





# A thumb on the scale: measures short of a prohibition to combat hate speech

Jacob Rowbottom

University College, Oxford, UK

## ABSTRACT

While debates on hate speech often focus on the case for banning certain types of expression, this article will focus on less restrictive alternatives. The article will consider the denial of a benefit normally granted to speakers, media regulations and government sponsored speech to counter messages of hate. Such measures, it is argued, are more proportionate than an outright ban and do not exclude any particular viewpoints from political debate. However, such measures also depart from expectations of even-handedness from public bodies in relation to political viewpoints. With these factors in mind, the discussion explores the potential for some types of speech to occupy a grey area, in which messages of hate or extremism do not meet the threshold for prohibition but are still subject to viewpoint-based treatment that would not normally be compatible with freedom of expression.

**KEYWORDS** Hate speech; counter-speech; viewpoint neutrality; media regulation; freedom of expression

## Introduction

Debates about hate speech often focus on whether content should be banned, or whether such a prohibition would violate freedom of expression. The lines of argument are well known. Advocates of hate speech laws point to a number of harms that result from such speech, such as the impact on dignity, the failure to respect a person's equal status and the curbing of democratic participation.<sup>1</sup> The line of argument is that hate speech undermines the values of autonomy and equality that underpin democracy and free speech.<sup>2</sup> As a result, the normal rules of free speech are thought not to apply. By contrast, some critics of hate speech laws challenge the rationales

**CONTACT** Jacob Rowbottom ✉ [jacob.rowbottom@univ.ox.ac.uk](mailto:jacob.rowbottom@univ.ox.ac.uk)

<sup>1</sup>For discussion of some of the leading arguments. see A Harel, 'Hate Speech' in A Stone and F Schauer (eds) *The Oxford Handbook of Freedom of Speech* (OUP 2021) and J Waldron, *The Harm in Hate Speech* (Harvard University Press 2012).

<sup>2</sup>See Harel *ibid*.

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for the measures and the harms said to be caused by such speech. Other critics accept that hate speech causes harm, but argue that the prohibition of such content is precluded by the commitment to freedom of expression. There are numerous variations of the free speech argument, with some versions referring to the restriction of individual self-expression and autonomy,<sup>3</sup> and other versions framing the issue in terms of democratic legitimacy.<sup>4</sup>

The point here is not to resolve or address these lines of debate, but to note the tendency to debate the merits of hate speech laws in general or with specific reference to hate speech bans. When discussing the general principles, the focus on a prohibition is understandable as it provides the starkest example to test the boundaries of free speech and the case for restriction. Moreover, many of the leading cases that are the focus of debates concern criminal liability.<sup>5</sup> However, the lines of debate can give the impression that hate speech either exists outside of the free speech principle or enjoys full protection.

This article will consider a mid-way path in which restrictions short of an outright ban target certain types of hate speech. Following Issacharoff's work on anti-democratic speech, such measures can be described as a type of 'intermediate' regulation.<sup>6</sup> An intermediate measure may be permissible even if the normal thresholds and standards required to justify a criminal penalty or ban are not met.<sup>7</sup> If such an approach is taken, it appears that the types of hate speech subject to the intermediate regulation are not prohibited outright, but at the same time are not recognized as fully legitimate or included within public debate. This type of speech can be seen to occupy a 'grey area' that sits between inclusion and prohibition.

The line of argument builds on the current ECHR jurisprudence, which recognises that there are different degrees of hate speech, which may warrant different responses. Along such lines, the Strasbourg Court has distinguished between two categories of hate speech: (1) that which falls within

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<sup>3</sup>See C Edwin Baker, 'Hate Speech' in M Herz and P Molnar (eds) *The Content and Context of Hate Speech* (CUP 2012) 57–67.

<sup>4</sup>J Weinstein, 'Hate Speech Bans, Democracy and Political Legitimacy' (2017) 32 *Constitutional Commentary* 527.

<sup>5</sup>See the cases referred to in the European Court of Human Rights, *Factsheet – Hate Speech* (February 2022). There are exceptions to this point, such as the line of cases considering the liability of digital platforms in private law for failure to remove comments deemed to constitute hate speech, see *Delfi v Estonia* App no 64569/09 (ECHR, 16 June 2015). To be clear, criminal sanctions are not the only prominent restriction, for example the role of speech codes in universities has been another area of debate.

<sup>6</sup>S Issacharoff, 'Fragile Democracies' (2007) 120 *Harvard Law Review* 1405, 1418. Examples include restrictions on the electoral participation of anti-democratic political parties.

<sup>7</sup>Issacharoff, *ibid*, notes that the US First Amendment doctrine has been built around the question of 'whether the speech in question is sufficiently inciteful of criminal conduct to sustain a criminal prosecution', and cites R Pildes and F Schauer, 'Electoral Exceptionalism and the First Amendment' (1999) 77 *Texas Law Review* 1803.

Article 17 ECHR and is entitled to no ECHR protection and (2) hate speech that does not engage Article 17 and is entitled to some protection under Article 10 ECHR.<sup>8</sup> Article 17 provides that the ECHR does not protect acts and activities ‘aimed at the destruction’ of other Convention rights, and therefore refers to the most extreme forms of hate speech.<sup>9</sup> Accordingly, where Article 17 applies, there are no free speech issues and restrictions can be imposed on the expression without being subject to the usual tests under Article 10(2). The second category of hate speech is not excluded from Article 10, but receives a lower level of protection and the Court will grant considerable scope for states to restrict such speech.<sup>10</sup> A prohibition of hate speech in that category is permissible, as long as the Article 10(2) tests are met. This category is not limited to speech that incites or calls for violence, and extends to speech that insults, holds up to ridicule or slanders specific groups.<sup>11</sup> To decide whether hate speech in this category can be restricted, the court looks at a range of factors such as the content and the manner of delivery.<sup>12</sup>

The dual approach taken by the ECHR raises some difficult questions, not least how hate speech should be defined and where the boundary between the two categories lies. Within the second category, there can also be different degrees of hate speech that warrant different legal responses. That much is envisaged by the proportionality standard, under which a stronger justification is required for more severe restrictions. A criminal sanction prohibiting certain types of hate speech is a drastic measure and has the effect of banishing certain types of statement from public debate. Given the severity of a prohibition, a relatively high threshold is normally set for legal intervention. Less evidence may be demanded to show that an intermediate measure is necessary to prevent some types of harm. The ‘less restrictive means’ part of the proportionality test assumes that a lesser measure will sometimes be permissible even where a stronger sanction is not. This feature of the Article 10 jurisprudence suggests some scope for intermediate measures to be taken in relation to speech that is not prohibited.

