AUTHOR MANUSCRIPT

The "Who?" Question in the Hate Speech Debate: Part 1: Consistency, Practical, and Formal Approaches

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This two-part article addresses the "Who?" question in the hate speech debate. This question is about which characteristics, social identities or statuses should or should not be treated as protected characteristics within a body laws banning incitement to hatred. To put this into a UK context, the 1965 Race Relations Act introduced for the first time an offence of stirring up racial hatred. The scope of this offence was later clarified by the Public Order Act 1986 in which 'racial hatred' was defined as 'hatred against a group of persons defined by reference to colour, race, nationality (including citizenship) or ethnic or national origins' (s 17). Twenty years later the Racial and Religious Hatred Act 2006 added a new offence of stirring up religious hatred. The Criminal Justice and Immigration Act 2008 extended this body of law still further to create another new offence of stirring up hatred on grounds of sexual orientation. In recent years the government has also given some consideration to the proposal of extending a third time to cover disability and transgender identity. By contrast, it has given little, if any, serious consideration to creating an offence of stirring up hatred on grounds of age. So what characteristics should be covered? Clearly the answer to this question cannot be − because it is circular − that governmental authorities should include within the scope of incitement to hatred laws protected characteristics, where the definition of protected characteristics is simply characteristics that ought to be protected by incitement to hatred laws. In order to answer the "Who?" question in a rational and non-circular way we must first ask a more fundamental or meta-level question: what is the right approach to answering the "Who?" question? Or, more specifically, what moral and practical considerations are relevant to specifying the proper scope of incitement to hatred laws?

Across the two parts of the article I shall outline and critically appraise five different broad approaches to specification. Part 1 deals with *consistency specification*, which highlights norms of consistency both within incitement to hatred law itself and in relation to other laws, *practical specification*, which focuses on the ostensible goals or apparent aims of incitement to hatred laws, and *formal specification*, which looks at the formal qualities of the characteristics themselves and to the different forms of people's relationships with those characteristics. And Part 2 considers *functional specification*, which concentrates on the underlying or real functions, purposes or objectives of incitement to hatred laws, and *democratic specification*, which appeals to democratic procedures as well as to democratic values, norms and principles that speak to the proper scope of incitement to hatred laws.

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Along the way I shall also critically assess a range of substantive arguments about which particular characteristics should or should not be covered by incitement to hatred laws given the aforementioned approaches. My main conclusion shall be that each of the approaches has its strengths and weakness and that, partly because of this, no single approach is adequate *by itself* as a tool for specifying the proper scope of incitement to hatred laws, but also, by the same token, no approach should be ruled out entirely. Instead, the best strategy is one that combines together all five approaches in reasonable ways given the law, the characteristic and the context.

I. Hate speech laws and protected characteristics

I want to begin by clarifying the nature of the "Who?" question. There are numerous characteristics, social identities or statuses that either currently are or conceivably could be brought under the scope of hate speech laws.[1] These include:

- age (e.g., Canada,[2] South Africa,[3] Tasmania (Australia),[4] YouTube[5]);
- age performance or ways of performing age such as acting young or old;
- citizenship status, if distinguished from nationality (e.g., England and Wales (UK),[6] Northern Ireland (UK)[7]);
- criminal record, when not already included under social status;
- disability including both mental and physical disability (e.g., Canada,[8] Finland,[9] France,[10] Hong Kong,[11] the Netherlands,[12] Northern Ireland (UK),[13] South Africa,[14] Tasmania (Australia)[15]);

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[1] I use the term 'hate speech laws' in deliberately broad way to include any laws/regulations/codes that directly or indirectly restrict uses of hate speech where this can encompass instances of human rights law, criminal law, anti-discrimination law, civil law, media and Internet regulations, the codes of practice of media and Internet companies, and the codes of conduct of businesses, organisations and institutions, including university anti-harassment policies or campus speech codes.

[2] ss 318(4) and 319 of the Criminal Code (as amended by An Act to Amend the Criminal Code (Hate Propaganda) of 2004).

[3] Ch 1, s 1(1) and Ch 2, s 10(1) of the Promotion of Equality and Prevention of Unfair Discrimination Act 2000.

[4] s 17(1)(b) of the Anti-Discrimination Act 1998.

[5] YouTube Community Standards, Hateful Content, www.youtube.com/yt/policyandsafety/en-GB/communityguidelines.html, last accessed June 1, 2016.

[6] ss 17-29 of the Public Order Act 1986.

[7] ss 8-13 of the Public Order (Northern Ireland) Order 1987.

[8] ss 318(4) and 319 of the Criminal Code (as amended by An Act to Amend the Criminal Code (Hate Propaganda) of 2004).

[9] Ch 11, s 10 of the Criminal Code.

[10] Arts 24, 32, and 33 of Law on the Freedom of the Press of 29 Jul. 1881 (as amended by the Law of 1 Jul. 1972, the Law of 30 Dec. 2004, and the Law of 6 Aug. 2012).

[11] s 46 of the Disability Discrimination Ordinance.

[12] Arts 137(c) and 137(d) of the Penal Code.

[13] ss 8-13 of the Public Order (Northern Ireland) Order 1987.

- education, when not already included under social status;
- employment status, such as employed or unemployed;
- ethnicity including cultural heritage, ancestry or descent, physical appearance, homeland, origin (e.g., Australia,[16] Australian Capital Territory (Australia),[17] Canada,[18] Chile,[19] Connecticut (US),[20] Croatia,[21] Denmark,[22] England and Wales (UK),[23] Finland,[24] France,[25] the Netherlands,[26] Massachusetts (US)[27], New South Wales (Australia),[28] New Zealand,[29] Northern Ireland (UK),[30] Queensland (Australia),[31] Republic of Ireland,[32] Russia,[33] South Africa,[34] Tasmania (Australia),[35] Western Australia (Australia)[36]);
- gender such as man, woman, male, female, or sex such as cisgender, transgender, cissexual, transsexual, third gender, bigender, pangender, agender, intersex, third sex (e.g., Australian Capital Territory (Australia),[37] Canada,[38] Chile,[39] France,[40] the Netherlands,[41] New South Wales (Australia),[42] Queensland (Australia),[43] South Africa,[44] Tasmania (Australia)[45]);

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[14] Ch 1, s 1(1) and Ch 2, s 10(1) of the Promotion of Equality and Prevention of Unfair Discrimination Act 2000.
[15] ss 17(1) (k) and 19(b) of the Anti-Discrimination Act 1998.
[16] s 18C(1) of the Racial Discrimination Act 1975.
[17] ss 66(1)(a) and 67(1)(d)(i) of the Discrimination Act 1991.
[18] ss 318(4) and 319 of the Criminal Code (as amended by An Act to Amend the Criminal Code (Hate Propaganda) of 2004).
[19] Art 31 of the Statute on Freedom of Opinion and Information and the Performance of Journalism.
[20] Ch 939, s 53-37 of the Connecticut General Statutes.
[21] Art 174(3) of the Criminal Code.
[22] s 266(b)(1) of the Penal Code.
[23] ss 17-29 of the Public Order Act 1986.
[24] Ch 11, s 10 of the Criminal Code.
[25] Arts 24, 32, and 33 of Law on the Freedom of the Press of 29 Jul. 1881 (as amended by the Law of 1 Jul. 1972, the Law of 30 Dec. 2004, and the Law of 6 Aug. 2012).
[26] Arts 137(c) and 137(d) of the Penal Code.
[27] Ch 272, s 98C of the Massachusetts General Laws.
[28] ss 20B-20D of the Anti-Discrimination Act 1977.
[29] Arts 61 and 131 of the Human Rights Act 1993.
[30] ss 8-13 of the Public Order (Northern Ireland) Order 1987.
[31] 124A(1) and 131A(1) of the Anti-Discrimination Act 1991.
[32] ss 1-12 of the Prohibition of Incitement To Hatred Act, 1989.
[33] Art 282(1) of the Criminal Code.
[34] Ch 1, s 1(1) and Ch 2, s 10(1) of the Promotion of Equality and Prevention of Unfair Discrimination Act 2000.
[35] ss 17(1)(a) and 19(a) of the Anti-Discrimination Act 1998.
[36] ss 76-80H of the Criminal Code 1913.
[37] ss 66(1)(c) and 67(1)(d)(iii) of the Discrimination Act.
[38] ss 318(4) and 319 of the Criminal Code (as amended by An Act to Amend the Criminal Code (Hate Propaganda) of 2004).
[39] Art 31 of the Statute on Freedom of Opinion and Information and the Performance of Journalism.

- gender performance or ways of performing gender identity such as being masculine, effeminate, metrosexual, when not already included under gender;
- HIV/AIDS status (e.g., Australian Capital Territory (Australia),[46] New South Wales (Australia)[47]);
- immigration status, when not already included under citizenship status and nationality;
- language including language status, mother-tongue and language accent identity, if not included under ethnicity (e.g., South Africa[48]);
- marital status including relationship status, when not already included under social status (e.g., South Africa,[49] Tasmania (Australia)[50]);
- medical status including serious disease, when not already included under HIV/AIDS status (e.g., Facebook[51]);
- nationality or legal relationship to a state, when not already included under ethnicity (e.g., Australia,[52] Australian Capital Territory (Australia),[53] Canada,[54] Chile,[55] Connecticut (US),[56] Croatia,[57] Denmark,[58] England and Wales (UK),[59] Finland,[60] France,[61] the Netherlands,[62] Massachusetts (US)[63],

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[40] Arts 24, 32, and 33 of Law on the Freedom of the Press of 29 Jul. 1881 (as amended by the Law of 1 Jul. 1972, the Law of 30 Dec. 2004, and the Law of 6 Aug. 2012).
[41] Art 137(d) of the Penal Code.
[42] ss 38R-38T of the Anti-Discrimination Act 1977.
[43] 124A(1) and 131A(1) of the Anti-Discrimination Act 1991.
[44] Ch 1, s 1(1) and Ch 2, s 10(1) of the Promotion of Equality and Prevention of Unfair Discrimination Act 2000.
[45] ss 17(1)(ea) and 17(1)(eb) of the Anti-Discrimination Act 1998.
[46] ss 65, 66(1)(d), and 67(1)(d)(iv) of the Discrimination Act 1991.
[47] ss 49ZXA-49ZXC of the Anti-Discrimination Act 1977.
[48] Ch 1, s 1(1) and Ch 2, s 10(1) of the Promotion of Equality and Prevention of Unfair Discrimination Act 2000.
[49] Ch 1, s 1(1) and Ch 2, s 10(1) of the Promotion of Equality and Prevention of Unfair Discrimination Act 2000.
[50] ss 17(1)(f) and 17(1)(fa) of the Anti-Discrimination Act 1998.
[51] Facebook Community Standards, Encouraging Respectful Behaviour, Hate Speech, www.facebook.com/communitystandards#, last accessed June 1, 2016. And s 3.7 of the Facebook Statement of Rights and Responsibilities, www.facebook.com/legal/terms, last accessed June 1, 2016.
[52] s 18C(1) of the Racial Discrimination Act 1975.
[53] ss 66(1)(a) and 67(1)(d)(i) of the Discrimination Act 1991.
[54] ss 318(4) and 319 of the Criminal Code (as amended by An Act to Amend the Criminal Code (Hate Propaganda) of 2004).
[55] Art 31 of the Statute on Freedom of Opinion and Information and the Performance of Journalism.
[56] Ch 939, s 53-37 of the Connecticut General Statutes.
[57] Art 174(3) of the Criminal Code.
[58] s 266(b)(1) of the Penal Code.
[59] ss 17-29 of the Public Order Act 1986.
[60] Ch 11, s 10 of the Criminal Code.

New South Wales (Australia),[64] New Zealand,[65] Northern Ireland (UK),[66] Queensland (Australia),[67] Republic of Ireland,[68] Russia,[69] South Africa,[70] Tasmania (Australia),[71] Western Australia (Australia)[72]);

- parental status (e.g., Tasmania (Australia)[73]);
- personality traits or types;
- physical appearance such as body weight, skin tone, hair colour, facial configuration and other bodily features, when not already included under race or ethnicity;
- political beliefs, activities, or affiliations (e.g., Australia,[74] the Council of the European Union,[75] Penn State University[76]);
- pregnancy, when not already included under parental status (e.g., Penn State University,[77] South Africa,[78] Tasmania (Australia)[79]) or, even more specifically, breastfeeding activity (e.g., Tasmania (Australia)[80]);
- profession such as banker, politician, lawyer, or tax collector, when not already included under social status or veteran status;
- race including colour and other aspects of physical appearance (e.g., Australia,[81] Australian Capital Territory (Australia),[82] Canada,[83] Chile,[84]

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[61] Arts 24, 32, and 33 of Law on the Freedom of the Press of 29 Jul. 1881 (as amended by the Law of 1 Jul. 1972, the Law of 30 Dec. 2004, and the Law of 6 Aug. 2012).
[62] Arts 137(c) and 137(d) of the Penal Code.
[63] Ch 272, s 98C of the Massachusetts General Laws.
[64] ss 20B-20D of the Anti-Discrimination Act 1977.
[65] Arts 61 and 131 of the Human Rights Act 1993.
[66] ss 8-13 of the Public Order (Northern Ireland) Order 1987.
[67] 124A(1) and 131A(1) of the Anti-Discrimination Act 1991.
[68] ss 1-12 of the Prohibition of Incitement To Hatred Act, 1989.
[69] Art 282(1) of the Criminal Code.
[70] Ch 1, s 1(1) and Ch 2, s 10(1) of the Promotion of Equality and Prevention of Unfair Discrimination Act 2000.
[71] ss 17(1)(a) and 19(a) of the Anti-Discrimination Act 1998.
[72] ss 76-80H of the Criminal Code 1913.
[73] s 17(1)(i) of the Anti-Discrimination Act 1998.
[74] ss 80.2A and 80.2B of The Commonwealth Criminal Code Act 1995.
[75] Para (10) of the Council of the European Union Framework Decision on Combating Racism and Xenophobia by Means of Criminal Law 2008/913/JHA, of 28 November 2008.
[76] Policy AD85: Discrimination, Harassment, Sexual Harassment and Related Inappropriate Conduct.
[77] Policy AD85: Discrimination, Harassment, Sexual Harassment and Related Inappropriate Conduct.
[78] Ch 1, s 1(1) and Ch 2, s 10(1) of the Promotion of Equality and Prevention of Unfair Discrimination Act 2000.
[79] s 17(1) (g) of the Anti-Discrimination Act 1998.
[80] s 17(1)(h) of the Anti-Discrimination Act 1998.
[81] s 18C(1) of the Racial Discrimination Act 1975.
[82] ss 66(1)(a) and 67(1)(d)(i) of the Discrimination Act 1991.
[83] ss 318(4) and 319 of the Criminal Code (as amended by An Act to Amend the Criminal Code (Hate Propaganda) of 2004).

