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Public order offences: how feasible is their applicability to online hate?

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Abstract

As an area of law in the UK, public order offences are almost entirely useless on social media. This set of offences (ss. 4, 4A and 5 of the Public Order Act 1986) was aimed to address any behaviour or expressive activities, either oral or written, carried out in a context of physical proximity to the victim. In principle, the foundational base of public order offences runs the risk of becoming blurred if we extend their applicability to hateful messages online and, therefore, to any impersonal way of acting. Consequently, only 13% and 14% of the hate crimes committed online in 2016/17 and 2017/18 in England & Wales involved public order offences. Therefore, there is a certain resistance based on the adequacy of these offences to the online environment without requiring the message to be audible or visible to someone, as a matter of immediacy/proximity. We will explain how this glimmer of hope has lasted over time amid fierce opposition to broaden the scope of application of public order offences beyond traditional public forums, such as disturbances triggering in a city's main square.

Key words

Public order; hate crimes; hate speech; public disturbances; cyberspace

Resumen

La utilidad práctica de los delitos de orden público (public order offences), que representan todo un sector legal en Reino Unido, resulta muy escasa en redes sociales. Este conjunto de delitos (arts. 4, 4A y 5 de la Public Order Act 1986) pretendía ocuparse de cualquier comportamiento o actividad expresiva, sea de forma oral o escrita, llevada

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a cabo en un contexto de proximidad física con la víctima. En principio, la razón de ser de los delitos de orden público podría desdibujarse si extendiéramos su aplicabilidad a los mensajes de odio online y, por tanto, a cualquier forma impersonal de actuar. En consecuencia, solo el 13% y el 14% de los delitos de odio cometidos online en 2016/17 y 2017/18 en Inglaterra y Gales implicaron delitos de orden público. Por tanto, se observa cierta resistencia basada en la adecuación de estos delitos al entorno online sin exigir que el mensaje sea audible o visible para alguien, poniendo en cuestión las notas de inmediatez/proximidad. Trataremos de explicar cómo este rayo de esperanza ha perdurado en el tiempo en medio de una feroz oposición a ampliar el ámbito de aplicación de los delitos de orden público más allá de los foros públicos tradicionales, como sería el caso de los disturbios desencadenados en la plaza mayor de una ciudad.

Palabras clave

Orden público; delitos de odio; discurso de odio; disturbios; ciberespacio

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1. Introduction

The codified law or parliament-made law that seeks to preserve public order in England and Wales, the Public Order Act 1986 (POA 1986), has found in criminal law an ally and, at the same time, a remarkably controversial mechanism for limiting citizens' freedoms if their behaviour deviates from expected standards. Mainly, there are three highly thought-provoking offences under constant scrutiny, as they usually generate particularly uncertain standards of behaviour. These offences, as a kind of ladder of seriousness from most to less serious, are related to:

i. using threatening, abusive or insulting conduct with the intention of either causing a person to fear that violence will be used against them or of provoking a person to use violence [*intended* outcome concerning *violence*, irrespective of actual achievement; s. 4 of the POA 1986]
ii. using threatening, abusive or insulting conduct causing harassment, alarm, or distress with intent to cause it [*intended* and *caused* outcome concerning *harassment, alarm, or distress*; s. 4A of the POA 1986]; and
iii. using threatening or abusive conduct that is likely to cause harassment, alarm, or distress [*creation of risk without any intention to cause* the outcome concerning *harassment, alarm, or distress*; that is, *likelihood of causation* irrespective of whether the person at risk was or not the one intended to reach thereby; s. 5 of the POA 1986].

Racially/religiously aggravated public order offences under s. 31 of the Crime and Disorder Act 1998 (CDA) created racially/religiously aggravated counterpart offences for those already enshrined in public order law (ss. 4, 4A and 5 of the POA 1986). Since the CDA was passed, half of all prosecutions concerning aggravated offences on hostility grounds year after year had to do with this set of offences (Iganski 2008, 124). However, in contrast with these promising statistics, there have been very few successful prosecutions concerning online hate. This criminal activity, often referred to as cyberhate, can be defined as the use of networks (e.g. computer or mobile telephone networks) and electronic communication services (e.g. email or messaging services) or web-hosted content services (digital press) –i.e. content that is more or less static and not, in principle, aimed at satisfying communicative interaction– for making declaratory manifestations of human thought that are of a biased or prejudiced nature towards a *collective identity* that is legally recognised as such, on the grounds of race or religion in the case of the concrete offences concerned in the CDA.

Actually, up to now, it appears as though only s. 4A of the POA has been ever applied to online expression.[1] Therefore, in 2016/17 and 2017/18, according to the police criteria for setting crime categories, only 13% (O'Neill 2017, 21) and 14% (Home Office 2018, 30–32) of the hate crimes committed online involved public order offences. This category also includes stirring up hatred offences [Part III (ss. 18–23) and 3A (ss. 29B–29G) of the POA 1986)].[2] The threat to public peace must be directly inflicted to activate ss. 4, 4A and 5 of the POA 1986, whereas the stirring up hatred offences must indirectly inflict that

[1] It remains to be seen whether ss. 4 and 5 of the POA 1986 could have fitted in the same path, and if not, why not.

[2] Apart from what will be explained thereupon, this self-ruling area of public order law (stirring up hatred offences) will not receive further attention here. For a detailed explanation, see: Gordon Benito 2023b.

public order menace. On a scale of seriousness, the offences of stirring up hatred are at a second level closing the chances of incriminating massive but weaker speech acts that, in turn, are considerably more doubtfully connected to public disorder (Wolffe 1987, 85–87). They are not concerned with inappropriate hateful speech/behaviour for the intended audience or anyone who witnesses, as would happen with ss. 4, 4A and 5 of the POA 1986. They mainly serve the purpose of confronting hateful speech/behaviour that might prompt others to act (Neller 2023, 11–13). Moreover, there can also be differences in terms of online implementation. The Law Commission for England & Wales has raised doubts about the validity of implementing ss. 4, 4A and 5 of the POA 1986 online, quite the opposite of what would happen with stirring up hatred offences: "[W]hereas other public order offences are primarily concerned with physical, public spaces [ss. 4, 4A and 5 of the POA 1986], the stirring up hatred offences can equally be committed in an online context, and in this respect are of an appreciably different character" (Law Commission 2020, par. 9.22). Thus, one task for this research study will be to validate or refute this observation. In short, to shed light on the uncertainty of not knowing the actual applicability of ss. 4, 4A and 5 of the POA 1986 within the online environment.

Has the draftsman been exclusively concerned with expressions that might provoke outbreaks of disorder on the street than with the spread of hatred per se? Richard Card and Richard Ward made an interesting thought on this issue. In their view, if members of the most vulnerable groups in society (e.g. Blacks, Arabs, etc.) fear being identified by the criminal justice system due to possible reprisals, then s. 4A was not directly framed for them. Racist messages (e.g. racist graffiti) are often represented in abstract form, not to anyone in particular but to the community at large. At the very least, it was a risk to be identified as the person who had felt alluded to by such racist and vague claims (Card and Ward 1994, par. 4.86). Even more, the victim may belong to a predominant social group. An example will suffice. That would be the case of a white man hearing racial abuse towards blacks (e.g. "fucking nigger" or "fucking coon bitch") and making him recall his loved one. In that case, the victim would be the white hearer man if the abusive language, for instance, caused him to be in distress (s. 31(1)(c) of the CDA, in connection with the counterpart offence settled in the s. 5 of the POA 1986) (see *Taylor v DPP* (2006), par. 18).

