Is the First Amendment the Greatest Right of All?

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I want to acknowledge the research of Pippa Hill, Nesta Jones, Micky Rai and Tom Shepherd on this issue as they wrote on the First Amendment for my class at Bristol University last year.

The issue here is whether the First Amendment the most important of all, given its five foundational rights – no establishment of religion; free exercise of religion; freedom of speech and the press; the right peaceably to assemble; the right to petition the Government for a redress of grievances.

And how does this compare to our experience in the UK (and Europe)? How might the UK benefit from such a right?

The text of the First Amendment is quite succinct:

> Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or 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.

US CONST. Amend. I.

According to John Stuart Mill in his famous work *On Liberty* (1859), the 'marketplace of ideas' preserves freedom and tolerates diversity, and thereby maximises happiness. The First Amendment is, initially, an instrumental that preserves self-expression to all Americans. It was innovative for its time, since – in 1791 – the idea of free speech for the masses was hardly accepted by the monarchical governments of Europe. Even less so the concept of religious freedom, as wars (civil and international) were being fought in the tensions between Catholicism, the relatively new and intolerant Protestantism, and a number of dissenting sects.

The ultimate theory behind each element of the First Amendment is that the only answer to a bad idea is a better idea – not to criminalise it. The purpose of the Amendment is essentially to ensure a liberal space for the expression of all beliefs, with its guiding principle being the notion that false assertions may always be refuted by true ones. Underlying this is the concept that in the end a free debate is likely to reach an acceptable conclusion more often than censorship.

The Amendment was concluded in draft by the Founding Fathers on 15th December 1791. It had begun life as the Free Exercise and Establishment of Religion Clauses. In this, Thomas Jefferson aimed to promote individual freedom of religion by building a 'wall of separation between Church and State'.[1] This enabled individuals freely to practise their religion without state interference through legislation in marked contrast to the UK where there was (and still is) an 'Established' faith.

Similarly, the remaining freedoms of 'the freedom of speech, or of the press; or the right of the people to peaceably assemble, and to petition the Government for a redress of grievances', although not absolute, were intended to enable citizens collectively to voice their views about the government.

[1] A. Libscomb, Ed., *The Writings of Thomas Jefferson* (1904).

In Britain and Europe the closest equivalent may be found in Articles 9-11 of the ECHR.[2] Not only are these not truly enforceable against countries in the way that the US constitution is enforced against the government, but each right has troubling "exceptions" in section 2:

Article 9 – Freedom of thought, conscience and religion

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
2. *Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.*

Article 10 – Freedom of expression

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. *The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, 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.*

Article 11 – Freedom of assembly and association

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
2. *No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others.* This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

The ECHR also has a catch-all about the State or citizens abusing their rights:

Article 17 – Prohibition of abuse of rights

Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

Related to the caveats placed on rights in the ECHR is the sloth in enforcement. I have noted in an earlier lecture that the Parliamentary Assembly of the Council of Europe has raised as a "major source of concern" the delay in which many states take to executing judgements:

"The slow execution of Court decisions is a problem in a number of cases. In its recent annual report on the supervision of the execution of judgments, the Committee of Ministers notes for

[2] Council of Europe, *Convention for the Protection of Human Rights and Fundamental Freedoms* (1950).

instance that although the percentage of cases pending for less than two years has decreased, the percentage of leading cases under supervision for more than two years has increased in 2010, as compared to 2009. There are currently more than 9,000 cases awaiting execution."[3]

The assembly has credited these delays to "chronic non-enforcement of domestic judicial decisions; ill-treatment by law-enforcement officials and a lack of effective investigations thereof; unlawful detention; and excessive length of detention on remand."[4]

But in a general sense, as applied or spurned by domestic legislation, the ECHR provides a framework for understanding the approach taken by Britain to these rights.

1. The Establishment Clause & the Free Exercise Clause

Taking the elements of the Amendment in sequence, we turn first to the [No]-Establishment Clause which may be read alongside the Free Exercise Clause.

a. Establishment & Free Exercise in the UK and Europe

The Church of England was established in 1534 as the state religion of England. Even in 2025 it remains the case, and there are very real consequences of this. Since 1543, when Parliament conferred the title "Defender of the Faith and of the Church of England and also of Ireland in Earth the Supreme Head" of the Church of England on Henry VIII (of late, excommunicated by the Pope), all subsequent monarchs except the Catholic Queen Mary I took the same title.

We have already seen in an earlier lecture on the structure of the UK that the House of Lords, the second chamber of the legislature, has reserved 26 seats for Bishops of the CofE ('Lords Spiritual'), whereas not one is reserved for any other faith. And why should the Catholics not be represented, given that more people (about 1.75 million) attend mass each week than C of E churches? Or Muslims? Or Shamanists who, according to the 2021 Census, are the fastest growing religious group in the U.K.?[5]

Indeed there is a better argument that Gary Lineker and 25 other representatives of Premier League football clubs should hold these seats, since they expect 1.5 million weekly supporters. This should not be dismissed as a mere pleasantry. Peter Terson's 1967 play '*Zigger Zagger*' suggested almost 60 years ago that the cult following of football in the UK could lead to football being defined as a religion. Here, the characteristics of huge following, weekly meetings for a shared purpose, and considerable commitment and devotion arguably define football as a religion. One could go further and suggest football to some extent suggests a routine and lifestyle that its followers should subscribe to; supporting a team loyally, holding a season ticket, criticising the opposition without question, going to 'church' on Saturday, etc. However, whilst there is an identifiable way of life supporters should follow, the lack of aspirational ultimate reality means football, or another widely followed social phenomenon, cannot be defined as a religion.

Or one might think that 26 publicans should be elevated to the Lords, since Britain has more pubs than any other country, and many more people attend them each week.

Preferential treatment for the CofE can also be seen in much of day-to-day life in England: for example, registering and formalising a marriage in the UK. The *Marriage Act 1949* establishes one straightforward system for an Anglican wedding, and a second system for all other religions and atheists. A non-CofE marriage is complicated in comparison, and dependent on the licence of the venue, while some individuals may not be able to have a marriage in their chosen place of worship recognised legally.

Meanwhile the CofE continues to play an enormous role the education of British children of all faiths. The CofE states on its website[6] that:

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[3] https://www.coe.int/tr/web/commissioner/-/judgments-issued-by-the-european-court-cannot-be-ignor-1

[4] https://www.coe.int/tr/web/commissioner/-/judgments-issued-by-the-european-court-cannot-be-ignor-1

[5] See generally https://en.wikipedia.org/wiki/Religion_in_England#:~:text=After%20Christianity%2C%20the%20religions%20with,fastest%20growing%20religion%20in%20England.

[6] See

- Approximately 1 million children attend Church of England schools.
- A quarter of all primary schools and 228 secondary schools are Church of England.
- There are 1,540 Church of England academies with 280 Multi Academy Trusts (MATs) holding Church of England Articles. This makes the Church of England the biggest provider of academies in England.
- Over 500 independent schools declare themselves to be Church of England in ethos.

These receive large sums in government funding, including the independent (private) schools.

Opinions will differ on this, but I did not like going to CofE-slanted (in my case independent) schools throughout my primary and secondary education, where I was required to attend CofE services every day from the ages of four to 18. When I was at Radley College (a 'Public' School), one Muslim (my friend Hani) and a very small number who identified as religiously observant Jews were the only people who did not identify as CofE – and while they were not provided with an Imam or a Rabbi, they were excused Chapel. I don't remember anyone ever mentioning Catholics then. While Radley now attempts to make some accommodation for others,[7] it is still claimed that "the chaplains play a key pastoral role supporting boys and staff at times of need."[8]

The impact of schools with a religious bent is not something that most British people consider. Consider this then: Radley currently has a government-sanctioned charity that reported £45,350,000 in gross income as of December 2024.[9] If this was all subject to Gift Aid, this would mean one-fifth of the income came from the government – roughly £9 million. With an enrollment of 770 student, this works out to £11,688 per student, paid by the taxman. Meanwhile, the Government states that with regard to State schools, "[o]n a per-pupil basis the total funding allocated to schools for 5-16 year old pupils, in cash terms, in 2025-26 was £8,210..."[10] In other words, it would seem likely that the privately-educated privileged student is getting as much or more Government money spent on his or her education than the state student.[11] On top of this, the massive fees (£51,150) mean that the Radleian has a total of nearly £60,000 spent on him (they are all boys) each year, more than seven times my son (who I would never send to a private school).

One cannot imagine any of these privileges – membership in the Lords, different wedding ceremonies, or the kind of financial support given to CofE and CofE-inspired schools – would survive muster in the US.

Whether keeping the CofE as the established religion makes any sense is certainly thrown into

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https://www.churchofengland.org/about/education-and-schools/church-schools-and-academies#:~:text=About%2015%20million%20people%20alive,schools%20are%20Church%20of%20England.

[7] The incremental development is to be welcomed, but even now the language - "Roman Catholic dons and boys attend a separate mass on Sundays and we make special arrangements for boys of non-Christian faiths." – makes it clear that these are "other" faiths. https://www.radley.org.uk/live/chapel/ (accessed 2025.02.19).

[8] There are many ways in which promoting one faith over another alienates the minority. While the media is full of "grooming" stories about people of Asian heritage, one of my good cricketing friends was a victim of serial abuse by the CofE chaplain at Radley. It would be very wrong to suggest that people of faith are more abusive than others, of course, but such incidents (and other notorious stories) do undermine the right of the CofE to insist on a privileged role on the moral high ground. See, e.g., Amy Walker, *The abuse scandal that led to the archbishop's resignation*, BBC News (Nov. 12, 2024), available at https://www.bbc.co.uk/news/articles/c5y5l7116g1o (accessed 2025.02.19).

