Do we want free speech or not? Modern Challenges to Free Speech

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HUMAN RIGHTS

Do we want free speech or not? Modern challenges to free speech

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Introduction

Free speech, so we are told, is the bedrock and lifeblood of democracy.[1] It allows us to achieve self-fulfilment and individual autonomy and promotes the public benefit in discussing matters of public interest, in challenging government action, and in discovering the truth.[2] These statements are valid despite the conditional status of free speech: in other words, that it must often yield to countervailing interests,[3] and that it imposes on the speaker duties and responsibilities, which they must consider when exercising the right.[4] Thus, freedom of speech is regarded as a good in itself, occupying the dominant position, and any restriction is presumed to be unlawful and invalid, the duty being on those who interfere with free speech to justify the interference on strong and compelling grounds.[5]

Given the above, why should we now be questioning the inherent values of free speech, and challenging its dominant position in democracy and modern society? This essay will explore some of the modern challenges to free speech and warns against a modern trend to displace its values and its dominant position in a democratic society. The article does not purport to offer a solution to all the dilemmas raised in the text of the article. Neither does it deal with those dilemmas and the relevant legal issues in detail. Rather it identifies those issues and the modern trend for attacking free speech, and provides a reminder of the values of free speech and the need to protect it from unreasonable and arbitrary interference. More specifically, it makes a plea for free speech to be allowed to maintain its dominant position in any case where it has come into conflict with other rights and interests.

The status of free speech and its inevitable harm

Freedom of speech and expression, as contained in Article 10 of the European Convention, is clearly a conditional right and one that can only be enjoyed subject to various legal restrictions imposed to facilitate a variety of legitimate aims.[6] This recognises that speech and expression can cause harm and rejects the saying that 'sticks and stones may break my bones, but words can never harm me.' Speech can cause harm to an individual's reputation or privacy,[7] compromise their right to a fair trial (or otherwise obstruct the course of justice),[8] interfere with

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[1] See Lord Steyn in *R v Secretary of State for Home Department, ex parte O'Brien and Simms* [2000] 2 AC 115.

[2] Eric Barendt, *Freedom of Speech* (2nd edition OUP 2005, Chapter 1 – 'Why Protect Free Speech?

[3] See Article 10(2) of the European Convention on Human Rights and Fundamental Freedoms !1950), which states that the right is subject to restrictions which are prescribed by law and necessary in a democratic society for the interests of national security, territorial integrity or public safety, for the prevention of disorder and crime, for the protection of health and morals, for the protection of the reputation and rights of others, for the prevention of disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

[4] Article 10 is the only right in the Convention that reminds the right holder of duties and responsibilities when exercising their human rights.

[5] See *Sunday Times v United Kingdom* (1979) 2 EHRR 245, where the European Court reminds us that Article 10 guaranteed free speech, subject to restrictions which must be narrowly interpreted.

[6] These are listed in Article 10(2) of the European Convention on Human Rights, see n. 3 above.

[7] Covered by the domestic laws of defamation and misuse of private information.

[8] Covered by the domestic laws of contempt of court, most specifically by the Contempt of Court Act 1981.

the right of religious observance,[9] incite or cause acts of violence or terrorism,[10] threaten national security or public safety,[11] or threaten public morality or decency.[12] In all these cases, it is no defence to argue that speech and expression is merely words or ideas, and that all this harm must be tolerated in order to accommodate the value of free speech in a democracy.

Indeed, it is tempting to argue that as speech and expression is capable of causing such harm, that it should only be enjoyed subject to *any* legal restriction intended to uphold a competing claim. Thus, under this approach you can *only* exercise your right under Article 10 when it *does not* come into conflict with any other legitimate claim; and when it does, we will restrict your right of speech and expression because we are not prepared to endure a particular harm, or even run the risk of such a harm occurring. We might want to take this position because we are aware, from previous experience, of the harm that can be caused by speech and expression, and thus wish to shape the right under Article 10 around these harms and fears.

However, as with any other interference with human rights, we need to restrict this approach. First, as abuses of free speech provides us with evidence of harm, so do instances of over restrictive interferences with free speech; where governments have used their power and the law to restrict the advantages of press freedom, governmental accountability and political opposition. Secondly, in order to ensure an appropriate balancing of speech with other interests we need to insist that the counterclaim itself is legitimate – for example, to secure the rights of others as opposed to ensuring that the government's authority is not called into question. We need, therefore, to be distrustful of certain reasons for restricting free speech, or of certain evidence put forward to justify the restriction. Thirdly, in order to ensure that any restriction is *necessary* in a *democratic society*, we need to insist that the restriction is proportionate to that legitimate aim and that it reflects the values of free speech.