These reflections instantly raise another interesting question to attend: if the offence under the s. 4A of the POA 1986 has been the only one to be implemented online, and if it was not designed to protect vulnerable victims of hate crimes, do public order law fail to take care of these sort of victims?

In fact, what amounts to public disorder online? When an online activity poses risks to offline order? What about the deterrent effect of law? This research intends to provide valuable information, addressing those and many more related questions that may come to our minds.

2. Public order offences: a socio-historical background

Rather than merely dwelling on the current debates, we must look briefly at the past now to gain a proper legal standpoint. Existing controversies will not be understood

sufficiently if we ignore the socio-historical genesis and the role played by these –or by the historically comparable– offences.

2.1. A look almost a century back to understand the troublesome present

During the 1930s, s. 5 of the Public Order Act 1936 (POA 1936) was passed to combat the rise of British fascism, particularly the civil disorders atmosphere created by the British Union of Fascists (Thurlow 1998, 61–87). As is well known, feeding the community by sowing suspicion or fear among individuals or groups of individuals might be enough for public disturbances to occur at any moment. The governmental response[3] thus ensured that the legislative machinery would be able to promptly react to offensive conduct that may foster breaches of the peace. In particular, it was stated that "any person who in any public place or at any public meeting uses threatening, abusive or insulting words or behaviour with intent to provoke a breach of the peace or whereby a breach of the peace is likely to be occasioned, shall be guilty of an offence" (s. 5 of the POA 1936).[4] However, the functional utility of s. 5 of the POA 1936 resulted in being controversial. Although some fascist speakers were successfully prosecuted for racial defamation or racialist propaganda, thus being regarded as a quite effective offence (Dickey 1968a, 316–317; 1968b, 15–16; Lester and Bindman 1972, 350–353; Leopold 1977, 392–393), it is also true that these cases often went to appeal, and magistrates threw some out (Thurlow 1996, 127). Court decisions were not consistent and created legal uncertainty (Laverick and Joyce 2019, 35). In fact, in order to circumvent the law, "fascist speakers developed the technique of criticising the Jews as an ethnic group rather than as individuals", which often made it difficult for police officers "to distinguish between *badinage* and abuse" (Thurlow 1996, 127). Fascist propaganda certainly became less provocative (Cross 1961, 177).

In short, we had better say that there were honourable exceptions of a final and binding judgment for criminal activity under the offence provided for by law. In addition, as far as our study is concerned, what is most interesting is that the law made a broad understanding of *public space* or *public meetings* foreseen in s. 5 of the POA 1936. So broad was the interpretation given to those terms that the law admitted that a public meeting could take place in a public space or on private premises (s. 9(1) of the POA 1936).

The Race Relations Act 1965 (RRA 1965)[5] finally extend the s. 5 of the POA 1936 to written matter, not limiting its scope to words uttered by the offender. It included from

[3] Note that the POA 1936 was applicable in England and Wales and Scotland, but was not extended to Northern Ireland (s. 10(2) of the POA 1936). For Northern Ireland, a comparable provision would be enacted by s. 3 of the Public Order Act (NI) 1951.

[4] The maximum punishment was three-months' imprisonment or a fine of £50.

[5] The RRA 1965 was passed in unique and unprecedented circumstances until the 1950s. That was the massive migration of waves of people of colour to predominantly white British society. It was thought that the integration process of immigrants would help reactivate the problem of colour prejudice already latent in society. The problem of colour prejudice in Britain was "(…) very recent, arising from what was a trickle of coloured Commonwealth immigrants coming to settle in the country in the early 1950's, which became a rush in the mid-1950's and a flood by the time the Commonwealth Immigrants Act was passed in 1962" (Dickey 1968b, 10). Note that the Act was not extended to Northern Ireland (s. 8(3) of the RRA 1965), which still had the Public Order Act (NI) 1951 and its comparable offence settled in s. 3. The problem seemed to lie rather with s. 6 of the RRA 1965, which created the offence of incitement to racial hatred (or stirring up racial hatred) for the first time in Great Britain. Northern Ireland demanded its distinctive features to be

then on "any writing, sign or visible representation" which is threatening, abusive or insulting (s. 7 of the RRA 1965). At that time, many doubts were raised as to whether *visible representation* within the clause could cover television broadcast or not (Dickey 1973, 6–8).

The Race Relations Act 1976 (RRA 1976) repealed the s. 7 of the RRA 1965 (RRA 1976). What is more, it was stated that the old s. 5 of the POA 1936 will continue to have effect as substituted by s. 7 of the RRA 1965 (s. 79(6) of the RRA 1976). The Public Order Act 1986 (POA 1986) will finally repeal s. 5 of the POA 1936 (s. 40(3) and Sch. 3) and assume legal control over the corresponding subject that has lasted to the present day. Even so, it is worth briefly explaining the turbulent context that led to this legal change at the time. The UK experienced some violent episodes before passing the POA, like the Red Lion Square (15 June 1974), Southall (23 April 1979), New Cross Fire (18 January 1981) or Brixton (10–12 April 1981) disorders. Massive picketing, hooliganism or rowdy crowds were also a matter of great concern. Many of these series of events involved the most disadvantaged ethnic communities on them, whether reacting to provocations of a far-right party, racial disparities of police's stop and search powers, or accidental discharges of police's firearms. After the notorious 1981 Brixton rioting, for example, new sources of social disruption occurred that same year in other cities across the country. In all of them, the racial component played an important role.[6] Several inquiries, with their subsequent reports, were commissioned and fully undertaken during those troubled times (Scarman 1975, 1981, Home Office 1980, 1985, Law Commission 1983).

The violent acts triggered by social upheavals boosted the law reform. The POA 1936 did not stand the test of time.[7] No progress was made in fifty years, so a renewed successor in the aftermath of the above events was more than welcome. The following quotation is extracted from the statement of Mr. Douglas Hurd as Secretary of State on January 1986: "The threat to public order comes in different shapes at different times. That means that the measures needed to safeguard public order and protect the public must be re-examined from time to time. It is half a century since Parliament set itself to that task, and society and its habits have changed radically. It is not unreasonable that the POA 1936 should be followed by a POA 1986".[8] Was Mr Hurd referring to the new

adequately considered, as it was a region where faith-based discrimination was rampant. Even if incitement to religious prejudice could have been incorporated into Britain's RRA 1965, the Stormont Government simply did not want to embrace a unified legislative image. Great Britain also chose not to include the incitement on religious grounds, since it considered odd and inappropriate to do so if Northern Irish law, where the offence was really needed, was renouncing to do so (Dickey 1972, 134-135).

