
IN PROTECTION OF FREEDOM OF SPEECH

A Legal Analysis

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RECLAIM
PARTY

IN PROTECTION OF FREEDOM OF SPEECH: a Legal Analysis.

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I. FOREWORD

This report is a timely and important reminder of the value of freedom of thought and expression, and the high social cost of suppressing opinions that we believe to be mistaken.

“Fundamentally,” wrote Max Weber, “bureaucratic administration means domination through knowledge.” Bureaucratic administration, as Weber perceived, is the defining characteristic of the modern state. It has many advantages: rationality, objectivity, efficiency. The danger comes when knowledge is not just an essential tool of government, but a public monopoly. This is what happens when approved bodies are empowered to determine what knowledge is true or valuable. It is a significant step on the road to despotism, because it is based on the notion that intellectual enquiry and the dissemination of ideas should be subordinated to authority. It reflects a view of society as a single great organism which must have a single collective notion of what is true and good. Many people who are convinced of the rightness of their own opinions take this view. They regard dissent as inherently anti-social, even treasonable. This is among the hallmarks of a totalitarian society.

It is also culturally destructive. All statements of fact or opinion are provisional. They reflect the current state of knowledge and experience. But knowledge and experience are not closed or immutable categories. They are inherently liable to change. Recently, the Royal Society, Britain’s premier scientific society, proposed “legislation and punishment of those who produced and disseminated false information” about vaccines. What they mean by “false information” is information inconsistent with the scientific consensus as defined by some recognised authority. Once upon a time, the scientific consensus was that the sun moved round the earth and that blood did not circulate round the body. These propositions were refuted only because claims to a monopoly of knowledge failed and current orthodoxy was challenged by people once thought to be heretics. Knowledge advances by confronting contrary arguments, not by suppressing them.

We have to accept the implications of human curiosity. Some of what people believe will be wrong. Some of it may even be harmful, not just to those who hold those beliefs but to others. We cannot have truth without accommodating error. It is the price that we pay for allowing knowledge and understanding to develop and human civilisation to advance.

Jonathan Sumption

5th March, 2021

II. PREFACE

Never in my lifetime have I witnessed language so weaponised. Never have I seen such suppression of free speech, such censoring of perfectly moderate opinion, and perhaps most perniciously, the censorship of the self. New speech codes – vocabulary, semantics, syntax, pronouns, banned words, etc. – are forced into everyday parlance.

I commissioned this Report to understand the relationship between this aspect of contemporary culture and the law as it relates to freedom of speech in Britain; and, crucially, I wanted to consider the effect this has on our democratic process.

Why make the link between freedom of speech and democracy? Because freedom of speech exists to protect equality before the law by allowing every person to get his point across through peaceful means. Furthermore, stable government can only exist and evolve through the broadest possible debate. When certain views or statements are suppressed or outlawed, segments of the population begin to feel disenfranchised, excluded and unprotected by the system. Disquiet and division ensue, leading to disgruntlement, resentment and ultimately instability.

Which views, then, are currently *not* being heard? I ask you to consider things like the definitions of gender, race, multiculturalism, immigration, religion, climate change, COVID decisions, vaccinations, vaccination passports, decisions taken by the NHS, national identity and British history. None of these can be discussed openly today. Why, then, aren't they?

Just look at the style of public discourse that has taken root in this country. It's one that summarily banishes anyone who dares challenge the 'morally superior' position on any of these issues. Offence is called at the slightest disagreement which is followed by histrionics from the self-appointed 'offendee' – or, indeed, any self-appointed moral guardian speaking on behalf of the offended class. "Burn the Witch!" is shouted at anyone who says, writes, illustrates, performs or posts anything about these topics. The 'offender' is openly denounced, suspended, dropped, sacked and 'nonpersoned' – their career and livelihood are ended overnight.

We are talking, here, about the dynamics of 'cancel culture'.

The list of high-profile victims of this censorship is long: the list of ordinary people whose livelihoods have been ended overnight is much longer. JK Rowling, Jenni Murray, Martina Navratilova were vilified for publicly stating biological facts. David Bellamy, once so beloved of the nation, was summarily cancelled for daring not to bow at the altar of climate change.

Who decided that these people were not allowed to hold their views? Who voted to bring in these punishments? Where has this licence for one group of citizens to punish another come from? The answer is legislation and its overinterpretation. But it is not for legislation to regulate what people may say, especially if those opinions are not popular (and it is difficult to know what is popular when half the UK population is too scared to speak their minds).¹ When half the debate is missing, how can government represent the people?

How, then, has this assault on free expression come about?

I assumed that by virtue of living in a western liberal democracy, freedom of speech was *somewhere* enshrined as an inalienable right. This Report dispels that misapprehension.

¹ Savanta: ComRes poll, 8.2.2021.

Freedom of speech in Britain has never been an inalienable right. America stated its inalienable rights in the Declaration of Independence and enshrined them in the First Amendment. England's forerunner, the oft-trumpeted 'equivalent' – the 1689 Bill of Rights – does stipulate the right to freedom of speech in Britain but it is *only* granted to MPs; and then only limited to parliamentary privilege.

Before anyone thinks of countering with Article 10.1 of the European Convention on Human Rights, I urge them to read the very next clause. Article 10.2 grants powers to the government that undermine any such freedom. To parody President John F Kennedy, freedom of speech in the UK *does* only come from the generosity of the state and not from the hand of God.

But there is a further complication. Legislation goes through 'interpretation'. Standard procedure is for institutions responsible for implementing the legislation to prepare published guidance on how it should be applied in practice. This includes, for example, the *Hate Crime Operational Guidance*, now called the *Authorized Professional Practice*, amongst a plethora of others. These are written by unelected bodies and subject to no parliamentary scrutiny.

All of this begs the crucial question: What can and should be done? This Report provides a serious and considered response.

First, it identifies two areas of existing and proposed legislation and guidance where freedom of speech is unnecessarily restricted: public order offences and hate crime allegations. The Report shows how guidance issued to interpret legislation can embellish actual legal responsibilities and damage true freedom of speech. As a result, The Reclaim Party recommends that all guidance issued by public bodies should be subject to parliamentary scrutiny before it is published or subsequently amended.

Secondly, the Report identifies two areas in which freedom of speech must be pre-emptively reinforced before it is too late: social media and employment.

The proposals in this Report are narrow, targeted and eminently achievable.

Laurence Fox

Leader of The Reclaim Party

15th July, 2021

III. EXECUTIVE SUMMARY

Introduction

The free exchange of ideas is the foundation of all freedom. But with its capacity to challenge the powerful comes a need for constant vigilance in its protection.

It once looked as though the revolutions across Eastern Europe a generation ago were the beginnings of a golden age of freedom. There followed another revolution in communication, one more significant than any for 500 years, that democratised and enlarged the exchange of ideas as never before: the internet.

Yet, in the same way that the dawn of printing led to ever more violent attempts at suppression by Church and State, so have the state and new powers, social media companies, used it to restrict free expression. And the supposed justification is the same now as it was half a millennium ago: safety. Except now the safety is that of our bodies and our sentiments rather than of our souls.

This Report revisits the analysis of John Stuart Mill one and a half centuries ago. A person's opinion is a gift to others and only through its exchange may we enlarge our understanding. The very idea of the arbitration of truth is flawed because it requires the appointment of an infallible arbitrator. And only through openness and the clash of ideas may we enlarge knowledge and understanding to the betterment of mankind.

The legal protection of freedom of speech and conscience and its limitations

Freedom of expression is protected both by the common law and Article 10 of the European Convention on Human Rights, which are considered here. It includes the right to publish what is dangerous, heretical, offensive and provocative. This country has a proud history of protecting the freedom of expression not only of its own citizens but of those seeking refuge from less fortunate lands. It has a duty to protect it still.

The criminal law contains a wide range of prohibitions on speech that risks causing defined harm. The breadth of its protection is sufficient to address the concerns about bullying, harassment and trolling online; and it provides a clarity that is a necessary precondition before state agencies should interfere with freedom of expression. Where speech leads to the advocacy of violence or disorder, the criminal law can intervene to punish the incitement of any offence and of racial hatred in particular. Outside the criminal law, defamation and breaches of privacy are actionable in civil claims. While there is a legitimate concern about the breadth of some of these offences (and three reforms are proposed), broadly a tolerable compromise has been reached and the true risk to freedom of expression lies elsewhere.

This Report considers two areas of concern.

First is the Hate Crime and Public Order (Scotland) Bill. This proposes an offence of stirring up hatred that criminalises not only threatening behaviour but behaviour that a 'reasonable person' would think was 'abusive' and 'insulting', where a 'reasonable person' considers it 'likely' that it would stir up religious (or other) hatred. Not only is criminal liability imposed

so lightly, the Bill contains a wholly inadequate provision that supposedly protects the freedom to insult religious belief but in fact does no such thing. It should be opposed entirely or radically amended.

Secondly, it addresses the Hate Crime Operational Guidance, which recommends that police officers record allegations of speech as a ‘non-crime hate incident’ where no crime has been committed simply because the speech is ‘perceived’ to be motivated by hatred of a particular group; and which advises officers not to challenge or require evidence for that (alleged) perception. This guidance is a dangerous interference not only with freedom of speech but with the presumption of innocence and should be removed in its entirety. Police are already required to investigate criminal behaviour where it is proportionate to do so and to do so sensitively. The state should not be recording lawful behaviour of which it disapproves.

Social Media

The revolution in the exchange of ideas enabled by the internet has created public spaces online that mirror physical public spaces. Yet with this openness has come the difficulty that a handful of forums host the greater proportion of political comment, giving them extraordinary power to censor speech that is (effectively) permitted online.

As it is sometimes necessary to break up monopolies to permit true competition, so now must freedom of speech be protected within forums hosted by private companies. A handful of companies cannot be permitted to close-down debate; and neither they nor states nor international authorities should be permitted to arbitrate the acceptability of speech online.

It is proposed that website ‘hosts’ of ‘organic’ content that is not edited or published by them (in law) may only remove a statement if its publication is or may be a criminal offence or a civil wrong. This would encompass defamatory comments and those in contempt of court as much as incitement to racial hatred and harassment. Only then will there be an objective and foreseeable test of what is acceptable, one that reflects the protection of freedom of speech in physical public places and that allows all speech not prohibited in law.

Disturbingly, the government’s proposal is to do the reverse. It proposes to introduce an Online Safety Bill that will make websites responsible for ‘harm’ not rooted in the criminal law and with no objective definition. It would do so by introducing the concept of a ‘duty of care’ owed not to an individual but to a regulator. In the name of a nebulous concept of ‘safety’ and ‘harm’, censorship would not merely be permitted but required, with no objective or foreseeable definition of what it is that may be censored. The proposed Bill is offensive to the very idea of freedom of expression and is objectionable in principle.

Employment

The opportunity to exchange ideas online has led to corresponding cases of employees being disciplined or dismissed for their statements on social media. There is currently no express protection of an employee’s right to freedom of speech, which has the effect that voicing controversial or challenging opinions carries a risk to a person’s livelihood.

The prohibition of discrimination against those holding a ‘philosophical belief’ is a wholly inadequate means of protecting speech. It protects a person because of his ‘protected characteristic’ of holding that belief, not his freedom of expression; and it allows a judge to determine whether that ‘philosophy’ is sufficiently coherent and even whether it is ‘worthy of respect in a democratic society’.

This Report proposes that employment law is amended to include an express protection for an employee’s speech outside the course of employment. An employer may only discipline or dismiss an employee if it can show that it was reasonably necessary to preserve its reputation or the rights and relations between its employees; or because it was reasonable to restrict the speech of an employee because of his role.

For the first time, the freedom of expression of employees would be protected expressly, a necessary recognition that membership of society conveys a right to contribute to its debate without fear of the consequences.

Proposed reforms

This Report makes six proposals:

- (1) The word ‘abusive’ should be removed from section 5 and the words ‘insulting’ and ‘abusive’ should be removed from section 4A of the Public Order Act 1986: offences which criminalise speech or behaviour that is likely to or intended to cause harassment, alarm or distress. ‘Insulting’ was removed from section 5 recently but is an inadequate protection against the criminalisation of speech or behaviour that, while it might be unpleasant, should not be the concern of the state.
- (2) Offences of stirring up racial hatred should be reformed to align them with the offences of stirring up hatred due to religious belief or sexual orientation by providing that they are committed only where there is intent to stir up hatred.
- (3) The Hate Crimes Operational Guidance should be withdrawn in its entirety. Alternatively, it should be reformed to provide that police officers may not record speech or behaviour unless they reasonably believe that a criminal offence has been committed; and that they may only reach that conclusion after having evaluated all the evidence.
- (4) The Hate Crime and Public Order (Scotland) Bill should be opposed outright. Alternatively, the Bill should be amended: (a) to provide that it criminalises only threatening behaviour and only where it is intended to stir up religious (or other) hatred; and (b) to include a provision protecting the free expression of belief that is as robust as section 29J of the (English) Public Order Act 1986.
- (5) Website ‘hosts’ of ‘organic’ content that is not edited or published by them (in law) should be prohibited from removing statements unless their publication is or may be a criminal offence or a civil wrong.
- (6) Employment law should be amended to include express protection for an employee’s speech outside the course of employment.

But increased protection in law goes only so far. What is needed is a re-evaluation of this country’s values. One that recognises that a free society is one in which the state may not intrude save where society, through laws made by its representatives, has decided that it may.

That a mature society is one that tolerates others and accepts that the state has no role or right to 'protect' the sensibilities of its citizens. And that a robust society is one that facilitates the freest exchange of ideas.

IV. INTRODUCTION: The value of freedom of conscience, speech and assembly

It was not for nothing that it was the First Amendment to the United States Constitution that protected freedom of speech. It is the foundation not only of all freedom but of the development of civilisation. For it is through speech that mankind has traded, tested ideas and advanced science, technology, the liberal arts and all the other elements that have contributed to the development of mankind. As Matthew Tindal put it in 1704:

‘In a word, as there’s no Freedom either Civil or Ecclesiastical, but where the liberty of the Press is maintained; so wherever that is secured, all others are safe. That like a faithful Centinel prevents all surprize, and gives timely warning of any approaching Danger.’²

Yet, forasmuch as this freedom has been venerated, it has forever presented a threat: a threat not only to weak ideas but to the state and to all who seek to control. Even the society seen as the fountain of democracy saw fit to put its greatest thinker, Socrates, to death for questioning what it saw as fundamental truth. And it was for his speech that Jesus Christ was given up to the authorities to be crucified.³

Speech challenges. Speech exposes. Speech reveals. And speech will ever present a threat to authority.

It is because of this that ‘the condition upon which God hath given liberty to man is eternal vigilance’.⁴ And it is that vigilance that is needed even as speech has been democratised, through the internet, in perhaps the most significant revolution in the communication of ideas since the advent of printing half a millennium ago.⁵

This latest revolution came after the culmination of what appeared to be the greatest victory for freedom since the defeat of Nazism, in the liberation of the Eastern Bloc from totalitarian communism, where books were censored or destroyed, radio stations were blocked and those who dared read or listen to them were punished. It was in the luxury of those next few years that Francis Fukayama could say, in a prediction that became more embarrassing with every year that followed, that we had reached ‘the End of History’.⁶

We hadn’t. Not only has the world since been beset by terrorism and war, it has seen a decline in the value it places upon freedom, perhaps not unconnected to the absence of an example of its direct repression in the centre of continental Europe. And the last year has seen the culmination of a growing political trend that puts safety above freedom. Never before in modern history have liberal democracies imposed wholesale and unqualified proscriptions on

² Dr Matthew Tindal, *Reasons Against Restraining the Press*.