[9] https://register-of-charities.charitycommission.gov.uk/en/charity-search/-/charity-details/309243/financial-history.

[10] https://explore-education-statistics.service.gov.uk/find-statistics/school-funding-statistics. It is not clear whether this includes the amount given to schools like Radley.

[11] I do not pretend these statistics are precise. However, it is worth noting that there is strong resistance today to taking away the VAT exemption for private schools, let alone the charitable status. Compare this to the discussion at the time of my education which focused on abolishing such class-defined institutions. Dennis Silk the excellent if very conservative head teacher when I was at Radley told me he thought the schools should at least lose their charitable status.

doubt by the evolution of religious belief in the UK. When the US colonies broke away in 1776, in the UK 93.6% of the population were at least 'nominal Anglicans'[12] – i.e. identifying as members of the Established Church of England. It is easy to see how the others six percent could feel the sharp edge of discrimination, sparking the drive for tolerance; the "Established" nature of the CofE is also quite readily understood, even if one does not agree with it.

However, membership has dropped significantly over time and continues to do so: in 2021 the CofE listed its truly practising population ('worshipping community') to be 1.7% of the population of England. This has fallen precipitously – nine-tenths -- from the 2009 level of 17%. A third of CofE worshippers are over 70 years old, so the prognosis is not good. It is perhaps not so much as an established church, as a thoroughly diminished one.

Ultimately, though, when we are dealing with a constitutional system, the impact of this 'Established Church' on the 'others' is key, whether they be from another religion, or think that all organized faith is so much humbug. How do they feel about being excluded by the structure of the UK, which is tilted towards what was once perhaps an oppressive majority, but is now a tiny minority?

It is worth mentioning briefly the Continental European experience with religious issues. The French are perhaps the most notorious when it comes to what I would consider religious intolerance. Consider the bill, passed on March 3, 2004, prohibiting the wearing of conspicuous religious symbols in public schools. Most Americans assume that the wearing of such personal symbols in public schools can be accommodated without violating principles of religious freedom – indeed, it is precisely "religious freedom" that allows them to follow their cultural and religious practices. The French take a very different view:

> In the United States, the purpose of separating Church and State was to avoid interference of the government in church matters—including by forbidding the establishment of a "state" church that would then threaten minority religions. In other words, the intent was to protect religion from the State. In France, it was exactly the reverse: the purpose of separating Church and State was to protect the new French democracy from the Catholic Church, which was socially dominant and a strong political force opposed to the establishment of secular democracy.[13]

This is anathema to me. First, it is all about people adhering to the French "norm" which inevitably means the practices of the majority, Christians. But beyond this "French supporters of the headscarf ban … argue that in the *current* French social, political and cultural context, they cannot" allow religious symbols.[14] It is precisely this (the current context) that creates the problem: the ban is clearly aimed at Muslims. It is, therefore, aimed precisely at those who the US Constitution would protect – the vilified minority.

b. No Establishment in the US

The US legal system (if not always its president) is very serious about the [No] Establishment Clause. Ironically this comes in a country that is much more religious than the UK.

The common belief is that it arose because many people who came to the "New World" in the 1600s and 1700s were escaping religious persecution in the UK, a country riven since the reign of Henry VIII by the back and forth between Catholic and Protestant monarchs, each persecuting members of the other Christian sect. However, perhaps counterintuitively:

> Our history books may be cluttered with images of pious Puritans gathering for the first Thanksgiving, the first Christmas, the first pot-luck social and the like. But most colonial Americans probably were more likely to be found in the local tavern on Saturday night than in church on Sunday, said Rodney Stark, professor of sociology and comparative religion at the University of Washington. In 1776, only about 17 percent of the country were church members, compared to

[12] Clive D. Field, *Eighteenth Century Religious Statistics,* British Religion in Numbers (Sept. 21, 2012), available at https://www.brin.ac.uk/eighteenth-century-religious-statistics/ (accessed April 7, 2024).
[13] Justin Vaisse, *Veiled Meaning: The French Law Banning Religious Symbols In Public Schools,* The Brookings Institution (March 2004), available at https://www.brookings.edu/wp-content/uploads/2016/06/vaisse20040229.pdf (accessed 2025.02.19).
[14] Vaisse, *Veiled Meaning*.

> about 65 percent today, said Stark, who has tallied church membership as a percentage of the population over the past 250 years using church records and census figures.[15]

In other words, it was not just the tension between faiths that led to the First Amendment, but the fact that a significant proportion of the new-founded country did not want to be told they had to have a structured faith at all.

Thus, to establish a state religion in the US ran against the grain, perhaps fortunately so given where we find ourselves now. In the US today, almost two-thirds of citizens are Christian (divided into denominations including Protestants, Evangelicals, Catholics, Mormons, and Orthodox). Despite this, this active religious majority has significantly decreased since its apogee 35 years ago: In 1990, around 90% of US citizens identified as Christian.

As with the UK – though to a much lesser degree – the greatest growth has come among those with no religious affiliation (either atheist or agnostic), a group which now stands at 23%. Countless other faiths are minorities, with 0.7% as Buddhist, and 0.7% Hindu. The percentage defining themselves as Jewish has increased from 2.2% in 2013 to 2.4% in 2020. Participation in Islam has also increased in the US, from 2.3 million citizen identifying as Muslim in 2007 to 3.5 million in 2017, now around 1% of the US population. While this it will still be relatively small, Pew Institute projections suggest the Muslim population will replace Judaism as the second largest religious group by 2040.

Despite this, the US is (comparatively) an overwhelmingly religious or spiritual country with Christians in a clear majority. This requires – if one accepts that the primary function of the Bill of Rights is to protect a potentially vilified minority – a stronger effort to avoid domination by a tyrannical majority.

In January 2017, Donald Trump issued an executive order banning entry into the United States from seven predominantly Muslim nations, whilst vowing to exempt persecuted Christians. Many people responded loudly that this was a direct violation of the Establishment Clause, prompting Trump to issue a revised executive order, where he omitted the commitment favouring Christians.[16] The U.S. Appeals Court rejected this too.

When he was President, Thomas Jefferson

> explained his understanding of the First Amendment's religion clauses as reflecting the view of "the whole American people which declared that their legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof,' thus building a wall between church and State."[17]

The First Amendment had ingrained in Americans an antipathy towards differential treatment between religious groups even in the Islamophobic aftermath of 9/11: Trump was not allowed to build a 'wall' between citizens of different faiths; indeed, there had to be a wall between his role and any Church.

It remains to be seen how Trump will get on this time. For example, one of his early acts as president was to announce a taskforce to tackle 'anti-Christian bias', an Executive Order signed after giving remarks at the National Prayer Breakfast in Washington DC.[18] This aimed "to protect the religious freedoms of Americans and end the anti-Christian weaponization of government" and he appointed Attorney General Pam Bondi to lead a task force to eradicate what he called "anti-Christian bias" in the federal government. A cynic would expect eliminating anti-Christian bias to be a euphemism for leaning towards Christianity, but we will have to see how this goes.

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[15] Richard Morin, *The Way we Weren't: Religion in Colonial America*, Washington Post (November 25, 1995), available at https://www.washingtonpost.com/archive/opinions/1995/11/26/the-way-we-werent-religion-in-colonial-america/6cb64903-30f4-435e-a415-6be0f0465bfe/#:~:text=In%201776%2C%20only%20about%2017,church%20records%20and%20census%20figures (accessed February 19, 2024).

[16] Ray Raphael, *The U.S. Constitution Explained Clause by Clause for Every American*, 2017.

[17] John S. Baker Jr, *Wall of Separation*, Free Speech Center (Aug. 5, 2023), available at https://firstamendment.mtsu.edu/article/wall-of-separation/#:~:text=Jefferson%20explained%20his%20understanding%20of,wall%20between%20church%20and%20State (accessed 2025.02.18).

[18] Mallory Moench, *17 things Trump and his team did this week*, BBC News (Feb. 7, 2025), available at https://www.bbc.co.uk/news/articles/cjdep9j31l8o, accessed 2025.02.17.

A seminal Supreme Court case citing Jefferson's wall analogy was *Everson vs. Board of Education,* 330 U.S. 1 (1947), which involved a challenge by a tax payer to money being used to bus students to schools that included faith schools. The Court narrowly permitted this, finding that such financial reimbursements were "separate and so indisputably marked off from the religious function" that they did not violate the constitution. However, it is abundantly clear that the Court would not stand for any significant funding of a faith-based school by the Government, in stark contrast to the UK.

The same goes for prayer in schools. Over sixty years ago, in the case of *Engel v. Vitale*, 370 U.S. 421 (1962), the Supreme Court reviewed a proposal by the Board of Regents of New York proposed that public schools start the day with a non-denominational prayer:

> Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our country. Amen.

There was also a bible reading. Five parents of students sued school board president William J. Vitale Jr., challenging the constitutionality of what was known as the Regents' Prayer. Two were Jewish, one was atheist, one was a Unitarian Church member, and one was a member of the New York Society for Ethical Culture.

In declaring this unconstitutional, Justice Hugo Black wrote

> "... the constitutional prohibition against laws respecting an establishment of religion must at least mean that in this country it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government."

Soon after, in *Abington School District v. Schempp*, 374 U.S. 203 (1963), the Court ruled that a school-sponsored Bible reading and the recitation of the Lord's Prayer was also unconstitutional under the Establishment Clause of the First Amendment. (More than 60 years ago, the courageous Ellery Schempp, a Unitarian Universalist, had announced that he was going to read from the Quran rather than the Bible.)

In *McCreary County v. American Civil Liberties Union of Kentucky,* 545 U.S. 844 (2005), the ACLU sued three Kentucky counties in federal district court for displaying framed copies of the Ten Commandments in courthouses and public schools. The Court ruled that the displays violated the establishment clause because their purpose had been to advance religion, where the county reached "for any way to keep a religious document on the walls of courthouses."

