

Freedom of Expression and Hatred of Religion

1. *Introduction*

When the UK's Racial and Religious Hatred Act 2006 came into force in October of the following year, it made it an offence to deliberately stir up hatred against people on religious grounds.¹

Incitement to racial hatred had been a criminal offence for many years, located most recently in the Public Order Act 1986.² This older offence sought to prevent hatred being stirred up against a range of groups defined by colour, race, ethnicity, nationality and national origin. But proponents of the RRHA argued that the POA failed to protect certain religious groups – Christians and Muslims prominent among them – since they are multi-racial or multi-ethnic in character. They argued, therefore, that it was necessary to plug this gap left by the existing legislation in order to ensure that all vulnerable religious groups enjoyed the equal protection of the law. As David Nash and Chara Bakalis put it, 'extending the Public Order Act 1986 provisions to include religion is the government's way of bringing equality to an area deemed to discriminate against certain religions' (2007: 355; and see 351-3, 360, 368; see also Hare 2006: 525). For its critics, by contrast, the offence created by the RRHA was (and is) an illegitimate restriction on freedom of expression. The critics argued that it would in effect constitute a ban on jokes about religion and even on serious theological debate. For this reason, Ivan Hare, amongst many others, concluded that 'the Religious Hatred Act should be opposed by those who value free speech' (2006: 538).

In the debate which took place before, during and after the passage of the Act, its defenders focused on rebutting this charge. They took great pains to try to show that, while the Act criminalized

incitement of hatred against people defined by their religious beliefs, it did not criminalize the criticism of those religious beliefs themselves. Although there is no disputing the importance of the right to freedom of expression, I nevertheless believe that it is unfortunate that most of the debate about the RRHA has concerned this right. The near exclusive focus on this aspect of the legislation has meant that the debate has almost entirely overlooked the important claim that the Act offers necessary protection to certain religious groups which are vulnerable to the harmful effects of incitement of hatred against them. My aim in this article is to try to help redress the balance by concentrating on this claim. To put the initial formulation of my argument in the conditional tense, if there is a good reason to place this particular limitation on freedom of expression, this reason will refer to the harm which may be caused by the incitement of hatred.

Before I can reach this conclusion, however, I must first examine the offence of incitement to religious hatred in detail. In the first half of this article, then, I shall focus my attention on four particular aspects of this offence, namely the role of religious beliefs, the notion of threatening words or behaviour, the need to prove intention, and the protection of freedom of expression. I shall present a stylized contrast between these four aspects of the offence and the corresponding aspects of the offence of incitement to racial hatred. In each case, I shall argue that the differences between the two offences have made it harder to prove that incitement to religious hatred has been committed. And in each case, I shall suggest that these differences can be explained by reference to the legislators' desire to protect freedom of expression. Most obviously, Section 29J of the RRHA – which is entitled 'Protection of the Freedom of Expression' – explicitly seeks to allay critics' fears that the Act threatens such freedom.

In the second half of this article, I shall argue that it is possible to strengthen the offence of incitement to religious hatred, so that it more closely resembles that of incitement to racial hatred, without threatening legitimate freedom of expression. In order to make this argument, I shall utilise Axel Honneth's theory of recognition (1995; 2003). In his theory, Honneth identifies three distinct modes of recognition, which I shall refer to as care, respect and esteem. He also identifies three corresponding modes of misrecognition which prevail if recognition is not achieved. These are threats to individuals' psychological self-confidence, to their self-respect, and to their sense that their way of life has value. Put in these terms, my thesis is that, since incitement to religious hatred may cause one or more of these harms of misrecognition, it may in some instances be legitimately restricted.³ My conclusion will be that placing this constraint on freedom of expression is one way, amongst numerous others, in which ethno-religious diversity may be appropriately accommodated.

2. *Incitement to religious hatred*

In the RRHA, the offence of incitement to religious hatred is defined as the 'stirring up of hatred against persons on ... religious grounds'. For the purposes of this article, four aspects of this offence are of particular importance. In this section, I shall critically examine each of them in turn. First, the offence is defined by reference to people's religious beliefs rather than their identities (a). Second, to be guilty a person must use threatening rather than merely abusive or insulting language (b). Third, by using such language, a person must thereby 'intend thereby to stir up religious hatred' (c). Fourth, the Act includes a section intended to protect freedom of expression (d).

a. beliefs and identities

The RRHA defines 'religious hatred' as 'hatred against a group of persons defined by reference to religious belief or lack of religious belief'.⁴ Here we can see that the Act defines a religious group in terms of a set of shared beliefs. Such a group is one united by its adherence to a particular theological doctrine.⁵ It is instructive to compare this definition to that offered in the POA in which 'racial hatred' is characterized as 'hatred against a group of persons in Great Britain defined by reference to colour, race, nationality (including citizenship) or ethnic or national origins'.⁶ Thus, while a religious group is defined in terms of religious belief alone, a racial group is defined by reference to a range of identity-markers. Not only does it encompass groups that are regarded as having ethnic or racial identities, but in theory it could also include Belgian citizens ('citizenship') or even British citizens who were born in Belgium ('national origins').

