocence: The Politics of Interlocking Oppressions in Transgender Day of Remembrance." *Sexuality Research and Social Policy* 5, no. 1 (2008): 24-42.

- Lamble, Sarah. "Queer Necropolitics and the Expanding Carceral State: Interrogating Sexual Investments in Punishment." *Law and Critique* 29 (2013): 229–253.
- Langton, Rae. "Beyond Belief: Pragmatics in Hate Speech and Pornography." In *Speech and Harm: Controversies over Free Speech*, edited by Ishani Maitra and Mary Kate McGowan. Oxford, Oxford University Press, 2012.
- Lasson, Kenneth. "Racism in Great Britain: Drawing the Line on Free Speech." *Boston College Third World Law Journal* 7, no. 2 (1987): 161-181.
- Lawrence, Charles. "If He Hollers Let Him Go: Regulating Racist Speech on Campus." In *Words that Wound: Critical Race Theory, Assaultive Speech and the First Amendment*, edited by Mari J. Matsuda, Charles Lawrence, Richard Delgado and Kimberlé Williams Crenshaw. Boulder, CO and Oxford: Westview Press, 1993.
- Lawrence, Frederick M. *Punishing Hate: Bias Crimes under American Law*. Cambridge, MA and London: Harvard University Press, 2002.
- Lewis, D. S. *Illusions of Grandeur: Mosley, Fascism and British Society, 1931-81*. Manchester: Manchester University Press, 1987.
- Lillian, Donna. "A Thorn by Any Other Name: Sexist Discourse as Hate Speech." *Discourse and Society* 18, no. 6 (2007): 719-740.
- Liu James H. and Duncan Mills. "Modern Racism and Neo-liberal Globalization: The Discourses of Plausible Deniability and their Multiple Functions." *Journal of Community and Applied Social Psychology* 16 (2006): 83-99.
- Lobba, Paolo. "Holocaust Denial Before the European Court of Human Rights: Evolution of an Exceptional Regime." *European Journal of International Law* 26, no.1 (2015): 237-253.

- London, Louise. *Whitehall and the Jews, 1933-1948: British Immigration Policy, Jewish Refugees and the Holocaust*. Cambridge and New York: Cambridge University Press, 2000.
- Luhmann, Niklas. "Are There Still Indispensable Norms in Our Society?" *Soziale Systeme* 14, no. 1 (2008): 18-37.
- Luke, Allen. "Beyond Science and Ideology Critique: Developments in Critical Discourse Analysis." *Annual Review of Applied Linguistics* 22 (2002): 96-110.
- Lunny, Allyson M. *Debating Hate Crime: Language, Legislatures and the Law in Canada*. Vancouver and Toronto: UBC Press, 2017.
- MacKinnon, Catharine A. *Only Words*. Cambridge, MA: Harvard University Press, 1996.
- Macklin, Graham. *Very Deeply Dyed in Black: Sir Oswald Mosley and the Resurrection of British Fascism after 1945*. London and New York: I. B. Tauris, 2007.
- Mahmud, Tayyab. "Colonialism and Modern Constructions of Race: A Preliminary Inquiry." *University of Miami Law Review* 52, no. 4 (1999): 1219-1246.
- Marcus, George. "Emotions in Politics." *Annual Review of Political Science* 3 (2000): 221-250.
- Malik, Maleiha. "Extreme Speech and Liberalism." In *Extreme Speech and Democracy*, edited by Ivan Hare and James Weinstein. Oxford: Oxford University Press, 2009.
- Malik, Maleiha. "Religious Freedom, Free Speech and Equality: Conflict or Cohesion." *Res Publica* 17, no. 1 (2011): 21-40.
- Martin, James. "The Rhetorical Satisfactions of Hate Speech." In *Fomenting Political Violence: Fantasy, Language, Media, Action*, edited by Steffen Krüger, Karl Figlio and Barry Richards. Cham: Palgrave Macmillan, 2018.

