31

Offences against public order

31.1 The Public Order Act 1986

31.1.1 Background

The Public Order Act 1986 replaced the ancient common law offences of riot, rout, unlawful assembly and affray and some statutory offences relating to public order[1] with new offences. These are, in descending order of gravity: s 1 riot; s 2 violent disorder; and, s 3 affray. In addition to these more serious offences, the Act created lower level offences: s 4 (threatening, abusive or insulting conduct intended, or likely, to provoke violence or cause fear of violence); s 5 (threatening or abusive [or insulting[2]] conduct likely to cause harassment, alarm or distress); and s 4A (threatening, abusive or insulting conduct intentionally causing harassment, alarm or distress) as added by subsequent legislation.[3] These latter offences have become very heavily used.

It should also be noted that the offences created by the 1986 Act are not all offences that must be committed in 'public'.[4] However, as the courts have repeatedly emphasized, it is important to keep sight of the public order foundations of these offences and not treat them as merely additional offences against the person. With the lower level offences under ss 4, 4A and 5, one might question whether the real harm being protected against is one against an attack on the person or one of a more general endangering of public safety and security.[5]

31.1.2 General matters of interpretation

Though the contrary has been argued in some cases, it is clear that the general principles of secondary liability and general defences, such as private defence or the prevention of crime, are applicable to offences under the Act as they are under other statutes and at common law. In addition, the serious offences—riot, violent disorder and affray—are continuing offences, following the common law position.[6] Once the 12 people (in the case of riot) or the three (in violent disorder), as the case may be, have used or threatened violence, the offence is constituted and will continue so long as they remain together (in the case of riot, for a common purpose) and at least one of them is continuing to use or threaten violence. One is enough, since it is provided that the persons present need not use or threaten violence simultaneously.

The Act does not provide a complete code of public order offences, and some reference is made here to relevant common law offences. However, care must be taken in relying on common law interpretations. As the Court of Appeal emphasized in *Carey*[7] in the context

[1] For the law before the 1986 Act, see the 5th edn of this book, Ch 20; for the background to the 1986 Act, see the Home Office, *Review of the Public Order Act and Related Legislation* (1980) Cmnd 7891 and Law Com Working Paper No 82 (1982) and LC 123, *Offences Relating to Public Disorder* (1983). For detailed studies of the new law at the time it was enacted, see R Card, *Public Order: The New Law* (1987) and ATH Smith, *Offences against Public Order* (1987). For a more detailed study of the offences, see P Thornton et al, *The Law of Public Order and Protest* (2010).

[2] The word 'insulting' was removed from s 5 by s 57 of the Crime and Courts Act 2013 with effect from 1 Feb 2014.

[3] Crime and Disorder Act 1998, s 31(1)(c).

[4] Indeed, given the ability to disseminate a variety of material over the internet it is possible that an individual could commit a public order offence sitting in his living room in front of his computer screen. For a discussion of the interaction between digital speech and public order offences, see J Rowbottom, 'To Rant, Vent and Converse: Protecting Low Level Digital Speech' (2012) 71 CLJ 355.

[5] Duff suggests that the offences involve an attack on a person if they are intended to cause fear, but are endangerment offences otherwise. See RA Duff, 'Criminalising Endangerment' in Duff and Green, *Defining Crimes*, 52.

[6] *Woodrow* (1959) 43 Cr App R 105; *Jones* (1974) 59 Cr App R 120.

[7] [2006] EWCA Crim 17.

of affray, the language of the subsections is plain and should be given its ordinary unglossed meaning. In *NW*,[8] the court referred, as guides to construction, to the Law Commission Reports which led to the enactment of the 1986 Act. The Sentencing Council has issued a Definitive Guideline for public order offences that applied from 1 January 2020.

31.2 Riot

Riot is an indictable only offence, punishable with ten years' imprisonment, or an unlimited fine, or both.[9] It is explained by s 1 of the Act as follows:

(1) Where 12 or more persons who are present together use or threaten unlawful violence for a common purpose and the conduct of them (taken together) is such as would cause a person of reasonable firmness present at the scene to fear for his personal safety, each of the persons using unlawful violence for the common purpose is guilty of riot.

(2) It is immaterial whether or not the 12 or more use or threaten unlawful violence simultaneously.

(3) The common purpose may be inferred from conduct.

(4) No person of reasonable firmness need actually be, or be likely to be, present at the scene.

(5) Riot may be committed in private as well as in public places.

Riot is intended for exceptionally serious cases and the consent of the DPP is necessary before a prosecution can be brought.[10] It is, nevertheless, a very widely drafted offence. In making the decision to prosecute for riot, the CPS Charging Standards suggest that riot might appropriately be charged where: 'the normal forces of law and order have broken down; due to the intensity of the attacks on police and other civilian authorities normal access by emergency services is impeded by mob activity; due to the scale and ferocity of the disorder, severe disruption and fear is caused to members of the public; the violence carries with it the potential for a significant impact upon a significant number of non-participants for a significant length of time; [there are] organised or spontaneous large scale acts of violence on people and/or property'.[11]

31.2.1 Elements of the offence

31.2.1.1 Twelve or more

The gravity of riot depends on the presence of large numbers. The number, 12, is arbitrary and it will not usually be necessary to offer evidence of a headcount because the offence is unlikely to be used except in the case of a large crowd, when well in excess of 12 are using or threatening violence.

31.2.1.2 Common purpose

There is no requirement that the 12 or more should have come together under any agreement. They may have assembled by chance, one by one, and at some point when violence is used, they are present together with a common purpose of using or threatening violence.

[8] [2010] EWCA Crim 404. [9] See *Blackshaw* [2011] EWCA Crim 2312.

[10] For examples of successful prosecutions, see *Sherlock* [2014] EWCA Crim 310 and *Lewis and others* [2014] EWCA Crim 48.

[11] See www.cps.gov.uk/legal-guidance/public-order-offences-incorporating-charging-standard.

The common purpose relates to the violence, not the coming together. If 12 or more people with a common purpose threaten unlawful violence but only one actually uses it, there is a riot but only one principal rioter. Since the 12 have a common purpose, the rest (the other 11 or more) may be guilty as secondary parties,[12] depending on the proof of their relevant intentions.[13]

In *Mitsui Sumitomo Insurance (Europe) Ltd and others v The Mayor's Office for Policing and Crime*,[14] a civil case relating to riot damages, the claimants had to establish that there had been a riot within the meaning of s 1 of the Public Order Act 1986. The court held that there had been a riot. Flaux J as he then was said:

> In my judgment, even if not all the gang were smashing down the door or throwing petrol bombs, the others by their presence were threatening unlawful violence, or, putting it another way, they were all engaged together in the joint enterprise of breaking into the premises and looting and destroying them, even the two twelve year olds [witnesses] encountered outside.

With respect, this is not what s 1 says. The fact that 12 or more persons are present together with a common purpose that one or more of their number should use or threaten violence does not mean that all 12 have in fact used or threatened violence.[15]

The common purpose need not be an unlawful one. It might, for example, be to persuade an employer to reinstate an employee whom he has wrongfully dismissed. But violence, whether used or threatened, must be unlawful. Force reasonably used or threatened by D in self-defence or for the prevention of crime cannot found a charge of riot.[16]

31.2.1.3 Violence

By s 8, in Part I of the Act 'violence' means any violent conduct, so that:

(1) it includes violent conduct towards persons and (except in the case of affray (discussed later)) violent conduct towards property;

(2) it is not restricted to conduct causing or intended to cause injury or damage but includes any other violent conduct (eg throwing at or towards a person a missile of a kind capable of causing injury which does not hit or falls short).

Conduct that might well have caused injury or damage will clearly be capable of amounting to violence even though it was neither intended to, nor did, cause injury or damage. 'Violent' movements of the body, where there is no possibility of any impact—as where D waves his fist at V who is across the street—is probably not 'violence' but a threat of violence.

It is immaterial whether the 12 or more use or threaten the unlawful violence simultaneously: s 1(2).

31.2.1.4 Fear for personal safety

The conduct (of the 12) must be such as would (but not necessarily did) cause a person of reasonable firmness present at the scene to fear for his personal safety; no person need actually be, or even be likely to be, at the scene.[17] Where no person is present, the court or jury

[12] The ordinary law of secondary participation applies to riot: *Jefferson* [1994] 1 All ER 270.

[13] See Ch 6. [14] [2014] 1 All ER 422 (a case under the Riot (Damages) Act 1886).

[15] The decision that there had been a riot was upheld on appeal: [2014] 3 WLR 576. The Supreme Court disagreed: [2016] UKSC 18.

[16] *Rothwell and Barton* [1993] Crim LR 626. This may prove especially problematical when DDs claim that they were taking pre-emptive action in self-defence.

[17] Sections 1(3) and (4), 2(3) and (4) and 3(3) and (4).

has to answer a hypothetical question. It is not incumbent on the judge to direct the jury on the attributes of the hypothetical reasonable person, nor to give examples of reasonable firmness.[18]

31.2.1.5 Mens rea

The mental element of riot includes the common purpose. A common purpose (which need not involve violence) must be proved in respect of all 12 persons, though not all of them are charged. It must be proved that any person charged with riot shared that common purpose and that he (but not necessarily the other 11 or more)[19] intended to use violence or was aware that his conduct might be violent,[20] and it is important that this is made clear to the jury.[21]

The Act wisely avoids the ambiguous word 'reckless' by its use of the word 'awareness'. In effect, this is adopting a subjective approach akin to the *Cunningham*[22] meaning of recklessness, thus keeping the law of riot, violent disorder and affray in line with offences against the person generally. There is a subtle difference since the *Cunningham* recklessness formula requires not only that D has a subjective awareness of the risk (that his conduct may be violent) but that he has taken that risk unjustifiably. With a test of awareness alone, there is no objective assessment of the justification for his taking the risk. It is doubtful whether this has significant practical implications.

Because the meaning of violence itself is uncertain, it is not entirely clear what the requirement of awareness will exclude. It is arguable that a person who was not aware that his conduct would cause any risk of injury or damage would be held to be unaware that his conduct might be violent when it did in fact cause a risk of, or actual, damage or injury.[23]

31.2.1.6 Intoxicated rioters

Unusually, the statute makes specific provision in s 6(5) and (6) to deal with a plea of intoxication.

> (5) For the purposes of this section a person whose awareness is impaired by intoxication shall be taken to be aware of that of which he would be aware if not intoxicated, unless he shows either that his intoxication was not self-induced or that it was caused solely by the taking or administration of a substance in the course of medical treatment.
>
> (6) In subsection (5) 'intoxication' means any intoxication, whether caused by drink, drugs or other means, or by a combination of means.

The common law governs the position where D denies that he had the alleged 'purpose' because he was too drunk. Thus, if the indictment alleges only intent to use violence, that is presumably an allegation of a specific intent, so self-induced intoxication would be an answer at common law.[24] But because of s 6(5), D is still to be taken to be aware of that of which he would be aware if not intoxicated. So, if the jury think D would have been aware that violence was a virtual certainty, that is evidence on which they might find that he intended it. Intoxication might not be an excuse even to an allegation of intentional violence in riot. As regards indictments alleging riot without intention—that is, alleging that D was aware that his conduct may be violent—s 6 applies in full. In effect, this spells out

[18] See *Rafferty* [2004] EWCA Crim 968 on affray. The bystander who must be imagined, 'though hypothetical, is not necessarily hypothetically a white bystander': *Gray v DPP*, CO/5069/98, QB.

[19] Section 6(7); ATH Smith, *Offences Against Public Order*, para 3.03. [20] Section 6(1).

[21] *Blackwood* [2002] EWCA Crim 3102. [22] See Ch 3.

[23] This is, it is submitted, unlikely to succeed. [24] Although cf *Heard* [2007] EWCA Crim 125.

the common law rule for offences 'of basic intent' but shifts onto the defendant the onus of proving (or more probably imposes a burden on him to raise evidence) that the intoxication was involuntary.[25]

31.3 Violent disorder

Violent disorder is an offence punishable on indictment with five years' imprisonment or an unlimited fine or both or, on summary conviction, with six months' imprisonment or the statutory maximum fine, or both. It is defined as follows by s 2:

(1) Where 3 or more persons who are present together use or threaten unlawful violence and the conduct of them (taken together) is such as would cause a person of reasonable firmness present at the scene to fear for his personal safety, each of the persons using or threatening unlawful violence is guilty of violent disorder.

(2) It is immaterial whether or not the 3 or more use or threaten unlawful violence simultaneously.

31.3.1 Elements of the offence

31.3.1.1 Three or more

It is essential for the conviction of any defendant that the jury or magistrates are sure that at least three people had been unlawfully violent during the incident.

In *Mahroof*,[26] it seems to have been assumed that if three defendants are the only persons alleged to have been involved in the disorder and one of them is acquitted, the others must also be acquitted. This will usually be the case but it is submitted that it is not necessarily so. If, for example, the acquitted person was using or threatening unlawful violence but was not guilty on some other ground, there seems to be no reason why the other two accused should not be convicted. The third person may have been acquitted because he did not so intend to, and was not aware that he might use or threaten violence (perhaps being insane) or had some defence such as duress. He will nevertheless have been involved in unlawful violence. Such cases are likely to be rare. In contrast, in *Mechen*,[27] it was acknowledged that if the jury acquits, on the grounds of self-defence, any person potentially relied on by the prosecution to constitute one of the three persons involved, that person cannot be included to make up the necessary minimum number of people using or threatening *unlawful* violence. It is for this reason that it is often important for the prosecutor to lay alternative charges of affray.[28]

In *Lemon*,[29] it was emphasized that s 2 does not require that at least two others be *convicted* of the offence before any one defendant could be convicted.[30] The judge properly directed the jury that provided they found three or more used or threatened violence, they could convict any one or more of the defendants even though they were unable to identify the three. This interpretation was reiterated in *Mbagwu*[31] with Hughes LJ explaining that 'a jury may be perfectly satisfied that there were at least 3 people participating without being able to say to the criminal standard who most of them were'.[32]

[25] See Ch 1 on the post-HRA 1998 approach to reverse burdens and the greater likelihood that this is merely an evidential burden.

[26] (1988) 88 Cr App R 317; cf *Fleming and Robinson* [1989] Crim LR 658; *McGuigan* [1991] Crim LR 719.

[27] [2004] EWCA Crim 388. [28] *Hadjisavva* [2004] EWCA Crim 1316. [29] [2002] EWCA Crim 1661.

[30] L was one of six defendants charged under s 2. All accepted their presence at the scene, but L claimed mistaken identity, two others claimed that they had acted in self-defence and the remaining three made no comment.

[31] [2007] EWCA Crim 1068. [32] At [66].

In cases of aiding and abetting violent disorder, it is crucial that the directions make clear the respective mens rea requirements of the principals and secondary parties.[33]

31.3.1.2 Present together

In *NW*,[34] the Court of Appeal held that the expression 'present together' meant no more than being in the same place at the same time. There need be no common purpose. Each of the three or more persons may have a different purpose or no purpose. Three or more people using or threatening violence in the same place at the same time, whether for the same purpose or different purposes, were capable of creating a 'daunting prospect for those who may encounter them', simply by reason of the fact that they represented a breakdown of law and order. The phrase did not require any degree of cooperation between those using or threatening violence. The court, referring with approval to the 12th edition of this work, took as guides to construction the Law Commission Reports which led to the enactment of the 1986 Act and to the absence of any requirement in s 2 that there be a 'common purpose' among those using or threatening the use of violence. The absence of such a condition was in contrast to the requirement of a 'common purpose' in the s 1 riot offence. The term 'present together' involves a question of fact and, if necessary, a jury should be told to give those words their ordinary meaning.