[6] In 1981, the Home Office published the first state report with measures against the emergence of racial violence outbreaks and the circumstances favouring them to appear (Home Office 1981). Even if it was officially considered a serious problem before, since the early 1960s, the state used to apply a battery of responses (e.g. measures of migration control and restrictions) that put the victims at the forefront. It was all about blaming migrants for their massive and increasing presence in the country. Hence, Rob Witte refers to this positioning as an "excluding recognition" of racist violence by the state. In the 1970s, the problem of racially motivated violence began to be increasingly noticeable to part of British society. The 1981 report finally depicted a transition point. Never before was unreservedly recognised the systematic nature of racist violence, nor was a road map given to root out evil in this sense. According to Rob Witte, it was the start of the "including recognition" of racist violence by the state (Witte 1996, 24-79).

[7] For a better understanding of the social background and the existing outdated legislation that eventually led to law reform proposals, see: Smith 1987, pars. 1.11-1.13.

[8] HC Debate, Vol. 89, Col. 792 (January 13, 1986).

role communications took in spreading the news among society? Could that be behind the legal change? The following section will shed light on this issue.

2.2. Media revolution as the catalyst for legal change?

Apparently, the media revolution was more probably than not part of the circumstances pressing for updating the existing law. According to Lord Beaverbrook, plural viewpoints that affect social order may be inferred from many persons assembling or massed together. Moreover, for that to be so, dialogue and publication were to be considered necessary carriers of public outcry. While the 1930s was a decade when newspapers were the prevailing news media, it would never be like this again. Half a century later, television, telephone and other electronic media were making news coverage to be more freely broadcast than ever. Interestingly, Lord Beaverbrook concludes his deliberation by assuring that "(...) news of breaches of public order, even on a local scale, now reach the people of this country faster and more vividly. This tends to cause terrible concern to many people over relatively minor and perhaps short-lived events, so inevitably increasing the call by public opinion for a review of public order laws. (...) Today the media are often unwittingly used as an instrument for the promotion of sometimes dubious causes".[9] In our view, what was stressed is that the media had developed quite a lot and, at that time, could make any single behaviour resound louder to endanger public safety.

As we can imagine, public order offences encompass many situations that easily exceed what is of interest here. However, a crucial set of offences was newly added to Part I of the POA covering disorderly conduct or behaviour, mostly following closely an English Law Commission's report (Law Commission 1983). In the words of Lord Irvine of Lairg, disorderly behaviour means "physical disturbance or disruption" [See: HL Debate, Vol. 555, Col. 1866 (June 16, 1994)]. For this research study, its use will not be limited to unlawful violence, whether individually or in tandem, but also to any behaviour amounting to offensive conduct likely to cause violence, harassment, alarm or distress. For some prominent scholars, the problem lies here, as the very concept of disorderly behaviour is tremendously flexible so that people who act differently rather than dangerously can cause alarm or distress (Smith 1987, par. 7.05; Robertson 1993, 90), as is requested by some offences of the POA 1986 that we are about to introduce now. Notwithstanding, before going one step further, it is worth mentioning that the successors of s. 5 of the POA 1936 are ss. 4 and 4A of the POA 1986. They result from a re-enactment completely reinventing that aged offence of the POA 1936. Unlike ss. 4 and 4A of the POA 1978, s. 5 of the very same Act is considered a completely new offence.[10]

3. The current set of offences to safeguard civil liberties: ss. 4, 4A and 5 of the Public Order Act 1986

Even if the primary focus of this research work will not be on them, Part I of the POA 1986 (ss. 1–10) also contains a revisited statutory recognition for the abolished riot, rout, unlawful assembly, and affray common-law offences (s. 9(1) of the POA 1986). These are

[9] HL Debate, Vol. 476, Cols. 530-531 (June 13, 1986).

[10] Apart from what is to be developed shortly regarding this offence, to find out more about the not-so-distant origins of s. 5 of the POA 1986, see: Smith 1987, par. 7.02.

now riot (s. 1), violent disorder (s. 2) and affray (s. 3) statutory offences. Despite differences with ss. 4, 4A and 5 of the POA 1986, it is important to assume from now on that they all are part of the same seriousness scale settled in Part I of the POA 1986 by the draftsman. While ss. 1–3 are at the upper half, the ss. 4–5 are at the lower half. Avrom Sherr regarded this entire legal framework as a *frightening gradation*. They all have in common the feasibility of causing fear or alarm to others for their personal –or other's personal– safety (Sherr 1989, 85–105). Richard Card prefers to allude to the ss. 1–3 offences as violent offences, whereas those in ss. 4, 4A and 5 are non-violent (Card 2000, par. 4.87). We now turn to the offences that will receive further attention henceforth: ss. 4, 4A and 5 of the POA 1986.

3.1. An overview of the offences concerned in England & Wales

Section 4 of the POA 1986 makes it an offence (a) to use towards another person threatening, abusive or insulting words or behaviour, or (b) to distribute or display to another person any writing, sign or other visible representation that is threatening, abusive or insulting. In any case, engaging in these activities shall be done 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. There is also a racially/religiously aggravated counterpart offence (s. 31(1)(a) of the CDA).[11]

Section 4A of the POA 1986 makes it an offence (a) to use threatening, abusive or insulting words or behaviour – including disorderly behaviour –, or (b) to display any writing, sign or other visible representation that is threatening, abusive or insulting. In any case, engaging in these activities shall be done by causing that or another person harassment, alarm or distress. There is also a racially/religiously aggravated counterpart offence (s. 31(1)(b) of the CDA).[12]

Section 5 of the POA 1986 makes it an offence (a) to use threatening or abusive words or behaviour –including disorderly behaviour–, or (b) to display any writing, sign or other visible representation that is threatening or abusive. In any case, engaging in these activities shall always be done within the hearing or sight of a person likely to be caused

[11] The maximum penalty for the s. 4 of the POA 1986 is, on summary conviction, 6-months' imprisonment and/or an unlimited fine. In the case of the racially or religiously aggravated fear or provocation of violence, the maximum penalty for the s. 31(1)(a) of the CDA is, on conviction on indictment, 2-years' imprisonment and/or an unlimited fine, and on summary conviction, 6-months' imprisonment and/or an unlimited fine. See: s. 4(4) of the POA 1986, s. 31(4) of the CDA, s. 37 of the Criminal Justice Act 1982, and s. 85 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012. For the Magistrates' Court Sentencing Guidelines (MCSG) on s. 4 of the POA 1986 and s. 31(1)(a) of the CDA, see: Sentencing Council 2020c.

[12] The maximum penalty for the s. 4A of the POA 1986 is, on summary conviction, 6-months' imprisonment and/or an unlimited fine. In the case of the racially or religiously aggravated intentional harassment, alarm or distress, the maximum penalty for the s. 31(1)(b) of the CDA is, on conviction on indictment, 2-years' imprisonment and/or an unlimited fine, and on summary conviction, 6-months' imprisonment and/or an unlimited fine. See: s. 4A(5) of the POA 1986, s. 31(4) of the CDA, s. 37 of the Criminal Justice Act 1982, and s. 85 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012. For the MCSG on s. 4A of the POA 1986 and s. 31(1)(b) of the CDA, see: Sentencing Council 2020b.

harassment, alarm or distress thereby. There is also a racially/religiously aggravated counterpart offence (s. 31(1)(c) of the CDA).[13]

As we may notice, there are some interesting variations surrounding the wording of these offences. Firstly, the verb "to distribute" is only employed in s. 4(1)(b), and is referring "to another person" as much as "to display" do. The ss. 4A(1)(b) and 5(1)(b) just mention "to distribute" without noting against who in particular. "To distribute" formula means a form of publication that concerns the recipient of such publication. It has to be two or more people concerned as recipients, and to all of whom would be the publication delivered. In the online context, the Law Commission has indicated that to prove a publication, transmission of stored data (e.g. upload or download a document, image or video) is usually needed. Secondly, the verb "to display" suggests public showing. The Law Commission probably assumes this meaning when noting that a post on Facebook without privacy restrictions to that social media community fits well in it. It would not work any more if what is sent is a private message to another Facebook user (Law Commission 2018, pars. 6.59–6.63 and 7.61). Note also that what is distributed or displayed must be threatening, abusing or insulting, and exclusively threatening or abusing for s. 5 of the POA 1986.[14] Finally, as it is not otherwise stated, the term "writing" includes typing, printing, lithography, photography and other modes of representing or reproducing words in a visible form (s. 5 and Sch. 1 of the Interpretation Act 1978).

