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FREEDOM OF SPEECH: A PERNICIOUS SHROUD FOR HOMOPHOBIA

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Freedom of speech/expression is a legal principle central to any democratic society. However, it is argued in this paper that, in cases which implicate the law governing homophobic communications, deference to that principle is not always a favourable approach; despite its embedment in the ideology of democracy. A case study involving Olympic diver Tom Daley is used to demonstrate how justifications based on the principle of free speech can indirectly, yet actively, oppress the queer community. The methodology used applies a queer perspective to the heterosexual norms which form the basis of free speech justifications, arguing it is possible to transcend their superficial democratic appeal in certain circumstances. The writer aims to raise the awareness of both legislators and prosecutors, in whose minds the value of free speech arguments must be carefully balanced against the risk of misunderstanding and harm alluded to herein. It is hoped that, consequently, some reconsideration will be given to the primacy of freedom of speech in a democratic society over important queer agendas.

INTRODUCTION

> Good authors … who once knew better
> words,
> Now only use three letter words
> Writing prose, Anything Goes![1]

The principle of free speech is dearly valued but it is not, legislatively speaking, unlimited. An issue of societal concern, given added eminence by technological developments in the last decade, is how and when to limit free speech in order to give effect to other competing legal principles.[2] Artfully marketed as a glittering component of democratic civilization, most people could be forgiven for thinking free speech is a ready-made defence to almost any opprobrious calumniation. Most people may also be convinced that that no level of *mala fide* intent warrants interference with the exercise of so prized a 'right'. Almost anything goes.

[1] *Anything Goes,* Robert Lewis, Paramount, [1956].

[2] The development of legal restrictions to 'freedom of expression' are outside present scope, but an up-to-date summary which makes due reference to jurisprudence from the European Court of Human Rights can be found in George Christie, 'Freedom of expression and its competitors' (2012) 31(4) CJQ 466.

Where prosecution or civil action does chase a vituperatively vociferous individual, it is not necessarily because they have crossed a consistency-ensuring 'unlawful line'. The thesis guiding this paper is that laws promoting free speech help to perpetuate the status quo, where heterosexual agendas are given priority over the homosexual, which is sometimes an arbitrary and undesirable effect. Legal rules should instead be formulated to protect the more vulnerable in society, when their perspective reveals that exceptional protection is appropriate. *Aliter*, the law's grand claims to universal justice are compromised, though veiled by 'free speech' jargon. Almost anything should not go.

After considering how the Critical Legal Studies ('CLS') movement identifies with its thesis, this paper will explore a case study within which legal curtailment of free speech was eschewed, revealing the underlying oppression sponsored on that occasion by applying the more focused approach developed by Queer Legal Theory ('QLT'). The facts of the case study are outlined, then the law involved, followed by the application of relevant queer critique. An analysis of some unfortunate institutional consequences of the case study is subsequently incorporated. This double-barrelled critical ammunition against the principle of free speech, in the given context, is summarised at the paper's close.

A CRITICAL LENS

In lieu of reifying free speech*,* the leftist ideas promulgated by CLS, like Legal Realism before it, heralded a 'methodology orientated toward practical policy reform'.[3] This approach played a significant role in 'illuminating the fissure between rhetoric and reality'.[4] Those ideas depicting the study and practice of laws as being unavoidably politically conditioned and directed,[5] as 'absorbed, adapted and refined'[6] by QLT, compose the theoretical toolbox used to profit contemplation of the oppressed minority in this paper.

Crits banish the 'false consciousness' which tightly grips traditional theorists convinced by law's legitimating forces; theorists who accept and normalize institutionalised processes, thereby concealing their underlying rationales. This allows crits to unveil the exploitative aspects of the legal system, instead of erroneously believing we ubiquitously benefit under its self-legitimised rule.[7] The case study herein demonstrates how legal doctrine, a 'repertoire of manipulating techniques for categorizing, describing, organising and comparing'[8], is not a substantive process for reaching the glorified 'justice' goal

[3] Howard Davies and David Holdcroft, *Jurisprudence: Texts and Commentary* (Butterworths, London 1991) 472.
[4] Raymond Wacks, *Philosophy of Law: A Very Short Introduction* (OUP, Oxford 2006) 97.
[5] Ian McLeod, *Legal Theory* (5th ed. Palgrave Macmillan, Basingstoke 2010) 155.
[6] ibid.
[7] *Davies and Holdcroft* (n 3) 483.
[8] Hutchinson and Monahan, 'Law, Politics and Critical Legal Scholars: The Unfolding Drama of American Legal Thought' (1984) 36 SLR 199, as cited in *Ian McLeod* (n 5) 154.