³ For blasphemy (a point observed by JS Mill): Mark 14:61; Matthew 26:63.

⁴ John Philpot Curran ‘the Right of Election’ in 1790, published in *Speeches On The Late Very Interesting State Trials* in 1808 (often attributed to Thomas Jefferson).

⁵ The invention of the telephone and the telegraph could be argued to have been bigger developments in communication but not in the communication of ideas to wide audiences.

⁶ Francis Fukayama, *The End of History and the Last Man*, Free Press, 1992.

political protest – a right inextricably linked with that of freedom of speech and without which it is robbed of much of its power.⁷

This threat is one of many. An uncomfortable and illiberal idea has gained traction in recent years: that it is possible to identify ‘truth’ and, more dangerously but in consequence of this fallacy, that it is necessary to ‘correct’ those who ‘contradict’ it. Yet ‘what is truth?’⁸ ‘Truth’ is rarely unqualified. Even where there are concrete truths – in the natural sciences – rarely can human experimentation, endeavour and thought do more than attempt to uncover layers of meaning: meaning that would be impossible to uncover without the freedom to discuss and debate. And where facts are possible to establish, reports about them will often be clothed with nuance. Opinion is always difficult to disentangle from fact, particularly in respect of political observation. If absolute ‘truth’ may be identified – for example the attendance by a politician at a particular event – the answer is not to suppress those who challenge it but to cultivate an environment of openness, in which lies are impossible to sustain because of the freedom of others to expose them. In this respect, it is well to observe the common law development of an adversarial rather than inquisitorial legal system. This recognises that it is not possible for a court to determine what is truth. It must accept its limitations and decide only what is more likely (or about what it is sure) on the evidence before it.⁹

Moreover, as the observer looked from pig to man and man to pig, unable to tell which was which,¹⁰ the ability of the censor to prohibit or the requirement to ‘correct’ falsehood can all too easily be used to suppress or distort truth. As Dr Radomir Tylecote has pointed out, the concept of ‘fact checking’ literally means censorship insofar as the Latin term ‘censor’ (*censere*) means ‘to estimate, rate, assess, be of opinion’.¹¹

A further danger to develop in recent years has been the suggestion that it is acceptable to be intolerant of intolerance, to the extent that speech expressing that intolerance may be curtailed. This idea is bound up with the assertion that speech must be censored to prevent harm – this time the distress caused by speech that is hurtful or offensive. But perhaps a greater concern is the growing acceptance of censorship of speech regarded as intolerant even where it is not itself criminalised. This is the censorship that would be imposed on social media and other online companies by the government’s proposed Online Safety Bill (considered in detail in Chapter VI). Such censorship has already been imposed not only by such companies but by employers, some of whom have dismissed employees for expressing opinions deemed offensive.¹² This Report will consider these difficulties and possible solutions.

J.S. Mill Revisited

Freedom of conscience has perhaps a longer recognition in England than freedom of speech. It was this freedom that Sir Thomas More struggled to protect, relying on the maxim ‘*qui tacet consentire videtur*’ (one who keeps silent seems to consent), which (while being an inaccurate

⁷ Freedom of Assembly is outside the scope of this Report but is touched on in the next Chapter.

⁸ John 18:38.

⁹ Respectively, the civil and criminal standards of proof.

¹⁰ *Animal Farm* by George Orwell, London 1945.

¹¹ ‘Why the Government’s plans to regulate the internet are a threat to free speech’, Free Speech Union briefing by Dr. Radomir Tylecote, September 2020. Citation is of the Oxford English Dictionary.

¹² See consideration in Chapter VII.

supposition in his case) might have protected him from conviction for treason.¹³ Elizabeth I later said that ‘I have no desire to make windows into men’s souls’.¹⁴ Yet, as More found to his cost, freedom of conscience is worth little if unaccompanied by freedom of speech.¹⁵

In his seminal tract ‘On Liberty’, John Stuart Mill recognised that the liberty of discussion is inextricably linked to the liberty of thought; and he addresses them together at the beginning of his work. It is striking how prescient it is, published more than a century and a half ago, today.¹⁶ His argument is perhaps the most insightful explanation of the benefit of freedom of speech to have been made, not only to the individual but to society and to civilisation.

Mill’s starting point was that a man’s opinion was not a ‘personal possession of no value’ but was at least capable of being a gift to others; and that denying or suppressing it would be to the detriment of society at large.

‘But the peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.’

No person is infallible; and it is only by the free exchange of opinion and ideas that a deeper understanding of truth can arise. ‘Judgment is given to men that they might use it.’

Mill had a succinct answer to today’s ‘fact-checkers’:

‘There is the greatest difference between presuming an opinion to be true, because, with every opportunity for contesting it, it has not been refuted, and assuming its truth for the purpose of not permitting its refutation.’

We might add that freedom of speech is premised on complete equality: if I want to say what I like, how can I stop you from saying what you like? If I stop you, I am asserting my superiority. A free and democratic society is one that recognises that there can be no infallible arbiter of truth; and that no individual or body of people, however preponderant, have the right to appoint one. This conclusion is the necessary result of the Kantian principle of ‘universalisability’, or indeed the Christian ‘do as you would be done by’. We must assume the rationality of others if we assume the rationality of ourselves. Indeed, the premise that there is a person or body capable of declaring that it is rational and others are not is a logical fallacy.

Moreover, ‘there must be discussion, to show how experience is to be interpreted... reliance can be placed on it only when the means of setting it right are kept constantly at hand.’ In this,

¹³ Henry Ansgar Kelly; Louis W. Karlin; Gerard Wegemer: *Thomas More's Trial by Jury: A Procedural and Legal Review with a Collection of Documents*, Boydell & Brewer Ltd, 2011, p 189.

¹⁴ Oral tradition, the words very possibly originating in a letter drafted by Bacon: J.B. Black *The Reign of Elizabeth 1558–1603*, Oxford, 1936.

¹⁵ Less sympathetic observers might point out that he was in that respect a victim of the same form of repression of speech that he pursued against William Tyndale and ‘heretics’ in England.

¹⁶ By John W. Parker and Son in 1859, the same year as Darwin’s *On the Origin of Species*. All quotations are from Chapter II: ‘On the Liberty of Thought and Discussion’.

Mill mirrored Tindal, whose pamphlet was published in the years following the abolition of the licensing of newspapers in 1695:

'Tis the danger of being detected and exposed that makes Men write with more Temper, as well as more regard to Truth'.¹⁷

Mill also recognised the danger of creating a limitation on freedom to be measured by the 'extreme' nature of the speech in question. It was strange, he observed, that those proposing such a limitation 'should imagine that they are not assuming infallibility, when they acknowledge that there should be free discussion on all subjects which can possibly be *doubtful*, but think that some particular principle or doctrine should be forbidden to be questioned because it is *so certain*, that is, because *they are so certain* that it is certain.'¹⁸ It is not difficult to think of many people who display such certainty while not only castigating the opinion of others but challenging the temerity to express it.

As Mill said, 'the usefulness of an opinion is itself a matter of opinion: as disputable, as open to discussion and requiring discussion as much, as the opinion itself.' And the decision as to what opinion is 'useful' would depend on the same infallible judge as would be needed to decide whether the opinion was false. As George Orwell later put it: 'If liberty means anything at all, it means the right to tell people what they do not want to hear.'¹⁹

Mill observes that times change and with them the acceptance and often endorsement of opinions once suppressed. Who are we to be so arrogant, he argues, as to determine what is truth? He draws attention to the execution of Socrates for heresy and of Jesus for blasphemy, alluded to above. And he reflects upon Marcus Aurelius, perhaps the greatest humanitarian and thinker of his age, who considered it his duty to put down Christianity, seeing it as the greatest threat to the ties that he considered knitted his society together.

Those, like Dr Johnson, who claim that 'persecution is an ordeal through which truth ought to pass' ignore history, says Mill. He points to the many times at which the Christian Reformation arose, only to be put down; and that it was no more than happenstance that Luther's reformation had sufficient protection to be able to flourish. These examples are instructive whether or not (like Mill) one values or recognises the religious or political advances brought by the Reformation, not least to freedom of conscience in a religious movement that valued the right of the individual to read scripture. And it is not only by suppressing heretical opinions that public discourse is impoverished, but by allowing them to 'smoulder in the narrow circles of thinking and studious persons among whom they originate'. This might be 'a convenient plan for having peace in the intellectual world' but the price for this 'intellectual pacification' is 'the sacrifice of the entire moral courage of the human mind'.

'But it is not the minds of heretics that are deteriorated most, by the ban placed on all inquiry which does not end in the orthodox conclusions. The greatest harm done is to those who are not heretics, and whose whole mental development is cramped, and their reason cowed, by the fear of heresy.'

¹⁷ *Ibid.*

¹⁸ Original emphasis.

¹⁹ Unpublished introduction to *Animal Farm*, written in 1945.

How much does that insight strike home? How many journalists, politicians and academics does it describe? While there have been ‘and may again be, great individual thinkers, in a general atmosphere of mental slavery... there never has been, nor ever will be, in that atmosphere, an intellectually active people.’ And, as Mill later observes, it is not enough to hear the arguments of adversaries from one’s own teachers, one must be able to hear them ‘from persons who actually believe them; who defend them in earnest and do their very utmost for them.’

Similarly, society benefits from the clash of ideas represented by rival parties or political movements, as it does from the adversarial nature of common law systems.²⁰ If any of the ‘great open questions’ – those favourable to democracy against those to aristocracy, to property against equality, to liberty against discipline – are not ‘expressed with equal freedom... there is no chance of both elements obtaining their due’. And all great movements start as a reaction against another: Christianity against Paganism (says Mill) and (we might add) Whig constitutionalism against Stuart absolutism, modern conservatism against the French Revolution, liberalism against conservatism and socialism against *laissez-faire* liberalism.

Strikingly, Mill identified, in 1859, that ‘the quiet surface of routine is as often ruffled by attempts to resuscitate past evils, as to introduce new benefits.’ Though he feels it unnecessary to observe as much, such attempts are always justified by an appeal to the ‘greater good’, whether that be to the maintenance of order (in the 19th century) or for the protection of health and the avoidance of causing offence (as they are today).

Another parallel is of Mill’s criticism of the Catholic Church’s then practice of withholding an *imprimatur* on books it considered dangerous or heretical, while allowing certain clerics and theologians the right to read it so as to present the arguments against. Only one year ago, the British government initially refused to publish the minutes of the meetings of its Special Advisory Group for Emergencies (‘SAGE’) for fear that their contents might ‘still contain sensitive information, with policy advice still under live consideration.’²¹ When they were published, it transpired that the government’s strategy was to increase people’s apprehension of risk as part of a public relations campaign. In other words, to spread not knowledge but fear. It was for the government to act as ‘gatekeepers’ of the truth and to determine what it was ‘safe’ to communicate to the public: the scientific Sacred Congregation of the Holy Office.

Mill summarises his arguments with four points: that to silence opinion is to assume infallibility; that a silenced opinion may contain a portion of truth; that even if the prevailing opinion is the whole truth, it will be received with little comprehension unless it is challenged; and that the meaning of a doctrine will be enfeebled if it is not subject to challenge. He concludes with a warning which is particularly relevant in the online age:

‘The worst offence... that can be committed by a polemic is to stigmatize those who hold the contrary opinion as bad or immoral men.’

²⁰ The term is used here to distinguish those systems that descend from the English legal system in which the law develops through precedent (in the United States, Australia, etc) from the ‘civil law’ systems in continental Europe and elsewhere, based on an inquisitorial and not adversarial approach.

²¹ <https://www.reuters.com/article/us-health-coronavirus-britain-sage/uk-science-advisory-board-publishes-minutes-of-meetings-in-push-for-transparency-over-virus-idUSKBN2352BM>, Reuters, 29.5.2020.

As John Stuart Mill recognised, freedom of speech is threatened not just by governments but by other people; and particularly by hostility to the very notion of challenging consensus or 'received opinion'.

V. FREEDOM OF SPEECH AND THE LAW

Protection under the common law and the Convention for the Protection of Human Rights and Fundamental Freedoms

The common law protection of freedom of speech and its importance was expressed superlatively by Lord Bingham.²²

‘The reasons why the right to free expression is regarded as fundamental are familiar, but merit brief restatement in the present context. Modern democratic government means government of the people by the people for the people. But there can be no government by the people if they are ignorant of the issues to be resolved, the arguments for and against different solutions and the facts underlying those arguments. The business of government is not an activity about which only those professionally engaged are entitled to receive information and express opinions. It is, or should be, a participatory process. But there can be no assurance that government is carried out for the people unless the facts are made known, the issues publicly ventilated ...’

By Lord Justice Hoffman:

‘... a freedom which is restricted to what judges think to be responsible or in the public interest is no freedom. Freedom means the right to publish things which government and judges, however well motivated, think should not be published. It means the right to say things which ‘right-thinking people’ regard as dangerous or irresponsible. This freedom is subject only to clearly defined exceptions laid down by common law or statute.’²³

And by Lord Justice Sedley:

‘Free speech includes not only the inoffensive but the irritating, the contentious, the eccentric, the heretical, the unwelcome and the provocative ... Freedom only to speak inoffensively is not worth having ...’²⁴

The latter two quotations are from judgments given before the implementation of the Human Rights Act 1998 (‘the HRA’), by which judges were obliged to give effect to rights protected by the (European) Convention for the Protection of Human Rights and Fundamental Freedoms (‘the ECHR’) including that of freedom of speech, and reflect a distillation of protections developed within the common law. The preservation of freedom of speech has a long history going back, in its modern form, to the Bill of Rights 1689 and the abolition of the licensing of the press shortly afterwards;²⁵ and which has its origins in the election of representatives with the right to petition the Crown since the first House of Commons was elected in the 13th century.

²² In *R v Shayler* [2003] 1 AC 247, at [21].

²³ Later Lord Hoffman, in *R v Central Independent Television plc* [1994] Fam 192, 202-203.

²⁴ *Redmond-Bate v Director of Public Prosecutions* (1999) 7 BHRC 375, [20].

²⁵ By the refusal of the House of Commons to approve the renewal of the Licensing Act 1662 on 11.2.1695.

That right of petition was expressly protected by Article V of the Bill of Rights and arguably includes not only the protection of the right of any person to present grievances to the Crown but also to protest actively.²⁶ As Lord Denning declared:

‘...freedom of assembly is another of our precious freedoms. Everyone is entitled to meet with his fellows to discuss their affairs and to promote their views; so long as it is not done to propagate violence or do anything unlawful.’²⁷

And as Lord Bingham said:

‘it is an old and cherished tradition of our country that everyone should be free to go about their business in the streets of the land, confident that they will not be stopped and searched by the police unless reasonably suspected of having committed a criminal offence. So jealously has this tradition been guarded that it has almost become a constitutional principle.’²⁸

Freedom of conscience and speech is protected by Article 10 of the ECHR, which was itself largely based upon freedoms that had developed in the common law. These Convention rights were given greater protection by the HRA. The HRA provided that all legislation must be interpreted ‘so far as is possible’ consistently with rights protected by the ECHR; that public bodies have a duty to give effect to those rights; and that they may not implement secondary legislation inconsistent with ECHR rights.

Article 10 is subject to conditions or restrictions described as being ‘necessary’ in a democratic society: ‘in the interests of national security..., for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.’