That, however, does not exhaust the free speech analysis. Some objections to hate speech restrictions focus on the reason for the measure and the targeting of particular types of message.<sup>13</sup> The objection is to the public body’s decision that certain viewpoints are not deserving of a fair hearing in public debate. For example, the singling out of a viewpoint for adverse treatment

<sup>8</sup>*Carl Jóhann Lillindahl v Iceland* App no 29297/18 (ECHR, 12 May 2020) [33].

<sup>9</sup>*Perinçek v Switzerland* App no 27510/08 (ECHR, 15 October 2015).

<sup>10</sup>*Lillindahl v Iceland* (n 8) [35].

<sup>11</sup>*ibid* [36].

<sup>12</sup>*ibid*.

<sup>13</sup>For an argument connecting content neutrality doctrines in US law with an underlying concern with impermissible reasons, see E Kagan ‘Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine’ (1996) 63 *University of Chicago Law Review* 413.

runs counter to an influential justification for free speech rights, which requires government to permit the free and autonomous formation of public opinion.<sup>14</sup> That freedom is a condition of democratic legitimacy, as government is supposed to be directed by and accountable to public opinion.<sup>15</sup> In applying this approach, the argument runs that the legitimacy of restrictions on the manifestation of hatred, such as discrimination laws, rest on people's freedom to express hostility to the values that such laws embody.<sup>16</sup> This line of argument does not dispute the harms caused by hate speech, but applies a special restriction to government action. Accordingly, that restriction precludes official interference with speech because the view expressed is disfavoured by those in authority.

On the analysis so far, the intermediate measure may be more proportionate than an outright ban, but will nonetheless cross a line by subjecting certain viewpoints to less favourable treatment. The challenge cannot be sidestepped by denying that intermediate measures engage the right to free speech, especially since a broad definition of an interference is taken under Article 10.<sup>17</sup> The use of intermediate measures therefore represents a compromise. On the one hand, some messages associated with hate are not prohibited outright and some degree of circulation is tolerated. At the same time, the public body may be permitted to take steps that stop certain messages being given a fair hearing. The acceptance of such intermediate measures is based on the special position of hate speech in the grey area, which means it can be subject to restrictions that would not be accepted for other types of political speech (broadly defined). The harms of hate speech thereby allow the government or public body to abandon its commitment to fairness or even-handedness in the political process.<sup>18</sup> The line of thinking envisages that a democracy can take some measures to self-protect, while stopping short of the more severe steps normally associated with a militant democracy.

The discussion will consider three non-exhaustive examples: (1) the denial of a benefit, (2) media regulation, and (3) state sponsored counter-speech. These measures do not ban hate speech, but place a thumb on the scale to disadvantage the speech in political debate and reduce the chance

<sup>14</sup>R Post, 'Hate Speech' in I Hare and J Weinstein (eds), *Extreme Speech and Democracy* (OUP 2009) 136, writing about the approach in US constitutional law.

<sup>15</sup>See 'Interview with Robert Post' in Herz and Molnar (n 3), 24–25, referring to a 'default rule' subject to contextual considerations.

<sup>16</sup>R Dworkin, 'Foreword' in Hare and Weinstein (n 14) vii, and Weinstein (n 4). See also E Heinze, *Hate Speech and Democratic Citizenship* (OUP 2016) 22.

<sup>17</sup>See discussion in *R (on the application of Miller) v College of Policing* [2021] EWCA Civ 1926 [73]. For a rare case where a measure did not constitute an interference, see *Schweizerische Radio- und Fernsehgesellschaft v Switzerland* App no 68995/13 (ECHR, 12 November 2019).

<sup>18</sup>For discussion of the general principles that public power should not be used for political advantage, see J Rowbottom, 'Political Purposes, Anti-entrenchment and Judicial Protection of the Democratic Process' (2022) 42 *Oxford Journal of Legal Studies* 383.

of the message of hate convincing anyone. Some of the measures may be widely accepted and others more controversial. The aim of the discussion is not to endorse any of these steps, but to show how hate speech can occupy a special category, even when the content is not banned. The discussion thereby invites further consideration of whether and when such measures should be permitted, and what types of speech (if any) should occupy this grey area.

The discussion below will not consider social media regulation to combat hate speech, although some of the restrictions discussed will have an indirect impact on social media activity. For example, if a political party is denied public funds, then that limits the resources that can be spent on social media advertising. Government supported counter-speech could also take place on social media. The discussion will not look at current proposals for social media regulation, but is relevant to the debates on those proposals. The framework discussed here is applicable to social media regulations that do not ban speech outright, but restrict the availability and reach of certain types of content on platforms. Such measures could be considered a type of intermediate regulation, in so far as the speech is permitted off the social media platform and liability is not imposed on the speaker.<sup>19</sup>

### **Denial of a benefit and conditions on access**

The first example of action short of an outright prohibition is the denial of a benefit or denial of access to a resource that facilitates speech. Such measures do not forbid the person from speaking. Instead, the person is not given access to resources for communication that would otherwise be granted. The strategy will often enjoy public support, given that most people would find it unacceptable for the state to finance activities that generate divisions in society and perpetuate hatred. The point can be illustrated with reference to a system that publicly funds political parties. In such a system, imagine a political party advocates certain policies that are overtly racist, but the party is not prohibited and not subject to criminal law restrictions. In such an example, the party is free to field candidates and promote its policies. However, the relevant authorities may decide to deny public funding to the party on the grounds that the overtly racist goals of the party are incompatible with fundamental democratic values. The restrictiveness of the measure will depend on whether the party has alternative sources of finance and other avenues to communicate. While the measure does not address the problems arising from the disparities in campaign resources,

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<sup>19</sup>This is not to say all such measures will be permissible. The compatibility with free speech will depend on what the social media regulations require in relation to hate speech and what safeguards are in place.

the denial of a benefit is significant in the refusal to allow public resources to subsidise hate messages and anti-democratic activities. The significance also lies in the decision of the public body to place a thumb on the scale to deliberately disadvantage the extreme party.

