SECTION 5 OF THE PUBLIC ORDER ACT 1986 RESHAPING THE FUTURE OF FREE SPEECH IN THE UNITED KINGDOM: THE RISE OF A TYRANNY

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A INTRODUCTION

'The core right of citizens in England to express unpopular ideas in public is insecure.'[1] This is an issue that is worryingly reflected in today's society and has called for critical discussion into the wording of Section 5 of the Public Order Act 1986 (s 5), and the inclusion of the term 'insulting' condemned as a menace to free speech and the right to protest.[2] The inclusion of the term 'insulting' within s 5 is often cited as leaving the boundary between free speech and the criminal law unnecessarily blurred. This paper will delve into discussion on the desirability of reforming the Public Order Act 1986 and further providing an evaluation on the position taken by the United Kingdom in a post-HRA era.[3] It will critically analyse both sides of the argument as to whether free speech should be upheld in the name of a democratic, self-governing social order or alternatively whether we should criminalise such speech so as to confer a protection to the public to go about their business without being gratuitously insulted.

B ANALYSIS

The Oxford English Dictionary defines the term 'insulting' as 'scornfully triumphing over another, treating him with contemptuous abuse.'[4] This term as incorporated into s 5 has been the catalyst of much debate and controversy pertaining to the boundary

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[1] James Weinstein, *Extreme Speech, Public Order and Democracy* (Oxford University Press, 2009) 60.
[2] Peter Tatchell, Reform Section 5 Campaign <http://reformsection5.org.uk/2012/05/home-secretary-under-pressure-to-reform-public-order-act/> accessed 24 February 2014.
[3] Human Rights Act 1998.
[4] John Simpson & Edmund Weiner, *The Oxford English Dictionary* (2nd edn, Oxford University Press: Clarendon Press 1989).

between free speech and the criminal law. Clause 38 of the Crime and Courts Bill[5] was the next in a long line of attempts to amend s 5 to remove the term, a move strongly resisted by the Labour Government on the grounds that the correct balance was already struck. The Labour Government contended that the removal of the term 'insulting' would lead to judicial confusion in having to decide on a case-by-case basis what was '(criminally) abusive or merely (non-criminally) insulting.'[6] However, the Joint Committee on Human Rights took the opposite view. It claimed that an amendment to s 5 would act to strike an effective balance in allowing free speech, whilst continuing to protect the public from threatening or abusive speech.[7]

A recent campaign in the United Kingdom entitled 'Reform Section 5: Feel Free to Insult Me'[8] acted as impetus to generate dialogue on this draconian legislation. The campaign stressed that the law already had effective measures in place to protect individuals against discrimination, incitement and violence.[9] It argued that placing legal sanctions on trivial remarks would be superfluous, encroaching on the freedom of expression, a right as guaranteed in Article 10 of the European Convention on Human Rights.[10] In July 2011, the Home Office responded to this lobbying with public consultation seeking to produce dialogue on whether s 5 should be amended to remove the word 'insulting' or whether the solution was to be found through further guidance on police powers aimed at better promoting and maintaining public order.[11]

Under s 5(1) it is an offence to use 'threatening, abusive or insulting words or behaviour, or disorderly behaviour' or to display 'any… visible representation which is threatening, abusive or insulting' within the hearing or sight of a person 'likely to be caused harassment, alarm or distress.'[12] In practice interpreting the notion 'insulting' is problematic and in fact it appears that no conclusive definition can be

[5] Crime and Courts Bill 2012-13.
[6] Pat Strickland & Diana Douse, 'Insulting words or behaviour Section 5 of the Public Order Act 1986' (HC Report of the Home Affairs section, 2012).
[7] For further discussion see: Joint Committee on Human Rights, *Demonstrating respect for rights? A human rights approach to policing protest* (2009 HL Paper 47-I, HC 320-I).
[8] 'Reform Section 5: Feel Free to Insult Me' Campaign <http://reformsection5.org.uk> accessed 24 February 2014.
[9] Lord Macdonald, 'A proposed Amendment to the Protection of Freedoms Bill' ('Reform Section 5: Feel Free to Insult Me' Campaign 2011) 6 <http://reformsection5.org.uk/download/rs5-macdonald-opinion.pdf> accessed 24 February 2014.
[10] European Convention on Human Rights, Article 10(1).
[11] Home Office, *Consultation on police powers to promote and maintain public order,* October 2011.
[12] Public Order Act 1986, s 5(1) (a-b).

