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A question of faith?

Prosecuting religiously aggravated offences in England and Wales

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Abstract

Have some of the prosecutions for religiously aggravated offences going before the courts amounted to attempts to apply unjust prohibitions against freedom of speech? Is there any evidence that the provisions for religiously aggravated offences have been applied to suppress criticism of religion? This paper applies an analysis of Crown Prosecution Service records on religiously aggravated offences to address these questions.

Keywords: Religiously aggravated offences; Prosecutions, Freedom of expression; Crown Prosecution Service

Legislation: Anti-terrorism Crime and Security Act 2001 s.39

Introduction: controversies in the prosecution of religiously aggravated offences

The Anti-terrorism Crime and Security Act 2001 established provisions for religiously aggravated offences in response to a backlash of incidents against Muslims in Britain following the 9/11 terror attacks in the United States.[1,2] New measures were needed to close a

loophole in the law left by the provisions for racially aggravated offences established by the Crime and Disorder Act 1998.[3] Crimes against Muslims in which they are targeted as Muslims, as was the case with many incidents seemingly triggered by the 9/11 terror attacks, could not be prosecuted as racially aggravated offences. Muslims are regarded under UK jurisprudence as a poly-ethnic religious community and not a racial group.[4] Concerns had been raised by some Muslim groups about the apparent inequity under the law. It was rectified by section 39 of the Anti-terrorism, Crime and Security Act 2001 which amended the Crime and Disorder Act 1998 to revise the existing racially aggravated offences into 'racially and religiously aggravated' offences.

The new provisions aimed to provide protections against attacks on religious identity, not only for Muslims, but for believers of all religions, and also non-believers. Attacks on faith or religious belief per se, or lack of religious belief, were to be managed by provisions against incitement to religious hatred in the Racial and Religious Hatred Act 2006. Some attempts have been made in the limited scholarly legal literature on religiously aggravated offences and religious hatred at identifying such a distinction between attacks on religious identity and attacks on religion or religious beliefs. Oliva labelled religiously aggravated offences as "an important device in the hands of Parliament to combat attacks on believers"[5] and distinguished the provisions from measures which might offer a "safeguard of beliefs" or of "religious feelings".[6] However, others have suggested that drawing a distinction between attacks on identity and religion may be a challenge for the implementation of law. Barendt, for instance, in discussing religious hatred law contests the notion that "a coherent line can be drawn between an attack on religious beliefs or observance on the one hand, and attacks on members of the communities who share these beliefs on the other".[7] McGuire and Salter, also addressing religious hatred law, suggest that "the UK's legal distinction between attacks upon

a religious belief as such and the abuse of subscribers", while "supportable at the level of principle ... is surely often difficult to sustain in practice … because it is difficult to isolate a religious group from its religious beliefs."[8,9]

How the challenge in distinguishing between attacks against religious identity and attacks on religious beliefs has been managed in prosecutions for religiously aggravated offences provides the focus of this paper. The challenge is significant, because while the new provisions were passed with little controversy raised in Parliamentary debate, a major and persistent concern raised in media commentary,[10] from the very first prosecution for a religiously aggravated offence, has been that the provisions have been used to stifle free speech—and criticism of religion in particular. Given the strength and persistence of this claim, triggered by a number of critical cases that we discuss in this paper prosecuted over the span of a decade, and given that there have been no published systematic analyses of prosecutions for religiously aggravated offences,[11] we seek to address in this paper the question of whether legitimate criticism of religion has indeed been targeted in prosecutions for religiously aggravated offences. To address this question we present an analysis of a complete year's sample of prosecutions for religiously aggravated offences in England and Wales from the financial year 2012-13, enabled by unique access we attained to the Crown Prosecution Service Case Management System. We focus on the conduct and discourse of offenders to determine whether prosecutions have indeed stepped beyond the boundaries of the law by attacking lawful criticism of religion.

Critical cases: identifying the principles guiding prosecutions for religiously aggravated offences

To set the context for the analysis it is instructive to briefly review two prosecutions for religiously aggravated offences—with almost a decade between them—that triggered critical commentary in the news media of the CPS regarding free speech concerns and the decisions to prosecute. In what the press dubbed as the first prosecution under the 2001 provisions, a man who had an argument in the street with a neighbour about the 9/11 terror attacks, pleaded guilty and was convicted in October 2002. [12] He was arrested following an argument with his "Arab-born neighbour" who was alleged to have shouted that "bin Laden was great, September 11 was a great day, all Americans deserved to die". The neighbour also allegedly called the defendant "a 'Zionist pigf****r'", which he denied. For his part the defendant claimed that he was upset by the 9/11 attacks as he had a friend whose father was killed in the destruction of the World Trade Center. He said in court that "I deny being a racist although I would say I am a faithist…I was talking about the Islamic religion and it was clear we did not see eye to eye on anything. I wanted to know how a religion could promote hatred". His defence was that the case was about nothing more than the strong expression of opinion:

> This defendant is not a senseless thug who has jumped on a bandwagon to have a go at a minority. He is not some unthinking skinhead who is not interested in discussion, he is an intelligent, hardworking, well-qualified professional man who has never been in a court before in his life. His crime is to have strong convictions and to have taken people to task in an inappropriate way at a sensitive time.