Connecticut (US),[85] Croatia,[86] Denmark,[87] England and Wales (UK),[88] Finland,[89] France,[90] the Netherlands,[91] Massachusetts (US)[92], New South Wales (Australia),[93] New Zealand,[94] Northern Ireland (UK),[95] Queensland (Australia),[96] Republic of Ireland,[97] Russia,[98] South Africa,[99] Tasmania (Australia),[100] Western Australia (Australia)[101]);

- regional identity including sub-national regional identity and trans-national regional identity, when not already included under nationality;
- religion including religious beliefs, practices, or affiliations as well as lack thereof (e.g., Canada,[102] Chile,[103] Connecticut (US),[104] Croatia,[105] Denmark,[106] England and Wales (UK),[107] Finland,[108] France,[109] the Netherlands,[110] Massachusetts (US),[111] Northern Ireland (UK),[112] Queensland (Australia),[113] Republic of Ireland,[114] Russia,[115] South Africa,[116] Tasmania (Australia)[117]);

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[84] Art 31 of the Statute on Freedom of Opinion and Information and the Performance of Journalism.
[85] Ch 939, s 53-37 of the Connecticut General Statutes.
[86] Art 174(3) of the Criminal Code.
[87] s 266(b)(1) of the Penal Code.
[88] ss 17-29 of the Public Order Act 1986.
[89] Ch 11, s 10 of the Criminal Code.
[90] Arts 24, 32, and 33 of Law on the Freedom of the Press of 29 Jul. 1881 (as amended by the Law of 1 Jul. 1972, the Law of 30 Dec. 2004, and the Law of 6 Aug. 2012).
[91] Arts 137(c) and 137(d) of the Penal Code.
[92] Ch 272, s 98C of the Massachusetts General Laws.
[93] ss 20B-20D of the Anti-Discrimination Act 1977.
[94] Arts 61 and 131 of the Human Rights Act 1993.
[95] ss 8-13 of the Public Order (Northern Ireland) Order 1987.
[96] 124A(1) and 131A(1) of the Anti-Discrimination Act 1991.
[97] ss 1-12 of the Prohibition of Incitement To Hatred Act, 1989.
[98] Art 282(1) of the Criminal Code.
[99] Ch 1, s 1(1) and Ch 2, s 10(1) of the Promotion of Equality and Prevention of Unfair Discrimination Act 2000.
[100] ss 17(1)(a) and 19(a) of the Anti-Discrimination Act 1998.
[101] ss 76-80H of the Criminal Code 1913.
[102] ss 318(4) and 319 of the Criminal Code (as amended by An Act to Amend the Criminal Code (Hate Propaganda) of 2004).
[103] Art 31 of the Statute on Freedom of Opinion and Information and the Performance of Journalism.
[104] Ch 939, s 53-37 of the Connecticut General Statutes.
[105] Art 174(3) of the Criminal Code.
[106] s 266(b)(1) of the Penal Code.
[107] ss 29A-29N of the Public Order Act 1986.
[108] Ch 11, s 10 of the Criminal Code.
[109] Arts 24, 32, and 33 of Law on the Freedom of the Press of 29 Jul. 1881 (as amended by the Law of 1 Jul. 1972, the Law of 30 Dec. 2004, and the Law of 6 Aug. 2012).
[110] Arts 137(c) and 137(d) of the Penal Code.
[111] Ch 272, s 98C of the Massachusetts General Laws.
[112] ss 8-13 of the Public Order (Northern Ireland) Order 1987.

- sexual orientation (e.g., Australian Capital Territory (Australia),[118] Canada,[119] Croatia,[120] Denmark,[121] England and Wales (UK),[122] Finland,[123] France,[124] the Netherlands,[125] New South Wales (Australia),[126] Northern Ireland (UK),[127] Queensland (Australia),[128] South Africa,[129] Tasmania (Australia)[130]);
- sexual preference such as preference for particular sex acts or practices, when not already included under sexual orientation;
- social status including social origin and class (e.g., the Council of the European Union,[131] South Africa[132]);
- traveller community, when not already included under race or ethnicity (e.g., Republic of Ireland[133]);
- war record including veteran status (e.g., Northern Arizona University (US),[134] Penn State University (US),[135] University of Oregon (US)[136]) or pacifist status.

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[113] 124A(1) and 131A(1) of the Anti-Discrimination Act 1991.
[114] ss 1-12 of the Prohibition of Incitement To Hatred Act, 1989.
[115] Art 282(1) of the Criminal Code.
[116] Ch 1, s 1(1) and Ch 2, s 10(1) of the Promotion of Equality and Prevention of Unfair Discrimination Act 2000.
[117] s 19(d) of the Anti-Discrimination Act 1998.
[118] ss 66(1)(b) and 67(1)(d)(ii) of the Discrimination Act 1991.
[119] ss 318(4) and 319 of the Criminal Code (as amended by An Act to Amend the Criminal Code (Hate Propaganda) of 2004).
[120] Art 174(3) of the Criminal Code.
[121] s 266(b)(1) of the Penal Code.
[122] ss 29AB and 29JA of the Public Order Act 1986 (as amended by the Criminal Justice and Immigration Act in 2008 and the Marriage (Same Sex Couples) Act 2013).
[123] Ch 11, s 10 of the Criminal Code.
[124] Arts 24, 32, and 33 of Law on the Freedom of the Press of 29 Jul. 1881 (as amended by the Law of 1 Jul. 1972, the Law of 30 Dec. 2004, and the Law of 6 Aug. 2012).
[125] Arts 137(c) and 137(d) of the Penal Code.
[126] ss 49ZS, 49ZT, and 49ZTA of the Anti-Discrimination Act 1977.
[127] ss 8-13 of the Public Order (Northern Ireland) Order 1987.
[128] 124A(1) and 131A(1) of the Anti-Discrimination Act 1991.
[129] Ch 1, s 1(1) and Ch 2, s 10(1) of the Promotion of Equality and Prevention of Unfair Discrimination Act 2000.
[130] ss 17(1)(c), 17(1)(d), and 19(c) of the Anti-Discrimination Act 1998.
[131] Para (10) of the Council of the European Union Framework Decision on Combating Racism and Xenophobia by Means of Criminal Law 2008/913/JHA, of 28 November 2008.
[132] Ch 1, s 1(1) and Ch 2, s 10(1) of the Promotion of Equality and Prevention of Unfair Discrimination Act 2000.
[133] ss 1-12 of the Prohibition of Incitement To Hatred Act, 1989.
[134] s II.C.2. of the Northern Arizona University Policy Regarding Prohibited Discrimination, Harassment, and Other Inappropriate Behaviors.
[135] Policy AD85: Discrimination, Harassment, Sexual Harassment and Related Inappropriate Conduct.
[136] ss II.16.b. and V.3.f. of the University of Oregon Student Conduct Code.

This is, of course, a very diverse list − diverse both in the types of characteristics and in the types of hate speech law. As far as the characteristics are concerned, we have:

- affective states or patterns thereof (e.g., sexual orientation, sexual preference);
- affiliations relating to communities, cultures, social groups or families (e.g., citizenship, ethnicity, language, marital status, nationality, parental status, regional identity, religion);
- attitudinal dispositions, beliefs or ways of thinking (e.g., political, religious);
- biological, genotypic, physiological, or physical(-phenotypic) attributes (e.g., medical status, race, sex);
- conduct, (phenotypic-)behaviour, performance or ways of living (e.g., age performance, education, employment status, gender performance, marital status, profession, religion, traveller community, war record).

This form of diversity will be particularly relevant when we come to consider the third approach to specifying the proper scope of incitement to hatred laws, what I call the formal approach, because it appeals to intuitions about the formal qualities of characteristics and about the form of people's relationships to their characteristics.

In terms of the diversity of hate speech laws, we have:

- laws that proscribe group defamation based on protected characteristics;
- laws that regulate negative stereotyping and stigmatization based on protected characteristics;
- laws that disallow insults, slurs, or derogatory epithets or disseminating ideas based on the inferiority of persons or using any words, signs, or symbols that are deeply insulting or offensive to persons based on protected characteristics;
- laws that ban stirring up, inciting, or promoting feelings of hatred or hostility toward or among members of groups based on protected characteristics;
- laws that prohibit speech or other expressive conduct concerning members of groups or classes of persons identified by protected characteristics when it is a threat to public order;
- laws that penalise denying, grossly trivialising, approving, justifying, condoning, or glorifying acts of mass cruelty, violence, or genocide perpetrated against members of groups or classes of persons based on protected characteristics;
- laws that constrain speech or other expressive conduct directed at members of groups or classes of persons identified by protected characteristics when it constitutes the enactment of a dignitary crime or tort;
- laws that forbid speech or other expressive conduct when it amounts to conduct that violates or interferes with people's exercise of civil or human rights based on protected characteristics;
- laws that interdict speech or other expressive conduct that constitutes a hate crime based on protected characteristics;

- laws that restrict speech or other expressive conduct aimed at members of groups or classes of persons identified by protected characteristics via time, place, and manner restrictions.[137]

I do not have space here to discuss each of the different types of hate speech law nor particular instances thereof. The focus of the study will be stirring up hatred offences in the UK. It may be that different conclusions follow if the focus is shifted to other types of hate speech law. To put the same point a little more formally, it may be that when thinking about a hate speech law of type X it would be correct to consider inclusion of characteristics c1, c2 and c3 but not c4, c5 and c6, whereas when reflecting on hate speech law of type Y it might be fitting to include characteristics c4, c5 and c6 but not c1, c2 and c3, because of morally relevant differences between X and Y. I shall return to, and try to defend, this generalisation in the conclusion at the end of Part 2.

Before discussing the first of five approaches to specification, I first need to distinguish between two motives for addressing the "Who?" question and to clarify which of the two informs this investigation. One motive is deep scepticism about the moral justification for, and practical usefulness of, hate speech law including incitement to hatred law. Here the "Who?" question is intended or designed to create a slippery slope or adverse consequences argument against any such legislation by adding more and more protected characteristics to the list so as to make all hate speech laws seem unpalatable.[138] A second motive stems from a belief that current incitement to hatred legislation in the UK has developed over a long period of time in a piecemeal, reactive, politicised, and in many ways illogical and incoherent manner, and a desire to (re-)theorise the proper scope of such laws in way that is far more systematic and analytical. This motive is open-minded over whether or not hate speech laws can be warranted all things considered. It is about seeking correct answers to both the "Who?" question and the more general warrant question without prejudging either. This article proceeds under the second motive.

II. Consistency specification

The first approach to specifying the proper scope of incitement to hatred laws emphasises norms of consistency. Consistency is a familiar and essential feature of the rule of law, of course. In the area of sentencing, if two people have broken the law in similar ways, then consistency requires that they should expect to receive similar punishments from judges. This is *the principle of treating like cases alike (and unalike cases unalike)*. But consistency is also important in the area of the enactment of criminal laws, where similar conduct should have similar status as criminal or not criminal. So, if two examples of conduct are similar in that they are both incitement to hatred albeit one is incitement to hatred on grounds of characteristic c1 and the other is incitement to hatred on grounds of c2, then *prima facie* consistency requires that

[137] Alexander Brown, *Hate Speech Law: A Philosophical Examination* (New York, NY: Routledge, 2015) ch 2.

[138] See, e.g., Eric Heinze, "Cumulative Jurisprudence and Hate Speech: Sexual Orientation and Analogies to Disability, Age, and Obesity" in Ivan Hare & James Weinstein, eds, *Extreme Speech and Democracy* (Oxford: Oxford University Press, 2009).

both examples of conduct should be dealt with in similar ways by the criminal law. This is *the principle of treating like conduct alike (and unalike conduct unalike*).

Then again, perhaps what matters is not only similarity in the treatment of similar conduct but also similarity in the treatment of similar groups; which is to say, similar groups should receive similar protection in law. According to Alon Harel, for example, 'treating the victims of racist speech more favorably than victims of sexist, homophobic, or other forms of abhorrent speech is itself a form of discrimination' (Harel 1992: 1906). So, if two similar groups of people are subject to similar forms of incitement to hatred, then consistency requires that they should enjoy similar legal protections or lack thereof. This is *the principle of treating like groups alike (and unalike groups unalike)* or *the principle of parity* for short.

However, consistency in the treatment of similar cases, conduct and groups are not the only relevant forms of consistency. Consider as well consistency in the way that lawmakers, for example, handle reasons or rationales for including some characteristics and not others under the scope of given hate speech laws. Some of these reasons are practical, some formal, some functional, and some relate to democratic values. But what really matters is that when lawmakers invoke and apply these reasons they do so in a consistent manner, rather than in highly politicised or even haphazard ways. The principle of parity demands equal treatment of similar groups, whereas what I am talking about now relates more to equity in the treatment of groups, meaning that groups have a right to expect that reasons or rationales will be applied in consistent ways. Thus, if two types of conduct are similar in that they are both forms of incitement to hatred but one type of conduct is incitement to hatred on grounds of characteristic c1 and the other is incitement to hatred on grounds of c2, and if the principled reasons for banning incitement to hatred on grounds of c1 would also apply *mutatis mutandis* to incitement to hatred on grounds of c2, then consistency requires banning both types of conduct *qua* forms of incitement to hatred, absent other relevant and equally compelling reasons for banning one and not the other. I shall call this *the principle of treating like reasons alike (and unalike reasons unalike)* or *the principle of higher-order consistency* for short.[139]

Keeping in mind these basic forms of consistency, let us now consider some concrete arguments about the proper scope of incitement to hatred laws in the UK. They have to do with anomalies or inconsistencies within anti-discrimination law, criminal law, incitement to hatred laws, and constitutional law. Starting with anti-discrimination law, the Equality Act 2010 makes it unlawful in England and Wales to discriminate against persons based on certain 'protected characteristics', namely, age, disability, gender reassignment, race, religion or belief, sex, sexual orientation. At the same time, however, it is currently unlawful to stir up hatred only on the basis of three of these characteristics: race, religion, sexual orientation. This raises a question of consistency between incitement to hatred laws and extant anti-discrimination law.[140] As Ivan Hare puts it, 'if Parliament has considered that individuals and groups should be protected from suffering detriment in relation to employment and other social goods on the grounds of gender and age, why should they not also enjoy the equal

[139] Of course, if there are morally relevant reasons to treat similar conduct differently, then the principle of higher-order consistency may justify setting aside the principle of treating like conduct alike. Likewise, if there are morally relevant reasons to treat similar groups differently, then the principle of higher-order consistency may justify setting aside the principle of parity.

[140] See, e.g., Heinze, *supra* note 138.

protection of the criminal law in relation to discriminatory incitement to hatred against them?'[141] In fact, such inconsistency is neither necessary nor unavoidable. In South Africa,[142] for example, hate speech laws have been developed in concert with, and even written into, anti-discrimination legislation, thus ensuring that the wide scope of prohibitions of discrimination (in terms of the range and number of protected characteristics) is matched exactly by the wide scope of prohibitions of hate speech.

Now it might be objected at this stage that there is a relevant difference between discrimination and hate speech: namely, whereas discrimination is an act, hate speech is speech. But the difference disappears as soon as one recognises that using words or behaviour to stir up hatred is itself a type of act and that some forms of discrimination are enacted to a large extent through speech or other expressive behaviour. So, for example, ss 26 and 27 of the Equality Act 2010 in England and Wales make it unlawful to harass or victimise persons based on protected characteristics including when this harassment or victimisation takes the form of speech or other expressive conduct.[143]

Turning to inconsistencies within criminal law, ss 145 and 146 of the Criminal Justice Act 2003 (as amended by s 65 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012) are hate crime provisions giving magistrates and judges in England and Wales powers to determine if criminal acts were made more 'serious' or 'aggravated' by hostility toward victims based on the characteristics of race, religion, disability, sexual orientation or transgender identity. Now s 146 relates specifically to disability, sexual orientation and transgender identity, and could apply *inter alia* to various public order and harassment offences that are typically enacted through speech or other expressive conduct.[144] Consider the offences of causing fear or provocation of violence (s 4), intentional harassment, alarm or distress (s 4A), and harassment, alarm or distress (s 5) under the Public Order Act 1986 (as amended by the Criminal Justice and Public Order Act 1994), as well as the offence of harassment (ss 1 and 2) under the Protection from Harassment Act 1997. But if hostility toward

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[141] Ivan Hare, "Free Speech and Incitement to Hatred on Grounds of Disability and Transgender Identity: The Law Commission's Proposals" (2015) *Public Law* 385 at 391.

[142] Ch 1, s 1(1) and Ch 2, s 10(1) of the Promotion of Equality and Prevention of Unfair Discrimination Act 2000.