While a speaker does not normally have an entitlement to a benefit, the free speech principle is engaged by a public body singling out a speaker for different treatment based on the viewpoint being expressed. Such a denial amounts to a departure from the expectation that different parties should have an equal opportunity to convince the public in an election. If the government were to deny funding to an opposition party (which does not have anti-democratic objectives), simply because the government wishes to entrench its position in office, then that decision would taint the legitimacy of the election. If a denial of a benefit to hate speech is permissible, it therefore shows that a different approach is taken in which certain viewpoints do not have equal status, even where those viewpoints are not legally prohibited.

### ***Denial of a subsidy***

The denial of a benefit to combat extreme speech, while controversial, is accepted in some European systems. The issue arose in Germany in relation to anti-democratic speech after the German Constitutional Court rejected an application to prohibit the National Democratic Party of Germany (NPD) in 2017.<sup>20</sup> Despite the party's objective 'to abolish the free democratic basic order',<sup>21</sup> the Court looked at a range of factors, such as the methods and levels of support for the party, and found that there were 'no specific and weighty indications suggesting even at least the possibility that these endeavours might be successful'.<sup>22</sup> As a result, the party failed to meet the threshold for prohibition. The Court also noted that the Basic Law did not include a provision to impose sanctions below the level of a prohibition, such as the removal of state funding.<sup>23</sup> Moreover, the German Court emphasised the importance of equality of opportunity for political parties.

The 2017 ruling showed that there was limited scope at the time for the state to deny benefits to the NPD. However, the Basic Law was subsequently amended to include a clause for anti-democratic parties to be excluded from schemes of public funding.<sup>24</sup> The amended Basic Law provides different thresholds for a prohibition order and the denial of public funding. The

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<sup>20</sup>I am grateful to Mathias Hong for this example.

<sup>21</sup>BVerfG (17 January 2017), 2 BvB 1/13 ([https://www.bverfg.de/e/bs20170117\\_2bvb000113en.html](https://www.bverfg.de/e/bs20170117_2bvb000113en.html)).

<sup>22</sup>*ibid* [633].

<sup>23</sup>*ibid* [625].

<sup>24</sup>Basic Law for the Federal Republic of Germany, Article 21(3) ([https://www.gesetze-im-internet.de/englisch\\_gg/englisch\\_gg.html#p0118](https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0118)).

law in Germany provides that parties that ‘*seek* to undermine or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany’ can be prohibited [emphasis added]. By contrast, parties that ‘are *oriented* towards an undermining or abolition of the free democratic basic order or an endangerment of the existence of the Federal Republic of Germany’ can be denied state funds. The use of the term ‘oriented’ suggests that authorities do not have to establish the party’s prospects of success in achieving its aims. The provisions therefore envisage a system in which a political party is lawful, can organise and contest elections, but is denied certain benefits. The point should not be overstated, as earlier rules which emphasise equality among parties remain in place.<sup>25</sup> However, the amendment shows how the law can place certain parties in a grey area in which they are neither fully included nor excluded in the political system.

### **Conditions on the use of a public subsidy**

The discussion above focuses on the denial of a benefit to a speaker or organization that promotes hatred or anti-democratic goals. An alternative strategy is not to deny the benefit, but to impose conditions on the use of the benefit so that state resources do not directly subsidise the message of hatred. From one perspective, the condition is a lesser restriction, as the group still receives the benefit. In some cases, the condition may only limit the manner of expression, rather than the communication of the viewpoint.<sup>26</sup> Under this view, the measure incentivises the speaker to rephrase the message in terms that do not violate the particular standard.<sup>27</sup> However, the distinction between the manner of expression and the viewpoint may be less clear with hate speech restrictions, where the condition is more likely to restrict the essence of the message. From another perspective, a condition on the use of the resource is more intrusive than a denial of a benefit, as the public authority decides what uses (or what messages) are permissible. On this view, the problem lies in the public body regulating the exercise of the expression right.

The point can be illustrated by looking at political parties in the UK. In the UK, direct public funding to political parties is limited, and offered to those with a degree of electoral success.<sup>28</sup> However, there are various benefits in

<sup>25</sup>In its earlier decisions, the Constitutional Court has also ruled that the broadcasting authorities cannot deny advertising to extremist political parties. See Issacharoff (n 6) 1447, citing BVerfG, *Radical Groups Case* (14 February 1978), 47 BVerfGE 198.

<sup>26</sup>See *R v Secretary of State for the Home Department, Ex parte Brind* [1991] 1 AC 696, 749 (Lord Bridge).

<sup>27</sup>A requirement to refrain from certain forms of speech can be contrasted with a condition to adopt a particular message that amounts to a form of compelled speech. See *Lee v Ashers Baker Company Ltd* [2018] UKSC 49 [52], and *Wheeler v Leicester City Council* [1985] AC 1054, finding a requirement to publicly condemn a tour of apartheid-era South Africa to be unlawful.

<sup>28</sup>For example, some public funds are provided to the support the work of the Opposition in Parliament.



kind that are offered to political parties, such as free access to the broadcast media (known as party election broadcasts).<sup>29</sup> To qualify for a broadcast, parties have to contest a relevant number of parliamentary seats at an election.<sup>30</sup> Even where a party has no prospect of electoral success, gaining such access has provided an important way for some political groups to raise their profile. Such access is now less crucial for parties, given the access to audiences via the digital media. However, the system of party election broadcasts provides a useful example as it raises the question of whether conditions can be attached to the use of the benefit by extreme parties.