In hyperbolic tone, one press commentator described the prosecution as "a serious attack on the freedom of thought and speech, one-sided and menacing".[13] Extending beyond this

specific case to attack the principle of the new provisions for religiously aggravated offences more broadly this particular commentator propounded that:

> This is a new crime invented in the mad, hysterical weeks after the Twin Towers outrage, which (the victim) thinks was such a great event. During this period most politicians simply took leave of their senses, which is presumably why the enemies of free speech in the Home Office chose this opportunity to slip it past them.

The Crown Prosecution Service came in for particular attack:

> As for the CPS, this incident proves that it's not just dim and useless but nasty as well…Our authorities are far more effective at policing ideas than at suppressing crime. Perhaps the CPS should in future have a new name. How about the Thought Police?

Despite his defence of rights to freedom of thought and expression, the defendant showed contrition. He admitted that matters went beyond a robust exchange of views as his behaviour could have been intimidating. Accordingly, by the victim's account, the defendant

…put his face against mine. He said my teeth were yellow. He said America has spent $ 400 million on security because of terrorism. He wanted to know what Islam had contributed to the world.

The defendant's alleged behaviour was also threatening, as the victim stated:

> He said he would do things to my daughter and when I told him I did not have a daughter he said he would do things to my mother. He said he hated Arabs and he hated Muslims. I felt insignificant and I felt threatened.

In short, while the defendant's verbal attack on religious identity—stating that he hated Muslims—provided the religious aggravation, it was his intimidatory and threatening behaviour that provided the underlying public order offence. It was his threatening conduct, and threatening words, that triggered prosecution.

In the second case that it is instructive to briefly review here to set the context for our analysis of prosecutions for religiously aggravated offences, in 2009, two Merseyside hoteliers were acquitted on the charge of religiously aggravated use of threatening, abusive or insulting language. They had been accused of making hostile comments to a guest in their hotel who had recently converted to Islam, about her religion, the Islamic Prophet Mohammed and her religious clothing. Headlines from national newspapers at the time of the case's dismissal leave little doubt about how many commentators saw the case: "Victory for Free Speech";[14] "Our Christian Faith is being targeted";[15] "We are being gagged".[16]

However, despite the emphasis on questions of free speech and the right to criticise religion in news reports, in comment articles and in statements issued by interest groups such as the Christian Institute, it is important to note that the District Judge's decision to acquit was not based on an assessment of whether the words they uttered were acceptable expressions of legitimate criticism of religion. Instead, the ruling was made on the weakness of the evidence against the defendants. It was ruled that the evidence against them had been inconsistent, that

the alleged victim's claim that she was verbally attacked for up to an hour had simply not been supported by other witnesses, and that the allegations had ultimately not been proven.[17]

In short, it is important to recognise that the failure of the prosecution in this case was not due to a verdict on the acceptability of the alleged behaviour, but rather on the basis that the evidence suggested the alleged behaviour did not occur as described by the complainant. In this context, it is instructive to consider some of the allegations that had been made in order to identify the features that were considered by the CPS to have taken the alleged actions beyond the bounds of legitimate criticism of religion. According to the complainant, one of the defendants had become enraged when the complainant wore a hijab and an ankle-length gown on her last day at the hotel and the defendant allegedly began shouting at her in the lobby. She alleged that he followed her into the breakfast room waving his arms and, continuing his tirade, asked her if she was a murderer and a terrorist, called Mohammed a murderer and a warlord and likened him to Saddam Hussein and Hitler. According to the complainant, the other defendant also insulted her, calling her hijab a form of bondage. In total, she claimed that she had been verbally attacked for up to an hour. One witness claimed in court that one of the defendants had been "shaking his fists, whirling like a dervish and going bright red in the face. He was really irate". For their part, the defendants admitted that one of them had referred to the hijab as a form of bondage, but they said this had been said as part of a debate on religion. They asserted that there was no tirade and no abuse.[18]

On the basis of the description of events presented by the complainant then, the circumstances of the case appeared to be about far more than the simple expression of negative sentiment towards the Islamic religion. The allegations—despite being concluded to

be without sufficient evidence—were indicative of threatening hostility rather than about the free expression of views about religion.

These two cases appear to exemplify principles[19] guiding the prosecution for religiously aggravated offences:

- First, the defendant's alleged conduct provided the basis for the charge for the primary offence — in both of these cases, public order offences.
- Second the substance of the words allegedly uttered, in the commission of the primary offence, provided the basis for the religiously aggravated version of the charge.