formulated[13] 'but an ordinary sensible man knows an insult when he sees or hears it.'[14] Interpretation of the term 'insulting' therefore remains a factual question to be left to the court,[15] but 'insulting' is not to be considered synonymous with anger or disgust[16] nor is it to be determined as distasteful or unmannerly conduct.[17]

The incorporation of such an elastic concept into UK domestic law acts to create an excessively low threshold extending the criminal law into 'areas of annoyance, disturbance and inconvenience',[18] where mere irritation towards an individual dissenter's speech could potentially bring a criminal charge, such as a student calling a horse 'gay',[19] or an individual referring to the Scientology church as a 'dangerous cult'.[20] As protest is by its very nature, aimed at an unsympathetic audience it is no surprise that it may inflame and antagonise others, terms that are often not miles apart from 'insult'.[21] Such a low threshold in which the criminal law could be invoked is not only of concern from a freedom of expression perspective, but could also become a political embarrassment. The basis of the s 5 offence is superfluous as 'what one person finds insulting… may be water off a duck's back to another.'[22] Effectively s 5 becomes a catch-all offence whereby the boundary between acceptable and unacceptable speech remains unnecessarily vague, which as common law within UK jurisdiction will suggest is having a chilling effect on freedom of expression, freedom of religion and freedom of assembly, all of which are allegedly protected under the European Convention on Human Rights.

Following the introduction of the Human Rights Act 1998, cases must now be addressed in the shadow of the European Convention on Human Rights. The Human

[13] *Brutus v Cozens* [1973] AC 354, 861 (Lord Reid).
[14] ibid 862 (Lord Reid).
[15] ibid 861.
[T]he word 'insulting'… appears to me … to be intended to have its ordinary meaning. It is for the tribunal which decides the case to consider, not as law but as fact, whether … the words of the statute do or do not as a matter of ordinary usage of the English language cover or apply to the facts which have been proved. (Lord Reid).
[16] *Parkin v Norman* [1983] QB 92.
[17] *Brutus v Cozens* (n 13) 862, 865.
[18] Peter Thornton, *The Law of Public Order and Protest* (Oxford University Press, 2010) 36.
[19] '"Gay" Police Horse Case Dropped', *BBC News* (London, 12 January 2006).<http://news.bbc.co.uk/1/hi/england/oxfordshire/4606022.stm> accessed 22 February, 2014.
[20] Anil Dawar, 'Teenager faces prosecution for calling Scientology a "cult"', *The Guardian (*London, 20 May 2008) <www.guardian.co.uk/uk/2008/may/20/1> accessed 24 February 2014.
[21] Alex Bailin, 'Criminalising free speech' [2011] Criminal Law Review 705-711.
[22] *Percy v DPP* [2001] EWHC Admin 1125; [2002] ACD 24, 28.

Rights Act 1998 expressly provides that 'it is unlawful for a public authority to act in a way which is incompatible with one or more of the Convention rights.'[23] Some of the more pertinent rights with regard to this discussion include freedom of assembly[24] and freedom of religion.[25] However, the most fundamental right that we shall deal with is freedom of expression.[26] This freedom has been hailed 'the lifeblood of democracy' without which an effective rule of law would not be possible.[27] Article 10(2) of the European Convention on Human Rights provides that freedom of expression may be justifiably restricted as prescribed by law, but only when proved to be necessary in a democratic society in achieving a legitimate aim.[28] The relevant legitimate aims in relation to allowing an individual dissenter's speech to be restricted are 'for the prevention of disorder or crime, [and] for the protection of the rights of others.' Due to the fundamental nature of Article 10 of the European Convention of Human Rights, the state must also find a pressing social need for such interference, which must also be proportionate to the aim pursued. Arguably 'a freedom which is restricted to what judges think to be responsible or in the public interest is no freedom' in any sense of the word.[29]

Unfortunately UK Courts are 'exhibiting a preference for public peacefulness and the avoidance of incitement over freedom of expression'.[30] Such a preference has borne witness to the development of a culture of injudicious policing, forcibly silencing peaceful protest in excessively wide-ranging situations in the public domain.[31] Furthermore s 5 is capable of restricting free speech from within a dwelling, where such conduct is seen or heard externally, encroaching on Article 10 ECHR within