Thus, we need to establish and maintain certain rules governing the enjoyment and restriction of free speech and expression: these rules reflecting the democratic importance of speech. These rules include the following: that prior restraint is especially dangerous and needs strong justification;[13] that the media should enjoy greater protection under Article 10,[14] especially in cases of public interest stories,[15] that political speech should be defended more robustly; [16] and that free speech that supplements and augments the right of peaceful assembly, and/or religious rights deserves greater protection.[17] These rules assist us in conducting an appropriate balancing act between free speech and the realisation of other aims; a balance that will give free speech a proper status and importance in democracy, whilst accepting that there may be cases where free speech might have to come second best. These rules will not mean that free speech has a 'trump' status over other rights and interests – particular where the competing claim is another human rights – but, it is argued, will give free speech a dominant starting

[9] As protected under Article 9 of the European Convention, and as covered under domestic laws of blasphemy (now abolished in UK domestic law), and incitement to racial and religious hatred and a variety of aggravated public order offences under the Public Order Act 1986.

[10] See ss. 1-2 Terrorism Act 2000 and s.26 of the Counter Terrorism and Security Act 2016, Act which contains an obligation on educational institutions to support the government's PREVENT strategy, considered later in this article.

[11] Covered by both the common law of confidentiality and the Official Secrets Act 1989.

[12] Covered by a variety of common law and statutory offences intended to regulate both obscene and indecent speech and displays.

[13] *Observer and Guardian Newspapers v United Kingdom* (1991) 14 EHRR 253.

[14] *Jersild v Denmark* (1991) 14 EHRR 1.

[15] *Sunday Times v United Kingdom*, n 5 above.

[16] *Castells v Spain* (1992) 14 EHRR 245

[17] *Redmond-Bate v DPP* (1998) Crim, Law Rev. 998. In practice, however, this type of speech is given little if any added protection; see below

position, insisting that those who wish to restrict is must provide the necessary and compelling evidence for its curtailment.

Challenges through the decades

In addition to the inevitable challenges to free speech caused by the laws on privacy, confidentiality, defamation, contempt of court and myriad public order offences, it is quite clear that whilst some challenges to free speech have remained constant over the last five decades, some have changed. Thus, the issue of national security and national public safety has posed a regular and constant threat to freedom of speech and freedom of information, with the courts, both domestic and European adopting a hands-off approach and providing the state and public authorities with a wide margin of appreciation in this area.[18]

Thus, despite the apparent liberalisation of primary legislation in this area, the courts have continued to show judicial deference to both Parliament and government agencies when national security conflicts with free speech and press freedom.[19] Thus, the approach taken by the House of Lords in the 1980s in *Brind*,[20] in upholding a Minister's ban on the media using the direct speech of terrorist organisations, was evident in 2010, when the Supreme Court upheld an exclusion order prohibiting an Iranian activist visiting the UK, at the request of several MPs, to address Parliament.[21] In both cases national security overrode the interests of independent media reporting, the public right to know and full democratic debate.[22]

Yet some challenges have changed over the years and been replaced by others. In the 1960's and 1970's, British society, and domestic law, was obsessed with protecting us from damage to public morality, and the courts responded by restricting free speech which posed a danger to those public interests. Despite the liberalisation of obscenity laws,[23] the courts devised, and then rigorously applied, common law offences of outraging public decency and corrupting public morals.[24] These laws were used to attack publications and works of art that were felt to be damaging to public morality,[25] and both the domestic and European courts were prepared to recognise that threat and relegate free speech in an attempt to defend public morality and to stop individuals from being led morally astray.[26]

As we shall see below, the concept of public morality in controlling free speech (and private life) has largely become redundant, despite the continued existence of a range of laws regulating obscene and indecent material.[27] Greater exposure to, and the relaxing of attitudes to matters of sex, sexual activity and violence meant that we were no longer susceptible to being corrupted and the law turned its attention to controlling extreme pornography, and to concentrate on the harm caused to individuals or groups rather than society as a whole.