In my own experience one courthouse where I did capital cases tried to get around the rule by adding a couple of extra commandments to the list – I forget what they were now, but Moses clearly forgot to bring them down from Mount Sinai. That went the same way as *McCreary*. Similarly, my friend Ken Rose successfully (and courageously) sued the State of Mississippi for having a Christian cross lit up on the state office building at Christmas time (of course it is called Christ-mas, not Jew-mas, and that is bias enough).

While I lay no claim to being religious myself, I do approve of the way the Americans generally approach faith. In *Employment Division v. Smith,* 494 U.S. 872 *(*1990*),* the Court held that the state could deny unemployment benefits to Native Americans fired for violating a state prohibition on the use of peyote even though the use of the drug was part of a religious ritual. The Court held that this was a "neutral law of general applicability" and although states have the power to accommodate otherwise illegal acts performed in pursuit of religious beliefs, they are not required to do so.

Religious freedom is a wholly bi-partisan notion in the US. In response to *Smith*, Congress rapidly and unanimously passed RFRA (the Religious Freedom Restoration Act 1993), and later the RLIPUA (Religious Land Use and Institutionalized Persons Act 2000), federal laws that set a much higher "strict scrutiny" rule for assessing limitations on religious freedoms. prohibiting federal government and the states from "substantially burdening a persons' exercise of religion" unless "application of the burden…is in furtherance of a compelling governmental interest" and "is the least restrictive means of furthering that…interest." (RFRA, H.Rept 103-88, 1993).

The impact of the law was rapidly seen. The case of *Gonzales v. O Centro Espírita Beneficente Uniáo do Vegetal,* 546 U.S. 418 (2006), involved the use of hoasca (a tea leaf containing hallucinogen), used in a religious ceremony, but banned under the Controlled Substances Act. Following the RFRA's balancing test, the Court held unanimously that the sacramental use of hoasca cannot be prohibited for

believers, because it could not be shown that there was a substantial risk that the drug would be used recreationally.

In *Cutter v. Wilkinson*, 544 U.S. 709 (2005), five prisoners in Ohio - two adherents of Asatru (a form of paganism), a minister of the “White supremacist Church of Jesus Christ-Christian”, a Wiccan and a Satanist sued, arguing that prison officials violated RLUIPA by failing to accommodate the inmates' exercise of their "nonmainstream" religions. The Court ruled unanimously in their favour. While my personal view is that some of these “religions” are a wee bit nutty, it is great that they were given the same treatment as others.

Moreover, the impact of the First Amendment has been strengthened through the *Do No Harm Act*, prohibiting the RFRA’s misuse by federal officers where religious freedom laws are increasingly being weaponized to justify discrimination and undermine civil rights protections. The case of *Tanzin v Tanvir*, 592 U.S. ___ (2020) is an illustration of this. Three Muslim men, all legal residents of the United States, had been placed on the No Fly List by FBI agents for refusing to be informants for their fellow Muslim communities. The Court ruled that RFRA allowed those whose religious rights are adversely affected by federal officers can seek appropriate remedies, including monetary damages.

The force of this law is important for members of often-vilified minorities. Consider the case of my client Aafia Siddiqui. She is wrongly deemed “Lady Qaida” – I spent two months in Afghanistan in the last year and can now prove she is perhaps the most wronged person in the entire ‘War of Terror’. She was abducted in 2003 in Karachi, with her three kids. Suleiman (aged 6 months) was apparently dropped on his head and killed, though the CIA has never admitted this. Maryam (aged 3), a US citizen, was taken to Kabul and forcibly adopted into a white, Christian American family, renamed Fatima, and only released seven years later when her aunt intervened with President Hamid Karzai. Ahmed (aged 6 and also a US citizen) was put in a Kabul prison for five years. Aafia was tortured in Bagram Air Force Base for 5 years before being framed for the crime of attempted murder and given 86 years in the awful federal prison, FMC Carswell, in Fort Worth, Texas, where she faces sexual abuse on a daily basis.

Aafia is a Sunni Muslim, which is the strongest legal shield she has in prison. She is required to strip down for ‘security reasons’ in order to see a doctor. This obviously infringes her religious views of modesty as Islam prohibits the showing of the *awrah* (nakedness) of a woman, which is ‘the entire body except the face, hands and feet’.[19] She is also being denied access to her own spiritual advisor, Imam Omar Suleiman. She is told that it is sufficient that she has access to a Christian minister (notwithstanding the unfortunate fact that one such Christian minister has been convicted of sexual assault on prisoners). Therefore, based on RFRA, we have sued the prison to set this straight. While most law is hostile to prisoners, this is not true of religious issues. She is one of the core beneficiaries of a Constitution goal to ‘restrict the majority’s ability to harm a minority’.[20] While the government makes a series of insensitive arguments, I suspect they will lose.

There are exceptions to the US aversion to anything that looks like an Established faith. For example, the phrase ‘In God we trust’ is found on all currency in the US, and in almost all courtrooms. In *Aronow vs. United States*, 432 F.2d 242 (9th Cir. 1970), the Court considered the use of the phrase on currency, finding no breach of the Establishment Clause. The court felt that the phrase should be considered more inspirational than religious. Whether this will survive a gradual decline in people who believe in any god at all remains to be seen.

The addition of ‘so help me god’ to the presidential oath is voluntary and has been carried on by Presidents as a tradition. The first 26 presidents did not say ‘so help me god’; Herbert Hoover in 1929 is the most recent to abstain. There is no legal requirement for the president or other elected officials to use a religious book – particularly the bible – or state ‘so help me God’ in their inauguration. Thus, whilst individual politicians may choose to involve religious displays in their personal actions, this is not enforced and there is theoretically no consequence for not doing so. The prevalence of these religious displays in the Presidential inauguration can be clearly linked to the fact that only three presidents have not been religious – Lincoln, Jefferson, and Taft.

Right now, the US is going through a rather intolerant period when it comes to religion. In 2019, a Gallup poll found that 60% of Americans would be willing to vote for an atheist president (but 40% would

[19] Wehr, *Arabic-English Dictionary*, at 131 (1994).
[20] Maddison, *Federalist Nos. 51-60*, Library of Congress (1787).

not). This is an improvement on 35 years ago, but such reluctance towards atheist political candidates triggers an unwillingness amongst elected officials to be perceived as unreligious. Rep. Jared Huffman is the most outspoken non-religious member of congress,[21] with only 3.6% of congress publicly stating they are not religious or refusing to answer.[22] Compare that to Oliver Letwin, who used to be the Conservative MP in my area: he started one stump speech I attended, "I am an atheist Jew."

It may well be that citizens are drawn to that which is not mandated. The American student is forbidden from practicing religion in state-funded schools, yet is vastly more likely to do so after graduation; the British student who may be required to attend prayer services every day is likely to fall by the wayside. The UK is arguably less religious simply because of the established religion – leading to apathy. In other words, Establishment can be the death of Religion.

2. Freedom of speech and the press.

On the day I was writing this I was talking to a friend who works in New York on civil rights issues. We talked about the ways in which people were being penalized in the UK for simply saying "from the river to the sea." He was astounded. While there is no city where antisemitism is more strongly condemned than New York, he thought I was joking when I said this was could be a crime in the UK.

I am a First Amendment Absolutist. That does not mean that every single aspect of speech is protected – there are very limited exceptions involving the incitement to immediate violence against an identified person – but generally for a number of reasons the "only answer to bad ideas are better ideas."

I come from two directions in reach this conclusion. The first is the US experience where allowing people to express views freely is generally more effective than censorship when it comes to neutralizing "stupid and ugly speech". Second, though, we genuinely have to answer with better ideas, not merely announce that the speaker is an idiot. This is, indeed, the turf on which "liberals" are losing the argument with "wanna-be fascists"[23] – we tend to be critics of hateful populist ideas, rather than being proponents of an Idealism that is better.

Then there is the desperately important issue of our current era – which is the suppression of free speech by private corporations who are not directly covered by the First Amendment, though there may be other ways to hold them liable. For all the hype from members of the Trump Administration about Free Speech, the main violators include not just governments, but social media and other on-line entities. I have recently been trying to help one person banned from LinkedIn for using the phrase "from the river to the sea," and another person banned from FaceBook (upon complaint by the current Pakistan regime) for making statements critical of manifestly corrupt members of the Pakistan military.

a. Free Speech in the UK and Europe?

There are various ways in which British practice falls far short of true free speech. For purposes of this discussion, I will focus primarily on two areas: hate speech and the intersection with privacy.

In October 2023, Suella Braverman announced her interpretation of the limits of free speech (and peaceable assembly), relying (she said) on advice from Home Office lawyers. The full context of her remarks is particularly worrying:

> "It is not just explicit pro-Hamas symbols and chants that are cause for concern. I would encourage police to consider whether chants such as: 'From the river to the sea, Palestine will be free' should be understood as an expression of a violent desire to see Israel erased from the world, and whether its use in certain contexts may amount to a racially aggravated section 5 public order offence.
>
> "I would encourage police to give similar consideration to the presence of symbols such as swastikas at anti-Israel demonstrations. Context is crucial. Behaviours that are legitimate in some circumstances, for example the waving of a Palestinian flag, may not be legitimate such as when intended to glorify acts of terrorism.

[21] https://www.theguardian.com/world/2019/aug/03/athiesm-us-politics-2020-election-religious-beliefs

[22] https://www.pewresearch.org/religion/2021/01/04/faith-on-the-hill-2021/

[23] Federico Finchelstein, *The Wannabe Fascists: A Guide to Understanding the Greatest Threat to Democracy* (University of California Press, 2024).