[23] Human Rights Act 1998, s 6(1).
[24] European Convention on Human Rights, Article 11(1), 'Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.'
[25] ibid Article 9(1), 'Everyone has the right to freedom of thought, conscience and religion.'
[26] ibid Article 10, '[F]reedom to hold opinions and to receive and impart information and ideas without interference by public authority.'
[27] *R v Secretary of State for the Home Department Ex p. Simms* [2000] 2 AC 115, 126.
[28] European Convention on Human Rights, Article 10(2).
[29] *R v Central Independent Television Plc* [1994] Fam 192 (Lord Hoffman).
[30] Anthony Geddis, 'Free Speech Martyrs or Unreasonable Threats to Social Peace? – "Insulting" Expression and Section 5 of the Public Order Act 1986' [2004] PL 853-874.
[31] Jonathan Wynne-Jones, 'Christian hoteliers charged with insulting Muslim guest' *The Telegraph* (London, 19 September 2009) <www.telegraph.co.uk/news/religion/6209687/Christian-hoteliers-charged-with-insulting-Muslim-guest.html> accessed 22 February 2014.

both the public and private sphere.[32] This is a worrying development in terms of upholding the statutory aim of s 6(1) of the Human Rights Act 1998.

The 'Association of Chief Police Officers' stipulates that you must look at the message being communicated and the manner in which it is conveyed in adopting a principled approach to interpreting 'insulting'.[33] In general 'it is conduct … which is gratuitous and calculated to insult that is the subject of the offence rather than the public expression of an offensive message or opinion.'[34] This was the central issue in the UK case of *Percy v DPP*,[35] where an appellant charged under s 5 had defaced and desecrated an American flag during protest. Rather interestingly flag desecration was upheld as a protected form of protest in the United States.[36] However in *Percy v DPP*[37] the appellant sought protection by invoking s 5(3)(c) which stipulates that 'it is a defence … to prove … that his conduct was reasonable.'[38] The Public Order Act 1986 fails to define 'reasonable', remaining a factual question open to interpretation on an ad hoc basis.[39] Such an approach makes cases increasingly difficult to predict before a verdict is reached. In this case the appellant also indicated that she did not intend her behaviour to be insulting by virtue of s 6(4) which requires an intention or awareness of threatening, abusive or insulting conduct, or an intention or awareness that it may be disorderly.[40] Considered in the light of Article 10 ECHR she failed in her plea since her message which was a legitimate public debate became a gratuitous and calculated insult in the manner in which she chose to convey it. It was held that the 'prevention of the denigration of objects of veneration and symbolic importance'[41] was a legitimate aim.[42] However the decision was quashed pursuant to s 6 of the Human Rights Act 1998 as the judge had erred in applying the correct balancing

[32] Public Order Act, s 5(2), 'An offence under this section may be committed in a public or a private place, except that no offence is committed where the words or behaviour are used, or the writing, sign or other visible representation is displayed, by a person inside a dwelling and the other person is also inside that or another dwelling.'
[33] Association of Chief Police Officers, *Manual Guidance on Keeping the Peace* (2010) 30-31.
[34] ibid 31.
[35] *Percy v DPP* [2001] EWHC Admin 1125; (2002) 166 JP 93 (DC).
[36] *Texas v Johnson* (1989) 491 US 397 'the court concluded that the State could not criminally sanction flag desecration in order to preserve the flag as a symbol of national unity'.
[37] *Percy v DPP* (n 35).
[38] Public Order Act 1986, s 5(3)(c).
[39] *Clarke v DPP* (1991) 94 Cr App Rep 359.
[40] Public Order Act 1986, s 6(4).
[41] *Percy v DPP* [1995] 1 WLR 1382, 30; Peter Ramsay, *The Insecurity State: Vulnerable Autonomy and the Right to Security in the Criminal Law* (Oxford University Press 2012) 118.
[42] European Convention on Human Rights, Article 10(2).

exercise, highlighting the commitment of the courts to follow strict procedural rules when restricting Article 10 ECHR.[43] Such a commitment of UK Courts was reiterated in *Dehal v CPS*.[44] It can quite reasonably be argued that s 4A of the Public Order Act 1986 already provides a framework suitable to catch the more serious low-level public disorder in raising the mens rea threshold to intention; awareness will not suffice. In that regard, s 5 is again shown to be superfluous.