Nevertheless, possibly buoyed by the acquittal in the second case, one commentator recently argued that:

> A law to stop disorder on the streets has become a means of controlling opinions that are considered unacceptable, without any obvious reason why they should be apart from the fact that someone else might not like them".[20]

Another argued that "The law should be used, not as a weapon to suppress unpopular opinions, but rather as the protector of free speech.[21]

Given the strident nature of such claims, along with the criticism of the Crown Prosecution Service cited earlier, it is pertinent to ask whether the CPS has consistently abided by the principles guiding prosecution for religiously aggravated offences exemplified by the two cases. Have some of the prosecutions going before the courts amounted to attempts to apply unjust prohibitions against freedom of speech? Is there any evidence that the provisions for religiously aggravated offences have been applied to suppress criticism of religion? Before

unpacking our analysis which addresses these questions, given the uniqueness of the data we use it is instructive to briefly discuss the data and the research design more broadly.

Research Design and Sample

Crown Prosecution Service case records

The research involved an analysis of Crown Prosecution Service (CPS) case records for all prosecuted cases flagged as 'religiously aggravated' in the 2012-13 financial year and tried in the Crown Courts.[22,23] We focused on the Crown Courts as we postulated that it is reasonable to assume that persons who are prosecuted for a religiously aggravated offence but who believe that they are being wrongly persecuted in that their rights to legitimate expression of religious views are being denied, would be more likely to elect Crown Court trial or have been sent for Crown Court trial by the magistrates.

Numbers of religiously aggravated prosecutions 2012-13

In 2012-13, according to records produced for the research by the CPS Management Information Team, 66 cases going before the Crown Courts were flagged as religiously aggravated on the Case Management System, involving 90 defendants in total. In 43 cases the defendants subsequently pleaded guilty. This left only 23 cases for juries to decide

Selected sample of cases

Although flagged as 'religiously aggravated', not all of the cases included counts on the indictments for religiously aggravated offences. The selection of cases we analysed was principally confined to all those with indictments which included counts for religiously aggravated offences—representing all prosecutions in the Crown Courts for religiously aggravated offences in 2012-13. We also included a small number of cases without an

indictment count for a religiously aggravated offence, but in which some type of religious aggravation was mentioned in either a count on the indictment for another type of offence or elsewhere in the CPS records for the case. With these selection criteria, our sample consisted of 17 cases involving 27 defendants in total. The 17 indictments included 43 counts altogether: 19 counts were for religiously aggravated offences (the most common being 'religiously aggravated intentional harassment, alarm or distress'); 5 for racially aggravated offences, and; the remaining 19 counts ranging from exposure, to violent disorder, to possession of explosives.

Prosecuting against the Expression of Religious Criticism?

Classifying cases

To unpack our analysis of the cases we divide them on the basis of three major analytic observations. First, the religious aggravation in a number of cases simply involved the momentary hurling of invective against a person's religious identity. In these cases the violation of religious identity was peripheral to a wider altercation. Second, other cases involved broader comments and attacks against religious identity and in such cases the alleged offences were seemingly motivated directly by hostility against the victims' religious identities. Third, there were two cases in our sample which involved an attack against religious beliefs. As will be discussed, these cases came the closest to testing the boundary of the criminalization of religious aggravation.

Momentary invective against religious identity

Six of the cases in the sample involved the expression of crude invective against the perceived religious identity of the victims. In all such cases, the evidence of religious aggravation amounted to no more than the utterance of vulgar and offensive phrases by the

defendants in the course of their encounters with their alleged victims. In one case (Case A),[24] after attending a birthday party, the victim-to-be and his girlfriend were given a lift home by a friend. At approximately 1.30am, when the car entered the cul-de-sac where the victim resided, they encountered the defendant stood in the middle of the road. According to the victim's account, the defendant was acting aggressively, shouted "f***ing Muslims", and attacked the victim and his girlfriend. In the ensuing struggle, part of the victim's ear was bitten off. There were no indications in the CPS records of any other religiously aggravated utterances. The defendant was indicted for three counts—which included religiously aggravated inflicting grievous bodily harm, contrary to section 29(1)(a) of the Crime and Disorder Act 1998.

This case exemplified a distinct type of case in the sample where rudimentary and unambiguous violations of religious identity provided the apparent evidence of religious aggravation. A similar pattern was evident in the other five cases of this type. In all such cases in the sample there was therefore no evidence of the expression of complex thoughts, criticisms or beliefs about the victims, their religious practices or the religious groups they were believed to belong to. Instead, they involved primitive and unambiguous emotive outbursts against individual identity.