[143] The inconsistency is not limited to England and Wales. Consider the Anti-Discrimination Act 1998 in Tasmania, Australia. On the one hand, ss 16 and 17(1) set outs a generalised offence of harassment based on conduct which offends, humiliates, intimidates, insults or ridicules another person, the scope of which is extremely broad and encompasses (a) race, (b) age, (c) sexual orientation, (d) lawful sexual activity, (e) gender, (ea) gender identity, (eb) intersex, (f) marital status, (fa) relationship status, (g) pregnancy, (h) breastfeeding, (i) parental status, (j) family responsibilities, and (k) disability. On the other hand, s 19 provides an offence of inciting hatred towards, serious contempt for, or severe ridicule of, another person or group of persons, the scope of which is much narrower and encompasses only (a) the race of the person or any member of the group, (b) any disability of the person or any member of the group, (c) the sexual orientation or lawful sexual activity of the person or any member of the group, and (d) the religious belief or affiliation or religious activity of the person or any member of the group. I thank Luke McNamara for alerting me to this example.

[144] See, e.g., Brown, *supra* note 137 at 35-38.

victims based on their disability or transgender identity can be aggravating factors in the case of someone using, say, threatening, abusive or insulting words with intent to cause harassment, alarm or distress (s 4A), then why should stirring up hatred offences not include stirring up hatred on grounds of disability or transgender identity? It scarcely seems sufficient merely to point out that these are separate regimes or schemes of law since that only invites the following question: why should they be considered separately or regarded differently when it comes to specifying the proper scope of such laws?[145]

Next, consider inconsistencies within incitement to hatred laws themselves. When the 1965 Race Relations Act introduced for the first time the stirring up racial hatred offence it was well recognised that there are groups in society whose categorisation as a race could be open to doubt. Yet the concern was to ensure parity of treatment for different groups. What if the law protected newly arrived immigrants from the Caribbean, for example, but not Jews? And so, speaking in the House of Commons in 1965, the then Home Secretary, Frank Soskice MP, opined, 'I would have thought a person of Jewish faith, if not regarded as caught by the word "racial" would undoubtedly be caught by the word "ethnic", but if not caught by the word "ethnic" would certainly be caught by the scope of the word "national", as certainly having a national origin.'[146] The controversies have persisted however. For one thing, if immigrants arriving from the Caribbean are protected by the stirring up racial hatred offence (as defined by s 17 of the Public Order Act 1986) on grounds of their colour or race, then what about people against whom hatred might also be stirred up not ostensibly because of their colour or race but on grounds of their immigration status as being economic migrants, illegal immigrants, so-called "bogus asylum seekers", failed asylum seekers, genuine asylum seekers, or even refugees? Are they to be included under the technical term 'race' on grounds of their nationality or citizenship?[147] For another thing, because Jews have been covered under the legislation as a racial or ethnic group, courts in England and Wales have on occasions convicted Muslim activists and clerics for inciting racial hatred against Jews − for example, *R. v. Iftikhar Ali* (2002)[148] and *R. v. El-Faisal* (2003).[149] However, ironically, the courts have not regarded Muslims as belonging to racial, ethnic or

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[145] Cf The Law Commission, *Hate Crime: Should The Current Offences Be Extended?* (London: HMSO, 2014) paras 7.12-7.18; Chara Bakalis, "Legislating Against Hatred: The Law Commission's Report on Hate Crime" (2015) *The Criminal Law Review* 192 at 205-6.

[146] House of Commons Debate on the Race Relations Bill, House of Commons, 3 May 1965, *Hansard*, vol 711, cols 932-3, http://hansard.millbanksystems.com/commons/1965/may/03/race-relations-bill, last accessed June 1, 2016.

[147] Interestingly, in the case of racially aggravated crimes or hate crimes, the courts in *R v Rogers* [2007] UKHL 8 and *Attorney General's Reference (No 4 of 2004) R v D* [2005] EWCA Crim 889 did interpret the words 'bloody foreigner' and 'immigrant doctor' as relating to a race for the purposes of the offence.

[148] No. T2001/0599, Southwark Crim Ct, May 3 (involving the prosecution of a member of the group al-Muhajiroun for distributing leaflets likely to stir up racial hatred against Jews).

[149] No. T20027343, Central Crim Ct, March 7 (involving the prosecution of a Muslim cleric for several public order offences including using threatening, abusive or insulting words or behavior with intent to stir up racial hatred against Jews).

national groups for the purposes of interpreting the stirring up racial hatred offence − a view consistent with a leading case in the field of anti-discrimination law, *Nyazi v. Rymans Ltd* [1988].[150] And so, a rabbi could not be convicted for stirring up racial hatred against Muslims. Perhaps not surprisingly, then, various Muslim groups and politicians argued on grounds of parity (treating like groups alike) for extending existing incitement to hatred laws so that they covered Muslims. In 2005, for example, the office of the then Home Secretary, Charles Clarke MP, allegedly wrote to several mosques to explain '[w]e cannot see why it is right to have protection in law for Jews and Sikhs, but wrong to extend it to other communities like the Muslim community.'[151]

Following on the heals of the Racial and Religious Hatred Act 2006, which introduced the stirring up religious hatred offence and effectively extended protection to Muslims, yet further anomalies were identified in the treatment of other groups. Thus, in 2007 Chris Bryant MP declared that it was high time to introduce an offence of stirring up hatred on grounds of sexual orientation in order to 'overcome anomalies' in the relevant laws.[152] Likewise, in 2011 the Equality and Human Rights Commission defended the creation of a new offence of stirring up hatred on grounds of disability for the sake of 'parity'.[153] More recently, a significant number of the individuals and stakeholder organisations who took part in the Law Commission's consultation exercise allied to its report *Hate Crime: Should the Current Offences be Extended?* argued on the basis of parity for the creation of new stirring up hatred offences for both disability and transgender identity.[154] The Commission itself ultimately did not recommend this extension for mainly practical reasons, which I intend to discuss in the next section. However, in 2015 the House of Commons Women and Equalities Committee also heard evidence from a number of expert witnesses on the need for parity of protection for people with transgender identities.[155] Pace the Law Commission, the Women and Equalities Committee recommended that '[t]he Government should introduce new hate crime legislation which extends the existing provisions on [...] stirring up hatred so that they apply to all protected characteristics, as defined for the purposes of the Equality Act 2010.'[156]

Although much more could be said about these particular arguments, here I am interested in critically evaluating consistency as a general approach to specifying the proper scope of incitement to hatred laws. One potential weakness in the current approach is that the principles of consistency may underdetermine single best

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[150] EAT 86.

[151] A blank version of Clarke's letter appears on the following website: http://www.civitas.org.uk/pdf/ClarkeLetter.pdf (last accessed 25/10/15).

[152] HC Column 59, October 8, 2007, Criminal Justice and Immigration Bill Order for Second Reading.

[153] Equality and Human Rights Commission, *Hidden in Plain Sight* (London: Equality and Human Rights Commission, 2011) at 154, www.equalityhumanrights.com/sites/default/files/documents/disabilityfi/ehrc_hidden_in_plain_sight_3.pdf, last accessed May 26, 2015.

[154] The Law Commission, *supra* note 145 at paras 7.12 and 7.17.

[155] House of Commons Women and Equalities Committee, *Transgender Equality, First Report of Session 2015–16*, January 14, 2016, at paras 269-72, www.publications.parliament.uk/pa/cm201516/cmselect/cmwomeq/390/390.pdf, last accessed May 26, 2016.

[156] *Ibid* at para 275.

solutions to inconsistency. Consider parity in the treatment of groups and a situation in which one group enjoys protection via an existing stirring up hatred offence, whereas another, similar group does not enjoy such protection. There are two main ways to achieve parity in this situation. The first is to expand the existence stirring up hatred offence or else create a new stirring up hatred offence so as to protect the group that is as yet unprotected. This involves a kind of levelling up of protection: members of a group are said to have a *prima facie* right to the same high level of protection that other groups already enjoy. A second way is to withdraw or repeal the existing stirring up hatred offence without introducing any new offence. This involves a kind of levelling down of protection: groups who currently enjoy protections are said to have no right to a level of protection that other groups do not enjoy. The problem is that the principle of parity does not in itself dictate which of these two strategies is best. In terms of parity alone, either is acceptable. This means that the argument for the levelling up strategy over the levelling down strategy is dependent not merely on the principle of parity but also on treating the existing offence as given or as having a sound or generally accepted rationale. In other words, in the absence of a generally accepted rationale for the existing offence the argument would probably not be made for expanding it or creating a new offence like it. Conversely, the argument for the levelling down strategy over the levelling up strategy is dependent not merely on the principle of parity but also on questioning the rationale for the existing offence. Hence, it is partly because the rationale for the existing offence no longer commands widespread acceptance that the case for retrenchment is being made. The upshot is that consistency is only one of a number of principled considerations that are likely to be needed in order to determine the proper scope of incitement to hatred laws.

By way of illustration of this problem, consider once again the case of incitement to hatred against Muslims. Up until 2006 it could have been an offence to use threatening, abusive or insulting words with the intention or likelihood of stirring up hatred against Jews defined as an ethnic group − including words identifying or picking out Jews as an ethnic group partly on the basis of their religious beliefs − but not an offence to use threatening, abusive or insulting words with the intention or likelihood of stirring up hatred against Muslims defined as an ethnic group − including words identifying or picking out Muslims as an ethnic group partly on the basis of their religious beliefs.[157] Now it would be incorrect to say that prior to 2006 Muslims enjoyed no legal protections against hate speech whatsoever. In England and Wales the Crown Prosecution Service (CPS) already had the power to prosecute someone who used Islamophobic hate speech in the process of committing a religiously aggravated public order or harassment offence under ss 31 and 32 of the Crime and Disorder Act 1998 (as amended by the Anti-terrorism, Crime and Security

[157] This anomaly was coupled with the fact that at the time Christians but not Muslims also enjoyed protection of their religious beliefs through the UK's blasphemy laws (which were not repealed until the Criminal Justice and Immigration Act 2008). Thus, in the words of Tariq Modood, 'Muslims in particular feel that they suffer a double discrimination: they do not enjoy the legal protection favoured on the majority religion; and, not being a racial group, they are not recognised as a group protected by the incitement to racial hatred offence.' Tariq Modood, "Muslims, Incitement to Hatred and the Law" in John Horton, ed, *Liberalism, Multiculturalism, and Toleration* (Basingstoke: Macmillan, 1993) at 147.

Act 2001).[158] Nevertheless, before 2006 Jews but not Muslims were protected under the stirring up racial hatred offence. This inconsistency mattered even more because the maximum custodial sentence for the stirring up racial hatred offence − an offence that was inapplicable to Islamophobic hate speech − was higher than for comparable religiously aggravated public order offences − offences that were applicable to Islamophobic hate speech. So, for example, at that time the maximum custodial sentence for the offence of displaying writing, say, which is threatening, abusive or insulting and is intended or likely under the circumstances to stir up racial hatred − such as against Jews − was seven years under s 18(1) of the Public Order Act 1986. Yet the maximum custodial sentence for the discreet religiously aggravated offence of displaying writing, say, which is threatening, abusive or insulting and with the intention of causing harassment, alarm or distress − such as to Muslims − was just two years under s 31(1)(b) of the Crime and Disorder act 1998 (as amended by the Anti-terrorism, Crime and Security Act 2001). The anomaly was further exacerbated by the fact that s 9 of the Public Order (Northern Ireland) Order 1987 made it an offence in Northern Island (under direct rule from Great Britain) to stir up hatred on grounds of religious belief. So Muslims in Northern Ireland enjoyed protections not afforded to Muslims in other parts of the UK. Consequently, some scholars insisted that England and Wales needed the same stirring up religious hatred offence that existed in Northern Ireland.[159] But herein lies the problem with the current approach. Put simply, the argument for a new stirring up religious hatred offence is underdetermined by the principle of parity. For, it would have been feasible to remove the inconsistency by adopting any one of the following courses of action: (i) Legislate a new stirring up religious hatred offence; (ii) Repeal the existing stirring up racial hatred offence; (iii) Revise the existing stirring up racial hatred offence so as to explicitly name Muslims along with Jews as racial or ethnic groups or else direct judges to change their working definitions of race and ethnicity so as to include Muslims along with Jews as racial and/or ethnic groups for the purposes of interpreting the offence; (iv) Revise the existing stirring up racial hatred offence so as to explicitly exclude both Jews and Muslims as racial or ethnic groups or else direct judges to revise their working definitions of race and ethnicity so as to exclude both Jews and Muslims as racial or ethnic groups for the purposes of interpreting the offence.

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[158] For example, in *R. v. Norwood* (2002) Oswestry Mag Ct, December 13, Mark Anthony Norwood was convicted of a religiously aggravated offence of displaying 'any writing, sign or other visible representation which is threatening, abusive or insulting, within the hearing or sight of a person likely to be caused harassment, alarm or distress thereby' under s 5(1)(b) of the Public Order Act 1986, aggravated in the manner that 'the offence is motivated (wholly or partly) by hostility towards members of a racial or religious group based on their membership of that group' under ss 28(1)(b) and s 31(1)(c) of the Crime and Disorder act 1998 (as amended by the Anti-terrorism, Crime and Security Act 2001). Norwood had displayed a large poster in the window of his first-floor flat depicting the Twin Towers in flames, with a caption containing the words "Islam out of Britain − Protect the British People" and a symbol of the crescent and star in a prohibition sign. Norwood subsequently lost appeals in *Norwood v. DPP* [2003] EWHC 1564 (Admin) and *Norwood v. United Kingdom* (2005) 40 EHRR 11.

[159] See, e.g., Modood, *supra* note 157 at 142.

At this juncture one could, of course, try to make an appeal to the principle of higher-order consistency in the enactment of criminal law, which speaks to consistency in the application of legislative rationales. One possible rationale for banning incitement to racial hatred is that certain kinds of racist hate speech can contribute to a climate of hatred and fear. Applying this same rationale to the case of Muslims could justify course of action (i) based on a parallel concern that stirring up hatred against Muslims can contribute to a climate of hatred characterised in part by an increased likelihood of acts of discrimination and violence against Muslims, as well as an increased fear among Muslims of acts of discrimination and violence.[160] However, this argument for creating a new stirring up religious hatred offence is also underdetermined by the principle of higher-order consistency in the enactment of criminal law. This is because appealing to the principle of higher-order consistency and the aforementioned rationale would also justify course of action (iii).[161] Appealing to the principle of higher-order consistency does not by itself determine one course of action as being better than another if either represents the consistent application of legislative rationales. Indeed, the equivalent suitability of (iii) is all the more apparent given the development of Modood's own thinking on Islamophobic hate speech in the wake of the Danish cartoons controversy.[162] Modood presented the Danish cartoons − or two of the cartoons[163] − not as pure expressions of religious Islamophobia but as instances of *quasi-racist* Islamophobia, a type of racism that comes close to ethnophobia.[164] As he explains, '[i]t is true that "Muslim" is not a (putative) biological category in the same way as "black" or "south Asian", aka "Paki", or Chinese. But nor was "Jew" once: a long, non-linear history of racialization turned a faith group into a "race".'[165] This explanation prompts the following question. If public expressions of Islamophobia amount to quasi-racism, and if the operative rationale for banning incitement to hatred is to tackle speech that contributes

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[160] Cf *ibid* at 146; Raymond Chow, "Inciting Hatred or Merely Engaging in Religious Debate? The Need for Religious Vilification Laws" (2005) 30 *Alternative Law Journal* 120 at 120.

[161] See, e.g., Shabbir Akhtar, "Is Freedom Holy to Liberals? Some Remarks on the Purpose of Law" in *Free Speech: Report of a Seminar, Discussion Papers 2* (London: Commission for Racial Equality, 1990) at 24; Justice, Written Submission to the Select Committee on Religious Offences in England and Wales, August, 2002, www.parliament.the-stationery-office.co.uk/pa/ld200203/ldselect/ldrelof/95/95w47.htm, last accessed May 26, 2016. Precisely this course of action was also advocated by Tony Baldry MP in the House of Commons in 2001. See House of Commons Debate on the Anti-terrorism, Crime and Security Bill, House of Commons, 19 November 2001, Hansard, vol. 375, col. 35, http://hansard.millbanksystems.com/commons/2001/nov/19/anti-terrorism-crime-and-security-bill, last accessed June 1, 2016.