at all. It can be the vehicle of own-goals; a way for 'those who hold power in society [to] preserve their own position'.[9]

Throughout the case study, the indeterminacy of the law is apparent and the 'passivizing illusion' of free speech as a justification for the decision, 'which establishes the presumptive political legitimacy of the status quo', is transparent.[10] Using 'the canons of legal reasoning', a formally correct decision is indeed reached, but it is arguably not the principle of free speech alone which produces the decision (as is claimed), but 'a bevy of factors whose marked feature is that they are anything but universal, rational or objective'.[11] 'Justification' here is not meant in an honest, scientific sense, but rather as dressed under its legal jacket: where a person well trained in the legal system provides a normative solution using an accepted variety of legal argument.[12] Jacketed justification, exemplified by the case study, is to be contrasted with an example of naked justification:

> Many … pretend to be champions of freedom of speech, when in reality their true motives are protecting their own political and commercial interests.[13]

Kennedy famously hypothesised that if he, sitting as a judge, were told there is always a right answer to legal problems, he would respond that they were given 'determinate shape as a matter of [his] free ethical or political choice'.[14] He describes this as 'the vulnerability of the field'.[15] Kennedy's indeterminacy thesis has been broadly imported to inform various critical research, including the acolytes of QLT. By challenging prevailing societal ideas of legal stability and consistency which stem from a triad of subversive ideologies – hegemonic consciousness, reification and denial[16] – it is possible to reveal how in the sample case subsequent there is an unacceptable contradiction between the promises of equality, neutrality and justice tied to free speech on one hand and the reality of homophobic oppression on the other.[17] This is the application of the indeterminacy thesis across fields; instead of labouring at the problems of malicious communication, the problem is redefined as implicating a neighbouring field – the concept of free speech.[18]

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[9] *Ian McLeod* (n 5).
[10] *Davies and Holdcroft* (n 3) 514.
[11] James Boyle in *Critical Legal Studies* as cited in Brian Bix, *Jurisprudence: Theory and Context* (5th ed. Sweet and Maxwell, London 2009) 233.
[12] Mark Tushnet, 'Critical Legal Theory' in Martin Golding and William Edmunson (eds), *The Blackwell Guide to the Philosophy of Law and Legal Theory* (Blackwell, Oxford 2004) 82.
[13] *Hugh Grant: Taking On the Tabloids*, TV, Channel 4, [2012].
[14] Duncan Kennedy, 'Freedom and Constraint in Adjudication: A Critical Phenomenonlogy' [1986] JLE 518, 562.
[15] ibid.
[16] Raymond Wacks, *Understanding Jurisprudence: An Introduction to Legal Theory* (OUP, Oxford 2005) 334.
[17] ibid.
[18] *Mark Tushnet* (n 12).

It is widely believed that CLS has been eclipsed by its descendants (including, *inter alia*, QLT), as a result of the nihilistic 'transformative agenda' which dominated its proponents.[19] QLT is different in its *raison d'être* because, as will be seen, it 'calls for an end to the quest for consensus'[20] and in so doing avoids the trap of falling 'into the inauthenticity that it sets itself against'.[21]

Without further ado, the case study's factual matrix will be explored.

THE HOMOPHOBIC TWEET

> If there is any consolation for finishing fourth at least Daley and Waterfield can go and bum each other #teamHIV.[22]

The salient facts of this story are drawn from secondary reports because properly corroborated evidence is unobtainable in light of the Crown Prosecution Service's ('CPS') choice to abandon a prosecution case. The basis of that decision is in fact the legal centrepiece of the critique *infra*.

The above statement by football player Daniel Thomas was electronically conveyed to Olympic diver Tom Daley, consequent to him coming fourth place – despite initial hopes for first – in the ten-metre synchronised dive event at London 2012 with diving partner Peter Waterfield.[23] An incensed response ensued, similar to a previous 'trolling' incident involving Daley,[24] spearheaded by the Dorset Police who arrested the 28-year-old suspect of abusive messaging.[25] One social commentator accurately remarked:

> …[I]f technology makes it easier to unmask trolls, social pressure and shame may well do the job of sanitising the net, but in [some cases] it's perfectly reasonable for the police to get involved.[26]