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[18] See *Leander v Sweden* (1987) 9 EHRR 433 on the margin of appreciation given to member states when balancing free speech with national security.
[19] See *R v Shayler* [2001] 2 WLR 574 on the interpretation and application of the Official Secrets Act 1989,
[20] *R v Secretary of State for the Home Department, ex parte Brind* [1991] 1 AC 696.
[21] *R (Carlile) v Secretary of State for the Home Department* [2014] UKSC 60
[22] See Steve Foster 'Stop me if you've heard this one before: judicial deference in free speech and security cases' (2018) 20(1) Cov, Law J. 58.
[23] Obscene Publications Act 1959 (as amended by the Obscene Publications Act 1964). This clarified that the offence was based on obscenity and not indecency, and provided a public good defence via s.4.
[24] *DPP v Shaw* [1962] AC 220 and *DPP v Knuller* [1973] AC 435.
[25] See *R v Gibson and Sylverie* [1991] 1 All ER 441 – exhibit at an art gallery using freeze-dried foetuses was found to outrage public decency
[26] *Gibson and Sylverie*, n 25 and *Sand G v United Kingdom* (Application No. 17634)
[27] See Steve Foster, *Human Rights and Civil Liberties*, 3rd edition Longman 2011, 372-395; and Helen Fenwick, *Fenwick on Civil Liberties and Human Rights*, 5th edition, Routledge 2017, chapter 7.

Modern challenges to free speech

So what *are* the modern challenges to free speech, assuming that national security and public safety have remained a constant, and the need to defend public morality had diminished? Although there may be other challenges, it is argued in this article that the main threats and dilemmas of protecting and regulating free speech are as follows:

- The problem of controlling speech on social media
- Speech likely to incite violence, intimidation of others and terrorism
- The increase in hate speech
- The violent reaction to unpopular speech
- The potential for speech to damage others' human rights
- The increase in evidence of harm caused by free speech – less 'guessing'

It will be argued that these factors all pose dilemmas in human rights law, as they all question how we both define 'harm' in order to justify restricting or censoring free speech, and the extent to which we are prepared to restrict it. It will also be argued that these modern challenges have led to a distrust of free speech and its inherent values, resulting in a loss of its dominant position.

Speech on Social Media

The use of social media as a platform for free speech gives rise to two main modern dilemmas. One is the specific difficulty of keeping information out of the public domain in order to support a claim of confidentiality and privacy. The free availability of such information on social media can in effect neutralise the confidentiality of the information, resulting in the failure of the claim: the information has now lost its secrecy and confidentiality upon which the action is based.[28] Modern privacy law has reacted to this issue, and to other disclosures, by recognising that the right to privacy is not necessarily negated by previous disclosure,[29] and that subsequent disclosure can cause *further* harm to privacy interests, which are therefore still worthy of protection.

Thus, in a number of privacy actions, the courts have continued injunctions (and anonymity orders) prohibiting the public revelation of private details and identities, despite that information being freely available from other sources, most notably on social media. Whether claimants can succeed in such cases is fact-sensitive, and well-known figures who are likely to have their details revealed the media may have a greater chance of maintaining their privacy. Thus, the courts recognise that the media are likely to cause substantially more harm to privacy and family interests by publishing that information to the general public and in the manner in which they reveal and report on the information.[30]

In addition to the dangers of multi-national corporations invading privacy and other human rights by carrying out their operations,[31] a more general concern over social media and free speech relates to the type of speech posted on these sites, the harm that it can cause, and the

[28] *A-G v Guardian Newspapers* [1990] 1 AC 109
[29] *R v Broadcasting Complaints Commission, ex parte Barclay* (1997) 9 Admin LR 265.
[30] Steve Foster 'Tell us something that we don't know: celebrity privacy, interim injunctions and information in the public domain' (2016) 21(10 Cov. Law J 57
[31] See 'Facebook and Google business models pose "systemic threat to human rights"'
Non Official Publication Report Amnesty International, 21 November 2019, which finds that the surveillance-based business model of Facebook and Google is inherently incompatible with the right to privacy and poses a threat to a range of other rights including freedom of opinion and expression, freedom of thought, and the right to equality and non-discrimination.

willingness of the law to regulate it.[32] Leaving aside hate speech, considered below, the speaker on social media continues to enjoy a good deal of anonymity and legal immunity, and thus pushes the boundaries of what they feel they can say. 'Trolling' on social media is commonplace and individuals will air their views with little thought or sympathy for the feelings of the recipient, or common standards of decency. The effect of these messages on particular victims, or society generally, will be identified below, but for the present argument, the more offensive and hurtful the comments made on social media, the more likely society and the law will become intolerant of offensive speech.