31.3.1.3 Use or threat of unlawful violence

At least three must be using or threatening *unlawful* violence,[35] so if one of only three persons present is acting in self-defence or for the prevention of crime, no offence is committed.[36]

In *Farmer*,[37] D was convicted of a single count of violent disorder when he participated in a protest and used violence against police officers on two separate instances during that protest. The Court of Appeal accepted D's argument that this was a case in which the allegation against him was that there were separate incidents rather than a single sequence of conduct. In such cases, it is necessary to determine whether the conduct forms a single incident;[38] if so, no problem arises. Where, however, the conduct alleged comprises two or more separate incidents, any one of which would suffice to secure a conviction, then the judge ought to give the jury a direction that each ingredient of the offence must be proved to the satisfaction of *each and every member* of the jury (subject to the majority direction).[39]

It must be proved that each defendant intended to use or threaten violence or that he was aware that his conduct might be violent or threaten violence.[40] A prima facie case of violent disorder could be established where D was running along with a group in a populated area when D knew members of the group were armed and intent on violence.[41] There was held to be evidence of a threat of unlawful violence where three men followed another along a path for three-quarters of a mile and for three-quarters of an hour in the middle of the night, creating 'an aura of violence'.[42] The breadth of the offence has

33 *Blackwood* [2002] EWCA Crim 3102. See also *Powell* [2006] EWCA Crim 685 on the importance of directing on mens rea in relation to general participation in a violent disorder.

34 [2010] EWCA Crim 404. 35 For the meaning of 'violence', see earlier. 36 *Mechen*, n 27.

37 [2013] EWCA Crim 126.

38 Reliance was also placed upon *Houldon* (1994) 99 Cr App R 244 and *Smith* [1997] 1 Cr App R 14.

39 This is known as a '*Brown* direction'. See *Brown* (1984) 79 Cr App R 115. 40 Section 6(2).

41 *Church* [2000] 4 Arch News 3.

42 *Brodie* [2000] Crim LR 775. See also *Casey* [2004] EWCA Crim 1853 and *O'Harro* [2012] EWCA Crim 2724 in which the Court of Appeal approved the judge's direction to the jury that D's presence on the sidelines with his hood up whilst others in his group used violence towards the shutters of a jeweller's shop constituted 'implicit menace amounting to a threat'.

resulted in its diverse use to deal with conduct ranging from pub brawls to violent animal rights protests.[43]

Where the evidence which led to a conviction under s 2 relates to violence to property, the court must decline to substitute verdicts under s 3 since that offence is limited to violence to people.[44] The judge must then direct the jury adequately on the relevant parts of s 4 (see later).[45]

31.3.1.4 Effect of conduct

The conduct of the three must be such as would (but not necessarily did) cause a person of reasonable firmness present at the scene to fear for his personal safety; no person need actually be, or even be likely to be, at the scene.[46] Where no person is present, the court or jury has to answer a hypothetical question.

31.3.1.5 Other matters

Private defence, the prevention of crime[47] and other general defences are available to a defendant charged with this offence. The intoxicated defendant is governed by s 6(5) and (6), considered earlier. The offence may be committed in private as well as public.

Violent disorder is intended to be the normal charge[48] for serious outbreaks of public disorder, riot being reserved for exceptionally serious cases, but violent disorder clearly covers many relatively minor disturbances. Consequently, it is triable either way. The CPS cites as examples of the type of conduct which may be appropriate for a s 2 charge: 'fighting between three or more people involving the use of weapons, between rival groups in a place to which members of the public have access (for example a town centre or a crowded bar) causing severe disruption and/or fear to members of the public; an outbreak of violence which carries with it the potential for significant impact on a moderate scale on non-participants; serious disorder at a public event where missiles are thrown and other violence is used against and directed towards the police and other civil authorities'. The gravamen of the offence is that people could be put in fear by the group action in which D participates.[49]

31.4 Affray

Bingham LCJ described the nature of affray[50] as follows:[51]

It typically involves a group of people who may well be shouting, struggling, threatening, waving weapons, throwing objects, exchanging and threatening blows and so on. Again, typically, it

[43] eg *Oxford Crown Court, ex p Monaghan* (1998) 18 June, DC (throwing stones over the fence in an aimless manner at police and using fences as battering rams).

[44] *McGuigan and Cameron* [1991] Crim LR 719.

[45] *Perrins* [1995] Crim LR 432. The jury may return a verdict under s 4 on a count alleging s 2 if the s 4 offence has been left to them. Section 7(3) expressly provides that s 4 may be left. That section does not require that s 4 is left as an alternative in all cases: *Walton* [2006] EWCA Crim 822. See also *Mbagwu* [2007] EWCA Crim 1068 and *Smith* [2013] EWCA Crim 11.

[46] Section 2(3) and (4). [47] *Rothwell v Barton* [1993] Crim LR 626.

[48] See CPS website for details of Charging Standards: www.cps.gov.uk/legal-guidance/public-order-offences-incorporating-charging-standard.

[49] See *Grealish* [2006] EWCA Crim 1095 at [46].

[50] *Smith* [1997] 1 Cr App R 14. Where an alleged affray falls into two or more sequences—eg inside, and outside, a house—the judge must give a separate direction in relation to each sequence, for the jury may be satisfied that only one is an affray. See also *Flounders* [2002] EWCA Crim 1325.

[51] *Smith* [1997] 1 Cr App R 14 at 16. Contrast the position where parties are charged with committing an offence by a specific act in the course of a joint enterprise: *Uddin* [1998] 2 All ER 744.

involves a continuous course of conduct, the criminal character of which depends on the general nature and effect of the conduct as a whole and not on particular incidents and events which may take place in the course of it. Where reliance is placed on such a continuous course of conduct, it is not necessary for the Crown to identify and prove particular incidents.

Affray is punishable on indictment with three years' imprisonment or an unlimited fine or both, or, on summary conviction, with six months' imprisonment or the statutory maximum fine or both. It is defined as follows by s 3:

(1) A person is guilty of affray if he uses or threatens unlawful violence towards another and his conduct is such as would cause a person of reasonable firmness present at the scene to fear for his personal safety.

(2) Where 2 or more persons use or threaten the unlawful violence, it is the conduct of them taken together that must be considered for the purposes of subsection (1).

(3) For the purposes of this section a threat cannot be made by the use of words alone.

In resolving a doubt about the meaning of the section, it is permissible to refer to the definition of the common law offence—but this practice is to be approached with care.[52] The Court of Appeal in *Carey*[53] refused to interpret the offence by reference to the common law or the Law Commission paper preceding the 1986 Act.

31.4.1 Elements of the offence

31.4.1.1 Violence

In this offence, unlike s 2, 'violence' is limited to violence towards another person and does not include violence towards property.[54] The overt act of carrying petrol bombs in the presence of those against whom the bombs are intended to be used may be a threat of violence.[55] The section makes it clear that the offence cannot be committed by the use of words alone, however aggressive and frightening the tone of voice.[56] If a mere threat to use violence were enough, affray would swallow the lesser offence under s 4(1) (considered later).[57] But the use of words to set a dog on another may amount to affray.[58] It seems that to say 'I am going to set the dog on you' would not be the offence, but 'Seize him, Fido' would—Fido being a Pit Bull terrier whose performance would alarm a bystander.

The violence must be unlawful, so that if the jury accept that D honestly believed or may have honestly believed that it was necessary to defend himself or others, there will be no unlawful violence.[59]

31.4.1.2 Participants

The participants do not need to have a common purpose.[60] The offence envisages at least three people: (a) the person using or threatening unlawful violence;[61] (b) a person towards whom the violence or threat is directed who must be present at the scene; and (c) a person

[52] *I, M and H v DPP* [2001] Crim LR 491. [53] [2006] EWCA Crim 17. Cf *NW*, n 34.
[54] Section 8. [55] *I, M and H v DPP*, n 52. [56] *Robinson* [1993] Crim LR 581.
[57] While affray is designed to deal with imminent violence, charges under the OAPA 1861 are available for threats to cause harm in the future: *Lewis* [2004] EWCA Crim 1407.
[58] *Dixon* [1993] Crim LR 579, and commentary. See also *Dackers* [2000] All ER (D) 1958.
[59] See *Talland* [2003] EWCA Crim 2884. The defences of self-defence, etc will be available; see *Rothwell* [1993] Crim LR 626; *Pulham* [1995] Crim LR 296; *Duffy v CC of Cleveland* [2007] EWHC 3169 (Admin).
[60] This was confirmed in *Gnango* [2011] UKSC 59.
[61] Where the only evidence is that D, having been beaten by X, returns shortly afterwards to the scene to look for X, there is no evidence of unlawful conduct for the purposes of affray: *Portela* [2007] EWCA Crim 529.

of reasonable firmness who need not actually be, or be likely to be,[62] present. So where D swiped with a knife towards a constable, J, the question was not whether a person of reasonable firmness in J's shoes would have feared for his personal safety but whether this hypothetical third person, present in the room and seeing D's conduct towards J, would have feared for *his own* safety.[63] But where gang A marched to attack gang B, but dispersed on the arrival of the police before they came in sight of the Bs, there was no affray.[64] There is no requirement that the reasonable bystander experience 'terror' as at common law.[65]

The question involves an objective assessment. Affray is a public order offence for the protection of the bystander. There are other offences for the protection of persons at whom the violence is aimed. This distinction should be observed, and charges of common assault should not be elevated to affray.[66]

A striking example of this is the case of *Leeson v DPP*.[67] L lived with her partner V. The alleged affray comprised L saying to V, in a calm voice, that she was going to kill him with the 6-inch kitchen knife she was holding. She made no attempt to move the knife or attack him with it. The incident occurred in the bathroom of their joint home, which was securely locked with no one present or expected in the house. V disarmed her easily, returned the knife to the kitchen, phoned a neutral friend and then called the police. V testified that he had not felt directly threatened by L or believed that she intended to use violence towards him. L's conviction was quashed. The possibility of a bystander arriving was truly remote but that does not preclude a conviction because by s 3(4) it is unnecessary for any third person actually to be present or to be likely to be present. However, the offence does require that L's use or threat of unlawful violence against V was such as to cause a hypothetical person of reasonable firmness present at the scene to fear for his personal safety. By s 3(3), words alone cannot constitute threats but her brandishing the knife could. That conduct may have caused V to fear for his safety but that is not enough: it is whether the hypothetical bystander would have feared for his *own* safety (not that of V). Account can be taken of the nature of the premises, the scene of the incident, the fact that the violence was limited to those involved and that the others present were not in fear: *Cotcher*.[68] The short, calm exchanges between L and V in private were not capable of engaging fear in another.

Subsection (2) makes it clear that where two or more use or threaten the unlawful violence, it is the conduct of all of them which must be considered in deciding whether it would cause a person of reasonable firmness to fear for his personal safety.

Since 'affray' is not a word in common use, the judge's direction will be important.[69]

[62] *Thind* [1999] Crim LR 842. Hence, the offence may apply to conduct occurring in a prison cell as in *Beaument and Correlli* (1999) 12 Feb, unreported, CA (Crim Div).

[63] *Davison* [1992] Crim LR 31; *Sanchez* [1996] Crim LR 572, approving the commentary on *Davison*. These commentaries were approved in *Blinkhorn* [2006] EWCA Crim 1416 in which a conviction was quashed where a bystander feared for V who was being assaulted in broad daylight, but had no fear for himself. See also *Donaldson* [2008] EWCA Crim 2457 and *Wild* [2011] EWCA Crim 358—'the statutory test relating to the hypothetical person of reasonable firmness, who is present at the scene, did not necessarily mean,. . . the relatively safe distance of being on the other side of the road.' Per Sweeney J.

[64] *I, M and H v DPP*, n 52. [65] *Carey* [2006] EWCA Crim 17.

[66] *Plavecz* [2002] Crim LR 837. *Plavecz* was distinguished in *R (Freeman) v DPP* [2013] EWHC 610 (Admin) on the basis that the injuries suffered by V were not trifling. For details of CPS Charging Standard, see www.cps.gov.uk/legal-guidance/public-order-offences-incorporating-charging-standard.

[67] [2010] EWHC 994 (Admin). Notably, the CPS advises that 'incidents within a dwelling should not be charged as affray merely because a lesser public order charge is not available. Offences of assault are likely to be more appropriate'. *Leeson* was distinguished in *Oye* [2013] EWCA Crim 1725 on the basis that the incident in that case, in which D was involved in a prolonged altercation with a number of police officers in a coffee shop, 'clearly had a public order element to it', at [29] per Davis LJ.

[68] (1992) The Times, 29 Dec. *Cotcher* was cited with approval in *R (Freeman) v DPP* [2013] EWHC 610 (Admin).

[69] *Salami* [2013] EWCA Crim 169.

31.4.1.3 Mens rea

The mental element is D's intention to use or threaten violence or his awareness that his conduct may be violent or threaten violence. Where reliance is placed by the prosecution on subs (2), it will probably be necessary to show that D's awareness extended to the conduct of the other person or persons using or threatening violence.

The intoxicated defendant is governed by s 6(5) and (6), considered earlier.

31.5 Fear or provocation of violence

It is an offence under s 4, punishable on summary conviction[70] with six months' imprisonment or an unlimited fine, if a person:

(a) uses towards another person threatening, abusive or insulting words or behaviour, or

(b) distributes or displays to another person any writing, sign or other visible representation which is threatening, abusive or insulting,

with intent to cause that person to believe that immediate unlawful violence will be used against him or another by any person, or to provoke the immediate use of unlawful violence by that person or another, or whereby that person is likely to believe that such violence will be used or it is likely that such violence will be provoked.

The fact that violence is actually used does not prevent the use of this charge.[71]

The section creates only one offence. It may be committed in a variety of ways, but the facts proved must correspond with the form alleged. If there is a substantial discrepancy between the particulars alleged and the facts found, a conviction will be quashed.[72]

31.5.1 Towards another

The words in s 4(1)(a), 'uses towards another person', mean 'uses in the presence of and in the direction of another person directly . . .' following *Atkin v DPP*[73] where D told customs officers in his house that, if the bailiff in the car outside came in, he was 'a dead un'. The bailiff, being informed, felt threatened but the threat was not direct. Similarly, under s 4(1)(b) the distribution or display must be made directly to a person present. Writing contained in an envelope is not a 'display'.[74] For the purposes of s 4 (though not for any other offence under the Act), the words 'towards another' arguably also require that the words or behaviour be directed against that other.[75]

31.5.2 Threatening, abusive or insulting

This is the first of many offences under the 1986 Act of which 'threatening, abusive or insulting' conduct is a principal constituent.[76] Whether conduct has this quality seems to be governed by an objective test. This is an element of the actus reus. It has been explained[77] that a word describing the actus reus element of an offence may also imply a mental element. In some instances, the 1986 Act, however, assumes that conduct or material may be

[70] Note that the racially aggravated forms of the offence discussed later are triable either way. See the CPS Charging Standards: www.cps.gov.uk/legal-guidance/public-order-offences-incorporating-charging-standard.