> "Nor is it acceptable to drive through Jewish neighbourhoods, or single out Jewish members of the public, to aggressively chant or wave pro-Palestinian symbols at. Where harassment is identified, I would encourage the police to take swift and appropriate enforcement action.
>
> "I encourage all chief officers to ensure that any protests which could exacerbate community tensions by way of offensive placards, chants, or behaviours that could be construed as incitement or harassment, have a strong police presence to ensure perpetrators are appropriately dealt with, and that communities feel protected," she wrote. Home Office sources confirmed her words had been approved by government lawyers.[24]

I am proud of my half-Jewish heritage, with my father's family apparently coming from Russia in the days of the pogroms. It is my personal view that the view that Jews in Israel should never be forcibly removed. To me, the notion that the Holocaust is really just a European affair is pretty fatuous, and the argument that the State of Israel should not exist is one of the follies of trying to undo history. At the same time, Donald Trump's suggestion (strongly backed by the current Prime Minister of Israel) that Palestinians should be removed from his "Gaza Riviera" is likewise idiocy to the ultimate degree.

Yet however ridiculous and dangerous his statements, Trump has the right to express them so long as he respects the US limitations on free speech discussed below, that focus entirely on inciting violence.[25]

Interestingly, the European Commission against Racism and Intolerance (ECRI) strikes a balance that is very close to the US rule:

> Aware of the dangerous link between hate speech and violence, ECRI has always considered that criminal prohibition is necessary when hate speech publicly incites violence against individuals or groups of people. At the same time criminal sanctions should be used as a measure of last resort and, all along, a balance must be kept **between fighting hate speech** on the one hand, and safeguarding freedom of speech on the other. Any restrictions on hate speech should not be misused to silence minorities and to suppress criticism of official policies, political opposition or religious beliefs.[26]

As we will see below, it is indeed "fighting hate speech" – where the speaker advocates immediate violent action against an identified person or group – where the line is crossed. But while the ECRI writes this, Europe does not respect it.

Set in this context, it is a sign of European illiberality that Braverman wants to criminalise statements made in support of Palestinians and Hamas. It is one of many examples of how clamping down on free speech by using Hate Speech exceptions tends to be used primarily against the weakest members of society, rather than the powerful.

Consider hate crimes. The British government tells us that "any crime can be prosecuted as a hate crime if the offender has either: demonstrated hostility based on race, religion, disability, sexual orientation or transgender identity or been motivated by hostility based on race, religion, disability, sexual orientation or transgender identity."[27] Lest you question what this means, their website shows their success with "hate crime" prosecutions:

I don't doubt that the 14,047 people punished in the first 9 months of 2024 said nasty things of which we should rightly disapprove. But if they only prosecuted 129 people for Transphobic crimes, they have obviously not been making much of an effort. I have probably read and heard that many comments myself in that time, not counting the spats on the internet between JK Rowling and those who, equally,

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[24] Rajeev Syal & Aubrey Allegretti, *Waving Palestinian flag may be a criminal offence, Braverman tells police,* Guardian (Oct. 10 2023), available at https://www.theguardian.com/politics/2023/oct/10/people-supporting-hamas-in-uk-will-be-held-to-account-says-rishi-sunak (accessed 2025.02.19).

[25] Trump often strays over any line that is set. Unfortunately Benjamin Netanyahu also crosses a fundamental line when he advocates and actually employs violence.

[26] ECRI, *Hate Speech and Violence*, available at https://www.coe.int/en/web/european-commission-against-racism-and-intolerance/hate-speech-and-violence#:~:text=Hate%20speech%20covers%20many%20forms,and%20the%20rule%20of%20law (accessed 2025.02.19) (emphasis in original; some emphasis removed).

[27] See https://www.cps.gov.uk/crime-info/hate-crime (accessed 2025.02.19).

seem to hate her. I would be astounded if there were not 14,047 such comments in my relatively enlightened town of Bridport in that time. Various MPs have made some very unpleasant comments about Muslims and asylum seekers. In other words, there is some very selective prosecution going on.

After all, the government tells us that "[t]here is no legal definition of hostility so we use the everyday understanding of the word which includes ill-will, spite, contempt, prejudice, unfriendliness, antagonism, resentment and dislike."[28] There are entire books written on "treatments to cure" of gay people by some religious figures, while others write books about how insane anyone is who believes in god. Presumably, they all have a "prejudice" against each other.

The issues are best addressed on the individual level to consider how mad this is. I read *The New European* each week, which probably means a lot of Brexiteers would hate me (I am not going to prosecute them for it!). Last week there was a revealing article by Martin Fletcher.[29] Richard Crisp is a Sheffield man, until recently relatively happy, married, two grown-up kids, a project manager in a local construction company (Wates), who enjoyed playing golf at his local club, where he had been captain for a while. One of the joys of his life was to walk over to the Sheffield Wednesday football ground to watch his beloved team. The main entrance is flanked by a memorial to the Hillsborough disaster – during the FA Cup Semi-Final against Nottingham Forest in 1989, 97 Liverpool fans were crushed to death.

On September 24, 2024, his life essentially came to an end. He had watched the match against West Bromwich Albion, at which sadly a 57-year old WBA fan, Mark Townsend, collapsed and died. Later that evening, in what was a rather drunk moment after a couple of drinks, "Crispy" got his phone out and tweeted. "*Another one to add to Leppings Lane tally. What are we at now, 98?When we get to 100 we'll have a party. Up the Owls!*"

I don't know if Crispy is a bit autistic. It is certainly something to which we have become more sensitive. Or he just could be a bit of a twit, of the type to frequent *The Tiger* around the corner from my office. Some of them I consider my friends, as I am not responsible for them being fundamentally tasteless. I am sure tastelessness is a sin I have committed from time to time myself.

Martin Fletcher refers to this as "a man committing a crime without realizing it was a crime, a crime for which there was no obvious victim, a crime about which nobody formally complained." However, because of the viral trajectory of his tweet, he was called a "nonce", a "Grade A melt", an "absolute little shithouse", an "utter fucking moron" and a "vile heathanic [sic] inbred scumbag", among various other things. I have no idea what a Grade A melt is, though I doubt it is a kind term, but the use of several of these comments – including at least "nonce"[30] and "moron"[31] – would qualify as hate crimes under British law.

Crispy was then banned by the football and his golf clubs, and sacked by Wates. For reasons best known to himself, Mark Allen, the golf club manager, reported the incident to the South Yorkshire Police – the people whose actions had been a major cause of the Hillsborough disaster. (The acquittals of a raft of police officers, not charged for decades, was described by no lesser a Conservative than Jacob Rees-Mogg as "the greatest scandal of British policing of our lifetimes".) They chose to charge Crispy, and within 20 days he was convicted under the Malicious Communications Act of 1988 for sending a message that was "indecent or grossly offensive."[32] He was facing two years in prison!

On top of everything that had happened, Crispy's mother was suffering from advanced dementia, he had turned to drink, and was now (unsurprisingly) in treatment for depression. Thankfully he was "only" given a criminal record involving community service and court costs.

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[28] See https://www.cps.gov.uk/crime-info/hate-crime (accessed 2025.02.19).

[29] Martin Fletcher, *How to Destroy your Life in a Single Tweet*, New European, at 15-16 (Feb. 13, 2025).

[30] The word "nonce" is "a slang term chiefly used in Britain for alleged or convicted sex offenders, especially ones involving children." In other words, under British law, since there is absolutely no evidence he is anything of the sort, it would be defamation *per se*.

[31] Moron is a term once used in psychology and psychiatry to denote intellectual disability, which was still in use medically when I started to practice law, often representing people who were deemed such. The term was closely tied with the horrendous American eugenics movement, which focused on choosing "superior" members of the human race in much the same way as advocated by Hitler. In other words it would be a rude way of committing a hate crime against him, an insult based on a supposed disability.

[32] See https://www.legislation.gov.uk/ukpga/1988/27/section/1 (accessed 2025.02.19)

To place this in my own personal experience, my dear late father used to send offensive missives on a daily basis. To give just one example of thousands, on October 12, 1989, he sent a letter to the *Newmarket Journal*. The paper then quoted it, publishing his view that the death penalty should be retained as "entirely justified – nay demanded – for younger sons who behave as he has done…" By this he meant that I should be executed for telling a journalist that he had bankrupted Cheveley Park Stud, where I grew up. I cannot say I was "grossly offended" by his letter, but my mother certainly was. Dad, equally, was "grossly offended" by my statement (though it was entirely true, I agree that I should not have said it).

While many of us may not match my father for silly statements, we have all sent stupid letters or emails. The idea that Crispy Crisp could be hatefully "cancelled" by thousands of people is bad enough, but the notion that he could be prosecuted for it by the very police force responsible for the most terrible disaster of football history is beyond comprehension.

It illustrates the abject state of the British comprehension of free speech. A statement may be offensive, but it cannot be deemed criminal.

Of course, this is all applied in a way that picks, as ever, on the weak. Hamas is not the most powerless often vilified group by any means. Large swathes of the world strongly support them – in truth no country in the Middle East supported Trump's idea of some new beachfront property on the Mediterranean. There are many groups who are much more universally hated, where venom comes even from *Guardian* readers. This came to a head for me when the former Prime Minister David Cameron was spouting what was essentially hate speech about a group, I have sought to defend my whole life – those we dub "criminals".