[162] Tariq Modood, "Obstacles to Multicultural Integration" (2006) 44 *International Migration* 51.

[163] *Ibid* at 54.

[164] *Ibid* at 55-56.

[165] *Ibid* at 56. A similar point was made in 2001 by Lord Desai in a House of Lords Debate. See House of Commons Debate on the Anti-terrorism, Crime and Security Bill, House of Lords, 27 November 2001, *Hansard*, vol. 629, col. 246, www.publications.parliament.uk/pa/ld200102/ldhansrd/vo011127/text/11127-12.htm, last accessed June 1, 2016.

to a climate of hatred, then why not argue for the assimilation of Muslims into incitement to racial hatred provisions as opposed to creating a new stirring up religious hatred offence?[166] The key point here is that additional rationales must be adduced as determinative reasons for choosing course of action (i) over (iii).[167]

The inconsistencies did not end once the Racial and Religious Hatred Act 2006 came into effect, adding the stirring up religious hatred offence. The current body of legislation contains seemingly arbitrary differences in the thresholds for prosecution for the different offences. Part 3 of the Public Order Act 1986 covers incitement to racial hatred and the test remains a person who uses 'threatening, abusive or insulting words or behaviour' and '(a) he intends thereby to stir up racial hatred, or (b) having regard to all the circumstances racial hatred is likely to be stirred up thereby'. By contrast, Part 3A of the Public Order Act 1986 (as amended by the Racial and Religious Hatred Act 2006) covers incitement to religious hatred and the test is 'a person who uses threatening words or behaviour' and 'he intends thereby to stir up religious hatred'. Therefore, so long as courts continue to deal with cases of incitement to hatred against Jews under Part 3 (incitement to racial hatred) and cases of incitement to hatred against Muslims under Part 3A (incitement to religious hatred), then in theory it is easier for prosecutors to secure convictions in cases of incitement to hatred against Jews than it is to secure convictions in cases of incitement to hatred against Muslims. The anomaly did not go unnoticed by members of parliament. Paul Goggins MP, for example, argued that if we cannot have the anomaly of it being an offence to stir up hatred against Jews and Sikhs (qua racial groups) but not an offence to stir up hatred against Muslims and Christians (qua religious groups), then, by the same token, 'we cannot have different rules [or thresholds] for Jews and Sikhs than for Muslims and Christians.'[168] Once again,

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[166] Cf Modood, *supra* note 162 at 52.

[167] One practical rationale for favouring (i) over (iii) might be that a new stirring up religious hatred offence is needed not so much for cases where prosecutors and courts reasonably believe that a speaker is stirring up hatred against Muslims as a racial or ethnic group but for cases in which the speaker is picking out, and stirring up hatred against, Muslims on the basis of their religious beliefs very specifically. It might be more difficult to build a successful prosecution against such a speaker if stirring up hatred against Muslims is assimilated into the existing stirring up racial hatred offence. No doubt some forms of Islamophobia in the UK are forms of quasi-racism (based on false generalisations about the shared race or skin colour of Muslims) or ethnophobia (based on false generalisations about the shared heritage, culture, language, customs, and so on of Muslims, including but not limited to religious beliefs specifically). But since 9/11 and 7/7 it is possible to discern strains of distinctly religious Islamophobia, often fuelled by a stream of negative stereotypes and pejorative characterisations of Muslims in the media and on the Internet which draw simplistic, misleading and false connections between the Muslim faith and acts of terrorism or the barbaric treatment of women and girls. And so if there are genuine cases of speakers stirring up hatred against Muslims identified either exclusively or predominantly in terms of religious beliefs, this may be grounds for creating a separate stirring up religious hatred offence.

[168] Standing Committee E, Debate on the Racial and Religious Hatred Bill, House of Commons, 29 June 2005, col. 73, www.publications.parliament.uk/pa/cm200506/cmstand/e/st050629/pm/50629s04.htm , last accessed June 1, 2016.

however, appealing to the principle of parity does not lead to a single correct way of resolving inconsistency. For, it would have been feasible to remove the inconsistency by adopting either of the following two courses of action: (v) Define the new stirring up religious hatred offence with the same lower threshold for conviction as the existing stirring up racial hatred offence; (vi) Revise the existing stirring up racial hatred offence so that it has the same higher threshold for conviction as the new stirring up religious hatred offence.[169]

Would it help to make an appeal to the principle of higher-order consistency? Suppose part of the underlying function or purpose of incitement to hatred law is to combat the creation of climates of hatred and fear, and this applies equally to race and religion. And suppose this principled reason suggests that generally speaking we should prefer lower prosecution thresholds to higher prosecution thresholds. Based on this we now do appear to have a consistency-based reason to favour (v) over (vi). However, there remains incompleteness in the consistency specification precisely at the point at which the principle of higher-order consistency is introduced. The incompleteness consists in the fact that this principle tells us to treat like reasons alike; it does not tell us what those reasons should be. And so we must inevitably, I think, appeal to other approaches, such as the functional approach, in order to obtain the sorts of reasons that can be utilised by or fed into the principle of higher-order consistency. Without the other approaches, there would be nothing to go on.

There is one final area in which inconsistencies may emerge that will serve to highlight this incompleteness. The area is constitutional law and, in particular, the constitutional principle that governments must secure the basic rights and freedoms of all citizens such that it must not deny the protection of law to any citizens. It may be possible to interpret this principle as flowing from or serving the more abstract principle of parity (treating like groups alike).[170] What is more, it has seemed to some writers axiomatic to say that the principle of equal protection requires governments to extend any protections afforded to some groups who are the subject of harmful hate speech to other similar groups who are the subject of similarly harmful hate speech.[171]

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[169] Some people might argued that the inconsistency is inconsequential on practical grounds so long as the numbers of successful prosecutions for both the stirring up racial hatred offence and the stirring up religious hatred offence remain very small, despite the differential thresholds. Then again, we cannot be absolutely certain what the prosecution rate would be for the stirring up religious hatred offence if the threshold were lower. Moreover, the inconsistency could remain important, despite low prosecution rates, if it sends out an unintended and unwelcome message to Muslims that the government takes combating Islamophobic hate speech less seriously than combating anti-Semitic hate speech.

[170] See, e.g., Robin West, *Progressive Constitutionalism: Reconstructing the Fourteenth Amendment* (Durham, NC: Duke University Press, 1994) at 67.

[171] See, e.g., Marie-France Major, "Sexual-Orientation Hate Propaganda: Time to Regroup" (1996) 11 *Canadian Journal of Law of Law and Society* 221 at 228 n 27. Cf Catharine MacKinnon, *Sexual Harassment of Working Women: A Case of Sex Discrimination* (New Haven, CT: Yale University Press, 1979) at 6; Charles R. Lawrence III, et al. "Introduction" in Mari Matsuda et al., eds, *Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment* (Boulder, CO: Westview Press, 1993) at 9; Richard Delgado, "Two Ways to Think About Race: Reflections on the Id, the Ego, and Other Reformist Theories of Equal Protection"

How do these ideas relate to the situation of hate speech law in the UK? The Human Rights Act 1998 sets out the basic rights and freedoms of all citizens in the UK and it does so by giving further effect to the European Convention of Human Eights (ECHR). Now it might be argued that appealing to Art 14 of the ECHR could justify an extension of the UK's existing incitement to hatred laws to other groups when combined with Art 10(2) of the ECHR. To explain, Art 14 makes it clear that '[t]he enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status'. And Art 10(2) states that the exercise of the right to freedom of expression protected under Art 10(1) may be restricted by laws that 'are necessary in a democratic society'. Therefore, if Art 10(2) can be interpreted as implying that hate speech laws are necessary in a democratic society to secure the rights and freedoms of those groups who are subject to it, then Art 14 seems to imply that this securing should be done for all citizens or 'without discrimination on any ground'. How are these arguments incomplete? Put simply, these are not freestanding arguments but instead piggy-back on arguments about the conditions under which it would or would not amount to discrimination to draw distinctions between the different characteristics listed in Art 14. Some such arguments may have to do with the underlying function or purpose of incitement to hatred laws. After all, if the function of incitement to hatred laws strongly implies that characteristics c1, c2, and c3 should be protected but not other characteristics c4, c5 and c6, then it would not be unfair discrimination for incitement to hatred laws to protect groups of people with characteristics c1, c2, and c3 only. In other words, it is hard to know what the *relevant* discriminatory grounds are in relation to the scope of incitement to hatred laws unless we know something of the function of such laws.

III. Practical specification

A second approach to specifying the proper scope of incitement to hatred laws focuses on the ostensible goals or apparent aims of such laws and then attempts to solve the problem of specification in a practical way based on the relevant goals or aims. It usually asks questions of the following form, 'If the ostensible goal or apparent aim of hate speech law is X, then what would have to be the case in order for that goal or aim to apply not merely to characteristics c1, c2 and c3 but also to c4, c5 and c6?' So, for example, one ostensible goal of incitement to hatred law might be to deter acts of incitement to hatred. Another could be more simply to punish people who engage in incitement to hatred. Notice, however, that, in contrast to functional specification, an approach that concentrates solely on ostensible goals may ignore the underlying or real functions, purposes or objectives of incitement to hatred laws and as such may provide a limited or incomplete justification for the very existence of such laws.

If one ostensible goal of incitement to hatred laws is to deter words or behaviour that amount to stirring up hatred, then a basic practical requirement of any extension of such law to cover more groups must be that members of these other groups are in fact (or are likely to be) the object of words or behaviour that stirs up hatred against

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(2001) 89 *Georgetown Law Journal* 2279 at 2289-90. These writers are primarily interested in the US Fourteenth Amendment equal protection clause.

them. It will not suffice merely to point to the existence of at least some instances of hate speech against members of these groups; this is because not all hate speech is incitement to hatred. Thus, if one is very specifically arguing for an extension of incitement to hatred laws to cover sexual orientation, for example, it is not enough to show that instances of homophobic hate speech can be found in the media and other areas of public life.[172] And if one wanted to push for an extension to cover people with disabilities, it is not enough to flag up evidence of cyber-bullying of people with disabilities[173] or the existence of websites proclaiming hatred of 'retards', 'spastics' and 'cripples'[174] or the fact that negative media portrayals of people with disabilities may have increased off the back of the austerity policies pursued by the UK coalition government after 2010 or even that many people with disabilities in the UK have reported an increase in their own personal experience of direct, face-to-face verbal harassment and hostility potentially as a result of negative media portrayals of people with disabilities.[175] Likewise, if one wanted to justify an extension of existing incitement to hatred laws to also cover body weight and age, it would not be enough to refer to studies showing that almost three quarters of overweight women in the UK have received derogatory remarks regarding their weight[176] or to point to surveys revealing that 41% of respondents in the UK say they have experienced ageism in the form of subtle prejudice or lack of respect.[177] Instead, it would be necessary to show that actual instances of the various forms of hate speech that currently surround sexual orientation, disability, body weight and age have in fact reached the level of stirring up hatred on a par with other forms of stirring up hatred that are already criminalised.[178]

In 2007 the parliamentary committee examining the Criminal Justice and Immigration Bill received expert witness evidence from the Chief Executive of Stonewall, Ben Summerskill, on the question of introducing a new offence of stirring

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[172] See, e.g., Ellen Faulkner, "Homophobic Hate Propaganda in Canada" (2006) 5 *Journal of Hate Studies* 63 at 70-72.

[173] See, e.g., Equality and Human Rights Commission, *supra* note 153 at 154.

[174] See, e.g., Mark Sherry, *Disability Hate Crime: Does Anyone Really Hate Disabled People?* (Farnham: Ashgate, 2010) at 29.

[175] See, e.g., Disability Rights UK, *Press Portrayal of Disabled People: A Rise in Hostility Fuelled By Austerity?* (London: Disability Rights UK, 2012), www.disabilityrightsuk.org/sites/default/files/pdf/disabilitypresscoverage.pdf, last accessed May 26, 2015.

[176] See, e.g., All Party Parliamentary Group on Body Image, *Reflections on Body Image* (London: HMSO, 2012) at 61, www.ncb.org.uk/media/861233/appg_body_image_final.pdf, last accessed May 26, 2015.

[177] See, e.g., European Social Survey, *Experiences and Expressions of Ageism: Topline Results (UK) from Round 4 of the European Social Survey*, 2012 at 5, www.europeansocialsurvey.org/docs/findings/ESS4_gb_toplines_experiences_and_expressions_of_ageism.pdf, last accessed 26 May, 2015.

[178] Cf Ian Cram, "Hate Speech and Disabled People: Some Comparative Constitutional Thoughts" in Anna Lawson & Caroline Gooding, eds, *Disability Rights in Europe: From Theory to Practice* (Oxford: Hart Publishing, 2005) at 79; Kay Goodall, "Challenging Hate Speech: Incitement to Hatred on Grounds of Sexual Orientation in England, Wales and Northern Ireland" (2009) 13 *The International Journal of Human Rights* 211 at 218.

up hatred on grounds of sexual orientation. He addressed the aforementioned practical issue head-on.

> We are anxious that, although there is protection around racial and religious hatred, there is no such protection for gay people, and we are mindful that there has been an increase in the incidence in recent years of what seem to us to be very obvious examples of incitement to hatred that would not otherwise be caught by the criminal law. One key area is in the creation and distribution of what is quite often reggae music.[179]

In the end the government concluded that introducing a new offence of stirring up hatred on grounds of sexual orientation was an appropriate response to an actual problem. Writing to the Joint Committee On Human Rights at the end of 2007, the then Minster of State for Justice, David Hanson MP, put the position thusly.

> The Government considers that a compelling case can be made that there is a pressing social need because of the evidence of hatred against homosexual people being stirred up by, amongst others, some extreme political groups and song lyrics, and of widespread violence, bullying and discrimination against homosexual people.[180]

By contrast, when a year later in 2008 the same Minister was asked by the same Joint Committee to set forth the government's view on the merits of creating a new offence of stirring up hatred on grounds of transgender identity he stated the following.

> We endorse the Committee's concern that legislation should be firmly based on evidence.
>
> The Government has been in contact with a number of groups and individuals representing transgender people, including Press for Change, Gender Trust, FTM network, Gender Identity Research and Education Society, GALOP and the Beaumont Trust. We have heard some eloquent and specific examples of the difficulties which some transgender people may face.
>
> Like the Committee, the Government has considerable sympathy for the views expressed by transgender organisations and we want to minimise the difficulties faced by many transgender people. But the evidence we have suggests that most of the incidents described are already criminal, and should be dealt with by existing criminal law. Incitement to commit a crime (as opposed to stirring up hatred) is already a criminal offence. One case of disparaging song lyrics was cited as evidence, the Government believes that although distasteful they would be unlikely to be considered threatening to transgender people as a group.

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[179] General Committee Debates, Public Bill Committee examining the Criminal Justice and Immigration Bill, House of Commons, 16 October 2007, Col. 74, www.publications.parliament.uk/pa/cm200607/cmpublic/criminal/071016/pm/71016s01.htm, last accessed June 1, 2016.

[180] David Hanson, Letter to the Joint Committee on Human Rights, November 25, 2007 at para 6, www.publications.parliament.uk/pa/jt200708/jtselect/jtrights/37/3710.htm, last accessed May 26, 2016.