- Martin, James. "Capturing Desire: Rhetorical Strategies and the Affectivity of Discourse." *British Journal of Politics and International Relations* 18, no 1. (2016): 143-160.
- Marwick, Alice E. and Robyn Caplan. "Drinking Male Tears: Language, the Manosphere, and Networked Harassment." *Feminist Media Studies* 18, no. 4 (2018): 543-559.
- Mason, Gail. "Hate Crime and the Image of the Stranger." *British Journal of Criminology* 45, no. 6 (2005): 837-859.
- Mason, Gail. "Hate Crime as a Moral Category: Lessons from the Snowtown Case." *Australian and New Zealand Journal of Criminology* 40, no. 3 (2007): 249-271.
- Mason, Gail. "Victim Attributes in Hate Crime Law." *British Journal of Criminology* 54 (2014): 161-179.
- Mason-Bish, Hannah. "We Need to Talk about Women: Examining the Place of Gender in Hate Crime Policy." in *Responding to Hate Crime*, edited by Neil Chakraborti and Jon Garland. Bristol: Policy Press, 2014.
- Massaro, Toni. "Equality and Freedom of Expression: The Hate Speech Dilemma." *William & Mary Law Review* 32, no. 2 (1991): 211-265.
- Matsuda, Mari. "Public Response to Racist Speech: Considering the Victim's Story." In *Words that Wound: Critical Race Theory, Assaultive Speech and the First Amendment*, edited by Mari J. Matsuda, Charles Lawrence, Richard Delgado and Kimberlé Williams Crenshaw. Boulder, CO and Oxford: Westview Press, 1993.
- Mbembe, Achille. "Necropolitics," translated by Libby Meintjes. *Public Culture* 15, no. 1 (2003): 11-40.
- McClintock, Anne. *Imperial Leather: Race, Gender and Sexuality in the Colonial Contest*. New York and London: Routledge, 1995.

- McCulloch, Jude and Sharon Pickering. "Pre-Crime and Counter-Terrorism: Imagining Future Crime in the 'War on Terror.'" *The British Journal of Criminology* 49, no. 5 (2009): 628-645.
- McDevitt, Jack, Jennifer Balboni, Luis Garcia and Joann Gu. "Consequences for Victims: A Comparison of Bias- and Non-Bias-Motivated Assaults," *American Behavioral Scientist* 45, no. 4 (2001): 697-713.
- McGonagle, Tarlach. Expert Paper, "The Council of Europe against Online Hate Speech: Conundrums and Challenges." (Council of Europe, 2014) <https://rm.coe.int/16800c170f>.
- McGowan, Mary Kate. "Oppressive Speech." *Australasian Journal of Philosophy* 87, no. 3 (2009): 389-407.
- Meer, Nasar. "The Politics of Voluntary and Involuntary Identities: Are Muslims in Britain an Ethnic, Racial or Religious Minority?" *Patterns of Prejudice* 42, no. 1 (2008): 61-81.
- Meyer, Doug. "Evaluating the Severity of Hate-motivated Violence: Intersectional Differences among LGBT Hate Crime Victims." *Sociology* 44, no. 5 (2010): 980-995.
- Mayring, Philipp. "Qualitative Content Analysis: Theoretical Foundation, Basic Procedures and Software Solutions." (Klagenfurt, 2014)
http://www.ssoar.info/ssoar/bitstream/handle/document/39517/ssoar-2014-mayring-Qualitative_content_analysis_theoretical_foundation.pdf?sequence=1.
- Mill, John Stuart. *On Liberty*. Kitchener: Batoche Books, 2001.
- Mills, Catherine. "Efficacy and Vulnerability: Judith Butler on Reiteration and Resistance." *Australian Feminist Studies* 15, no. 32 (2000): 265-279.
- Mison, Robert B. "Homophobia in Manslaughter: The Homosexual Advance an Insufficient Provocation." *California Law Review* 80 (1992): 133-178.