[71] See *CPS v Shabbir* [2009] EWCA Crim 2754. [72] *Winn v DPP* (1992) 156 JP 881.

[73] (1989) 89 Cr App R 199. [74] *Chappell v DPP* (1988) 89 Cr App R 82.

[75] Thornton et al, *The Law of Public Order and Protest* (2010) 1.137.

[76] Sections 4(1), 4A(1), 18(1), 19(1), 20(1), 21(1), 22(1), 23(1). [77] See Ch 2, p 28.

threatening, abusive or insulting even though there is no evidence that the actor or author intended it to have, or was aware that it might have, that quality. The effect is to create harsh offences. When proof of such intention or awareness is required, the Act specifically so provides;[78] and, in other cases, it puts the burden of proof (or at least an evidential one) on the defendant to show that he did not suspect or have reason to suspect that it was threatening, abusive or insulting.[79]

The words 'threatening, abusive or insulting', which are taken from the repealed s 5 of the Public Order Act 1936, are to be given their ordinary meaning. Much of the following case law concerns the offence under s 5 of the Public Order Act 1986 which, in its original form, also used the 'threatening, abusive or insulting' formulation. It has been said that it is not helpful to seek to explain the words by the use of synonyms or dictionary definitions because 'an ordinary sensible man knows an insult when he sees or hears it'.[80] Whether particular conduct is 'threatening', etc is a question of fact. In *Brutus v Cozens*,[81] D interrupted a tennis match to protest against apartheid and thereby angered the spectators. The House of Lords, reversing the Divisional Court, held that the finding of the magistrate that this was not 'insulting' behaviour was not an unreasonable finding of fact. If the magistrates had decided that the behaviour was insulting, it may be that their decision would have been equally beyond challenge.[82]

The section is not limited to rowdy or abusive behaviour. In *Taft*,[83] D was prosecuted having driven erratically alongside lone women drivers on country roads while masturbating. Masturbation in the sight of a stranger while in a public lavatory is capable of being insulting behaviour.[84] It is immaterial that the stranger is a policeman[85] who is on the lookout for this sort of thing, or a person who is not at all insulted. Words cannot be insulting (or, presumably, threatening or abusive) unless there is 'a human target which they strike' and it seems that D must be aware of that 'human target', though he need not intend the conduct to be 'insulting': *Masterson v Holden*,[86] where cuddling by two men in Oxford Street at 1.55 am, in the presence of two young men and two young women, was held capable of being insulting. It is surely now unlikely that this could withstand scrutiny under the HRA 1998. The gay couple could surely claim that they were being discriminated against in the exercise of their private lives since it is unrealistic to assume that similar displays of heterosexual behaviour would be prosecuted.

The concept of 'insulting' has also given rise to difficulty in the context of protestors. In *Lewis v DPP*,[87] protestors outside an abortion clinic displayed placards including one of an aborted 21-week foetus in pools of blood. The Divisional Court held that this could constitute abusive and insulting behaviour, rejecting the argument that 'the photograph on the placard was an accurate representation of the result of an abortion, and that what is truthful cannot be abusive or insulting'. Again, challenge under the ECHR in such cases would seem likely. If the protest is peaceful and involves the depiction of factual images, it is questionable whether prosecution is a necessary and proportionate response to protect the rights of others.[88]

78 Section 6(3) and (4). 79 Sections 19, 20, 21, 22, 23.

80 *Brutus v Cozens* [1972] 2 All ER 1297 at 1300 per Lord Reid. 81 [1973] AC 854.

82 At 1303 per Lord Kilbrandon. Lord Reid, *obiter*, agreed with the magistrates' finding; but it does not follow that he would have held a contrary finding to be unreasonable.

83 (1997) 13 Jan, unreported, CA (Crim Div). 84 *Parkin v Norman* [1982] 2 All ER 583 at 588–9.

85 And therefore presumably one who will not be readily insulted or provoked to violence.

86 [1986] 1 WLR 1017.

87 (1995) unreported, DC. Cf *DPP v Clarke* (1991) 94 Cr App R 359, where acquittals were upheld following the defendants' claims that they had not intended nor were they aware that displaying abortion images to police officers on duty outside a clinic would be threatening, abusive or insulting.

88 See on the Art 11 guarantee in the context of peaceful protest: *Alekseyev v Russia* [2011] Crim LR 480; *Brega v Moldova* (App no 52100/08), 2010; *Karabulut v Turkey* (App no 16999/04), 2009; *Hyde Park v Moldova* (App no 18491/07), 2009.

31.5.3 Mens rea/effect on V

It must be proved that D:[89]

(1) intended his words or behaviour towards V to be, or was aware that they might be, threatening, abusive or insulting;[90] and

(2) either—

(a) that he intended V to believe that immediate unlawful violence would be used against him or another; or

(b) that he intended to provoke the immediate use of unlawful violence by V or another; or

(c) that V was likely[91] to believe that such violence (that is, *immediate* unlawful violence)[92] would be used; or

(d) that it was likely that such violence would be provoked.

Although the section creates only one offence,[93] alternatives (a) and (b) require proof of intention whereas in alternatives (c) and (d) the test is objective and focuses on the effect of the conduct. The belief specified must be the belief of the person threatened.[94]

Where D's awareness that his conduct might be threatening, abusive or insulting is impaired by intoxication, s 6(5) and (6)[95] apply.

31.5.4 Public/private

The offence may be committed in a public or private place, except where D acts inside a dwelling[96] and V is also inside that, or another, dwelling.[97] So, in *Atkin v DPP*,[98] the threat to the customs officers in D's house could not be the offence. Threatening gestures through the bedroom window to the neighbour in his bedroom window across the street do not amount to the offence. Where D is in a dwelling, it seems that, if the issue is raised, the

[89] See *Winn* (1992) 156 JP 881. [90] Section 6(3).

[91] In construing the word 'likely', it is the state of the mind of the victim which is crucial rather than the precise probability of violence actually occurring within a short space of time: *DPP v Ramos* [2000] Crim LR 768 (D sending letter bomb). See also Auld LJ in *Chief Constable of Lancashire v Potter* [2003] EWHC 2272 (Admin), [34], considering the expression in the context of ASBOs.

[92] *Horseferry Road Metropolitan Stipendiary Magistrate, ex p Siadatan* [1991] 1 QB 260 (the publication of Salman Rushdie's *The Satanic Verses* was not an offence because it was not likely to provoke *immediate* violence without any intervening occurrence). Immediate does not mean instantaneous and is generously interpreted as in *Valentine* [1991] 1 QB 260 where V had said to a neighbour who was a prison officer 'next time you go [to work] we're going to burn your house. You are all going to fucking die.' The Divisional Court held that the magistrates were entitled to infer that these words gave rise to a fear of immediate violence. See also *Ramos*, n 91, and *Liverpool v DPP* [2008] EWHC 2540 (Admin)—D making gun gestures with his hand. In *Hughes v DPP* [2012] EWHC 606 (Admin), when D struck V from behind there was no evidence from which it could have been inferred that D intended to cause V to believe that unlawful violence would be used against him. Not every assault constitutes an offence under s 4(1). It is impermissible to strain the facts so as to make an individual guilty of an offence of which they are clearly innocent, albeit that they may have committed a different and perhaps even a more serious one.

[93] Section 7(2). [94] *Loade v DPP* [1990] 1 QB 1052. [95] See earlier in this chapter.

[96] Defined in s 8. Cf the definition adopted in relation to burglary in *Hudson* [2017] EWHC 841 (Admin).

[97] Section 4(2). See *Barber* [2001] EWCA Crim 838. Delivery of a threatening letter to V's home was held to be incapable of being an offence under s 4 or 5 in *Chappell v DPP* (1988) 89 Cr App R 82, although that decision was correct on the basis that there was no display by D. Cf *DPP v Ramos* [2000] Crim LR 768 where the letter went to a business address.

[98] See n 72.

prosecution must prove that D was aware that his conduct might be heard or seen by a person outside that dwelling or another dwelling.[99] The common parts, including a landing in a block of flats, are not part of a dwelling (this emphasizes the public order nature of the offence).[100] A police cell does not constitute a home or living accommodation and so the offence can be committed therein.[101] A laundry room used communally by tenants (each living in their own flat) was not a 'dwelling'. It could not properly be described as part of the structure of any individual home in the building.[102] More recently, in *DPP v Distill* the Divisional Court considered whether the definition of 'dwelling' includes a private garden.[103] The court observed that a garden to the front or rear of a dwelling-house cannot ordinarily be regarded as being 'a structure or part of a structure occupied as a person's home or as other living accommodation'. It followed that if, on the particular facts, a garden cannot properly be regarded as a 'structure' or 'part of a structure', then it will fall outside the definition of a 'dwelling' in s 8 of the Act.

31.6 Harassment, alarm or distress

It is an offence under s 5(1), punishable on summary conviction with a fine not exceeding level 3 on the standard scale,[104] if a person:

(a) uses threatening or abusive[105] words or behaviour, or disorderly behaviour, or

(b) displays any writing, sign or other visible representation which is threatening or abusive,

within the hearing or sight of a person likely to be caused harassment, alarm or distress thereby.[106]

This offence is wider than that under s 4 in that it includes the further alternative of 'disorderly' behaviour; and it extends beyond apprehension of violence to the causing of 'harassment, alarm or distress' (although it is now narrower than originally enacted because 'insulting' behaviour is no longer caught by s 5). When enacted, it was regarded as a controversial extension of the law. It is now heavily used in policing anti-social behaviour.[107]

The breadth of the offence and the vagueness of these elements leave an enormous discretion to the police in arrest, and subsequently to the magistrates, and can lead to great inconsistency in application. The circumstances and context in which the statements are

[99] cf s 5(3)(b), putting the onus of proof (or at least an evidential burden) on D.

[100] *Rukwira v DPP* [1993] Crim LR 882. [101] *CF* [2007] 1 WLR 1021.

[102] *Le Vine v DPP* [2010] EWHC 1128 (Admin). For a discussion of the meaning of the term 'dwelling' in the context of burglary, see K Laird, 'Conceptualising the Interpretation of "Dwelling" in Section 9 of the Theft Act 1968' [2013] Crim LR 656 and *Hudson*, n 96.

[103] [2017] EWHC 2244 (Admin).

[104] The offence attracts a fixed penalty.

[105] Previously, conduct could also be 'insulting', as under ss 4 and 4A, but this word was removed from s 5 by s 57 of the Crime and Courts Act 2013 with effect from 1 Feb 2014. The amendment also has the effect of removing the 'insulting' limb from the racially or religiously aggravated form of the offence.

[106] For research on the impact and operation of the offence, see D Brown and T Ellis, *Policing Low-Level Disorder: Police Use of s 5 of the Public Order Act 1986* (1994) HORS 135.

[107] Some of the more bizarre examples of purported s 5 offences include: a window display of a 4-foot high Indonesian carved penis (this was reported in the *Northern Echo* (2010), www.thenorthernecho.co.uk/news/7988195.Phallus_imprisonment), window displays of gollies (see A Turner, 'Golly Distressing' (2006) 170 JP 161), and logos on T-shirts (FCUK): *Woodman v French Connection Ltd* [2007] ETMR 8.

made are all-important. It has been held to be abusive for D to say 'fuck' twice to a police officer who was trying to arrest D's brother.[108] Describing someone of Asian appearance as 'fucking Islam' is undeniably abusive.[109]

A series of arrests, investigations and convictions (some of which were overturned on appeal) led to calls by campaigners for reform of the s 5 offence.[110] Amid concerns that the limb of the offence relating to 'insulting' conduct was encroaching on freedom of expression,[111] an amendment was made to the Crime and Courts Bill which had the effect of removing 'insulting' from the s 5 offence.[112]

It remains to be seen whether the amendment to s 5 will be anything more than symbolic. The effect on prosecutions for the s 5 offence is likely to be minimal—during the parliamentary scrutiny on the Crime and Courts Bill, the DPP was unable to identify any cases where the behaviour which had led to the conviction could not have been described as 'abusive' as well as 'insulting'.[113] The result of the amendment, in practice, may mean that additional scrutiny is applied by police and prosecutors: guidance produced by the College of Policing reminds officers that they should take into account the role of Art 10 and that conduct and visible representations which are 'merely insulting' are no longer criminal.[114] Furthermore, the CPS Charging Standards indicate that prosecutors 'will need to carefully consider' whether the s 5 offence is made out (although they add that, in most cases, prosecutors are likely to find that 'insulting' behaviour can also be described as 'abusive').[115]

31.6.1 Elements of the offence

Many of the elements are discussed previously in relation to s 4. 'Disorderly' is, no doubt, another ordinary word of the English language to be given its natural meaning and it will apply to acts of hooligans likely to produce the specified effect. In *Chambers and Edwards v DPP*,[116] 'disorderly' was held to be a question of fact for the trial court to determine. The CPS Charging Standards suggest that the following types of conduct may at least be capable of amounting to disorderly behaviour: causing a disturbance in a residential area or common part of a block of flats; persistently shouting abuse or obscenities at passers-by; pestering people waiting to catch public transport or otherwise waiting in a queue; rowdy behaviour in a street late at night which might alarm residents or passers-by, especially those who

[108] *DPP v Southard* [2006] EWHC 3449 (Admin). *Southard* was distinguished in *Harvey v DPP* [2011] EWHC 3992 (Admin) on the basis that the expletive could have been being used to convey D's frustration at being searched by police officers or as a form of emphasis. In *Williams v CPS* [2018] EWHC 2869 (Admin), the Divisional Court re-emphasized that police officers need to show a degree of resilience to inappropriate language.

[109] *R (DPP) v Humphrey* [2005] EWHC 822 (Admin).

[110] These included: the investigation of a protestor for holding a sign which read 'Scientology is not a religion it is a dangerous cult'; the arrest of a man for 'woofing' at a dog; the arrest of a student who asked a police officer 'do you realise your horse is gay?'; and the conviction of a street preacher for holding a sign which stated that homosexuality is immoral. See http://reformsection5.org.uk/#?sl=3.

[111] See eg: A Bailin, 'Criminalising Free Speech?' [2011] Crim LR 705; A Geddis, 'Free Speech Martyrs or Unreasonable Threats to Social Peace?—"Insulting" Expression and Section 5 of the Public Order Act 1986' [2004] PL 853.

[112] Hansard, HC, 14 Jan 2013, col 642 (Theresa May MP). [113] ibid.

[114] See http://library.college.police.uk/docs/APPREF/Guidance-amendment-public-order-2013.pdf, p 13.

[115] See www.cps.gov.uk/legal-guidance/public-order-offences-incorporating-charging-standard.

[116] [1995] Crim LR 896 (defendants standing peacefully to block surveyor's theodolite beam convicted despite absence of threat or fear of violence).

may be vulnerable such as the elderly or members of an ethnic minority group; causing a disturbance in a shopping precinct or other area to which the public have access or might otherwise gather.[117] The offence can be committed in public or private, except where D and V are inside a dwelling at the time of the relevant conduct.