In a number of past elections, the British National Party has qualified for a party election broadcast by fielding a sufficient number of candidates. While the party has been offered access, the content regulations for broadcasters have restricted the messages that could be carried. For example, in 2004 a broadcaster refused to show a BNP election broadcast concerning allegations of anti-white crimes being committed by Asian men in West Yorkshire.<sup>31</sup> The broadcaster refused to show the film on the grounds that it was likely to stir up racial hatred. This did not deny the BNP its time on the media, but the party had to change its message for the purposes of the broadcast.<sup>32</sup> The content regulations applicable to election broadcasts are not limited to the high threshold of content likely to stir up hatred. The Ofcom Broadcasting Code provides broader grounds for restriction, such as harm and offence, which apply a lower threshold.<sup>33</sup> Applying these rules, a broadcaster could decline to carry an election broadcast that is overtly racist or includes discriminatory content (and could face a regulatory sanction if it did carry such content), even if it would not stir up hatred.<sup>34</sup>

The compatibility of content-based standards on party election broadcasts with freedom of expression was considered by the House of Lords in *ProLife Alliance*.<sup>35</sup> That case did not concern hate speech, but set out the principles that would be applied in such a case. While noting that there is no general right for political parties to access the media under Article 10, the House of Lords held that ‘access to an important public medium of communication should not be refused on discriminatory, arbitrary or unreasonable grounds’

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<sup>29</sup>Communications Act 2003, s 333.

<sup>30</sup>Ofcom, *Ofcom Rules on Party Political and Referendum Broadcasts* (2020).

<sup>31</sup>See discussion in J Rowbottom, ‘Extreme Speech and the Democratic Functions of the Mass Media’ in Hare and Weinstein (n 14) above. See BBC News, ‘BNP forced to edit election film’, 29 May 2004 ([http://news.bbc.co.uk/1/hi/uk\\_politics/3757641.stm](http://news.bbc.co.uk/1/hi/uk_politics/3757641.stm)).

<sup>32</sup>See Ofcom, *Programme Complaints Bulletin*, Issue 18 (September 2004) finding no breach of the Code.

<sup>33</sup>Ofcom, *The Ofcom Broadcasting Code* (<https://www.ofcom.org.uk/tv-radio-and-on-demand/broadcast-codes/broadcast-code>).

<sup>34</sup>The content of an election broadcast is primarily the responsibility of the political party, but should also be considered by the broadcaster, *Ofcom Rules on Party Political and Referendum Broadcasts* (2020) at [6]. A breach of the Code can provide the basis of a complaint to Ofcom.

<sup>35</sup>*R (on the application of ProLife Alliance) v BBC* [2003] UKHL 23, [2004] 1 AC 185.

nor 'subject to discriminatory, arbitrary or unreasonable conditions'.<sup>36</sup> The refusal to show a party election broadcast on the grounds that it would offend standards of 'taste and decency' (under the broadcast rules at the time) was not found to be unreasonable. While the case concerned the use of images that might cause offense, the reasoning showed how broadcasters and regulators have considerable leeway to apply content restrictions in relation to the use of a publicly-granted resource.<sup>37</sup> The leeway granted to the broadcasters, suggests that Article 10 will, in some cases, permit the application of regulations to stop political parties carrying specific views or messages associated with hate, even where those messages are otherwise lawful.

### Conditions on access

A related issue has arisen where a speaker seeks access to a publicly-owned forum, and where conditions are applied on access.<sup>38</sup> The decision in *Core Issues* illustrates the point, although the case concerned a restriction on advertising on the grounds of offence and 'public controversy', rather than hate speech. In that case, the courts upheld Transport for London's decision not to accept an advertisement from the Core Issues Trust on a bus, stating 'NOT GAY! EX-GAY, POST-GAY AND PROUD. GET OVER IT!'.<sup>39</sup> The advertisement was to be a reply to an earlier advert from Stonewall with the words 'SOME PEOPLE ARE GAY. GET OVER IT!'. Core Issues challenged the decision, partly on Article 10 grounds, arguing that the decision discriminated against the group, as it was not able to reply to the Stonewall advertisement. Both Lang J and the Court of Appeal rejected the challenge.

In the Administrative Court, Lang J placed weight on the limited informational value of the speech, finding that it was entitled to less protection as it was 'a confrontational assertion, not a reasoned, informed contribution to a debate'.<sup>40</sup> The judge referred to the advertisement as causing 'grave offence'.<sup>41</sup> The limited nature of the restriction was another key element of the reasoning in *Core Issues*. Lang J stated 'those who wish to promote an offensive or controversial message should be entitled to do so', but they should do so via '[p]osters, leaflets, articles, meetings and the internet'.<sup>42</sup> Similarly the Court of Appeal stated the group 'is not faced with a total prohibition on publishing and disseminating its message'.<sup>43</sup> Accordingly, the

<sup>36</sup>*ibid* [8].

<sup>37</sup>See the discussion of the respect to be shown to the decision maker in *ProLife Alliance*, *ibid*.

<sup>38</sup>The difference here is that the speaker does not seek a subsidy or benefit.

<sup>39</sup>*R (on the application of Core Issues Trust) v Transport for London* [2014] EWCA Civ 34 (Court of Appeal) and [2013] EWHC 651.

<sup>40</sup>[2013] EWHC 651, [142]. Lang J thought similar criticism could be made of the Stonewall advertisement, [135].

<sup>41</sup>*ibid* [138].

<sup>42</sup>*ibid* [132].

<sup>43</sup>[2014] EWCA Civ 34 [83].

court considered the severity of the sanction when assessing the proportionality of the measure.

Despite the limited effect, the public body departed from expectations to act even-handedly on a question of access to a communicative forum. Lang J accepted that Transport for London applied the policy ‘inconsistently and partially’, as the advertisement accepted from Stonewall would also have been offensive to some people.<sup>44</sup> However, the inconsistent treatment was justified by a number of countervailing factors, including ‘the nature of the message, its effect on gays, and the public sector equality duty’.<sup>45</sup> In relation to the latter, Lang J found that allowing the advertisement to appear on buses would result in a breach of the Equality Act 2010, in so far as the message encouraged discrimination based on sexual orientation.<sup>46</sup> The judge noted the argument that the freedom to express views that are hostile to equality is a condition that legitimates discrimination law statutes. However, Lang J found the protection of free speech on that ground to be precluded by the obligations under the Equality Act 2010.<sup>47</sup> According to this reasoning, the discriminatory nature of the message in the proposed advertisement justified the inconsistent treatment. In supporting this conclusion, the Court of Appeal compared the messages in the Stonewall and Core Issues advertisements. Lord Dyson MR stated that the Stonewall message was ‘intended to promote tolerance of homosexuals and discourage homophobic bullying’.<sup>48</sup> By contrast, Dyson MR thought the Core Issues advertisement was ‘liable to encourage homophobic views and homophobia places gays at risk’.<sup>49</sup> The Core Issues’ advertisement was to be seen as ‘encouraging “gay rejection” by implying offensively and controversially that homosexuality can be cured’.<sup>50</sup>