Although a minimum understanding of these offences has been outlined, we will later have the opportunity to develop their constituent elements in depth through case law. Before doing so, all that remains is familiarising ourselves with the proximate frameworks of Scottish and Northern Irish law.

3.2. The state of play in Scotland and Northern Ireland

Even if s. 5 of the POA 1936 was applicable throughout Britain,[15] Part I of the POA 1986 was not finally extended to Scotland. This merits clarification. In fact, instead of making

[13] The maximum penalty for the s. 5 of the POA 1986 is, on summary conviction, of £1,000 fine. In the case of the racially or religiously aggravated harassment, alarm or distress, the maximum penalty for the s. 31(1)(c) of the CDA is, on summary conviction, of £2,500 fine. See: s. 5(6) of the POA 1986, s. 31(5) of the CDA, and s. 37 of the Criminal Justice Act 1982. For the MCSG on s. 5 of the POA 1986 and s. 31(1)(c) of the CDA, see: Sentencing Council 2020a.

[14] The s. 57(2) of the Crime and Courts Act 2013, in force by 1st February 2014, removed the word "insulting" from the s. 5 of the POA 1986. However, the Government was contrary to changing the law at the time of discussing to remove that term in the parliamentary debate on the Crime and Courts Bill. In fact, the responses to the consultation conducted by the Government (13th October 2011-13th January 2012) were not conclusive at all. The position of the Crown Prosecution Service (CPS) was a way different, as they explained that "abusing" could in any conceivable case apply to what "insulting" was actually covering. For a detailed explanation covering all that s. 5 of the POA 1986 and the "insulting" term have passed through, as well as the interesting parliamentary debate held regarding the repealing amendment, see: Strickland and Douse 2013.

[15] For analysing the nature, prevalence and legal responses to the criminal activity of popular disturbances in Scotland until the mid-twentieth century, along with judicial statistics since 1805 onwards, see: Kilday 2018, 153-199.

some adjustments, it was thought that the breach of the peace common-law offence was able to fill any gap left.[16]

A conduct that is reasonably likely to cause some effects of public concern can easily amount to a breach of peace without any causation or proof of the offender's state of mind or intention. The prospective result must be regarded as likely to happen once assessed what the offender has done or said (objective recklessness test). Overall, the warhorse was more settled in the actus reus than in the uncontroversial mens rea. Until recently, there has been a progressive, tortuous and carefree deviation causing the breach of peace to reach the private sphere of the individuals and likewise to attract mere unpleasant or distasteful comments.[17] However, two major decisions made it unsustainable to maintain the status quo, as they completely redefined the breach of peace common law offence. *Smith v Donnelly* (2002) set the starting point observing that the conduct must be "genuinely alarming and disturbing, in its own context, to any reasonable person". It was also named the flagrancy of the conduct. The relevant conduct does not end there, as it must also be likely to "threaten serious disturbance to the community".[18] The prospective (that is, likelihood) and public element (that is, affecting the community) must be satisfied to get a conviction under the breach of peace offence (*Paterson v HM Advocate* (2008), par. 9–10).

This all means notably increasing the offence's seriousness standard, as prospective minor effects (e.g., embarrassment, distress, annoyance, irritation or disgust) are unmistakably banished. It also reinforces what was previously assumed about the lacking necessity of actual effects of public concern (alarm or disturbance). Even if the result is actually caused, it must be objectively tested to determine whether or not it still could have been reasonably caused in some particular circumstances. There was no turning back. The breach of peace offence would admit no more one-on-one commission[19], which means transcending the immediate victim's sensitivities online.

The contours of the public element of that offence were finally clarified on *Harris v HM Advocate* (2009) as follows: "It is unnecessary for the purposes of this opinion to seek to give definitive guidance as to what public element would be sufficient. Disturbance or potential disturbance of even a small group of individuals in a private house (...) may suffice. The conduct need not be directly observable by the third parties (...) but, if in private, there must be a realistic risk of it being discovered (...)" (*Harris v HM Advocate* (2009), par. 25.). This assertion makes easier to envision a parallel between the offline and online world.

[16] Note that once the Criminal Justice and Licensing (Scotland) Act 2010 was passed and the *insulting* term has been removed from the s. 5(1) of the POA 1986 by the Crime and Courts Act 2013, in force by 1st February 2014, English law and Scottish law seems to be closer from each other (Channing 2015, 155).

[17] For a highly regarded historical portrayal of the offence at hand, and for noticing its disconcerting malleability, see: Christie 1990.

[18] *Smith v Donnelly* (2002), par. 17-18. Even so, in *Gifford v HM Advocate* (2011) it was noted that conduct that "threatens public safety" will be proof enough at any time that to "threat serious disturbance to the community" cannot be determined. See *Gifford v HM Advocate* (2011), par. 12.

[19] For a thorough study of breach of peace common law offence in Scotland up to September 2016, noting the great significance that *Smith v Donnelly* (2002) had, along with all the prior and ulterior related case law in mind, see: Chalmers and Leverick 2016, 583-606.

In Northern Ireland, the Public Order (NI) Order 1987 maintains the POA 1986 essence but diverges considerably in its catalogue of provisions. It is an analogous legislative body that would respond to local needs, which differed from England, Wales and Scotland's. Minor clashes in an already so-divided society make any small outbreak of violence able to ignite unpredictable tensions. As we can imagine, disorderly behaviours have deserved singular attention in that region. More than in racial terms, preventing disorder or any risk to public safety was reflected in sectarian terms. That said, there are no comparable offences for those in ss. 4, 4A and 5 of the POA 1986.

The Committee on the Administration of Justice (CAJ), an independent human rights organisation based in Belfast, advocated for incorporating s. 5(1) of the POA 1986 to the Public Order (NI) Order 1987 (CAJ 2003, 7). More recently, Judge Desmond Marrinan recommends incorporating provisions equivalent to ss. 4, 4A and 5 of the POA 1986. He warns of a possible lacuna in the legal framework if this is not done and for some particular scenarios. While he claims that there are offences in Northern Ireland already prepared to cover offensive conduct, the limitations of each may open the door to some areas of impunity. On the different existing offences that are shortsighted, Judge Desmond Marrinan notes what follows: "Disorderly behaviour requires the offence to be committed in a public place. Breach of the peace requires harm to be done or apprehended from an assault, affray, riot or unlawful assembly. Harassment requires at least two incidents". All of them are unsatisfactory to some point and reveal the failure of tackling some other lower-level conducts (Marrinan 2020, pars. 9.51–9.90).