The ECHR had ruled that there was no excuse for denying the vote to those under conviction for crimes. *Hirst v. United Kingdom* (No 2) (2005) ECHR 681 (a blanket ban on British prisoners exercising the right to vote is contrary to the European Convention on Human Rights). Cameron's respond was venomous. He announced that the wings of the ECHR should be "clipped" and that it made him feel "physically ill" to think such people should have the vote. As one commentator wrote, this really was nothing but "hate speech", that was sadly consistent with the views of the vast majority of parliamentarians:

> The prospect of David Cameron continuing to peddle his brand of illiberal populism makes me feel physically sick. No need for such violent language, I hear you chide. Indeed. That is pretty much what I thought when the prime minister said that his gorge literally rose at the idea that Britain might be forced to give the vote to people in prison. I don't suppose he paused to wonder what those in jail might feel when they heard his vomit-inducing vocabulary.
>
> Who cares what prisoners think? Not many of our elected representatives, to judge by the overwhelming vote – 234 against just 22 – when MPs were asked to vote on a ruling by the European Court of Human Rights that Britain is wrong in its present blanket ban on prisoners voting.[33]

This was a poisonous debate all around. But one thing that is clear is that elected officials in the UK are not keen to take positions that might seem favourable to "criminals" – just as American elected officals were hell-bent on the death penalty in the 1980s. Even though all the studies show that harsher and longer sentences are no solution to what we view as criminality,[34] trampling on the rights of prisoners is deemed a vote winner.

The ECHR position on prisoners having a vote is quite reasonable – again, Moses failed to bring an eleventh commandment down on tablet from Mount Sinai that took away the vote. Indeed, anyone familiar with "Felony Disenfranchisement Laws" will know that they have a sordid history, and their widespread use was rooted in an effort to keep recently-liberated slaves from voting in the Southern States of the United States:

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[33] Paul Vallely, *Why David Cameron makes me Feel Physically Sick*, Article Archive (Feb. 13, 2011), available at https://paulvallely.com/archive/?p=3529 (accessed 2025.02.19).

[34] I say "what we view as criminality" since, as may be clear from some of my comments, I am unconvinced that the current structure of the criminal law even begins rationally to distinguish the acts that do the greatest harm to society from those that are relatively inconsequential or should be seen as addictions and illnesses. Corruption by people in power, for example, does much more harm than personal-use of many drugs. And so forth.

> It wasn't until the end of the Civil War and the expansion of suffrage to black men that felony disenfranchisement became a significant barrier to U.S. ballot boxes. At that point, two interconnected trends combined to make disenfranchisement a major obstacle for newly enfranchised black voters. First, lawmakers — especially in the South — implemented a slew of criminal laws designed to target black citizens. And nearly simultaneously, many states enacted broad disenfranchisement laws that revoked voting rights from anyone convicted of any felony. These two trends laid the foundation for the form of mass disenfranchisement seen in this country today.[35]

Currently there are 6.1 million Americans who have had their votes taken away, more than the voting population of New Jersey:

> This widespread disenfranchisement disproportionately impacts people of color. One in every 13 voting-age African Americans cannot vote, a disenfranchisement rate more than four times greater than that of all other Americans. In four states, more than one in five black adults are denied their right to vote.[36]

As with so many things, British politicians have looked across the Atlantic at the American example, and followed it. Despite this history, David Cameron had adopted wholesale the rather hateful views that inspired these exclusions, views that define "criminals" as inherently evil rather than people who may have made a mistake – or not. (Andy Malkinson was tarred as the most vicious human being imaginable before my wife and her colleagues exonerated him.)

Treating everyone as an undifferentiated mass never makes sense. Not everyone in prison is a murderer. Many people in prison, even if they happen to be guilty, have done vastly less damage to vastly fewer people than Liz Truss and Kwasi Kwarteng managed to achieve in the lifetime of a lettuce. Indeed, our attitude towards "criminals" is not so far removed from other "hatreds".

Cameron's unpleasant statement so annoyed me that I did contemplate bringing a case against him for hate speech. It was a typical example of how we apply hate speech against those who Suella Braverman dislikes (defenders of Palestinians) but then hypocritically spout the same hatred where they feel it is permissible (against Hamas, against "criminals", etc.). But I am a free speech advocate and I would be equally hypocritical if I applied their foolish laws against Cameron (I also checked the law and it only covers five groups of people – not even gender-hatred, let alone prisoner-vilification).

* * *

There are many other areas where Free Speech comes hard up against British limitations, and I can't address them all here; but for now let us also consider Privacy. The substantive notion of privacy is a much more European concept than it is American (where the "right to privacy" has generally been associated with such issues as bans on abortion and contraception).[37] However, no matter what your definition, it is difficult to protect what the Europeans consider to be Privacy while simultaneously advocating Free Speech.

One area is the Data Protection Act – in the UK it is so draconian that many US publications cannot allow publication in the UK for fear of falling foul of it. It has huge implications for my own work as in the US I am able to locate the location of, and information on, any witness by running them through our databases. Nothing similar is readily available to us in the UK, though you can be sure that the Government has access to it when they want it.

Suing people for invasions of privacy is not something I have ever done, and I doubt I would ever

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[35] Erin Kelley, *Racism & Felony Disenfranchisement: An Intertwined History*, Brennan Center for Justice (May 19, 2017), available at https://www.brennancenter.org/our-work/research-reports/racism-felony-disenfranchisement-intertwined-history (accessed 2025.02.19).

[36] Kelley, *Racism & Felony Disenfranchisement*.

[37] See, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965) (the US Constitution protects the liberty of married couples to use contraceptives without government restriction). While the torturous history of *Roe v. Wade*, 410 U.S. 113 (1973), and the right to abortion has sometimes been seen in the context of privacy, the decisions generally rested on other amendments.

agree to. Those lawyers who do work in this area assure us that "[a]ny person has a right of action against any other person who is intending to publish information about him, which relates to his [or her] personal affairs or conduct."[38] This finds support in the Article 8 of the ECHR itself, since "[e]veryone has the right to respect for his private and family life, his home and his correspondence." In all this, there is a fundamental irony that while we insist on this privacy for ourselves, we buy apps willy-nilly that allow us to track our children and other people.

One face of "privacy" involves defamation where Britain is notorious as a global location for what Geoffrey Robertson called "libel tourism". He coined the term because of the ridiculous state of the law. Generally, defamation renders someone liable for saying anything to a third person about the plaintiff which would be apt to make the average citizen think worse of the latter in a significant way. "Defamation *per se*" applies to statements imputing that a crime has been committed, or words "calculated to disparage" a person in their office, calling, trade, business, or profession.[39] For the most part the burden of proof remains on the defendant to prove that the statement was true or it was an honestly held opinion (though fair comment, and justification defences fail if they are based on misstatements of fact). Typically, there are the absolute privileges given by politicians to themselves in parliament, and under oath in a court of law.[40]

Sometimes "breach of privacy" cases sound awfully like defamation litigation, and in the UK they tend to come to the same result, as the person who made a statement is generally exposed to litigation:

> In February 2001 the Daily Mirror published an article detailing supermodel Campbell's attendance at Narcotics Anonymous meetings, and printed photographs of her leaving such a meeting. Campbell successfully sued the newspaper in the High Court, on grounds that the report amounted to a breach of confidence, and violation of the Human Rights Act and the Data Protection Act. She was awarded somewhat nominal damages of £3,500. That decision was overturned by the Court of Appeal in October 2002. Its decision relied heavily on the fact that Campbell had denied having a drugs problem.[41]

When the case went to the Supreme Court (then called the Lords), the damages were reinstated, and despite their differences the judges said "the importance of this case lies in the statements of general principle on the way in which the law should strike a balance between the right to privacy and the right to freedom of expression, on which the House is unanimous." They were unanimous that privacy trumped free speech, even though that speech was true. It sounds a little like the old adage, "the greater the truth, the greater the libel."

Of course, there is no reason why any newspaper run by civilized people would wish to publish the details of the unfortunate person's narcotics treatment, even if she was unwise enough to lie about it. But that does not mean that the law should intervene – far better, perhaps, to vilify the Mirror for what they had done. It is also interesting again that Naomi Campbell was able to spend huge sums on legal fees fighting over damages of £3,500. Vindicating this right inures almost exclusively to someone rich.

No wonder people rush to London to sue for defamation. All this is very different from the world of

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[38] Internet Law Centre, *Breach of Privacy*, available at https://harassmentlawyer.co.uk/online-breach-of-privacy-legal-help/breach-of-privacy-in-the-uk#:~:text=Any%20person%20has%20a%20right,tort%20of%20breach%20of%20confidence (accessed on 2025.02.19).

[39] This is generally a classist provision, where someone saying I am a hopeless lawyer would arguably be culpable of slander *per se* (were it not true!) simply because I am a "professional" lawyer.

[40] This is true in court no matter whether the statement is true. Why should this be? There is the suggestion that courts must be allowed to encourage people to speak, and yet the Crown Prosecution Service can decide that someone committed perjury and threaten them with criminal prosecution. Yet if a prosecution witness lies about a criminal defendant, as patently happened to the unfortunate Andy Malkinson and many others, there is not even a civil action available to the defendant. As so often happens (as with principles of immunity) some people in power tend to think their work is more important than others.

[41] Global Team of Pinsent Mason, *Naomi Campbell wins Privacy Appeal in the House of Lords* (May 6, 2004), available at https://www.pinsentmasons.com/out-law/news/naomi-campbell-wins-privacy-appeal-in-house-of-lords (accessed 2025.02.19).

the First Amendment.

b. Free Speech in the US.

The First Amendment to the US Constitution took a particularly radical approach to free speech when it was adopted more than 200 years ago. It sought to constrain government and the powerful from silencing citizen.

When it comes to free speech US law is protective of individual liberty to speak. For example, in the seminal case of *Brandenburg v Ohio*, 395 U.S. 444 (1969), the U.S. Supreme Court considered a state law criminalising the speech by the appellant, a member of a white supremacist group who was blatantly racist against black and Jewish people.