31.6.1.1 Harassment, alarm or distress

The terms harassment, alarm and distress were considered in the Divisional Court in *R (R) v DPP*.[118] R, aged 12 and only 4 feet, 9 inches tall, was found by the Youth Court to have caused distress to a police officer, V, who was 6 feet tall and weighed 17 stone, when R made 'masturbatory gestures' towards the police officer. The officer claimed that he was distressed by R being out so late and by his behaviour. The Divisional Court quashed R's conviction, accepting that his behaviour was anti-social and intended to annoy V, but that it did not cause V 'emotional disturbance or upset'.[119] The court commented that the emotional disturbance need not be serious. In contrast, where the allegation is one of harassment, there is no need to demonstrate that any person suffered real emotional disturbance or upset.[120] The element of harassment in this context requires something more than merely trivial harassment. In *Gough v DPP*,[121] the Divisional Court stated that the District Judge at first instance was entitled to conclude that the words 'insulting' (which was then part of the offence) and, by extrapolation, 'threatening', 'abusive' and 'disorderly' were not to be narrowly construed. Given that s 5 has the potential to encroach upon freedom of expression, it is submitted that this *dictum* ought to be treated with caution and that a more narrow construction of the words might be considered more appropriate.

31.6.1.2 Victim

It is clear that the prosecution do not have to establish that the words or conduct were in fact heard or seen by a person. The prosecution must prove that D's conduct took place within the hearing or sight of a person (who might be a policeman)[122] and was likely to cause harassment, alarm (for his own or a third party's[123] safety) or distress. There must be a real, not merely a hypothetical, victim. There is no requirement that the conduct be directed 'towards another person'. It is sufficient that the conduct merely might have been seen or could possibly have been seen by a person present.[124] It has been held that the s 5 offence (and the s 4A offence discussed later) can be committed where there is a general confrontation between the police and protesters and the fact that the victim perceives the behaviour through CCTV at the scene does not prevent a conviction.[125]

[117] See public order offences Charging Standard: www.cps.gov.uk/legal-guidance/public-order-offences-incorporating-charging-standard.

[118] (2006) 170 JP 661. [119] Per Toulson J.

[120] *Southard v DPP* [2006] All ER (D) 101. The court endorsed the interpretation of distress in *R (R) v DPP*. See also *Burrell v CPS* [2005] EWHC 786 (Admin).

[121] [2013] EWHC 3267 (Admin). See N Parpworth, 'A Right to Be Naked in a Public Place?' (2013) 177 JPN 843.

[122] *DPP v Orum* [1989] 1 WLR 88; *Harvey v DPP* [2011] EWHC 3992 (Admin). The court in *Southard* rejected an argument that the offence is not available when police officers are the sole audience. More recently, however, it has been emphasized that police officers are expected to possess higher levels of fortitude and stoicism than members of the public which might make the offence a difficult one to prove when there is no one else present at the time of the incident other than police officers. See *Mladenov v Bulgaria* [2013] EWHC 903 (Admin).

[123] *Lodge v DPP* (1988) The Times, 26 Oct. See also *Chambers v DPP* [1995] Crim LR 896.

[124] *Taylor v DPP* (2006) 170 JP 485. Cf *Holloway v DPP* [2004] EWHC 2621 (Admin) (D videoing himself naked with group of school children on playing field in background unaware of D's presence), and see *Reda v DPP* [2011] EWHC 5 (Admin).

[125] *Rogers and others v DPP* (1999) 22 July, unreported, DC.

It is for D to prove, if he can, that he had no reason to believe that there was any such person within hearing or sight, who was likely to be caused harassment, alarm or distress.[126] The requirement of a 'true' potential victim operates as some limitation on the breadth of the offence as compared to the public order offences discussed previously, where a hypothetical bystander will suffice.

In *S v DPP*,[127] the Divisional Court held that the offence was made out even if the material that caused the harassment, alarm or distress was no longer in the public domain at the time it caused someone to be harassed or distressed. In that case, material on a website was removed before the police showed it to the victim.

31.6.1.3 Mens rea

It must be proved that D intended his conduct to be threatening or abusive or disorderly or was aware that it might be so.[128] Section 6(5) and (6) apply to the intoxicated defendant.[129] The requirement at its lowest involves proof that D had an awareness of a possibility.

31.6.1.4 Defence of reasonableness

An important aspect of the crime is the defence provided in s 5(3). In addition to the opportunity to prove (a) that D had no reason to believe that there was any person within sight or hearing who was likely to be caused harassment, alarm or distress or (b) that he was inside a dwelling and had no reason to believe that his conduct would be heard or seen by a person outside that or any other dwelling, it is a defence for D to prove under s 5(3)(c) that his conduct was reasonable. This test is clearly one of an objective nature.[130] Note that the defence was not sufficient to prevent conviction in a number of cases of protest discussed in the next paragraph.

31.6.1.5 ECHR

In a number of cases, the offence has been challenged as being incompatible with Art 10 of the ECHR (which guarantees the right to freedom of expression).[131] There is no doubt that the protection of freedom of expression applies widely and is engaged by 'conduct' that might not normally be considered as expression. 'Expression' includes purely physical acts of protest: *Hashman and Harrup v UK*,[132] and extends to 'the irritating, the contentious, the heretical, the unwelcome and the provocative provided it does not tend to provoke violence'.[133] The term also includes public nudity.[134] The domestic courts have adopted a rather inconsistent application of Art 10 in this context.

In *Percy v DPP*,[135] P had desecrated the US flag as part of her protest against US defence systems in the UK. Evidence was adduced that the US military personnel witnessing P's behaviour found it distressing. The Divisional Court held that s 5 was not necessarily incompatible with Art 10 (nor could it be since the offence encompasses behaviour other than that involving freedom of expression). The court expressly acknowledged that s 5 is drafted in such a way as to accommodate freedom of expression defences. On the facts, the District

126 If D is within a dwelling, he may also rely on s 5(3)(b).

127 [2008] EWHC 438 (Admin).

128 Section 6(4). *Ball* (1989) 90 Cr App R 378 at 381.

129 See earlier in this chapter.

130 See generally A Geddis, 'Free Speech Martyrs or Unreasonable Threats to Social Peace? "Insulting" Expression and s 5 of the Public Order Act 1986' [2004] PL 853.

131 See Ch 1. See also S Turenne, 'The Compatibility of Criminal Liability with Freedom of Expression' [2007] Crim LR 866.

132 (1999) 30 EHRR 241, para 28 (hunt saboteurs).

133 *DPP v Redmond-Bate* [1999] Crim LR 998 at 1000 per Sedley LJ; and see *Handyside v UK* (1976) 1 EHRR 737, para 49.

134 *Gough v DPP* [2013] EWHC 3267 (Admin).

135 [2001] EWHC 1125 (Admin).

Judge had attached too much weight to the fact that P could have made the protest without the flag desecration. The court had to presume that the appellant's conduct was protected by Art 10 unless and until it was established that a restriction on her freedom of expression was strictly necessary, having regard to: P's awareness of the likely impact of her conduct, the fact that P's behaviour went beyond legitimate protest, that the behaviour had not formed part of an open expression of opinion on a matter of public interest, but had become disproportionate and unreasonable, that P knew the likely effect of her conduct upon witnesses, whom she had targeted, and the fact that she used a method of demonstration—destroying the flag—which was not necessary to convey her message or the expression of opinion.

Percy was followed in *Norwood v DPP*,[136] where N's conviction for the racially aggravated version of the offence was upheld when he displayed a British National Party poster ('Islam out of Britain') showing an image of the 9/11 terrorist attack. The Divisional Court concluded that although Art 10 was engaged, having regard to Art 10(2), prosecution was a necessary and proportionate restriction on D's freedom of expression for the prevention of disorder or crime and/or for the protection of the rights of others.[137] Norwood's application to the European Court on the grounds of an Art 10 infringement was declared inadmissible.[138]

In *Hammond v DPP*,[139] H, an evangelical Christian, carried a double-sided sign bearing the words 'Stop Immorality', 'Stop Homosexuality and Stop Lesbianism' on each side of a pole. H's preaching with the sign on display led to a gathering of 30 to 40 people shouting and becoming angry. H refused when police requested him to remove the sign, although H admitted he was aware that his sign was insulting (which was at that time sufficient for s 5) because he had experienced a similar reaction before. H was convicted under s 5 and the conviction was upheld by the Divisional Court who concluded that H had not established that his conduct was reasonable having regard to Art 10 of the Convention and Art 9—the right to freedom of thought, conscience and religion.

In *Abdul and others v DPP*[140] in the Divisional Court, A and others were prosecuted under s 5 after demonstrating at a homecoming parade of an army regiment returning from Afghanistan and Iraq. At the parade, the defendants were close to the parading soldiers and chanted slogans such as 'rapists', 'murderers', 'go to hell', etc. The police did not warn them at the time or seek to stop them or seize their placards. There was no evidence that the defendants were anything other than compliant with the police throughout. There was unrest as members of the public supporting the soldiers took offence; the members of the regiment did not. The judge, having regard to Art 10 of the ECHR, convicted five of the seven defendants of the s 5 offence, concluding that they had gone significantly beyond the legitimate expressions of protest when viewed within the context and circumstances

[136] [2003] EWHC 1564 (Admin). For criticism see I Hare, 'Crosses, Crescents and Sacred Cows: Criminalising Incitement to Religious Hatred' [2006] PL 521 at 529–30; K Goodall, 'Incitement to Religious Hatred: All Talk and No Substance' (2007) 70 MLR 89. See similarly *Kendall v DPP* [2008] EWHC 1848 (Admin) (poster saying 'illegal immigrant murder scum'). See also C Newman, 'Undesirable Posters and Dubious Symbols: Anglo-German Legal Solutions to the Display of Right-Wing Symbolism and Propaganda' (2011) 75 J Crim L 142.

[137] If the prosecution prove that D's conduct was abusive and that he intended it to be, or was aware that it might be so, it would in most cases follow that his conduct was objectively unreasonable, especially where that conduct was motivated wholly or partly by hostility towards members of a religious group based on their membership of that group.

[138] *Norwood v UK* (2005) 40 EHRR SE11. The Court referred to the protection in Art 17 of the ECHR against misuse of the protections afforded by other guarantees in the Convention. On which see Turenne, n 131. It referred also to the long line of cases rejecting Art 10 challenges to prosecutions for racist conduct: *Glimmerveen v Netherlands* (1982) 4 EHRR 260; *WP v Poland* (2005) 40 EHRR SE1; *Jersild v Denmark* (1994) EHRR 1. See generally https://rm.coe.int/guide-art-10-eng/16809ff23f.

[139] [2004] EWHC 69 (Admin). [140] [2011] EWHC 247 (Admin).

of the day. The Divisional Court dismissed the appeal. The court identified the relevant principles governing the relationship between s 5 of the Act and Art 10 of the Convention:

i) The starting point is the importance of the right to freedom of expression.

ii) . . . Legitimate protest can be offensive at least to some—and on occasions must be, if it is to have impact. Moreover, the right to freedom of expression would be unacceptably devalued if it did no more than protect those holding popular, mainstream views; it must plainly extend beyond that so that minority views can be freely expressed, even if distasteful.

iii) . . . interference with the right to freedom of expression must be convincingly established. Art. 10 does not confer an unqualified right to freedom of expression, but the restrictions contained in Art. 10.2 are to be narrowly construed.

iv) There is not and cannot be any universal test for resolving when speech goes beyond legitimate protest, so attracting the sanction of the criminal law. The justification for invoking the criminal law is the threat to public order. Inevitably, the context of the particular occasion will be of the first importance.

v) The relevance of the threat to public order should not be taken as meaning that the risk of violence by those reacting to the protest is, without more, determinative; sometimes it may be that protesters are to be protected. That said in striking the right balance when determining whether speech is 'threatening, abusive [or insulting[141]]', the focus on minority rights should not result in overlooking the rights of the majority.

v[i]) If the line between legitimate freedom of expression and a threat to public order has indeed been crossed, freedom of speech will not have been impaired by 'ruling . . . out' threatening, abusive or insulting speech.[142]

vi[]i) [The High Court] should not interfere [with decisions of the magistrates] unless, on well known grounds, the Appellants can establish that the decision to which the District Judge has come is one she could not properly have reached.[143]

The words were personal insults to the soldiers and not general statements against the war. It has been argued that the Administrative Court's judgment is overly paternalistic and has the potential to have a chilling effect on free speech.[144]

In *Campaign Against Anti-Semitism v DPP*,[145] the court rejected an application for judicial review by a charitable organization. The DPP had taken over and discontinued the organization's private prosecution of D under s 5. It was alleged that D had shouted anti-semitic remarks during a public parade after the Grenfell Tower tragedy. D alleged that Zionists were responsible. Referring to *Abdul* (discussed earlier), the court distinguished between legitimate freedom of expression on the one hand and a threat to public order on the other. There is not and cannot be any universal test for resolving when speech goes beyond legitimate protest: context is everything. The court did not condone the language used, but that was not the question.

The courts have also struggled with the question of whether the Crown should have to prove that the decision to prosecute is proportionate and, accordingly, that it does not amount to an infringement of Art 10 of the ECHR. The latest decision is that in *James v DPP*[146] where the court examined a number of authorities. The court held that the 'necessary

[141] Note that it is no longer sufficient for words to be insulting.

[142] *Brutus v Cozens* [1973] AC 854 at 862 per Lord Reid.

[143] [2011] EWHC 247 (Admin) at [49] per Gross LJ.

[144] A Khan, 'A "Right Not to be Offended" under Article 10(2) ECHR? Concerns in the Construction of "Rights of Others"' [2012] EHRLR 191.

[145] [2019] EWHC 9 (Admin).

[146] [2015] EWHC 3296 (Admin).

balance of proportionality is struck by the terms of the offence-creating provision, without more ado'.[147] The prosecution do not have to prove that the decision to prosecute was *necessary and proportionate*.

31.7 Intentional harassment, alarm or distress

The Criminal Justice and Public Order Act 1994 inserted s 4A into the 1986 Act, creating an offence of intentional harassment, alarm or distress punishable on summary conviction with imprisonment for six months or an unlimited fine, or both. It requires threatening, abusive or insulting words or behaviour but it also requires an *intention* to cause a person harassment, alarm or distress and actual causing of harassment, alarm or distress to that or another person. As in s 5, the offence may be committed in public or in private, with the same exception relating to a dwelling. The offence, being more severely punishable than s 5, was explained in parliamentary debates to be aimed at serious or persistent racial harassment.

The provisions relating to intoxication in s 6(5) and (6) do not apply to the offence under s 4A. The mens rea requires an intention, and the offence would seem therefore to be one of specific intent.

31.8 Racially or religiously aggravated public order offences

The offences under ss 4, 4A and 5 of the 1986 Act are offences that can be 'racially aggravated' offences under s 31 of the Crime and Disorder Act 1998, and 'religiously aggravated' under the Anti-terrorism, Crime and Security Act 2001.[148] Definitions of 'racially aggravated' and 'religiously aggravated' are set out and discussed in Ch 16. Aggravated s 4 and s 4A offences are punishable on summary conviction by six months' imprisonment, or a fine not exceeding the statutory maximum or both; and on indictment by two years' imprisonment, or a fine or both. An aggravated s 5 offence is triable only summarily and punishable by a fine not exceeding level 4 on the standard scale. It is CPS policy 'not to accept pleas to lesser offences, or a lesser basis of plea, or omit or minimise admissible evidence of racial or religious aggravation for the sake of expediency'.[149]

Romany gypsies are capable of being recognized as a racial group on the basis of their ethnic origin: *Hewlett*.[150] The court referred to the *Oxford English Dictionary* definition of

[147] Per Ouseley J in *James v DPP* [2015] EWHC 3296 (Admin), disapproving *Dehal v CPS* [2005] EWHC 2154 (Admin) and approving *Bauer v DPP* [2013] 1 WLR 3617.