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[19] Neil Duxbury in *Patterns of American Jurisprudence*, 506, as cited in *Raymond Wacks* (n 16) 338.
[20] ibid.
[21] Costas Douzinas and Adam Geary, *Critical Jurisprudence: The Political Philosophy of Justice* (Hart, Oxford 2005) 237.
[22] Daniel Thomas (10danthomas10), 'If there is any consolation for finishing fourth at least Daley and Waterfield can go and bum each other #teamHIV.' 30 July 2012. Tweet.
[23] James Meikle, 'Teenager issued with harassment warning over tweets sent to Tom Daley' (*Guardian,* 31 July 2012).
[24] BBC News, 'Tom Daley Twitter abuse: Boy given warning and bailed' (*BBC News England*, 31 July 2012) <http://www.bbc.co.uk/news/uk-england-19072301> accessed 1 December 2012.
[25] BBC News, 'Tom Daley tweet: Footballer Daniel Thomas arrested' (*BBC News Wales*, 2 August 2012) <http://www.bbc.co.uk/news/uk-wales-19095923> accessed 1 December 2012.
[26] Ed West, 'Twitter and Tom Daley: freedom of speech does not extend to the freedom to make death threats' (*The Telegraph*, 31 July 2012).

However, the Director of Public Prosecutions ('DPP') for the CPS opted not to pursue a prosecution case against Thomas.[27] If justice were a jump-race, Daley's tale fell at the first hurdle, which arguably underscores how lowly homophobic remarks rank in some legal minds along the 'offensiveness spectrum'.

Societal pressure did indeed lead to Thomas being suspended for one match and fined five hundred pounds by a disciplinary panel of the Football Association of Wales ('FAW').[28] Clearly, free speech did not feature in the FAW's decision to chastise its player, over their desire to prevent the game being brought into public disrepute. Curiously, the DPP defended his decision not to prosecute, without bringing the law into public disrepute, by implicating free speech. A chasm between legal rubric and punitive reality can be detected, despite the existence of legal restrictions to free speech which might have been invoked.

THE OFFENDING LAW

The law engaged by the facts discussed *supra* will now be synopsised, along with the DPP's statement on the case (considered herein as ancillary guidance to the existing law, carrying a degree of legal force) before a queer analysis of the injustice culpable betwixt fact and law is performed.

There is currently no specific legislation dealing with online harassment.[29] It has been argued that the present framework is inaccessible, uncertain and thus inadequate to deal with the evolving age of online social networking.[30] In this poorly regulated digital environment, 'which explicitly encourages free speech',[31] perhaps it is partially comprehendible why the side-lining of niched queer agendas escapes critical attention.

There are two acts which had the potential to be applied:

(1) Malicious Communications Act 1988 ('MCA')

A charge may have been brought under Section 1 of this Act;[32] one instance of communication being sufficient to prosecute, as opposed to a 'course of conduct' which is required under the Protection from Harassment Act 1997.

It is made a summary offence for a person to send another person a letter, electronic communication or article of any description conveying a message

[27] Martin Robinson, 'Welsh pro footballer who posted a homophobic Tweet about Tom Daley as he competed in the Olympics will NOT be charged' (*Daily Mail*, 20 September 2012).
[28] BBC News, 'Tom Daley tweet: Port Talbot footballer Daniel Thomas fined' (*BBC News Wales*, 27 November 2012) <http://www.bbc.co.uk/news/uk-wales-south-west-wales-20512439> accessed 5 December 2012.
[29] Neal Geach and Nicola Haralambous, 'Regulating Harassment: Is the Law Fit for the Social Networking Age?' (2009) 73 JCL 241, 241.
[30] ibid.
[31] Nicola Haralambous and Maureen Johnson, 'Facebook – Friend or Foe?' (2010) 174 JPN 469, 471.
[32] as amended by the Police and Criminal Justice Act 2001, s 43.

which is indecent or grossly offensive; a threat; or information which is false and known or believed to be false by the sender. It is also an offence to send anything which is, in whole or in part, of an indecent or grossly offensive nature. A person is made guilty of an offence only if their purpose, or one of their purposes, in sending the offending material was to cause distress or anxiety to its 'immediate or eventual recipient'.[33]

Notably, the overall purpose of the offence has been judicially described as being to 'protect people against receipt of unsolicited messages which they may find seriously objectionable'.[34]

The intention of Daniel Thomas to cause Tom Daley distress and anxiety would probably have been a prickly matter to prove under this offence (*mens rea*). Apparently 'Mr Thomas intended the message to be humorous'. Therefore, unsurprisingly, the DPP makes no mention of this charge in his statement on the case.[35] The *actus reus* element would also have been unsatisfied because, according to the offensiveness-barometer of the DPP, the tweet was 'not so grossly offensive that criminal charges need[ed] to be brought'.[36]

(2) Communications Act 2003 ('CA')

Under Section 127(1) of this legislation it is also a summary offence if a person sends by means of a public electronic communications network a message or other matter that is grossly offensive or of an indecent, obscene or menacing character; or causes any such message to be sent.