Reinforcing the pattern that the religious aggravation in such cases involved base emotional outbursts focused on identity, it was also evident that in four of the six cases, the religiously targeted abuse was preceded or accompanied by the expression of invective against other identity characteristics of the victims. In one case for example, a defendant was attending court for trial for an earlier offence (Case D). When he encountered police officers outside the court who he believed were serving as witnesses against him, he became aggressive and

abusive. At that stage he was arrested for harassment. However, after arrest and restraint, he continued to verbally abuse the officers with further offensive language, including racially and religiously aggravated and gendered abuse. To account for the charge of religiously aggravated harassment, the defendant was alleged to have shouted at one officer, "f***ing Muslims" and "You're a f***ing Muslim and have got the head of a Jew. I hope your child gets cancer and dies." The defendant was indicted with one charge of religiously aggravated harassment and two charges of racially aggravated harassment.[25]

One clear commonality between all six of these cases in the sample that involved unadorned slurs on religious identity was that the religious aggravation was seemingly peripheral to the underlying crime or altercation that brought together the defendant and their alleged victim or victims. This can be illustrated distinctly by another case in the sample, the sole example of verbal abuse of religious identity that did not involve hostility towards Muslim identity. An intoxicated man was arrested for exposing himself on two occasions a few days apart (Case C). Upon each arrest he verbally abused the arresting police officers. The abuse included invective against various strands of social identity. The first occasion included racial abuse, and the second included homophobic abuse and religiously aggravated abuse, whereby the defendant was alleged to have called an officer "you f***ing protestant p***k" and used other expletives. The defendant was indicted for three counts of exposure for the alleged primary offending behaviour. He was further indicted for one count of religiously aggravated intentional harassment, alarm or distress, as well as two counts of racially aggravated intentional harassment, alarm or distress for the manifest hostility demonstrated.

It is clearly evident that in this case, as well as in all of the prosecutions involving simple invective against religious identity, the religious aggravation played only a small part in the

overall offending behaviour attributed to the defendant. Notably, the abuse of the actual or perceived religious identities of the victims was subordinate to the underlying reasons for, and nature of, the encounters between the defendants and victims. Further than this, the defendants might be seen to have been expressing religiously aggravated – and in this case and some others, racially aggravated and homophobic insults also – in the course of being thwarted in some activity or confronted about their behaviour.

Sustained expressions of hostility to religious identity

A further nine cases in the sample of religiously aggravated prosecutions also entailed attacks against the religious identity of alleged victims. However, in these examples, the religious aggravation seemingly went beyond the simple expression of vulgar and rudimentary abuse, and consisted of more sustained or broader sentiments against religious identity. Of these cases, six involved the targeting of individuals, and one involved the communication of religious hostility through written words — using the online medium of Twitter to seemingly target named individuals and to share hostile sentiment with a wider audience.

One incident which led to a prosecution for religiously aggravated common assault (Case F) allegedly involved a physical attack on a taxi driver that was preceded by the expression of sentiment hostile to Muslims. A taxi driver of Asian origin was working a night shift. At 3 a.m. he picked up three male passengers outside a nightclub. According to the victim's witness statement, he was initially asked by one of the passengers if he agreed with the "poppy burning" which recently took place in the town. After replying by saying "I don't know what you're on about but no I don't agree with that behaviour", the victim alleged that the defendant then said to his friends, "he's one of them". A little while later, according to the victim's account, he was asked the question again and was also asked if he was a Muslim.

After replying by asking “what’s that got to do with anything”, it was alleged that one of the passengers then replied “we hate Muslims” and another stated “kill him”. At that point, one of the passengers was accused of hitting the driver on the back of the head. After he fled the vehicle, two of the passengers allegedly chased him and further assaulted him by punching and kicking him after he fell to the ground.

The alleged verbal abuse which was used as evidence of religious aggravation in this case, and the others which will be discussed below, clearly went beyond the expression of simple invective or emotive slurs and entailed the expression of more pointed and thought-out attacks on aspects of the religious identity which the victim was seemingly perceived to represent. By explicitly referencing “poppy burning”, associating the action with Muslims and with the victim personally, the defendants can be seen to be stepping beyond the utterance of basic slurs on religious identity as encapsulated in the examples just discussed. Instead, the language allegedly used in the incident entailed much broader vilification of the victim’s religious identity.

A key feature evident in this case, and evident in all nine cases that involved the expression of more complex thought or sentiment against aspects of religious identity, was that the religiously aggravated hostility was a central and fundamental feature of the incidents rather than being peripheral to a wider dispute or altercation. The hostile stage of the interaction in this alleged offence was apparently triggered solely by the religious identity of the victim. The overall offending behaviour can therefore be understood in terms of manifest religious hostility motivating the offence rather than as otherwise motivated offending behaviour where religious hostility was also expressed, thereby aggravating the offence. Nevertheless, in each case there was still an underlying primary offence committed with the expressed

religious hostility secondarily providing the evidence for the religiously aggravated version of the charge.