Clarence Brandenburg was a Kul Klux Klan (KKK) leader in rural Ohio who invited a reporter to cover a Klan rally in 1964. The reporter filmed parts of the rally, showing the KKK members in their horrible robes and hoods, some carrying firearms, burning a cross and then making speeches. One of the speeches made reference to the possibility of "revengeance" (sic) against “N*****s” and “Jews”, made claims about how politicians were repressing the Caucasian race with their civil rights laws, and announced plans for a march on Congress to take place on July 4th. Another Klansman advocated for the forced expulsion of African Americans to Africa and Jewish Americans to Israel.

Although morally reprehensible, the Court declared the state law unconstitutional as the exercise of the right to free speech was not “directed at inciting or producing imminent lawless action”, nor was “likely to incite or produce such action.” This is the standard in the US, and it is an eminently sensible one, no matter how dreadful the opinions. Indeed, it is fortunate for some members of the current Administration, who appear to believe that White Americans are having a hard time of it, despite the obvious residue from last two thousand years of privilege.

When it comes to defamation, the lead case is generally considered to be *New York Times v. Sullivan*, 376 U.S. 254 (1964), that effectively insulated people (and newspapers) from defamation litigation by elected officials. The case arose out of an article in 1960, when the NYT published a full-page advertisement by supporters of Martin Luther King Jr. criticizing the Montgomery, Alabama, police for their attempts to quash the protests by civil rights workers. It was the height of unrest over desegregation – the Supreme Court decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), had recently rejected the theory of “separate but equal”, and Rosa Parks’ refusal to sit at the back of a bus on December 20, 1956, had sparked the Montgomery Bus Boycott.

There were various relatively minor factual errors in the advertisement (mainly such trivia as how many times MLK had been arrested, and what songs had been sung) and based on this the police commissioner sued for defamation in a local Alabama court. The (locally elected) judge ruled that the advertisement's inaccuracies were defamatory *per se* (much as in the UK, an intimation that a professional was falling down in his work), and the jury returned a verdict in favor of Sullivan, awarding him half a million dollars, a huge sum at the time. The (elected) Supreme Court of Alabama affirmed, holding that the First Amendment did not protect defamatory statements.

In March 1964, the US Supreme Court issued a 9–0 decision holding that this violated the Constitution. The Court reasoned that defending the principle of wide-open debate will inevitably include "vehement, caustic, and... unpleasantly sharp attacks on government and public officials." Most important, the Court held:

> “The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice" – that is, with knowledge that it was false or with reckless disregard of whether it was false or not.”

Sullivan, 376 U.S. at 279–80.

The Supreme Court later extended *Sullivan*'s higher legal standard for defamation to all “public figures” making it extremely difficult for a public figure to win a defamation lawsuit in the United States. If one is a private citizen, essentially unknown to the general public, the standard for defamation is lower, with no need to show actual malice, but free speech still trumps defamation and privacy interests to a far greater

extent.

Thus, the law is essentially the polar opposite of the law in the UK, where considerations of costs mean defamation litigation is almost only used by rich people coming to London to overwhelm those who cannot defend themselves. In the US, the rich and famous person would find it very difficult to sue, and there is no issue of costs in the overwhelming majority of cases.

The range of freedoms encompassed by the first amendment has been extended to include almost all forms of expression, including what is termed political speech. As a result, successive attempts by Congress to regulate funding for political campaigns have been struck down. For example, in *Buckley v. Valeo*, 424 U.S. 1 (1976), where some limits on election spending were deemed to be unconstitutional. The court upheld limits on contributions to candidates, limits where candidates accept government funding, and disclosure rules. However, the court struck down limits on the expenditures of individuals on their own campaigns – if Elon Musk wants to spend a billion dollars on his own campaign he can. Of course, this is an example of how the First Amendment benefits the rich and influential. Elon Musk clearly has an outsized influence on politics in the US and abroad. Yet in the end, it is hard to see how one can limit the free speech of rich people by setting an arbitrary limit, and Barack Obama showed that an effective fund-raising structure on social media can overcome a seemingly wealthier opponent.

There are other areas that probably offend some critics of the First Amendment. In *United States v. Stevens*, 559 U.S. 460 (2010), the Court struck down the conviction of Robert Stevens, whose dubious speciality was to film dog fights and sell his videos. He had been indicted under 18 U.S.C. § 48 for creating and selling three video tapes, two of which depicted pit bulls fighting, and the third was a pit bull attacking a domestic pig as part of training to kill wild hogs. The latter included "a gruesome depiction of a pit bull attacking the lower jaw of a domestic farm pig." The Court ruled 8-1 that the statute was overbroad in violation of free speech. (Congress immediately passed a much narrower law that only outlawed "crush videos", which show people crushing animals to satisfy some strange sexual fetish.)

Then there is the lengthy and contentious line of cases on pornography. In this area, what is called the "*Miller* test" was developed in the case of *Miller v. California*, 413 U.S. 15 (1973). The test has three parts, each of which has to be met:

- Whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest,
- Whether the work depicts or describes, in a patently offensive way, sexual conduct or excretory functions specifically defined by applicable state law,
- Whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.

This is itself fairly vague, as Justice Douglas argued – who is the average person? What community are we talking about (especially in the age of the internet)? How patent it patently offensive? What (given the cost of the pornography?) is serious value?

At least this was a step forward from the standardless standard, announced in 1964, by Justice Potter Stewart, when he tried to explain how he would assess the level of obscenity in "hard-core" pornography by saying, "I shall not today attempt further to define the kinds of material I understand to be embraced... [b]ut I know it when I see it..." *Jacobellis v. Ohio*, 378 U.S. 184 (1964). Nevertheless, the continued arbitrariness of it all is well illustrated by a case in Provo, Utah, in 2000, where the jury took only two hours to clear Larry Peterman, owner of a Movie Buffs video store.[42] While Utah is notably conservative, researchers had shown that guests at the local Marriott Hotel accessed more pornographic films than the store was distributing.

The First Amendment reflects the importance of non-interference in fundamental rights of freedom of speech and the press, which permeates civic culture. This promotes the idea that citizens do not simply 'tolerate' other people's views, but they respect their right to exercise them as intrinsic to the Constitution.

[42] Kathy Oldham, *Peterman Found 'not guilty' in Movie Buffs Case*, The Daily Universe (March 31, 1999), available at https://universe.byu.edu/1999/03/31/peterman-found-not-guilty-in-movie-buffs-case/ (accessed 2025.02.19).

Again, this is about bad ideas being countered by better ideas, rather than censorship. The First Amendment champions the individual liberty to express one's views, applying only an imminent harm principle – there must be proof that speech would imminently cause violent action. The policy behind this right is a refinement on John Stuart Mill's principle that freedom of speech is key in 'ensuring bad ideas are not accepted, that good ideas are adopted and refined'.[43] The theory is that the circulation of a range of views is significant in ensuring that extremist ideologies - 'bad ideas' - are naturally displaced through their realisation.

c. Free Speech and the Social Media platforms

We must touch on social media here. When it comes to interpreting the US Constitution I fall very squarely into the "evolving standards" camp, rather than the originalist one. It is not as if any approach provides simple answers to all the issues, but I prefer to think of how Jefferson and Madison would have seen it today, rather than be stuck in an age of slavery. But the originalist looks at what the founders would have literally meant in 1787-91 as the documents were completed. This allows them to state confidently that there should be few limitations on the death penalty, as none existed 235 years ago. But it runs into all kinds of problems when we consider how to deal with such issues as motorways, airplanes and the internet.

Here we look at social media in the context of the First Amendment.

"While in the past there may have been difficulty in identifying the most important places...for the exchange of views, today the answer is clear," wrote Justice Kennedy in *Packingham v. North Carolina*, 582 U.S. 98 (2017). The answer is cyberspace, and in particular, social media. Lester Packingham had been banned from social media under a North Carolina statute that forbade sex offenders from using it. The Court found that this was a patent violation of free speech.

Private corporations like Twitter (redubbed X), Facebook and LinkedIn wield unprecedented power over public discourse. It is not that there was not Yellow Journalism in 1787,[44] but its reach was comparatively limited. The influence of social media companies in global politics is a technological evolution unforeseen by the First Amendment. As of April 2024, 62.6% of the world's population were social media users, exposing 5.07 billion people[45] to the unregulated power of these private corporations. The power in question falls mainly into two categories: the power of content control, and information.[46] The discussion today falls under content control, in which social media corporations hold the power of censorship through moderation.

The First Amendment prevents *government restrictions* on speech – "*Congress* [and the State legislatures] shall make no law … abridging the freedom of speech" - which therefore reached the North Carolina statute in Packenham. This limitation encompasses public schools, universities, and courts.[47] Yet a gap in protection has grown where private individuals and corporations are not directly prevented from censorship by the First Amendment.[48] A right equivalent to the First Amendment is crucial when attempting to regulate social media corporations as most major social media companies are headquartered in the

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[43] John Stuart Mill, *On Liberty and the Subjection of Women* (1873).

[44] I realise that the actual term did not exist then, but some of the habits already did: "The term was coined in the late 1800s in New York by established journalists to belittle the unconventional techniques of their new rivals: William Randolph Hearst, publisher of the New York Journal, and Joseph Pulitzer, publisher of the New York World." Cleveland Ferguson II, *Yellow Journalism*, Free Speech Center (July 19, 2024), available at https://firstamendment.mtsu.edu/article/yellow-journalism/#:~:text=Yellow%20journalism%20refers%20to%20sensationalistic,newspapers%20present%20as%20objective%20truth. (accessed 2025.02.20).

[45] Internet and social media users in the world 2024 | Statista.

[46] Has the power and influence of social media platforms gone too far? – FLUX MAGAZINE.

[47] The First Amendment, Censorship, and Private Companies: What Does "Free Speech" Really Mean? - Carnegie Library of Pittsburgh.

[48] The First Amendment, Censorship, and Private Companies: What Does "Free Speech" Really Mean? - Carnegie Library of Pittsburgh.