- Modood, Tariq. "Muslims, Incitement to Hatred and the Law." in *Liberalism, Multiculturalism and Toleration*, edited by John Horton. New York: Palgrave Macmillan, 1993.
- Modood, Tariq. "The Liberal Dilemma: Integration or Vilification." *International Migration* 44, no. 5 (2006): 4-7.
- Moher, James G. "Trade Unions and the Law: History and a Way Forward?" *History and Policy* (17 September 2007), <http://www.historyandpolicy.org/policy-papers/papers/trade-unions-and-the-law-history-and-a-way-forward>.
- Moran, Leslie J. "Affairs of the Heart: Hate Crime and the Politics of Crime Control." *Law and Critique* 12, no. 3 (2001): 331-344.
- Moran, Leslie J. "Invisible Minorities." *Criminology and Criminal Justice* 7, no. 4 (2007): 417-441.
- Moran, Leslie J. "LGBT Hate Crime." In *Routledge Handbook on Hate Crime*, edited by Nathan Hall, Abbee Corb, Paul Giannasi and John G. D. Grieve. London and New York: Routledge, 2014.
- Moran, Leslie J. and Andrew N. Sharpe. "Violence, Identity and Policing: The Case of Violence against Transgender People." *Criminal Justice* 4, no. 4 (2004): 395-417.
- Moran, Leslie J. and Beverley Skeggs. *Sexuality and the Politics of Violence and Safety*. London and New York: Routledge, 2004.
- Mosley, Oswald. *Fascism: 100 Questions Asked and Answered*. London: Black House Publishing Ltd, 2017.
- Mullany, Louise and Loretta Tricket. "Misogyny Hate Crime Evaluation Report" (2018) <http://www.nottinghamwomenscentre.com/wp-content/uploads/2018/07/Misogyny-Hate-Crime-Evaluation-Report-June-2018.pdf>.

Murphy, Meghan. “‘TERF’ Isn’t Just a Slur, It’s Hate Speech.” *Feminist Current*, 21 September 2017, <https://www.feministcurrent.com/2017/09/21/terf-isnt-slur-hate-speech/>.

Mutua, Makau. *Human Rights: A Political and Cultural Critique*. Philadelphia: University of Pennsylvania Press, 2002.

National Council for Civil Liberties. *Report of a Commission of Inquiry into Certain Disturbances of Thurloe Square, south Kensington on March 22nd 1936*. London: National Council for Civil Liberties, 1936.

Neller, Jen K. “The Need for New Tools to Break the Silos: Identity Categories in Hate Speech Legislation.” *International Journal for Crime, Justice and Social Democracy* 7, no. 2 (2018): 75-90.

Neller, Jen K. “Hate Speech Law and Equality: A Cautionary Tale for Advocates of ‘Stirring Up Gender Hatred’ Offences.” In *Towards Gender Equality: Clashes in Law*, edited by David Davies, Gizem Guney and Po-Han Lee. London: Palgrave, forthcoming.

Neocleous, Mark. *The Fabrication of Social Order: A Critical Theory of Police Power*. London: Pluto Press, 2000.

Neocleous, Mark. “War as Peace, Peace as Pacification.” *Radical Philosophy* 159 (January/February 2010): 8-17.

Neocleous, Mark, George Rigakos and Tyler Wall, “On Pacification: Introduction to the Special Issue,” *Socialist Studies* 9, no. 2 (2013): 1-6.

Neu, Jerome. *On Loving Our Enemies: Essays in Moral Psychology*. Oxford: Oxford University Press, 2012.

Nielsen, Cynthia. *Foucault, Douglas, Fanon, and Scotus in Dialogue: On Social Construction and Freedom*. New York: Palgrave Macmillan, 2013.

Nietzsche, Friedrich. *On the Genealogy of Morals*, edited by Keith Ansell-Pearson, translated by Carol Diethe. Cambridge: Cambridge University Press, 2006.

Norrie, Alan W. *Law and the Beautiful Soul*. London: GlassHouse Press, 2005.

Nussbaum, Martha C. *Political Emotions: Why Love Matters for Justice*. Cambridge, MA and London: Bellknap, 2013.