> In summary, we have not seen any compelling evidence of words, behaviour or material which are threatening and intended to stir up hatred against transgender people as a group.[181]

What might 'compelling evidence' look like? Presumably it would have to be not only methodologically robust but also comprehensive in nature. Specifically, perhaps it might include data from large-scale quantitative discourse analyses of media and Internet content, as well as reliable statistics based on large-scale gathering and recording of reported incidents of incitement to hatred. At any rate, in 2010 the government reaffirmed its position that there was insufficient evidence that hatred was being stirred up against people with transgender identities to justify creating a new offence, and also insufficient evidence in relation to the stirring up of hatred against people with disabilities.[182]

Nevertheless, I believe that it is more difficult to draw policy conclusions from this putative evidence gap than one might at first assume. On the one hand, let us just imagine for the sake of argument (and almost certainly contrary to fact) that compelling evidence does exist and what it shows is that the extent of incitement to hatred relating to disability and transgender identity in the media and on the Internet is very small both in absolute terms and relative to race, religion and sexual orientation, as well as that there are few reported incidents of incitement to hatred relating to disability and transgender identity and once again fewer than for race, religion and sexual orientation. It would not necessarily follow from this evidence (if it existed) that the creation of new stirring up offences for disability and transgender identity are unwarranted. In terms of incitement to hatred in the media and on the Internet, it may be that the 'pressing social need' requirement is different for people with disabilities and people with transgender identities (people who may feel particularly vulnerable or socially excluded), and so a lower extent may be sufficient to warrant intervention. In terms of reporting, it may be that people with disabilities and people with transgender identities (again people who may feel particularly vulnerable or socially excluded), as well as the wider population (people who may not be used to looking out for or even recognising incitement to hatred against people with disabilities and people with transgender identities), are simply not yet reporting incidents at the same rate as for other forms of incitement to hatred, and this could be for various reasons other than that there are fewer incidents to report.[183]

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[181] David Hanson, Letter to the Joint Committee on Human Rights, March, 12, 2008, www.publications.parliament.uk/pa/jt200708/jtselect/jtrights/81/8118.htm, last accessed May 26, 2016.

[182] Ministry of Justice, Circular 2010/05: Offences of Stirring up Hatred on the Grounds of Sexual Orientation, May, 2010 at para 20, http://webarchive.nationalarchives.gov.uk/20110201125714/http://www.justice.gov.uk/publications/docs/circular-05-2010-sexual-orientation-stirring-up-hatred.pdf, last accessed May 26, 2016.

[183] Of course, there are also some general problems with under-reporting of incitement to hatred that cut across its different forms (racial, religions, and so on). One is that people, including those who are the objects of incitement to hatred and also those who oppose it, are too scared or too disempowered to report incidents, which might itself be one aspect of the climate of fear created by hate speech. Another is that the stirring up of hatred is something that is done primarily within or among hate groups and would-be members of hate groups or like-minded people, particularly

What seems far more likely, on the other hand, is that there is currently a lack of methodologically robust and comprehensive evidence one way or the other. Now it is certainly true that non-governmental organisations (NGOs) like Disability Rights UK do from time to time commission research into negative media portrayals of people with disabilities and that NGOs like True Vision do gather and record self-reports of transphobic hate incidents, to give just two examples. But because these evidence-gathering practices are not coordinated by governmental authorities, and because each NGO focuses (or is seen to focus) on particular groups at particular times, and does so with limited resources, and does not seek to pinpoint incitement to hatred specifically, the evidence generated is patchy and unsystematic. At present governmental agencies do not regularly commission large-scale quantitative discourse analyses looking into the true extent of incitement to hatred on grounds of disability or transgender identity in the media and on the Internet. Nor do they engage in large-scale gathering and recording of reported incidents of incitement to hatred on grounds of disability or transgender identity, albeit the Home Office does capture reported incidents relating to existing stirring up hatred offences covering race, religion and sexual orientation within its recorded crime figures under the public order offences category.[184] But does this mean, therefore, that creating new stirring up hatred offences for disability and transgender identity cannot be warranted? Again not necessarily. For one thing, it would be hard to understand the logic of a decision to refrain from creating new stirring up hatred offences whilst leaving the existing offences in place rather than removing the existing offences if there is a paucity of evidence to call upon for any of the characteristics in question. For another thing, the paucity of evidence might reflect a lack of institutional impetus and political will on the part of governmental agencies. And there may be various reasons for this. One malign reason could be that lack of research is symptomatic of precisely the sort of attitudes that can sow the seeds of hate speech itself, namely, lack of concern for, empathy toward or solidarity with people with disabilities and people with transgender identities. A more benign reason is simply that the issues around incitement to hatred towards such people are relatively new to the agenda of civil servants, politicians, policymakers, and media professionals, if not to stakeholders, campaigners and academics.[185] Moreover, in a time of departmental budget cuts in the UK the resources available to the Home Office and Ministry of Justice to investigate possible extensions of the law may be limited, not to mention the fact that parliamentary time to discuss and push through necessary provisions is at a premium. As an illustration of these practical issues,

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on the Internet but also in meetings and gatherings in person. And so, the people who are most likely to make complaints, such as people who are members of the groups against whom hatred is being stirred up or people who are outspoken critics of hate speech, may not be exposed to this speech. And so it goes unreported.

[184] It is worth noting that the European Commission Against Racism and Intolerance (ECRI), of which the UK is a member, has recently adopted General Policy Recommendation No. 15 on Combating Hate Speech of December 2015, Recommendation 3 of which calls on governments to gather, record and publicly disseminate data on reported cases of incitement to hatred, www.coe.int/t/dghl/monitoring/ecri/activities/GPR/EN/Recommendation_N15/REC-15-2016-015-ENG.pdf, last accessed June 1, 2016.

[185] Cf Ivan Hare, "Free Speech and Incitement to Hatred on Grounds of Disability and Transgender Identity: The Law Commission's Proposals" (2015) *Public Law* 385 at 391.

consider the fact that as of June 2016 the UK government has still yet to respond officially to the Law Commission's 2014 report on extending hate crime legislation including the stirring up hatred offences to cover additional groups.

Let us take it as read, therefore, that governmental authorities should take on the responsibility for creating or obtaining methodologically robust and comprehensive evidence. Then again, what should legislators do in the meantime whilst they wait for compelling evidence to come in? One strategy is to hold off creating any new stirring up hatred offences until the results are in. This is precisely the view of the Joint Committee on Human Rights.[186] The problem with this approach, however, is that some groups may continue to be the objects of incitement to hatred whilst they wait for governmental authorities to create or obtain compelling evidence, weigh it, draft an action plan, consult with stakeholders, and finally attempt to get legislation passed through both Houses of Parliament. It goes without saying that there is unlikely to be a similar hiatus among hate speakers during this potentially lengthy period. Indeed, members of groups who are subject to incitement to hatred and who want the government to create new offences may find themselves in the perverse position of welcoming a spike in hate speech against them, so that it can be picked up by researchers.

A second strategy is for legislators to go ahead and create new stirring up hatred offences based on suspicions or anecdotal reports in lieu of methodologically robust and comprehensive evidence. What, if anything, can be said on behalf of this strategy? It seems to me that some rationales are better than others. One is that creating new offences could give people the confidence they need to report incidents and this in turn will enable government authorities to build up a more reliable picture of the phenomena in question. Yet an obvious objection here is that the rationale proposes to create new offences in order to gain some certainty on the existence of phenomena whose existence is in fact a precondition for introducing the new offences in the first place.[187] Nonetheless, a second rationale is based on the old adage that "there is no smoke without fire". This could mean two things. First, that if people are raising suspicions about or offering anecdotal reports of certain phenomena, the chances are that the phenomena do exist, even if nobody yet knows for certain. Of course, it might be countered that the people raising suspicions or offering anecdotal reports are biased or have a vested interest or are simply unreliable witnesses because of their own traumatic experiences. But what if their concerns are supported by a second application of the adage? Suppose we know for certain that members of groups who are the objects of incitement to hatred are also typically subject to discrimination or violence and that there is some reciprocal connection between stirring up hatred and the discrimination or violence. In which case, if we also know for certain that members of a given group are subject to discrimination or violence, this may lend additional credence to the suspicions or anecdotal reports of incitement to hatred against them. A third, related rationale is a conscious adoption of a certain form of the precautionary principle. In the absence of methodologically robust and comprehensive evidence of the existence of incitement to hatred against particular groups in society but mindful of the fact that this sort of hate speech can have very

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[186] Joint Committee On Human Rights Fifteenth Report, Conclusions and Recommendations, 25 March 2008 at para 13, www.publications.parliament.uk/pa/jt200708/jtselect/jtrights/81/8110.htm, last accessed June 1, 2016.

[187] Cf The Law Commission, *supra* note 145 at paras 7.139-7.142 and 7.145.

seriously harmful effects, especially for members of those groups but also for society as a whole, a perfectly rational course of action for government authorities to take is to not merely commence gathering the evidence but also to combat the risk of the seriously harmful effects through an extension of the relevant legislation whilst they wait for that evidence to come in and during which time the burden of proof is shifted toward those people who advocate non-extension on the grounds that there is no problem.[188]

Let us now turn to consider another ostensible goal of incitement to hatred law: namely, to punish wrongdoers, that is, people who stir up hatred against vulnerable groups in society. Now it might seem fair to suppose that a practical requirement of law with this sort of ostensible goal is that it can be applied to prosecutable cases and that the CPS has a reasonable prospect of securing successful convictions. If the elements that make up existing offences together create a high threshold for prosecution, then creating new offences to cover yet more characteristics but based on the elements of the existing offences, could become a pointless exercise (it might be argued) in the event that few, if any, actual cases involving those newly protected characteristics are prosecutable. In 2014, for example, the Law Commission argued that it would be futile to create new offences of stirring up hatred on grounds of disability and transgender identity because, based on the elements of the existing stirring up hatred offences relating to religion and sexual orientation (i.e., intent, use of threatening words or behaviour), the threshold required for successful prosecution would be so high that there would be small numbers of prosecutable cases and vanishingly small numbers of actual successful prosecutions.[189]

However, I believe that there is a significant weakness in this line of argument and that this weakness is a good illustration of why it would be wrong to rely exclusively upon a practical specification of the proper scope of incitement to hatred laws. If the reason not to create new offences for additional characteristics is the lack of prosecutable cases, which itself reflects the high threshold for prosecution, then surely this reason could also equally support some very different conclusion about how we should proceed.[190] For instance, it might be argued that the best solution is not to refrain from creating new offences but instead to adjust the basic elements of the new offences to create a lower threshold. Perhaps this could be done by matching the basic elements of any new stirring up hatred offences relating to disability and transgender identity not to the existing stirring up hatred offences relating to religion and sexual orientation, which have relatively high thresholds for conviction (i.e., intent, threatening words or behaviour), but instead to the stirring up racial hatred offence, which has a relatively low threshold for conviction (i.e., intent or likelihood, threatening, abusive or insulting words or behaviour). Of course, it might be countered at this stage that even the lower threshold for incitement to racial hatred has not led to a significantly higher number of successful prosecutions. But this response only invites the following question. If the Law Commission concluded that low prosecution rates are a valid reason to refrain from creating new stirring up hatred offences covering additional characteristics, why did it not also conclude that low prosecution rates are a valid reason to repeal existing stirring up hatred offences? The answer must surely be that there may be powerful rationales for the existing offences that are neither undermined nor trumped by the issue of thresholds for prosecution

[188] Cf Brown, *supra* note 137 at 247.
[189] The Law Commission, *supra* note 145 at paras 1.70, 7.120, and 7.125-7.138.
[190] Cf Bakalis, *supra* note 145 at 204-5.

and the extent of prosecutable cases. One such rationale might be the symbolic function of incitement to hatred law, to which I shall return in Part 2. And if this is true, it seems reasonable to consider whether or not the same or similar powerful rationale(s) might also apply to the new offences.

My point here is that arguments for and against the creation of new stirring up hatred offences cannot rely solely on practical considerations relating to thresholds for prosecution. After all, if authorities declared that they were going to lower the threshold for the new offences to ensure that legal professionals have plenty of prosecutable offences to work with, so that introducing the new offences is not a pointless exercise, members of the public might reasonably respond that it is not enough for new offences to create prosecutable offences; they must serve some underlying function or purpose. For example, if one wanted to justify the erection of a sign in a field that reads "People who throw stones at this sign will be prosecuted" it would not be enough to comment on how many prosecutable cases and successful prosecutions would be likely to occur. One would need to supply a good reason for creating the offence in the first place. Likewise, in order to justify enacting new stirring up hatred offences it is not enough to make arguments about what threshold would be needed in order to sustain a certain number of prosecutable cases and successful prosecutions. Instead, one would need to make more fundamental arguments about the underlying or real function or purpose of incitement to hatred laws, and one would also need to recognise that these functional arguments might be relevant to determining the thresholds.

I plan to explore the functional approach in detail in Part 2, but for now I can offer one brief illustration. One possible functional argument might support the creation of new stirring up hatred offences for disability and transgender identity but with lower prosecution thresholds because of the expressive or symbolic value of having these offences on the books with lower thresholds. A lower threshold for prosecution sends out a message that the government is genuinely interested in combating this speech because, for example, it has bona fide concern that people with disabilities and transgender identities should not face a climate of hatred and fear (to which the stirring up of hatred contributes). Of course, if this argument is accepted, then there may also be reasons of parity to adopt lower thresholds for all the stirring up hatred offences. What is more, there could be another functional argument for this lowering of thresholds for all the stirring up hatred offence once again couched in terms of expressive or symbolic value: namely, it sends out a message that the government has no greater or lesser concern for people with disabilities or transgender identities than for other groups in society; that there is no suggestion of a pecking order of sociolegal status among different groups based upon a hierarchy of prosecution thresholds. At any rate, it seems clear to me that these or other functional arguments, as well as consistency and democratic arguments, have just as important a role to play as purely practical considerations. That being said, some people might try to argue that characteristics such as religion, say, and are less deserving of protection because of the formal qualities of these characteristics and because of people's relationship with them. So, it is to this other type of argument that I shall turn next.

IV. Formal specification

A third approach to specifying the proper scope of incitement to hatred laws appeals to intuitions about the formal qualities of characteristics and about the forms of

people's relationships with their characteristics. These intuitions may lead us to suppose that some characteristics are deserving of, or appropriate objects of, legal protections whilst others are undeserving of, or inappropriate objects of, legal protections. Various formal distinctions have been drawn in the context of both public and academic debate on the "Who?" question. In what follows I shall submit five such distinctions to critical scrutiny.

A. Immutable versus changeable characteristics

One potentially relevant distinction is between immutable characteristics, that is, characteristics that are unchanging over time and that the individual is unable to change about him or herself, and changeable characteristics, as in, characteristics that do change over time and that the individual is to a greater or lesser extent able to change about him or herself through acts of will. During a House of Commons debate on the Racial and Religious Hatred Bill, for example, the then Shadow Attorney General, Dominic Grieve MP, argued that religion is a less eligible or fitting candidate for protection under incitement to hatred laws partly because 'race is immutable'.[191] In a similar vein, Kay Goodall contends that '[r]ace, for most people, most of the time, is indeed clear and fixed', whereas '[r]eligious affiliation, in contrast, is often less easily discerned by others and is not immutable (even if it is rare that people face an open choice in which faith to adopt).'[192] The alleged moral significance of immutability seems to rest largely in the thought that if it is literally impossible to change one's race, say, then all the more important that something is done to prevent the stirring up of racial hatred, because a person simply cannot evade the hatred by changing his or her race. Religion, by contrast, can be changed and so people can avoid incitement to hatred (so the thought goes).