I want to argue that this shift from collective identities to shared beliefs is unfortunate. It has enabled critics to argue that, since racial hatred and religious hatred are not analogous, incitement of the latter is much less harmful than incitement of the former. As Rowan Atkinson puts it: 'To criticise a person for their race is manifestly irrational and ridiculous. But to criticise their religion – that is a right. That is a freedom. And a law that attempts to say you can criticise or ridicule ideas, as long as they are not religious ideas, is a very peculiar law indeed'.⁷ Two not very subtle linguistic shifts give Atkinson's comment its rhetorical power. First, incitement to hatred is replaced by much milder ideas of criticism and ridicule. Second, a contrast is drawn between 'race', implicitly regarded as an unchosen identity, and 'ideas', understood as beliefs which are as such the legitimate objects of criticism. I do not think that it is difficult to show that Atkinson's objection is misplaced. The offence that the RRHA creates is incitement of hatred against *persons* defined by reference to their religious beliefs, and not against those *beliefs* themselves. Having said this, however, there is no doubt that this objection gains some plausibility from the way in which the Act defines a religious group by reference to belief rather than identity.

Picking up this final point, I want to argue that, in order to answer Atkinson's criticism, we should accept his point that beliefs are always legitimate objects of criticism, but then to deny that this undermines the rationale of the offence of incitement to religious hatred. The best way to do this is to modify the offence so that potential objects of hatred are defined in terms of identity as well as belief. One way to do this would be to adopt the definition of a religious group used in the corresponding Scottish legislation. In Section 74(7) of the Criminal Justice (Scotland) Act 2003, such a group is 'a group of persons defined by reference to their-

- (a) religious belief or lack of religious belief;
- (b) membership of or adherence to a church or religious organisation;
- (c) support for the culture and traditions of a church or religious organisation; or
- (d) participation in activities associated with such a culture or such traditions'.⁸

As we have seen, the RRHA stops at (a). But if (b), (c) and (d) were added, then the offence of incitement to religious hatred would also cover threatening words or behaviour directed against people, in light not just of their religious beliefs, but also of their membership of, support for, or participation in religious organisations. I would suggest that, if the Act were to be amended in this way, it would be easier to distinguish clearly between the lawful criticism of religious beliefs, and the unlawful incitement of hatred against the holders of those beliefs.

Before moving on to examine the next feature of the offence of incitement to religious hatred, however, it may be worth noting that in practice it could be unnecessary to amend it in the way just proposed. This is because it is possible that, in considering prosecutions for this offence, the courts will have to pay attention to identity as well as belief. Anthony Jeremy observes that 'no definitive description of a "religion" has emerged from the jurisprudence'.⁹ In this case, '[i]t follows that the

question of what constitutes a religious group in United Kingdom law in the absence of a legal definition becomes a question of fact. It is likely that the evidence will have to disclose a distinct social identity, based on beliefs and practices, forming a cohesive and identifiable community' (2007: 198-99; see also Goodall 2007: 98). In other words, since the law has failed to develop a definition of a religious group characterised purely by reference to religious belief, then when it comes down to it such a definition will have to draw on a broader notion of identity. If this is right, then the theoretical problem I have been considering will be solved in practice as the courts, in seeking to determine whether someone is guilty of incitement to religious hatred, will understand the target of such incitement as a group with a concrete social identity rather than one just sharing a particular set of beliefs.

b. threats, abuse and insults

The RRHA focuses on 'threatening words or behaviour', the public performance of plays which contain such words or behaviour, and the display, production and distribution of written material, visual images or sounds 'which are threatening'. Again, it is instructive to compare this to the corresponding section of the POA, which refers more broadly to actions which are 'threatening, abusive or insulting'. It follows that a person can be guilty of incitement to racial hatred by the use of 'abusive or insulting' words, while the use of the same sort of words would not make a person guilty of incitement to religious hatred. It seems clear that this narrowing of focus onto threatening words or behaviour was intended to answer concerns about freedom of expression by ensuring that it would remain lawful to abuse or insult religious beliefs. As Nash and Bakalis put it, this feature of the Act was 'aimed to allay fears about the infringement of freedom of expression' (2007: 355).