In another case (Case G), the defendant, who appeared to have been drinking alcohol and was suspected of being high on drugs at the time of the alleged offences, was accused of verbally abusing and threatening staff in a pizza takeaway on three separate occasions. In this instance also, the religious aggravation was central to the offending behaviour, as the defendant, who pleaded guilty to the two charges of religiously aggravated fear or provocation of violence, seemingly appeared on two of the occasions to have solely walked into the shop and uttered the verbal abuse.

Again, the alleged offences entailed far more than the expression of religiously hostile invective against the victims, and in this case included not only extensive hostility and threats towards the victims as proxies for their perceived religious group but also hostility towards a component of their religious beliefs as well. On the first occasion, the defendant allegedly shouted "f*** the Koran", "kill the Muslims and close the f***ing shop". On the third occasion, as well as repeating the earlier phrases , the defendant was alleged to have said, "my two mates were killed in Afghanistan by Muslims, so I'll kill you", and "I will kill you because you are all Muslims. I don't like Muslims."

The suggestion that the diatribes which were attributed to the defendant went beyond violations of their identity was borne out by the way that the victims described the incidents in their statements. After describing the language used, one commented by saying, "I am a Muslim and I find the above about the Koran very offensive". The other victim, who also

suggested that the defendant had been "swearing about …the Prophet" stated that he "want[ed] him to respect other peoples' beliefs and nationality".

Two further cases appeared not only to reflect clear cognitive sentiment hostile to the religion of the victims and apparent evidence that the offending behaviour was explicitly precipitated by their religious identity, but also evidence that they may have been motivated by the religious ideologies of the defendants. In one case (Case H), two defendants, both Kurdish Muslims, were alleged to have physically assaulted a co-worker of one of the defendants in a takeaway with an iron bar and of verbally abusing his religious identity after discovering that he was of the Kaka'ee faith when he rejected their invitation to join them in prayer. During the incident, the defendants, who were charged with four counts including one of religiously aggravated grievous bodily harm, were claimed by the victim to have called him an "infidel" and "son of an unbeliever". Based on the details alleged in the case documents, the incident therefore involved clear sentiment targeting the victim's religious identity, and as in all other cases of this type, the religious aggravation was central in triggering the hostile stage of the incident. This case also appeared to have been linked directly to the religious ideology of the defendants.

Some cases were linked to the alleged political sympathies of the defendants rather than their religious ideologies In one case (Case I), two female defendants were accused of verbally abusing and threatening staff members in a takeaway after attending a local English Defence League (EDL) meeting which one of the two defendants had arranged in a bar a few doors away. In the aftermath of the Sunday afternoon meeting of the local EDL branch, of which one of the defendants claimed in police interview to be the leader, a group from the meeting became rowdy. Some of the group allegedly chanted slogans in the direction of the owner of

a kebab shop a few doors away when he walked to his car in order to make a delivery and a glass was thrown towards him, smashing on the floor. The chants were claimed to include "EDL, EDL, go back to your f***ing country", "EDL, EDL, get them out of our country" and "Allah is a paedo". As the situation escalated, the two defendants were alleged to have approached the takeaway itself, trying to force their way inside, and one was alleged to have grabbed the owner's wife, scratched her in the ensuing scuffle, and to have thrown a glass into the shop. One of the defendants allegedly shouted to the fourteen year old daughter of the owner "EDL, EDL, come out b**ch" and called her a "little whore" before also being accused of shouting various threats of violence. Both defendants were then alleged to have kicked at the door of the takeaway in an attempt to gain entry. The alleged religiously aggravated hostility was ostensibly central in motivating the incident rather than being a peripheral factor in a wider altercation, and the sentiment expressed again appeared to extend beyond the simple use of invective against religious identity.

Attacks against religious beliefs

Two remaining cases in our sample provided, out of all of the cases we analysed, the closest proximity to the dividing line between unlawful religious aggravation and lawful criticism of religion. Both cases raised questions for the CPS about the defendant's rights to freedom of expression—judging from the prosecutors' reflections recorded on the CPS Case Management System.

In one case (Case J) the defendant, subject of a restraining order to maintain distance from and avoid contact with a prior acquaintance, allegedly hand delivered three letters over the course of a month to the female minister of a Spiritualist Church where the individual protected by the restraining order was a member. The letters allegedly attacked the victims'

religious beliefs, in particular the use of Tarot Cards, and suggested that they were preaching the words of the devil.