Several factors in *Core Issues* are important for the present discussion. The case is an example where the speech did not constitute unlawful hate speech, but fell into a category that was said to ‘denigrate people on the basis of protected characteristics’.<sup>51</sup> That provides another example of the grey area of speech. By falling into this category, the public authority denied access to a forum to disseminate the message. Moreover, access was denied to the group, even though an organisation expressing an opposing view was allowed to advertise. The viewpoint based distinction raises flags in relation to free speech and marks a departure from standards of even-handedness from public authorities. Nonetheless, the court permitted the public

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<sup>44</sup>[2013] EWHC 651 [135] and [137].

<sup>45</sup>*ibid* [146].

<sup>46</sup>*ibid* [144].

<sup>47</sup>*ibid* [145].

<sup>48</sup>[2014] EWCA Civ 34 [88]. Compare with the view of Lang J [2013] EWHC 651 at [136].

<sup>49</sup>*ibid* [85], agreeing with Lang J [2013] EWHC 651, [142].

<sup>50</sup>[2014] EWCA Civ 34 [88].

<sup>51</sup>[2013] EWHC 651 [145].

authority to act in a way that disadvantaged the speech and made it less likely to reach an audience.

The examples discussed in this section have shown how speakers advancing messages that are contrary to core democratic values, promote hatred or are hostile to equality are sometimes denied a benefit or subject to content restrictions when using the benefit or seeking access to a forum. The question is whether such restrictions are justified and if so which speakers or messages such measures should apply to? These types of issue are likely to become more pressing if Article 10 is taken to require more positive support for free speech. Questions will arise as to whether the positive support extends to those promoting hate or the unequal treatment of protected groups. However, the examples above show that departures from the usual standards of even-handedness expected in relation to political speech are sometimes permitted when the speech in question falls within the grey area.

## Media regulation

Media regulation is another type of measure that can combat hate speech short of criminalisation. A regulatory rule prohibiting the dissemination of hate speech on the media appears to have much in common with a prohibition, as a legal measure stops a speaker from saying something based on the content or viewpoint expressed. However, media regulations do not stop statements of hatred from being uttered outside of the media and in other settings. Media regulations thereby curb the reach of the message, rather than prohibit the speech outright. While a media regulation can reduce the visibility of the speech, the sanction imposed by the regulator will also be less severe and normally result in a reprimand or fine. For these reasons, the media regulation is more likely to be proportionate.

Another reason why some media regulations are more likely to be permissible lies in the distinct nature of media freedom, which is often justified by its service to the public in a democracy.<sup>52</sup> The media institution does not have the human interest in speaker autonomy or the personal right to participate in collective decisions. Instead, media freedom is valued for the provision of information and ideas, the scrutiny of government and other powerful actors, and as a forum for debate and deliberation. In line with this justification, the Strasbourg Court has often stated that the media are expected to comply with professional ethics and provide information and ideas that will be of some value to the public. While professional ethics most commonly refers to systems of verification, it can also include an

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<sup>52</sup>See J Rowbottom, *Media Law* (Hart 2018) ch 1, *R (on the application of Miranda) v Secretary of State for the Home Department* [2014] EWHC 255 (Admin), [2014] 3 All ER 447 [46], J Lichtenberg, 'Foundations and limits of freedom of the press' in J Lichtenberg (ed), *Democracy and the Mass Media* (Cambridge University Press 1990).

expectation not to inflame tensions or present stories in ways that can be used by groups that wish espouse hatred towards others.<sup>53</sup> The media has to take particular care, as its reach and authority provides the potential to amplify the harms that are attributed to hate speech.<sup>54</sup> Reports in the media can also feed online cultures of hatred.<sup>55</sup> For example, a story in a newspaper or TV programme promoting a race angle in relation to a particular issue could be seized on as evidence by extreme digital speakers. For these reasons, media organisations may be subject to obligations not to disseminate hate that go beyond the general legal obligations that apply to any speaker. However, such measures will only be permissible when compatible with media freedom, which will be discussed later.

The clearest example of such an obligation can be found in the Ofcom Broadcasting Code, which provides that '[m]aterial which contains hate speech must not be included in television and radio programmes or BBC ODPS except where it is justified by the context'.<sup>56</sup> While the obligation overlaps with parts of the criminal law,<sup>57</sup> the provision is broader as it refers to a wider range of protected characteristics, applies a lower threshold that includes content that *spreads* or *promotes* hatred and does not include a mens rea requirement.<sup>58</sup> The Code also contains an obligation to protect viewers from harmful or offensive content, which includes 'discriminatory treatment or language (for example on the grounds of age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex and sexual orientation, and marriage and civil partnership)'. Again, the

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<sup>53</sup>The Strasbourg Court has stated that national authorities need to show caution to ensure that the media does not 'become a vehicle for the dissemination of hate speech and the promotion of violence', *Erdogdu v Turkey* App no 25723/94 (ECHR, 15 June 2000).

<sup>54</sup>See Council of Europe, *Recommendation R (97) 20 of the Committee of Ministers to Member States on 'Hate Speech'* (1997), noting that hate speech 'may have a greater and more damaging impact when disseminated through the media'.

<sup>55</sup>See for example, Hacked Off, *White Supremacism, the Press and the Absence of Regulation* (2020) (<https://hackinginquiry.org/wp-content/uploads/2020/09/White-supremacism-the-press-and-the-absence-of-regulation.pdf>).