The European Court of Human Rights (‘the ECtHR’) has joined with the English courts in emphasising that Article 10 protects information or ideas that ‘offend, shock or disturb’, that its exceptions must be ‘narrowly interpreted’ and that their necessity must be ‘convincingly established.’²⁹ In another judgment, it found that ‘every “formality”, “condition”, “restriction” or “penalty” imposed in this sphere must be proportionate to the legitimate aim pursued.’³⁰

It is, however, questionable that Article 10 is sufficiently robust. While Article 17 requires that no person, body or state may ‘seek the abolition or limitation of rights guaranteed in the Convention’, this can be used as much to challenge freedom of expression as to defend it, for example where it is suggested that speech violates the dignity of another person or minorities protected by Article 14 (the right to protection against discrimination). Moreover, the above caveats to the right to freedom of expression are considerable. The protection it affords differs from both the wording and the application of the First Amendment to the United States Constitution. That Amendment, while it has been interpreted as permitting some reservation,

²⁶ And, insofar as it has, has been breached over three lengthy periods by the ‘lockdown’ regulations.

²⁷ *Verrall v Great Yarmouth Borough Council* [1981] QB 202 at 217.

²⁸ *R (on the application of Gillan) v Commissioner of Police for the Metropolis* [2006] UKHL 12 at [1].

²⁹ *Sunday Times v United Kingdom (No 2)* [1992] 14 EHRR 123.

³⁰ *Handyside v United Kingdom* (1979-80) 1 EHRR 737.

expressly and without qualification prevents Congress from ‘abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.’

Dr Preston Byrne has argued that Article 10.1 is a ‘woefully inadequate... and weakly implemented rule of law which has, in the form of Article 10.2, more often than not been used to restrict freedom of speech than expand it’ and that it ‘has allowed the boundaries of legal speech to shift with prevailing cultural currents instead of any objective, permanent principle.’³¹ This Report sets out some examples of courts paying little more than lip-service to the protection afforded to speech, while using its exceptions to allow statutory restrictions on speech (including the expression of religious belief) not simply to prevent public disorder but offence and distress.³² There have, however, been welcome developments amending a provision in the Public Order Act 1986 that prohibited ‘insulting’ or ‘abusive’ words or behaviour where they were ‘likely’ to cause ‘alarm or distress’.

It is for this reason that the reforms of the law proposed in this Report protect speech that is subject only to a clear test of whether it constitutes a criminal offence (in respect of social media companies) or that it damages an employer or its employees. While the courts will unavoidably have to judge between competing rights, they should not be required to evaluate the merits or ‘danger’ of the free expression of opinion and ideas.

Speech and the criminal law³³

Parliament has developed a large volume of legislation capable of criminalising speech where it causes defined harms. While this Report proposes two reforms, the statutory code reflects debate in Parliament and (in most cases) the settled consideration about the harms that are so serious that they should be capable of criminalisation when caused by speech or behaviour. By outlining their breadth here (particularly in relation to speech communicated online), one can appreciate the context in which to consider interference with speech that goes well beyond applying the criminal law. This is particularly the case in respect of the proposals in the Online Harms White Paper, which is considered in the following Chapter.³⁴

Communications offences include the following:

³¹ ‘Sense and Sensitivity: Restoring free speech in the United Kingdom’ by Preston J. Byrne, response to the Online Harms White Paper by the Adam Smith Institute: <https://www.adamsmith.org/research/sense-and-sensitivity-restoring-free-speech-in-the-united-kingdom>.

³² See, for example, *Hammond v DPP* [2004] EWHC 69 (Admin), where a prosecution under the Public Order Act was permitted against a man with a placard that was offensive to gay people but was acknowledged to express his religious beliefs and further examples in the Employment Chapter. However, not only have the courts since expressed scepticism about the decision, it was a prosecution under the old version of s 5 of the Public Order Act 1986, which has since been amended to remove the provision about speech or behaviour that ‘insults’.

³³ This Report focuses on the law of England and Wales but considers, below, a proposed reform of the criminal law in Scotland.

³⁴ There are a number of offences relating to obscenity and indecency, particularly concerning pornographic content, which are outside the scope of this summary. Moreover, illegal content relating to the sexual abuse of children and grooming is outside the scope of this Report: statements inciting such behaviour would of course be a criminal offence and would have to be removed under the proposals made in this Report. (See Chapter VI, below.)

- (1) Section 1 of the Malicious Communications Act 1988 ('MCA 1988'): sending, with intent to cause distress or anxiety, an electronic or other communication conveying an indecent or grossly offensive message, a threat or information which is false.
- (2) Section 127 of the Communications Act 2003 ('CA 2003'): sending through a public communications network, a message or other matter that is grossly offensive or of an indecent, obscene or menacing character (s 127(1) CA 2003); or persistently using a public electronic communications network to cause annoyance, inconvenience or needless anxiety (s 127(2) CA 2003).
- (3) Offences under the Public Order Act 1986 ('the 1986 Act') include:
 - a. Threatening, abusive or insulting conduct intended, or likely, to provoke violence or cause fear of violence contrary to section 4 of the 1986 Act.
 - b. Threatening, abusive or insulting conduct intentionally causing harassment, alarm or distress contrary to section 4A of the 1986 Act.
 - c. Threatening or abusive conduct likely to cause harassment, alarm or distress contrary to section 5 of the 1986 Act as amended by the Crime and Courts Act 2013 section 57 to remove the word 'insulting'.
 - d. Section 31 of the Crime and Disorder Act 1998 ('CDA 1998') created a racially or religiously aggravated form of the offences under sections 4, 4A and 5 of the 1986 Act.
 - e. Offences relating to stirring up racial hatred, religious hatred or hatred on grounds of sexual orientation are as follows:
 - i. Part 3 of the 1986 Act sections 18 and 19, contain offences concerning threatening, abusive or insulting conduct intended, or likely, to stir up racial hatred. Similarly, sections 20 to 23 deal with offences arising from the public performance, distribution, broadcasting and possession of threatening, abusive or insulting materials intended, or likely, to stir up racial hatred; and includes the public performance of a play;
 - ii. Part 3A of the 1986 Act sections 29B and 29C, contain offences concerning threatening conduct with intent to stir up religious hatred or hatred on grounds of sexual orientation. Similarly, sections 29D to 29G deal with public performance, distribution, broadcasting and possession of threatening materials with intent to stir up religious hatred or hatred on grounds of sexual orientation.³⁵
- (4) Sections 2, 2A, 4 and 4A of the Protection from Harassment Act 1997 contain the offences of pursuing a course of conduct which amounts to harassment, stalking, putting another in fear of violence, and stalking involving fear of violence or serious

³⁵ Part 3A was inserted by the Racial and Religious Hatred Act 2006 (per s 1 and the Schedule) and amended to include hatred on grounds of sexual orientation by the Criminal Justice and Immigration Act 2008 (s 74 and Schedule 16).

alarm or distress. Section 32 of CDA 1998 creates a racially or religiously aggravated form of these offences.

- (5) Offences under the Data Protection Act 2018 include the knowing or reckless obtaining, disclosure, retention or procuring the disclosure of personal data without the consent of the controller under section 170; and the knowing or reckless re-identification of information that was previously de-identified under section 171.
- (6) Section 145 of the Criminal Justice Act 2003 ('CJA 2003') requires racial and religious hostility to be considered at the sentencing stage for all criminal offences other than those charged as aggravated offences under CDA 1998. Section 146 of CJA 2003 requires the sentencing court to consider hostility based on disability, sexual orientation, and transgender identity in sentencing for any offence.
- (7) Sections 44 to 46 of the Serious Crime Act 2007 also codify and amend the common law concept of 'inchoate' liability, that is to say incitement, encouraging or assisting the commission of an offence.

In respect of the above offences, there are some which, if prosecuted as broadly as they might be, could threaten free expression.³⁶ However, with three exceptions, it is not proposed to reform them.

The threat to freedom of speech posed by the previous version of section 5 of the 1986 Act has been removed or ameliorated by the removal of the word 'insulting'. It is now only through threatening or abusive words likely to cause harassment, alarm or distress that an offence will be committed. This offence is at the lowest end of the scale and is punishable only by a fine.

The above reform was welcome but does not go far enough. In a public order context (and these offences only apply in a public place) it is reasonable for 'abusive' and 'insulting' behaviour to be criminalised where it is intended to or likely to provoke or cause the fear of violence, as it is under section 4 of the 1986 Act. It is not reasonable to criminalise abuse and insults where they do no more than harass or cause distress. The Secular Society addressed this issue well in their criticism of the Hate Crime and Public Order (Scotland) Bill:

'We respectfully disagree with the conclusions of Lord Bracadale that the requirement for 'threatening' behaviour alone sets the legal threshold too high. On the contrary, the inclusion of "abusive" poses a serious risk to freedom of expression by promoting the idea that there should be a right not to be offended. It risks capturing vast array [sic] of robust yet legitimate speech and will create an unreasonable expectation that religious sensibilities are protected by something akin to a blasphemy law.'

³⁶

See: https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jxou24uy7q/uploads/2018/10/6_5039_LC_Online_Comms_Report_FINAL_291018_WEB.pdf." The Law Commission's subsequent Consultation Paper sets out a proposed communication offence (see summary at p 106 para 5.49) in which harm appears to include "emotional harm" and "at least serious emotional distress". Such an offence would raise serious concerns about the creation of unnecessary criminal liability, but the recommendations in that Paper are outside the scope of this Report: <https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jxou24uy7q/uploads/2020/09/Online-Communications-Consultation-Paper-FINAL-with-cover.pdf>.

*Where someone is abusive about someone else's beliefs, the believer can quite reasonably argue that they are abusing them personally too. Therefore, if we wish to apply criminal sanctions to protect people from feeling "abused" when someone criticises or attacks their beliefs, it is obvious that the beliefs themselves as well as the individual who feels insulted or abused are being protected. Some sincerely held religious beliefs and practices – likewise the failure to follow such beliefs or practices – are seen as profoundly irrational and inhumane by others. Rational and liberal critics may reasonably regard some beliefs as 'hateful' and deserving of mockery, abuse and hatred. The right to express this must not be restricted by law.'*³⁷

While the above relates to abuse in the context of religion, the criminalisation of 'abusive' behaviour that need do no more than cause distress is not objectively justified, even in the public order context.

Both 'abusive' and 'insulting' remain in section 4A of the 1986 Act. This offence is materially different as it is committed only if a person intends the other to feel 'harassment, alarm or distress'. 'Intention' in the criminal law has a specific definition: a person is considered to 'intend' a consequence if he does an act knowing that the act is virtually certain to cause it.³⁸ It is not identical to 'desire'. Thus, if a person knows that his threats are 'virtually certain' to cause another harassment, alarm or distress, he is considered to 'intend' that consequence and (in that case) to be guilty of an offence under section 4A of the 1986 Act.

Yet it is not for the state to police insults or abuse, even if they are virtually certain to cause 'distress' (as most will be). While this offence is reserved for speech and behaviour in a public place, were it applied rigorously it could allow the police to arrest almost anyone for shouting or even saying insults to others. That it is probably policed more selectively is no answer. Indeed, it allows the police an improperly large discretion over what 'insulting' behaviour in public should be policed and what should not. More concerning, while the offence must be considered in alignment with Article 10 of the ECHR, that would only lead to a court being required to arbitrate over what 'insulting' speech should be protected and what should not.³⁹

Similarly, while the concern of many campaigners about the effect of the offence of incitement to religious hatred is merited, because of its effect on the ability of frank criticism of different religious beliefs, the offence is only engaged where threatening words or behaviour are used *intending* to stir up hatred; and the right to insult and ridicule particular religions or beliefs and to proselytise is specifically protected by s 29J of the 1986 Act. A tolerable compromise has been reached, there is no evidence of the prosecution of preachers under this section of the 1986 Act and the true risk to freedom of expression lies elsewhere.

The offences that cause some concern are those of stirring up racial hatred, including prohibition on the performance of a play (s 20), where it is 'likely' to incite racial hatred (ss 18 and 19 of the 1986 Act), because of the breadth of their drafting. Unlike the offence of stirring up religious hatred or hatred due to sexual orientation (also including by the performance of a

³⁷ Briefing, late 2020 (undated): <https://www.secularism.org.uk/uploads/briefing-scottish-hate-crime-bill.pdf?v=1607420358>.

³⁸ *R v Nedrick* (1986) 8 Cr. App. R. (S.) 179; [1986] 3 All ER 1.

³⁹ Considered in more detail in Chapter VII, below.

play: s 29D of the 1986 Act), these sections (18, 19 and 20) prohibit words or behaviour not only where it is intended to stir up racial hatred but where it is ‘likely’ to.⁴⁰

These words are troublingly broad, given that they affect not only speech but the performance of a play, where the protection of free expression should be at its broadest. (While there is a specific offence related to plays, the wider offence would catch stand-up comedians as much as it would preachers and lecturers. And the right to ridicule is an important one.) To criminalise something because it is ‘likely’ to cause something else is tenuous and an inappropriate use of the criminal law. It effectively imports a civil standard of proof to a criminal offence – something is ‘likely’ if it is ‘more likely than not’ – rather than requiring the court to be sure about a person’s intention. Establishing a person’s culpability by requiring that intention or recklessness be established – the ‘*mens rea*’ (mental element) – is a core feature of what distinguishes the criminal from the civil law. An offence as serious as this should only be able to be committed if intent is established. This Report proposes that the offences be narrowed in the same terms as in sections 29B-29G (stirring up hatred due to religious belief or sexual orientation) by limiting them to speech intended to stir up such hatred.⁴¹

Overall, what is notable about these offences is their breadth. They are a statutory code that provides for the prosecution of all manner of offensive behaviour that crosses the threshold and causes harm that Parliament has considered should be labelled criminal: from threats to kill and incitement to racial hatred to the offence of persistent communications with the intention to harass. As discussed in the following chapter, they are more than adequate to protect online users from harassment, bullying and trolling and they provide a clear and foreseeable distinction between what is criminal and what is not.

The Hate Crime and Public Order (Scotland) Bill

It is beyond the scope of this Report to focus on this Bill in detail. But it marks a concerning development that replicates and expands the very elements of the offences of ‘stirring up racial hatred’ that are addressed above: namely by making it an offence to use not just threatening but abusive or insulting behaviour where to do so would be considered by a ‘reasonable person’ to be ‘likely’ to stir up religious hatred, without any requirement that it is intended that it should.⁴²

The above analysis about the threat to freedom of speech of criminalising words or behaviour ‘likely’ to cause hatred applies in this case too. A further problem with this Bill is that it would require a jury to consider what a ‘reasonable person’ would think: not only in respect of whether

⁴⁰ This includes the director or producer of a play. The reason for the existence of these offences is to enable the prosecution of a director or producer of such a play, who would not themselves have engaged in threatening words or behaviour. Had they done so intending to stir up racial (etc) hatred, they would have committed an offence. It is possible that this offence is otiose as any director of a play that made threats who intended to stir up racial hatred would probably be guilty of inciting or encouraging others to commit that same offence.

⁴¹ That said, it seems that there have been no prosecutions under either section in the 35 years since the Act was originally passed: that was the position in April 2012 (<https://www.englishpen.org/posts/news/the-prevention-of-disorder-or-crime/>) and the author has found no evidence of any prosecution since.