To the extent that this provision does not need communication to be specifically sent 'to another person' and does not require a 'course of conduct', 'it is easier to prove and thus a more practical option for prosecutors'.[37] Thomas was questioned under the CA.

The maximum penalty for a guilty offender is prescribed at six months and/or a fine not exceeding level five on the standard scale.[38] Additionally, academic arguments may be borne in mind at the sentencing stage, relating to a distinction between 'the casual amateur speaker' and 'professional journalists', so that proportionate measures are handed out to 'encourage greater responsibility … among those who exercise communicative freedoms'.[39] Notwithstanding this, Thomas dodged the softest punitive measure available in law because the DPP still considered his tweet neither so grossly offensive to be sanctioned criminal,

[33] *DPP* v *Collins* [2006] UKHL 40, [26] (Lord Browne).
[34] ibid, [7] (Lord Bingham).
[35] Keir Starmer QC, 'DPP statement on Tom Daley case and social media prosecutions' (*The blog of the CPS*, 20 September 2012) <http://blog.cps.gov.uk/2012/09/dpp-statement-on-tom-daley-case-and-social-media-prosecutions.html> accessed 6 December 2012.
[36] ibid.
[37] *Nicola Haralambous* (n 31) 470.
[38] Communications Act 2003, s 127(3).
[39] Jacob Rowbottom, 'To Rant, Vent and Converse: Protecting Low Level Digital Speech' (2012) 71(2) CLJ 355, 383.

nor requiring prosecution by his understanding of the public interest.[40] It is remembered that the FAW felt it was in the reputational interests of football as a sport to punish Thomas quite harshly.

Per contra to the MCA, the overall purpose of this offence is to 'prohibit the use of a service provided and funded by the public for the benefit of the public'.[41] Accordingly, the offensiveness of the material is determined on an objective basis. Geach and Haralambous add:

> The importance of this is that where the message is aimed at a particular section of society, provided that section of society would reasonably be offended, then the offence is made out.[42]

An intention to insult those to whom the message relates is again required. The DPP appears to have accepted too readily that Thomas intended his statement in 'misguided' or 'naïve' humour,[43] which on proper cross-examination may have been disproved; his true motives 'put in the closet' as it were, under the spectre of police interrogation. Of course, just prior to Daley's incident it was ruled that:

> …banter or humour, even if distasteful to some or painful to those subjected to it [will continue] quite undiminished by this legislation.[44]

Nonetheless, queer perspectives reveal that there is often a bright line between distasteful humour and dark implication, the connotations of 'teamHIV'[45] qualifying under the latter.

A passing comparison is drawn with the Court of Appeal decision in March 2012 to uphold the conviction of Liam Stacey for 56 days imprisonment under a different Act,[46] one of the tweets warranting that sentence being:

> "Go suck a nigger dick you fucking aids-ridden cunt."[47]

Similar queer issues were apparent (stereotyping and gay sex) but, when combined with a racist agenda, the law proactively engaged with the communication in spite of the same free speech arguments. In the following

[40] *Keir Starmer QC* (n 35).
[41] *DPP* v *Collins* (n 33).
[42] *Neal Geach* (n 29) 253.
[43] *Keir Starmer QC* (n 35).
[44] *Chambers* v *DPP* [2012] EWHC 2157, [28] (Lord Judge CJ).
[45] *Daniel Thomas* (n 22).
[46] Stacey was charged with an offence contrary to section 31(1)(b) of the Public Order Act 1986.
[47] *R* v *Liam Stacey* [2012], [8] <http://www.judiciary.gov.uk/Resources/JCO/Documents/Judgments/appeal-judgment-r-v-stacey.pdf> accessed 9 December 2012.

section, it is argued that an equal standard of engagement should be applied to these serious queer issues (as exemplified by Daley's case) *ipso facto*. A queer perspective will demonstrate how the issues involved called for prosecution based on both their grossly offensive nature and their implications for general public interests.