<sup>56</sup>*Ofcom Broadcasting Code* (n 33) [3.2]. While the broadcast media is subject to the broadest set of obligations, some other media sectors are subject to statutory rules limiting hate speech. On-demand video services are subject to a statutory rule not to 'contain any material likely to incite violence or hatred against a group of persons or a member of a group of persons' based on certain protected characteristics, see Communications Act 2003, s 368E. The protected characteristics are those referred to in Article 21 of the Charter of Fundamental Rights of the European Union of 7 December 2000, as adopted at Strasbourg on 12 December 2007. Video-sharing platforms are also required to take certain measures to protect the public from material that is likely to incite hatred, see Communications Act 2003 s 368Z1. While not as broad as the rules for television and radio, both examples are statutory obligations which have a different scope and threshold than the criminal law.

<sup>57</sup>Broadcasters are reminded to consider s 22 and s 29F of the Public Order Act 1986.

<sup>58</sup>*Ofcom Broadcasting Code* (n 33) defines hate speech as 'All forms of expression which spread, incite, promote or justify hatred based on intolerance on the grounds of disability, ethnicity, social origin, gender, sex, gender reassignment, nationality, race, religion or belief, sexual orientation, colour, genetic features, language, political or any other opinion, membership of a national minority, property, birth or age'.

rules are cast in more general terms and can apply to a wider range of content than the criminal hate speech laws.

Applying these rules, in May 2020, a £100,000 fine was imposed by Ofcom after *Peace TV* broadcast a programme in which the presenter made comments ‘comparing homosexuals to animals’, and ‘describing the practice of homosexuality as insane, corrupt and a manifestation of satanic influence’.<sup>59</sup> Ofcom found the programme breached the provisions relating to hate speech and offensive content. The example is an extreme case which called for a strong sanction, but also shows how the regulations restrict content without having to meet the higher thresholds of the criminal law.<sup>60</sup> The rules can also be applied to less extreme cases, in which case a lesser penalty will be applied.

The print media are not subject to statutory regulations and newspapers have their own systems of self-regulation. The self-regulatory systems do not involve the state acting to disadvantage a message of hate, as with the other intermediate controls. However, such methods provide another potential avenue to tackle hate speech. Along such lines the self-regulatory rules covering newspapers add professional obligations in relation to hatred and discrimination. The Editor’s Code of Practice, which is used by IPSO, provides that newspapers ‘must avoid prejudicial or pejorative reference to an individual’s race, colour, religion, sex, gender identity, sexual orientation or to any physical or mental illness or disability’.<sup>61</sup> That provision goes beyond the requirements of the criminal law and regulates the ‘pejorative’ reference as opposed to the incitement of hatred. There are, however, limits to the Code as it does not restrict content that refers to groups, as opposed to specific individuals. The issue has been one of controversy. In 2017, *The Sun* published an article, which concluded ‘What will we do about The Muslim Problem then?’ However, IPSO concluded that the article did not violate the discrimination clause of the Editor’s Code because it did not refer to a specific individual.<sup>62</sup>

Despite the controversy, the Editor’s Code Committee has rejected the case for a more general anti-discrimination provision that targets groups. The Committee said that the Code should not duplicate the criminal law on inciting hatred.<sup>63</sup> This argument is not convincing, given that regulatory

<sup>59</sup>Sanction Decision by Ofcom, *Sanction: to be imposed on Lord Production Inc Limited* (May 2020).

<sup>60</sup>For example, s 29F of the Public Order Act 1986 criminalises broadcasts *intended* to stir up hatred on the basis of sexual orientation where the programme involves images or sounds that are *threatening* [emphasis added].

<sup>61</sup>Editor’s Code of Practice (2021), clause 12 (<https://www.ipso.co.uk/media/2032/ecop-2021-ipso-version-pdf.pdf>). Compare the IMPRESS Standards Code, clause 4.3 (<https://www.impress.press/downloads/file/code/the-impress-standards-code.pdf>).

<sup>62</sup>*Elgy v The Sun*, 26/10/2017. The complaint based on the accuracy clause was also rejected, (<https://www.ipso.co.uk/rulings-and-resolution-statements/ruling/?id=17562-17>).

<sup>63</sup>Editor’s Code of Practice Committee, *Editors’ Code of Practice Review Report* (2020) (<https://www.editorscode.org.uk/downloads/reports/Editors-Code-of-Practice-Review-2020-Report.pdf>).

codes often overlap with legal standards, and help to resolve complaints without taking journalists to court. Moreover, a regulatory system can apply different thresholds and standards of evidence, and can go beyond the criminal law in setting down practices in line with professional ethics. The Committee also concluded that a wider clause on hate speech 'would limit freedom of expression and prevent a free press examining and debating key issues'.<sup>64</sup> While the broadcast media is subject to broader obligations on hate speech, the free speech issues may be more pressing for newspapers which have a very different culture and a tradition of more politically attached coverage.<sup>65</sup> The particular concern is that wider restrictions on discriminatory speech may inhibit the reporting of controversial subjects. While the self-regulatory codes are the subject of debate, there is good reason for caution and the impact of a regulatory provision on media freedom needs to be carefully assessed.

There are several ways that a regulatory control on hate speech can undermine the performance of the other democratic functions assigned to the media. In the well-known case of *Jersild v Denmark*, the Strasbourg Court found that the conviction of a journalist for the inclusion of statements from members of a far right wing group in a documentary violated Article 10.<sup>66</sup> The Court found that the individual members of the group that made the statements could be prosecuted without a violation of Article 10. By contrast, the journalist broadcast the comments in a programme aiming to inform the public of views held by certain groups and was not seeking to promote those views. While that case concerned a criminal penalty, similar considerations can arise if a prohibition on hate speech on the media is made via a regulatory measure. However, the flexibility of media regulations can accommodate this problem, especially where there is a provision that content can be justified by the context (as in the broadcast regulations). That way regulators should be able to differentiate between media advocacy and reporting.

There is also a tension between restrictions on hate speech and the role of the media in carrying diverse views and perspectives. Under this view, the media provides a type of forum in which competing views come together and ideas are exchanged.<sup>67</sup> By performing this function, every relevant viewpoint should get a fair hearing.<sup>68</sup> For example, broadcasters are required to cover matters of political controversy with 'due impartiality'. However, when covering hate speech the ordinary rules are displaced and the broadcaster is

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<sup>64</sup> *ibid.*

<sup>65</sup> Rowbottom, 'Extreme Speech and the Democratic Functions of the Mass Media' (n 31).