Olson, Joel. "Whiteness and the Polarization of American Politics." *Political Research Quarterly* 61, no. 4 (2008): 704-718.

Orwell, George. "Politics and the English Language." (1946)
http://www.orwell.ru/library/essays/politics/english/e_polit/.

Orwell, George. *Nineteen Eighty-Four*. New York: Harcourt Brace Jovanovich: 1949.

Osgerby, Bill. *Youth Media*, 2nd edn. London and New York: Routledge, 2005.

Oyediran, Joanna. "The United Kingdom's Compliance with Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination." In *Striking a Balance: Hate Speech, Freedom of Expression and Non-Discrimination*, edited by Sandra Coliver. London: Article 19 / Colchester: Human Rights Centre, University of Essex, 1992.

Paltridge, Brian. *Discourse Analysis: An Introduction*, 2nd edition. London and New York: Bloomsbury, 2012.

Parris, Matthew. "I Oppose a 'Gay-Hate' Law Because that is not what Criminal Legislation is for." *The Spectator*, 5 December 2007, <https://www.spectator.co.uk/2007/12/i-oppose-a-gayhate-law-because-that-is-not-what-criminal-legislation-is-for/>.

Pathak, Pathik. *The Future of Multicultural Britain: Confronting the Progressive Dilemma*. Edinburgh: Edinburgh University Press, 2008.

- Pearson, Geoffrey. *Hooligan: A History of Respectable Fears*. London and Basingstoke: Macmillan, 1983.
- Percy-Smith, Janie and Paddy Hillyard, "Miners in the Arms of the Law: A Statistical Analysis." In *The State v the People: Lessons from the Coal Dispute*, edited by Phil Scraton and Phil Thomas. Oxford: Blackwell, 1985.
- Perry, Barbara. *In the Name of Hate: Understanding Hate Crimes*. New York and London: Routledge, 2001.
- Perry, Barbara. "Missing Pieces: The Paucity of Hate Crime Scholarship." In *Advancing Critical Criminology: Theory and Application*, edited by Walter S. DeKeseredy and Barbara Perry. Oxford: Lexington Books, 2006.
- Perry, Kenetta Hammond. *London is the Place for Me: Black Britons, Citizenship and the Politics of Race*. Oxford: Oxford University Press, 2016.
- Post, Robert. "Racist Speech, Democracy, and the First Amendment." *William and Mary Law Review* 32 (1991): 267-328.
- Powell, Cedric Merlin. "The Mythological Marketplace of Ideas: RAV, Mitchell, and Beyond." *Harvard Blackletter Law Journal* 12 (1995): 1-48.
- Powell, Enoch. Speech at a Conservative Association meeting. Birmingham, 20 April 1968 (known as the 'Rivers of Blood' speech), <http://www.telegraph.co.uk/comment/3643823/Enoch-Powells-Rivers-of-Blood-speech.html>.
- Puar, Jasbir. *Terrorist Assemblages: Homonationalism in Queer Times*. Oxford: Oxford University Press, 2007.

- Quinn, Gerard and Theresia Degener, T. “The Current Use and Future Potential of United Nations Human Rights Instruments in the Context of Disability.” (2002), <http://www.ohchr.org/Documents/Publications/HRDisabilityen.pdf>.
- Rainbow, Jennifer Sloan. “Sex Doesn’t Matter? The Problematic Status of Sex, Misogyny, and Hate.” *Journal of Language and Discrimination* 1, no. 1 (2017): 61-82.
- Randall, Don. *Kipling’s Imperial Boy: Adolescence and Cultural Hybridity*. Basingstoke and New York: Palgrave, 2000.
- Reeves, Frank. *British Racial Discourse: A Study of British Political Discourse about Race and Race-Related Matters*. Cambridge and New York: Cambridge University Press, 1983.
- Reid, Andrew. “Does Regulating Hate Speech Undermine Democratic Legitimacy? A Cautious ‘No.’” *Res Publica* (2019), <https://link.springer.com/content/pdf/10.1007%2Fs11158-019-09431-6.pdf>.
- Renton, Dave. *Fascism, Anti-Fascism and Britain in the 1940s*. Basingstoke and London: Palgrave Macmillan, 2000.
- Richards, Lyn. “Qualitative Computing – a Methods Revolution?” *International Journal of Social Research Methodology* 5, no. 3 (2002): 263-276.
- Ringrose, Jessica and Emilie Lawrence. “Remixing Misandry, Manspreading, and Dick Pics: Networked Feminist Humour on Tumblr.” *Feminist Media Studies* 18, no. 4 (2018): 686-704.
- Ronen, Yael. “Incitement to Terrorist Acts and International Law.” *Leiden Journal of International Law* 23, no. 3 (2010): 645-674.
- Rose, Nikolas. “Government and Control.” *British Journal of Criminology* 40, no. 2 (2000): 321-339.