[148] See P Iganski, A Sweiry and J Culpeper, 'A Question of Faith? Prosecuting Religiously Aggravated Offences in England and Wales' [2016] Crim LR 334; MM Idriss, 'Religion and the Anti-Terrorism, Crime and Security Act 2001' [2002] Crim LR 890 and N Addison, *Religious Discrimination and Hatred Law* (2007) 131 et seq. See also, *inter alia*, LC 348, *Hate Crime: Should the Current Offences be Extended* (2014). LCCP 213, *Hate Crime: The Case for Extending the Existing Offences* (2013) included an online appendix of the history of these offences. See also M Malik, 'Racist Crime: Racially Aggravated Offences in the Crime and Disorder Act 1998 Part II' (1999) 62 MLR 409; F Brennan, 'The Crime and Disorder Act 1998: (2) Racially Motivated Crime: The Response of the Criminal Justice System' [1999] Crim LR 17. Specific guidance is provided to prosecutors by the CPS on prosecuting racially or religiously motivated crime—www.cps.gov.uk/legal-guidance/racist-and-religious-hate-crime-prosecution-guidance.

[149] See CPS guidance, ibid. [150] [2016] EWCA Crim 673.

the word 'pikey' as referring to a 'gypsy or traveller'. It is clear from *Commission for Racial Equality v Dutton*[151] that Romany gypsies are to be recognized as a racial group on the basis of their ethnic origin. The offence applies irrespective of whether V was in fact a Romany gypsy. The offence was committed if H presumed V was a member of that group and demonstrated hostility towards it in the manner described.[152]

One important procedural issue that has arisen in relation to these offences is whether it is permissible for D to be convicted of both the simple version of the offence and the aggravated version. In *R (Dyer) v Watford Magistrates' Court*,[153] the court held that it is not. Laws LJ described that possibility as:

> unfair and disproportionate. It is not a matter of being punished twice. The double conviction is of itself unfair. It must be basic to our system of criminal justice that a person's criminal record should reflect what he has done, no more and no less. That is fair and proportionate. To convict him twice for a single wrong offends this basic rule. These two offences were charged as alternatives but they have been treated as if they were cumulative.[154]

The courts have been faced with numerous substantive issues under the aggravated offences, particularly as to the intentions of the defendant.[155] In *CPS v Weeks*,[156] a charge under s 4A failed on the facts where the defendant had said 'watch out the nights are getting dark' to his victim, and called him a 'black bastard'. Holland J noted that the question whether the use of words such as 'black bastard' indicates an *intention* to cause harassment, alarm or distress is a question of fact dependent on the context and circumstances in which they were used. In *DPP v McFarlane*,[157] Rose LJ found that once the 'basic' offence (ie the public order element) was proved and that racist language was used that was hostile or threatening to the complainant, it made no difference that the defendant may have had an additional reason for using the language; the test of demonstration of racial hostility under s 28(1)(a) was satisfied.[158] In *DPP v Woods*,[159] it was confirmed that for the aggravated offence under s 28(1)(a)[160] the offence applies irrespective of D's motivation (even if it was something other than a racist motivation such as D being refused entry by a bouncer). That s 28(1)(a) offence requires only that there is a demonstration of hostility. That is an objective test and nothing to do with D's motives, unlike s 28(1)(b) which does require proof of a racial motivation.[161] Ordinarily, the use of racially or religiously insulting remarks in the normal course of events will be enough to establish a demonstration of hostility.

In *Valentine*,[162] the Court of Appeal held that under s 28(1)(a) the offence is not committed if the racial hostility was not targeted at the victim of the public order offence (D using racist language about a child but with intent to distress the mother). The victim of the aggravated offence is the person who is caused harassment, alarm or distress and not the person the defendant intended to harass, alarm or distress, where those people are different.

151 [1989] QB 783. 152 See *Blackstone's Criminal Practice* (2021) B11.148.

153 [2013] EWHC 547 (Admin), [11].

154 Although counsel for the CPS indicated that he intended to ask the court to certify a point of law given the importance of the case, this does not appear to have occurred. The contrary view had earlier been taken in *R (CPS) v Blaydon Youth Court* [2004] EWHC 2296 (Admin).

155 On which see E Burney, 'Using the Law on Racially Aggravated Offences' [2003] Crim LR 28.

156 (2000) 14 June, unreported, DC. 157 [2002] EWHC 485 (Admin).

158 See also *Greene* [2004] All ER (D) 70 (May). 159 [2002] EWHC 85 (Admin).

160 See also *DPP v M* [2005] Crim LR 392 and commentary.

161 *R (Jones) v DPP* [2010] EWHC 523 (Admin). 162 [2017] EWCA Crim 207.

Arguments that such offences are an illegitimate restriction on the right to freedom of expression will be most unlikely to get off the ground. The European Court has taken the view that the direct expression of racist views is not protected under Art 10.[163]

31.8.1 Reform

In 2013, the Law Commission was asked by the Ministry of Justice to consider whether there was a case for extending the aggravated offences in the Crime and Disorder Act 1998 to include where hostility is demonstrated towards people on the grounds of disability, sexual orientation or gender identity. In its report, the Law Commission[164] recommended amendments to the enhanced sentencing scheme that currently exists. Under ss 145 and 146 of the Criminal Justice Act 2003, if the defendant demonstrated hostility towards the victim on the basis of one of the five listed characteristics or was motivated by such hostility, then this must be taken into account at sentencing.[165] In addition, the judge must state publicly when passing sentence that hostility has been taken into account and how it has impacted upon the sentence. The Law Commission also recommended a wider review to produce a more coherent approach to hate crime offences, but in the absence of such a review, the Commission recommended extending the aggravated offences.[166]

At present, the offences can be aggravated where the hostility is demonstrated towards or motivated by D's belief about V's race or religion. The Law Commission has more recently published a consultation paper[167] with wide-ranging questions about extending the scope of the offences to include migration and asylum status, and/or language within the definition of race, to extend the aggravated offences to include sexual orientation, transgender,[168] non-binary and intersex identity and disability. The Commission seeks views on extending the aggravated offences to include age, subcultures, sex workers, homelessness, philosophical beliefs and gender or sex. In addition, the Commission proposes reforming the current test of hostility or motivation to one of motivation by 'hostility or prejudice' towards the protected characteristic.

31.9 Other public assembly-related offences

Other public order offences such as those dealing with raves[169] (ss 63–66 of the Criminal Justice and Public Order Act 1994 as amended), aggravated trespass (ss 68 and 69 of the 1994 Act) and prohibited processions and assemblies (Part II of the Public Order

[163] See the Law Commission's discussion of this in the appendix to LCCP 213, *Hate Crime: The Case for Extending Existing Offences* (2013), https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2015/03/cp213_hate_crime_appendix-a.pdf. See generally *X v Italy* (1976) 5 DR 83; *Jersild v Denmark* [1994] EHRR 1, on which see also J Andrews and A Sherlock, 'Freedom of Expression—How Far Should It Go' (1995) 20 EL Rev 329. See also the important limitation in Art 17 preventing any group from performing acts designed to destroy the rights and freedoms in the Convention to a greater extent than is provided for in the Convention. This has been influential in the ECtHR's reasoning. There are similar guarantees in Art 20 of the International Covenant on Civil and Political Rights. For concern that it is too readily used, see Turenne, n 131.

[164] LC 348, *Hate Crime: Should the Current Offences be Extended* (2014), www.gov.uk/government/uploads/system/uploads/attachment_data/file/316099/9781474104852_Web.pdf.

[165] For discussion of how this provision operates in practice, see A Owusu-Bempah and M Austin Walters, 'Racially Aggravated Offences: When Does Section 145 of the Criminal Justice Act 2003 Apply?' [2016] Crim LR 116.

[166] ibid, fn 164.

[167] LCCP 250, *Hate Crime Laws* (2020).

[168] It is proposed that the definition of 'transgender' be revised to include: people who are or are presumed to be transgender; people who are or are presumed to be non-binary; people who cross-dress (or are presumed to cross-dress); and people who are or are presumed to be intersex.

[169] Open air gatherings to listen to loud 'music' ('sounds wholly or predominantly characterised by the emission of a succession of repetitive beats'): s 63(1)(b).

Act 1986) as well as the dispersal powers in Part 3 (ss 34–42) of the Anti-social Behaviour, Crime and Policing Act 2014 are beyond the scope of this book. It should be noted that these are becoming increasingly important in dealing with protestors.[170]

31.10 Stirring up hatred on grounds of race, religion or sexual orientation

These offences are focused not on whether D, by his communication, intends or causes P to commit an offence against someone on the grounds of their race, religion or sexual orientation; that would be dealt with as assisting or encouraging offences described in Ch 11. The offences under consideration here deal with conduct by D which is intended (or, in racial cases, likely) to cause someone to hate others because of their personal characteristic: race, religion or sexual orientation.[171] As the CPS guidance on the stirring up hatred provisions states, hatred is a very strong emotion. Stirring up racial tension, opposition and even hostility may not necessarily be enough to amount to an offence.

The racial hatred offences apply to specified forms of behaviour or content that is: threatening, abusive or insulting; and intended, or likely, to stir up racial hatred.

The offences relating to hatred on the grounds of religion or sexual orientation are much narrower, applying only to specified forms of behaviour or content that is: threatening; and intended to stir up hatred on these grounds. In the case of these offences, there are provisions safeguarding freedom of expression, so as to allow discussion of religious beliefs and practices, sexual practices and the merits of same-sex marriage.

31.10.1 Racial hatred

Offences of inciting racial hatred were first introduced into the law by the Race Relations Act 1965 which required proof of an intention to stir up such hatred.[172] Because of the difficulty of proving such intent, the law was amended by the Race Relations Act 1976 which replaced the requirement of intent with an objective test. It was enough that the defendant's conduct was likely to stir up racial hatred, whether he intended to do so or not. Part III of the Public Order Act 1986 replaced the old law with six new offences. They are all concerned with acts intended or likely to stir up racial hatred—the objective test is retained throughout.

[170] See *Richardson v DPP* [2014] UKSC 8; *Bauer v DPP* [2013] EWHC 634 (Admin); *DPP v Bayer* [2003] EWHC 2567 (Admin); *DPP v Tilly* [2001] EWHC 821 (Admin); *DPP v Barnard* [2000] Crim LR 371; *Nelder v DPP* (1998) The Times, 11 June. See further S Bailey and N Taylor, *Civil Liberties Cases Material and Commentary* (6th edn, 2009) Ch 4; D Feldman, *Civil Liberties and Human Rights* (2nd edn, 2002) Ch 18; Thornton et al, *The Law of Public Order and Protest*, Ch 5.

[171] See J Waldron, *The Harm in Hate Speech* (2012); I Hare, 'Crosses, Crescents and Sacred Cows: Criminalising Incitement to Religious Hatred' [2006] PL 521, tracing the history of the common law: PS Rumney, 'The British Experience of Racist Hate Speech Regulation—A Lesson for First Amendment Absolutists?' (2003) 32 Common L World Rev 117. See also the valuable historical analysis in the appendix to LCCP 213, *Hate Crime: The Case for Extending the Existing Offences* (2013).

[172] Related offences include making racist chants at football games: Football (Offences) Act 1991, s 3. See LCCP 250, *Hate Crime Laws* (2020) Ch 19.

31.10.1.1 Meaning of racial

By s 17:

In this Part, 'racial hatred' means hatred against a group of persons [. . .[173]] defined by reference to colour, race, nationality (including citizenship) or ethnic or national origins.

It will be noted that the offences extend to stirring up hatred against members of some religious groups such as the Jewish and Sikh religions because these religions also constitute a 'racial group'.[174] Under the 1976 Act, it was held that the term 'ethnic' was to be construed relatively widely and that the Sikhs, though originally a religious community, now constituted an ethnic group because they were a separate community with a long shared history and distinctive customs.[175]

In *Mandla*, Lord Fraser of Tullybelton observed that:

For a group to constitute an ethnic group in the sense of the Act of 1976, it must, in my opinion, regard itself, and be regarded by others, as a distinct community by virtue of certain characteristics. Some of these characteristics are essential; others are not essential but one or more of them will commonly be found and will help to distinguish the group from the surrounding community. The conditions which appear to me to be essential are these: (1) a long shared history, of which the group is conscious as distinguishing it from other groups, and the memory of which it keeps alive; (2) a cultural tradition of its own, including family and social customs and manners, often but not necessarily associated with religious observance. In addition to those two essential characteristics the following characteristics are, in my opinion, relevant; (3) either a common geographical origin, or descent from a small number of common ancestors; (4) a common language, not necessarily peculiar to the group; (5) a common literature peculiar to the group; (6) a common religion different from that of neighbouring groups or from the general community surrounding it; (7) being a minority or being an oppressed or a dominant group within a larger community, for example a conquered people (say the inhabitants shortly after the Norman conquest) and their conquerors might both be ethnic groups.[176]

It has been held in an employment context that Muslims are not a racial group under this definition.[177] In *R v DPP, ex p LBC of Merton*,[178] it was held in judicial review proceedings that a declaration that Muslims were a group covered by ss 17 to 19 would not be binding on the criminal courts. The law was argued to be arbitrarily discriminatory in the protection it offers to certain religious groups within England and Wales.

31.10.1.2 The racial hatred offences

Proceedings for an offence under Part III of the 1986 Act may not be instituted except by or with the consent of the Attorney General. Each offence is punishable on indictment with seven years' imprisonment[179] or an unlimited fine or both, or on summary conviction with

173 The words 'in Great Britain' in the original formulation were repealed by the Anti-terrorism, Crime and Security Act 2001, s 37.

174 On earlier proposals to extend the offences to include inciting religious hatred, see Idriss [2002] Crim LR 890. On the difficulty of definition and application of the racial hatred offences to members of home nations, see C Munro, 'When Racism is Not Black and White' (2001) 151 NLJ 313.

175 *Mandla v Dowell Lee* [1983] 2 AC 548.

176 This passage was cited with approval by Lord Phillips in *R (E) v Governing Body of JFS* [2009] UKSC 15.

177 *JH Walker v Hussain* [1996] IRLR 11. See for an argument that British Muslims are protected, KS Dobe and SS Chhokar, 'Muslims, Ethnicity and the Law' (2000) 4 Int'l J Discrimination and Law 369. See generally Bailey and Taylor, n 170; S Bailey, D Harris and D Ormerod, *Civil Liberties: Cases and Materials* (5th edn, 2001) Ch 11.

178 [1999] COD 358.

179 Raised from two years by the Anti-terrorism, Crime and Security Act 2001, s 40.

six months' imprisonment or a fine not exceeding the statutory maximum, or both. The offences are very rarely prosecuted.[180] In *Burns*[181] D sought to appeal his conviction on the basis that the judge was wrong to conclude that it was not necessary that the intended or likely stirring up of racial hatred be in the jurisdiction of England and Wales. The Court of Appeal saw no merit in this argument and held that it is sufficient for the purposes of these offences in relation to publication that the relevant actions of the defendant in publishing took place in this jurisdiction, even if the relevant website was hosted overseas. This issue is discussed further later in the chapter.

