# Are our laws on freedom of speech fit for purpose in the age of “cancel culture”?

Cancel culture is paradoxical. It is both a form of and threat to free speech. Consequently, law should neither absolutely protect nor absolutely suppress it. Rather, law’s primary role is to foster a culture that values free speech.

The essay begins by outlining the nature of free speech (**I**) and cancel culture (**II**). It then addresses the chief difficulty raised by this question: how cancel culture fits within our free speech tradition (**III**). It finally proposes three legal reforms (**IV**).

# I. Free speech

Crudely, free speech is the freedom to ‘[s]peak what we feel, not what we ought to say.’[[1]](#footnote-1) It axiomatically includes provocative, heretical and unwelcome speech: ‘[f]reedom only to speak inoffensively is not worth having’.[[2]](#footnote-2)

In our thought and law, free speech rests on several foundations. It promotes the autonomy and self-fulfilment of the individual and the wider culture.[[3]](#footnote-3) It protects minority ideas, opinions and speech from majority or state oppression.[[4]](#footnote-4) It is therefore essential to pluralism, in turn a foundation of liberty and democratic society.[[5]](#footnote-5) It is further crucial to democracy itself.[[6]](#footnote-6)

Three points require emphasis. First, minority speech is not protected only, or even principally, for the sake of the minority. It is protected for the potential audience and for society as a whole. It is not simply that the majority may be wrong. Open contestation is the very precondition of the majority’s own opinion: ‘[t]he beliefs which we have most warrant for, have no safeguard to rest on, but a standing invitation to the whole world to prove them unfounded.’[[7]](#footnote-7)

Secondly, free speech is not unlimited. What is important for our purposes is that limitations on free speech may be necessary *to enable* free speech. ‘At a minimum, speech will have to be limited for the sake of order. If we all speak at once, we end up with an incoherent noise.’[[8]](#footnote-8) One might conceive defamation law, for instance, as partly protecting the ability to participate in open debate; without it, ‘it would be enough to annoy a falsely pious man or an irritable fanatic, to be cruelly destroyed by his pen.’[[9]](#footnote-9)

Thirdly, free speech is a value as much as a legal principle. This value can be undermined by private actors, individually or collectively. The English tradition emphasises that social control is ‘as efficacious as law; men might as well be imprisoned, as excluded from the means of earning their bread’.[[10]](#footnote-10)

# II. Cancel culture

In keeping with the title, this essay will assume that we are in an age of cancel culture. It will therefore not address arguments that cancel culture does not exist, is exaggerated or is nothing new. It will take as its starting point Alexander’s definition: ‘[i]ts purest definition is the boycotting of a person or organisation because of an objectionable comment or act.’[[11]](#footnote-11)

Three nuances are necessary. First, cancel culture is primarily about *calls* and *pressure* for boycotting or ‘cancellation’, not merely the *acts* of boycotting, disinvitation, dismissal or removal from sale which frequently follow. Cancel culture thus falls at the midpoint of a spectrum of private action to control speech, with ‘call-out culture’– publicly condemning perceived transgressions without calling for punishment – at one end, and the advocacy or use of violence at the other. Cancel culture seeks to impose speech norms using social and economic coercion, not persuasion or violence.

Secondly, the word ‘culture’ is important: cancel culture is the *systematic* and *disproportionate* use of this tool by one sector of society – amplified by social media – in a way that undermines pluralism and open debate. As the Harper’s letter put it: ‘[w]hatever the arguments around each particular incident, the result has been to steadily narrow the boundaries of what can be said…’.[[12]](#footnote-12)

Thirdly, today’s cancel culture purports to protect minorities against a hegemonic order that has long marginalised and silenced their voices. For its defenders, this is all that is new: a response to the Harper’s letter, for instance, argued that minorities ‘can now critique elites publicly and hold them accountable socially; this seems to be the letter’s greatest concern.’[[13]](#footnote-13) Yet cancel culture’s force derives from its use of culturally salient accusations (of racism, sexism, transphobia and so on) which allege violations of the core state value of equality. The state itself imposes far-reaching limitations on liberty and free speech to enforce that value. Nothing prevents cancel culture being used by other sectors of society to enforce other salient values.