- Rose, Nikolas, Pat O'Malley and Mariana Valverde. "Governmentality." *Annual Review of Law and Social Science* 2 (2006): 83-104.
- Rose, Nikolas and Peter Miller. "Political Power beyond the State: Problematics of Government." *British Journal of Sociology* 43 no. 2 (1992): 173-205.
- Rosga, AnnJanette. "Deadly Words: State Power and the Entanglement of Speech and Violence in Hate Crime." *Law and Critique* 12, no. 3 (2001): 223-252.
- Rowbotton, Jacob. "Extreme Speech and the Democratic Functions of the Mass Media," in *Extreme Speech and Democracy*, edited by Ivan Hare and James Weinstein. Oxford: Oxford University Press, 2009.
- Rumney, Philip N. S. "The British Experience of Racist Hate Speech Regulation: A Lesson for First Amendment Absolutists?" *Common Law World Review* 32 (2003): 117-160.
- Runnymede Trust. *Islamophobia: A Challenge for Us All*. Runnymede Trust, 1997.
- Sandberg, Russell and Christopher Norman Doe. "The Strange Death of Blasphemy." *Modern Law Review* 71, no. 6 (2008): 971-986.
- Scaffardi, Sylvia. *Fire Under the Carpet: Working for Civil Liberties in the 1930s*. London: Lawrence and Wishart, 1986.
- Schweppe, Jennifer. "Defining Characteristics and Politicising Victims: A Legal Perspective." *Journal of Hate Studies* 10, no. 1 (2012): 173-198.
- Scruton, Phil. "'If You Want a Riot, Change the Law': The Implications of the 1985 White Paper on Public Order." *Journal of Law and Society* 12, no. 3 (1985): 385-393.
- Scruton, Phil. "Editor's Preface." In *Law, Order and the Authoritarian State*, edited by Phil Scruton. Milton Keynes: Open University Press, 1987.

Scraton, Phil. "Unreasonable Force: Policing, Punishment and Marginalization." In *Law, Order and the Authoritarian State*, edited by Phil Scraton. Milton Keynes: Open University Press, 1987.

"The Fighting Sixties: 62 Group Special Issue," *Searchlight* (July 2002),
https://libcom.org/files/62_group.pdf.

Sears, David O. "Symbolic Politics: A Socio-Psychological Theory." In *Explorations of Political Psychology*, edited by Shanto Iyengar and William J. McGuire. Durham and London: Duke University Press, 1993.

Shaw, LaShel. "Hate Speech in Cyberspace: Bitterness without Boundaries." *Notre Dame Journal of Law, Ethics and Public Policy* 25, no. 1 (2011): 279-304.

Sherwood, Marika. "White Myths, Black Omissions: The Historical Origins of Racism in Britain." *History Education Research Journal* 3, no. 1 (2003): 45-53.

Shilliam, Robbie. *Race and the Undeserving Poor: From Abolition to Brexit*. Newcastle upon Tyne: Agenda Publishing, 2018.

Sim, Joe, Phil Scraton and Paul Gordon, "Introduction: Crime, the State and Critical Analysis," in *Law, Order and the Authoritarian State*, edited by Phil Scraton. Milton Keynes: Open University Press, 1987.