United States, and thus fall under U.S. jurisdiction.[49]

There are some statutory limitations, but these rapidly run into the First Amendment themselves. The *Communications Decency Act* protects the publication of certain matters, but Section 230 protects the private company from liability for user-generated content so long as they make the enigmatic "good faith" effort to remove it. This has been described as a corporate "get-out-of-jail-free card" by none of other than Clarence Thomas:

> "[Social media platforms] are fully responsible for their websites when it results in constitutional protections, but the moment that responsibility could lead to liability, they can disclaim any obligations and enjoy greater protections from suit than nearly any other industry."

Doe v. Snap Inc., 603 U.S. ___ (2024) (Thomas & Gorsuch, JJ., dissenting from denial of certiorari). Yet it is not clear that he or some of his colleagues would actually put someone in jail if their friends in the Trump Administration overreached.

This "good faith" moderation remains open to subjective interpretation, and has recently been limited even more by decisions by huge corporations to abandon much of the limited “moderation” that existed. More important still, the weak “get out of jail free” limitations on the corporations are the subject to First Amendment challenge, because it is the government imposing the limitations. The extent of a corporation’s free speech right is currently being hotly debated in court. Thus in *Moody v. NetChoice, LLC* and *NetChoice, LLC v. Paxton*, 603 U.S. 707 (2024), laws in Florida and Texas that sought to limit interference by large social media companies in elections. Primarily this was about “deplatforming” people running for office (something that happened to Donald Trump at one point). When the cases reached the Supreme Court, the justices unanimously remanded both, holding that neither lower court had properly applied existing First Amendment caselaw. Writing for the court, Justice Elena Kagan said the platforms, like newspapers, deserve protection from governments’ intrusion in determining what to include or exclude from their space. “The principle does not change because the curated compilation has gone from the physical to the virtual world,” Kagan wrote in an opinion signed by five justices. All nine justices agreed on the overall outcome.[50]

The application of the First Amendment to private bodies is a sword that tends to cut off the rights of less powerful individuals rather than the super-rich and their social media corporations. Elon Musk might insist he has some free speech right to tell Germans to vote for a neo-Nazi party on Twitter, but in reality that are almost no limitations on him anyway, or on any super-rich person.

Limitations are usually applied by the corporations against much weaker people. Consider just one example of the on-going censorship by *LinkedIn*, a platform dominating the professional networking market.[51] People have been banned from career networks for condemning Palestinians being starved, bombed and buried under the rubble.[52] By contrast hate speech from CEO’s claiming “99.9% of Muslims are terrorists” remained on LinkedIn for over months.[53] LinkedIn’s selective enforcement of its User Agreement censors posts while allowing those who harass the very person who put up the post to remain active.

Likewise, *Instagram* applied significant censorship on artists and cultural figures, with a nebulous policy that cracked down on Political content defined vaguely as material that “is likely to mention governments, elections, or social topics that affect a large group of people and/or society at large…”[54]

YouTube acts in a similar way. For example, in supposedly applying their rules consistently, they

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[49] Social Media: Reasonable Lines of Enquiry | The Crown Prosecution Service (cps.gov.uk).

[50] Mark Sherman, *The Supreme Court casts doubt on Florida and Texas laws to regulate social media platforms*, Associated Press (July 1, 2024), available at https://apnews.com/article/supreme-court-social-media-florida-texas-dc523bc9a6ef7b0f7b0aa933d0a43cca (accessed on 2025.02.19).

[51] LinkedIn Statistics for Marketers in 2024 | Sprout Social

[52] Censorship is a crucial complement of genocide | Israel-Palestine conflict | Al Jazeera

[53] Confidential source on file with the author.

[54] Stella Gilbert, *Instagram’s Content Crackdown is Worse Than You Think*, Crimson (March 28, 2024), available at https://www.thecrimson.com/article/2024/3/28/social-media-restriction-instagram-meta-restriction-politics/ (accessed 2025.02.19).

certainly seem to apply them consistently in Pakistan to comply with complaints by the undemocratic military. They reported Colonel Adil Raja when he exposed corruption, and had him banned – ironically they then headed to London to do a bit of libel tourism to try to close him off altogether. They merely tell a user he or she has been banned - stating simply “we have removed your channel from YouTube” – without explaining why.[55]

The result is an ongoing tension that means there is more protection for behemoth corporations and their owners - controlling userbases larger than India and China combined - than to individuals engaging in free speech.

Globally, this is an even greater problem than it is in the US or the UK. Governments are increasingly using social media platforms as vessels for censorship, often in stark contrast to the ideals behind free speech. In countries like Turkey[56], Russia[57], and China[58], social media companies have succumbed to significant (usually financial) pressure to comply with government directives to censor content. Economist Maxime Combes highlights the European Union's push for instant erasure of 'calls for revolt' on social networks, frequently applied with respect to Garza, contrasting sharply with the praise social media received during the Arab Spring revolutions a decade ago[59].

3. The Rights Peaceably to Assemble and to Petition the Government for a Redress of Grievances

It was quite radical when, in 1791, the Founders established the “right of the people peaceably to assemble, and to petition the Government for a redress of grievances”. This right was only enshrined in Article 10 and 11 of the ECHR, enacted over 150 years later in 1953, and it came with limitations even when it arrived then.

It is strange that a country like the UK, where the Trades Unions held far greater sway in the second half of the 20th Century than they did in the US, should have such a limited view of these rights.

a. The Rights Peaceably to Assemble and to Petition the Government for a Redress of Grievances in the UK and Europe?

Britain’s history with public demonstrations is pitted with incidents such as the Peterloo Massacre, which took place at St. Peter’s Field in Manchester, Lancashire, England, on Monday August 16th 1819. Eighteen people died and hundreds were injured when cavalry charged a crowd of around 60,000 people who had gathered to demand the reform of the legendarily corrupt parliamentary representation. For years, Peterloo was commemorated only by a blue plaque that referred only to the "dispersal by the military" of an assembly. Only in 2007, the city council replaced the blue plaque with a red plaque referring to "a peaceful rally" being "attacked by armed cavalry" and mentioning "15 deaths and over 600 injuries".

The UK continues to place ever-increasing restrictions upon the right to protest, with the *Public Order Act 1986 s12(1)(a)* granting senior police officers the power to intervene in the protest. This was then broadened by the *Policing, Crime, Sentencing and Courts Act 2022* reducing the proof necessary to the protest merely to have an “impact” rather than cause “disruption”, as well as including “noise” as a reason to impose conditions on a protest:

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[55] Adam Satariano, *How a Mistake by YouTube Shows Its Power Over Media: Novara, a London news group, fell victim to YouTube’s opaque and sometimes arbitrary enforcement of its rules*, New York Times (Oct. 28, 2021), available at https://www.nytimes.com/2021/10/29/business/youtube-novara.html (accessed 2025.02.19).

[56] Turkey's MPs vote to tighten grip on social media - BBC News

[57] How Russia tries to censor Western social media - BBC News

[58] China Punishes Microsoft’s LinkedIn Over Lax Censorship - The New York Times (nytimes.com)

[59] Emilie Johanno, *Règlement européen : Va-t-on vers une « censure » des réseaux sociaux le 25 août?* 20 Minutes TV (July 17, 2023), available at https://www.20minutes.fr/high-tech/by-the-web/4045528-20230717-reglement-europeen-va-vers-censure-reseaux-sociaux-25-aout (accessed 2025.02.19).

> If the senior police officer, having regard to the time or place at which and the circumstances in which any public procession is being held or is intended to be held and to its route or proposed route, reasonably believes that … it may result in serious public disorder, serious damage to property or serious disruption to the life of the community, *** [or] the **noise generated by persons taking part in the procession may result** in serious disruption to the activities of an organisation which are carried on in the vicinity of the procession … he may give directions imposing on the persons organising or taking part in the procession such conditions as appear to him necessary to prevent such disorder, damage, disruption, **impact** or intimidation, including conditions as to the route of the procession or prohibiting it from entering any public place specified in the directions.

The first obvious flaw with this is the lack of any real legal guidance to assess the impact of a protest, or the level of noise that causes problems for someone. The second is the fact that this discretion is placed entirely in the hands of a local policeman.

I am reminded of one of the few demonstrations I have actually organized. It came in 2005 in Birmingham and involved the shackles made by Hiatts, that were being used on my clients in Guantánamo Bay.[60] I had first seen them on Moazzam Begg in Camp Echo on my first trip there in 2004. Moazzam and I had shared a laugh at the irony: the shackles were from Birmingham and bore the inscription “Made in England”. Moazzam was himself “Made in England”, in Birmingham, and after he got out in 2005, he discussed our protest against Hiatts in the *Guardian*:

> Mr. Begg said: "When I was in Guantánamo Bay, one of the things I pointed out to my lawyer was how it was ironic that these shackles were made in England, just like me and him. It was very bizarre. Those shackles would often cut into my arms and legs and make me bleed. It was those very same shackles I saw being used by American soldiers in Bagram airbase to hang a prisoner from the ceiling. It said 'Made in England' on there too. If these cuffs are used to shackle people up to the tops of ceilings or cages and then [those people are] beaten, it calls into question what those shackles are actually being used for."

Moazzam came along on our escapade, and we all dressed up in orange Guantánamo-style prison suits, with Hiatts shackles, ready-made to be hauled off to prison if anyone wanted to give us a little extra publicity. We parked our flatbed truck outside the Hiatts headquarters, and the band *Seize the Day* cranked up their recent single, *Guantánamo Bay (Shackle Shuffle)*.