The discussion will now delve further into some of the theories of speech developed in this area: the pro-civility model versus the transformative approach. It is often cited that the prevalent judicial position arises in the desire to limit the scope of speech deemed unpalatable. Such a position is termed pro-civility as formulated by Lord Scott.[45] The Court took such an approach to prosecuting under s 5 in *Percy v DPP*[46] allowing the individual dissenter's speech to be legitimately restricted in protecting the public from offence albeit that the decision was quashed on procedural grounds. Questionably the pro-civility model is flawed since it contravenes the intention of Article 10 ECHR to cover not only welcomed speech but also '[t]he offensive, shocking and disturbing … such are the demands of pluralism, tolerance and broadmindedness without which there is no democratic society.'[47] This was the view lobbied by various organisations and think tanks within the UK, such as the Christian Institute, the Peter Tatchell Foundation and the National Secular Society.[48]

The alternative model has come to be known as the transformative approach formulated by Lord Scott.[49] Although this approach stipulates that 'public opinion cannot be totally disregarded in the pursuit of liberty' it contends that the public must at least be tolerant to offence in the name of a vibrant, robust and open realm of public discourse.[50] In the UK it was affirmed in *R (ProLife Alliance) v BBC*[51] that:

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[43] Steve Foster, 'Human rights: flag desecration, national insult and peaceful protest' (2002) Coventry Law Journal 52.
[44] Sophie Turenne, 'The compatibility of criminal liability with freedom of expression.' [2007] Criminal Law Review 866-881.
[45]Geddis (n 30) 853; see also *R (on the application of ProLife Alliance) v BBC* (n 50).
[46] *Percy v DPP* [1995] 1 WLR 1382.
[47] *Handyside v United Kingdom* [1979] 1 EHRR 373, 49.
[48] For a full list of supporters see: <http://reformsection5.org.uk/#?sl=4> accessed 24 February 2014.
[49] A Macdonald, *'R (on the application of ProLife Alliance) v British Broadcasting Corporation*: political speech and the standard of review' [2003] 6 EHRLR 651, 657.
[50] *R (on the application of ProLife Alliance) v BBC & Others* [2003] UKHL 23.
[51] ibid; [2004] 1 A.C. 185.

> [V]oters in a mature democracy may strongly disagree with a policy … but ought not be offended by the fact that [it] is being promoted … Reject[ing] a Party Election Broadcast on a undeniably important issue, on the ground that it would be offensive … denigrates the voting public.[52]

The transformative model thus affirms the magnum opus of John Stuart Mill, 'if all mankind minus one were of one opinion, mankind would be no more justified in silencing that one person than he … would be justified in silencing mankind.'[53] It conveys a message that diversity and pluralism are key aspects of a fully functioning democratic, self-governing social order.

However argument can be put forward that the transformative approach goes a step too far, as witnessed in foreign jurisdictions. In the United States for example the Westboro Baptist Church staged protests at various military funerals condemning the United States for its tolerance of homosexuality especially in its armed forces. Their right to free speech was controversially upheld by the US First Amendment placing strong emphasis on free speech for its citizens. The Court held that 'speech is powerful. It can stir people to action, move them to tears … and … inflict great pain … we cannot react to that pain by punishing the speaker.'[54] If removing 'insulting' from s 5 were to result in further harmonisation with the stance adopted in the United States, it should arguably be avoided since hate speech victims may be left unprotected to emotional harm which can be parasitic in nature.[55]

Some may view the pro-civility model as 'self-insulating'. If a conscious effort is made to protect citizens from an individual dissenter's speech it is reasonable to suggest that they will feel offence if ever exposed to it thus stifling any challenge to the status quo.[56] In that regard the transformative model has the benefit of avoiding an

[52] ibid 98-99.
[53] John Stuart Mill, *On Liberty* (Longman, Roberts & Green, 1859) 21.
[54] *Snyder v Phelps* [2011] 562 US.
[55] John Stannard, 'Sticks, stones and words: emotional harm and the English criminal law'74 (6) [2010] Journal of Criminal Law 533-556.
[56] *R (ProLife Alliance) v BBC* (n 50); [2004] 1 A.C. 1899 [Lord Scott]; *Terminiello v City of Chicago* [1949] 337 US 145 (Douglas J).

overemphasis being placed on assessing public popularity and basing legal protection upon such an approximation. It recognises that public opinion cannot be disregarded entirely but also such opinion cannot be determinative of the legal approach to restricting free speech. The transformative model acknowledges that the Court has a role in establishing the 'level playing field'[57] on which conflicting views flourish, making free speech a tangible reality for all.