Jonathan Simon, *Governing Through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear*. Oxford: Oxford University Press, 2007.

Smart, Carol. *Law, Crime and Sexuality: Essays in Feminism*. London: Sage Publications, 1995.

Spicer, Robert. *Conspiracy: Law, Class and Society*. London: Lawrence and Wishart, 1981.

- Sokhi-Bulley, Bal. "Human Rights as Technologies of the Self: Creating the European Governmentable Subject of Rights." In *Re-Reading Foucault: On Law, Power and Rights*, edited by Ben Golder. Abingdon and New York: Routledge, 2013.
- Sooben, Philip N. "The Origins of the Race Relations Act." Centre for Research in Ethnic Relations, University of Warwick, 1990,
https://web.warwick.ac.uk/fac/soc/CRER_RC/publications/pdfs/Research%20Papers%20in%20Ethnic%20Relations/RP%20No.12.pdf.
- Soral, Wiktor, Mikal Bilewicz and Mikolaj Winiewski. "Exposure to Hate Speech Increases Prejudice through Desensitization." *Aggressive Behavior* 44, no. 2 (2018): 136-146.
- Stanescu, James. "Beyond Biopolitics: Animal Studies, Factory Farms, and the Advent of Deading Life." *PhaenEx* 8, no. 2 (2013): 135-160.
- Steiner, Jürg, André Bächtiger, Marcus Spörndli and Marco R. Steenbergen. *Deliberative Politics in Action*. Cambridge: Cambridge University Press. 2005.
- Stone, Richard. "Breach of the Peace: The Case for Abolition." *Web Journal of Current Legal Issues* 2 (2001),
<https://www.bailii.org/uk/other/journals/WebJCLI/2001/issue2/stone2.html>.
- Stone, Matthew, Illan rua Wall and Costas Douzinas. "Introduction: Law, Politics and the Political." In *New Critical Legal Thinking*, edited by Matthew Stone, Illan rua Wall and Costas Douzinas. London: Birkbeck Law Press, 2012.
- Stonewall. "Homophobic Hate Crime: The Gay British Crime Survey 2013." (2013)
https://www.stonewall.org.uk/sites/default/files/Homophobic_Hate_Crime__2013_.pdf.
- Strobl, Rainer, Jana Klemm and Stefanie Wurtz. "Preventing Hate Crimes: Experiences from Two East-German Towns." *British Journal of Criminology* 45, no. 5 (2005): 634-646.

- Spade, Dean. *Normal Life: Administrative Violence, Critical Trans Politics, and the Limits of Law*. Brooklyn: South End Press, 2011.
- Stanko, Elizabeth. *Everyday Violence: How Women and Men Experience Sexual and Physical Danger*. London: Pandora 1990.
- Erel, Umut. "Migrating Cultural Capital: Bourdieu in Migration Studies." *Sociology* 44, no. 4 (2010): 642-660.
- Tatchell, Peter. "Hate Speech v Free Speech." *The Guardian*, 10 October 2007, <https://www.theguardian.com/commentisfree/2007/oct/10/hatespeechvreespeech>.
- Taylor, Ian. "Law and Order, Moral Order: The Changing Rhetorics of the Thatcher Government." *Socialist Register* 23 (1987): 297-331.
- Ten Cate, Irene. "Speech, Truth, and Freedom: An Examination of John Stuart Mill's and Justice Oliver Wendell Holmes's Free Speech Defenses." *Yale Journal of Law and the Humanities* 22 (2010): 35-81.
- Terrill, Richard J. "Margaret Thatcher's Law and Order Agenda." *American Journal of Comparative Law* 37, no. 3 (1989): 429-456.
- Testa, M. *Militant Anti-Fascism: 100 Years of Resistance*. Chico, CA: AK Press, 2015.
- Thatcher, Margaret. "Speech to 1922 Committee ('The Enemy Within') (19 July 1984), <https://www.margaretthatcher.org/document/105563>.
- Thompson, Noel. "To See Ourselves: The Rhetorical Construction." *British Politics* 12 (2016): 90-114.
- Thompson, Simon. "Freedom of Expression and Hatred of Religion." *Ethnicities* 12, no. 2 (2012): 215-232.