The essence of each offence is that D does an act involving the use of threatening, abusive or insulting words, behaviour or material and either:

(1) he intends thereby to stir up racial hatred; or

(2) having regard to all the circumstances racial hatred is likely to be stirred up thereby.[182]

The offences are specific statutory offences creating inchoate liability. It is enough that the words or conduct are threatening, abusive or insulting: the prosecution do not also need to prove that they in fact caused someone to feel threatened, abused or insulted. As ever with inchoates, the elements of mens rea take on paramount importance. This Part of the Act provides a variety of requirements of mens rea in relation to the 'threatening, abusive or insulting' quality of the material in question. We have seen that for offences under s 4 the prosecution must prove that D intended his conduct to have, or was aware that it might have, that quality.[183] In Part III, this requirement is not as simple.

The principled basis for such offences is that, irrespective of whether they do in fact cause alarm or distress, they 'intentionally denigrate or demean those against whom' the words are directed. What makes them public wrongs is their 'blatant and derogatory denial of their victims' status as members of the polity'.[184]

31.10.1.3 Section 18

It is an offence for D to use threatening, abusive or insulting words or behaviour or display any written material which is threatening, abusive or insulting, where D intends to stir up racial hatred or where racial hatred is likely to be stirred up thereby. Under the first form of the offence,[185] where D is shown to have intended to stir up racial hatred, the test for 'threatening, abusive or insulting' is wholly objective. Under the second form of the offence, where D is not shown to have intended to stir up racial hatred, the prosecution must prove that D intended his conduct to be, or was aware that it might be, 'threatening, abusive or insulting' and that having regard to all the circumstances, racial hatred was likely to be stirred up thereby.[186]

[180] Between 2008 and 2012, a total of 113 offences charged under the racial hatred provisions reached the first hearing in the magistrates' courts. For high-profile prosecutions, see eg *Abu Hamza* [2007] QB 659 and the cases involving the protests outside the Danish Embassy following the publication in Denmark of the cartoons of the prophet Muhammed: *Saleem* [2007] EWCA Crim 2692.

[181] [2017] EWCA Crim 1466.

[182] For a discussion of speech crimes as either conduct or result crimes, see J Jacconelli, 'Context Dependent Crime' [1995] Crim LR 771. Note this is a crucial difference from the religious hatred offence discussed later.

[183] Section 6(3) and (4).

[184] Duff, *Answering for Crime*, 134.

[185] Section 18(1)(a).

[186] Section 18(1)(b) and (5).

31.10.1.4 Section 19

D commits an offence by publishing[187] or distributing written material[188] which is threatening, abusive or insulting, either with intent to stir up racial hatred or in circumstances where racial hatred is likely to be stirred up.[189] The prosecution need not prove an intention or awareness with respect to the 'threatening, abusive or insulting' nature of the material or words, but it is a defence for D, who is not shown to have intended to stir up racial hatred, to prove:[190] that he was not aware of the content of material and did not suspect or have reason to suspect that it was threatening, abusive or insulting.[191] This contrasts with the second form of the s 18 offence (words, behaviour or written material likely to stir up racial hatred), where D's state of mind as to the threatening, abusive or insulting nature of his conduct is treated as part of the mental element of the offence, for the prosecution to prove.

31.10.1.5 Section 20

D commits an offence by presenting or directing the public performance of a play which involves the use of threatening, abusive or insulting words or behaviour, if he intends to stir up racial hatred or if such hatred is likely to be stirred up. The prosecution need not prove an intention or awareness with respect to the 'threatening, abusive or insulting' nature of the material or words but, as with s 19, it is a defence for D, who is not shown to have intended to stir up racial hatred, to prove[192] that he did not know and had no reason to suspect that the offending words or behaviour were threatening, abusive or insulting.

31.10.1.6 Section 21

D commits an offence by distributing or showing or playing a recording of visual images or sounds which are threatening, abusive or insulting, if he intends to stir up racial hatred or if such hatred is likely to be stirred up. The prosecution need not prove an intention or awareness with respect to the 'threatening, abusive or insulting' nature of the material or words, but again it is a defence for D, who is not shown to have intended to stir up racial hatred, to prove[193] that he was not aware of the content of the recording and did not suspect and had no reason to suspect that it was threatening, abusive or insulting.

31.10.1.7 Section 22

D commits an offence by providing a programme service for, or producing, or directing, a programme involving threatening, abusive or insulting visual images or sounds, or using the offending words or behaviour therein, with intent to stir up racial hatred or in circumstances where it is likely to be stirred up. Under s 22, where D is shown to have an intention

[187] In relation to the definition of 'publication' under s 29, in *Sheppard and Whittle*, n 195, the court concluded that it was misconceived to argue that without a publishee there could be no publication. The Crown had to show that there was publication to the public or a section of the public in that the material was generally accessible to all, or available to, placed before or offered to the public, and that could be proved by the evidence of one or more witnesses: in this case one police officer.

[188] This includes material on the internet: *Sheppard and Whittle*, n 195. This is not surprising since 'written material *includes* any sign or other visible representation'. For discussion, see J Rowbottom, 'To Rant, Vent and Converse: Protecting Low Level Digital Speech' (2012) 71 CLJ 355.

[189] For an example in the Brexit context, see *Bitton* [2019] EWCA Crim 1372.

[190] Subject to the discussion in Ch 1, relating to burdens of proof resting on the accused in the light of the jurisprudence on Art 6(2) of the ECHR.

[191] Section 19(2).

[192] Subject to the discussion in Ch 1, relating to burdens of proof resting on the accused in the light of the jurisprudence on Art 6(2) of the ECHR.

[193] Subject to the discussion in Ch 1, relating to burdens of proof resting on the accused in the light of the jurisprudence on Art 6(2) of the ECHR.

to stir up racial hatred the test of whether it is threatening, abusive or insulting is purely objective. Where D is not shown to have intended to stir up racial hatred, the prosecution must prove that he knew or *had reason to suspect* that the material was threatening, abusive or insulting. In this respect, then, the s 22 offence is drafted in the same way as the s 18 offence—in cases where the behaviour in question was likely (but not intended) to stir up racial hatred, it is for the prosecution to prove that D had the necessary mens rea, and not for D to disprove it.

31.10.1.8 Section 23

D commits an offence by possessing written material, or a recording of visual images or sounds, which is threatening, abusive or insulting, with a view to its being displayed, published, etc. The prosecution need not prove an intention or awareness with respect to the 'threatening, abusive or insulting' nature of the material or words, but it is a defence for D, who is not shown to have intended to stir up racial hatred, to prove[194] that he was not aware of the content of the written material or recording and did not suspect, and had no reason to suspect, that it was threatening, abusive or insulting.

31.10.1.9 Other defences

Section 26 provides a defence for fair and accurate reports of proceedings in Parliament and a contemporaneous report of proceedings in open court.

31.10.1.10 Jurisdiction

The case of *Sheppard* and *Whittle*[195] confirms that prosecutions can occur in England and Wales if a substantial measure of the activities has taken place in England and Wales.[196] In that case, the defendants had written, edited and uploaded racially offensive material in England, but it was stored on a server in California (where First Amendment free speech guarantees mean that no offence is committed in the United States). The material was downloaded in England. It was targeted at English audiences. The court was referred to, but declined to consider the merits of, three 'jurisprudential theories' as to jurisdiction over such publications on the internet.

The first is that a publication is only subject to the courts' jurisdiction where the web server upon which it is hosted is situated—the country of origin theory. The second is that publication on the internet is subject to prosecution in any jurisdiction in which it can be downloaded—the country of destination theory. The third is that while a publication is always capable of prosecution in the jurisdiction where the web server upon which it is hosted is situated, it may also be prosecuted in a jurisdiction at which the publication is targeted—the directing and targeting theory.[197]

194 Subject to the discussion in Ch 1, relating to burdens of proof resting on the accused in the light of the jurisprudence on Art 6(2) of the ECHR.

195 [2010] EWCA Crim 65.

196 Applying *Smith (Wallace Duncan) (No 4)* [2004] QB 1418. The court rejected an argument that s 42 of the Act (providing that the provisions of the Act extended to England and Wales save for some limited exceptions which mainly related to Scotland and Northern Ireland) constituted a restriction of jurisdiction to England and Wales.

197 Some further judicial analysis of the broader questions of criminal jurisdiction for cross-border crimes on the internet would, however, be welcome. See generally U Kohl, *Jurisdiction and the Internet: Regulatory Competence over Online Activity* (2007) and J Hörnle, *Internet Jurisdiction: Law and Practice* (2021). See also on the implications of the prevalent use of the internet to distribute racist material, M Horn, 'Racism and Cyber Law' (2003) 153 NLJ 777, and more generally I Walden, *Computer Crimes and Digital Investigations* (2007) 148–51.

31.10.2 Religious hatred

The racial hatred provisions in the 1986 Act applied in a discriminatory fashion. There was no protection against inciting hatred against a religion which did not also constitute a particular racial group. Growing anxiety over increasingly common examples of Islamophobia, particularly since 9/11, led to increased pressure for a new offence of inciting religious hatred. Defining an offence with sufficient precision, and one which would infringe on the right to freedom of expression only to a proportionate extent, proved difficult and controversial.[198] Draft offences were included in Bills in the Anti-terrorism, Crime and Security Act 2001, a Private Members' Bill (Religious Offences Bill) 2002, the Serious Organised Crime and Police Bill 2005 and finally in the Racial and Religious Hatred Act 2006.[199]

The 2006 Act as originally introduced was subject to very heavy criticism. During debates in the House of Lords, amendments were introduced which have rendered the offences much narrower and more difficult to prove.[200] The crucial amendments were: (a) that unlike the racial hatred offences, it is not enough that the conduct was 'likely' to stir up religious hatred; it must be intended to do so;[201] (b) the offences are not satisfied by proof of abusive or insulting words or conduct; the words or conduct must be 'threatening'; (c) s 29J was introduced to ensure that comment (eg comedy), criticism and debate on religious beliefs were protected. Section 29J provides:

> Nothing in this Part shall be read or given effect in a way which prohibits or restricts discussion, criticism or expressions of antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs or practices of their adherents, or of any other belief system or the beliefs or practices of its adherents, or proselytising or urging adherents of a different religion or belief system to cease practising their religion or belief system.[202]

This provision qualifies very heavily the offences described later, and it is not restricted by any element of reasonableness as to the discussion, criticism, etc.[203]

Religious hatred is defined in s 29A as hatred against a group of persons defined by reference to religious belief or lack of religious belief. The latter expression is important as it will allow for prosecutions where D incites his audience to kill 'unbelievers', meaning those who do not subscribe to his religious beliefs, rather than simply atheists. The courts will have to determine whether one set of faith beliefs constitutes a religion. The Home Office Explanatory Notes list religions 'widely recognised in this country' as: 'Christianity, Islam, Hinduism, Judaism, Buddhism, Sikhism, Rastafarianism, Baha'ism, Zoroastrianism and Jainism'.

In *R (on the application of Hodkin and another) v Registrar General of Births, Deaths and Marriages*,[204] the Supreme Court held that:

> Unless there is some compelling contextual reason for holding otherwise, religion should not be confined to religions which recognise a supreme deity. First and foremost, to do so would be a

[198] See Idriss [2002] Crim LR 890 for a full discussion; P Jepson, 'Tackling Religious Discrimination that Stirs up Racial Hatred' (1999) 149 NLJ 554; *Religious Offences in England and Wales*, House of Lords First Report (2003). See LCCP 213, *Hate Crime: The Case for Extending the Existing Offences* (2013).

[199] The Racial and Religious Hatred Bill was granted Royal Assent on 16 Feb 2006. The various sections came into force by virtue of the Racial and Religious Hatred Act 2006 (Commencement No 1) Order 2007, SI 2007/2490.

[200] See on the Act: Goodall (2007) 70 MLR 89; Hare [2006] PL 521; Addison, *Religious Discrimination and Hatred Law*, Ch 8; D Nash and C Bakalas, 'Incitement to Religious Hatred and the Symbolic' (2007) 31 Liverpool LR 349; E Barendt, 'Religious Hatred Laws; Protecting Groups or Beliefs?' (2011) 17 Res Publica 41.

[201] The old offences of racial hatred which rested on an intent requirement were acknowledged to be notoriously difficult to prosecute: see B Hadfield, 'Incitement to Religious Hatred' [1984] PL 231 at 242.

[202] For discussion of defences of political and academic comment etc, see J Jaconnelli, 'Defences to Speech Crimes' [2007] EHRLR 27.

[203] See N Addison, *Religious Discrimination and Hatred Law*, 145.

[204] [2013] UKSC 77.

form of religious discrimination unacceptable in today's society. It would exclude Buddhism, along with other faiths such as Jainism, Taoism, Theosophy and part of Hinduism. The evidence in the present case shows that, among others, Jains, Theosophists and Buddhists have registered places of worship in England. Lord Denning in *Segerdal* [1970] 2 QB 697, 707 acknowledged that Buddhist temples were 'properly described as places of meeting for religious worship' but he referred to them as 'exceptional cases' without offering any further explanation. The need to make an exception for Buddhism (which has also been applied to Jainism and Theosophy), and the absence of a satisfactory explanation for it, are powerful indications that there is something unsound in the supposed general rule.[205]

The offences, which were brought into force on 1 October 2007, are:

- s 29B: using threatening words or behaviour, or displaying any written material which is threatening, intending thereby to stir up religious hatred. The offence may be committed in a public or a private place, but no offence is committed where the words or behaviour are used or the written material is displayed by a person inside a dwelling[206] and are not heard or seen except by other persons in that or another dwelling.[207] It is a defence for D to prove that he was inside the dwelling and had no reason to believe that the words or behaviour used or the written material displayed etc would be heard or seen by a person outside that or any other dwelling;[208]
- s 29C: publishing or distributing written material which is threatening intending thereby to stir up religious hatred;
- s 29D: presenting or directing a public performance of a play which involves the use of threatening words or behaviour, intending thereby to stir up religious hatred;[209]
- s 29E: distributing, or showing or playing, a recording of visual images or sounds which are threatening, intending thereby to stir up religious hatred;[210]
- s 29F: producing or directing a programme including threatening visual images or sounds or using in such a programme such sounds or images, intending thereby to stir up religious hatred;
- s 29G: possessing either written material which is threatening with a view to its being displayed, published, distributed or included in a programme service whether by himself or another, or possessing a recording of visual images or sounds which are threatening with a view to its being distributed, shown, played or included in a programme service, whether by himself or another, intending in either case religious hatred to be stirred up thereby.

The maximum sentence for the offences is seven years' imprisonment, a fine or both; on summary conviction, the maximum is a term of imprisonment not exceeding six months, or a fine not exceeding the statutory maximum.[211] Sections 29H and 29I deal with powers of entry, search and forfeiture. There is a special saving for reports of parliamentary and judicial proceedings in s 29K.

[205] At [51] per Lord Toulson.

[206] 'Dwelling' means any structure or part of a structure occupied as a person's home or other living accommodation (whether the occupation is separate or shared with others) but does not include any part not so occupied, and 'structure' includes a tent, caravan, vehicle, vessel or other temporary or movable structure: s 29N.

[207] Section 29B(2). [208] Section 29B(4).

[209] 'Play' and 'public performance' have the same meaning as in the Theatres Act 1968: s 29D(4).