The right to shock and offend has always been regarded as part and parcel of freedom of expression, a product of broad-mindedness, tolerance and pluralism.[33] However, if we are confronted with the constant threat of offensive and insulting messages on social media, we are likely to invite legal intervention and a tightening up of what it is permissible, or impermissible to say. This may result in one or two things. First, we may wish to deprive these messages of the character and label of speech, classifying them as mere personal rants and thus unworthy of any constitutional protection.[34] The second is that we, and the law, will be prepared to extend the concept and scope of 'harm' in order to justify restricting such speech. Thus, whereas mere insult or offence was previously considered an inadequate basis for penalising or censoring speech, the menace of offensive social media speech might tempt us to regulate the offensive.

In such cases, the law will be careful to distinguish between the simply offensive and the abusive or threatening communication,[35] and the prosecution of such speech will be the exception.[36] Further, we would hope that the political or other context of the message would be considered in either prosecuting speech or the finding of guilt in particular cases. Yet it is argued here, that there is a further danger of attempting to regulate speech that offends and upsets. That danger is that we will come to regard the regulation and censoring of free speech as acceptable on the basis that there is no right to insult or upset and that such speech is not worthy of protection.

Thus, instead of starting from the position that there is a right to insulting and offensive speech, but that right may (in limited circumstances) be restricted, we will move directly to the position that insulting or offensive speech is not speech at all and should automatically be penalised or censored. This, it is argued, would be damaging to free speech and democracy, and would result in restrictions based on inflexible and illogical grounds that would lack both proportionality and context.

Indeed, a robust approach to defending offensive speech can be seen in the recent case of *Birmingham CC v Afsar (No 3)*,[37] a case concerned more specifically with controlling religious

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[32] See Andras Koltay, *New Media and Freedom of Expression Rethinking the Constitutional Foundations of the Public Sphere* (Hart 2019), chapter 5; Frederick Mostert 'To regulate or not to regulate online speech, that is the question' (2019) 14(10) *Journal of Intellectual and Property Law and Practice* 741; and Frederick Mostert 'Free speech and internet regulation' (2019) (14(8) *Journal of Intellectual and Property Law and Practice* 607.

[33] *Handyside v United Kingdom* (1976) 1 EHRR 737.

[34] See *Gaunt v OFCOM* [2010] EWCH 1756 (Admin); upheld on appeal – [2011] EWCA Civ 692.

[35] See the guidance issued by Keir Starmer, the then DPP on this issues: "DPP to issue guidelines on prosecution over face book and Twitter abuse' *The Guardian,* 19 December 2012.

[36] See the recent decision in *R v Chabloz (Alison),* unreported 13 February 2019, Southwark Crown Court, on whether the uploaded videos of the appellant singing anti-Semitic songs were "grossly offensive" for the purposes of the offence of sending grossly offensive, indecent, obscene or menacing messages via a communications network contrary to s.127(1) of the Communications Act 2003).

[37] [2019] EWHC 3217 (QB)

demonstrations outside schools that were teaching LGBT issues. In that case, whilst making injunctions against the protestors permanent, Marby J considered making orders against on line abuse posted by the demonstrators:

> 'It is generally undesirable for individuals to be abused, or for abusive things to be said or written about them, for what they do at work. Online abuse can be, and sometimes is, oppressive and intolerable. The speech with which the injunction interferes, and would interfere, is not on the evidence of especially high value. Much of it is little more than vulgar abuse with little or no informational content. All of that being said, the exercise of freedom of speech does not call for justification; it is interference that must be justified. The speech with which I am here concerned has been expressed in the context of a private, or limited, WhatsApp group. It was not aimed at the teachers, in the sense that they were intended to read it. It has come to their attention only as a result of disclosures made by one or more members of that group. The scale, frequency, nature and impact of the abuse to date, given its context, do not give rise to a sufficiently compelling case for interference'[38]

That dicta illustrates the judiciary's concern regarding the over-reaction to online abuse, and the need for circumspection in its regulation. However, it must be seen in the context of the specific facts: in that case it was not established that the teachers were specifically targeted, and the decision may be based more on the practicalities of regulating and prosecuting such speech, rather than any desire to uphold values of free speech.

The increase in hate speech and the control of speech likely to incite violence, intimidation or terrorism

The increase in speech on social media in general (above) would lead, inevitably, to an increase in hate speech. Obviously, such an increase is not explained, solely, by this factor. In addition to hate speakers hiding behind the anonymity of social media, any increase may be due to a growing intolerance towards certain views or lifestyles, or the use of free speech to wage a war of words in debates concerning political ideologies.