What might this distinction suggest about other characteristics besides race and religion? Marie-France Major maintains that if groups of people identified by their race or ethnicity are owed protection under incitement to hatred laws because race and ethnicity are immutable characteristics − because 'it is difficult, if not impossible, to contract out of one's race or one's ethnic origin'[193] − then it is at least arguable that the same can, and should, be said of sexual orientation.[194] Furthermore, insofar as we now understand that being a homosexual is not something that is subject to change over time, whether by an act of will on the part of the individual concerned or by medical interventions like electric shock treatment, then (argues Major) it becomes especially important for legislators to safeguard or assure the equal standing of that identity such as through hate speech law.[195]

On closer reflection, however, it is by no means obvious that even race is always and strictly immutable. After all, *if* − and admittedly this is a big if − race is defined purely by skin colour, then the idea of literal immutability is undermined by the practice among some ethnic minorities, often women, of using natural and artificial

[191] Standing Committee E, Debate on the Racial and Religious Hatred Bill, House of Commons, 29 June 2005, col. 72.
[192] Kay Goodall, "Incitement to Religious Hatred: All Talk and No Substance?" (2007) 70 *Modern Law Review* 89 at 97.
[193] Major, *supra* note 171 at 229-30.
[194] *Ibid* at 229 n 33.
[195] *Ibid* at 229-30.

cosmetics to lighten skin (often at great economic expense as well as risk to dermatological well-being). It may be possible, for example, for someone to make a kind of transition from being a member of a "black race" defined by skin colour into being a member of a "brown race" also defined by skin colour. This could either weaken the claim that race is appropriately protected under incitement to hatred law or, more plausibly, demonstrate the error of thinking that immutability is relevant. Race is not the only problematic characteristic. Consider gender identity. If immutability is a necessary condition for a characteristic being eligible for protection under incitement to hatred laws, and if we want to say that gender identity ought to be protected, then we might be forced to say that gender identity is immutable. Yet this flies in the face of the transitioning experiences of many people with transgender identities − such as people who change their gender presentation from male to female or female to male in order to better fit their internal sense of who they really are. Talk of immutability might even constitute a form of misrecognition.[196] If the distinction between immutable and changeable characteristics fails to divide characteristics in ways that seem intuitive, then perhaps we need a better distinction.

B. Chosen versus unchosen characteristics

Another possibility is the distinction between chosen and unchosen characteristics. The are two ways of understanding this distinction. The first is as a backward-looking distinction between characteristics that are the products of choices made by the people who possess them and characteristics that result from something other than the choices made by the people who possess them. The second is a forward-looking distinction between characteristics that people did not choose to possess but can now choose to rid themselves of and characteristics that people did not choose to possess and are unable to rid themselves of. The difference between these two forms of the distinction will become relevant below. But either way, the alleged moral significance of the present distinction seems to reside largely in the notion that other things being equal what happens to people including whether and how they should be protected by governmental authorities should depend on the choices they make.

So how does this alternative distinction play out for characteristics like race and religion, for example? In 2002 the British Humanist Association argued against the creation of a new stirring up religious hatred offence partly on the grounds that '[r]eligions, unlike race, can be chosen or put aside'.[197] In a similar vein, Hare argued that '[w]hatever advances have been made in defining race as a social (as opposed to a purely biological) construct, it remains the case that for the vast majority who live in liberal democracies, religious adherence is a matter of choice rather than birth and the law does not usually provide the protection of the criminal law for vilification based upon the life choices of its citizens.'[198] Likewise, it has been suggested that the scope

[196] Cf Martha T. Zingo, *Sex/Gender Outsiders, Hate Speech and Freedom of Expression: Can They Say That About Me?* (Westport, CT: Praeger, 1998) at 61.

[197] British Humanist Association, Final (Third) Submission to the Select Committee on Religious Offences: Legislation on Incitement of Religious Hatred, December 4, 2002 at para 6, https://humanism.org.uk/wp-content/uploads/BHA-Submission-on-Religious-Offences-3.pdf, last accessed May 26, 2015.

[198] Ivan Hare, "Crosses, Crescents and Sacred Cows: Criminalising Incitement to Religious Hatred" (2006) *Public Law* 521 at 534-5.

of hate speech laws in general should be 'confined to racial groups, with a clear exclusion of political or social groups with voluntary membership' on the basis that 'the racial group's unique feature is the nonvoluntary nature of membership'.[199]

But just how compelling is this distinction? Not very in my opinion. It does not take much to realise that few, if any, characteristics are entirely the product of people's choices or entirely the product of things other than people's choices. Instead, the aetiology of most characteristics is a combination of choices and other things that are not choices.[200] To see this we need only reflect on two questions. First, are there any characteristics, statuses or identities which people come to possess entirely as a consequence of their own choices? Second, are there any characteristics, statuses or identities the elements of which people come to possess entirely as result of things other than their own choices? Starting with the first question, consider obesity, immigration status, sex or gender identity, and permanently disabling injury, for example. Perhaps for some obese people their body weight reflects to a very significant extent lifestyle choices. And claims about the malleability of body weight peddled by the fitness and dieting industries may not be wholly inaccurate as applied to such people. But for many other obese people their overeating and lack of exercise can be symptoms of stress, anxiety or depressive disorders which they have not chosen. In other cases obesity itself can be explained by rare genetic conditions such as Prader-Willi syndrome or underlying medical conditions such as hypothyroidism. Furthermore, one can say of virtually all obese people that they did not choose the genetically inherited body build and shape that makes it harder for them than for other people to keep their weight under control. Some economic migrants, illegal immigrants, so-called "bogus asylum seekers", failed asylum seekers, genuine asylum seekers, or even refugees may be responsible for choosing where to migrate to or where to seek asylum but many may not be. Moreover, few, if any, are personally responsible for the push factors that cause them to leave the countries of their birth, not least extreme poverty, persecution, civil wars or natural disasters. Clearly some people elect (just as others elect not) to undergo sex reassignment surgery and hormone therapy, and some people decide (just as others decide not) to take on the presentation of masculine or feminine traits other than the traits society expects them to take on. So in those particular senses they might be said to choose their sex or

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[199] David Kretzmer, "Freedom of Speech and Racism" (1987) 8 *Cardozo Law Review* 445 at 467.

[200] It might be objected here that all characteristics are entirely unchosen because all the characteristics which are most relevant to the question of the proper scope of incitement to hatred laws are socially constructed, meaning, amongst other things, that their content and boundaries are not somehow inevitable or determined by natural facts but are constructed by social groups, with particular perspectives or ways of looking at the world and particular reasons for regarding certain categories as significant. See Ian Hacking, *The Social Construction of What?* (Harvard, MA: Harvard University Press, 1999). Moreover, since no individual chooses that a given set of physical qualities will become and remain a socially significant category − because a given set of physical qualities being socially significant is determined at the social or intersubjective level − in that sense no individual chooses to possess a socially significant characteristic. No individual chooses, in that sense, to be Afro-Caribbean or black rather Anglo-Saxon or white, disabled rather than able-bodied, transgender rather than cisgender, of example, because no individual chooses that these will become and remain socially significant categories.

gender identity. But people who elect to undergo surgery and hormone therapy do not choose to suffer the bad luck of being born in the "wrong" body, do not choose to have missed out on the seminal life experience of going through puberty in the "right" body and, insofar as diagnoses of gender dysphoria are appropriate, do not choose to suffer from this disorder. Likewise, people, including children and adults, who "decide" to take on masculine or feminine traits which confound social expectations, do not choose to be born with the feeling that their real gender identity does not align with the one assigned to them, and certainly do not choose to be born into societies that have such expectations of them. If someone opts to take part in a dangerous sport or pastime, when there is absolutely no requirement to do so, and then suffers some form of permanently disabling injury, then maybe it can be said that the injury was caused by his or her choices. Yet no disabled person (it might be argued), whatever the proximate cause of his or her disability, chooses to live in a society which is structured in such a way as to make physical impairments disabling.

Or take religion. The vast majority of adult believers are exposed to religious beliefs as children through their families and the religious organisations or institutions to which their families belong. Indeed, religious believers remain in touch with agents of socialisation throughout their adult lives, not only through continuing relationships with family members but also through religious organisations or institutions with which they are affiliated.[201] So even if people choose their religions, they do not choose the socialisation that influences the choices they make. Indeed, the more one reflects on the nature of religious socialisation the harder it may be to place race and religion on opposite sides of the distinction between unchosen and chosen characteristics. As Goodall puts it, 'it is rare that people face an open choice in which faith to adopt'.[202] Now in theory even people who do not choose to be born into a religious way of life can choose whether or not to give up, put aside, escape or exit their religion. But it would be foolish to ignore the practical difficulties that religionists face in giving up their religious identities − difficulties that they do not choose but which nevertheless shape the choices they make. One set of difficulties have to do with exiting a religious community. Within some Muslim communities in the UK, for example, if someone turns away from Islam he or she cannot become a secular person, he or she is a *takfir* (*apostate*), with everything this implies about his or her standing in a religious community. In the words of the House of Lords Select Committee on Religious Offences, 'there are communities in the UK where it is inconceivable that anyone could change their professed religion and continue to live within the community concerned.'[203] The point is that insofar as religious identity is tied to community membership and community membership is itself key to accessing family life, housing, occupation, friendship, affiliation, leisure, and so on, expecting people to give up their religious identity could be considered an unreasonable expectation given the spiritual, psychological, familial, material, and economic burdens of exit. Perhaps a liberal society should work much harder to ensure that

[201] See, e.g., Darren E. Sherkat, "Religious Socialization: Sources of Influence and Influences of Agency" in Michele Dillon, ed, *Handbook of the Sociology of Religion* (Cambridge: Cambridge University Press, 2003).
[202] Goodall, *supra* note 192 at 97.
[203] House of Lords, Select Committee On Religious Offences, *First Report*, 10 April 2003 at ch 8, para 100, www.parliament.the-stationery-office.co.uk/pa/ld200203/ldselect/ldrelof/95/9501.htm, last accessed June 1, 2016.

people do have viable options to exit religious communities.[204] But in the meantime, lack of reasonable options to exit surely undermines the idea that religion is chosen in the forward-looking sense. In addition, even if someone did choose to give up his or her Muslim religious beliefs, it is quite possible that he or she will nevertheless remain a "Muslim" in the eyes of some people, most notably in the eyes of people who intend to stir up hatred against Muslims and the audience in which hatred is being stirred up. The point is that when people pick out, and intend to stir up hatred against, Muslims sometimes (although not always) this can be more about Muslim ethnic identity in general than Muslim religious beliefs very specifically, meaning that that the difference between highly religious Muslims and secular Muslims might be lost on certain types of hate speakers and their audiences.[205] This reflects the deeper point that '[v]ery rarely can individuals choose the identity in terms of which they are perceived by others'.[206] In that specific sense 'human identities are primarily ascriptive, not elective'.[207]

How far could these sorts of argument be taken? I am inclined to think that most of what I have just said about the difficulties faced by religionists in choosing to give up or change their faith applies equally to people considering whether or not to give up or change their political beliefs. Consider an adult who spent much of her youth in and around the Women's Peace Camp at Greenham common and who continues to be affiliated with both feminist and environmental political organisations and communities. Both the influence of socialisation on the development of her political beliefs and the difficulties she might face in exiting this culture and way of life may also severely undermine the assumption that her political beliefs are chosen, in either the backward-looking or forward-looking ways. If so, then surely it makes as much sense or would be equally appropriate under the present distinction for governmental authorities to protect people from incitement to hatred on grounds of political affiliation as it does to protect them from incitement to religious hatred.

Let us now turn to our second question: are there any characteristics, statuses or identities the elements of which people come to possess entirely as result of things other than their own choices? Race is perhaps the most obvious candidate, but sticking with the example of religion for just a little longer, some people might be inclined to say that there is something special about religious belief that suggests it is in fact entirely unchosen. As Peter Jones puts it, '"choosing to believe" implies an optionality of a sort that is not normally a part of the believing process [for some types of beliefs].'[208] For example, 'it is not […] open to me to choose to believe that the square on the hypotenuse is not equal to the sum of the squares of the two other

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[204] Brian Barry, *Culture and Equality* (Cambridge: Cambridge University Press, 2001).

[205] Cf Modood, *supra* note 162 at 56. The same point was made in 2001 by Gerald Kaufman during a debate in the House of Commons. See House of Commons Debate on the Anti-terrorism, Crime and Security Bill, House of Commons, 26 November 2001, Hansard, vol 375, cols 683-4, http://hansard.millbanksystems.com/commons/2001/nov/26/religious-hatred-offences, last accessed June 1, 2016.

[206] John Gray, *Two Faces of Liberalism* (Cambridge: Polity, 2000) at 121.

[207] *Ibid*.

[208] Peter Jones, "Bearing the Consequences of Belief" (1994) 2 *Journal of Political Philosophy* 24 at 32.

sides of a right-angled triangle'.[209] Likewise, '[s]ome believers would protest that their religious beliefs are so manifestly true to themselves, even if not to others, that they have no choice but to believe.'[210] Putting it another way, beliefs dawn on believers; believers do not dawn on beliefs. Take an evangelic Christian coming to the belief that the Bible is God's inspired word to humanity or the belief that the life, death and resurrection of Jesus is the only true source of salvation and forgiveness of sins. He may be convinced that the possession of these beliefs is something that happens to him rather than being done by him. Then again, this subjective or personalised understanding of religious belief formation may not be entirely accurate and may underestimate the agency involved. For, it simply cannot be the case that believers are entirely uninvolved in the transformation of beliefs. After all, this process cannot happen without them; the beliefs are *their* beliefs. Perhaps it is true to say that someone who is inquisitive about evangelical Christianity, say, cannot choose how many visits to church he or she will be required to make in order for those visits to induce in him certain beliefs, but he or she can elect to kick-start the mechanism of belief formation, such as by joining a religious group. In other words, it may be possible for someone to start experimenting with evangelical Christianity even if he was socialised as a secularist. If so, then, as Jones puts it, '[b]eliefs cannot therefore be regarded as fixed features of people which have been irremediably implanted in their heads by circumstances.'[211]

But what of racial identity? Could it ever make sense to say that someone has chosen his or her racial identity? I think that it could. To see how consider the case of Rachel Dolezal, a regional president for the National Association for the Advancement of Colored People (NAACP) in the US, who despite being born to two white parents chose to perform the identity of being mixed race and persisted in that performance everyday for several years. This case of racial identity performance challenges the idea that racial identity is only ever ascribed as opposed to achieved.[212] And it serves to illustrate Judith Butler's claim that 'performativity is not a singular act, but a repetition and a ritual, which achieves its effects through its naturalization in the context of a body, understood, in part, as a culturally sustained temporal duration.'[213] Perhaps it also serves to show that racial identity performance can be chosen in one sense. For, one could say that the various ways in which Dolezal's physical appearance was subject to her control and the ways in which she was able to organise her professional life around her physical appearance amounted to her choosing to perform her preferred racial identity as mixed race.[214] Of course, it may well be that after a time her performance became automatic or habit as opposed to conscious choice. Indeed, the fact that performing the identity of a mixed race person became second-nature to her no doubt helped to make her identity seem even more "natural" (that is, believable) to other people. Even so, it does seem as though a

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[209] *Ibid*.
[210] *Ibid*.
[211] Peter Jones, "Beliefs and Identities" in John Horton & Susan Mendus, eds, *Toleration, Identity, and Difference* (Basingstoke: Macmillan, 1999) at 70.
[212] Cf Ralph Linton, *The Study of Man: An Introduction* (New York, NY: D. Appleton and Co., 1936).
[213] Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity, Second Edition* (London: Routledge, 1999) at xiv-xv.
[214] Cf Judith Butler, *Undoing Gender* (London: Routledge, 2004) at 214.

choice was made to begin the performance and on some level it maybe that other later choices are made not cease the performance.

To re-cap, I have tried to argue that many, if not all, of the characteristics relevant to the "Who?" question are both to some extent or in some sense chosen and to some extent or in some sense unchosen. Why does this matter? Because it poses a dilemma for legislators. They may be more inclined to create new stirring up hatred offences if the characteristic is toward the unchosen end of the spectrum and more inclined not to do so if the characteristic is toward the chosen end of the spectrum. But what should they do in the hard cases that fall in the middle? Decisions taken here could seem very arbitrary. For example, in 2010 the government made clear that the offence of stirring up hatred on grounds of sexual orientation 'covers only groups of people who are gay, lesbian, bisexual, or heterosexual' and does not extend to sexual preferences, such as 'a preference for particular sex acts or practices'.[215] Yet it may be that sexual preference is not that much nearer to the chosen end of the spectrum than sexual orientation. Come to that, assuming this spectrum does matter, what should governmental authorities do about people who stir up hatred against persons on grounds of their sexual orientation defined not in terms of the gender of the objects of sexual desire but in terms of the age of the objects of sexual desire?[216] No doubt there are many other cases in which characteristics occupy similar positions along the spectrum with only fine margins separating them. So in the end the drawing of non-arbitrary lines may rest on other functional considerations of the sort to be discussed in Part 2.