⁴² The Bill as amended up to 16.2.2021 is published here: <https://beta.parliament.scot/-/media/files/legislation/bills/current-bills/hate-crime-and-public-order-scotland-bill/stage-2/bill-as-amended-at-stage-2.pdf>.

the words or behaviour would be ‘likely’ to stir up hatred but whether the behaviour was ‘threatening, abusive or insulting’.⁴³ This is a test well known to the civil law, where it has become a term of art from the application of civil liability on an act that a ‘reasonable person’ might consider (for example) defamatory. But it is wholly unsuited to the criminal law for at least two reasons. First, civil liability is imposed where facts are simply more likely than not to be true. This makes it considerably easier for a judge to determine what the (mythical) ‘reasonable person’ might consider to be harmful or how he or she might act in a particular context. Secondly, juries are rarely asked to determine what a ‘reasonable person’ thinks, how they act or what they might do in a particular circumstance. They are required to decide whether facts are proven or whether, on the evidence before them, a person intended to cause particular harm or was reckless about whether it would be caused.⁴⁴

A particularly alarming provision of the Bill (Clause 8) provides for the ‘forfeiture and disposal of material to which this offence relates’. Such material would include books and ‘insulting’ newspaper articles ‘likely’ to stir up religious hatred. That is as chilling as it suggests: the modern equivalent of Savonarola’s Bonfire of the Vanities.

The Bill does contain a provision providing that speech is not to be taken as threatening or abusive ‘solely’ because it includes ‘discussion or criticism of, or expressions of antipathy, dislike, ridicule or insult towards’ religion or religious beliefs or proselytising.⁴⁵ This provides barely any protection to a preacher scorning the religious beliefs of another or an atheist ridiculing religious belief. Such a person will not be convicted ‘solely’ because of such behaviour but because a jury finds that a ‘reasonable person’ would consider it to be abusive (etc) and ‘likely’ to stir up religious hatred. It is nowhere near as robust as section 29J of the (English) Public Order Act 1986, which provides that:

‘Nothing in this Part shall be read or given effect in a way which prohibits or restricts discussion, criticism or expressions of antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs or practices of their adherents, or of any other belief system or the beliefs or practices of its adherents, or proselytising or urging adherents of a different religion or belief system to cease practising their religion or belief system.’

Without protection in similarly stark terms and while criminalising abusive and insulting behaviour that is no more than ‘likely’ to stir up religious hatred, this legislation could be used to arrest, harass, intimidate, prosecute and convict preachers, speakers and writers.

As the National Secular Society say in their fuller report:

‘The new law is also unnecessary in that genuine criminal activity that the proposed offences are seeking to address are already captured by existing law. The proposed offence (in Section 3) of stirring up hatred makes it an offence for a person to behave in a threatening or abusive manner against a group of persons defined by reference to certain characteristics. However, Section 38 of the Criminal Justice and Licensing

⁴³ See Clause 3 of the Bill. (The convention is to describe sections of a Bill as ‘clauses’, which then become ‘sections’ if the Bill becomes an Act of Parliament.)

⁴⁴ In the criminal context (under English law), recklessness means that a person has considered the possibility that what he is doing might lead to that harm but does it anyway: *R. v. G.* [2004] 1 A.C. 1034.

⁴⁵ Clause 11.

*(Scotland) Act 2010 already outlaws threatening or abusive behaviour against anyone where such behaviour would be likely to “cause a reasonable person to suffer fear or alarm”*⁴⁶

Alternatively, the Bill should be amended: (a) to provide that it criminalises only threatening behaviour and only where it is intended to stir up religious (or other) hatred; and (b) to include a provision protecting the free expression of belief that is as robust as section 29J of the English 1986 Act.

The Hate Crime Operational Guidance of the College of Policing

The College of Policing is a statutory body founded under the Anti-social Behaviour, Crime and Policing Act 2014 (‘the 2014 Act’). Sections 123 and 124 of that Act give the College powers to issue regulations and codes of practice for all police forces. One of these is the Hate Crime Operational Guidance (‘HCOG’).⁴⁷ That guidance provides that:

‘Where the victim, or any other person, perceives that they have been targeted because of hate or hostility against a monitored⁴⁸ or non-monitored personal characteristic, the incident should be recorded and flagged as a hate crime (where circumstances meet crime recording standards), or a non-crime hate incident. The victim does not have to justify or provide evidence of their belief for the purposes of reporting, and police officers or staff should not directly challenge this perception. Perception-based recording will help to reduce under-recording, highlight the hate element and improve understanding about hate-motivated offending. All allegations of hate crime will be subject to investigation to identify, and where available gather evidence to demonstrate the hostility element and support a prosecution. Where supporting evidence is not found, the crime will not be charged or prosecuted as a hate crime. Where a case cannot be prosecuted as a hate crime, the flag will remain on file.’

(‘Perception-based recording’, emphasis added)

The previous version of this guidance was challenged in the High Court in *R (Miller) v College of Policing*.⁴⁹ That judicial review was brought by a man who had been visited by police officers because he had tweeted about transgender issues in a way that a person reading them considered that others might find offensive. While the judge upheld his claim that the police should not actively intervene in the circumstances of that case,⁵⁰ he concluded that the then version of HCOG was lawful under the 2014 Act. The judgment is being appealed. This guidance is troubling and should be reversed by statute if it is not by the Court of Appeal.

⁴⁶ A response to the Justice Committee Hate Crime and Public Order (Scotland) Bill Call for Views, July 2020: [https://www.secularism.org.uk/uploads/submission-to-scottish-justice-committe-\(nss\)-5.pdf?v=1595431566](https://www.secularism.org.uk/uploads/submission-to-scottish-justice-committe-(nss)-5.pdf?v=1595431566).

⁴⁷ The current version was implemented in late November 2020: <https://www.app.college.police.uk/app-content/major-investigation-and-public-protection/hate-crime/responding-to-hate/>.

⁴⁸ That is real or perceived race, religion, sexual orientation, disability or transgender status.

⁴⁹ [2020] EWHC 225 (Admin).

⁵⁰ Broadly, the decision to visit Mr Miller and record as a ‘non-crime hate incident’ a complaint about a series of tweets that expressed Mr Miller’s views in sometimes intemperate terms and that the complainant had chosen to read.

As the judge related,⁵¹ the suggestion that hate ‘incidents’ be recorded as such because of the perception of the complainant is one that goes back to the MacPherson report into the murder of Stephen Lawrence, published in 1999. In the current version of the Guidance, the ‘victim’ of a ‘non-crime hate incident’ does not even have to justify or reveal any evidence to support her ‘perception’, the officer is advised not to challenge it at all.

As is regrettably all too common with policing in the 21st century, it is necessary to underline some facts that *are* capable of rational justification.

First, a person complaining of an incident is not, by definition, a ‘victim’. They are called a complainant for good reason. The facts complained of might be true or they might not. The ‘perception’ that is alleged might be real or it might be manufactured. Complainants lie. They do so for all sorts of reasons, including tarnishing the reputation of a neighbour or encouraging the police to prosecute him or her for a crime they did not do.

Secondly, not only *should* a police officer challenge the account of a person complaining of a crime – or a ‘non-crime hate incident’ – that is his duty. Any such complaint might be of the commission of an offence. If so, an officer may only arrest the person against whom a complaint is made if he has ‘reasonable suspicion’ that an offence has been committed. Suspicion is not ‘reasonable’ if an officer has accepted an allegation without investigating whether there is any evidence to sustain it.

Thirdly, it is a hallmark of a free society that it protects the presumption of innocence. The practice required by the HCOG offends doubly against that principle: it requires that an ‘incident’ be recorded before any attempt is made to investigate its truth and even if it is not an allegation of a criminal offence. That is notwithstanding the breadth of possible criminal offences that might be engaged by such a report (as set out above). The recent practice of police forces accepting the account of alleged victims of sex abuse without question – particularly in ‘Operation Midland’ in which the fantasist known as ‘Nick’ was believed without question – should have led them to realise how dangerous it is not to investigate allegations properly.⁵²

Fourthly, recording allegations of ‘hate’ has real consequences for those whose speech or behaviour is recorded: consequences that have a direct bearing on the operation of the presumption of innocence in general. As the judge recognised in *Miller*,⁵³ the record could be included in Enhanced Criminal Record Certificates (‘ECRC’) that might potentially be disclosed to future employers. The judge’s finding that this disclosure would only be due to a decision under another statutory duty (the Police Act 1997) is unconvincing and frankly wrong. Disclosure in an ECRC would be possible only if the ‘non-crime hate incident’ had been recorded in the first place.

Fifthly, it is a sinister development of the modern state that it deems it appropriate to record and collect ever more information about its citizens. The existence of criminal records is accepted as necessary to protect the public from wider harm and allow courts sentencing

⁵¹ Para 105, *ibid.*

⁵² The Henriques Report into Operation Midland included recommendations that those who make complaints should not be referred to as victims (recommendation 1) and that the instruction to believe a victim’s account should cease (recommendation 2): <https://www.met.police.uk/henriques>. Some recommendations were accepted and others, including recommendation 1, were not.

⁵³ At paragraphs 125, 182 and 183, *ibid.*

criminals to take past behaviour into account. But it is an exceptional measure. Similarly, the scheme of the ECRC and the Disclosure and Barring Service⁵⁴ might, exceptionally, justify recording behaviour threatening to children and vulnerable adults that has not led to a conviction. It is right that those seeking to work with them should face a higher standard of investigation. But it is only because of the importance of that investigation that the recording of such incidents might be justified: exceptional responses to an exceptional risk of harm do not and cannot justify the extension of this practice to all forms of behaviour that the state or society find offensive.

The recording by the police of speech and behaviour that is not criminal and that does not threaten children or vulnerable adults offends against the principle of freedom of expression and the presumption of innocence and is wrong. It is doubtful that the HCOG is necessary at all. Police officers have a duty to investigate crime where it is proportionate to do so; and that includes the investigation of speech that might constitute a criminal offence due to the harm that it causes. If HCOG is not removed entirely, however, it must be revised to require that officers record 'hate incidents' only if they are reasonably believed to be criminal offences; and that that is a decision that an officer cannot reach unless and until he has evaluated all the evidence.

A further consideration, although beyond the scope of this Report, is whether any police or other guidance that has the capacity to engage Article 10 or to affect the presumption of innocence should be subject to scrutiny by Parliament before coming into effect. As with too much primary legislation (Acts of Parliament) the 2014 Act gives huge power to a public body – the College of Policing – to impose what is described as 'guidance' but actually affects freedoms of ordinary people: in this case both freedom of expression and the presumption of innocence. While the guidance is subject to review by the courts (as it was in *Miller*) judicial review is an inadequate (although necessary) tool for scrutiny. It will normally be a recourse had only after guidance has come into effect and a judge will not intervene unless the action of the public body was irrational or disproportionate. 'Guidance' of such importance should be subject to democratic scrutiny – and before it is implemented.

⁵⁴ Which reviews whether an allegation against an individual should be revealed to those seeking an ECRC.

VI. THREATS TO FREEDOM OF SPEECH ONLINE

Introduction

The revolution in the exchange of ideas enabled by the internet has been particularly facilitated by international social media companies. Three, in particular, have enabled individual users to publish their opinions through blogs, videos, online books and more: Twitter (through short statements), Facebook (through longer comments and different means of sharing data) and YouTube (through sharing videos and comments attached to them). While each have rivals, their market share for the form of speech they enable is so large that anyone wanting to maximise the exposure of his commentary will be likely to use one of these platforms. They are, in effect, public spaces online that mirror physical public spaces.⁵⁵

Each of these websites has imposed censorship on its users' content, including (in the last year) of challenges to lockdowns, the efficacy of 'non-pharmaceutical interventions' to reduce transmission of the SARS-CoV-2 and the efficacy and potential dangers of vaccines developed in response to the virus. Moreover, while social media companies are under no direct regulatory control, their censorship has mirrored that imposed on the broadcast media by Ofcom, which has expressly restricted any attempt to 'undermine' (*ie* question the ethics, efficacy or proportionality of) the 'public health' advice of the government and the World Health Organisation ('WHO').⁵⁶

It was Adam Smith who recognised the uneasy balance between commercial freedom and the inability to exercise it because of unfair competition. Counter-intuitively, it is only by restricting the freedom of companies to create monopolies or (collectively) cartels that others have the freedom to compete in the marketplace and consumers have the freedom of choice that competition brings. As Smith said: '[p]eople of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the publick, or in some contrivance to raise prices'.⁵⁷

Thus, the classic answer to the existence of a monopoly has been to break it up. Yet, even if it was possible for any individual government to break up a social media company, it would be an inadequate answer to the limitations they impose on the free speech of their users. Competitors may be willing to impose fewer constraints. Or they may not. But competition, while an effective means of increasing quality and value, can only be a blunt tool where it comes to increasing freedom. This is particularly so for organisations making money from advertisers promoted by celebrities with large followings, rather than political speech. While there is some evidence of a negative market reaction to censorship when it involves the

⁵⁵ Statista suggests the following as the market share of the leading social media platforms in the United Kingdom as at February 2021: Facebook: 53.84%; Twitter: 25.41%; Pinterest: 11.1%; Instagram: 3.88%; and YouTube: 2.75%. Gab and Parler, that offer similar speech hosting to Twitter, do not appear to have a significant presence in the UK. Source: <https://gs.statcounter.com/social-media-stats/all/united-kingdom>.

⁵⁶ As Talleyrand observed in relation to treason (Duff Cooper, *Talleyrand*, 1932), getting on the wrong side of the WHO is a question of dates: their advice on pandemic responses in October 2019 recommended against almost all the measures they advised only five months later (<https://apps.who.int/iris/bitstream/handle/10665/329438/9789241516839-eng.pdf>).

⁵⁷ *An Inquiry into the Nature and Causes of the Wealth of Nations* by Adam Smith (W. Strahan and T. Cadell, London, 1776) [*sic*].

President of the United States,⁵⁸ it cannot be more than indirect and will have little impact on day-to-day censorship of posts by ordinary users; and there is little direct connection between the impact of censorship and market share.

For that reason, this Report proposes that regulation of the largest social media organisations is necessary not to impose censorship but to prohibit it. All companies are potentially liable for statements that are criminal offences (for example by inciting racial hatred) or defamatory once they are made aware of them and have had an adequate opportunity to remove them. That is as it should be and provides a reasonable and proportionate protection from harm. Yet where such companies operate what is in effect a monopoly, they should be prevented from censoring content any more than this. While this Report has outlined some concerns about the potential over-reach of the criminal law, it at least provides an objective and foreseeable test of what is acceptable that reflects the protection of freedom of speech in physical public places.

Worryingly, the government's approach to social media companies is the opposite. Despite authoritative and measured criticism of their plans (which they ignored in substance), they have introduced the Online Safety Bill⁵⁹ that will not only encourage censorship but make websites responsible for any 'harm' said to be caused to users by others and to preserve the 'safety' not only of children but of adults; and such 'harm' or the preservation of 'safety' is not rooted in the criminal law or in any objective definition.

'Disinformation', 'misinformation', 'fact-checking' and the illusion of 'safety'

In the Online Harms White Paper, the government expresses the following as a 'problem':

'There is also a real danger that hostile actors use online disinformation to undermine our democratic values and principles. Social media platforms use algorithms which can lead to 'echo chambers' or 'filter bubbles', where a user is presented with only one type of content instead of seeing a range of voices and opinions. This can promote disinformation by ensuring that users do not see rebuttals or other sources that may disagree and can also mean that users perceive a story to be far more widely believed than it really is'.⁶⁰

What is described above is no different in principle to an interested enthusiast researching a topic in a library. While he has access to material that might broaden his knowledge about a particular issue, the enthusiast is just as likely to focus his research in one direction. The resources available to an online user have vastly increased but as the capacity for burying oneself in favourable research or opinion, so has the capacity to correct misapprehension. And, as Matthew Tindal identified 300 years ago, the danger of being detected and exposed is likely

⁵⁸ See the decline in the value of shares in Facebook and Twitter after they deleted (then) President Trump's accounts: <https://www.reuters.com/article/us-twitter-stocks-trump-idUSKBN29G0XG>.