Post 9/11, the government's intention to re-write its anti-terrorism law included its efforts to tackle speech that might incite or promote terrorism. In addition to specific provisions criminalising certain speech, and the PREVENT strategy, both discussed below, the government has set up a Commission for Countering Extremism and in October 2019 it published its report *Challenging Hateful Extremism*. In the executive summary, Sara Khan, the Lead Commissioner, recognises the fundamental importance of tackling hateful extremism,[39] but also notes that:

> 'At the same time, protecting democratic debate and freedom of expression is vital. This includes defending speech and actions which can be offensive, shocking, dissenting and critical; or advocates for conservative religious beliefs. This is why we are taking a rights-based approach to challenging hateful extremism.'

But how does free speech, its values and its scope fare in this context? Section 26 of the Counter-Terrorism and Security (CTS) Act 2015 imposes a duty upon specified public authorities, including

[38] [2019] EWHC 3217 (QB), at 125.

[39] In identifying hateful extremism, the paper gives the following examples. 'Hateful, hostile and supremacist beliefs are increasingly visible in our country today. The Far Right's narratives of a racial or cultural threat to "natives" from "aliens" have been making their way into the mainstream. As are Islamists' ideas for defending a single communal Muslim identity against the West's corrupting influence. And the Far Left's conflation of anti-imperialism and antisemitism.

universities, to have due regard to the need to prevent people being drawn into terrorism in the exercise of their functions. This legislation has given rise to concerns from academics who feel that this will have a chilling effect on freedom of speech in universities.[40]

Guidance issued by the Secretary of State was challenged via judicial review and in *R. (on the application of Butt) v Secretary of State for the Home Department*,[41] the Court of Appeal recommended that a paragraph of that guidance be re-drafted to more accurately inform higher education institutions of their competing obligations, both under the 2015 Act. Thus, with respect to whether para.11 of the Higher Education Prevent Duty Guidance breached the duty to ensure freedom of speech in s.31(3) of the 2015 Act, the Court of Appeal found that the judge had erred in finding that it did not. That was because his view was that para.11 was merely guidance, not a direction to ban public speaking events that carried a risk of drawing people into terrorism events. In the Court of Appeal's view, paragraph 11 was expressed in trenchant terms and was likely to frame the decisions of higher education institutions. Even though they might be aware of other statutory duties to which they had to respond, this guidance was likely to be perceived as the most specific and pointed in its context, and event organisers were likely to assume that it represented a balance of the relevant statutory duties affecting them. It did not; it was not sufficiently balanced. The court, therefore, recommended the Government to re-draft para.11 to more accurately inform higher education institutions of their competing obligations.[42]

Violent reaction to free speech

The advantages of free speech is compromised when speech and expression is met not with reasoned reaction and reflection, or even tolerance, but with violence or threats. In such cases, free speech theory insists that the benefits of free speech should survive the consequences of violent reaction, and that the law should focus its attention on sanctioning such reactions. Thus in *Beatty v Gilbanks*,[43] it was established that there was no principle in English law that allowed a person to be punished for acting lawfully if he knows that in so doing he will induce another person to act unlawfully.

This principle would protect peaceful speech that induces another to react – irrationally – in a violent way. Thus, the speaker and speech is protected, and the reactor will be penalised; and the law will not dissuade free speech by censoring or sanctioning it because of its likely consequence. Yet, public order laws often penalise speech that was not intended to induce violence, but was nevertheless likely to provoke a violent reaction. Thus, protestors have often been penalised for provoking a violent reaction to their peaceful speech, either on the basis that they must take their audience as they find them,[44] or that their speech was likely to provoke a breach of the peace.[45]

This, of course, is not a recent phenomenon and the police have been consistently supported by the courts in their efforts to preserve the peace.[46] However, recent events, particular incidents involving religious followers' reactions to insulting or offensive speech, have made us think more cautiously of free speech and its values. The Charlie Hebdo case, where

[40] See Ben Stanford 'The multi-faceted challenges to free speech in higher education: frustrating the rights of political participation on campus' [2018] PL 708.
[41] [2019] EWCA Civ 256. Noted by Ben Stanford (2019) 24(1) Cov. L.J. 122
[42] [2019] EWCA Civ 256, at paras 158, 166-68, 171 and 174-77.
[43] (1882) 9 QBD 308
[44] *R v Jordan* [1963 Crim. LR 234
[45] *DPP v Mosley and others* [1996] Crim LR 318, and the recent case of *R (Hicks) v Metropolitan Police Commissioner* [2017] UKSC 12
[46] See Helen Fenwick, *Fenwick on Civil Liberties and Human Rights* (5th ed. Routledge 2017), 640-661

journalists were attacked by extremists after publishing allegedly blasphemous cartoons has understandably had a chilling effect on press freedom and free speech generally.[47] This caution can easily be transferred to the courts and inform legislative reform in these areas; the law over regulating free speech on the basis of the evidence of harm created by such incidents.