I also think it is important not to blindly accept the moral significance of the distinction between chosen and unchosen characteristics without further critical examination. Now it might be thought that someone has less grounds to complain about being the subject of incitement to hatred if it can be shown that his or her possession of the targeted characteristic was the result of his or her choices in a backward-looking sense. In other words: "You made your bed, now you can lie in it." But it is very far from obvious that choices about characteristics can or should attract this sort of outcome responsibility. Even if someone did make a voluntary choice against a background of equal opportunity to join the armed services and fight in a war, for example, it is not as though he or she also chose to become a member of a group of people who may be subject to incitement to hatred with impunity. This does not seem to be part of the choice that he or she made, especially if either he or she could not have reasonably foreseen this outcome or this is not in itself a reasonable outcome.[217]

One should be similarly cautious about the alleged moral significance of choice in the forward-looking sense. Maybe the idea is that so long as people are free to change a given characteristic from this point onwards, then it is acceptable for governmental authorities not to ban incitement hatred based on that characteristic. In theory a Muslim living in a society where the stirring up of hatred against Muslims is

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[215] Ministry of Justice, *Circular 2010/05: Offences of Stirring up Hatred on the Grounds of Sexual Orientation*, May 2010 at para 7.

[216] This issue was addressed in *B* [2013] EWCA Crim 291. Reported in (2013) *Archbold Review* 1 at 4.

[217] The fact that someone who chooses to join the armed forces and fight in a war might face calls to justify his or her choice or criticism of the choice made could well be another matter; that is to say, this might indeed be part of his or her choice, as well as either a foreseeable or not inherently unreasonable outcome.

widespread could choose to become a secularist or even a Christian (so the argument goes) and thereby evade the social evils of this sort of hate speech. In other words: "Given how difficult the government finds it to prevent religious hate speech, you are best placed to get yourself out of the situation in which you now find yourself." Yet this is an odd way of thinking about the choice that religionists face. Unless and until exit becomes a costless option, there is a sense in which religionists are in a lose-lose situation. Keep one's religion and retain one's place within the religious community but continue to be subject to incitement to hatred or else forsake one's religious beliefs and exit the religious community at great cost. Similarly high costs might be associated with the other option of exiting the society altogether. The absence of reasonable options is hardly a fitting basis for responsibility-attracting choices. Besides, even if someone could choose to change his or her religious beliefs without any cost, how could this excuse otherwise unacceptable forms of treatment? As Jones puts it, '[e]ven if some feature of a person is a product of that person's choice, it does not follow that others are justified in treating that person any old how in respect of that choice.'[218] To say that choosing to keep one's religion is a way of forfeiting a right not to be the subject of incitement to religious hatred is like saying that women who choose to wear revealing clothes do not deserve legal protection against sexual harassment. The argument almost treats incitement to religious hatred not as wrongdoing but instead as partly the consequence of religious believers' choices. But the opposite is the case. Incitement to religious hatred is a form of wrongdoing whereas being religious is permissible conduct; which is to say, being religious is not akin to contributory negligence.

C. Constitutive versus peripheral characteristics

Yet another potentially relevant distinction is between characteristics that are integral and characteristics that are peripheral features of people's subjective personal identities. This is primarily a matter of how the individual regards a given characteristic: of whether he or she is satisfied with the fact that he or she possess the characteristic or instead regards it with regret or frustration; of whether he or she accepts or adopts it as a central part of who he or she really is or else sees it as merely peripheral his or her personal identity or even as something alien or external.[219] In terms of the proper scope of incitement to hatred laws, the suggestion is that in order to be eligible for or worthy of protection under such laws a characteristic, social identity or status must be the sort of thing that is an integral feature of the subjective personal identities of the people who posses it.

Which characteristics fit the bill? Religion would appear to be an obvious candidate. After all, clearly there are people who regard their religious beliefs, religious practices, religious experiences, religious institutional affiliations, religious heritage, religious language, religious history, and so on, not simply as characteristics or socially significant attributes but as core constituents of their subjective personal identities, meaning that their own sense of themselves as people is inseparable from their sense of themselves as religious people.[220] The putative moral significance of the

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[218] Jones, *supra* note 208 at 32-33.

[219] Cf. Bhikhu Parekh, *A New Politics of Identity: Political Principles for an Interdependent World* (Basingstoke: Palgrave Macmillan, 2008) at 19.

[220] See, e.g., Akhtar, *supra* note 161 at 20.

present distinction perhaps lies in the idea that although it may not be good to have other people stir up hatred against characteristics, social identities or statutes that are merely peripheral or incidental to one's self image, it is especially bad to have other people stir up hatred against characteristics that go to the heart of who one is or who one takes oneself to be.

I have mention religion but it seems plausible that many characteristics can be constitutive of subjective personal identity including race, ethnicity, nationality, religion, sexual orientation, and gender identity.[221] I would only add that many other characteristics that are potential candidates for protection under incitement to hatred laws might also be central to one's self-image including, for instance, age, personality traits, employment status and profession, education, language, political beliefs, activities and affiliations, and regional identity. This is true insofar as people identity with their age and character traits, for instance, in the sense that they view these things not as external encumbrances to regret but as aspects of identity to take ownership of or even embrace. Moreover, the issue of whether or not characteristics can be constitutive of identity does not appear to depend on whether or not they are immutable. A person's age is obviously subject to change over time, meaning that even if a person can choose to slow down certain signs of ageing through medical interventions (if he or she is sufficiently wealthy) and can choose to perform his or her age in some ways rather than others (such as by acting younger or older than he or she really is), a person is unable to stop him or herself from getting older merely through an act of will, other than through suicide, of course. Character traits can also change over time as people get older, not only change in an individual's absolute level of character traits over time but also sometimes a change in an individual's level of character traits relative to other individuals. But it does not follow from this temporal-sensitivity that age and character traits cannot be constitutive of subjective personal identity. Indeed, even subjective personal identity, in the sense of what an individual identifies with or accepts as part of his or her identity, is not static but evolves over time as an individual gains different life experiences or finds him or herself in different social roles and social environments or contexts.

Although I am focusing here on the scope of incitement to hatred laws specifically, it is still interesting to note that, according to Bhikhu Parekh, someone's characteristic should not be eligible for protection under group defamation laws unless the characteristic is 'at least partially constitutive of their identity, such that an attack on it damages their sense of self-worth and demeans them in others' eyes'.[222]

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[221] See, e.g., Harvard Law Review, "Note: A Communitarian Defense of Group Libel Laws" (1988) 101 *Harvard Law Review* 682 at 693 n 74; Major, *supra* note 171 at 230. Cf Zingo, *supra* note 196 at 61.

[222] Bhikhu Parekh, *Rethinking Multiculturalism: Cultural Diversity and Political Theory, Second Edition* (Basingstoke: Palgrave, 2006) at 316. The clause 'at least partially constitutive of their identity' is a reminder that for most people subjective personal identity is pluralistic, complex, multifaceted, and therefore constituted from more than one characteristic. For example, Parekh argues that for most Muslims their identity is '[B]y and large' (i.e., chiefly or to a large extent) defined 'in religionational terms'. Bhikhu Parekh, "Feeling at Home: Some Reflections on Muslims in Europe" (2009) 8 *Harvard Middle Eastern and Islamic Review* 51 at 52. For such people, the vast majority of people in fact, no single characteristic is the key or defining characteristic (save for perhaps the very fact of plurality). *Ibid* at 80. See also Parekh, *Rethinking*, *supra* note 222 at 148-51; *supra* note 219 at 24. Cf Philip Pullman,

More intriguingly, Parekh suggests that 'in most societies there is a broad consensus that religion, nationality, culture and so forth shape and provide meaning to the lives of individuals in a way that being a Rotarian, a Californian, or a middle-class professional does not.'[223] But it is unclear why a true Californian could not regard his regional, sub-national identity as partially constitutive of his subjective personal identity in much the same way that a patriot might regard his national identity as partially constitutive of his subjective personal identity. The same might be said for profession, education and even political beliefs, activities and affiliations. In the UK, as in many countries, there are die hard football supporters who would certainly regard their identity as fans of a particular club as partially constitutive of their personal identity. Indeed, when the tabloid newspaper *The Sun* published a front page piece about the Hillsborough football stadium disaster in April 1989 which included, amongst other things, the words 'drunken Liverpool fans viciously attacked rescue workers as they tried to revive victims', many people were incensed by what they understood to be a form of group defamation. Even though there are some important differences between group defamation laws and incitements to hatred laws, there is also a way of seeing both types of hate speech law as serving the function of providing security to citizens, whether it be a sense of security in one's equal sociolegal status or a feeling of security in not being at risk of discrimination or violence.[224] At any rate, it may not be as outlandish as it could first appear to think that various sorts of characteristics could be considered partially constitutive of identity and because of this more eligible for protection under incitement to hatred laws. Consider people from Liverpool for whom being a true Scouser or Liverpudlian is an integral feature of their sense of self and who might benefit from laws banning people from stirring up hatred against Scousers in Football stadiums and other public places.[225] Or even people who work in the financial services sector for whom their profession is an integral part of who they are and who might benefit from laws banning people from stirring up hatred against bankers during anti-capitalist protests and in other similar contexts.[226]

"Against 'Identity'" in Lisa Appignanesi, ed, *Free Expression is No Offence* (London: Penguin Books, 2005) at 108-9.

[223] Parekh, *Rethinking*, *supra* note 222 at 316.

[224] Cf Brown, *supra* note 137 at chs 2-5.

[225] Any new stirring up hatred offence that covered regional identity or even associative identity would be in addition to existing public order offences that can be, and have been, used to combat anti-Liverpool hate speech. For example, in May 2016 a man allegedly sat in the garden of a pub in Worcester wearing a T-shirt with the printed words "Hillsborough. God's way of helping Rentokil." He was arrested by police on suspicion that with intent he had displayed writing which was threatening, abusive, or insulting and caused harassment, alarm or distress (s 4A of the Public Order Act 1986). Loulla-Mae Eleftheriou-Smith, "Man Thrown Out of Worcester Pub for Offensive T-Shirt Carrying Hillsborough Slur" *Independent*, May 30, 2015, www.independent.co.uk/news/uk/home-news/man-thrown-out-of-worcester-pub-for-offensive-t-shirt-carrying-hillsborough-slur-a7056471.html, last accessed May 30, 2015.

[226] In Italy during the 19th and 20th centuries people could be, and many people were, convicted under Art 247 of the Criminal Code of 1889 and then Art 415 of the Criminal Code of 1930 for the public order offence of 'incitement of hatred between the social classes', including in relation to speech concerning capitalists defined as a

Nevertheless, there are, as I see it, at least two major issues with the present distinction between constitutive and peripheral characteristics. First, part of the strength of the distinction is that it takes personal identity to be a subjective phenomenon, a matter of how people define themselves. But at the same time this is also its weakness. Treating personal identity as a subjective phenomenon makes the distinction less useful as a basis for thinking about the proper scope of incitement to hatred laws. In order to be workable such laws tend to cover characteristics that are specified at the group as opposed to individual level. Yet the distinction between constitutive and peripheral characteristics will play out differently for different individuals. For some people a given characteristic or social identity might be integral to their subjective personal identity,[227] whereas others might see the very same characteristic 'as external' to their identity.[228] To give an example, for some people religion is 'the sole basis of their identity',[229] for others it is not the sole basis but the 'primary' basis of their identity,[230] but for yet others it is entirely peripheral or even alien to their identity, something that is an unwelcome burden hindering their lives and is to be set aside or ignored as far as possible. Think of people who look upon their religion as a purely instrumental characteristic or 'role they play'[231] or even people who are converts to secularism and who sincerely wish they did not carry around feelings of religious guilt because those feelings are "just not them". Religious identity is certainly not unique in regard to this heterogeneity. For some people their gender identity, such as being female or a woman, is a constitutive characteristic. This might be as true for cisgender females or women as for transgender females or women, who have had to make a transition. But for some people their gender identity is not something they *are* even if it is something that does shape their experiences and actions. They may go so far as to say that their lives are oriented around certain objects, such as the body, customs and norms, language, and clothes,[232] but they might not go so far as to say that these things are central to their identity. What precisely is the problem here (it might be asked)? Why not simply make generalisations based on whether a given characteristic is constitutive or peripheral for most of the people who possess it? Put simply, because it may be inappropriate to make generalisations about characteristics as either constitutive or peripheral to personal identity − generalisations that are then used for deciding the scope of incitement to hatred laws − when the subjective personal identities of some individuals confound those generalisations. This may be ignoring the separateness of persons. The key point here is that under the proposed regime some individuals might be forced to live in a society in which people are legally permitted to stir up hatred against them on grounds of a characteristic they possess simply because the majority of people who also possess the characteristic view it as peripheral, despite the fact that for the individuals concerned it is a constitutive characteristic and in their eyes worthy of protection. Just as importantly, some individuals might be forced to live in a

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social class. David Riesman, "Democracy and Defamation: Control of Group Libel" (1942) 42 *Columbia Law Review* 727 at 744-5.

[227] Parekh, *supra* note 219 at 18-19.

[228] *Ibid* at 21.

[229] Parekh, "Feeling", *supra* note 222 at 78.

[230] Pullman, *supra* note 222 at 110.

[231] Parekh, *supra* note 219 at 21.

[232] Cf Iris Marion Young, *Intersecting Voices* (Princeton, NJ: Princeton University Press, 1997) at ch 1.

society in which people are banned from stirring up hatred against them on grounds of a characteristic they possess merely because the majority of people who also possess the characteristic see it as integral to their subjective identities, even though for the individuals concerned it is a peripheral characteristic and perhaps in their eyes unworthy of protection. Such individuals might even deeply regret the fact that so much is made of this characteristic: from their point of view it is an insignificant feature of their personal identity that they would rather not be judged on, even if that judgement takes the form of entitlement to legal protection from hate speech.

Second, as with the distinction between chosen and unchosen characteristics, the moral significance of the distinction between constitutive and peripheral characteristics *vis-à-vis* the proper scope of incitement to hatred laws cannot be merely assumed but must be defended or proven. But it seems to me quite a leap to go from the plausible claim that it is especially bad to have other people stir up hatred against oneself based on characteristics that go to the heart of who one takes oneself to be to the further claim that this is a necessary condition for warranting the legal suppression of this sort of speech. Or turning it the other way around, why is it any less bad to have other people stir up hatred against characteristics that are peripheral to one's subjective personal identity? In the case of laws that prohibit group defamation this may indeed make sense. It may well be the case that defamatory remarks about constitutive as opposed to peripheral characteristics are more likely to damage people's sense of self-worth. But here we are talking about incitement to hatred laws, where the social evils relate to things such as an increased risk of discrimination or violence, or the legitimate fear of these things. Such evils are equally bad whether they target constitutive or peripheral characteristics surely.

D. Internal life versus external life characteristics

Perhaps the proper scope of hate speech laws may also have something to do with whether a given characteristic belongs to internal life or external life. Internal life is a complex notion. It certainly has to do with inner thoughts, feelings, beliefs, desires, and even understandings of the meaning of life and of the type of people it is good to be. But it may also include practices, observance and rituals of a personal nature, even if they are performed physically. Religious beliefs, for example, belong to the domain of internal life, as do personal religious practices and rituals. External life, by contrast, has to do with outward appearances, and with how people are presented to, and interact with, other people. It also includes more communal practices and rituals. Skin colour, race, ethnicity, nationality, and citizenship all fit squarely within the domain of external life. External life can also include shared religious heritage, language, and history, as well as collective observance of religious rules, and forms of affiliation with religious institutions, like places of worship, and other religious organisations. Now internal life is obviously not independent of, immune from, external life, just as people's internal life can influence the way their external lives unfold. But the two are not one and the same thing, despite their interaction. Perhaps the moral significance of the distinction between internal life and external life rests in the special importance of internal life as compared to external life. Internal life is of special importance (some people might think) in virtue of being closer to what makes us truly human or because it furnishes us with greater and more long-lasting happiness or contentment.