There are, however, at least two problems with this aspect of the offence of incitement to religious hatred. The first is this. It may be argued that it is not easy to draw a clear line between insulting or abusing religious beliefs, and using threatening words to stir up hatred against specific individuals in light of their beliefs. Jeremy seems confident that such a line can be drawn: there is, he says, 'a clear distinction between criticism of a religion and the practices of its followers on the one hand, and using threatening language to incite hatred against members of that religion' (2007: 188). But are matters so straightforward? If I claim that a particular religion is founded on absurd and offensive beliefs that lend legitimacy to abhorrent practices, am I merely expressing my antipathy to those beliefs and their associated practices or am I stirring up hatred against the followers of that religion themselves? Jeremy undermines his own claim that it is possible to make a clear distinction between criticising a religion and inciting hatred against its adherents by suggesting that '[w]here there is ... publication of inflammatory material that vilifies the very foundations of a faith, it will not be difficult for the court to find there has been a deliberate incitement of hatred against a particular religious group' (2007: 193).¹⁰ So if abuse and insult shade into vilification, and if vilification amounts to incitement to hatred, then it will be hard to make a clear distinction between the critique of beliefs and the incitement of hatred against persons associated with such beliefs. This does not mean, however, that the offence of incitement to religious hatred, insofar as it depends on a distinction between abuse and insult, on the one hand, and threats, on the other, is incoherent. It may simply mean that, since it is impossible to draw a clear line between abuse, insult and threats in theory, it will be for the courts to draw such a line in practice. As Jeremy himself says, 'all the factual elements will have to be tested in the court in deciding what constitutes hatred' (2007: 90).

Be that as it may, there is a second problem with the restriction of the offence of incitement to religious hatred to threatening speech alone. It is not inconceivable that these two elements of the offence could come apart. On the one hand, threatening words could be used without the intention

to incite hatred. Instead, the purpose of the threats could be, for instance, to harass others or to incite violence against them. This is not such a problem for the RRHA. It would simply mean that, in such cases, it would not be the appropriate legal instrument. Instead, the person using threatening language could be guilty of another offence. For example, in February 2009, Rowan Laxton, a Foreign Office diplomat, was arrested for inciting religious hatred after what the *Daily Mail* described as a ‘foul-mouthed anti-Semitic tirade’. However, he was eventually charged not with incitement to religious hatred, but with racially aggravated harassment under Section 5 of the POA.¹¹ On the other hand, a potentially more serious problem for the RRHA is presented by the possibility that there could be an intention to incite hatred without the use of threatening words. It may be that the most effective way to incite hatred is by the use of subtle propaganda delivered in calm and dispassionate tones, rather than by bellowing crude invective from the soap-box or pulpit. As Bhikhu Parekh has put it: ‘Although hate speech is often expressed in an offensive, angry, abusive and insulting language ... it is not necessary that it should be so expressed. It can be subtle, moderate, non-emotive and even bland, and conveyed through ambiguous jokes, innuendos and images’ (2006: 214). This suggests that someone aiming to incite hatred against a religious group could deliberately eschew the use of threatening language, all the better to achieve that aim.

It seems to me that there are two ways in which these two elements of the offence could remain connected. One way would simply be to define ‘threatening’ as ‘intending to incite hatred’. But in this case, one of these elements of the offence would be redundant: it would not be necessary to specify that someone used threatening words *and* aimed to stir up hatred, since these would mean the same thing. The main problem with this solution is that it would rule out by definitional fiat the possibility to which Parekh draws our attention – namely, those cases in which incitement happens without the use of threatening language. For instance, Nash and Bakalis draw our attention to the *Southern News* case in which a racist group was able ‘to continue to disseminate poisonous ideas

under the guise of moderate and reasonable debate' (2007: 358; and see 357, 359). In this case, I would suggest, a better way of avoiding this disjuncture may be to remove reference to threatening language from the offence of incitement to religious hatred altogether. Instead, the offence should refer to words and behaviour which are intended to incite hatred, in whatever tone or manner they are delivered. I suspect that critics would reject this suggestion on the grounds that it would remove an important safeguard from the RRHA. To my mind, however, if the purpose of that Act is to criminalize incitement to religious hatred, then it should not be hamstrung by the need to show, not only that a person intended to incite religious hatred, but also that they did so using a particular tone of language.¹²

c. intentions and likelihoods

Under the RRHA, a person is guilty of an offence if, by the use of threatening words or actions, 'he intends thereby to stir up religious hatred'. Once more, it is useful to compare this feature of the offence to the corresponding feature of the POA. Here there are two possible grounds for guilt: '(a) a person intends thereby to stir up racial hatred, or (b) having regard to all the circumstances racial hatred is likely to be stirred up thereby' (18[1]).¹³ Here we can see yet another restriction in the 2006 Act that was not present in the 1986 Act. Since only one of two conditions needs to be met for the offence of racial hatred to be committed, it follows that people can be guilty *either* if they intend to stir up racial hatred (even if they have no chance of doing so) *or* if their actions are likely to stir up such hatred (even if they have no intention of doing so).¹⁴ By contrast, demonstration of guilt in the case of incitement to religious hatred requires proof of intention. Thus speakers can exercise their right to freedom of expression, even if they are aware that they may incite religious hatred, safe in the knowledge that they cannot be prosecuted for such consequences as long as it cannot be shown that they intended them.