Speech and damage to others' rights

We turn now to the problem or regulating speech that is damaging to the rights of others. Since the Human Rights Act 1998 came into operation, the law and the courts must interpret and apply the law in a manner that is compatible with Convention rights.[48] Although freedom of speech is given extra recognition in s.12 of the Act – the courts must pay particular regard to the right contained in Article 10 of the European Convention – it is clear that free speech will not be afforded a special 'trump' status.[49] Consequently, the courts must apply Article 10 in its entirety, including the qualifying provisions contained in Article 10(2). In particular, the courts will need to balance free speech with the exercise of other Convention rights, such as the right to privacy,[50] reputation,[51] the right to a fair trial,[52] the right to life,[53] and others' religious sensibilities rights.[54] This balancing exercise is inevitable and does not in itself pose any additional dilemmas in protecting freedom of speech, other than concerns that certain modern speech and practices might be seen as especially harmful.[55]

This section of the article will examine a number of instances or issues that do present additional challenges to free speech. The first issue relates to speech, or views, that might conflict with policies of diversity and equality, and thus might interfere with the rights of certain individuals (or groups of individuals) to be free from discrimination.[56] In a number of cases, from both the domestic courts and the European Court of Human Rights, preference has been given to the success of diversity and equality policies over the rights of individuals who have religious or philosophical objections to carrying out those policies.[57] This, in itself, may not be objectionable, provided the believer is not stopped from exercising their conviction

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[47] Sejal Parmar, 'Freedom of expression narratives after the Charlie Hebdo attacks' (2018) 18(2) Human Rights Law Review 267.

[48] Section 6 and ss.2-4 of the Human Rights Act 1998.

[49] *Re S (Publicity)* [2005] 1 AC 593

[50] See *Richard v BBC* [2018] EWHC 1837 (Ch)

[51] The Defamation Act 2013 was passed with a view of liberalising the law of defamation in respect of its impact on free speech. See Alastair Mullis, 'Tilting at Windmills: the Defamation Act 2013 (2014) 77(1) MLR 87, and Marriette Jones 'The Defamation Act 2013: a free speech retrospective (2019) 24(3) Communications Law 117.

[52] See ss.2 and 10 Contempt of Court Act 1981.

[53] See the decision in *Venables and Thompson v MGN* [2012] 2 WLR1038, recently applied in *Venables v News Group Newspapers* [2019] EWHC 494 (Fam), see Steve Foster 'We want to know where you are: balancing the right to know with the protection of offenders (2019) 24(1) Cov. Law J 111.

[54] This continues to be an issue in many European states, despite the abolition of the law of blasphemy in the United Kingdom. See *Otto Preminger v Austria* (1994) 19 EHRR 34, *Wingrove v United Kingdom* 1996 24 EHRR 1, and, more recently, *ES v Austria* (2019) 69 EHRR 4.

[55] For example, certain harmful media practices, such as telephone hacking, which might lead the courts taking an unsympathetic approach to more traditional tactics employed by the media to gather news. See Steve Foster 'Interfering with Editorial judgement, making 'good television' and the loss of the public interest defence'(2019) *Communications Law* 102

[56] *R (Ngole) v University of Sheffield* [2019] EWCA Civ.1127. These cases do not include speech that might amount to hate speech or speech that might lead to the speaker using their right to freedom of expression with the aim of promoting ideas contrary to the text and spirit of the Convention, such as in the case of Holocaust denial. See, for example the recent decision of the European Court in *Williamson v Germany* (2019) 68 EHRR SE9

[57] See, for example, *McLintock v Department of Constitutional Affairs* [2008] IRLR 29 and *London Borough of Ealing v Ladele* [2010] 1 WLR 995.

outside the context of employment or the provision of public services. However, where such policies restrict the free speech rights of such individuals, or accommodate the danger of compelled speech, there will be natural concern over the further erosion of free speech rights.