⁵⁹ Published in May 2021: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/985033/Draft_Online_Safety_Bill_Bookmarked.pdf.

⁶⁰ Published in April 2019: Executive Summary, para 4, p 5 (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/793360/Online_Harms_White_Paper.pdf).

to make a writer have more regard to the truth;⁶¹ and it has never been easier for falsehood (or presumed falsehood) to be exposed as in the online era.

In the government's Online Harms White Paper, the government uses the language of security to present the free exchange of (mis/dis)information as a "real danger" to society, encouraging "hostile actors" attacking the body politic from within and without.⁶² The Online Safety Bill would, if implemented, impose an extremely detailed regulatory structure, setting out duties and harms as well as requiring Ofcom to establish an Advisory Committee about 'misinformation', a committee that would inform its statutory duty (that would apply under the Bill) to require information from websites.⁶³

Disturbingly, the Online Safety Bill imposes upon websites a duty to remove content that could 'harm' not just children but adults: harm caused by words and (quite possibly) ideas. A state that assumes responsibility for protecting its subjects (the word 'citizen' does not seem apt) from what it determines is harmful is a dangerous edifice indeed.

The government's suggested 'problem' raises three particular concerns.

The first and most fundamental is that it is not the government's role to keep the public 'safe' from all harm; and particularly not from the supposed 'harm' that might arise from 'wrongthink'.⁶⁴ Indeed, it is perhaps not coincidental that the name of the Bill was not, as had been expected, the Online Harms Bill but the Online Safety Bill. The UK government appears to have formed the view, since early 2020, that it is responsible for the safety of every scared and vulnerable individual from risks that were once treated as part of living. Perhaps the growth in the regulatory structure of the state and the constant push for ever more regulation to prevent injury and ill-health is at the root of a form of 'safetyism' that sees the very expression of ideas and argument as a threat. As Lukianoff and Haidt put it:

*Fragility is a self-fulfilling prophecy. If you think certain ideas are dangerous, or are encouraged to do so by trigger warnings and safe spaces, you will be more anxious in the long run. Intellectual safety not only makes free and open debate impossible, it is setting up a generation for more anxiety and depression.*⁶⁵

Haidt and Lukianoff argue that a culture of 'safetyism' leads to the protection of feelings over argument, of sensitivity over intellectual rigour and of comfort over challenge. This is a culture that has poisoned the atmosphere on campuses in North America and the United Kingdom, normalising de-platforming policies and the punishment of students for expressing beliefs viewed as unacceptable by other students.⁶⁶ Indeed, it is deeply ironic that the momentum

⁶¹ See Introduction.

⁶² For example, according to a Culture Media and Sport Select Committee 'Misinformation in the COVID-19 Infodemic', misinformation may be spread by "hostile actors" seeking to capitalise on the public demand to hear unofficial voices and to explore varied and alternative sources of information: <https://publications.parliament.uk/pa/cm5801/cmselect/cmcomeds/234/23404.htm>.

⁶³ In Clause 98 of the Bill, *ibid*.

⁶⁴ Orwellian language seems inevitable.

⁶⁵ *The Coddling of the American Mind: How Good Intentions and Bad Ideas Are Setting Up a Generation for Failure* (Penguin, 2018); this quotation is a summary in a review in Quillette by Matthew Lesh, 2.9.2019: <https://quillette.com/2018/09/02/is-safetyism-destroying-a-generation/>.

⁶⁶ See, for example, the treatment of Prof Bret Weinstein at Evergreen State College, Washington State, in 2017 for questioning whether all white staff and students should be required to absent themselves for a day; and of

behind the Online Safety Bill has been unbroken as the (UK) government publishes proposals to protect free speech at universities.⁶⁷ The two initiatives are diametrically opposed. Government proposals to protect academic free speech treat freedom of expression as essential for a high-quality education in which participants are exposed to subjectively “different viewpoints”, even “controversial” topics.⁶⁸ They are right to do so. Yet the Online Safety Bill treats freedom of expression as a danger or national security threat. These two different paradigms are mutually exclusive.

Secondly, the problem about government proscribing something as a ‘danger’ is that it leads to a search for a solution. And a solution from government is invariably one enforced by legislation and the imposition of regulatory structures. But it is not a matter for the government to regulate ‘disinformation’ and ‘misinformation’. Had the government proposed that books it did not like were to be laced with warnings and introduced by ‘fact-checking’ it would have been ridiculed, if not regarded as suggesting something sinister. It is no different online. There, this has become the regular practice of social media companies: one that it is now the government’s express aim not merely to encourage but (if the notion of ‘harm’ is to be extended as widely as it may be) to require.

Not unlike the UK government’s Prevent Strategy, which was introduced to tackle Islamist radicalisation in schools, new regulatory strategies are fast emerging to tackle the spreaders of ‘misinformation’ as though they were domestic terrorists (“hostile actors”), wielding bombs and other dangerous weapons. Misinformation in this context belongs to a heavily securitised and anti-democratic form of language. In this vernacular, anyone holding or inquiring after an alternative view to some authorised ‘official position’ might be a potential security risk. There is no protection of freedom of expression under Article 10 where there is a threat to national security.⁶⁹

This tendency can be seen directly in the Online Harms White Paper and in the framework, scale and scope of the Online Safety Bill. The human rights group Article 19 argue that ‘the entire framing of the White Paper is built around negative emotions of fear and a state of helplessness that demand strong government action to provide safety and protection from nebulous ‘harms’.’⁷⁰ The government seeks to ‘whip up support’ by using emotionally charged language, such as ‘appalling’ or ‘horrifying,’ ‘apparently to give a sense of urgency to action being taken by the Government’ while failing to establish ‘a strong correlation between any ‘harm’ done and the need for the wide-ranging regulation envisaged by the Government.’ Quite.

Thirdly, the government appears to have adopted the idea that it is desirable to identify not only what is truth but (unless all speech is to be categorised as either true, partially true or false) what opinions are worthy of correction and what are not. As Mill identified, to purport to

Erika Christarkis at Yale in 2015, questioning whether students should be advised what to wear at Halloween parties: *The Madness of Crowds* by Douglas Murray (Bloomsbury, 2019), pp 128-134.

⁶⁷ <https://www.gov.uk/government/news/landmark-proposals-to-strengthen-free-speech-at-universities>, 16.2.2021.

⁶⁸ Report presented before Parliament by the Secretary of State for Education, Gavin Williamson, *Higher education: free speech and academic freedom* (February 2021), Annex B – Government Expectations. Examples of Good Practice, pp. 37-40.

⁶⁹ Article 10(2) ECHR.

⁷⁰ <https://www.article19.org/wp-content/uploads/2019/07/White-Paper-Online-Harms-A19-response-1-July-19-FINAL.pdf>; these and other responses to the White Paper cited in this Report were all published before the publication of the Online Safety Bill.

classify the importance of opinions is as questionable as is their truth or falsehood. ‘Judgment is given to men that they might use it’ and to remove it from them reduces the ability of the individual to understand the argument.

Ofcom and its regulation of broadcasters

Ofcom was established to regulate the broadcast industry. The public policy within the United Kingdom for many decades has been to ensure that broadcasters provide balanced coverage of controversial political issues,⁷¹ a duty enforced more rigorously during general elections. This contrasts with the United States, where (no doubt influenced by the much stronger protection of free speech in the First Amendment) there are no such restrictions and it is the norm for broadcasters to advocate particular opinions.

This public policy decision was influenced by two factors. First, broadcasting was originally the preserve of a publicly owned service, the BBC, and it would obviously be inappropriate for that broadcaster to be anything other than scrupulously neutral. Secondly, when independent broadcasters were permitted platforms on terrestrial television and radio, they were in limited numbers and had a correspondingly huge influence over the public. The modern broadcast landscape is different, with many more national broadcasters available digitally and hundreds of international news and other broadcasters. While it might be argued that the rationale for broadcast neutrality has been overtaken by events, that is not an argument considered here. There is a category difference between broadcasters presenting limited numbers of programmes on limited numbers of channels and forums for discussion and debate for millions of ordinary users.

The Online Harms White Paper suggested that social media and other online companies should be regulated and that the regulator should be Ofcom; and this suggestion was adopted in the Online Safety Bill. The objection to regulation in principle is addressed below but it is of relevance to note examples of the approach it takes to regulating content. In its most recent update on commentary on matters relating to the reaction to SARS-CoV-2, it notes that:

‘Ofcom underlines that the Code does not prohibit the broadcasting of controversial views which diverge from, or challenge, official authorities on public health information. However, such views should always be placed into context and not be presented in such a way as to risk undermining viewers’ trust in official health advice, which in the current context could have potentially serious consequences for public health. It is for each broadcaster to make an editorial decision about how to provide adequate protection to their audience in the circumstances. It could be achieved in a number of ways, including by ensuring timely and robust challenge by programme presenters or other guests. Presenters should therefore be ready to intervene to provide sufficiently strong challenge and context in the event of programme contributors making potentially inaccurate or harmful comments about the Coronavirus.’⁷²

⁷¹ See the Ofcom Broadcasting Code, r. 5.1 (for news programming): news, in whatever form, must be reported with due accuracy and presented with due impartiality: <https://www.ofcom.org.uk/tv-radio-and-on-demand/broadcast-codes/broadcast-code/section-five-due-impartiality-accuracy>.

⁷² https://www.ofcom.org.uk/data/assets/pdf_file/0033/195873/Note-to-broadcasters-Coronavirus-update.pdf, 26.5.2020, section 1, pp 3-4.

It should concern anyone in a democracy that a broadcaster is required to uphold ‘trust’ in any official organisation, rather than promote discussion about whether that organisation’s policies are based upon good evidence or are proportionate or ethical; and what is ‘potentially inaccurate’ or ‘harmful’ is of course a matter of opinion for the presenter. A claim that the failure to follow advice could have ‘serious consequences’ could be made about almost any advice; and a mature society is one that respects its citizens’ ability to make adult decisions and choose for themselves whether to follow that advice. It is deeply concerning that we have come to a point, as a society, where this statement could be seen as controversial rather than obvious.

Further guidance is set out in the Broadcasting Code and accompanying guidance. This includes protection of the public from ‘harmful and/or offensive material’ (rule 2.1), a requirement not to ‘materially mislead’ the audience so as not to cause harm or offence (rule 2.2 and Guidance).⁷³ It has led to sanctions for material that is broadcast relating to Covid-19 and the public health response.⁷⁴

Censorship online

Online censorship has become particularly prevalent over the past year. It is commonly said, as it has been by Ofcom, that this is to protect people from harm by their not following medical advice. Twitter, for example, censors content that ‘goes directly against guidance from authoritative sources of global and local public health information’.⁷⁵ But, as with any limitation through censorship, what fits into the limitation is as much a matter for debate or discussion as the material itself.

Advice on ‘public health’ is not limited to the safety of medication: it ranges across the whole of public life. It is said to be in the interests of ‘public health’ to reduce all but essential human contact, wear masks and close businesses. Yet these are matters of public policy in respect of which debate ranges not merely over their effectiveness but over whether they are proportionate.

Moreover, censoring content because it may lead individuals to harm imbues the censor with the sort of paternalistic responsibility that has gradually been removed, not only from the state but from medical practitioners. The old concept of ‘therapeutic privilege’, whereby a patient would not be told of their diagnosis for fear of causing them psychological harm, was commonplace until relatively recently, particularly for patients who were not told that they had cancer. This practice is now regarded as unethical.⁷⁶

Modern case-law puts great weight on the importance of informed consent, without which a medical practitioner is potentially liable for the tort of battery and trespass. Previously,

⁷³ Broadcasting Code:

<https://www.ofcom.org.uk/tv-radio-and-on-demand/broadcast-codes/broadcast-code/section-two-harm-offence>;
Guidance: https://www.ofcom.org.uk/_data/assets/pdf_file/0023/104657/Section-2-Guidance-Notes.pdf.

⁷⁴ Six sanctions issued including, ‘presenting hydroxychloroquine as a “cure” in failing to sufficiently put the ‘unsubstantiated claims into context’; and London Live, ESTV, were sanctioned for broadcasting a David Icke interview without sufficient challenge or context: <https://www.ofcom.org.uk/tv-radio-and-on-demand/information-for-industry/guidance/broadcast-standards-and-coronavirus>.

⁷⁵ Section 2 on ‘Protecting the Public Conversation’, a blog explaining Twitter’s policy: https://blog.twitter.com/en_us/topics/company/2020/covid-19.html.

⁷⁶ See American Medical Association Code of Medical Ethics Opinion 2.1.3, <https://www.ama-assn.org/delivering-care/withholding-information-patients>.

a doctor had been permitted to withhold information from a patient if a responsible body of medical opinion considered that to do so would be in a patient's best interests.⁷⁷ The Supreme Court recently reversed this decision, holding that disclosure of information must be oriented to safeguarding patient autonomy. It could not provide clinicians a legal 'flak jacket'.⁷⁸ Their judgment is a robust argument for the need to treat the individual as a rational actor able to inform her own mind and to determine competing arguments for herself. Its application to censorship of supposedly 'unsafe' information is obvious.

*'It would therefore be a mistake to view patients as uninformed, incapable of understanding medical matters, or wholly dependent on a flow of information from doctors. The idea that patients were medically uninformed and incapable of understanding medical matters was always a questionable generalisation, as Lord Diplock implicitly acknowledged by making an exception for highly educated men of experience. To make it the default assumption on which the law is to be based is now manifestly untenable...'*⁷⁹

Ironically, it is the modern 'progressive' who has now adopted Lord Diplock's paternalism, albeit without his qualification.

*'The social and legal developments which we have mentioned point away from a model of the relationship between the doctor and the patient based on medical paternalism. They also point away from a model based on a view of the patient as being entirely dependent on information provided by the doctor. What they point towards is an approach to the law which, instead of treating patients as placing themselves in the hands of their doctors (and then being prone to sue their doctors in the event of a disappointing outcome), treats them so far as possible as adults who are capable of understanding that medical treatment is uncertain of success and may involve risks, accepting responsibility for the taking of risks affecting their own lives, and living with the consequences of their choices.'*⁸⁰

*'...The doctor's advisory role cannot be regarded as solely an exercise of medical skill without leaving out of account the patient's entitlement to decide on the risks to her health which she is willing to run (a decision which may be influenced by non-medical considerations).'*⁸¹

*'An adult person of sound mind is entitled to decide which, if any, of the available forms of treatment to undergo, and her consent must be obtained before treatment interfering with her bodily integrity is undertaken...'*⁸²

⁷⁷ *Sidaway v Bethlem Royal Hospital and the Maudesley Hospital Health Authority and Others* [1985] AC 871.

⁷⁸ *Montgomery v Lanarkshire Health Board (Scotland)* [2015] UKSC 11. See commentary by Kirsty Keywood (University of Manchester), *BMJ*, 15.3.2015, from which the last quotation is taken: <https://blogs.bmj.com/medical-ethics/2015/03/15/the-death-of-sidaway-values-judgments-and-informed-consent/>. The phrase "legal flak jacket" originally comes from *Re W. (A Minor) (Medical Treatment: Court's Jurisdiction)* [1992] 3 WLR 758 and was quoted in *Bell v Tavistock and Portman NHS Foundation Trust* [2020] EWHC 3274 (Admin) at [110], which concerned the ability of children to consent to hormone treatment that would be the beginning of treatment leading to the transition of their sex.