In a further case under UK jurisdiction, *Norwood v DPP*,[58] the Court once again adopted a pro-civility approach. The Court's decision showed intolerance to those who seek to proliferate extreme views which pose a threat to public order. This case also confirmed that s 5 is capable of being a racially or religiously aggravated offence.[59] Here the appellant placed a sign in his dwelling window[60] containing the words 'Islam out of Britain', with reference to the 9/11 attacks depicting the World Trade Centre engulfed in flames. The sign was motivated by hostility towards members of a religious group. The Court held that his Article 10 ECHR right could be legitimately restricted 'for the protection of the rights of others.'[61] The reason for this was that his expression was intentionally or recklessly insulting and likely to cause significant mental upset.[62]

Arguably 'when hatred has been stirred up, violence and disorder are not far away'[63]. There is convincing argument that the pro-civility approach in circumstances pertaining to the aggravated form of the s 5 offence is warranted but justification will be dependent upon the factual matrix at play.[64] This suggests that the Courts are already in a very curious position in deciding on a case-by-case basis whether 'insulting' conduct warrants prosecution. John Stuart Mill strongly criticised this approach, since:

[57] *R (on the application of Animal Defenders International) v Secretary of State for Culture, Media and Sport [2008]* UKHL 15; [2008] 1 A.C. 1312 (Lord Bingham).
[58] *Norwood v DPP* [2003] EWHC 1564.
[59] By virtue of the Crime and Disorder Act 1998, s 31(1)(c).
[60] Public Order Act, s 5(2)(32).
[61] European Convention on Human Rights, Article 10(2).
[62] *Norwood v DPP* (n 58) (Auld LJ).
[63] James Wolffe, 'Values in conflict: incitement to racial hatred and the Public Order Act 1986' [1987] Public Law 85-95.
[64] Christopher Newman, 'Section 5 of the Public Order Act 1986: the threshold of extreme protest' (2012) 76(2) Journal of Criminal Law 105-109.

> [T]here is no parity between the feeling of a person for his own opinion and the feeling of another who is offended at his holding it, no more than between the desire of a thief to take a purse and the desire of the owner to keep it…'[65]

effectively 'recommending that victims … toughen up.'[66] This is an approach that would again raise the Government's concern that victims of hate speech would be left unprotected if amendment of s 5 were to proceed.[67]

Delving further into the approach taken under UK jurisdiction, *Hammond v DPP*[68] embodied a troubling decision in bringing conflict between s 5 and freedom of expression as well as freedom of religion.[69] The appellant staged a protest using signs containing the words 'Stop Homosexuality' provoking hostility amongst a crowd of onlookers. On refusing to desist from protesting he was charged under s 5 on the grounds that the signs being used were 'insulting' and likely to cause 'distress'. As a consequence the Court held that his Article 10 ECHR right was justifiably restricted in the 'prevention of disorder or crime',[70] his protest beginning to disrupt public peacefulness.[71] The Court held that a pressing social need warranted for such interference, which was deemed proportionate as he had gone beyond legitimate protest, whilst also interfering with 'the rights of others.'[72] Convincing argument was made on the premise that no gratuitous insult had been expressed since the signs were merely a reflection of his religious beliefs, a right guaranteed under Article 9 of the European Convention of Human Rights.[73] His belief as guaranteed under Article 9 ECHR considered such practices against God's law, therefore immoral. However this reasoning was without merit with the Court and the s 5 offence was upheld. This legal