**III. Free speech and cancel culture**

Given this understanding of free speech, how should English law and society approach cancel culture? Three broad approaches can be sketched. This essay argues for the third.

## 1. The free speech case for cancel culture

On one view, calls for cancellation should be promoted by English society and protected by law – either in all cases or, at a minimum, when they claim to vindicate state-backed values such as equality.

Three arguments support this. First, free speech exclusively seeks to protect individuals from state censorship.[[14]](#footnote-14) Calls for cancellation and the forms of boycotting that follow are part of the liberty of the individuals who undertake them. Secondly, this social censorship in fact amounts to the ‘marketplace of ideas’ working properly, supressing harmful words and actions without the need for state intervention. Thirdly, cancel culture helps protected groups to participate actively in public discussion on equal terms. Without it, those groups would be impeded from engaging in that discussion by speech that marginalises and silences them.[[15]](#footnote-15)

This approach finds legal expression in *NAACP v Claiborne Hardware Co* 458 US 886 (1982). The US Supreme Court held that speech promoting a boycott of white businesses did not lose First Amendment protection ‘simply because it may embarrass others or coerce them into action’. Indeed, ‘one of the foundations of our society is the right of individuals to combine with other persons in pursuit of a common goal by lawful means.’ Notably, the boycott aimed to achieve state-sanctioned values: they ‘sought to vindicate rights of equality and of freedom that lie at the heart of the Fourteenth Amendment itself’.

Cancel culture’s critics rarely grapple with the force of this case. Calls for boycott are clearly free speech (*Baldassi c. France* (15271/16), 11 June 2020, §63). Individuals and institutions respond to this social and economic pressure by choosing what to say, what to sell or buy, and whom to (dis)invite, dismiss or employ. This is part of the ordinary operation of individual liberty and is, moreover, an important means of achieving social change.

The case is, nevertheless, flawed. First, as set out above, the English tradition does not see the state as the only (or even the main) threat to free speech. Nor does it absolutely protect free speech from state interference, and calls for boycott are no exception to this (*Baldassi*, §64; *Viking Line Abp v The International Transport Workers’ Federation and anor* [2005] EWHC 1222 (Comm) §§123-126). Secondly, cancel culture’s concentration of power is a *prima facie* distortion of the ‘marketplace of ideas’. Cancel culture is a coercive instrument of intolerance.[[16]](#footnote-16) It aims to operate, as state censors before it, as ‘an oligarchy [who would] bring a famine upon our minds, when we shall know nothing but what it measures to us by their bushel’.[[17]](#footnote-17) Worse, unlike state censorship, it has no due process or other protection against untruthfulness, arbitrariness or disproportionality. Thirdly, the fact that cancel culture purports to enforce state-backed, universally shared opinions makes it more, not less, suspect. Free speech exists precisely to protect minority expression.

## 2. The free speech case for suppressing cancel culture

Given this, a second approach would invert the first: the law should prohibit some or all calls for cancellation rooted in cancel culture. The previous paragraph set out the theoretical case for this. Legally, it could build on positive human rights obligations to protect individuals from violence, dismissal or eviction for free speech in certain cases.[[18]](#footnote-18) It might also draw on the attempt to suppress boycotting when it first developed as a political tactic in 1880s Ireland. The Prevention of Crime (Ireland) Act 1882, s7, criminalised the use of or incitement to intimidation to cause person(s) to act where they could lawfully abstain from acting, or to abstain from acting where they could lawfully act. Intimidation included ‘any word spoken or act done in order to… put any person in fear of… any injury to or loss of his property, business, or means of living’.