The dilemma in these cases is that allowing free speech may undermine the culture of diversity and equality, whilst restricting such views will lead to a growing intolerance of alternative, perhaps 'politically incorrect' views.[58] Recently, therefore, the courts have faced the challenge of distinguishing acts of discrimination against protected groups with views that refuse to support a message of diversity and equality.[59] More specifically, the courts have to judge the legitimacy of speech that at the least questions ideas of diversity or at worst is critical or hostile towards it.[60] The acceptance of intolerant speech thus poses a conundrum: to accept that speech as representative of pluralism, or to regulate it as speech which is sufficiently harmful to achieving equality and diversity, or is regarded as sufficiently offensive to the individuals or society as a whole.[61]

The second issue relates to the test of harm and proportionality applied by the law when speech comes into conflict with others' rights. There are some provisions which allow restrictions on speech and protest not on the strong ground that such speech might cause violence or damage to property, but on the slighter grounds of disruption to the interests of the community or to those who live in that community. In these cases, there is a danger that once speech or protest is in conflict with others' rights, particularly their human rights, we naturally assume there is reason for restricting free speech and upholding the alternative claim. Litigation involving protests outside abortion clinics provides a good example, where alternative claims to those of protestors may be protected on grounds other than the threat of violence.

In the recent case of *Delargiu v Ealing LBC*,[62] injunctions were imposed against the protestors under s.59 of the Anti-social Behaviour, Crime and Policing Act 2014, in order to enforce a Public Spaces Protection Order. Such Orders can be imposed where anti-social conduct is likely to have a 'detrimental effect on the quality of life of those in the community.'[63] This is not to deny the seriousness of the rights claimed in these cases - the rights of women to use abortion facilities free from unreasonable harassment, or the right of schools to teach diversity - but if the criteria for restricting speech is so slight, there is a danger of those right holders becoming intolerant of opposition. In that sense, the encouraging dicta of Warby J in *Birmingham City v Asfar*, above, may be instrumental in keeping such laws within reason.[64]

Increased evidence of harm caused by free speech

Believers in free speech have always demanded evidence of the harm that is supposedly behind any restriction of our fundamental right. Whilst accepting that free speech can cause harm, and rejecting the saying that 'sticks and stones may break my bones, but words can never harm me', we insist on evidence of that harm beyond mere offence and beyond a bare assertion of

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[58] See Steve Foster, Accommodating Intolerant Speech: Religious Free Speech versus Equality and Diversity' [2019] EHRLR 609.
[59] *Lee v Ashers Baking Ltd* [2018] UKSC 49, distinguishing *Hall v Bull* [2013] UKSC 73.
[60] Foster, n 57
[61] See *Hammond v DPP* [2004 EWHC 69 (Admin) and *Core Issues Trust v Transport of London* [2013] EWHC 615 (Admin. See Steve Foster, 'Are we afraid of free speech' (2013) 18(1) Cov Law J 92.
[62] [2019] EWCA Civ 1490.
[63] *Birmingham City Council v Afsar* [2019] EWHC 1560 (QB). In this case, injunctions were maintained against the protestors under s.7 of the Anti-social Behaviour, Crime and Policing Act 2014 to protect people from the school from anti-social conduct and harassment.
[64] Marby J in *Birmingham CC v Afsar (No 3)* [2019] EWHC 3217 (QB), n 38, above

harm. Academics and liberals were unconvinced of assertions that speech or other activities were likely to deprave and corrupt those who read certain publications,[65] or likely to outrage public decency or corrupt public morals,[66] or likely to outrage the sensibilities of religious followers.[67] This scepticism not only demanded real evidence of harm, as opposed to the likelihood of it, but questioned the substantive value of that harm: if there was a shared morality (sexual or religious) why is it that we cannot question or even ridicule it? Similarly, we distrusted assertions from the government that speech or disclosures were likely to endanger national security; being unconvinced of bare assertions and demanding that we be provided with evidence that there was at least a clear and present danger of such harm.[68]

We are, of course, still right to be distrustful of bare assertions, but in some cases, we are indeed provided with stark and real evidence of the harm that speech can cause. In addition to cases such as Charlie Hebdo, where we receive shocking evidence of the consequences of free, offensive insulting speech, we are constantly provided with hard evidence of the effect of offensive speech placed on social media and other platform.[69] Such speech is shown to induce mental health issues, and in some cases self-harm or even suicide. Similarly, speech intolerant of other's sexual preferences or orientation often descend into hate speech, necessitating further restriction. Some will continue to argue for free speech in the face of this evidence, on the basis that the irresponsible actions of some, together with the consequences of that misuse of free speech, should not challenge the dominant and essential position of free speech in a democracy. Yet for others, such evidence will negate the argument for free speech and justify its further restriction. Consequently, with respect to human rights law, arguments based on context, reasonableness and the need to avoid arbitrary interference may be lost.