With regard to this aspect of the RRHA, Kay Goodall argues that, rather than create a credible safeguard for freedom of expression, the need to show intention will make the Act 'almost unenforceable'. As she says: 'Without a confession, it will be very difficult to prove the purposive intention' (2007: 113; and see 111-12). Taking up this point, I want to argue that the offence of incitement to religious hatred should be brought into line with that of incitement to racial hatred by adding the likelihood test to that of intention. If this were done, then people could be found guilty of stirring up religious hatred, not only if they aim to do so, but alternatively if their actions make this likely. In order to defend this argument, and in particular to show that this change can be made without undermining legitimate freedom of expression, I need to deal with the objection that the likelihood test would licence and indeed require speculation about the possible effects of certain speech-acts, speculation which would threaten freedom of expression. Consider Hare's claim that it is unwise to outlaw an action on the grounds that it may have certain consequences. As he says, the argument for the criminalisation of incitement to religious hatred 'is often ... based on the asserted likelihood that such speech may encourage its broader audience to discriminate or even to commit acts of violence against the impugned group' (2006: 531-2). The problem with this is that '[j]ustifications for restrictions on speech based on the effect such expression may have on its audience (for example, making them think less highly of a particular group) is an inevitably speculative, and potentially dangerous, basis for the imposition of legal sanction' (2006: 532). Furthermore, if the argument about likely effects is justified in the case of religious hatred, there is no reason why it should stop there, since exactly the same argument would apply to other types of expression. Thus Hare concludes that the offence of incitement to religious hatred could be a 'damaging Trojan horse' (2006: 534).

Against Hare, I want to argue that it is possible to formulate a test of likelihood which does not license or require ‘potentially dangerous’ speculation about the effects of certain words or behaviour. In other words, I think that it is possible to show that a person’s actions are likely to stir up religious hatred, without being drawn into conjecture about the possible effects of these actions at some indefinite point in the future. The trick, I think, is to ensure that the test of likelihood is only met if a *close* and *direct* connection between an action and the stirring up of religious hatred can be established. Let me say a little more about these two aspects of my proposed test. First, with regard to closeness, I would suggest that the US Supreme Court’s standard of ‘imminent lawless action’ provides a useful model. This standard was established by the Court in *Brandenburg v. Ohio*, 395 U.S. 444 (1969).¹⁵ In the Court’s judgment in this case,

the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.

While there are many important differences between the conduct under scrutiny in *Brandenburg* and that in the RRHA, these do not matter for the purposes of my current argument since it is only the test of imminence which is of interest to me here. Applying this test, speech is protected if it amounts ‘to nothing more than advocacy of illegal action at some indefinite future time’ (citing *Hess v. Indiana*, 414 U.S. 105 [1973]),¹⁶ but it is not protected if the illegal action is likely to occur at a specific point in the very near future. To return to the present case, then, my suggestion is that the standard of closeness is only met if there is a relatively short time interval between the speech and its purported effects – that is, between a particular expressive act and the stirring up of hatred toward a particular group. Second, so far as directness is concerned, I accept Goodall’s point that ‘freedom of expression permits people ... to tell dangerous lies. If the link between the lie and the harm is too indirect, no offence is committed’ (2007: 109). The second element of my proposed test

of likelihood therefore specifies that it must be possible to tell a plausible causal story about the link between the action and its effects. It must be possible to show, in other words, that a speech in which hatred toward a particular religious group is expressed led at least some of those who heard this speech to acquire a hatred of that group. Putting the two elements together, my proposal is that people can only be found guilty of incitement to religious hatred either if they intended to do so, or if it can be shown that their words or actions were the proximate cause of that incitement.

d. freedom of expression

The RRHA contains a strong and explicit commitment to the protection of freedom of expression. To cite Section 29J: 'Nothing in this Part shall be read or given effect in a way which prohibits or restricts discussion, criticism or expressions of antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs and practices of their adherents'. There is no corresponding statement in the POA, but only the proviso in Section 26 that the offence of incitement to racial hatred does not apply to 'a fair and accurate report of proceedings' either in parliament or the courts. As I have suggested, it is this final feature of the RRHA which provides the key to understanding the various aspects of the offence of incitement to religious hatred which I have discussed, and in this way it provides the key to understanding the nature of the offence itself. The overriding concern of the legislators responsible for the final shape of the Act was to allay the critics' fears that the offence it created would unjustifiably limit freedom of expression. As David Blunkett, in a speech delivered in July 2004, declared: 'One of the main arguments against introducing this legislation was a concern that it would prevent people debating each other's religions. This just isn't the case and people's rights to debate matters of religion and proselytise would be protected' (2004: 12; cf. Nash and Bakalis 2007: 355). Hence the point of narrowing the offence to threatening words or behaviour was to ensure that a person can abuse and insult another's religious beliefs without fear of being found guilty of incitement to religious hatred. Similarly the stipulation that it is necessary to demonstrate intention

was meant to make certain that people cannot be guilty of the offence so long as they do not deliberately aim to stir up religious hatred.¹⁷

It is, of course, impossible to deny that the right to freedom of expression is of vital importance. Let me briefly mention four arguments which are often made in its defence.¹⁸ First, it is suggested that freedom of expression is necessary for the development of self-knowledge, and hence for the achievement of self-realization. As Parekh puts it, free speech 'is a necessary condition of free thought and critical self-consciousness' (2006: 216). The idea is that, if individuals have a right to express themselves freely, then they can come to know who they are, and this will enable them to become what they are capable of being. A second argument suggests that the right to freedom of expression can be exercised in pursuit of truth. To cite Eric Barendt, 'the most durable argument for a free speech principle has been based on the importance of open discussion to the discovery of truth' (2005: 7). The third suggests that freedom of expression enables citizens to exercise effective collective control over their governments. In Parekh's words, this freedom 'assists the formation of informed public opinion and collective will' and hence 'provides the only effective check on the government' (2006: 216). A fourth argument suggests a connection between free speech and specifically *democratic* government. Thus Alexander Meiklejohn famously declared that: 'The principle of the freedom of speech springs from the necessities of the program of self-government' (1948: 26). Without free speech, democracy cannot exist.