This approach is also flawed. First, it would return the state to the centre, controlling in detail which cancellation calls are permissible and which are not. Rather than expanding to a cacophony of ‘much arguing, much writing, many opinions’[[19]](#footnote-19), the public square would shrink. By weakening social control over speech, the lines drawn in law would become the key touchstone for acceptability. This would undermine autonomy. But it would also invite increasing political and legal contestation over those lines, this time enforced by public rather than private power. Second, this blanket, draconian interference with free speech would clearly violate human rights law (*Baldassi*, §§63-64). Indeed, our tradition is suspicious of arguments that the state can protect speech by suppressing speech: despite Bayle’s quote above, the case-law casts free speech as colliding with other values, not itself.[[20]](#footnote-20) Finally, it is highly unlikely to work. Boycotts’ sting is their collective nature and institutions’ reactions to them, and targeting individual speech addresses neither. The Irish provision cited above – a colonial statute never imposed within England – was ineffectual.[[21]](#footnote-21) Today, it is still less plausible that the state could identify and punish every social media and private message call for cancellation.

## 3. The better approach

A fresh approach, harmonious with our thought and law, is needed.

Cancel culture’s critics consistently call for a shift in culture, not law.[[22]](#footnote-22) As Furedi argues:

‘tolerance is a social/cultural accomplishment, and a tolerant society is one where the cultural orientation discourages and restrains social intolerance… experience shows that legal safeguards can always come unstuck when confronted by a tidal wave of social intolerance.’[[23]](#footnote-23)

This resonates with classical thought, which emphasised the limits of law and importance of civic culture in free speech.[[24]](#footnote-24) Defenders of the open society should aim to foster a culture of tolerance for unpopular speech and of perspective on minor or historic breaches of speech norms. Consistent with the foundations of free speech, this should aim to increase the autonomy of individuals, including both those targeted by cancel culture and the institutions and individuals pressured to boycott them.

Law has three roles here. First, it should set the tone for tolerance. It should ensure that existing law does not promote cancel culture, given that ‘the chief mischief of the legal penalties is that they strengthen the social stigma’ (Mill p57). Secondly, it should supress libellous or harassing calls for cancellation, and protect privacy. Thirdly, where necessary it should place duties on institutions and intermediaries to enable them to resist unjustified calls for cancellation. Crucially, such duties do not interfere with free speech. All three roles operate within a framework that continues to protect calls for cancellation as free, and even valuable, speech.

# IV. Proposals

## 1. Setting the tone

English case-law is peppered with liberal statements outlining an expansive vision of free speech, recalled in **Section I** above. It emphasises that ‘pluralism requires members of society to tolerate the dissemination of information and views which they believe to be false and wrong’, and that subjective insult or offence cannot justify attempts to silence other views.[[25]](#footnote-25) Nevertheless, two shortcomings exist.

First, this case-law is, quite naturally, focussed on legal restrictions of free speech. We lack a general statement on what the cultural dimension of free speech entails. The government should draft a soft law instrument, following consultation with free speech, anti-discrimination and other NGOs, setting out neutral standards based on the principles articulated above.

Secondly, certain state practices encourage cancel culture. Hate speech illustrates this well. Speech that incites discrimination, hostility or violence against protected groups undermines pluralism and must be outlawed: art.20(2) ICCPR. Nevertheless, the ‘vagueness and… lack of consensus around [hate speech’s] meaning can be abused to enable infringements on a wide range of lawful expression’, including the mere expression of hatred.[[26]](#footnote-26) English law prohibitions on hate speech are narrowly framed and include specific protections for free expression (Public Order Act 1986, ss17-23 and Part 3A). Yet the informal meaning of ‘hate speech’ is much wider and vaguer, something given official sanction through the recording of ‘non-crime hate incidents’ based on the complainant’s perception alone. As the Law Commission acknowledges, this risks a chilling effect.[[27]](#footnote-27) Whilst criticised by free speech campaigners, the Law Commission’s call for a consistent and coherent approach to hate speech law provides an opportunity to articulate a clear and restrictive definition, consistent with international (rather than European) human rights law. This should draw a clear line between hate and lawful speech, requiring that police databases and communications refer to the latter (more accurately) as ‘perceived hate incidents’.