[65] Mill (n 53) Chap 4.12.
[66] Elizabeth Anderson, 'The Democratic University: The Role of Justice in the Production of Knowledge' (1995) 12(2) Social Philosophy and Policy, 186-219.
[67] Home Office, *Consultation on police powers to promote and maintain public order - Section 5 of the Public Order Act 1986: Summary of Consultation Responses and Government Response* (January 2013):
Stonewall believes that Section 5 of the Public Order Act 1986 is a reasonable and proportional method to tackle offensive homophobic incidents that occur frequently across England and Wales. We therefore believe there is no need to amend Section 5 to remove the term insulting.
[68] *Hammond v DPP* [2004] EWHC 69.
[69] European Convention of Human Rights, Article 10(1), Article 9(1).
[70] ibid Article 10(2).
[71] *Hammond v DPP* (n 68) 19.
[72] European Convention on Human Rights, Article 10(2).
[73] ibid Article 9(1).

discussion of this case stands to identify why finding the correct balance between the European Convention on Human Rights and the United Kingdom's domestic law is so important.

This decision adopted the pro-civility approach effectively conveying the message that the public would not tolerate views contradicting their own. It may be debated that this is an approach that should only be taken when 'the bonds that normally hold society together come under serious threat of destruction.'[74] Without granting 'toleration and freedom to the individual … we are all caught in a vice of dictatorship, repression and slavery.'[75] This undermines the argument that the individual dissenter is a 'place holder' for the values and goals central to a proper civic structure[76] where members of society should be able to contribute and develop in the competition of the market.[77]

It is arguable that there are convincing grounds for amending s 5 since 'free speech includes not only the inoffensive, but the irritating, the contentious … and the provocative provided it does not tend to provoke violence',[78] to which Hammond's conduct unfortunately did so, which in any case would likely fail if brought before the Strasbourg court, an avenue closed by Hammond's death before trial.[79] Nonetheless such a decision to restrict Hammond's Article 10 ECHR right for using 'insulting' conduct acts to reinforce John Stuart Mill's argument that 'the greatest threat to individual liberty resides … in … a tyrannical majority demanding total conformity to its views and stigmatising all opposition.'[80]

The triviality of remarks being charged under s 5 raises the argument in favour of removing 'insulting' from s 5. Section 5 is ripe for misuse in criminalising almost any

[74] Lee Bollinger, *The Tolerant Society (*Oxford University Press, 1988); see also: Ian Cram, 'Contested Words: Legal Restrictions on Freedom of Speech in Liberal Democracies' (2006) 16 (2) Applied Legal Philosophy, 104.
[75] *R v John Kingsley Reid* [1978] (Neil McKinnon QC).
[76] Geddis (n 30) 853-874.
[77] *Abrams v United States* (1919) 250 US 616 - Oliver Wendell Holmes' free marketplace of ideas model: 'the best test of truth is the power of the thought to get itself accepted in the competition of the market'; Geddis (n 30) 853-874.
[78] *Redmond-Bate v DPP* [1999] EWHC Admin 732.
[79] Ian Leigh, 'Hatred, sexual orientation, free speech and religious liberty' (2008) 10(2) Ecclesiastical Law Journal 337-344.
[80] John Stuart Mill, *On Liberty, In Collected Works of John Stuart Mill*. (1977) Vol 18, 217-223.

type of conduct since legitimate protest has long been recognised as having the ability to be offensive if it is to have any type of impact on its intended audience.[81] The current danger manifests itself in the carving of a general 'right not to be offended' through the 'right of others' exception under European Law. By the United Kingdom favouring the pro-civility model the State is seen to be using domestic law and the European Convention on Human Rights as a mechanism to effectively dictate the quality of public debate.[82]

Abdul v DPP[83] avoided such a general exception developing. This case concerned a protest during a ceremony held for soldiers returning from Iraq and Afghanistan. The protestors began by interrupting a moment of silence for the dead, deemed a calculated and deliberate insult to the dead and those who mourn them. The Court held that Article 10 ECHR could legitimately be restricted since the 'rights of others' includes 'the right to express publicly support, sympathy and remembrance for the armed forces' and 'using insulting behaviour likely to cause distress when people are gathered publicly to remember the dead is … justification for invoking the criminal law.'[84] Such a narrowly drawn approach is favourable since the public are 'not entitled to be offended … [because this would be] inimical to the values of a democratic society, to which … it must be assumed [they] adhere.'[85] However there are undoubtedly narrowly construed circumstances where such a restriction is warranted.