[210] The offence does not apply to the showing or playing of a recording solely for the purpose of enabling it to be included in a programme service, s 29E(3).

[211] Section 29L. Section 29D limits the type of performance to which the offence applies.

The anxiety about misuse is demonstrated by the fact that the Act amends s 24A of PACE 1984 so that the powers of citizen's arrest do not apply to the offences of stirring up religious and racial hatred. In addition, the consent of the Attorney General will be necessary before any prosecution can be instituted.

The provisions mean that the law is extended so that D inciting E to hate a religion becomes criminal even if D does not incite E to act in a criminal manner on the basis of such hatred. The offences will only be of value in those cases in which the incitement is to cause hatred in another rather than to incite the other to engage in an existing criminal offence.[212]

None of the offences require any religious hatred to be stirred up in fact and it is not necessary for anyone present to be stirred up. Nevertheless, because of the limitations introduced in the debates in the House of Lords, it has been widely predicted that in practical terms the impact of the Act will be negligible. It was described by the Director of Justice as 'always irrelevant'.[213] A government minister described the provision in the Bill as amended by the Lords as 'virtually impossible to prosecute'.[214]

The problem is exacerbated with some confusion amongst the public about the law in this area, with the racially and religiously aggravated forms of public order offences being construed as race and religion hate laws.

31.10.3 Stirring up hatred on the grounds of sexual orientation

Section 74 of the Criminal Justice and Immigration Act 2008 extended the scope of the incitement provisions by creating a new series of offences of inciting hatred based on grounds of sexual orientation. That includes hatred against a group of people defined by reference to sexual orientation, whether towards persons of the same sex, the opposite sex or both: s 29AB.[215] Sections 29B to 29G of the 1986 Act are amended so as to extend the offences of use of words or behaviour or display of written material (s 29B), publishing or distributing written material (s 29C), the public performance of a play (s 29D), distributing, showing or playing a recording (s 29E), broadcasting or including a programme in a programme service (s 29F) and possession of inflammatory material (s 29G).[216]

The first prosecution by the CPS was in 2011 and three out of the five defendants were convicted.[217]

In relation to each extended offence, the relevant act (namely words, behaviour, written material or recordings or programme) must be *threatening*, which is narrower than the offences in relation to race which include 'threatening, abusive or insulting' words or behaviour. As with the religious hatred provisions, the offences apply *only* to words or behaviour if D 'intends' to stir up hatred on grounds of sexual orientation, rather than if hatred is either

212 K Goodall (2007) 70 MLR 89 at 93, 113.

213 See P Botsford (2007) Law Soc Gazette, 7 June, 24.

214 Hansard, HC, 31 Jan 2006, col 190 (Paul Goggins MP).

215 Paragraph 7 of the Ministry of Justice Circular 2010/05 expresses the view that the definition of 'hatred on the grounds of sexual orientation' does not extend to 'orientation based on, for example, a preference for particular sex acts or practices. It therefore covers only groups of people who are gay, lesbian, bisexual or heterosexual.' See also *B* [2013] EWCA Crim 291 (not applicable to paedophilia).

216 The Criminal Justice and Immigration Act 2008 (Commencement No 14) Order 2010, SI 2010/712, brought into force on 23 Mar 2010, s 74 of and Sch 16 to the Act (offences of hatred on the grounds of sexual orientation). On the offences, see: I Leigh, 'Hatred, Sexual Orientation, Free Speech and Religious Liberty' (2008) 10 Ecclesiastical LJ 337; E Heinze, 'Cumulative Jurisprudence and Human Rights: The Example of Sexual Minorities and Hate Speech' (2009) 12 Int'l J of Human Rights 193; and K Goodall, 'Challenging Hate Speech' (2009) 13 Int'l J of Human Rights 211.

217 See CPS press release 28 Jan 2011, http://blog.cps.gov.uk/2011/01/first-prosecution-for-stirring-up-hatred-on-the-grounds-of-sexual-orientation.html. The judge's sentencing remarks are available at: www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Judgments/sentencing-remarks-r-v-ali-javed-ahmed.pdf.

intended or 'likely' to be stirred up as in the racial offences. A provision equivalent to s 29J of the 1986 Act is included. By s 29JA, 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.

The offences are triable either way with a maximum seven years' imprisonment on indictment. The consent of the Attorney General will be required for any prosecution to commence.

The government has stated that it considers there to be a 'compelling case' that there is a 'pressing social need' for these offences because of the evidence of hatred against 'homosexual people being stirred up by, amongst others, some extreme political groups and song lyrics, and of widespread violence, bullying and discrimination against homosexual people'.[218]

The government considers that legislation which prohibits the stirring up of hatred will deter such behaviour and send a message that it is unacceptable, leading to homophobic hatred becoming less widespread and in turn reducing the number of incidents of violence, bullying and discrimination.

31.10.4 Stirring-up offences and the ECHR

Challenges under Art 10 (freedom of expression) and Art 9 (freedom of religion) would seem inevitable, particularly since it has been held that there is no defence in English law that the words spoken or published are true.[219] As noted earlier, although the ECtHR has acknowledged that Art 10 protects the right to express views that offend, shock or disturb,[220] the Court has declined to extend the protection to direct expression of racist views.[221] However, in the leading case of *Jersild v Denmark*,[222] the Court distinguished between those who had expressed racist views directly, and acts of those exposing these individuals and the beliefs they espoused (the prosecution of an undercover journalist was a disproportionate response). It is arguable that the present law under the Public Order Act fails adequately to reflect that distinction, and that a prosecution of a journalist under s 22 or 23 would not be a proportionate response within Art 10(2). Less concern may arise under the religious hatred provisions because of the breadth of the exclusion in s 29J.

Article 17, which prevents Convention rights being relied upon to allow a person to destroy or limit the Convention rights of others, has also been important in the ECtHR case law.[223] This prevents extreme racists seeking to rely on Art 10 to protect their conduct.

31.10.5 Reform

In 2013, the Law Commission was asked by the Ministry of Justice to consider whether there was a case for extending the stirring up of hatred offences under the Public Order Act 1986 to include stirring up hatred on the grounds of disability or gender identity. The Law Commission concluded[224] that there was a case in principle for extending the existing offences in order to fill a lacuna that exists in the current legislative regime, but that there was no practical need demonstrated on consultation. The existing public order and

[218] See Home Office Explanatory Notes, para 1167.

[219] *Birdwood* [1995] 6 Arch News 2.

[220] *Muller v Switzerland* [1991] 13 EHRR 212.

[221] See Emmerson, Ashworth and Macdonald, HR&CJ, paras 18.30 et seq. See also the ECHR Appendix to LCCP 213, *Hate Crime: The Case for Extending the Existing Offences* (2013), https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2015/03/cp213_hate_crime_appendix-a.pdf. And that to the recent LCCP 250, *Hate Crime Laws* (2020).

[222] See *Jersild v Denmark* [1994] EHRR 1.

[223] See *Norwood v UK* (2005) 40 EHRR SE411.

[224] In LC 348, *Hate Crime: Should the Offences be Extended?* (2014).

communication offences would deal with a vast amount of the offensive conduct based on hostility towards disabled or transgender people.[225] The very high threshold required under the offence—to intend to cause *hatred* without also inciting the recipient to commit an offence[226]—meant that there would be very few instances of conduct being successfully prosecuted if offences were to be enacted.

The Law Commission's latest consultation paper makes far-reaching proposals in relation to the stirring-up offences. The Commission proposes that where it can be shown that the speaker intended to stir up hatred, it should not be necessary to demonstrate that the words used were threatening, abusive or insulting.[227] Presumably any words spoken with that intent will suffice, even ones that are, objectively viewed, harmless. The Commission also proposes that where intent to stir up hatred cannot be proved, it should be necessary for the prosecution to prove that: (a) the defendant's words or behaviour were threatening or abusive; (b) the defendant's words or behaviour were likely to stir up hatred; (c) the defendant knew or *ought to have known* that their words or behaviour were threatening or abusive; and (d) the defendant knew *or ought to have known* that their words or behaviour were likely to stir up hatred.[228] This seems to introduce an objective fault-based test for a very serious offence. The present law's distinction between race and other characteristics in the stirring-up offences is to be removed: there should be a single threshold to determine whether words or behaviour are covered by the 'likely to' limb of the stirring-up offences, applying to all protected characteristics.[229] The Commission also proposes that the offences of stirring up hatred be extended to cover hatred on the grounds of sex or gender and transgender identity and disability.[230] The consent of the DPP rather than the Attorney General should be required. Finally, the proposal is that the current exclusion of words or behaviour used in a dwelling from the stirring-up offences should be removed.[231]

31.11 Public nuisance

Public nuisance[232] is a common law offence triable either way.[233] It consists of:

> an act not warranted by law or an omission to discharge a legal duty, which act or omission obstructs or causes inconvenience or damage to the public in the exercise of rights common to all Her Majesty's subjects.[234]

The House of Lords confirmed the continued existence of the offence. It had been described in that case by the Court of Appeal in the following terms:

> A person is guilty of a public nuisance (also known as a common nuisance) who (a) does an act not warranted by law, or (b) omits to discharge a legal duty, if the effect of the act or omission is to endanger the life, health, property,[235] or comfort of the public, or to obstruct the public in the exercise or enjoyment of rights common to all Her Majesty's subjects.[236]

[225] For discussion, see I Hare, 'Free Speech and Incitement to Hatred on Grounds of Disability and Transgender Identity: The Law Commission's Proposals' [2015] PL 385.

[226] Since that is already an offence under the SCA 2007; see Ch 9.

[227] Para 18.195. [228] Para 18.197. [229] Para 18.208. [230] Para 18.225. [231] Para 18.256.

[232] I Brownlie, *Law of Public Order and National Security* (2nd edn, 1981) 75, 77. For provisional reform proposals see LCCP 193, *Simplification of Criminal Law: Public Nuisance and Outraging Public Decency* (2010).

[233] Magistrates' Courts Act 1980, s 17 and Sch 1. [234] Stephen, *Digest*, 184.

[235] The House of Lords deleted the word 'morals' from the definition proffered by the Court of Appeal.

[236] *Goldstein* [2004] 2 All ER 589, [3]. See commentary by Ashworth [2004] Crim LR 303 on the Court of Appeal.

A person who has suffered particular damage as the result of a public nuisance can maintain an action for damages in tort, and the major importance of public nuisance today is in the civil remedy which it affords.[237]

The Court of Appeal has recently confirmed that custodial sentences may be appropriate even in cases in which no physical harm is caused or threatened. In *Roberts*,[238] the public nuisance arose from a protest against fracking during which an A road was blocked for several days. The court recognized that there are 'a wide range of offences that may be committed in the course of peaceful protest of differing seriousness; and within the offending very different levels of harm may be suffered by individuals or groups of individuals'.[239]

31.11.1 Nature of nuisance

31.11.1.1 Diverse forms of offence

The most common and important instance of a public nuisance is obstruction of the highway and this is more closely considered later. But it also includes a wide variety of other interferences with the public; for example, carrying on an offensive trade which impregnates the air 'with noisome offensive and stinking smoke' to the common nuisance of the public passing along the highway;[240] polluting a river with gas so as to destroy the fish and render the water unfit for drinking;[241] unnecessarily, and with full knowledge of the facts, exposing in a public highway a person infected with a contagious disease;[242] taking a horse into a public place knowing that it has glanders and that that is an infectious disease;[243] sending food to market knowing that it is to be sold for human consumption and that it is unfit for that purpose;[244] burning a dead body in such a place and such a manner as to be offensive to members of the public passing along a highway or other public place;[245] keeping a fierce and unruly bull in a field crossed by a public footpath;[246] keeping two pumas and a leopard in a garden;[247] discharging oil into the sea in such circumstances that it is likely to be carried on to English (*sic*) shores and beaches;[248] causing excessive noise and dust in the course of quarrying operations;[249] hosting an 'acid house-party' which creates a great deal of noise so as greatly to disturb the local populace;[250] giving false information as to the presence of explosives so as to cause actual danger or discomfort to the public;[251] trespassing and sniffing glue in a school playground even in the absence of staff and pupils;[252] and arranging to cause the abandonment of a Premiership football match by switching off the floodlights.[253]

[237] See further on the tort, E Peel and J Goudkamp, *Winfield and Jolowicz on Tort* (19th edn, 2014) Ch 15.

[238] [2018] EWCA Crim 2739. [239] At [32].

[240] *White and Ward* (1757) 1 Burr 333. See also *Tysoe v Davies* [1983] Crim LR 684 (QBD).

[241] *Medley* (1834) 6 C & P 292. [242] *Vantandillo* (1815) 4 M & S 73. [243] *Henson* (1852) Dears CC 24.

[244] *Stevenson* (1862) 3 F & F 106; otherwise if D did not intend it for human consumption: *Crawley* (1862) 3 F & F 109.

[245] *Price* (1884) 12 QBD 247. Cf *R (Ghai) v Newcastle City Council* [2010] EWCA Civ 59.

[246] Archbold (2005) ss 31–53. [247] *Wheeler* (1971) The Times, 17 Dec.

[248] *Southport Corpn v Esso Petroleum Co Ltd* [1954] 2 QB 182 at 197 per Denning LJ; revsd [1956] AC 218.

[249] *A-G v PYA Quarries Ltd* [1957] 2 QB 169. [250] *Shorrock* [1994] QB 279.

[251] *Madden* [1975] 3 All ER 155. The court said 'potential danger' to the public was not enough but that 'actual risk' to the comfort of the public was. This is difficult to follow. Is not 'potential' danger the same as risk? And should not risk be enough?

[252] *Sykes v Holmes* [1985] Crim LR 791 (conduct capable of being a nuisance within s 40 of the Local Government (Miscellaneous Provisions) Act 1982). Section 40 of that Act has since been repealed by Sch 22(3), para 1 to the Education Act 2002.

[253] *Ong* [2001] 1 Cr App R (S) 404.

31.11.1.2 Relationship to statutory offences

In *Rimmington*, the House of Lords confirmed that the courts do not have the power to abolish the offence.[254] However, the House also emphasized that the offence should not ordinarily be prosecuted where there is a statutory offence covering the relevant mischief.[255] Lord Bingham referred to the numerous statutory offences which might be available in preference to public nuisance. These include statutory offences such as: obstructing the highway under the Highways Act 1980; harassment under the Protection from Harassment Act 1997; environmental wrongdoing under the Environmental Protection Act 1990; offences dealing with pollution under the Water Resources Act 1991 (as amended); sending substances inducing someone to believe they are noxious under the Anti-terrorism, Crime and Security Act 2001; sending obscene or indecent communications under the Postal Services Act 2000; sending malicious communications under the Malicious Communications Act 1988; and improperly using a public electronic communications network under the Communications Act 2003. The common law may still be useful where no statute has intervened or where the penalty provided by statute is inadequate.[256] Its flexibility renders the offence attractive to prosecutors, particularly as it may allow them to avoid procedural restrictions which limit the use of the statutory offences.

In *Stockli*,[257] the prosecution had charged public nuisance in preference to other statutory offences available and the trial judge stayed proceedings relying on *Rimmington*. The Court of Appeal allowed the prosecution's appeal.