- Thornton, Peter. *Public Order Law: Including the Public Order Act 1986*. London: Financial Training Publications, 1987.
- Thornton, Peter. "Public Order Law – The New Act." *Socialist Lawyer* no. 2 (1987): 17-18.
- Timmermann, Wibke Kristin. "Incitement in International Criminal Law." *International Review of the Red Cross* 88, no. 864 (2006): 823-852,
https://www.icrc.org/eng/assets/files/other/irrc_864_timmermann.pdf.
- Travis, Alan. "Thatcher was to Call Labour and Miners 'Enemy Within' in Abandoned Speech." *The Guardian*, 3 October 2014,
<https://www.theguardian.com/politics/2014/oct/03/thatcher-labour-miners-enemy-within-brighton-bomb>.
- Tsesis, Alexander. "Dignity and Speech: The Regulation of Hate Speech in a Democracy." *Wake Forest Law Review* 44 (2009): 497-532.
- Tyler, Imogen. *Revolting Subjects: Social Abjection and Resistance in Neoliberal Britain*. London and New York: Zed Books, 2013.
- Valverde, Mariana. "Beyond Discipline and Punish: Foucault's Challenge to Criminology." *Carceral Notebooks* 4 (2008): 201-223.
- Valverde, Mariana. "Questions of Security: A Framework for Research." *Theoretical Criminology* 15, no. 1 (2010) 3-22.
- van Dijk, Teun A. *Prejudice in Discourse*. Amsterdam and Philadelphia: John Benjamins, 1984.
- van Dijk, Teun A. "Critical Discourse Analysis." *Discourse & Society* 5, no. 4 (1994): 435-436.
- van Dijk, Teun A. "Political Discourse and Racism: Describing Others in Western Parliaments." In *The Language and Politics of Exclusion: Others in Discourse*, edited by Stephen H. Riggins. Thousand Oaks, CA: Sage, 1997.

- van Dijk, Teun A. "Principles of Critical Discourse Analysis." in *Discourse Theory and Practice*, edited by Magaret Wetherell, Stephanie Taylor and Simeon J. Yates. London, Thousand Oaks and New Delhi: Sage, 2001.
- Vanderbeck, Robert M. and Paul Johnson, "'If a Charge was Brought Against a Sainly Religious Leader Whose Intention Was to Save Souls...': An Analysis of UK Parliamentary Debates over Incitement to Hatred on the Grounds of Sexual Orientation," *Parliamentary Affairs* 64, no. 4 (2011): 652-673.
- Vernon, James. *Modern Britain: 1750 to the Present*. Cambridge: Cambridge University Press, 2017.
- Volokh, Eugene. "In Defense of the Marketplace of Ideas/Search for Truth as a Theory of Free Speech Protection." *Virginia Law Review* 97, no. 3 (2011): 595-602.
- Vukov, Tamara. "Imagining Communities through Immigration Policies: Governmental Regulation, Media Spectacles and the Affective Politics of National Borders." *International Journal of Cultural Studies* 6, no. 3 (2003): 335–353.
- Wacquant, Loïc. "The Advent of the Penal State is Not a Destiny." *Social Justice* 28, no. 3 (2001): 81-87.
- Wacquant, Loïc. *Punishing the Poor: The Neoliberal Government of Social Insecurity*. Durham and London: Duke University Press, 2009.
- Waldman, Ari Ezra. "Durkheim's Internet: Social and Political Theory in Online Society." *New York University Journal of Law and Liberty* 7 (2013): 345-430.
- Waldron, Jeremy. *The Harm in Hate Speech*. Cambridge, MA and London: Harvard University Press, 2012.