At the same time, however, few think that the right to freedom of expression should be unrestricted. Relatively uncontroversial limits include laws against libel and slander, against incitement to criminal acts, and against sedition and treason (see Meiklejohn 1948: 18). Even J S Mill, frequently cited in support of freedom of expression, recognizes the need to be clear about its

limits: 'No one pretends that actions should be as free as opinions. On the contrary, even opinions lose their immunity, when the circumstances in which they are expressed are such as to constitute their expression a positive instigation to some mischievous act' (1859: 56). Here Mill does not seek to identify a particular type of expression – such as incitement to religious hatred – and argue that all expressions of this type may rightly be prohibited. Rather he suggests that it is the particular circumstances in which an opinion is uttered that determine whether or not it should be proscribed.¹⁹ This aside, the pertinent point here is that, in spite of strong arguments in favour of freedom of expression, even its most famous defender acknowledges the need to place limits on it.

3. *Religious hatred as misrecognition*

In light of these reflections on the RRHA, the question which will concern me for the rest of this article can be put as follows: is there good reason to restrict freedom of expression in those cases when it constitutes incitement to religious hatred? My answer will be that this freedom may indeed be limited in some such cases, since such incitement may cause a range of harms of misrecognition. Although I shall mention several theorists of recognition in order to make my case, I shall focus in particular on Honneth. To be specific, I shall show that the taxonomy of forms of misrecognition which he develops can help us to understand the nature of the various harms which may be caused by incitement to religious hatred.²⁰ First, I present a brief sketch of Honneth's theory of recognition (a). Then I show how certain harms to individuals caused by incitement to religious hatred can be understood as forms of misrecognition (b).

a. Honneth's theory of recognition

Honneth's theory of recognition forges strong and intimate links between the psychological, social and political realms. It is simultaneously an account of the formation of individual psyches, an

explanation of the dynamics of social struggles, and a delineation of the parameters of social justice. He starts from the claim that 'practical identity-formation presupposes intersubjective recognition' (1995: 92). In other words, developing a sense of oneself as an individual requires that one is recognized by others. As Honneth puts it: 'One can develop a practical relation-to-onself only when one has learned to view oneself, from the normative perspective of one's partners in interaction, as their social addressee' (1995: 92). Furthermore, individuals can only have positive attitudes to themselves if those with whom they interact value them in certain specific ways. It follows that individuals have specific vulnerabilities 'resulting from the internal interdependence of individualization and recognition' (1995: 131). To be specific, if they are denied recognition, then their 'positive understanding of themselves that they have acquired intersubjectively' may be damaged (1995: 131). In other words, in the absence of positive attitudes of others to them, individuals will fail to develop positive attitudes to themselves. If, however, the conditions which facilitate recognition are in place, then individuals will be able to achieve self-realization. Hence, Honneth concludes, '[t]he justice or well-being of a society is proportionate to its ability to secure conditions of mutual recognition under which personal identity-formation, hence individual self-realization, can proceed adequately' (2003: 174).

For Honneth, there are three distinct and mutually irreducible forms that recognition – and hence misrecognition – can take. First, recognition as love concerns those '[p]rimary relationships ... constituted by strong emotional attachments among a small number of people' in which each is dependent on the other, and responsive to the other's needs (1995: 95). If these relationships are well-ordered, then this makes possible a 'positive relation-to-self' in which one can assert one's needs 'in an unforced manner' ... 'trusting one's own sense of one's needs and urges' (1995: 118). Thus the experience of love leads to a confidence in one's own worth and in the validity of one's needs. This 'basic psychological self-confidence' is most vulnerable to threats to one's 'physical integrity'. At the extreme end of a spectrum are experiences of torture and rape, which do not only

involve physical pain but also humiliation and social shame (1995: 132-3), and may even result in “psychological death” (1995: 135) in which the individual’s most fundamental sense of self is annihilated.

Second, recognition as respect is experienced when ‘[i]n obeying the law, legal subjects recognize each other as persons capable of autonomously making reasonable decisions about moral norms’ (1995: 110). In acknowledging each other’s rational autonomy, each subject is able to develop a sense of self-respect. As Honneth puts it, through this experience of recognition, subjects enjoy ‘the possibility of seeing their actions as the universally respected expression of their own autonomy’ (1995: 118). This type of recognition is absent when people are unjustly denied rights, and the effect of such a denial is to damage their ‘moral self-respect’ (1995: 133). At worst, experiencing this denial of their rational autonomy may lead to what Honneth calls their “social death” (1995: 135). In other words, such people may cease to be regarded – and may cease to regard themselves – as citizens who may rightly play an active part in the life of their political community.