THE INFERIORITY OF QUEER AGENDAS

'Queer' is a term used in numerous ways to describe activism, theory, politics, identity and community.[48] Whilst religious condemnation and legal persecution of homosexual behaviour had been prevalent for centuries, Queer Theory was formed in response to the extremist right-wing homophile movement of the 1980s.[49] Protest against institutionalised prejudices became an activist agenda, leading to the eventual implementation of many successfully lobbied legal reforms.

Butler's articulation of the Foucauldian notion that gender operates as a regulatory construct, privileging heterosexuality, has been a particularly radical influence on debate.[50] Her/his/that person's theory ontologically challenges the biological complementarity between sexes, which she/he/that person dubs 'heteronormativity'. It is premised on the idea of 'gender performativity': that 'I' am gay and male because semantic and cultural descriptors shape those fixed sexual and gendered ideas of me. In reality, there are as many genders as there are people. I am what I am. Daley is what Daley is.

The intricacies of Butler's philosophies are beyond the remit of this work, but an important element of the argument is that the effects of performativity are subtly politically enforced. The modern role of QLT then, at a time of relatively positive standing for the advancement of queer issues, is crystallising into a practice of deconstruction. Stychin's work acknowledges that law can operate not only in an explicitly repressive way, but also in 'a more subtle, disciplinary mode' whereby it encourages individuals to conform to how the law constructs proper, civilized behaviour.[51] Indeed, he asserts that:

> …it is now a virtual cliché that the term 'queer' is associated with … [the] transgression of heterosexual norms.[52]

[48] Jayne Caudwell (ed), *Sport, Sexualities and Queer/Theory* (Routledge, London 2006) 2.
[49] Annamarie Jagose, *Queer Theory: An Introduction* (NY University Press, New York 1996) 22-23.
[50] Judith Butler, *Gender trouble: Feminism and the Subversion of Identity* (Routledge, London 2006).
[51] Carl Stychin, *Governing Sexuality: the changing politics of citizenship and law reform* (Hart, Oxford 2003) 3.
[52] Carl Stychin, '"Las Vegas is not where we are": Queer Readings of the Civil Partnership Act' (2006) 25 PG 899, 899-900.

It is this approach, of using a queer perspective to encourage the legal modifications necessary for a way of living unconstrained 'by a heteronormative world order', that I apply now to the dismissal of Daley's case under the defensive shroud of freedom of speech. Legal understanding of the cognate terms 'grossly offensive' and 'public interest' must be recalibrated to transcend the heteronormative meanings they presently bear. If successful, this change would redefine the acceptable limits of free speech. Language so homophobic that it oppresses the foundational tenets of homosexuality, such as the sanctity of homosexual sex, would effectively be prohibited.

The law involved in Daley's case was a contradictory dichotomy. Freedom of speech emerged as the winning legal principle, whilst the losing body of legal argument was supposed to shield citizens from malicious communication. The indeterminacy was foreseen. It is suggested however that, because the two reasons given by the DPP for calling that fight in free speech's favour underestimate the true impact of Thomas' tweet on queers, it was incorrect. Recall that the two (related) reasons forwarded for the decision were that the tweet was not grossly offensive, and that it was not in the public interest to open a prosecution. Several queer interests are oppressed by these justifications.

Tom Daley's sexuality, whatever it may be, was reduced to a simplistic stereotype which Thomas publicly vilified and used to undermine Daley's individual accomplishment. The dedicated work of QueerCrits – championing reasons to be proud of kinship in all its forms so that difference can be appreciated rather than consensus – was chilled by this incorrect, yet officially legitimate, decision. The queer agenda was inferior to (and somewhat hidden by) the free speech agenda, signifying the interests of a heterosexual majority. Professional sports alliance, standard friendship, intimate male friendship with 'well defined boundaries' (otherwise known as a 'bromance'),[53] experimental sexual relationship, promiscuous playmates, monogamous male partners, potential civil partners or husbands; Daley and Waterfield's right to define themselves for themselves is something the law can better enable in the future by at least impugning destructively heteronormative gone homophobic discourse. It is a problem affecting the basic social construction of sexuality. Influencing social acceptance of wide-ranging sexualities is a subsidiary queer agenda which deserves legal attention. Although it is conceded that restricting freedom of speech may not always be an appropriate platform for manifesting that assistance, where it is coupled with a queer agenda which is being destructively oppressed it should be raised and criticized in tandem with the latter. It is the destructively oppressive quality of Thomas' tweet which warrants interference with the principle of free speech, to which I now turn.