- Walker, Samuel. *Hate Speech: The History of an American Controversy*. Lincoln and London: University of Nebraska Press, 1994.
- Wallington, Peter. "Criminal Conspiracy and Industrial Conflict." *Industrial Law Journal* 4, no. 1 (1975): 69-88.
- Walters, Mark and Rupert Brown, "Causes and Motivations of Hate Crime," with Susann Wiedlitzka. Equality and Human Rights Commission (Research Report 102), 2016. <https://www.equalityhumanrights.com/sites/default/files/research-report-102-causes-and-motivations-of-hate-crime.pdf>.
- Weinman, Michael. "State Speech vs. Hate Speech: What to Do About Words that Wound?" *Essays in Philosophy* 7, no. 1, art. 18 (2006), <https://philpapers.org/rec/WEISSV>.
- Weinstein, James. "Extreme Speech, Public Order, and Democracy: Lessons from The Masses." In *Extreme Speech and Democracy*, edited by Ivan Hare and James Weinstein. Oxford: Oxford University Press, 2009.
- Weinstein, James. *Hate Speech, Pornography, and the Radical Attack on Free Speech Doctrine*, revised edition. New York and Abingdon: Routledge, 2018.
- Werbner, Pnina. "The Fiction of Unity in Ethnic Politics: Aspects of Representation and the State among British Pakistanis." In *Black and Ethnic Leaderships: The Cultural Dimensions of Political Action*, revised edition, edited by Pnina Werbner and Muhammed Anwar. London and New York: Routledge, 2005.
- West, Caroline. "Words that Silence? Freedom of Expression and Racist Hate Speech." In *Speech and Harm: Controversies over Free Speech*, edited by Ishani Maitra and Mary Kate McGowan. Oxford, Oxford University Press, 2012.
- Westbrook, Laurel. "Vulnerable Subjecthood: The Risks and Benefits of the Struggle for Hate Crime Legislation." *Berkeley Journal of Sociology* 52 (2008): 3-23.

- Weston, Reg. "Fascists and Police Routed: The Battle of Cable Street." *Libcom*, 12 September 2005, <http://libcom.org/library/fascists-and-police-routed-battle-cable-street>.
- Wild, Rosalind Eleanor. "'Black was the colour of our fight.' Black Power in Britain, 1955-1976," PhD diss. University of Sheffield, 2008.
- Williams, David G. T. *Keeping the Peace*. London: Hutchinson 1967.
- Williams, Raymond. *Marxism and Literature*. Oxford: Oxford University Press, 1977.
- Wintemute, Robert. "Religion vs. Sexual Orientation: A Clash of Human Rights?" *Journal of Law and Equality* 1, no. 2 (2002): 125-154.
- Wodak, Ruth. "Introduction: Discourse Studies - Important Concepts and Terms." In *Qualitative Discourse Analysis in the Social Sciences*, edited by Ruth Wodak and Michal Krzyzanowski. Basingstoke and New York: Palgrave Macmillan, 2008.
- Wolffe, W. J. "Values in Conflict: Incitement to Racial Hatred and the Public Order Act 1986." *Public Law* (Spring 1987): 85-95.
- Womack, Amelia. "A Win for Women: Amelia Womack on the Landmark Move Against Misogyny" *Refinery 29* (7 September 2018) <https://www.refinery29.com/en-gb/misogyny-hate-crime-ameila-womanck>.
- Woods, Susanne. 'Is Freedom Slavery?' *Iowa Review* 29, no. 3 (1999): 36-45.
- Young, Jock. "Moral Panic: Its Origins in Resistance, Ressentiment and the Translation of Fantasy into Reality." *British Journal of Criminology* 49, no. 1 (2009): 4-16.
- Young, Iris Marion. *Justice and the Politics of Difference*. Princeton: Princeton University Press, 1990.

Zedner, Lucia. "Pre-Crime and Post-Criminology?" *Theoretical Criminology* 11, no. 2 (2007): 261–281.

Žižek, Slavoj. *The Plague of Fantasies*, 2nd edition. London and New York: Verso, 2008.