## 2. Calls for cancellation and privacy

Calls for cancellation based on serious and untrue accusations are likely to give rise to an action in libel.[[28]](#footnote-28) Malicious cancellation calls may also constitute civil or criminal harassment (*Plavelil v DPP* [2014] EWHC 736 (Admin) and *Kellett v DPP* [2001] EWHC 107 (Admin)). Where neither untrue nor otherwise unlawful, however, calls for cancellation are unlikely to give rise to tortious or criminal liability. In particular, despite cancel culture’s collective nature, an action in lawful means conspiracy is unlikely to arise: *Scala Ballroom (Wolverhampton) Ltd v Ratcliffe* [1958] EWCA Civ 4. This is consistent with the understanding of the role of the state outlined above.

A difficult case is the law concerning privacy – notably the ‘right to be forgotten’ in respect of old tweets and other material, privacy torts and rules around the disclosure of police data. Reinforcing the right to control one’s information strengthens autonomy in one sense, but does so at the cost of encouraging the further sanitisation of the public square. This engages a vast number of issues beyond the scope of free speech and so is not pursued further here.

## 3. Intervening in institutions and intermediaries

Cancel culture works primarily through influencing institutions and intermediaries – employers, universities, platforms, contract-holder – to ‘cancel’ the target. They are vulnerable to this pressure, not least for fear of themselves being ‘cancelled’. Legal duties can act as a counterweight to this pressure. Critically, this counterweight does not interfere with free speech.

Equality, human rights and employment law already provide individuals with various protections against these institutions. Claimants have contested speech-related dismissals and actions, sometimes successfully.[[29]](#footnote-29) However, these protections have two shortcomings. First, they typically involve the claimant fitting their view into a major mainstream view, such as Christianity or gender critical feminism.[[30]](#footnote-30) But this only exacerbates the shift from individual autonomy – the heart of liberal free speech – to group rights. So far from promoting individual thought, it replaces one form of conformity with another. Second, the employment case-law only grants equality law protection to beliefs which are compatible with ‘human dignity’. This notoriously elastic term has, for instance, been interpreted as precluding gender critical views from protection.[[31]](#footnote-31)

An Act to protect minority speech from public pressure should therefore be adopted, taking a free speech, rather than an equality, framework. In general, this should provide contractual or tortious protections against dismissal, disinvitation or contract termination where these are motivated by a person’s lawful speech and cannot be justified as the proportionate means of achieving a legitimate aim. More specific private and public law duties will be necessary in particular sectors, as shown by the very detailed framework regulating free speech in universities[[32]](#footnote-32) and the different considerations applying to particular professions (*Ngole* §104).

# V. Conclusion

Cancel culture is free speech. It also risks undermining free speech. The risk it poses must primarily be addressed by culture, not law. Nevertheless, the law has an important role in setting the cultural tone and intervening in narrow circumstances. In this respect, (i) a soft law should crystallise the case-law on toleration and pluralism, and the concept of ‘hate speech’ should be carefully restricted; (ii) remedies against calls for cancellation are limited but adequate; and (iii) duties should be placed on institutions and intermediaries to justify cancellation for speech.