Challenging the dominant position on free speech

It is argued here that all the factors outlined above have a deleterious and chilling effect on free speech, its values and its dominant position in democracy. Instead of assuming free speech to be a good in itself, and only capable of restriction in the most exceptional cases, we are in danger of reversing that assumption and challenging the speaker to prove the overriding good of that speech in order for it to prevail.[70] Free speech, like acts of violence, are becoming to be seen as a bad in itself, capable of causing harm and something that should be distrusted and restricted, often without adequate justification.[71]

This position may be valid when regulating violent conduct or incitement, but when applied to 'pure' speech or expression the values of free speech – tolerance, broadmindedness and pluralism and the acceptance of the alternative view – are lost, as will the need for restrictions to be rational, proportionate and necessary in a democratic society. Restrictions on free speech should therefore be seen as a defeat to democracy not a victory for the law. The restriction may well be necessary in the circumstances, but should be viewed as an instance where the battle

[65] Used in S.2 of the Obscene Publications Act 1959 to establish liability for publishing an obscene article.
[66] *DPP v Shaw* [1962) AC 220 and *DPP v Knuller* [1973] AC 435.
[67] The test for blasphemy – see *R v Lemon* [1979] AC 16.
[68] The test used by the US Supreme Court to determine the legitimacy of free speech interference.
[69] See Anthony Martino, 'Now that's what I call offensive' (2019) 30(8) Ent. Law Rev.249, 251, where the author accuses absolutists of trivializing speech-related harms as something that we should learn to bear, all the while acknowledging their deleterious nature, and thus overlooking the real world harms that speech is capable of inflicting.
[70] Indeed, it has been argued that free speech is not the dominant and natural position, and that censorship precedes speech; being constitutive of speech that is produced for a reason. Thus, he argues that without constraint there would be no meaningful speech. See Anthony Martino, 'Now that's what I call offensive' (2019) 30(8) Ent. Law Rev.249, 251
[71] See Claire *Fox, I Find That Offensive!* (2nd ed. Biteback Publishing, 2018).

for full democracy has been lost. This is similar to anti-terrorism laws; assuming they pass the the tests of legality and proportionality, they should be viewed as a (necessary) defeat for democracy, because the starting position is that we should have open justice, fair trials and control of arbitrary power.

This is not to argue for the right to absolute free speech, or to dismiss the importance of any relevant counterclaim. Yet in order to protect free speech we must not dismiss its values, or become afraid of its nature and the inevitable consequences of its manifestation. The right to freedom of speech is already a conditional right, but it should begin from a dominant position; the presumption in favour of free speech is essential and all restrictions, especially censorship, must be justified on strong grounds. The fact that is subject to lawful and necessary restrictions, and indeed carries with it duties and responsibilities, should not be used to construct a position where free speech is seen as a harm in itself, or to accept restrictions on it on flimsy evidence. In that case, we will either avoid the tests of proportionality and necessity, or apply them with little or no spirit or rigour. Instead, we will censor or restrict free speech because it is (more) convenient to that than to allow free speech and all its consequences.[72]

Conclusions: the future of free speech

As we have seen, there are several modern challenges to free speech and in upholding its dominant position. Some of these challenges are not new, whilst others are a product of new technology and the extraordinary political and social environment we now live in. These matters have exposed us to the inevitable harms that free speech entails, and have made us afraid and distrustful of free speech. Free speech only becomes truly controversial when it is potentially harmful to other interests: whether that be to others' right and sensibilities, or to public interests such as national security, public safety and, less so these days, public morals. It is in these circumstances – the 'hard' cases – that free speech faces its toughest challenge and needs the support of the law and judges. Free speech may well lose out in many of these cases – because an individual's privacy or reputation claim is stronger than the free speech claim, or because the threat to national security or public safety is overwhelming. However, if the law and the courts begin from the position that free speech is not allowed to cause a harm - and should be censored or restricted accordingly - then we lose the dominant position of free speech free and begin restricting it as a matter of course. If we really do want free speech, that must not happen.

[72] See, again, the comments of Marby J in *Asfar*, n 38 above