Based on this distinction it might be argued that aspects of internal life are more worthy of legal protection under incitement to hatred laws than aspects of external

life. This distinction challenges the conventional wisdom that criminalising incitement to racial hatred is less morally problematic than criminalising incitement to religious hatred. If protecting inner life is more fitting than protecting outer life, then conventional wisdom is turned on its head. Specifically, the present distinction would seem to suggest that banning the stirring up of hatred on grounds of religious beliefs is to honour and protect the special importance of internal life, whereas to protect people from incitement to racial hatred is to unwittingly fall into the trap of valorising the world of appearances. People who engage in racist hate speech often focus on skin colour, and they do so for all the wrong reasons − they fetishise mere appearance. But to ban this sort of speech is to unconsciously reproduce rather than challenge the mistaken belief that skin colour is of special importance and to implicitly legitimise the hate speaker's excessive or irrational concern with skin colour. "If the state is taking so much trouble to get me to stop talking about people's skin colour it must be because skin colour matters very deeply," a racist hate speaker might conclude.

In fact, the distinction between internal life and external life might not merely separate race and religion; it could also separate different dimensions of religious life.[233] Internal or inner spiritual life has to do with people's own personal religious beliefs, sentiments, practices, and rituals, with their relationship with their own religiosity and ultimately their relationship with God. In the case of Muslims, for example, inner spiritual life includes faith or belief in the six articles of faith (*iman*) but also piousness or consciousness of God (*taqwa*) and submission to God (*al-Silm*) through the performance of five rituals (*shahadah*, *salat*, *zakah*, *ramadan*, *hajj*). Of course, not all features of inner spiritual life take place in the mind or even in the privacy of one's own home: performance of religious practices and rituals will often take place among or alongside other believers. Nevertheless, external spiritual life is more directly and explicitly associated with people's relationship with other believers and with the trappings of what might be called social religiosity. Sticking with the example of Muslims, external spiritual life might involve, amongst other things, affiliation with a mosque or other Muslim organisation and participating in social action with other members in the fulfilment of that mosque's or that organisation's understanding of Islamic ideals. The distinction between inner spiritual life and external spiritual life need not be thought of as a hard and fast or sharp distinction. After all, religious beliefs which are tied to revealed religion and to religious texts and stories, such as the *Qur'an* and the *Hadith*, are themselves the sorts of beliefs that are formulated and maintained by groups of people acting in collaboration both within and across generations, and are constitutive of religion as shared or intersubjective culture. So even if beliefs are part of inner spiritual life, the practice of formulating and maintaining those beliefs is part of external spiritual life. Nevertheless, let us suppose for the sake of argument that inner spiritual life and external spiritual life are distinguishable even if sometimes overlapping dimensions of people's religiosity.

Taking inspiration from this distinction, some people might think that inner spiritual life is a more fitting candidate for protection under incitement to hatred laws than external spiritual life. After all, there is a long tradition in many countries of treating inner spiritual life as something of special importance and therefore worthy of special protection, as exemplified by the protection of the right to freedom of conscience. And so a case could be made for banning incitement to hatred based on religious beliefs and personal religious rituals and practices but not for banning incitement to hatred based on membership of or affiliation to a place of worship or

[233] I take inspiration here from a conversion with Mohammed Aziz.

religious organisation and support for or adherence to the culture and traditions of a place of worship or religious organisation.[234] It is worth pausing here to reflect on the fact that in England and Wales s 29A of the Racial and Religious Hatred Act 2006 defines 'religious hatred' as 'hatred against a group of persons defined by reference to religious belief or lack of religious belief'. Likewise, s 28 of the Crime and Disorder Act 1998 (as amended by the Anti-terrorism, Crime and Security Act 2001) defines a 'religious group' as 'a group of persons defined by reference to religious belief or lack of religious belief'. So here the criterion of membership of the protected group is having a certain sort of belief. As Simon Thompson points out,[235] these laws make for an interesting comparison with s 74 of the Criminal Justice (Scotland) Act 2003 (outlining offences aggravated by religious prejudice) which defines membership or perceived membership of a 'religious group' in terms of '(a) religious belief or lack of religious belief; (b) membership of or adherence to a church or religious organisation; (c) support for the culture and traditions of a church or religious organisation; or (d) participation in activities associated with such a culture or such traditions'. Drawing on the above distinction between inner spiritual life and external spiritual life might be *one* way to justify the relatively narrow way that religion is defined by hate speech laws in England and Wales, namely, that it is protecting inner spiritual life but not outer spiritual life.

No doubt there is much that could be said both for and against this version of the formal approach. But I shall limit myself here to making two observations. First, although it might be relatively straightforward to apply the general distinction between internal life and external to some characteristics, such as religion, it may be much harder to map the distinction onto other relevant characteristics. For example, it is a conundrum whether incitement to hatred on grounds of sexual orientation counts as the protection of internal life or external life. Thus, Part 3A of the Public Order Act 1986 (as amended by the Criminal Justice and Immigration Act 2008) also bans stirring up hatred on grounds of sexual orientation, but s 29AB defines 'hatred on the grounds of sexual orientation' simply as 'hatred against a group of persons defined by reference to sexual orientation (whether towards persons of the same sex, the opposite sex or both)'. This offers no real guidance as to the nature of sexual orientation *qua* inner life or outer life. This makes it challenging to use the current distinction as a tool for evaluating existing laws, although it could provide an impetus for authorities, most notably the judiciary, to clarify further the nature of given protected characteristics.

Second, from the mere fact that a characteristic is part of inner life and from the mere fact that inner life holds a special value or importance, it does not automatically follow that the characteristic is worthy of occupying the position of a protected characteristic within a body of incitement to hatred laws. It is certainly the case that in liberal societies the special value or importance of inner life including inner spiritual life has traditionally been accepted as a basis for negative protections against religious persecution including coercive religious conversion. And in non-liberal as well as

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[234] Note that someone can be convicted of stirring up religious hatred even if the hatred was not directed at particular persons, so the fact that a hate speaker might not known about the inner life of particular persons is not relevant to the application of the offence. What matters is that the stirring up is against a group of people defined by their religious beliefs as opposed to particular members of that group.

[235] Simon Thompson, "Freedom of Expression and Hatred of Religion" (2012) 12 *Ethnicities* 215 at 218.

some liberal societies it has also been taken as a basis for positive protections of religious beliefs including blasphemy laws. But there is much less consensus around the appropriateness of this move. And there is also no consensus around looking upon the special value or importance of inner life including inner spiritual life as a basis for positive protections of religious believers themselves: no consensus around laws against outraging religious feeling and no consensus around laws banning incitement to religious hatred. In reality it seems to me that accepting the special value or importance of inner life will not be a decisive factor in terms of legal protections. On the contrary, other arguments, such as having to do with consistency and functionality, as well as democracy, will need to be adduced if a compelling case is to be made for protecting inner life within a regime of incitement to hatred laws.

E. Characteristics we all share versus characteristics we do not all share

Finally, consider a formal approach that rejects or discounts certain characteristics as appropriately covered under incitement to hatred laws if they are characteristics whose different sub-characteristics all, or nearly all, citizens will come to possess during the course of their lives. Age is the odd one out (it might be thought) because it is the only characteristic such that generally speaking everybody, or nearly everybody, will come to pass through its different stages over the course of their lives. In the vast majority of cases a man is unlikely to become a woman at some stage in his life, a heterosexual is unlikely to become a homosexual, a white person a black person, a Christian a Muslim, then Hindu, Buddhist, Sikh, and Jew. By contrast, it is normally the case (premature death aside) that someone will start as a baby, become a child, then teenager, then young adult, middle-aged adult, and finally elderly adult. This fluidity (so the thought continues) is unconducive to the normal in-group versus out-group dynamics out of which motivations to engage in hate speech grow. Typically a white person will remain as such throughout his or her entire life, leaving plenty of time to build a sense of in-group identity and perhaps also room in which to develop feelings of fear, resentment, competition, contempt and hatred toward out-group members, safe in the knowledge that he will never be a member of the out-group. But a young adult will have a finite time in which to develop a sense of being a young person before he or she is a young adult no more, and even in that time there will be a lingering awareness that being a young adult will soon give way to being a middle-aged adult and then an elderly adult. Faced with this certainty, devoting time to building up a substantive in-group identity and devoting psychological effort to developing feelings of fear, resentment, competition, and even contempt and hatred toward out-group members would be a fool's errand. This is not to say that members of one age group typically do have empathy with and sympathy for the perspectives and experiences of members of other age groups. This is patently not the case. Rather, it is to say that a person's awareness of his or her inexorable movement across age groups over time may be enough to deter deficits in empathy and sympathy from breaking out into hate speech.[236] These facts (so the thought concludes) explains not merely why we are unlikely to find significant levels of incitement to age hatred but

[236] Cf. Jacqueline Taylor, "Humean Humanity Versus Hate" in Jennifer Welchman, eds, *The Practice of Virtue: Classic And Contemporary Readings in Virtue Ethics* (Indianapolis, IN: Hackett, 2006); Brown, *supra* note 137 at 132-7.

also why it would inappropriate to legislate against such incitement to hatred even where it does exist.

On closer examination, however, age might not be different or special enough to make it inappropriately covered under incitement to hatred laws after all. For one thing, although it may be true that age is special in that people pass through its different stages, it is also true that people only ever pass in one direction, young to old. Older people will never be young again and this may once again leave space in which motivations to engage in hate speech might grow even if large numbers of older people do have children and friends who are younger people. It is certainly not inconceivable that older people could feel enough solidarity with their own age-based in-groups combined with sufficient fear, anxiety and frustration toward younger people − perhaps based on a perception (true or false) that younger people have a sense of entitlement and are fixated on personal gain over the good of society − as to furnish older people with the motivation to stir up hatred against younger people. For another thing, population demographics and wealth distribution account for some important differences between different age groups. The fact is that older people make up a growing percentage of the population and may be economically better-off than younger people. So it is not inconceivable that younger people could feel enough solidarity with their own age-based in-groups combined with sufficient resentment toward older people − perhaps based on a perception (true or false) that older people are holding onto jobs too long and are economically lucky − as to furnish younger people with the motivation to stir up hatred against older people. Furthermore, the fact that ordinarily people will come to possess every sub-characteristic over time is certainly not idiosyncratic to age. For, a great deal of what can be said about age in this regard can also be said about disability. This is, to some extent, the point behind using the terms "temporarily able-bodied" or "temporarily non-disabled" rather than "able-bodied". To use of the former terms is to acknowledge the following facts that are an inevitable part of human life: as infants and small children everybody lacks the basic functioning of most adults; toward the end of their lives most people will lack at least some, sometimes many, and in some cases all, of the basic functioning of most adults; and as adults we are only ever one event away from lacking some or all of the basic functioning of most adults. Yet we are not so naive as to assume that this sort of fluidity makes it impossible to imagine able-bodied people stirring up hatred against people with disabilities and *vice versa*. And when it does happen we are unlikely, I think, to claim somehow that it is undeserving of protection, or inappropriately covered, under incitement to hatred laws merely because of the fact of fluidity.

But maybe age is just a bad example of the current line of thought. Consider instead the case of personality traits. Hate speech typically singles out particular persons or particular groups of persons on the basis of their possession of given characteristics or at least a perception of their possession of given characteristics. It is in that sense concerned with subsets of the population. But what is different or special (it might be thought) about personality traits – such as 'the big five' personality traits (openness, conscientiousness, extraversion, agreeableness, and neuroticism)[237] – is that they are to a greater or lesser extent possessed by everyone in society. And so for any form of hate speech to get off the ground the hate speaker must first identify certain personality types in which these big five personality traits are combined together in particular ways. The problem is that identifying clear and discernable

[237] Lewis R. Goldberg, "The Structure of Phenotypic Personality Traits" (1993) 48 *American Psychologist* 26.

character types based on particular concatenations of these big five personality traits is notoriously difficult. Even when people take these tests they do not present as falling into easily identifiable and obvious personality types. No doubt we could decide to identify personality types according to which among a given set of personality traits people possess in most abundance.[238] But that is by no means the only identification that could be made. The possibilities are almost endless. So perhaps this would make it inappropriate or misguided to include such a characteristic within a body of incitement to hatred laws (it might be thought).

Nevertheless, it strikes me as being uncertain at best that these facts about the scalar nature of personality traits could in themselves demonstrate that we should not ban incitement to hatred based on personality types, as distinct from other forms of incitement to hatred concerning which binary distinctions might be possible. After all, many forms of racist hate speech are predicated upon racists identifying racial types based on particular concatenations of physical characteristics that admit of degrees. Here also the hate speaker is relying on the drawing of distinctions or demarcation lines that are to a greater or lesser extent arbitrary. Just as personality trait variations between demarcated personality types tend to be gradual or matters of degree, so biological variations between demarcated racial groups tend to be piecemeal.[239] But this fact has not stopped racist hate speakers from drawing lines. And it has not stopped legislators from finding it appropriate or fitting to legislate against incitement to racial hatred. This is because legislators have been able to draw on various other types of considerations in support of the legislation.

This fact serves to underscore a more general conclusion I wish to draw from this section. I have now examined the merits of several versions of the formal approach to specifying the proper scope of incitement to hatred laws. Although I have identified weaknesses in these versions – having to do with their intuitive appeal and how they have been applied to particular characteristics – I do not take myself to have demonstrated that they should play no role in specifying the proper scope of incitement to hatred laws, much less that no version of the formal approach could have a role to play. Instead, my aim is to show that although the proper scope of incitement to hatred laws may well depend on some morally relevant distinctions between the formal features of the protected characteristics in question, it cannot depend exclusively on these formal considerations. I shall now give a brief illustration of this point, one that also segues into Part 2. Suppose for the sake of argument that part of the underlying or real function or purpose of incitement to hatred laws is to combat some of the social evils associated with climates of hatred and fear (to which incitement to hatred contributes), such as increased risks of discrimination or violence against people who possess the targeted characteristics, as well as legitimate feelings of insecurity among those people. It seems to me that having reflected on this functional consideration, formal distinctions between characteristics might start to look less determinative of the proper scope of incitement to hared law. So, for example, speech that stirs up religious hatred seems not more or less likely to contribute to a climate of hatred and fear (with associated social evils) than speech that stirs up racial hatred. And arguably this consideration matters at least as much as the suggestion that religious identity is chosen in a way that racial identity is not. Or,

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[238] Cf Hans Jurgen Eysenck, *Dimensions of Personality* (London: Kegan Paul, Trench Trubner & Co, 1947).

[239] S. O. Y. Keita, et al. (2004) "Conceptualizing Human Variation" 36 *Nature Genetics* 17.

to give another example, speech that stirs up hatred on the grounds of religious beliefs seems no more or less likely to contribute to a climate of hatred and fear than speech that stirs up hatred on grounds of religious affiliations. And surely this matters every bit as much as the idea that we should work harder to protect inner spiritual life than outer spiritual life given the special importance of the former.

In Part 1 of this article I have outlined and critically appraised consistency, practical and formal approaches to specifying the proper scope of incitement to hatred laws. In Part 2 I do the same for functional and democratic approaches. I shall also try to draw some conclusions about the implications and relative importance of these different approaches, and to offer some observations about how they might be knitted together. And I will end by discussing the potential applicability of my general approach to answering the "Who?" question to other types of hate speech law.