⁷⁹ *Montgomery, ibid*, para 76.

⁸⁰ *Ibid*, para 81.

⁸¹ *Ibid*, para 83.

⁸² *Ibid*, para 87.

Similarly, how can it be reasonable for social media companies to determine what information about the efficacy of drugs is authoritative (or correct) and what is not? Imposing limitations on freedom of speech in one area (medical intervention) but not others (political discourse) suggests either expert ‘gatekeepers’ of knowledge are needed in the medical but not political arena, that democratic discourse is necessary in the political arena but not otherwise, or both. But it also grants to the censor the responsibility for determining what is ‘medical’ and what is ‘political’.

To some extent, it is impossible to know the extent or the nature of censorship by definition: the material has been removed. Twitter, for example, has removed 8,493 Tweets and challenged 11.5 million accounts since introducing its Covid-19 Guidance.⁸³ We cannot know how many of those were comments on public policy, rather than (for example) the medical efficacy of drugs, although examples have been raised in media reports.⁸⁴ But the issue is not the correctness of these decisions, still less of the opinions they censored, but the fact that they were censored at all. Debate and discussion is harmed, not helped, through censorship by individuals or Artificial Intelligence controlled by corporations.⁸⁵

Who is a ‘publisher’ online?

This question is important as it determines who is liable for the content of a statement made online: the conventional way of enforcing protections against speech that is defamatory or criminal in nature.

In law, a person⁸⁶ is responsible for a statement only if he makes or publishes it. The law on who is a publisher online – and is therefore responsible for publications – has developed through both case-law and statute (mainly derived from European Union law). The advantage of this approach is that it has drawn from pre-existing principles as well as the circumstances and resources of websites and, in particular, large social media corporations.

The common law has applied the old principle that distinguished between an active publisher – such as of a newspaper – and a person providing a facility for others to publish – such as the host of a noticeboard. The general rule was that a publisher that had the opportunity to review, edit and amend statements before printing and distributing them was responsible for their contents as though he was the maker; whereas the host of a noticeboard, freely available for people to post announcements and advertisements, was not a publisher unless and until he was informed of the contents and had had a reasonable opportunity to remove them.

In the online era, the question of who is a ‘publisher’ of content on a platform over which the platform had no control was considered in *Tamiz v Google Inc.*⁸⁷ The judgment confirmed that Google could not have been a publisher until after it was notified of the content of the material, when it might be inferred that it ‘associated itself with, or to have made itself responsible for,

⁸³ https://blog.twitter.com/en_us/topics/company/2020/covid-19.html.

⁸⁴ <https://www.theamericanconservative.com/dreher/why-did-youtube-remove-the-doctors-briefing/>;
<https://www.dailymail.co.uk/news/article-8788811/Is-Twitter-acting-Government-Covid-censor.html>;
<https://www.theguardian.com/technology/2020/apr/20/facebook-anti-lockdown-protests-bans>;
<https://www.bbc.co.uk/news/technology-55544205>; <https://lockdownsceptics.org/2021/04/10/professor-denis-rancourt-banned-from-researchgate-for-warning-of-harms-of-masks/>.

⁸⁵ See, in relation to AI used by Facebook: <https://www.vox.com/recode/2020/3/17/21183557/coronavirus-youtube-facebook-twitter-social-media>.

⁸⁶ Including a ‘legal person’, *ie* a corporation.

⁸⁷ [2013] EWCA Civ 68.

the continued presence of that material on the blog and thereby to have become a publisher of the material'.⁸⁸

The other part of the legal framework is EU law.⁸⁹ The Electronic Commerce (EC Directive) Regulations 2002 provides three tiers of protection, depending on the level of involvement of the provider: *ie* whether they act as a 'mere conduit' for, 'cache' or 'host' the offending material. Of interest here is sites that are considered 'hosts', such as Twitter, blog hosting sites and 'below the line' comments under online articles. There is a requirement of neutrality which must be satisfied if an internet service provider ('ISP') is to qualify as a 'host': 'where the service provider, instead of confining itself to providing that service neutrally, by a merely technical and automatic processing of the data provided by its customers, plays an active role of such a kind as to give it knowledge of, or control over, those data', it will not qualify.⁹⁰

Finally, the Defamation Act 2013 and the Defamation (Operators of Websites) Regulations 2013 make detailed provision for the steps the operator of a website must take once notified of potentially defamatory material, if it is to avoid being a publisher.⁹¹

In summary, a social media company will be liable as a publisher for what is written by one of its users only if it has been informed about or becomes aware of it and has failed to remove it. The balance between freedom of speech and the responsibility of host to remove potentially defamatory or criminal statements is met by the host becoming a publisher if it does not remove the material. Once notified, it has a choice. Either it can stand with the maker of the statement and share his liability or it can remove it, expeditiously, and bear none.

That legal principle works. Social media has opened and democratised the possibility of speech and debate to huge audiences. The choice of who has a large platform no longer lies exclusively with newspapers and broadcasters but is dependent upon a national and international audience that enables ordinary individuals to spread their opinions to an almost unlimited audience.

None of this would be possible if the hosts of these platforms were responsible for the content of bloggers, 'tweeters' and Facebook users. Because it is impossible for them to know whether statements might be defamatory or criminal in nature, the corporations would be obliged to restrict content either by aggressive algorithms preventing almost any form of controversial speech or by scrutinising content in advance. The political content on their sites would become greatly reduced in size, neutered as a forum for discussion or both.

The Online Safety Bill

This sensible compromise between the ability to host mass organic content in the public square and the responsibility to investigate complaints has been put at risk by the Online Safety Bill that has now been published.⁹² There are two key distinctions between the current regime and what would be imposed by the Bill and was proposed in the White Paper. The first is that a website will be liable not only for those statements with which it has become so closely

⁸⁸ *Ibid*, para 34.

⁸⁹ Which continues to apply unless and until amended under the (first) EU Withdrawal Act 2020.

⁹⁰ *L'Oréal SA v eBay International AG* [2012] All ER (EC) 501, at [112]-[117], ECJ.

⁹¹ It imposes a timescale of 48 hours for the removal of a post after a complaint is notified unless the poster replies, in which case it must allow for an attempt at resolution with the complainant.

⁹² *Ibid*.

associated as to make it share responsibility as a publisher (by being notified of them and failing to remove them) but will have a duty to investigate and enforce compliance with its terms and conditions. It will do that, secondly, by ensuring that users comply with the terms and conditions that a website will be required to impose on its users by statute.

The ‘duty of care’ would be enforced by requiring a website to address in its terms and conditions how it would protect users from ‘harm’; and failure to meet the obligations a site would be required to impose on itself would risk enforcement by a regulator.⁹³ That is to say, the duty to the users of a website would not result in a claim by the user – as is conventional – but in enforcement by a regulator. And the regulator would be enforcing not a minimum standard, but whatever terms a company agreed with its users: which, as Big Brother Watch points out, may go far beyond any requirement of domestic law.⁹⁴ It is concerning that the suggested regulator is Ofcom, which has imposed what can only be described as censorship over criticism of government policy.⁹⁵

As has been said, by the imposition of a ‘duty of care’ on websites, the state would require the websites to investigate and potentially remove material that would risk causing not only children but adults ‘harm’. This is done by imposing a duty to undertake ‘risk assessments’ (in clause 7), including for children and adults, which must ‘identify, assess and understand’ (*inter alia*) ‘level[s] of risk of harm presented by different descriptions of content that is harmful to adults’. Clauses 15 and 24 require the website host to operate a system enabling complaints by users about content that is ‘harmful to adults’ as well as to children.

At clause 30, the Bill outlines ‘online safety objectives’, which include not only that ‘the service provides a higher standard of protection for children than for adults (at cl. 30(2)(a)(v)) but requires there to be ‘adequate controls over access to the service by adults’ (at cl. 30(2)(a)(vii)). That is to say, the state imposes on private businesses a duty to undertake censorship in accordance with its directions (made through Codes of Conduct that can be taken into account if Ofcom takes enforcement action against the websites).

And what is ‘content that is harmful to adults’, a phrase used throughout the Bill? It is any material where there is ‘a risk of the content having, or indirectly having, a significant adverse physical or psychological impact on an adult of ordinary sensibilities’. It takes but little imagination to consider material that would satisfy this test. The psychological harm that could be done by great literature, the witnesses of warfare or (and this is no doubt high in the consideration of the Bill’s authors) controversial information (that is not necessarily even untrue) that could lead its readers to disregard what the state considers to be in that person’s best interests for his or her physical welfare. While there are various provisions in the Bill that are intended to protect freedom of expression and the preservation of speech that is important to democratic discourse, this makes little difference to the nebulous nature of this extraordinary provision. It is one that not just permits but requires the website operator to be ‘nanny’ in close

⁹³ White Paper, *ibid*, p 42.

⁹⁴ <https://bigbrotherwatch.org.uk/wp-content/uploads/2020/02/Big-Brother-Watch-consultation-response-on-The-Online-Harms-White-Paper-July-2019.pdf>, at p 10.

⁹⁵ Albeit under the guise of restricting criticism that would undermine ‘trust’ in what is said to be public health policy but in fact relates directly to political decisions of the first rank: including to what extent fundamental freedoms should be withdrawn for alleged public health benefit.

to a literal sense: seeking out and removing ‘risks’ to the welfare of its charges, even when they are adults.

This is an extremely disturbing escalation of the power of state. The more the state considers it has a duty to ‘protect’, the more it will – of necessity – increase its power. That is inescapable if it is to be able to protect those at ‘risk’ of harm; to protect their safety. And while it is one thing to regulate the speed of vehicles in order to avoid serious accidents, it is quite another to restrict what information, literature and ideas can be presented to any person out of a presumed concern for their ‘safety’.

As cyber-law solicitor Graham Smith observes, this is not the conventional attribution of the term ‘duty of care’.⁹⁶ It does not impose a duty on an individual enforceable by legal liability against that individual. Smith observes that a generic basis for liability is rare and negatively impacts society by imposing liability for consequences that are remote and unforeseeable. ‘The ordinary duty is to avoid inflicting injury, not to prevent someone else from inflicting it.’ Smith gives examples of where a common law duty is imposed where the person responsible for the ‘risk-creating activity’ can be liable for it, including inviting people to play golf or inviting to a stadium fans known to be likely to engage in violence. There is, on the other hand, a fundamental problem with seeing the facilitation of speech as a ‘risk-creating activity’.⁹⁷ Indeed, it is an attitude reminiscent of the idea that exposure to speech is itself harmful, rather than an opportunity either to engage in argument or ignore it. Smith cites the Supreme Court, which has found that:

‘The right to report the truth is justification in itself. That is not to say that the right of disclosure is absolute... But there is no general law prohibiting the publication of facts which will cause distress to another, even if that is the person’s intention.’⁹⁸

Smith is one of many critics who have exposed the dangers of the proposal, from both individuals and organisations with an interest in protecting free expression.⁹⁹ Many concerns have been raised, some in greater detail than can be reproduced here and some (including in respect of the privacy of online users) that are beyond the scope of this Report. But the consistent thread from many is that the proposals are wrong in principle, imposing a regulation that will chill the right to freedom of expression online and not just allow but require censorship.

The human rights group Big Brother Watch summarises the extensive protection provided by the criminal law set out in the previous chapter. They observe that the Law Commission’s scoping report emphasised that the sort of harassment and bullying the Bill is supposed to protect against is ‘broadly criminalised to the same extent online as offline’.¹⁰⁰

⁹⁶ Online Harms White Paper – Response to Consultation, 28 June 201, Submission by Graham Smith, <https://drive.google.com/file/d/1zULZ8hvXqoMQ1UguCPx01RYNqjhWbTt2/view>.

⁹⁷ *Ibid*, paras 1.12 and 1.18.

⁹⁸ *Rhodes v OPO* [2015] UKSC 32.

⁹⁹ See, in particular, Index on Censorship (<https://www.indexoncensorship.org/wp-content/uploads/2019/07/Online-Harms-Consultation-Response-Index-on-Censorship.pdf>), PEN (<https://www.englishpen.org/campaigns/english-pen-and-scottish-pen-call-on-british-government-to-rethink-its-approach-to-online-harms/>), Privacy International (http://privacyinternational.org/sites/default/files/2019-07/Online%20Harms%20Response%20-%20Privacy%20International_0.pdf), Article 19 and Big Brother Watch and the reports by Dr Preston Byrne for the Adam Smith Institute and by Graham Smith (all *ibid*).

¹⁰⁰ *Ibid* fn 94, p 5 and fn 60, p 34.

The common law has long upheld a principle of the criminal law, also protected by Article 7 of the ECHR, that requires that the basis on which criminal liability is imposed must be both sufficiently clear and foreseeable. While the Bill does not impose criminal liability on users for creating ‘harms’ or on a social media company for permitting them, the consequences for social media companies not abiding by this novel duty of care are severe. Enforcement action can be taken by Ofcom starting with provisional notices requiring the website to take a defined action (cl. 80), escalating to a ‘confirmation decision’ that can be made after no response or one considered inadequate to a provisional notice (cl. 8-), by which further requirements can be made. The failure to comply with a confirmation decision can lead to a penalty notice being imposed by Ofcom (cl. 84). Even more concerningly, the proposal by the White Paper that penalties should include requiring an ISP to block a ‘non-compliant’ website¹⁰¹ has been included in cl. 91 of the Bill, which would permit the state to prevent the transmission of the website in the UK. This is an extraordinary measure for a liberal democratic state to take, one more reminiscent of Communist China. The country that once broadcast the truth to countries beyond the Iron Curtain that did all they could to block those transmissions is now proposing to block the transmission of information, news, ideas and literature.

The government has not merely given the wrong answer. It has attempted to solve the wrong problem. The true threat posed by large social media companies is not that they have become the ‘wild west’ of the internet. It is that they have allowed the accumulation of power in a handful of companies and a small number of individuals, all imbued with the power to police speech. Rather than restricting freedom of speech to protect sensibility, the government has an opportunity to protect it.

A new statutory protection from censorship

In a short passage, the White Paper addresses the problem of enforcement of its proposed regulation in the international context.¹⁰² It considers adopting the means of enforcement of the General Data Protection Regulations (‘GDPR’), by requiring the appointment of a UK or EEA-based ‘nominated representative’.

This Report does not address the jurisdictional problems the government would inevitably face were it to enforce duties towards UK based users and activity that could be considered to occur in the UK, given the different legal systems and standards these companies face. That is bound to be a problem of some complexity, although companies with an online presence in the UK are subject to its jurisdiction and can be subject to civil litigation and criminal enforcement.

These problems will apply to any form of regulatory duties imposed on social media companies. That said, international companies are obliged to respect the law across different jurisdictions, with laws developed through statute and the common law (set out above) that applies to their potential liability for publication of material. If it is possible to impose liability on a company for the publication of material (for libel or, potentially, criminal offences¹⁰³), it

¹⁰¹ *Ibid*, p 60.

¹⁰² *Ibid*, para 6.9-6.12, p 61.

¹⁰³ For example, if a social media company was warned about a statement that incited racial hatred and did not remove it, it would become a secondary publisher and could potentially share criminal liability for that offence with the original maker of the statement.

would be possible to impose a mirror form of liability for the removal of material, as proposed below.

This Report has considered the material risk of online censorship imposed by companies which host the great majority of commentary within the public square that the internet has become. Those decisions are made not according to the objective standards of the criminal and civil law but those imposed by multi-national corporations, giving them power over public debate in this country that undermines democratic discourse and neuters the freedom of speech notionally protected by the common law and the ECHR. As with laws and enforcement necessary to protect the free-market, it is only through legislation that the state can protect the free exchange of ideas.