It is its flexibility which also renders the offence subject to cogent criticism for its potential conflict with the principle of certainty.[258] The House of Lords nevertheless confirmed in *Rimmington and Goldstein*[259] that the offence is sufficiently certain to enable a person with appropriate legal advice to regulate his conduct. As such, the offence was found to be sufficiently clearly prescribed to satisfy the (rather undemanding) requirements of Art 7 of the ECHR. The House took a narrower approach than the Court of Appeal. Lord Bingham[260] accepted that:

> absolute certainty is unattainable, and might entail excessive rigidity since the law must be able to keep pace with changing circumstances, some degree of vagueness is inevitable and development of the law is a recognised feature of common law courts . . . But . . . existing offences may not be extended to cover facts which did not previously constitute a criminal offence. The law may be clarified and adapted to new circumstances which can reasonably be brought under the original concept of the offence. . . . But any development must be consistent with the essence of the offence and be reasonably foreseeable . . . and the criminal law must not be extensively construed to the detriment of an accused, for instance by analogy.

Previously, the offence had been used on more than one occasion as a stop-gap pending specific legislation, to prosecute activity that poses a new threat to the health and welfare of the community, for example for harassing behaviour and in some jurisdictions for such conduct as knowing HIV transmission.[261] Following *Rimmington*, this seems very doubtful.

[254] *Rimmington* [2006] 1 AC 459 at [31]. [255] At [30] per Lord Bingham.

[256] eg in *Bourgass* [2007] 2 Cr App R (S) 253, where 17 years for plotting a ricin attack on the Underground exceeded the maximum available under the Anti-terrorism, Crime and Security Act 2001, s 113. See also its use to regulate sex workers: T Sagar, 'Public Nuisance Injunctions Against On-Street Workers' [2008] Crim LR 353.

[257] [2017] EWCA Crim 1410.

[258] See JR Spencer, 'Public Nuisance—A Critical Examination' (1989) 48 CLJ 55.

[259] [2004] 2 All ER 589, [2004] Crim LR 303.

[260] At [35]. Cf *W* [2010] EWCA Crim 372, refusing to dilute the mens rea of the common law offence of misconduct in public office.

[261] See *Kreider* (1993) 140 AR 81; *Thornton* (1991) 3 CR (4th) 381.

31.11.1.3 Act or omission

A public nuisance may be committed by omission, as by permitting a house near the highway to fall into a ruinous state[262] or by allowing one's land to accumulate filth, even though it is deposited there by others for whom D is not responsible.[263]

A public nuisance can be committed by a single act or omission. What is crucial is that the acts or omissions contemplated by D are:

> likely to inflict significant injury on a *substantial section of* the public exercising their ordinary rights as such.[264]

In *DPP v Fearon*,[265] D was charged with public nuisance following his conduct in approaching an undercover policewoman on a single occasion and asking her for sex. A District Judge ruled that the offence of public nuisance could not be made out since this was a single incident affecting only one woman. Applying *Rimmington*,[266] the central concept of public nuisance was common injury to members of the public. It was not permissible to apply the offence to multiple, separate incidents on different members of the public, let alone a single incident affecting only one woman. The court rejected the argument that the single action of the defendant should be aggregated with all other conduct of those other people soliciting for sex in that vice area of Nottingham. That would amount to holding D liable on the basis, in part, of the conduct of others with whom he is not acting in concert and of whose actions he has no knowledge or ability to control.

31.11.1.4 Nature of interference

The interference with the public's rights must be substantial and unreasonable. For example, not every obstruction of the highway is a public nuisance:

> If an unreasonable time is occupied in the operation of delivering beer from a brewer's dray into the cellar of a publican, this is certainly a nuisance. A cart or wagon may be unloaded at a gateway; but this must be done with promptness. So as to the repairing of a house;—the public must submit to the inconvenience occasioned necessarily in repairing the house; but if this inconvenience is prolonged for an unreasonable time, the public have a right to complain and the party can be indicted for a nuisance.[267]

The public right to use the highway is not limited to passing and repassing; the highway is 'a public place, on which all manner of reasonable activities may go on'. It appears to include 'such ordinary and usual activities as making a sketch, taking a photograph, handing out leaflets, collecting money for charity, singing carols, playing in a Salvation Army band, children playing a game on the pavement, having a picnic, or reading a book . . .'[268]

The key word is 'reasonable'. Any interference with the public's rights must be caused by some unnecessary and unreasonable act or omission by D. In *Dwyer v Mansfield*,[269] it was held that when queues formed outside D's shop because in view of the wartime scarcity he was selling only 1lb (454g) of potatoes per ration book, he was not liable because he was carrying on his business in a normal and proper way without doing anything unreasonable or unnecessary. The nuisance, if there was one, had been created not by D's conduct but by

[262] *Watts* (1703) 1 Salk 357. [263] *A-G v Tod Heatley* [1897] 1 Ch 560.
[264] *Rimmington* [2005] UKHL 63, [36]. [265] [2010] EWHC 340 (Admin). [266] [2005] UKHL 63.
[267] *Jones* (1812) 3 Camp 230, per Lord Ellenborough. And see *Cross* (1812) 3 Camp 224: 'A stage-coach may set down or take up passengers in the street, this being necessary for the public convenience; but it must be done in a reasonable time': per Lord Ellenborough. See *Ellis v Smith* [1962] 3 All ER 954, [1962] 1 WLR 1486.
[268] *DPP v Jones* [1999] 2 All ER 257, per Lord Irvine LC. [269] [1946] KB 437.

the short supply of potatoes.[270] The result might be different if D sold ice-cream through the window of a shop, causing a crowd to gather on the pavement, because this is not a normal and proper way of carrying on business in England.[271]

31.11.2 The public

Blackstone stated that a public nuisance must be an annoyance to all the king's subjects.[272] This is obviously too wide for, if it were so, no public nuisance could ever be established. Denning LJ declared that the test is:

> that a public nuisance is a nuisance which is so widespread in its range or so indiscriminate in its effect that it would not be reasonable to expect one person to take proceedings on his own responsibility to put a stop to it, but that it should be taken on the responsibility of the community at large.[273]

Whether an annoyance or injury is sufficiently widespread to amount to a public nuisance is a question of fact. In *Lloyd*,[274] where D's carrying on his trade caused annoyance to only three houses in Clifford's Inn, Lord Ellenborough said that this, if anything,[275] was a private nuisance, not being sufficiently general to support an indictment. But in the *PYA Quarries* case,[276] the nuisance was held to be sufficiently general where the inhabitants of about 30 houses and portions of two public highways were affected by dust and vibration.

In *Rimmington*,[277] as noted, the House of Lords held that what is required is that the act or omission 'was likely to inflict significant injury on a substantial section of the public exercising their ordinary rights as such'. The House quashed Rimmington's conviction for sending 538 packages to people, some of them prominent public figures, with racist content, and in some cases threatening and obscene content. That was not a public nuisance: a series of acts involving individual members of the public cannot constitute the necessary effect on the public or a significant section of the public to constitute a public nuisance. A multiplicity of individual victims will not do.[278] Their lordships overruled *Johnson*[279] where D had made hundreds of indecent telephone calls to at least 13 women in South Cumbria. In *Madden*, a telephone call stating that there was a bomb in a factory affected only eight security officers who could not be regarded as a class of the public.[280] If the call had stated that the bomb was in a public place, such as a highway, from which the public were consequently excluded, there would have been a public nuisance, even if few or no members of the public were in fact affected.[281]

The same result should apply if the place were one to which the public have access on payment, such as a sports ground. Lord Bingham stated:

> To permit a conviction of causing a public nuisance to rest on *an injury* caused to separate individuals rather than on *an injury* suffered by the community or a significant section of it as a whole was to contradict the rationale of the offence and pervert its nature.

[270] *Sed quaere*. Would it be a defence to obstructing a pavement that D's lap-dancing club was the only one in town?

[271] *Fabbri v Morris* [1947] 1 All ER 315 (Highway Act 1835, s 72). [272] *Commentaries*, iii, 216.

[273] *A-G v PYA Quarries Ltd* [1957] 2 QB 169 at 191. [274] (1802) 4 Esp 200.

[275] The annoyance could be avoided by shutting the windows. [276] [1957] 2 QB 169 at 191.

[277] [2006] 1 AC 459. [278] See Lord Rodger at [48] and Baroness Hale at [58].

[279] [1996] 2 Cr App R 434.

[280] [1975] 3 All ER 155. What if all the workers in the factory had been evacuated? See now Criminal Law Act 1977, s 51(2); see Ch 15.

[281] Lord Nicholls gave the example of a single hoax call constituting a public nuisance if it was a bomb hoax but not if it was simply to inconvenience the recipient, at [42].

It is not clear why if D makes 1,000 calls, each to one of 1,000 women, inflicting the same harm on each woman, he is any *less blameworthy* than someone who sends one email to 1,000 women at once inflicting the same harm. The same harm is experienced by 1,000 women in each case.[282]

31.11.3 Mens rea

It was decided in *Shorrock*[283] that it is enough that D knew or *ought to have known* that a nuisance would be caused: the offence is one of negligence. The previous authorities were ambiguous and most of them were civil proceedings. D relied on *Stephens*,[284] where Mellor J said:

> in as much as the object of the indictment is not to punish the defendant, but really to prevent the nuisance from being continued, I think that the evidence which would support a civil action would be sufficient to support an indictment,

arguing that as the proceedings in *Shorrock* were indeed intended to punish, mens rea in the sense of actual knowledge of the nuisance was required. It was accepted, however, that whether mens rea was required or not could not depend on the motive of the prosecutor. Despite the endorsement of requirements of subjective mens rea for serious offences,[285] including in particular the common law offence of misconduct in public offence,[286] the House of Lords in *Rimmington* approved the definition of mens rea in *Shorrock*. In the conjoined appeal, *Goldstein*, an ultra-orthodox Jew, bought supplies from the company of an old friend in London, Mr E, with whom he had a bantering relationship. G owed Mr E money, which the latter had pressed him to pay. G accordingly put the cheque in an envelope (addressed to Mr E) and included in the envelope a small quantity of salt. This was done in recognition of the age of the debt, salt being commonly used to preserve kosher food, and by way of reference to the very serious anthrax scare in New York following the events of 9/11, which both men had discussed on the telephone shortly before. The envelope caused a security scare at the postal sorting office where it was believed to contain anthrax. The intention was to be humorous, and Mr E gave unchallenged evidence at trial that had he received the envelope he would have recognized it as a joke. G's conviction was quashed for lack of mens rea.

31.11.3.1 Proof

While *Shorrock* may be taken to have settled the issue of mens rea, it does not follow that criminal and civil proceedings for nuisance are the same in all respects. The criminal rather than the civil rules of evidence apply, particularly as to burden of proof.

Denning LJ held that:

> In an action for a public nuisance, once the nuisance is proved, and the defendant is shown to have caused it, the legal burden is shifted to the defendant to justify or excuse himself.[287]

But in a criminal prosecution, the principle of *Woolmington v DPP*[288] and the guarantees in Art 6(2) of the ECHR require that, as a general rule, there is only an evidential burden on D who sets up justification or excuse.[289]

[282] Admittedly it is harder to say at what point the nuisance becomes criminal with the individual calls, but the outcome is the same.

[283] [1994] QB 279. [284] (1866) LR 1 QB 702 at 710. [285] See *G* [2004] 1 AC 1034.

[286] *A-G's Reference (No 3 of 2003)* [2004] EWCA Crim 868.

[287] *Southport Corpn v Esso Petroleum Co Ltd* [1954] 2 QB 182 at 197. [288] [1935] AC 462.

[289] Another obvious difference is that the civil case may be made out on a balance of probabilities, but the criminal case must be proved beyond reasonable doubt.

31.11.4 Vicarious liability

In at least some types of public nuisance, an employer is liable for the acts of his employee performed within the scope of employment, even though the mode of performance which creates the nuisance is contrary to the master's express orders. Thus, in *Stephens*,[290] D was held liable for the obstruction by his employees of the navigation of a public river by depositing rubbish in the river. The reason given was that the proceeding was, in substance, civil, the object being not to punish D but to prevent the continuation of the nuisance.[291] But Mellor and Shee JJ thought that there may be nuisances of such a character that this rule would not be applicable. Baty[292] criticizes the ground of this decision and pertinently asks:

> who is to decide whether [the] prosecution is 'substantially civil' or tinged with criminology [*sic*]?[293]

Certainly, prosecutions for obstructing the highway are by no means always civil in substance: frequently the object is the punishment of the offenders. In *Chisholm v Doulton*,[294] Field J said that *Stephens* 'must be taken to stand upon its own facts';[295] and the court held that, on a charge under the Smoke Nuisance (Metropolis) Act 1853, D was not criminally liable for the negligence of his servant in creating a nuisance. In cases of statutory nuisance, D is vicariously liable only if the words of the statute require it.[296]

The rule imposing vicarious liability for public nuisance might not be as firmly established nor so all-embracing as is sometimes supposed; but *Shorrock* suggests that the courts will not distinguish between different types of nuisance and that all will be held to impose vicarious liability.[297]

31.11.5 ECHR

If D's conduct involves expressing opinions or engaging in activity that might be regarded as an aspect of his private life, the offence engages rights such as freedom of expression (Art 10) and respect for privacy (Art 8). However, it has been held that it is a necessary and proportionate response for the protection of the rights of others (under Arts 8(2) and 10(2)).[298] The House of Lords in *Rimmington*[299] took the view that the offence of public nuisance did not breach Art 7 of the ECHR on grounds of lack of certainty.

31.11.6 Reform

The Law Commission in its 2015 Report[300] recommended retention of the offence. This conclusion was arrived at because, in the Commission's view, the offence has developed a reasonable degree of certainty. It is based on the 'core' of public nuisance in civil law. That conclusion involves the assumption that one can define a public nuisance in civil law with reasonable certainty. The Commission identified serious cases in which public nuisance

290 (1866) LR 1 QB 702.

291 Does this involve an inquiry into the motives of the prosecutor? Or does it reflect the courts' own view of what is the proper remedy for the wrong in question?

292 *Vicarious Liability* (1916) 204.

293 In *Russell* (1854) 3 E & B 942, Lord Campbell thought that the obstruction of navigation by building a wall was 'a grave offence'.

294 (1889) 22 QBD 736. 295 ibid, 740. 296 cf *Armitage Ltd v Nicholson* (1913) 23 Cox CC 416.

297 See also *Craik v CC of Northumbria Police* [2010] EWHC 935 (Admin).

298 *Goldstein* [2003] EWCA Crim 3450. 299 [2005] UKHL 63.

300 LC 358, *Simplification of Criminal Law: Public Nuisance and Outraging Public Decency.*

has been prosecuted,[301] although these are not all strong examples. Numerous statutory offences were available in those cases.[302] The Commission recommended that public nuisance should be replaced by a statutory offence which, like the existing offence, should cover any conduct which endangers the life, health, property or comfort of a section of the public or obstructs them in the exercise of rights belonging to the public. This offence should require that the defendant either intended, or was reckless as to the risk of, the adverse effect on the public caused by that conduct. The defendant should not be guilty of the offence if his conduct was reasonable in the circumstances as he knew or believed them to be.

Further reading

ATH Smith, *Offences against Public Order*

[301] eg citing *Bourgass*, n 256.

[302] eg *Bourgass* could have been charged under s 58 of the Terrorism Act 2000 if it really was clear that he intended to use the information he had collected in terrorist activities.