Third, recognition as esteem ‘signifies only the degree of recognition the individual earns for his or her form of self-realization by ... contributing, to a certain extent, to the practical realization of society’s abstract goals’ (1995: 126). In other words, esteem is experienced if an individual’s chosen way of life is acknowledged to be valuable by other members of society. This does not mean that everyone will be esteemed ‘to the same degree’ (1995: 129), but rather ‘that every subject is free from being collectively denigrated, so that one is given the chance to experience oneself to be recognized, in light of one’s own accomplishments and abilities, as valuable to society’ (1995: 130). Thus, for Honneth, being esteemed should be understood negatively: it is the opportunity to be valued which exists when one’s identity is not ridiculed or one’s achievements scorned. It follows, therefore, that the sort of misrecognition corresponding to esteem takes the form of the ‘denigration of individual or collective ways of life’ which ‘robs the subjects in question of every

opportunity to attribute social values to their own abilities' (1995: 134). For example, victims of racism will find it harder than others to have their achievements valued by society at large.

b. Harms of misrecognition

Bearing Honneth's taxonomy of types of misrecognition in mind, I now seek to identify a range of harms which may be suffered by a person who is associated with a religious group against which hatred is incited. In order to do so, I shall look to the arguments used by defenders of the RRHA at the time the legislation was proposed, as well as analyses of this legislation by legal scholars. I shall suggest that the various sorts of harms that they identify can be roughly divided into three groups, which I shall call physical harms, psychological harms and status harms.

The suggestion that incitement to religious hatred should be criminalized because it may cause *physical* harms faces an immediate objection. Prior to the passage of the RRHA, there was already legislation in place which made incitement to criminal acts – including incitement to violence – illegal. 'It is well established', comments Hare, 'that speech which constitutes an incitement to criminal acts ... is legitimately prohibited ... such acts are already amply covered by the general criminal law and existing public order offences' (2006: 528-9). Similarly for Goodall, '[t]here is ... the common law of incitement. If one incites another to commit a criminal act, this ... is an offence' (2007: 92; see also Hare 2006: 532; Jeremy 2007: 187-8; Nash and Bakalis 2007: 359). Thus the objection is that, since individuals were already adequately protected from physical harm, the 2006 Act could not be justified on the grounds that it offered such protection.

I think, however, that proscribing incitement to religious hatred can be regarded as an appropriate and well-justified response to the *fear* of violence that individuals may otherwise experience.

Consider, for example, Jeremy's remark that the approach taken in the Act is 'that adherents of

religion will be protected from hate speech and material that calls for violence or raises a reasonable apprehension or fear of violence' (2007: 201; and see 188-9, 196, 200). In a similar vein, Caroline Flint, who was the Parliamentary Undersecretary of State for the Home Office at the time of the passage of the Act, contended that: 'At an individual level this [offence of incitement to religious hatred] can lead to *fear and intimidation* and a sense of isolation. It can also indirectly lead to discrimination, abuse, harassment and *ultimately crimes of violence* against members of our communities. It is legitimate for the criminal law to protect citizens from such behaviour' (quoted in Hare 2006: 524-5, emphasis added). In both of these passages, we see the idea that, if individuals have hatred stirred up against them, then they may develop the reasonable fear that they will be victims of violence motivated by that hatred.

To put this argument in Honneth's terms, I would suggest that well-founded fears of violence present threats to the physical integrity of the self. Hence such fears will undermine what he describes as a person's 'body-related *self-confidence*' (1992: 193).²¹ People who fear violence will lose the sense that their identity is stable and continuous over time, and that the environment in which they find themselves is safe and secure. My point is that it is not just physical violence itself, but also the threat of such violence, that is capable of undermining the self-confidence that Honneth regards as a vital prerequisite of all other positive attitudes to the self (1995: 176; 2003: 138). If this is right, then it would follow that the RRHA could be justified partly on the grounds that it may lessen this sort of harm by reducing individuals' fear that they could be the targets of violence.

Criminalizing the incitement of religious hatred may help to create and maintain an environment in which individuals associated with religious groups enjoy a greater sense of physical security.

It is more straightforward, I think, to argue that incitement to religious hatred should be proscribed since it inflicts *psychological* harm on its victims. Goodall suggests that '[e]xtreme racism denigrates people and represents them as inferior: they ... become targets of hatred or contempt' (2007: 96). I

see no reason to think that religious hatred would not have exactly the same effects. In this context, Charles Taylor's well-known essay on recognition comes to mind. In the famous opening passage of that essay, he argues that misrecognition 'can inflict a grievous wound, saddling its victims with a crippling self-hatred' (1995: 226). Echoing this remark, Parekh suggests that some members of the group targeted by hate speech 'internalise their negative image and develop self-abasement and low self-esteem' (2006: 218). In the current case, if hatred is incited against individuals on the basis of their religious beliefs, then it is not unlikely that they will suffer psychological harm as a result. In particular, they may internalize that hatred and make it part of their own identity. Such self-hatred is 'crippling', I would suggest, since it undermines individuals' capacity to find meaningfulness and value in their life-projects.