The overriding concern seems to be a separate area of law that, incidentally, is also covered by the same Act governing public order. That area of law had been called *incitement to hatred* in Northern Ireland. However, the Part III of the Public Order (NI) Order 1987 gave it a novel touch when renaming it as "stirring up hatred or arousing fear".[20] At least the offences that are foreseen in ss. 10 (publishing or distributing written material which is threatening, abusive or insulting) and 11 (distributing, showing or playing a recording of visual images or sounds which are threatening, abusive or insulting) of the Public Order (NI) Order 1987, the publication, distribution, showing or playing allusions will be only those directed "to the public or a section of the public" (ss. 10(3) and 11(2) of the Public Order (NI) Order 1987). For some, in a critical tone, if the applicability of s. 4A had been extended to the local context of Northern Ireland, there would be no loophole now about targeting an individual rather than a –smaller or larger– group of individuals.[21] It is all about what could have been and was not.[22]

[20] For example, Lord Lester of Herne Hill stressed the distinction between Part I (ss. 4, 4A and 5) and Part III of the POA 1986 that, in turn, is in line with the Part III of the Public Order (NI) Order 1987. He put to the foreground that the s. 4A has nothing to do with incitement to racial hatred. It is, thus, untied from what he considers a clearly distinguishable field of law. See: HL Debate, Vol. 555, Col. 1873 (June 16, 1994).

[21] An example will help to understand this better: "[I]f an organisation leaflets an area with racist material the offence would be committed, though not if it bombards one individual with this material. This 'loophole' could certainly be exploited by a cunning racist organisation and might be a particularly effective strategy where persons of colour find themselves physically isolated in Northern Ireland" (White 1998, 78).

[22] Robbie McVeigh goes further and suggests that the Part III designation of the Public Order (NI) Order 1987 shifted the language connotation in line with the priority treatment given to the group by the same legislation. The preceding "incitement to hatred" rests on a nexus between individuals, and points to encouraging something that may even be non-existent at that time. This is not what seems to suggest

3.3. A well-settled area of law for coping with online hate? More doubts than certainties

This set of offences' (ss. 4, 4A and 5 of the POA 1986) main aim was to address any behaviour or expressive activities, either oral or written, carried out in a context of physical proximity to the victim.[23] At that time, face-to-face communications in public spaces were meant to be so effectual that it was clear that they deserved a more tailored legal response. Surprisingly though it might be that just the s. 5 of the POA says so, the proscribed words or behaviour must be "within the hearing or sight of a person" (s. 5(1) of the POA 1986). Whether it is or not an indicator of the required physical nearness is an enigma (Rowbottom 2012, 361–362). More convincingly, Kim Barker and Olga Jurasz assure that observing judicial consideration over the ss. 4, 4A and 5 of the POA 1986 makes no doubt about the necessity of physical presence (Barker and Jurasz 2019, 48–55). In particular, s. 4(1)(a) of the POA 1986 holds that a person has to "use towards another" threatening, abusive or insulting words or behaviour. In *Atkin v DPP* (1989), it was alleged and confirmed that it should be read as meaning words or behaviour directly addressing another, who must be present, and either within earshot or aimed at as being putatively in earshot. Once treated as a matter of immediacy, the victim must have heard the threat at that precise moment.[24] There are no grounds for intermediaries (e.g. a retweet by another user) or time passing (e.g. sending a voice message via WhatsApp but listening time after). In regards to s. 4A(1)(a) of the POA 1986, it states that a person has to "use" threatening, abusive or insulting words or behaviour,[25] or disorderly behaviour. Again, looking over case law, words must have been articulated within the hearing of someone. With all this in mind, Kim Barker and Olga Jurasz take a very pessimistic view: ss. 4, 4A, and 5 of the POA 1986 are almost entirely useless on social media since the physical presence is an inescapable fact (Barker and Jurasz 2019, 48–55). The foundational base of public order offences runs the risk of becoming blurred if we extend their applicability to digital speech and, therefore, to any impersonal way of acting.

"stirring up hatred or arousing fear"; quite the contrary, it is probably referring to something that is already on the move or just lying dormant, but anyhow exceeding that one-to-one nexus (McVeigh 2018, 18-20).

[23] Even though these offences may involve an attack against a single person, note that they were not intended to protect the individual. A threat of public disorder is required to provide a solid justification for invoking criminal law. This makes a world of difference between the POA 1986 and some other parliament-made laws commonly enforced to tackle online hate (e.g. Malicious Communications Act 1988 or Protection from Harassment Act 1997). See: *Dehal v CPS* (2005), pars. 5, 7 and 12; Rowbottom 2017, 42.

[24] Actually, s. 4(1) of the POA calls for "immediate unlawful violence", whether in the sense of intending someone to believe it would be used, intending to provoke it to appear, or making someone likely believe that will be used or provoked it to appear. Despite all, it is well noticing that the Queen's Bench Division of the High Court of Justice in *R. v Horseferry Road Metropolitan Stipendiary, ex parte Siadatan* (1991), advised a very different position about immediacy. On behalf of the Court's provisional view, Watkins LJ stated as follows: "[T]he word 'immediate' does not mean 'instantaneous'; that a relatively short time interval may elapse between the act which is threatening, abusive or insulting and the unlawful violence. 'Immediate' connotes proximity in time and proximity in causation; that it is likely that violence will result within a relatively short period of time and without any other intervening occurrence". See: *R. v Horseferry Road Metropolitan Stipendiary, ex parte Siadatan* (1991), at p. 269.

[25] Even both words and behaviour, if taken cumulatively to reach a symbolism that would not be possible to catch otherwise. For example, we may refer to goose-stepping, giving a Nazi salute, and shouting *Seig Heil* (Smith 1987, par. 6.04).

However, the state of affairs is far more entangled than the above. First, it is clear that if the words or behaviour must be "used towards another" in s. 4(1)(a) of the POA 1986, then it closes the door to the non-physical presence of the receiver. Instead, in such cases, we should turn to consider the ss. 4A and 5 of the POA 1986, in which the presence of the receiver is not revealed by law nor decisive (Card 2000, pars. 4.8 and 4.26). Secondly, some resistance from the judges is still shown to uphold the adequacy of this set of offences (ss. 4, 4A and 5 of the POA 1986) on facts encompassing activities of an impersonal kind (e.g. online verbal abuse).[26] There is some space for discussion. For example, breaking this new ground, Jacob Rowbottom observes a one-off similarity between what he calls "social media speech" and "speech in public order cases". Both are open to virtually anyone who wants to contribute to those forums (e.g. a drunk who has just left a bar and utters racist expressions to foreigners and who, in the same drunkenness condition, publishes such phrases in his Facebook account). Whether occurring on social media or the street and despite the greater reaching effect of the former, the speech can be described as "cheap speech" (Rowbottom 2017, 41–42).