Modestly, I would claim we had an “impact” on Hiatts. Indeed, I would go so far as to say we “disrupted” their work: They had wisely closed for the day to avoid us. We regaled the world with their whole story, going back to 1780 when the started making “N****r Collars” for the slave trade. We got local Birmingham MPs Clare Short and Lynne Jones to published a letter with Moazzam explaining that they were asking Hiatt to "commit to voluntarily and permanently [ban] all further exports to the US military, and hence to Guantánamo Bay, given the notorious abuses practised there".

Indeed, we achieved precisely what we had aimed for – Hiatts closed their UK factory down altogether.[61] As our protest, the police were amused and refused our plea to take us into custody. Yet it would appear that they would have done so if a humourless local police chief did not like what we were doing. Under such circumstances, to borrow from Mr. Bumble, the law would be an ass, an idiot. As we shall see, such repression of our rights would never be countenanced in the US.

The law also includes establishing “Hate Incidents” which are recorded by the police and may lead to a hate crime prosecution:

> In this section “hate incident” means an incident or alleged incident which involves or is alleged to involve an act by a person (“the alleged perpetrator”) which is perceived by a person other than the alleged perpetrator to be motivated (wholly or partly) by hostility or prejudice towards persons with a

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[60] See generally Audrey Gillan, *UK Firm Picketed over Guantánamo ‘torture’ shackles*, The Guardian (Sep. 9, 2005), available at https://www.theguardian.com/uk/2005/sep/09/guantanamo.usa (accessed on 2025.02.19).

[61] *Infamous Handcuff Manufacturer to Leave Birmingham* (June 18, 2008), available at https://www.business-live.co.uk/economic-development/infamous-handcuff-manufacturer-leave-birmingham-3959202 (accessed on 2025.02.19).

particular characteristic.[62]

I would think our attitude towards Hiatts would be deemed hostile, though I would have politely told them that they should stop what they were doing, rather than shouting at them. This law can easily be read as covering any kind of demonstration against the Israeli ("Zionist") invasion of Gaza, just as it could logically apply to anyone who demonstrated against Hamas for what they did on October 6th, 2023 – the difference being that the British government would only ever use it against the former.

Building on the 1986 act, the 2022 act added the element of "noise":

> For the purposes of subsection (1)(aa), the cases in which the noise generated by persons taking part in a public procession may result in serious disruption to the activities of an organisation which are carried on in the vicinity of the procession include, in particular, where it may result in persons connected with the organisation not being reasonably able, for a prolonged period of time, to carry on in that vicinity the activities or any one of them.[63]

That's the end of *Mardi Gras* in New Orleans, then. The parades start at 7am, extending over two weeks leading up to the big day. I could barely get to my office, let alone think straight if I made it there. (Perhaps that was my excuse for just joining in.)

And so it goes on and on.

b. The Rights Peaceably to Assemble and to Petition the Government for a Redress of Grievances in the US.

As a result of the First Amendment, US citizens cannot face liability for a wide range of controversial actions. In *National Socialist Party of America v Village of Skokie,* 432 U.S. 42 (1978), the Supreme Court considered the right of American Nazi party members to march through a village containing Holocaust survivors whilst displaying swastikas on their uniform. To be sure, few demonstrations could be more offensive – though if the current Vice President has his way, the AFD will soon be marching all over Germany.

The American Nazis held regular demonstrations in Marquette Park, near their HQ. The Chicago authorities tired of this, and block these plans by requiring the party to post a $350,000 public safety insurance bond and by banning political demonstrations in the Park. The Nazis looked for another venue, and chose Skokie. About thirty of them announced plans to spend 30 minutes holding up signs demanding free speech for white men, including the phrases "White Free Speech", "Free Speech for White Americans", and "Free Speech for the White Men". At first the village was going to let them do it, on the principle that if it was quiet it would gain no publicity. However, the significant Jewish community included many Holocaust survivors, and some persuaded the mayor ordered the village attorney to seek an injunction. The village also adopted rules that banned marches in military uniform with Swastikas, as well as handing out hate leaflets.

The local court granted the injunction against the Nazis, and the Illinois courts refused to expedite the case. Many would think that sensible – who is going to support a jackbooted bunch of crackpots? The answer is that some mainly-Jewish lawyers from the ACLU stepped in to vindicate their rights. The US Supreme Court remanded the case and made it clear that any attempt to block a demonstration of any kind must be addressed immediately by the courts.

In the end, the march went ahead. This led to Skokie setting up the *Illinois Holocaust Museum and Education Center*.[64]

Perhaps of equal significance, it provoked a scene in the 1980 film *The Blues Brothers*. John

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[62] See https://www.legislation.gov.uk/ukpga/2022/32/section/60 (accessed 2025.02.19).

[63] See https://www.legislation.gov.uk/ukpga/2022/32/part/3/crossheading/public-processions-and-public-assemblies (accessed 2025.02.19).

[64] See https://en.wikipedia.org/wiki/Illinois_Holocaust_Museum_and_Education_Center (accessed on 2025.02.19).

Belushi is ‘Joliet’ Jake Blues (Joliet being an Illinois prison), and Dan Akroyd is his brother Ellwood Blues. At one point Jake asks a police officer what the demonstration on the bridge ahead of them is.

"Ah, those bums won their court case so they're marching today,” the cop replies. “The fucking Nazi Party."

Jake says “I hate Illinois Nazis.” Whereupon Ellwood drives their car at the demonstration, forcing them to jump off into the river. A side action for the rest of the movie involves the Nazis failing haplessly to exact revenge.

Perhaps, then, the Nazis lost this battle more effectively than they would have if the original injunction against them had been upheld, and there had been nothing more than a simple line in the local newspaper about it. This is another example of the First Amendment forcing us to choosing an educational – and hopefully humourous – response to some very bad ideas.

And so the First Amendment goes on. The case of *Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972), is an interesting one in the context of worker disputes. The US Supreme Court has set a higher standard for policing “content based” restrictions, which included Chicago’s effort to treat labour disputes differently from other demonstrations. Over the course of several months in 1967-68, Earl Mosley frequently picketed the Jones Commercial High School in Chicago with a sign that read: "Jones High School practices black discrimination. Jones High School has a black quota."

The court held that a Chicago ordinance could not prohibit picketing within 150 feet of a school whilst exempting other demonstrations:

> The Equal Protection Clause requires that statutes affecting First Amendment interests be narrowly tailored to their legitimate objectives. Chicago may not vindicate its interest in preventing disruption by the wholesale exclusion of picketing on all but one preferred subject. Given what Chicago tolerates from labor picketing, the excesses of some nonlabor picketing may not be controlled by a broad ordinance prohibiting both peaceful and violent picketing.

This ban could not be applied against Mosley when it was not applied on others doing similar things, albeit with different speech and motives.

The notion of what is free speech overlaps considerably with protest and demonstrations. In the U.S. case of *Texas v Johnson*, 491 U.S. 397 (1989), the Supreme Court held that *burning* the flag of the United States – let alone waving the flag of Hamas - was protected speech under the First Amendment, as it counted under symbolic and political speech.

This was an immensely contentious issue in the US, as 48 states had laws against “desecrating the flag” and Congress immediately passed a “Flag Protection Act” which was swiftly struck down by the court as well. *United States v. Eichman*, 496 U.S. 310 (1990). Next Congress considered a Flag Desecration Amendment to the US Constitution, but that never passed, as the amendment provision is thankfully complex.

Thus, unlike the UK, "freedom of speech applies to symbolic expression, such as displaying flags, burning flags, wearing armbands, burning crosses, and the like."[65] Everyone probably agrees with one of these actions – whether it is the Vietnam protester burning the flag or the Klansman burning a cross – but the First Amendment protects all these views.

The flag burning episode suggests another benefit of free speech. Societal issues are worked through by discussion, calmed by the Courts. The virulence of the political populism that led to the anti-flag burning anger eventually petered out.

They even shut me up. I was young and pretty stupid back then, and I planned a “flag burning” party at my house on my birthday which I was celebrating on July 4th, a few days after the Supreme Court decision on June 21st. I truly admired the Supreme Court decision upholding my favourite constitutional amendment. I planned to use Stars & Stripes playing cards on my darts board, and if you could hit it three times in a row it was yours to burn.

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[65] Scott Bomboy, *Flag burning and the First Amendment: Yet another look at the Two*, National Constitution Center (Nov. 30, 2016), available at https://constitutioncenter.org/blog/flag-burning-and-the-first-amendment-yet-another-look-at-the-two (accessed on 2025.02.19).

Someone in my own death penalty community snitched on me to the local media, who sent a truck around with cameras to catch some commie-pinko-liberal-lawyer doing such a thing. Fortunately someone had snitched on the snitch and told me, so I had substituted Union Jack cards. I doubt anyone in Britain would care if I was burning a little card with the British flag – they would just think I was a bit if a twit – and I was able to point out to the media that this was an entirely appropriate thing to do in celebrating Independence (from Britain) Day. Thus was a hot and rather foolish debate narrowly averted.

Had the earlier flag-burning convictions been upheld, the argument would have gone on forever, as it arguably does in the UK on other issues. By curtailing basic freedom of expression in the UK, the government potentially incites discord rather than calming it.

This has certainly been the case in Pakistan, where the British introduced the blasphemy laws, purportedly to stop discord between religious faiths but ultimately the deepest violation of the First Amendment imaginable. Banning blasphemy has empowered the intolerant, and the laws have grown into one of the great sores of society, with several hundred people on death row for saying relatively inconsequential things about one religion or another.

Calm is achieved by calm discussion. (Alright! I have learned that burning playing cards is not a very sensible way to persuade people!) The British practice courts the danger of authoritarianism where the government's view is the only one permitted, whereas in the US the First Amendment enables freedom of thought for all.

(*Watch this Space! Of course, there is every chance that a populist president will stir up trouble again, seizing on something like the flag burning issue to incite his MAGA base, whether anyone is burning one or not. It is then that we must hope that "his" justices on the Supreme Court remember what their real job is.*)