In terms of Honneth's analysis of the harms of misrecognition, I would argue that psychological harms, like the fear of physical harms just considered, present a threat to individuals' 'basic psychological self-confidence'. If people are the target of the incitement to religious hatred, the perpetrator of this offence encourages others to hate them on the grounds of their religious identity. To be regarded in this way is likely to undermine those people's sense of their own value in a very fundamental way. 'My own identity', Taylor claims, 'crucially depends on my dialogical relations with others' (1995: 231). In this case, when at least some of those others regard me as an object of contempt, it is not surprising that it is difficult for me to retain a sense of my own worth and of the validity of my needs. Given this analysis, I would argue that a second reason for proscribing incitement to religious hatred is to reduce the psychological harms which such hatred may cause, and doing this helps to establish one of the conditions which Honneth believes is necessary for individuals to have a chance of achieving self-realization.

The third and final type of harm which I suggest may be caused by the incitement of religious hatred is damage to an individual's *status*. Thus, according to Parekh, 'hate speech stigmatises its target by

ascribing to it a set of constitutive qualities that are widely viewed as highly undesirable'; hence the bearers of those qualities 'are despised, degraded, regarded as not quite normal, treated with contempt, even demonised' (2006: 214). Brendan Larvor and Richard Norman similarly suggest that speech can 'stigmatise a particular social group' and thus 'make its members feel threatened and excluded, feel that they are second-class citizens, aliens and outcasts whose very presence is resented' (quoted in Brown 2008: 10). In other words, becoming such a target may mean that victims have a lower status attributed to them, and having a lower status has important consequences for the quality of these individuals' lives. As David Blunkett points out, although talking about race rather than religion, '[r]ace inequalities affect life chances all the way down the line' (2004: 16; see also Parekh 2006: 219). This sort of harm to individuals' status is well described by Nancy Fraser when she conceptualizes misrecognition as status subordination: 'To say ... that society has a status hierarchy is to say that it institutionalizes patterns of cultural value that pervasively deny some members the recognition they need in order to be full, participating members in social interaction' (2003: 49). To put my argument in Fraser's terms, then, to criminalize incitement to religious hatred may be one way in which to move toward the achievement of equality of status, and thus what she calls parity of participation. Consider, for example, Blunkett's claim that the point of eliminating religious discrimination is to achieve 'full equality of opportunity' (2004: 18).

To return to Honneth one more time, his account of misrecognition draws attention to those harms which individuals experience when the groups with which they are associated are 'collectively denigrated'. In particular, he suggests, the individuals affected will find it difficult to be valued for their contributions to what he calls 'societal goals' (1995: 122). For instance, a particular religious group may have a useful and important contribution to make to public debates on a whole range of pressing issues, such as the morality of same-sex marriage or the ethics of euthanasia. But if that group is held in contempt by at least some members of society, it will be difficult for it to make that contribution. It will not be taken seriously, and its collective opinions will be derided and dismissed.

The consequences for the self-esteem of members of that groups are significant. Joel Anderson, Honneth's translator, puts it like this: 'in pluralistic and mobile societies, it is difficult to maintain self-esteem in the face of systematic denigration from outside one's subculture' (in Honneth 1995: xviii). It follows, I would suggest, that a third reason for criminalizing incitement to religious hatred would be to combat the collective denigration of particular religious groups, since such denigration undermines the opportunities of their members to be esteemed for their contributions to society's collective goals, and this in turn undermines their opportunities for self-realization.

4. *Conclusion*

In this article, my principal aim has been to argue that freedom of expression may rightly be limited in cases of incitement to religious hatred. This is because such incitement may cause what I referred to as physical, psychological and status harms, each of which may be regarded as a type of misrecognition. Although I am confident that I have established this much here, it seems to me that there is more work to be done. At least three further tasks suggest themselves to me. First, it would be useful to compare different forms of hatred. In this article, I have focused on hatred directed against religious groups. Are other forms of hatred exactly like religious hatred in all relevant respects? What about hatred directed against individuals to whom racialized identities are ascribed? Is there any truth to the claim that religious beliefs are chosen while racial identity is not? If there is, would it follow that religious and racial hatred are importantly different? And what about hatred directed against women? To be specific, could an offence of 'incitement to sexual hatred' be used 'as a possible model for the regulation of pornography' (Easton 1995: 89)? Second, it cannot be argued that any expressive act which stirs up some degree of religious hatred should be criminalized. This is because freedom of expression is an important right which should not be limited to prevent what might be very minor harms. In other words, some individuals' interest in