There is obviously no magic algorithm to determine the correct balance[86] but it cannot be said that behaviour is prohibited simply because it is an affront to certain people.[87] As Shaw contends: 'the reasonable man adapts himself to the world; the unreasonable one persists in trying to adapt the world to himself. Therefore, all progress depends on the unreasonable man.'[88] Furthermore, social attitudes inevitably evolve over time in

[81] *Abdul v DPP* [2011] EWHC 247, 249.
[82] Paul Wragg, 'Critiquing the UK judiciary's response to article 10 post-HRA: undervaluing the right to freedom of expression?' [2009] DPhil Thesis, University of Durham.
[83] *Abdul v DPP* (n 81).
[84] Bailin (n 21).
[85] *ProLife Alliance* (n 50), at [98]; see also Khan (n 91).
[86] Geddis (n 30) 853-874.
[87] *Brutus v Cozens* (n 13).
[88] Geddis (n 30) 853-874.

which certain expletives have become 'wearisomely familiar' for police officers.[89] Looking to foreign jurisdiction certain expletives are used so commonly that they lose all their significance and meaning.[90] Adopting this logic to 'insulting', such conduct is susceptible to become increasingly subjective and thus a poor criterion[91] in a democratic society where social attitudes are constantly evolving. This rebuts the suggestion that 'insulting' words can be measured on a factual basis like 'abusive' and 'threatening'.[92] Such an approach further implies the superfluous nature of s 5.

The s 5 offence as contained in the Public Order Act 1986, is sweeping, draconian and extends the criminal law into areas of annoyance, disturbance and inconvenience,[93] covering almost any type of conduct which inevitably has a chilling effect on free speech. On 12 December 2012, the House of Lords voted in favour of amending Clause 38 of the Crime and Courts Bill to remove 'insulting' under s 5. The Government were convinced that victims of hate speech would remain protected without the Crown Prosecution Service being affected in bringing prosecution. The Director of Public Prosecutions also concluded that in no case could the term 'insulting' not be appropriately replaced with the term 'abusive'.[94] Questionably a curious position has already developed, each case being dependent upon the factual matrix at play.[95] The whole debate was recently under even further threat in that the Home Secretary, Theresa May, began lobbying for the abolishment of the Human Rights Act 1998. This is a worrying development for those fighting for our right to free speech. Nonetheless the United Kingdom case law highlights a clear deference for public peacefulness over freedom of expression and the right to protest, showing an understandable tendency to give greater priority to the immediate negative over the general positive. Whilst the stance adopted in the United States may not be wholly desirable it seems convincing that a transition further toward a transformative model would not be as disadvantageous as some may suggest. In such a society an individual dissenter's 'insulting' expression could be seen as a welcome sign that the oxygen of

[89] *DPP v Orum* [1988] 3 All ER 449.
[90] *Police v Bulter* [2003] NSWLC 2.
[91] Aatifa Khan, 'A "right not to be offended" under article 10(2) ECHR Concerns in the construction of the "rights of others"' [2012] European Human Rights Law Review 191-204.
[92] *Brutus v Cozens* (n 13).
[93] Peter Thornton (n 18).
[94] Home Office, *Police Powers to Promote and Maintain Public Order – Section 5 of the Public Order Act 1986: Summary of Consultation Responses and Government Response* (January 2013) 3.
[95] Christopher Newman (n 64).

debate and dissent still flows through society rather than being an impermissible transgression of the rules of orderly public debate.[96]

C CONCLUSION

In sum, as John Stuart Mill masterfully puts it, 'the peculiar evil of silencing the expression of an opinion is … robbing the human race.'[97] The precise balance between upholding and respecting those rights as contained in the European Convention on Human Rights and further protecting the public from insulting speech pursuant to the Public Order Act 1986 has clearly not yet been found. Whether equilibrium will be identified is not yet clear. However what is abundantly clear is that 'a right to speak inoffensively [is] not a right in any meaningful sense.'[98]

[96] Geddis (n 30) 853-874.
[97] Mill (n 53).
[98] David Feldman, *Importing the First Amendment: Freedom of Speech and Expression in Britain, Europe and the USA* (Hart Publishing 1998) 163; *Redmond-Bate v DPP* [1999] Crim LR 998, 20 (Sedley LJ).