The defendant, who was charged with Religiously Aggravated Harassment and Acting in Breach of a Restraining Order, seems to have implied that he was expressing his own religious views. According to the case records "[the defendant] stated that he was trying to save these people from hell". The implications that this has with regards to the competing rights of the defendant and victim and in particular his rights to freedom of expression were explicitly raised by the CPS prosecutor as noted in the CPS records:

> ECHR Article 10 - freedom of expression is engaged, there is an element of this being a theological criticism. However Article 9 is also engaged as far as Rev. VICTIM is concerned. The nature of the conduct which is accepted to be harassing, and the background of the DEFENDANT and VICTIM mean that interference with the right is justified.

In the other case (Case K), there was considerable reflection by the CPS reviewing lawyers about the matters the case raised concerning freedom of expression. On three occasions over a four week period the defendant allegedly tore pages out of the Koran and verbally insulted the religion of two victims who were staffing an information stand, affiliated to an Islamic Centre, located in a city centre. According to the CPS records, on the occasion he was arrested, the defendant, "sending menacing looks at the aggrieved", told them their religion was "bollocks", and proceeded to tear pages out of the copy of the Koran he was carrying and throw them on the floor. The police were called, and as he was detained, the defendant allegedly made a shooting gun symbol as he shouted at the victims "see you next Saturday".

In an apparent distinction to the majority of cases in the sample, the alleged behavioural actions and words uttered by the defendant predominantly targeted the religious beliefs of the victims rather than their religious identity. In particular, the tearing and throwing of the Koran and the labelling of their religion as "bollocks" seemed to be an attack on their religion, and the defendant articulated it in that way himself when asked in police interview "Why did you throw the Quran on the floor", responding, "To show what I thought about their religion". Interestingly, the defendant said in police interview that his actions were an attack on religion per se, and not just on Islam, and that he would do the same with the Bible. He also said "Nothing against Islam, nothing against the people just their religion, any religion" and "I just hate religions, what can I say I just hate religions, I'm an atheist, shoot me".

The defendant's line of defence was later reiterated by a statement provided by his solicitor to the CPS which repeated his general opposition to religion and suggested that the alleged actions were motivated by his personal anti-religious views:

> 1. Any hostility shown to the two men was based on my strict anti-religious views. It was not based on their membership of a 'particular' religious group.
> 2. I had no intent to cause 'harassment, alarm or distress' but was motivated by my wish to express that religion in general was deserving of contempt.
> 3. Had the two men been preaching Christianity my approach would have been identical.
> 4. I did not point towards the men as if to give rise to the belief that they would be shot. I was pointing to them in order to indicate that I would return to continue my protest.

In view of the defence offered to the allegations, and the unique nature of the case given the centrality of a communicative action targeting religious belief, it is instructive to note that an airing of a question about the competing rights of the defendant and victims is recorded in the CPS files in significant detail. Ultimately, the CPS lawyer review drew attention to guidance on how to treat cases involving the burning of the Koran when explaining how the eventual indictment for two charges of religiously aggravated harassment was decided upon:

> I have copied the following from the Burning Quran guidance....Whilst I accept that the suspect did not burn the Quran his actions were akin to it as he specifically targeted the Muslim complainants due to the fact they were dressed as Muslims in traditional clothes, he chose to tear the Quran in close proximity to them, he informed them that their religion was "bollocks" and finally he made the shooting gestures towards them whilst saying "see you next week". …The burning of Qurans, particularly when done so publicly, is likely to constitute an offence of religiously aggravated harassment, alarm or distress under section 31 of the Crime and Disorder Act 1998. Further, in most cases the act itself demonstrates a clear intent to cause alarm and/or distress and therefore would specifically come under section 31(1) (b) of the Act – religiously aggravated intentional harassment, alarm or distress.

In short, this case demonstrates that even where criticism of religion is involved it is the mode of delivery of such criticism that provides the context for whether the criticism amounts to religious aggravation of an underlying offence. This principle is underlined by a prosecution in 2010 in which the defendant, Harry Taylor, was convicted on three counts of religiously aggravated harassment for leaving leaflets mocking Jesus, Islam and the Pope in the prayer room at Liverpool John Lennon Airport. The leaflets had been found by the

airport's chaplain who stated that she had been "deeply offended and insulted" when she discovered them. Described in the press as a militant atheist, the defendant had denied the charges, stating in court: "I am not hostile to religious people but I am hostile to religion". The prosecutor however argued that his actions had gone beyond freedom of expression.