<sup>66</sup> *Jersild v Denmark* App no 15890/89 (ECHR, 23 September 1994).

<sup>67</sup> Rowbottom (n 31).

<sup>68</sup> The approach has much in common with Meiklejohn's argument for free speech, see A Meiklejohn, *Free Speech and Its Relation of Self-Government* (Harper 1948).



not expected to be impartial to core democratic values.<sup>69</sup> The impartial coverage and inclusion of messages of hatred could undermine the 'forum' function of the media by creating a truly hostile environment that would turn certain groups away from that service. For a meaningful democratic debate, participants need to be recognised as being of equal worth and respect, otherwise there is little chance that their views will be given a fair hearing.

At the same time, there are risks in simply ignoring the extreme speaker and groups, so regulations should not prohibit the engagement with such speakers. Along these lines, a news organisation may invite an extreme speaker onto a panel discussion or interview, but should take care to avoid a breach of any regulatory or professional obligation. When including people or organisations associated with hate speech, the media should not aim to provide a platform or give the viewpoint a fair hearing.<sup>70</sup> The media also has to be careful not to inadvertently legitimate the message of hate by presenting it as a credible alternative to the non-extreme views or by normalising such speech. Instead, the purpose is to subject speakers expressing messages of hate to scrutiny and to challenge those views. The line of thinking is that the inclusion of the speaker is more likely to expose the weaknesses in the messages of hate in the hope that the audience will reject those views. When invited onto a television panel or when interviewed on the media, the extreme speaker is therefore not included in democratic debate on equal terms with opposing views, but is placed in a different category that receives more critical scrutiny.<sup>71</sup>

The discussion has shown that there are rules that directly restrain some media sectors from being used as vehicles of hate. Messages that may not reach the threshold for criminalisation can still be subject to a regulatory sanction. In the case of the broadcast media, these rules are imposed by a statutory regulator and will restrict the communication of certain viewpoints. The rules applicable to the broadcast media thereby provide another example of a state imposed intermediate measure. By contrast, the self-regulatory restraints on the national newspapers are far more limited

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<sup>69</sup>See BBC Editorial Guidance, *Racism* (2020), stating 'The position that the BBC is not impartial on racism reflects the BBC's underlying commitment to fundamental democratic principles.' See also Lord Annan (Chairman), *Report of the Committee on the Future of Broadcasting* (Cmnd, 6753 1977) para 17.21.

<sup>70</sup>Ofcom, *Broadcasting Code Guidance Notes* (2016) warns against providing an 'uncritical platform' to extreme speech.

<sup>71</sup>Along such lines, some broadcasters have defended decisions to interview certain controversial figures, as an opportunity to challenge the viewpoint. See 'Finsbury Park mosque attack: EDL founder Tommy Robinson's appearance on Good Morning Britain sparks outrage' *The Independent*, 20 June 2017, and 'BBC defends inviting far right leader to speak about Christchurch mosque attack on Newsnight', *The Independent*, 16 March 2019. However, the position is not always consistent. For example the decision to invite the leader of the BNP onto BBC's Question Time in 2009 was justified in terms of a need to include views that have secured a level of electoral success (in the European elections at the time), see 'BBC is right to allow BNP on Question Time, says Mark Thompson' *The Guardian*, 22 October 2009.



and have been the subject of controversy. The discussion of both systems shows the complexity of hate speech in relation to the media. While a media body should not become a vehicle for hate, it should not ignore extremist messages. Instead, the media is expected to scrutinise and challenge messages that promote hatred. However, the expectation is not for the media to treat such messages with balance or provide a fair hearing. Instead, the critical engagement of the media with such views can constitute a type of counter-speech provided by an independent non-state actor.

## Counter-speech

A third strategy for dealing with hate speech short of a ban is government sponsored counter-speech. Under this strategy, the public body uses its communicative resources to challenge messages of hate or provides support to other groups to challenge such messages.<sup>72</sup> The approach is one that utilises government speech or government sponsored speech. Proponents of counter-speech measures see it as a way of avoiding free speech problems as it does not stop anyone from saying anything. According to this view, counter-speech does not amount to censorship and simply adds to the overall quantity of expression. Nobody is compelled to accept the government's message and the countering of hate is achieved through persuasion.

Along such lines, Corey Brettschneider has written in the US that while the state is required to be neutral when using its coercive powers, it is not required to be neutral when it comes to its own expression in support of democratic values.<sup>73</sup> On this view, providing reasons to citizens is compatible with free speech because it 'respects their capacity as free and equal citizens to decide upon their own conception of the good and their conceptions of justice'.<sup>74</sup> Accordingly, the state should be expected to use its communicative power to challenge expressions of hatred. Similarly, Eric Heinze argues that while hate speech laws violate free speech, government is permitted to express and sponsor messages that promote tolerance.<sup>75</sup> Under this approach, government is not required to be neutral in all activities, but it cannot stop other people expressing hostility to its policies and certain core values.

Government communications are a tool used to advance many policy goals. For example, government may use its communicative resources to promote compliance with duties under the Equality Act, which is likely to be uncontroversial. The communicative power of the state is regularly

<sup>72</sup>See discussion in K Gelber, 'Reconceptualizing Counterspeech in Hate Speech Policy (with a Focus on Australia)' in Herz and Molnar (n 3).

<sup>73</sup>C Brettschneider, *When Government Speaks, What Should It Say?* (Princeton University Press 2012) 79.

<sup>74</sup>*ibid*, 66.

<sup>75</sup>See Heinze (n 16) 111–16. For discussion of state supported counter-speech, see also M Lepoutre, *Democratic Speech in Divided Times* (OUP 2021) ch 3.

used to promote public health messages. However, there should be limits on the way government can use its resources to shape public opinion, particularly on matters that are subject to democratic debate.<sup>76</sup> Imagine the government uses its communicative power as part of a publicity campaign to build support for a politically controversial proposal to extend parts of equality law. In such an example, the case would go beyond the implementation of a democratically approved policy, but would seek to generate democratic approval of a proposed policy. This might involve communications that respond to messages of hate made by groups opposing the extension of equality law. The latter example would be a departure from the usual expectations of government in relation to political debate.