If we delve deeper along these lines, ss. 4, 4A and 5 did not just create an offence when there are words or behaviour being used (ss. 4(1)(a), 4A(1)(a) and 5(1)(a) of the POA 1986), but also for the case that it is distributed or displayed any written, sign or other visible representation which is threatening, abusive or insulting (ss. 4(1)(b), 4A(1)(b) and 5(1)(b) of the POA 1986). In principle, we can safely say that this represents a better position for public order legal provisions to capture expressive activities online. Even so, s. 5 will probably continue to cause problems,[27] considering that is the only one saying that any writing, sign or other visible representation displayed (s. 5(1)(b) of the POA 1986) must occur "within the hearing or sight of a person", not just words or behaviour (s. 5(1)(a) of the POA 1986). This problem was highlighted in *S v CPS* (2008), observing the remarkable differences in wording between the s. 4A and s. 5 of the POA 1986. As the Act was amended in 1994 and s. 4A inserted,[28] it suggests that such missing point in s. 4A had to do with the concern about the emerging practice of posting offensive materials on websites. Consequently, if the "sight and sound" condition that also entails physical presence fades, the immediacy feature would do so. If someone posts something on the Internet, he is taking the chance that the intended causation might

[26] For instance, Kim Barker and Olga Jurasz are of the view that there have been "subtle judicial considerations", "some emerging flexibility", and "judicial nudges towards expansions of the behaviours covered by the s.4, s. 4A, and s. 5 offences" (Barker and Jurasz 2019, 55). In the same vein, Chara Bakalis noted that there had been pressures under judges in some cases so that fitting public order offences into facts dealing with cyberspace. Moreover, it has been done at all costs, even if it goes against previous case law concerning physical presence prerequisite (Bakalis 2018).

[27] Note that this is not the case for Richard Card, who sees no problem with s. 5(1)(b), but does see it with s. 4(1)(b). For him, as it is mentioned to distribute or display "to another person" (s. 4(1)(b) of the POA), the law is then referring to a material that must be distributed or displayed directly to another and with that person in place. In fact, there is no "to another person" clause in ss. 4A(1)(b) and 5(1)(b). Also, that person of s. 4(1)(b) will be the one that the *mens rea* of the offence must be concerned with, as opposed to s. 4(1)(a) that refers to "using towards another" and so has not to be necessarily the addressee (e.g. someone else to whom the speech is not directly was likely to be provoked to immediate violence) (Card 2000, pars. 4.8, 4.14, 4.23 and 4.43).

[28] The s. 4A joined the POA 1986 through the s. 154 of the Criminal Justice and Public Order Act 1994, having been in force since 3rd February 1995.

happen later, which would likewise be covered by the s. 4A (*S v CPS* (2008), pars. 12–13 and 15).

While this case made one think that s. 5 was doomed to failure regarding its hypothetical applicability to new technologies, it is not entirely correct to feel this way. In *Taylor v DPP* (2006), following what Mr. Justice Collins previously upheld in *Holloway v DPP* (2004), some inflexibilities accompanying the s. 5 of the POA 1986 were removed. In brief, these cases reflect that "within the hearing or sight of a person" expression does not require that someone has effectively heard the words or seen the behaviour. There must be no more than someone, whether completely identified or not, able to hear or see what the offender was saying or doing at the time of committing the offence. This is not about what would have happened if someone had come to see the evolution of the facts; it is about looking for evidence to show that words or behaviour has been really audible or visible for someone (*Taylor v DPP* (2006), par. 9; *Holloway v DPP* (2004), pars. 27–38; see also: Card 2000, pars. 4.48–4.51). Despite those cases were not specifically addressing online activities, it is clear anyway that such interpretation would open the doors quite a lot for the implementation of the s. 5 of the POA to cyberspace.

In conclusion, desperate times call for desperate measures. Whether the contested expression resulted in being included (s. 5) or not (ss. 4 and 4A) in the POA 1986, some steps have been taken to push for the Act's adaptive nature to the cyber age. In addition, it is crucial to clarify that there is no requirement for communications to take place in public, even if the net is conceivable in such a sense.[29] The POA 1986 does mention that the proscribed words or behaviour might be committed in private places as well,[30] as long as they do not depart from a person inside a dwelling to any other person inside that or another dwelling (ss. 4(2), 4A(2) and 5(2) of the POA 1986).[31] In late 2018, the Law Commission noted that this exemption could well amount to constrain the application of these offences to online behaviour arbitrarily (Law Commission 2018, pars. 7.37 and 7.62).

Before moving to the relevant case law, we must note that it is in s. 4A of the POA 1986 where the offence ever applied to expressive activities online remains. Even so, the

[29] In *S v CPS* (2008), an excerpt showing the District Judge's opinion was included and upheld. For him, posting material on the Internet equates to put it in public domain. See: *S v CPS* (2008), par. 4.

[30] If s. 5 of the POA 1936 was the common ancestor of ss. 4 and 4A of the POA 1986, we may conclude that a gap in the law must have been noticed when the current legislation was passed. The s. 5 of the POA 1936 was only capable of catching the use of threatening, abusive or insulting words or behaviour by someone *"in any public place or at any public meeting"*, so it could have been a matter of necessity for the POA 1986 to finally cover some incidents occurring on private properties but having an effect outside. Mr. Blake, the counsel for the appellant in *Le Vine v DPP* (2010), points to this logic and reflects a contemporaneous reality by means of an example: "[T]hreats made by miners during the miners' strike when they were on private land owned by the National Coal Board, but some of the victims were on the public high way". See: *Le Vine v DPP* (2010), par. 5.

[31] According to the interpretation given by the POA 1986, "dwelling" means "any structure or part of a structure occupied as a person's home or as other living accommodation (whether the occupation is separate or shared with others) but does not include any part not so occupied, and for this purpose (…) includes a tent, caravan, vehicle, vessel or other temporary or movable structure" (s. 8 of the POA 1986). The reason behind the dwelling defence was as simple as to avoid enforcing the law into domestic disputes; in other words, for not extending the law to peoples' homes (private dwelling houses). See: Home Office 1985, par. 3(8), *Le Vine v DPP* (2010), par. 5.

remaining public order offences shall also be considered, if only for the potential of reaching the online arena.

3.4. Relevant case law concerning issues surrounding public order offences and their suitability to the cybernetic environment

Unlike offences under ss. 4 and 5 of the POA 1986, s. 4A is an excellent example of a result crime (Law Commission 2018, par. 8.113). Maybe that is why there are striking resemblances between the offence under s. 4A of the POA 1986 and the harassment/stalking offences under the Protection from Harassment Act 1997 (ss. 2–2A and 4–4A of the PHA),[32] to such a degree that the former adds nothing more than duplicity and uncertainty. For some, the solution is just to repeal s. 4A,[33] and its closely related s. 5 of the POA 1986. Actually, the s. 5 operates as a less serious offence comparing to the one sanctioned in s. 4A of the POA 1986. Thus, many of the concerns they raise are shared.

For example, one-off incidents (e.g. losing your temper when typing on computer) are perfectly prosecutable under these offences. Moreover, if a single act would be enough, another problem is riskily added here: "distress" is a slippery slope towards an infinite number of expressive acts[34] whose punishment will often be counterproductive. As an example, Geoffrey Robertson warned of certain forms of expression that are commonly used to seek a distressful outcome to those causing, or who are perceived to be causing –or, plainly, those who are indifferent to– injustice, poverty or oppression (Robertson 1993, 90–91). This would be the case of rap songs as a vehicle for the particularly intense claims. However, for some words to be clearly "insulting" there must be well distinguished from critical, annoying or irritating words. And, for that to be so, common sense and contemporary standards ought to play a decisive role (Williams 1963, 426)[35].