free speech outweighs others' interest in being protected against the harm that such speech incites. It follows, I would suggest, that it is necessary to articulate what Joel Feinberg calls a 'regulative scheme' which shows how to strike the right balance between these two set of interests (1985: 228).²² More optimistically, it may be that in some circumstances expressions of hatred, if articulated in the right sort of forum, could lead not to the corrosion of social solidarity but to the development of greater mutual understanding, thus unleashing what Wendy Martineau calls 'the creative potential for imagining new shared realities' (this volume). Third, it is necessary to determine how the harms associated by religious hatred are produced. In exceptional cases, it may be possible to see how a particular act of incitement causes harm to some specific individuals. But it is much more likely that religious hatred causes what Feinberg calls an 'accumulative harm' (1985: 225-32). This is a harm to a person (or persons) caused by a group of people, where the action of no single member of that group suffices to cause that harm (Kernohan 1993: 52). If I am right in thinking that the harms caused by religious hatred are accumulative in nature, this will have significant implications for how we seek to regulate speech in those cases where it may incite religious hatred. I hope to turn to the last of these tasks next.

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¹ See <http://www.legislation.gov.uk/ukpga/2006/1/contents>, accessed 03/03/2011.

² See <http://www.legislation.gov.uk/ukpga/1986/64/contents>, accessed 03/03/2011.

³ In an analysis which is in some regards complementary to my own, Alexander Brown formulates a 'Millian response' to the RRHA, in which he suggests that 'since words do have the potential to harm others it is appropriate for harm-provoking speech acts to enter into our (utilitarian) deliberations about whether or not, and to what extent, liberty-limiting restrictions may be justified all things considered' (2008: 9).

⁴ The same definition of a religious group can be found in section 28(4) of the Crime and Disorder Act 1998 (see <http://www.legislation.gov.uk/ukpga/1998/37/contents>, accessed 05/05/11), and in section 39(4) of the Anti-Terrorism, Crime and Security Act 2001 (see <http://www.legislation.gov.uk/ukpga/2001/24/contents>, accessed 05/05/11).

⁵ For the sake of simplicity, I shall put aside the possibility that individuals may be the targets of religious hatred because they *lack* certain religious beliefs.

⁶ Compare the very similar definition of a racial group in section 28(4) the Crime and Disorder Act 1998.

⁷ <http://www.independent.co.uk/news/people/rowan-atkinson-mr-bean-shows-his-serious-side-683230.html>, accessed 25/02/2011; and compare Goodall (2007: 97); Hansen (2006: 12); Hare (2006: 534); Nash and Bakalis (2007: 369).

⁸ See <http://www.legislation.gov.uk/asp/2003/7/contents>, accessed 04/03/2011; and see the commentary in Goodall (2007: 109-10).

⁹ Compare Edge's comment: 'There is no generally applicable definition of religious belief, or cognate terms, in English law' (2003: 19).

¹⁰ See also Jeremy's discussion of examples in the BNP's literature (2007: 196); and see Baggini and Cohen (2004: 3).

¹¹ See <http://www.dailymail.co.uk/news/article-1139249/High-ranking-Foreign-Office-diplomat-arrested-anti-Semitic-gym-tirade.html>, accessed 25/02/2011. For an example of a 'religiously aggravated offence', see Jeremy (2007: 190).

¹² The only prosecution for incitement to religious hatred of which I am aware failed because the jury agreed with the defendant that the pamphlet he wrote and circulated, which argued that Muslims 'are almost exclusively responsible' for the 'production, transportation and sale' of heroin in Britain, was not threatening. See <http://www.telegraph.co.uk/news/newstopics/religion/7844429/BNP-lecturer-behind-Muslim-heroin-leaflet-cleared-of-inciting-religious-hatred.html>, accessed 25/02/2011; and http://www.lep.co.uk/news/race_hate_defendant_walks_free_from_court_1_791415, accessed 25/02/2011.

¹³ See the remarks in Nash and Bakalis (2007: 357-8) on this shift between the RRHA and the POA.

¹⁴ They would, of course, also be guilty if they intend to stir up racial hatred *and* that is the likely effect of their actions.

¹⁵ See <http://laws.findlaw.com/us/395/444.html>, accessed 03/03/2011.

¹⁶ See <http://laws.findlaw.com/us/414/105.htm>, accessed 03/03/2011.

¹⁷ It must be said that, by contrast, defining a religious group as one that shares a set of beliefs rather than a collective identity had the opposite effect: it fuelled anxieties that this offence would criminalize the criticism of religious ideas.

¹⁸ See also Arthur (2002: 365-6).

¹⁹ For a discussion of a range of ways of interpreting this passage from *On Liberty*, see Brown (2008: 8-11).

²⁰ In this article, I make the assumption that Honneth's theory of recognition – and in particular his identification of three types of misrecognition – is well grounded. Although I cannot prove the validity of his theory here, I may at least be able to strengthen the case for it by demonstrating its utility in the present case.

²¹ Compare Mari Matsuda's suggestion that 'the effect' of hate propaganda 'on one's ... sense of personal security is devastating' (1989: 25; cited in Arthur 2002: 370).

²² Compare Brown's proposed 'proportionality test' (2008: 14-15).