As noted earlier, by communicating, the government does not enforce its view by shutting down any viewpoint. However, by using its resources in the example given above, the government is doing more than supplying reasons. The government is lending its authority to support a particular outcome that is subject to democratic contestation.<sup>77</sup> If government has a free hand it could use its resources to drown out other speakers, distract attention and set the agenda for discussion. Government speech may provide a way of managing and directing public opinion that is more subtle than censorship. More fundamentally, the issue is not just about the effect of the intervention, as the communication on a matter of democratic debate is at odds with the relationship between democratic government and citizens, including the respect for the independence and autonomy of public opinion. Under this view, government is not itself a participant in the debates that form public opinion, but is the institution to be directed by that opinion.<sup>78</sup> The view can be seen in Hayek's statement that the 'conception that government should be guided by majority opinion makes sense only if that opinion is independent of government'.<sup>79</sup> As a result Hayek criticised the 'absurdity' of government using its resources to move public opinion to approve of its policies.<sup>80</sup>

Government speech can thereby raise issues in relation to democratic legitimacy that are related to free speech. If democratic legitimacy rests on the idea that citizens recognise themselves as authors of collective decisions,<sup>81</sup> that can be subverted not only by censorship, but by government

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<sup>76</sup>Brettschneider's case for counter-speech is limited to the challenging of viewpoints that 'that are incompatible with an ideal of free and equal citizenship, and not views that are incompatible with morality per se', see Brettschneider (n 73) 89.

<sup>77</sup>Lepoutre, (n 75) notes that the authority of the state is one factor that can make government counter-speech more effective than that of private individuals.

<sup>78</sup>See J Habermas, 'The public sphere: an encyclopedia article (1964)' (1974) 1 *New German Critique* 49, writing that 'state authority is so to speak the executor of the political public sphere' but 'it is not a part of it'.

<sup>79</sup>FA Hayek, *The Constitution of Liberty* (Routledge 1960) 109.

<sup>80</sup>*ibid.*, 293.

<sup>81</sup>See R Post (n 14) and (n 15).

attempts to move and direct public opinion.<sup>82</sup> Under this view, government is not the co-author of collective decisions. Similarly, a person's status as an equal participant in democratic debate can be undermined if the government uses its authority and resources for the purpose of neutralising that person's efforts to persuade others because government officials disagree with the particular viewpoint.<sup>83</sup> If government uses its resources to attack a person's message, then that person's lack of success may be attributed to a significant disadvantage in the process of debate, rather than simply losing an argument on its merits.<sup>84</sup> The government sponsored message does not deny the viewpoint of a hearing, but the use of government resources taints the usual expectations of fairness.

None of this means that government speech should not be used to counter hatred. However, it is important to recognise that it subjects hate speech to different treatment that would not normally be permitted in relation to mainstream viewpoints. The hate speech sits in the grey area where it is not banned, but where government resources are used in an effort to prevent its effectiveness. Accordingly, when views are placed in the grey area, they are not treated as fully legitimate contenders for collective decisions. The counter-speech policy may allow the government to steer public opinion as a way of protecting core constitutional values. While the strategy does not censor, it raises difficult questions. For example, there are questions about which core values the government can use its communicative resources to defend. There are also questions about what means can be used by government. Could government resources be used in an election campaign to publish messages opposing an extreme political party?<sup>85</sup> The strategy may require the types of choice about favoured and disfavoured viewpoints that arise in relation to hate speech laws.

## Conclusion

This article has considered measures short of a ban to combat hate speech. The discussion has shown that such measures raise difficult questions. Such measures cannot be justified solely in terms of being more proportionate or not engaging Article 10 ECHR. When acting to combat hate speech through less restrictive measures, the government departs from the normal expectations about acting even-handedly in relation to political debate (broadly defined). Such measures (and the judicial acceptance of such

<sup>82</sup>J Rowbottom, 'Government Speech and Public Opinion: Democracy by the Bootstraps' (2017) 25 *Journal of Political Philosophy* 22.

<sup>83</sup>*ibid.*

<sup>84</sup>Such unfairness could be addressed if government provides resources so that the opposing view can make its case against the government's view. However, such a subsidy or platform would defeat the object of the counter-speech policy.

<sup>85</sup>Such a measure goes beyond the *denial* of a benefit discussed above, as government *provides* funding to oppose the party.

measures) seems to accept that certain viewpoints have lower status under the Article 10 jurisprudence. The measures do not banish the speech from political discourse and thereby allow the hate speech in the grey area to have a hearing of sorts, but the measures pursued mean that the normal standards of fairness are not followed in relation to that hearing.

The article has explored three examples: the denial of a benefit, the regulation of the media, and government counter-speech. The first disadvantages the hate speech by denying the communicative resources or access that would normally be granted. Media regulation is similar in so far as it aims to deny the hate speaker a platform that is normally central to success in public debate. However, the regulations of the media may go further in incentivising the media to challenge and scrutinise the claims of the hate speaker. This overlaps with the strategy of counter-speech, although in the final section the focus was on state sponsored communications. The three examples are not exhaustive and no doubt divide opinion. The discussion has sought to consider the role of such measures as a mid-way approach that sits between prohibition and inclusion.

The article has not sought to endorse any of the measures, but has sought to highlight the issues and difficult questions. By departing from the normal expectation that government will not use its power to disadvantage a viewpoint in political debate, the acceptance of such measures may entail a loss of some democratic legitimacy. For this reason, such measures need to be approached with care and caution. There are risks in treating hate speech as a matter of degree, as the category becomes more vulnerable to manipulation and expansion. Such a flexible definition increases the potential for government to characterise the speech that it disfavors as hate speech, and take such intermediate steps against it. Recognising such issues may be a first step towards devising appropriate safeguards and procedures to avoid such abuse. Courts may also recognise that such measures should be the exception for a special category of speech, when assessing compatibility with free speech. Moreover, recognising the role such intermediate measures can play invites further discussions about when (if ever) it is permissible to depart from the ordinary practices, what thresholds should be met, and how speech falling within the grey area should be defined.

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### Notes on contributor

*Jacob Rowbottom* is a Professor of Law at the University of Oxford and Fellow of University College, Oxford.