Thus, this Report proposes that websites that host organic material should have a legal obligation to retain all content unless they consider, on investigation, that a statement contravenes either the criminal or the civil law. This Report proposes the following scheme:

- (1) The host of organic material is not legally responsible for any statements unless it becomes a publisher under the current statutory and common law principles set out above. (A host that becomes aware of a comment through its own investigation, rather than being informed about it, is likely to become a publisher under the common law if it does not remove it expeditiously.)
- (2) Where a host becomes a publisher, it may remove material for only two reasons. First, an allegation is made or the host has reasonable suspicion that the statement may be contrary to the criminal law or might make the host liable for a civil wrong,¹⁰⁴ providing the host then actively investigates the allegation. Thus, a host could remove a post even if no specific allegation of criminality was made if it was satisfied that the statement might constitute a criminal offence or expose it to civil liability. However, the host would then be required to investigate and to replace the material. Secondly, a host would be permitted to remove a statement permanently if it concluded upon a reasonable investigation, on the balance of probabilities, that the making of the statement was a criminal offence or would make the host liable for a civil wrong. If not, the host would be required to replace the material
- (3) Criminal and civil law should be amended to provide a defence to a secondary publisher (*ie* a social media company) that had not removed a statement if it had investigated it with due diligence and decided not to remove it after deciding, on the balance of probabilities, that it was neither criminal nor defamatory nor constituted another civil wrong. Such a defence would only be rebutted by the prosecution if it could prove, on the balance of probabilities, that there had not been a fair decision making process or the decision was unreasonable or irrational.
- (4) If a statement were removed, the user would have the right to obtain redress by compulsory arbitration. The substantive ground would be that the making of the

¹⁰⁴ This not only includes libel as a secondary publisher but also contempt of court requirements if a user has commented on an ongoing court case in a manner not permitted (for example by revealing the name of an anonymous complainant or reporting a jury verdict where a judge had banned reporting because of other upcoming trials).

statement was neither a criminal offence nor a civil wrong. The procedural ground would be that the host had taken an unreasonable time to investigate the allegation; but it is unlikely to be sensible to impose a time-scale. Arbitration awards (decisions) may be appealed to the civil courts but only in extremely limited circumstances. Again, it would be a defence from civil or criminal liability for a secondary publisher to retain a statement after a reasonable and fair arbitration process.

(5) This scheme would apply only to sites available to any member of the public. Membership sites – such as clubs and societies and political parties – may wish to impose rules about conduct and may also (in the case of political parties or religious organisations) require their members to subscribe to a particular political or religious view.

(6) Further, this scheme would not apply to any sites that were not ‘hosts’ under the current E-Commerce Regulations, that is to say any organisation that ‘vetted’ comments in advance of publication.

The latter two qualifications would enable smaller websites easily to avoid these obligations, either through vetting comments in advance or by imposing a membership requirement before comments were permitted. A membership requirement can be defined as any requirement to be approved as a member before commenting. Thus, while Twitter and Facebook currently only permit comments from those with accounts, their users would not be considered ‘members’ as any person is able to join instantly; and other sites permit users to upload material without membership or payment requirements. Any political or religious organisation that wished to restrict the speech of its members would be able to take advantage of this means of avoiding becoming a ‘host’.

Those qualifications also allow newspapers with ‘below the line’ comments to choose whether they wish their comments to be free from censorship. They could retain the right to remove them as they wished by imposing a membership or subscription requirement or by reviewing them before publication.

It might be suggested that this regulatory structure imposes additional burdens on social media companies. That is unlikely. The proposed regulations would only apply if a website wishes to remove material where they are likely to have had to make that decision anyway – because a contentious statement was reported to them and they were obliged to decide whether or not to retain it and become a secondary publisher. They would not apply to statements unknown to them. Because of their current statutory obligations and their own terms and conditions, social media companies already apply schemes to investigate complaints and to review decisions to remove material.

Moreover, they will not impose a disproportionate burden on smaller companies, which will be able to move towards a membership or editing system. What this scheme would do is to ensure that social media companies operating as a forum for debate are required to do so. And it would also mark a welcome strike for freedom of expression in a world turning its back on it.

VII. FREEDOM OF EXPRESSION AND EMPLOYMENT RIGHTS

Introduction

To be barred from a club or society or attacked in a newspaper because of one's belief is one thing. To lose one's livelihood is another. Not only is it inherently wrong for an employee to fear for his employment through expressing his opinions, it imposes a particular chill on freedom of expression: very few can afford to lose their livelihood, even if they might be prepared to forego other things.

Employment rights are protected by statute over other contractual rights between employer and employee, for this reason. Since the Industrial Relations Act 1971, employees have had statutory protection against 'unfair' dismissal after a qualifying period of employment, which is now two years. Broadly, this protection ensures that an employee cannot be dismissed save for a genuine redundancy, misconduct,¹⁰⁵ incapability or 'some other substantial reason'. (The statutory rights have largely since been codified in the Employment Rights Act 1996 ('the ERA')).

Under the Equality Act 2010, employees who are discriminated against for a 'protected characteristic' may claim compensation, including for dismissal, at any stage in their employment; and before it if discriminated against at an interview. A protected characteristic includes (alongside sex, age, ethnic and national origin, disability, sexual orientation and gender reassignment) religion and philosophical belief. While the European Court of Human Rights has distinguished between having a belief and manifesting it, a person can be discriminated against in response to both.

Yet the protection of adherents to a political philosophy has been an ineffective tool in protecting the freedom of expression of employees. It is limited in principle, by being subject to a test about whether (according to a judge and dependent upon the political philosophy itself) it is 'acceptable' in a democratic society. And it is limited in its application, by being balanced against other rights. Moreover, although courts and employment tribunals have considered it alongside Article 10 of the ECHR, 'philosophy and belief' does not include all expressions of opinion.

This Report proposes an additional right to protection for the expression of any opinion outside the course of an employee's employment. This free speech right would apply at an employment interview and throughout a person's employment. It may be displaced only by an employer able to establish that it was reasonably necessary to preserve the reputation of the employer or the rights and relations between its employees; or that the nature of an employee's role justified restricting his freedom of speech outside the course of employment. It is likely to be used in preference to an allegation of discrimination against a person because of the 'protected characteristic' of adherence to a political philosophy, although it would not replace it.

This protection creates a fair balance. It removes judicial oversight over what beliefs are worthy of 'respect' and replaces it with an assumption of the right to free expression; and it focuses not on the 'respect' to be afforded to an opinion but on what is necessary to protect an employer's reputation and its employees. It does not single out political, social, or religious

¹⁰⁵ Normally only for gross misconduct save where a disciplinary procedure has been followed and appropriate warnings have been given for previous instances of misconduct.

opinions and so avoids the court having to determine whether an opinion falls into those categories. And it puts the burden on an employer to prove that it is objectively reasonable to dismiss or discipline an employee for the expression of an opinion.

The protection of ‘philosophical belief’ and its limitations

The Employment Appeal Tribunal set out principles by which a tribunal could determine whether a ‘philosophical belief’ could be protected in *Grainger plc v Nicholson*:

- (i) *the belief must be genuinely held;*
- (ii) *it must be a belief and not an opinion or viewpoint based on the present state of information available;*
- (iii) *it must be a belief as to a weighty and substantial aspect of human life and behaviour;*
- (iv) *it must attain a certain level of cogency, seriousness, cohesion and importance;*
and
- (v) *it must be worthy of respect in a democratic society, not be incompatible with human dignity and not conflict with the fundamental rights of others.*¹⁰⁶

Although these criteria limit the protection to be afforded to an adherent of a ‘philosophy’, the first four are arguably necessary if the existence and coherence of a philosophy must be determined. There are, however, four serious problems with the fifth criterion.¹⁰⁷

First, it distinguishes ‘philosophical belief’ from religion. Members of a religious body or those who believe in a creed will be considered to have a ‘protected characteristic’ irrespective of whether their religion is ‘worthy of respect in a democratic society’. Many religious beliefs will be considered by many to conflict with the fundamental rights of others; and by large numbers to be unworthy of ‘respect’ in a democratic society. That should not mean they are unworthy of protection. If ‘philosophical belief’ is to be protected alongside religious belief, why should one be subject to a ‘gatekeeper’ test but not the other?¹⁰⁸

The distinction between ‘respect’ and ‘tolerance’ for different opinions, philosophies and religions was recognised recently by Cambridge University. It voted to replace ‘respect’ with ‘tolerance’ in a resolution that students, staff and visitors should be able to ‘express new ideas and controversial or unpopular opinions within the law, without fear of disrespect [replaced with ‘intolerance’] or discrimination’ and be ‘respectful [replaced with ‘tolerant’] of the diverse identities of others’.¹⁰⁹ A liberal society is a tolerant one, not one that imposes a duty to respect others. It is one that recognises that it may be impossible for a conservative honestly to respect the belief of a Maoist or for a Salaafi honestly to respect the belief of a Hindu. What all must do to be part of the public square is to tolerate the other. As said Lord Justice Laws:

¹⁰⁶ [2010] ICR 360 at para 24.

¹⁰⁷ Which derives from a judgment in ECtHR, *Campbell and Cosans v UK* (1982) 4 EHRR 293.

¹⁰⁸ This is perhaps particularly so given that atheism and agnosticism are protected under the religious category of belief ‘or the absence of belief’ and are thus immune to the test of whether they are ‘worthy of respect’, despite it being impossible to consider them anything other than philosophical in nature.

¹⁰⁹ <https://www.cambridgeindependent.co.uk/news/university-of-cambridge-free-speech-vote-tolerance-wins-over-respect-9144582/>; the amendment to the resolution passed in December 2020, by a margin of 87%, by Regent House, the governing body of the University.

‘The precepts of any one religion—any belief system—cannot, by force of their religious origins, sound any louder in the general law than the precepts of any other. If they did, those in the cold would be less than citizens; and our constitution would be on the way to a theocracy, which is out of necessity autocratic ... So it is that the law must firmly safeguard the right to hold and express religious belief; equally firmly, it must eschew any protection of such a belief’s content in the name only of its religious credentials. Both principles are necessary conditions of a free and rational regime.’¹¹⁰

We should remember that ‘to tolerate’ is not to agree, approve or respect. It is not a benevolent, kindly, positive word. ‘Tolerance’ is only engaged when one disapproves or even dislikes. Otherwise, there is nothing to ‘tolerate’. By being reminded of its true meaning, we should recall that it is a principle necessary in a society with conflicting ideas, beliefs, religions and philosophies: one that allows all of them to ‘rub along’ together without requiring conversion or even respect.

Secondly, the requirement that a belief’s acceptability be vetted by a judge for its worthiness of ‘respect’ is troubling. It is easy to think of beliefs that the vast majority would consider unworthy of respect, such as Holocaust denial¹¹¹ or the belief in a Satanic global elite.¹¹² But it is not merely trite but true to say that such ‘hard cases’ make ‘bad law’.

The original judgment in *Forstater v CGD Europe* illustrates the difficulty.¹¹³ The judge in that case considered himself bound by the *Grainger* principles to determine whether a belief that biological sex is innate and unchanging was ‘worthy of respect in a democratic society’. His decision that it was not was itself disturbing, but it revealed the fundamental problem with requiring judges to determine such a question. It both: (i) allows an arm of the state (the judiciary) to determine what is or is not acceptable; and (ii) undermines the separation of powers by asking the judiciary to determine whether the expression of a particular political opinion is to be afforded protection, where the only legitimate means of testing such an opinion is in public discourse and public election. Fortunately, that decision has been reversed by the Employment Appeal Tribunal, in a judgment that contains a welcome assertion of the undesirability of the courts finding that any but the most extreme views could be found ‘unworthy of respect in a democratic society’.¹¹⁴

Another example is the judgment in *Thomas v Surrey and Borders Partnership NHS Foundation Trust* where it was found that the claimant’s belief in English nationalism was not ‘worthy of respect in a democratic society’ because it included ‘anti-Islamic’ views.¹¹⁵ The judgment includes an account of views most will find prejudiced or worse (as did the

¹¹⁰ *McFarlane v Relate Avon Ltd* [2010] EWCA Civ 880, para 22.

¹¹¹ Found to be ‘unworthy of respect’ in *Ellis v Parmagon Ltd* [2014] EqLR 343.

¹¹² Ditto in *Farrell v South Yorkshire Police Authority* [2011] EqLR 935.

¹¹³ Case no 2200909/19 – London Central ET:

https://assets.publishing.service.gov.uk/media/5e15e7f8e5274a06b555b8b0/Maya_Forstater_vs_CGD_Europe_Centre_for_Global_Development_and_Masood_Ahmed_-_Judgment.pdf.

¹¹⁴

https://assets.publishing.service.gov.uk/media/60c1cce1d3bf7f4bd9814e39/Maya_Forstater_v_CGD_Europe_and_others_UKEAT0105_20_JOJ.pdf.

¹¹⁵ Case Number: 2304056/2018, London South ET:

https://assets.publishing.service.gov.uk/media/603e30dfd3bf7f02248b3dcd/Mr_S_Thomas_v_1_Surrey_and_Borders_Partnership_NHS_Foundation_Trust_2_Ms_A_Brett_2304056-2018_Judgment.pdf.

employment judge¹¹⁶). But that case again involved a judge deciding that speech, while ‘not outside the bounds of democratic debate’ was not worthy of respect.¹¹⁷ This determination contrasts with the statutory protection against using the offence of incitement to religious hatred in such a way that ‘prohibits or restricts discussion, criticism or expressions of antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs or practices of their adherents’.¹¹⁸ Were the reason for the dismissal of this employee to be judged by whether it was ‘reasonably necessary’ to protect the rights and relations between other employees, on the other hand, the focus would be not on the merits of his opinions or the extent of their offensiveness but on their effect on others. While the judgment of the EAT in *Forstater* might render the approach in *Thomas* unlikely to be followed in future, the existence of the test of ‘worthiness’ remains problematic; or, at least, establishes that protecting employees only where they are expressing a coherent ‘philosophical belief’ provides limited protection to the exercise of free speech rights.

The telescope is the wrong way around. Freedom of speech must be a premise not a privilege. This is because the question in *Forstater* arguably should not have been a question in the first place, which is why the proposal in this Report reverses the burden onto the one who wants to restrict freedom of speech rather than the one exerting their freedom of speech; and why assessing “worthiness” remains problematic notwithstanding *Forstater*. Indeed, it would appear that *Forstater* demonstrates exactly why it is a problem.

Thirdly, the criterion confuses whether a ‘protected characteristic’ should be protected, on the one hand, with whether the adherence to ‘protected’ beliefs should trump all other considerations, on the other. As with most rights protected by the ECHR (including Article 10), the protection is not absolute. The law allows for circumstances where freedom of speech can be curtailed or whether it or the adherence to religious or philosophical opinion must be balanced against other considerations. That does not exclude the protection of certain (perhaps ‘offensive’) religious beliefs or expression, it recognises that they must sometimes be balanced against other rights.

There may be circumstances in which the expression of a political belief will conflict with other rights or where it would not be unlawful for an employer to discriminate against an employee with those beliefs. For example, it may be against the beliefs of a vegan (which has been found to be a protected philosophical belief¹¹⁹) or a Hindu to work in a leather factory or to handle it in a handbag shop. While an employer might be required to take reasonable steps to accommodate their beliefs, that might be impossible, particularly for a small business in which employees had to undertake multiple roles. Where such situations arise and lead to challenges in the courts or employment tribunal, the judiciary is well equipped to handle them.