Apart from causing (s. 4A of the POA 1986) or likely causing (s. 5 of the POA 1986) harassment, alarm or distress, both the s. 4A and 5 of the POA 1986 have the very same elements for the actus reus, except that the word "insulting" was removed from s. 5 of the POA 1986 not so long ago. Certainly, the differences between ss. 4A and 5 of the POA 1986 are more notable as far as the mens rea is concerned.

In s. 5 of the POA 1986, the criminal liability barrier moves away from the one proposed by the s. 4A of the POA. The main cause for that to happen has to do with the mental element of each offence: the "intention" to cause and "actually causing" a person

[32] For a detailed explanation of these offences, see: Gordon Benito 2023a.

[33] Not for nothing, the PHA offences were said to be passed for solving the already failed s. 4A of the POA 1986 (Geach and Haralambous 2009, 256).

[34] Among the different terms (harassment, alarm or distress) that the law requires to be caused (s. 4A of the POA 1986) or likely to be caused (s. 5 of the POA 1986), distress is the most subjective one. Thus, it sets an uncertain conviction standard (Card 2000. Par. 4.30).

[35] The "threatening, abusive or insulting" nature of words, behaviour, or acts of displaying any writing, sign or other visible representation, or disorderly behaviour, form part of the actus reus of the offence and represent a matter of fact for the tribunal. These concepts have been part and parcel of these offences since they were also included in the s. 5 of the POA 1936. In fact, when has been discussed the meaning that these terms should have had in that old section, it was established that they better maintain their ordinary sense. They are easily recognisable without the need of making any non-desirable effort of trying to define them, and they ought to be judged weighing their impact on reasonable members of the public, even if there is some truth on the abusive or insulting language employed.

harassment, alarm or distress are two additional elements that s. 4A has incorporated since it came into being in 1995. It differs from the intention (a person who "intend to be" threatening or abusive) plus, alternatively, subjective awareness (a person who is "aware that his or her way of behaving might be" threatening or abusive) formula settled for the s. 5 (s. 6(4) of the POA 1986).[36] Similarly, harassment, alarm or distress have not to be simply "likely to be caused" in s. 4A of the POA 1986, but actually caused. Moreover, in s. 4A of the POA 1986, the causal link between the activity of the offender and the effect upon the victim can be deduced from the offender's intention. In turn, the intention might be inferred from the circumstances surrounding the case, or sometimes even from the very words used (Thornton 2010, 46–47). Moreover, relying on the CPS legal guidance, the intention may also be inferred from the mere fact of targeting a vulnerable victim (CPS 2022). Apparently, though, the intention is subordinated to causality when there are discrepancies on who is the real victim of the offence. That is, let us imagine that a Twitter user tries to cause great emotional distress to a co-worker who is mixed-race. Also suppose that to whom really ends up causing such emotional distress is to the dark-skinned mother of him that, by chance, was surfing the Internet at that time. According to the Court of Appeal (Criminal Division) that was resolving a similar issue raised in *R v Valentine* (2017), the victim in respect of the s. 4A of the POA 1986 would be the one to which the intended effect was actually caused.[37] Now, if we focus on cases involving offences under the s. 4A of the POA 1986 committed online, the *S v DPP* (2008) and *R v Stacey* (2012) have aroused so much interest that is impossible for us to ignore.

In *S v DPP* (2008), the High Court judges dealt with a case in which S, the appellant, was convicted of causing intentional harassment, alarm or distress by displaying a photograph of the victim on a website. He was also charged with a racially aggravated offence under the s. 31(1)(b) of the CDA that was unsuccessful in terms of conviction. During a demonstration held in Leeds, S took a photograph of Nigel Savery, an in-service security guard in Covance Laboratory, part of an animal testing company. If that happened on 12th October 2005, S retouched the photo[38] one day later and then uploaded it to a campaign webpage against the company the victim worked for. He also introduced a text implicating Mr Savery in false convictions for violence and violent reactions against demonstrators. The photo would not even take two days since it was brought to finally catch the attention and interest of the North Yorkshire Police. Even if Mr Savery did not see the photograph, he became aware of it shortly after the incident by one of his colleagues. It was not until 8th March 2006 that the police showed up to him. At this moment, harassment, alarm or distress was caused to Mr Savery due to becoming aware of the time elapsed with such a photograph openly displayed on the

[36] In detail, on the complexities surrounding the mental element of s. 5 of the POA 1986 since the very beginning, see: Smith 1987, par. 7.09.

[37] Moreover, if the victim of the s. 4A of the POA 1986 is the person to whom the harassment, alarm or distress is caused, in the racially aggravated intentional harassment, alarm or distress contrary to the s. 31(1)(b) of the CDA would still be so (see *R. v Valentine* (2017)).

[38] It was proved that the appellant "(…) used this image to construct a further image on his computer showing the photograph with a 'speech bubble' from the complainant's mouth added, with the words 'C'mon I'd love to eat you! We're the Covance Cannibals'" (see: *S v CPS* (2008), par. 3).

net. Regarding the intentional element,[39] Maurice Kay LJ dealt with it quickly by saying that it was inferable from the evidence on the newly-made photomontage, the text accompanying it and the posting altogether on the campaign's website (*S v CPS* (2008), par. 8). Regarding causation, Maurice Kay LJ stated that with an intended posting of such an image on the referred website, S took the chance for the harassment, alarm, or distress to be caused to Mr Savery. Submitting for debate when was first shown the image to the victim and who finally did it has no interest here. Then, Mr Justice Walker noted that, as there is no need for an act to occur within the hearing or sight of the person in s. 4A of the POA, passing the time until causing harassment alarm or distress would not pose any problem. He went even further when stating that if a victim is merely informed, like the way Mr Savery was, not showing him the image, there would still be a legal basis for a conviction under the s. 4A if the intention and causation elements remain intact (*S v CPS* (2008), pars. 13 and 15).

In *R v Stacey* (2012), as it is an unreported case, we will turn attention to the details available in the note of the appeal judgement[40] instead. On 17th March 2012, Liam Stacey, a 21-year-old university student, was watching the Bolton Wanderers-Tottenham Hotspur football match on TV. A terrible fortuitous event was about to happen and shake the football community and society as a whole profoundly. During that FA Cup match, Fabrice Muamba, Bolton's Congolese midfielder, lost consciousness and suffered a cardiac arrest. About one hour and a half later, Mr. Stacey tweeted what follows: "LOL. Fuck Muamba. He's dead!!! #haha". Many Twitter users criticised him for his attitude, but he continued to use highly offensive and racist messages[41] in response. Just two days after these events, Mr Stacey admitted before a Magistrates' court the use of racially aggravated threatening, abusive or insulting words with intent to cause harassment, alarm or distress (s. 31(1)(b) of the CDA). He was finally sentenced to 56 days' imprisonment and appealed for such a conviction. Interestingly, according to the magistrates that would dismiss the appeal, even if we accept that the tweets expressing racial content were not aimed directly at the footballer, we cannot detach them from the context in which they have their *raison d'être*.