One commentator on the case, the president of the National Secular Society, expressed his anger at the conviction arguing that:

> The professional 'offence takers' in religious communities will now feel that they have a strong weapon to use against anyone who is critical or disapproving of them. It is, in effect, a blasphemy law that covers all religions...[26]

While subject to only a small amount of press coverage, the case was the focus of some discussion online, with a notable debate about the issues the case raised hosted on the website *Index On Censorship*.[27] While on the one hand the right to offend was defended, a counter viewpoint was expressed by the news editor of *New Humanist* magazine, who suggested that while religion and belief systems should not receive special protection from criticism, ridicule or even insult, individual adherents of any religion or belief system should be free to practise their belief without obstruction or harassment from those that disagree with them. Addressing the Taylor case directly, a cogent argument was made to explain why it was not the contents of the leaflet alone which were significant, but the manner in which Taylor had behaved:

> In my view the context matters a great deal. If Taylor had been convicted for publishing the images in a magazine, or on a website, where members of the public have the

> choice not to buy or visit, I would strongly oppose his conviction. But this isn't what Taylor did – he placed the images in a room provided for the religious to quietly practise their faith, away from public space. He did this several times and deliberately. Why did he do it? He claims that it was a protest about the very existence of a prayer room in an airport named after John Lennon (the man who penned the line "Imagine there's no heaven"), and a way of expressing his own religion of "reason and rationality". But is this reasonable? If his aim was to protest the prayer room, and not about offence at all, surely the "rational" way to do this is to take it up with the airport authorities, write a letter to the media or stage a protest as is his right.

Conclusion. Prosecuting religiously aggravated offences: context matters

A 2010 report published by the 'think tank' Civitas titled *A New Inquisition: Religious Persecution in Britain Today*, asks a question that seems to strike at the heart of concerns about the impact of legislation for religiously aggravated offences on rights to freedom of speech and expression:

> Is the Crown Prosecution Service so prudent in its understanding of 'religious hatred' that it should be free, with no penalty for error, to mobilise the power and resources of the state against ordinary citizens who make ordinary comments—or indeed extraordinary comments—about this or that god or his representatives on earth?'.[28]

However, from the analysis of cases presented in this paper tried in the Crown Courts in 2012-13, it is evident that in prosecuting religiously aggravated offences the CPS has acted entirely within the spirit of the law and has not stepped beyond Parliament's intentions by using Public Order Act offences to prosecute otherwise protected expression.

It is notable that the antipathy expressed in each of the cases we analysed, apart from two, was aimed at adherents of religion, not at religious beliefs, practices, or views per se. This marks the fundamental difference between unlawful religious aggravation and the lawful expression of criticism of faith or believers, or believers' practices. In each case persons were targeted, not beliefs or religious doctrine. And not only were they targeted, but those on the receiving end of the antipathy were targeted in a threatening manner, or a manner likely to cause harassment, alarm or distress. It is the mode of expression, in other words the context of expression that makes the difference. In each case we analysed there was already an underlying offence in play (which is a prerequisite for prosecution for a religiously aggravated offence) which was aggravated by the expression of hostility against the religious identity of the victims.

In the two cases where there were exceptions to the targeting of believers rather than beliefs, it was evident from the CPS records that we consulted that these cases exercised considerable reflection on the part of CPS reviewing lawyers. It was concluded that even where criticism of religion is involved, it is the mode of delivery of such criticism that provides the context for whether the criticism amounts to religious aggravation of an underlying offence. And in these cases, the defendants' alleged behaviour amounted to underlying offences of behaviour likely to cause harassment, alarm or distress.

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[2] Crime, Security and Anti-terrorism Act 2001 section 39.

[3] Sections 28-32 of the 1998 Crime and Disorder Act created racially aggravated versions of a number of pre-existing criminal offences — crimes of violence (section 29); criminal damage (section 30); public order offences (section 31); and harassment (section 32) — and provided for higher possible penalties for those convicted of the racially aggravated version compared with the pre-existing offence. Section 28 of the Act defined 'racially aggravated' as hostility towards the victim based on their membership (or presumed membership) of a racial group, which either had to be demonstrated at the time of committing the offence (or immediately before or after doing so), or which wholly or partly motivated the offence.

[4] Followers of Islam are defined by adherence to its teachings and beliefs. Therefore Muslims constitute a religious group as defined by the Crime, Security and Anti-terrorism Act 2001 as: "a group of persons defined by reference to religious belief or lack of religious belief." (Section 39[4]).

[5] Javier Garcia Oliva, "The legal protection of believers and beliefs in the United Kingdom" (2007) Ecclesiastical Law Journal. 9(1) 66–86. Page 76.

[6] Edge has drawn further distinctions by proposing that religious belief, religious identity, membership of a religious community and religious practice are "different interests raising different issues". Peter Edge, "Extending hate crime to religion" (2003) Journal of Civil Liberties. 8, 5.

[7] Eric Barendt, "Religious hatred laws: protecting groups or belief?" (2011) Res Publica. 17(1) 41–53. Page 43.

[8] Kim McGuire and Michael Salter, "Legal responses to religious hate crime: Identifying critical issues" (2014) King's Law Journal. 25(2) 159–184.

[9] Notably, Addison's otherwise thorough discussion of religiously aggravated offences doesn't explicitly draw out the potential significance of distinctions between identity, beliefs, and religion. Neil Addison, *Religious Discrimination and Hatred Law* (Routledge-Cavendish, 2007).