Fourthly, this and the other criteria show the limitation of the protection of the belief in a ‘coherent’ philosophy rather than the protection of speech itself. It does exactly what Mill warned against, requiring an arbitrator to determine what is ‘coherent’ and what beliefs are important and what are not. The undesirability of this test is placed in sharp focus when

¹¹⁶ *Ibid*, para 63.

¹¹⁷ *Ibid*, para 84.

¹¹⁸ Section 29J of the 1986 Act, as amended by the Criminal Justice and Immigration Act 2008.

¹¹⁹ *H v United Kingdom* (1991) Application No. 18187/91, European Court of Human Rights; *Williamson v Secretary of State for Education and Employment* [2005] 2 AC 246; although vegetarianism has been found not to be - *Conisbee v Crossley Farms* (2018) Case no 3335357/18 – Norwich ET.

tribunals and courts must grapple with whether what is essentially a scientific belief is in fact a political one.¹²⁰ Such questions might be capable of logical resolution, but that resolution is itself likely to be highly controversial and – again – requires an employer and a judge to arbitrate over whether a belief is important enough to merit protection.

Fifthly, treating a person’s ‘philosophical belief’ as an inherent characteristic, rather than protecting his freedom of expression fails to take into account that opinions change. Often frequently.

In summary, the limitations of this approach derive from its attempt to protect a person’s identity as the adherent of a political philosophy rather than his opinion. When placed under any scrutiny, its weakness becomes ever more apparent. Why is an ‘ethical vegan’ to be protected but not a vegetarian whose beliefs are supposedly less ‘coherent’? It is an attempt to classify a person by his opinions, rather than to respect his right to have them – whatever they are and howsoever they are expressed; and an attempt to drive a square peg into a round hole, using the principles of equality legislation to protect a freedom held by all mankind, irrespective of the coherence of their philosophical principles.

Proposed statutory protection for employees’ freedom of expression

The additional statutory right it is proposed be added to the ERA would protect all speech of any employee outside the course of his or her employment.¹²¹ It would include the right not to be victimised (treated less favourably) and an automatic right to claim unfair dismissal (without a qualifying period) if the treatment or dismissal was caused or contributed to by the expression of speech outside the course of employment. The right would apply not only to employees but to those applying for employment. Thus, those able to establish that they were not interviewed, or treated less favourably in an interview, because of their speech, could claim damages in an employment tribunal. This mirrors the right of an applicant for employment to claim discrimination if they are treated less favourably during the application process due to their ‘protected characteristic’.

As in cases of discrimination,¹²² wherever an employee establishes a *prima facie* case of less favourable treatment (including dismissal) because of speech made outside the course of employment, it would be for the employer to prove (on the balance of probabilities) that this treatment was *not* because of that speech; or, where it was because of that speech, it was for one or more of the justifications set out below. That is because, as in cases of discrimination, it is particularly difficult for an employee to prove why he has been treated less favourably¹²³ but that employee may be faced with circumstances suggesting that the real cause is, for example, a controversial statement made on Twitter. Moreover, were this additional protection

¹²⁰ In *Grainger* itself, which was concerned with whether the belief in man-made climate change and the ethical obligation to stop it was a ‘political philosophy’.

¹²¹ Although the mirror protections for protected characteristics are included within the Equality Act, this protection is distinguished by not relating to a person’s characteristics or to equality of opportunity but to the respect to be accorded his speech and privacy outside his work. It therefore falls more logically within the ERA, which protects employment rights and sets out the protections (*inter alia*) in unfair dismissal cases.

¹²² *British Leyland (UK) Ltd v Swift* [1981] IRLR (Court of Appeal) *et seq.*

¹²³ Perhaps more so than where an employee is dismissed, as the employer would then be required to set out the reasons for dismissal in a fair investigation, although it is common in discrimination cases for employees to accuse employers of disguising the real, discriminatory, reason for a dismissal.

for employees introduced, unscrupulous employers would have a motivation to disguise the true reason for their treatment or dismissal of an employee. That is to say, if an express protection for freedom of speech is introduced, an employer would be more likely to disguise the fact that a dismissal is actually because of an employee's speech outside work. It is for this reason that the burden is reversed in discrimination cases: because employers who are dismissing a person because of his race (for example) are most unlikely to say so outright.

In each case where an employee is able to prove less favourable treatment because of speech outside the course of employment, it is suggested that an employer may displace it only if it is able to establish (on the balance of probabilities) that its response to speech outside the course of employment (by not employing the claimant, disciplining or dismissing him) was reasonably necessary for one or more of three reasons: (a) because the employee's role justified restricting speech; (b) to protect the employer's reputation; or (c) to protect the rights of its employees and preserve harmonious relations between them. An employer deciding whether less favourable treatment or dismissal was reasonably necessary would have to take into account the employees right to freedom of expression, as would a tribunal determining whether an employer could establish the 'reasonableness' defence.

This protection would also apply to employees who were 'constructively dismissed' because of their speech: that is, those who resigned because the working environment became so hostile that the employer breached its duties of trust and confidence or co-operation and support (or other express contractual duties) to the employee.

Under section 3 of the Human Rights Act 1998, all legislation must be implemented so that it is compatible with rights preserved under the ECHR 'so far as it is possible' and this law would be no exception. Those articles include Article 17, which provides that the Convention cannot be interpreted to allow acts aimed at the destruction of rights, and Article 14, which requires that the rights be secured without discrimination against a person on grounds 'such as' sex, race, religion, political opinion, etc. An employer and a tribunal would have to take such considerations into account in deciding whether discipline or dismissal was 'reasonably necessary' to protect the rights of its other employees.

Claims of unfair dismissal that do not allege discrimination are determined by whether the decision to dismiss is within the 'range of reasonable responses' of an employer.¹²⁴ This is not the case where discrimination is alleged, where it is for the employer to establish that it did not discriminate against the employee provided there is a *prima facie* case of discrimination.¹²⁵ It would not be appropriate to extend the 'range of reasonable responses' test to the protection of a fundamental right; and the logic of its introduction is that it should mirror the manner in which employees are protected from discrimination. The question of whether the employer's defence is established should be an objective one that the tribunal can determine. Courts and tribunals are well able to determine what is reasonably necessary; and employment tribunals, in particular, benefit from being able to consider what a wider range of employers consider to be 'reasonably necessary' when protecting their reputation or that of other employees.

The new test that this Report recommends:

¹²⁴ *Ibid.*

¹²⁵ *Hewage v Grampian Health Board* [2012] UKSC 37, applying the EU Burden of Proof Directive 97/80/EC.

- (1) Is concerned not with the merits of an opinion but whether its restriction can be justified. It removes from the judiciary the invidious (and inappropriate) task of evaluating whether a political opinion is coherent or ‘worthy of respect in a democratic society’, instead requiring them to focus on whether the effect of speech outside the course of employment is so serious as to justify discipline or more by an employer. That is where the focus is normally when a tribunal determines the reasonableness of dismissals and disciplinary decisions; and it is the appropriate focus.
- (2) Does not protect a person because he adheres to a particular system of beliefs but protects his freedom to express his opinions outside the course of his employment; and recognises that opinions change. (And, insofar as a person might need protection from discrimination not because of his expression of those beliefs but because he is known to have them, such discrimination because a person holds the ‘protected characteristic’ of adherence to a philosophical belief will remain.)
- (3) Establishes an assumption that speech outside the course of employment is not the concern of the employer save where it affects its company’s interests (including those of its other workers).
- (4) Recognises that an employer may reasonably restrict the speech of an employee in the course of his employment, something that has previously been recognised by the ECtHR.¹²⁶ That the right would not extend to speech within the workplace would not give an employer *carte blanche* to dismiss anyone arguing about politics in a common room or while on duty: the employee would still be able to establish unfair dismissal if his dismissal was ‘unreasonable’. But it recognises that employers may have many and varied reasons for wishing to restrict the expression of speech within the workplace; and that an employee voluntarily subjects himself to the discipline of his employer when at work. Examples might include where an employer is within an area with sectarian tensions where prohibiting the discussion of religion or politics is considered necessary to promote harmonious relations, avoid disorder and/or to increase productivity. Or where an employee must maintain a neutral public face when dealing with customers.
- (5) Recognises that some employers may need to restrict the public expression of political, religious or social opinions of employees in particular roles. Obvious examples include the civil service or the military. Others might include members of the secretariat of political parties or religious organisations, those subject to religious vows of obedience or senior executives of organisations with corporate views. But any such exception would have to be justified as ‘reasonable’ by an employer; and objectively so.
- (6) Is not limited to speech expressing opinions about political, social, economic or religious views. As soon as one limits the category of opinion that might be protected, an employment tribunal would have to determine whether it actually fell within it. Does vociferous support for Celtic Football Club express Irish Republican opinions? Is the belief in divination religious? Would it be a social opinion to disparage rugby union in

¹²⁶ *Ahmed and Others v UK*, 2 September 1998, §63, Reports of Judgments and Decisions 1998-VI.

favour of football? The absence of any such limitation is particularly important because the richness of discourse is not limited to any one area of the liberal arts or natural sciences but embraces them all. It would be impossible – and undesirable – to categorise what areas of learning or enquiry were worthy of protection. To do so would be to enter Mill’s trap of arbitrating not only the truth or desirability of an opinion but whether it ‘mattered’. Not only is it not for the state (or an employer) to determine this question, human history shows that what is thought to be insignificant can transpire to be the most significant of all.

- (7) Is not limited to the expression of opinion but extends to any speech. Again, this avoids a judge having to determine whether something said on Twitter (for example) amounts to an opinion. The question of whether something is an opinion or of what it is an opinion about is irrelevant. A person’s speech is not a matter for their employer unless it is said within the course of employment, or if it is reasonable to restrict the expression of particular opinions outside it because it damages the reputation of the employer or it damages the relations between employees.
- (8) Allows employers to discipline employees for coarse behaviour serious enough to damage its reputation, where harm to its reputation could be proved *by the employer* on the balance of probabilities. For example, this would allow an employer to dismiss an employee for offensive tweets sent by a sales manager on a Twitter account, where he was followed by many clients that the employer concluded would cease to trade with the employer because of his language.¹²⁷
- (9) Allows an employer to prove (on the balance of probabilities) that it was necessary to dismiss an employee for remarks that were so offensive that they would affect its workplace by damaging its other employees’ rights or harmonious relationships between them. An example might be political or religious discussion outside the course of employment between employees in an area of sectarian tension, where an employer had specifically banned such speech in order to avoid those tensions in its workplace (although it would be for the employer to prove that such a policy was reasonably justified). However, where an employee expressed views that were highly controversial and offensive to many, it would be for the employer to prove (on the balance of probabilities) not only (a) that such speech actually affected the harmonious relations of employees but also (b) that it was reasonably necessary to take any action against the employee bearing in mind her right to freedom of expression. The focus, again, is removed from the perceived offensiveness of the remarks themselves and shone on their effect on the employer and other employees. Only once it is established that the remarks had such an effect need their offensiveness be judged; and then only in relation to their actual effect on other employees.¹²⁸

¹²⁷ As in *Game Retail Ltd v Laws* (2014) UKEAT/0188/14/DA (<https://www.employmentcasesupdate.co.uk/site.aspx?i=ed24867>).

¹²⁸ It is of note that it has been found to be a reasonable for an employer to dismiss an employee for ‘some other substantial reason’ if that employee causes an ‘unbearable atmosphere’ in the workplace that seriously affected the employer’s business, even if the employee who was the cause was not guilty of misconduct: *Treganowan v Robert Knee & Co Ltd* [1975] IRLR 247, [1975] ICR 405 (EAT); *Perkin v St George's Healthcare NHS Trust* [2005] EWCA Civ 1174.

This new protection is particularly important in the social media age, where the vast majority of employees will have an online presence and many will not remember a time when such a presence was not the norm. It is also a necessary reaction to the increased (and in many cases) unreasonable sensitivity to non-conformist opinion. And it recognises that, while a person may have all the freedom in the world in theory, it is worthless if he may not exercise it without putting his livelihood in jeopardy.

VIII. AFTERWORD

The first draft of this Report was written in February 2021, in the midst of the third period within which the state had taken upon itself powers to require its subjects to remain at home and to close the businesses and workplaces of many of them. This was done for their ‘safety’. Alongside this accumulation of power, the state has, through its broadcasting regulator, restricted what its subjects may say about decisions that are not only the most important of the day, politically, socially and economically, but the very decisions that have limited their freedom.

These restrictions (by Ofcom) have neutered the ability of broadcasters to question government and to enable debate. Regrettably, all too many people rely on the traditional broadcasters to convey their news and what passes for a representation of political debate. So it has been the press and, particularly, social media, that have plugged the gap, enabling something of a true debate about whether it is really necessary for the state to accumulate such extraordinary power for the ‘safety’ of the public.

And it is here that the government wishes to extend its power over speech and expression still further. Not content with the censorship of criticism of its accumulation of power, it has consulted on and published a Bill that imposes duties of censorship on all hosts of websites, including all those whose objective is to facilitate the free exchange of ideas. It has done so in order to ‘protect’ not just children but adults from the risk of ‘harm’ from reading or viewing images.

These developments are disturbing. They entrench still further the nebulous idea of ‘safety’, not coincidentally the name adopted by the revolutionary tribunal of the Terror. Power is only ever accumulated by the state for the ‘protection’ and ‘safety’ of its people: particularly in wartime and particularly at times of real or exaggerated public crisis. And that power comes at the expense of freedom each time it is increased.

Yet it is not only the state that poses a risk to the freedom of expression. While private companies, the large social media corporations have become quasi-monopolies in the exchange of ideas by means that they have facilitated. And, like all monopolies, they present a threat to the consumer and, in this case, contributor. For, as the state has imposed regulation over broadcasters, social media companies have themselves censored debate about the removal of freedom and the efficacy of its intended purpose. Were these companies a number within a large market, that would be of no concern. But where a website is the principal means by which political ideas are circulated and debated (as Twitter is) or by which videos of political messages are uploaded (as YouTube is), that regulation becomes a public concern.

Moreover, the last few years have seen a concerning trend for employers to penalise their employees for political and other speech in their free time.

This Report suggests three ways in which the balance can be redressed. First, in the criminal arena, the College of Policing’s guidance enabling them to investigate and report ‘non-crime hate incidents’ should be revoked; and the Scottish Hate Crime Bill should be opposed or substantially amended. Secondly, rather than the need for legislation requiring websites to police their users’ content in order to ‘protect’ them from harm, legislation is needed to protect

major fora for political debate from censorship. Thirdly, employees should not be at risk of losing their livelihood through the manifestation of their political and other opinions.

But such measures can only go so far. What is needed is a revolution in public outlook. A country whose citizens have become used to seeking the instruction of the state before deciding whether to leave their own homes needs to re-acquaint itself with the freedoms that are its greatest heritage; and its citizens need to learn that the more they rely upon the state as a protector, the less control they will have over how and in what way they are protected.

Because, while freedom of expression is the gateway to all freedom, it is no more than that. The British people must walk through the gate.

Francis Hoar

10th June, 2020

Gray's Inn

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***Lord Sumption** was regarded as the leading barrister of his generation before his elevation to the Supreme Court, the first direct appointment from the Bar to that court or its predecessor for over one hundred years. He is also an accomplished Medieval historian and an expert on the Hundred Years' War. Lord Sumption has been a prominent critic of the emasculating of freedom since his retirement from the bench.*

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