The fear or provocation of violence (s. 4 of the POA 1986) is the remaining offence to attend. As we have noted earlier, s. 4 of the POA 1986 calls for *immediate unlawful violence*, whether in the sense of intending someone to believe it would be used[42] or to provoke it to appear[43] (specific intents), or making someone likely believe that will be used or

[39] It appears to be a *purposive* intention, as it is specifically directed to cause harassment, alarm or distress. It has nothing to do with the likely risk that the offender perceives for such causation to occur (Newman 2008, 484).

[40] Available at: https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Judgments/appeal-judgment-r-v-stacey.pdf

[41] The subsequent racist messages read as follows: "I am not your friend, you wog cunt, go pick some cotton", "You are a silly cunt your mother's a wog and your dad is a rapist, bonjour you scruff northern cunt" and "Go suck a nigger dick you fucking aids-ridden cunt".

[42] The Law Commission suggested an example to grasp how this could happen if committed online: "Brian is among the crowd at a festival. He spots Anna in the crowd and sends her a text saying he can see her, and is going to attack her" (Law Commission 2018, par. 7.48).

[43] The Law Commission suggested an example to grasp how this could happen if committed online: "Anna and Craig are part of a WhatsApp group. Anna sends Craig a message suggesting they attack Brian. Brian is with Craig at the time and sees the message appear on Craig's phone" (Law Commission 2018, par. 7.48).

provoked it to appear[44] (objective awareness).[45] However, even if there is no need for a specific intention, as awareness should suffice, this is not enough to get an offence under s 4 of the POA 1986. There is one more intention (general intent) or awareness (general awareness) that must be added to one of those mentioned earlier (specific intent or objective awareness). In fact, following the s. 6(3) of the POA 1986, it is required that the offender intends his words or behaviour, or the writing, sign or other visible representation, to be threatening, abusive or insulting (general intent), or to be aware that it may be threatening, abusive or insulting (general awareness).[46]

Hence, these configuring elements play a bridging role between the mens rea (intention and awareness) and the actus reus (threatening, abusing or insulting words or behaviour) of the offence. As a result, it is perfectly possible not to encounter any intentional element on an offence under the s. 4 of the POA 1986 (specific objective awareness plus general objective awareness) or, at the other end, to encounter more than one (specific intent plus general intent). Hence, in terms of causation, it is not really about proving actual violence; the anticipatory fear of it will be enough (Thornton 2010, 33–35; Law Commission 2018, pars. 7.48–7.49).

4. Conclusions

In broad terms, ss. 4 and 4A of the POA 1986 encompass a different type of speech than that covered by s. 5 of the POA 1986. Suppose the former involves a speech directly spoken to an individually identifiable victim. In that case, the latter concerns vague speech not necessarily directed to an audience in particular (e.g. offensive posters likely to cause distress to any people walking around) (Neller 2023, 11–13). However, we shall not ignore the supersaturation of offences to deal with online hate in the UK (Gordon Benito 2023b, 5–8). There has long been an overlapping concern in this field. For instance, among many others, we have already pointed out the striking resemblances between harassment/stalking offences under the Protection from Harassment Act 1997 (ss. 2–2A and 4–4A of the PHA) and the public order offences of the POA 1986.

In addition, as we have seen, the debate over public order offences has mainly focused on whether or not the requirement of immediacy allows the offences to operate online. Indeed, it seems complicated to reach a consensus on this issue. In any case, for making a speech/behaviour criminal (e.g. racist insults under s. 31 of the CDA), existing offences (ss. 4, 4A and 5 of the POA 1986) appear to be justified by likely causing or actually causing –mainly with the intentional element involved– *psychological harms* to others (e.g. harassment, alarm, or distress). One might think this is insufficient due to the

[44] The Law Commission suggested an example to grasp how this could happen if committed online: "Anna knows that Brian has recently been tried for a child sex offence and was found not guilty, she believes on a 'technicality'. She posts a message on the Facebook page of a known violent 'paedophile hunter' group, telling the group about Brian and suggesting that he deserves to be 'sorted out'" (Law Commission 2018, par. 7.48).

[45] To make someone "likely believe" means to make someone believe it is probable to happen and not just possible. However, what is likely believable or not must be assessed objectively, considering the impact of the words or behaviour on an ordinary or reasonable person's view. Additionally, such an ordinary person would take the circumstances surrounding the case as they are, which includes taking into consideration the reactions of to whom was directed the words or behaviour (Card 2000, par. 4.16).

[46] The proof for this additional intention or awareness will be commonly inferred from the nature of the exact threatening, insulting or abusive words or behaviour in the case at hand (Card 2000, par. 4.11).

unacceptable pressure these offences place on the right to freedom of expression. However, good reasons have also been put forward to support the convenience of criminalising racist insults through public order law, regardless of the above-referred consequential harm. In fact, we may point to hateful insults' aptitude to be criminalised exclusively in a given context in which the vulnerable groups to whom the speech/behaviour is directed may find them physically threatening or, at least, "threatening to a secure sense of their memberships of the polity" (Duff 2007, 134). Thus, at the very least, hateful speech/behaviour might be punishable insofar as it equates to "blatant and derogatory denial of their victims' status as members of the polity" (Duff 2007, 134). It seeks to undermine the bases of harmonious coexistence in a democratic society. However, is the same true for hateful speech/behaviour *online*? A racist tweet does not only concern the individual the message addresses. Other Internet users may also read and suffer remotely racist insults, whether they are drafted in vague or more personal terms. A racist tweet may disturb, create insecurity and retract a particular group of individuals to the point that they do not exercise their civil liberties (e.g. going out for a walk late at night).

It would be quite another question to ask ourselves whether a tweet can be risky to public order offline. Online criminality can reinforce offline criminality, or vice versa. That said, it is simply not possible to plainly assert that online hate and offline violent action maintain a causal link. At least, the evidence from the studies conducted until now reflects that some correspondence exists between both realities, which does not seem to be casual. Indeed, it is interesting to mention that the online-offline relationship is more intense the closer we get to real humanitarian catastrophes (e.g. pre-war or pre-genocide atmosphere) or scenarios putting a very extreme social or emotional strain on citizens (e.g. terrorist attacks). The further we move away from those scenarios, the more unstable the correlation becomes. However, in the specific case of terrorist attacks, it has been argued that the role that the new technologies play is not only important but also decisive for the change in attitude towards certain minorities (Hanes and Machin 2014). Hate messages online provoke others to act. Thus, it is evident that the new technologies operate as *early warning systems* for offline behaviour (Williams and Burnap 2016). Finally, hate online can be simply the consequence of certain offline trigger events, such as a terrorist attack. The terrorist attack will be followed by an aggravation of inter-group tensions online. This, in turn, can give free rein to similar acts to continue to take place offline (Wiedlitzka *et al.* 2023). The online-offline worlds complement and reinforce each other in a kind of *spiral of hate*. The boundaries between the two worlds are becoming increasingly blurred. The latter cannot and should not be overlooked by criminal law.

Briefly, the legitimacy and online implementation of the offences included in ss. 4, 4A and 5 of the POA 1986 can be defended. However, as we have seen throughout the study, it is still possible to argue the opposite. Away from quick answers to complex questions, looking at the problem from all angles possible is more necessary than ever in the digital public agora. The field for discussion is wide open, up-to-date and lively.

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