[10] See for example Simon De Bruxelles, "Man guilty of religious hatred after Sept 11 row" *The Times* (London, 4 October 2002); Peter Hitchens, "Can we no longer even argue with a Muslim?" *Mail on Sunday* (London, 27 October 2002), and; The Daily Telegraph, "A victory for free speech" *The Daily Telegraph* (London, 11 December 2009).

[11] While the Crown Prosecution Service has published limited data on the numbers of prosecutions, and prosecution outcomes, for religiously aggravated offences, there has been no more detailed published systematic analysis of prosecutions. A National Scrutiny Panel was established by the CPS in 2014 to evaluate prosecutions for religiously aggravated offences and the project from which this paper is drawn provided a contribution. However, the evaluation has not been published to date.

[12] Simon De Bruxelles, "Man guilty of religious hatred after Sept 11 row" *The Times* (London, 4 October 2002).

[13] Peter Hitchens, "Can we no longer even argue with a Muslim?" *Mail on Sunday* (London, 27 October 2002).

[14] The Daily Telegraph, "A victory for free speech" *The Daily Telegraph* (London, 11 December 2009).

[15] Jonathan Petre and Andrew Chapman "'Our faith is being targeted and we have been thrown to the lions': the Christian hoteliers accused of insulting Muslim guest reveal" *Mail on Sunday* (London, 13 December 2009).

[16] Mike Judge, "We are being gagged: The right to speak freely is being undermined by those who should be protecting it" *Mail on Sunday* (London, 13 December 2009).

[17] Notably, a senior lawyer at the CPS later defended the decision to prosecute, saying that it had been a "serious allegation" and that the CPS had had to decide "whether there was any evidence that the defendants had caused harassment, alarm or distress and in so doing demonstrated to the victim hostility solely based on the fact that she was Muslim". BBC News, "Christian hoteliers cleared in Muslim woman abuse row" (London, 9 December 2009). *http://news.bbc.co.uk/1/hi/england/merseyside/8404212.stm* [Accessed January 14, 2016]

[18] Russell Jenkins, "Christian hoteliers asked guest in hijab if she was terrorist or killer, court told" *The Times* (London, 9 December 2009).

[19] See for example Law Commission *Hate Crime: Should the Current Offences be Extended?*, LAW COM No.348 (Law Commission, 2014)

[20] Philip Johnston, *Feel Free to Say It. Threats to Freedom of Speech in Britain Today* (Civitas 2013) 41.

[21] David Green, "Foreword" in Philip Johnston, *Feel Free to Say It. Threats to Freedom of Speech in Britain Today* (Civitas 2013) x.

[22] The analysis was part of a larger project on 'The management of hateful invective by the Courts', focusing on the prosecution of racially and religiously aggravated public order offences, conducted between the spring of 2014 and spring 2016. The analysis of religiously aggravated offences included all prosecuted offences, not solely public order offences, and was conducted at the request of the CPS

while the full project was underway to inform a CPS National Scrutiny Panel on religiously aggravated offences. The research was funded by the Economic and Social Research Council as one project in the newly established Lancaster University ESRC Centre for Corpus Approaches to Social Sciences, ESRC grant reference ES/K002155/1. The research was governed by Lancaster University's Code of Practice on Research Ethics and Research Governance.

[23] Three documents, available in each of the case records consulted, together provided a consistently full account of cases: the 'MG3' form (Report to the Crown Prosecutor for Charging Decision) which captures the details of the case as reported by the victim(s), any witnesses and police officers, along with the defendant's response to the allegations, the rationale for prosecution along with a weighing of the potential strengths and limitations of the prosecution's case; the Record of Taped Interview (ROTI) which provides a transcript of the defendant's interview(s) by the police, and; the Indictment detailing the charges faced by the defendant(s) in court.

[24] This case reference number, and the others that follow, are anonymised references to cases on the CPS Case Management System.

[25] CPS Guidance is that "where the allegation involves evidence of both racial and religious aggravation, it will normally be necessary to include separate charges to reflect both aspects at both the aggravated and basic level of offences" *Racist and Religious Crime – CPS Guidance http://www.cps.gov.uk/legal/p_to_r/racist_and_religious_crime/#a15* [Accessed January 14, 2016]

[26] Jerome Taylor, "Atheist given Asbo for leaflets mocking Jesus" *Independent* (London, 24 April 2010)

[27] Index on Censorship. (2010, April 28). "Atheists and asbos: What price offence?" *https://www.indexoncensorship.org/2010/04/atheist-harry-taylor-liverpool-religion-offence-paul-sims-ophelia-benson/* [Accessed May 27, 2015]

[28] Jon Gower Davies, *A New Inquisition: Religious Persecution in Britain Today* (Civitas 2010).