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1. *Henry VI, Part 2*, Act V, scene 3, cited in *R(Miller) v College of Policing* [2020] EWHC 225 (Admin) §12. [↑](#footnote-ref-1)
2. *Redmond-Bate v DPP* [1999] EWHC 733 (Admin), §20. [↑](#footnote-ref-2)
3. *DPP v Ziegler* [2019] EWHC 71 (Admin) §49(i), (iv); Mill, *On Liberty* (Parker 1859), chII. [↑](#footnote-ref-3)
4. *Ziegler* §49(ii); Milton, ‘Areopagitica’ in *English Minor Poems* (Encyclopaedia Britannica 1990), p410; Mill, pp31-2. [↑](#footnote-ref-4)
5. *Trimingham v Associated Newspapers Limited* [2012] EWHC 1296 (QB), §265. [↑](#footnote-ref-5)
6. *Ziegler* §49(iii); *R v Shayler* [2002] UKHL 11, §21. [↑](#footnote-ref-6)
7. Mill, pp38-9. [↑](#footnote-ref-7)
8. <https://plato.stanford.edu/entries/freedom-speech/>. [↑](#footnote-ref-8)
9. Bayle, ‘Sur les libellés diffamatoires’ (1702). [↑](#footnote-ref-9)
10. Mill, p58. Compare <https://www.orwellfoundation.com/the-orwell-foundation/orwell/essays-and-other-works/the-freedom-of-the-press/>. [↑](#footnote-ref-10)
11. <https://www.harpersbazaar.com/uk/culture/a33296561/cancel-culture-a-force-for-good-or-a-threat-to-free-speech/>. This essay, like its title, will focus on cancellation targeting speech, not acts. [↑](#footnote-ref-11)
12. <https://harpers.org/a-letter-on-justice-and-open-debate/> [↑](#footnote-ref-12)
13. <https://www.objectivejournalism.org/p/a-more-specific-letter-on-justice> [↑](#footnote-ref-13)
14. E.g. <https://www.theguardian.com/world/2019/sep/03/the-myth-of-the-free-speech-crisis>. [↑](#footnote-ref-14)
15. Compare Fiss, *The Irony of Free Speech* (HUP 1996), p16. [↑](#footnote-ref-15)
16. Jones, *Essays on Toleration* (ECPR 2018), pp214-217; *Miller*, §250. [↑](#footnote-ref-16)
17. Milton, p408. [↑](#footnote-ref-17)
18. *Dink v. Turkey* (2668/07), 14 September 2010; *Herbai v. Hungary* (11608/15), 5 November 2019; *Mustafa v. Sweden* (23883/06), 16 December 2008. [↑](#footnote-ref-18)
19. Milton, p406 [↑](#footnote-ref-19)
20. Eg. *Reynolds v Times Newspapers* [1999] UKHL 45 (free speech vs reputation), *Trimmington*, §267 (free speech vs protection from harassment). [↑](#footnote-ref-20)
21. Laird, *Subversive Law in Ireland* (Four Courts 2005), pp32-42. [↑](#footnote-ref-21)
22. Fn12; Blackford, *The Tyranny of Opinion* (Bloomsbury 2019), pp55, 202-205, 209-11 and 215; Furedi, *On Tolerance* (Continuum 2011), pp116-117, 172-3 and 196. [↑](#footnote-ref-22)
23. Ibid, p5. [↑](#footnote-ref-23)
24. E.g. Milton, pp390, 394 and 402. [↑](#footnote-ref-24)
25. *Trimmington*, §§265, 267. [↑](#footnote-ref-25)
26. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression A/74/485 (9 October 2019), §1, 19-25**.** [↑](#footnote-ref-26)
27. LC CP250, *Hate crime laws* (23 September 2020), §18.284; *Miller*. [↑](#footnote-ref-27)
28. Compare *Boyle v MGN* [2012] EWHC 2700 (QB) §8 and <https://www.bbc.com/news/entertainment-arts-20033097>. [↑](#footnote-ref-28)
29. E.g. *R(Ngole) v University of Sheffield* [2019] EWCA Civ 1127. [↑](#footnote-ref-29)
30. *Ngole*; *Miller*, §251. [↑](#footnote-ref-30)
31. *Forstater v CGD Europe and ors,* (2200909/2019), 9 January 2020. [↑](#footnote-ref-31)
32. JCHR, *Freedom of Speech in Universities* (21 March 2018): <https://publications.parliament.uk/pa/jt201719/jtselect/jtrights/589/589.pdf>; Policy Exchange, *Academic Freedom in the UK*: <https://policyexchange.org.uk/publication/academic-freedom-in-the-uk-2/>. [↑](#footnote-ref-32)