Thomas' tweet contained a dangerous insinuation, axiomatically linking gay sex to AIDS. Not for the first time taking a backseat on an issue relevant to the queer community, the subject of gay sex was legally sidestepped. Theory suggests that this arises from patriarchal concepts of male supremacy which sometimes makes

[53] Elizabeth Chen, 'Caught in a Bad Bromance' (2012) 21 TXJWL 241, 242.

the notion of one man being submissive to another counter intuitive.[54] It has been argued that among the flaws of the Civil Partnership Act 2004 is a contradictory binary of 'sex/no sex' which leaves the constitution of gay sex 'shrouded in mystery'.[55] Just as that failure makes the determination of same-sex adultery problematic,[56] in Daley's case it makes the determination of what it will take to qualify as 'grossly offensive' and 'in the public interest to prosecute' a bewildering litmus test.

To 'go and bum each other', and thereby procure AIDS, implies that the couple in question will agree to unprotected anal sex, or 'barebacking'.[57] A range of 'densely constituted discourses [on] barebacking have been deconstructed',[58] from which I believe two matters can be raised in order to underscore the gravity of Thomas' tweet from a queer perspective.

First, men who have sex with men are, for the purposes of public health research, conceived collectively as a risk group. This 'discursive sleight-of-hand' potentially stigmatizes said men by blurring the important distinction between being at a high risk of *contracting* HIV, and of *constituting* a high risk to other people.[59] To assume any man is HIV-positive can have a significantly damaging effect on his love life and public interactions. It can take courage enough to go public in these regrettable circumstances, made so much worse by the 'gay disease' stigma ordained by homophobes in recent history. However, these assumptions can be reconstructed using legal intervention if its orchestrators are able to empathise with the negative impact the status quo perpetuates. The DPP may not have been aware that correlating Daley's purported sexuality to his purported serostatus was an offensive matter, but it was grossly offensive: the wider gay community passionately wish to protect their sexuality from sociological oppression, just as feminists yearn to protect and empower their gender.[60]

Second, Ashworth's deconstruction of the criminal law governing barebacking features a pertinent point. He observes that 'the right to bareback seems to come only with monogamy',[61] but believes that 'before straight society condemns such actions' they should assimilate them with heterosexual intercourse. Unprotected sex is, in modern culture, often a symbol of commitment. Thomas' tweet castrates the sanctity of homosexual sex by reducing love-making to disease-spreading. The law available could have been applied as an indication of the

[54] Brenda Cossman, 'Sexuality, Queer Theory, and "Feminism After": Readings and Rereading the Sexual Subject' (2004) 49 McGill LJ 847.
[55] *Carl Stychin* (n 52) 907.
[56] ibid.
[57] Benjamin Junge, 'Bareback Sex, Risk, and Eroticism: Anthropological Themes (Re-)Surfacing in the Post-AIDS Era' in Ellen Lewin and William Leap (eds), *Out in Theory* (University of Illinois Press, Urbana 2002) 189.
[58] ibid, 188.
[59] ibid, 195.
[60] Tim Edwards, *Erotics & politics: gay male sexuality, masculinity and feminism* (Routledge, London 1994) 128.
[61] Chris Ashford, 'Barebacking and the "Cult of Violence": Queering the Criminal Law' (2010) 74 JCL 339, 342.

unacceptability of this paradigm. Its failure to do so is a testament to heteronormative persistence, armoured by the principle of free speech.

DISAPPOINTING INSTITUTIONAL CONSEQUENCES

In the same statement which explained the DPP's reasons for dropping the prosecution case against Thomas, a commitment to issue guidelines on social media cases for prosecutors was made. Guidelines were called for in order "[t]o ensure that CPS decision-making in these difficult cases is clear and consistent".[62] In due course, interim guidelines were released and, following a three-month consultation period,[63] final guidelines were published last year.[64]

Some highly disconcerting developments are embedded in these guidelines. The DPP has decided that statements which 'may be considered grossly offensive, indecent, obscene or false … will be subject to a **high threshold**'[65] because, predictably, 'there is the potential for a chilling effect on free speech'.[66] The guidelines add that, where communications in this category are being considered, 'in many cases a prosecution will be **unlikely**'.[67]

Assuming this high threshold can ever be reached by exclusively queer agendas, such as those in Thomas' tweet, the same public interest test referenced throughout this paper (in the context of the case which led to the new guidelines) must then be satisfied. Interestingly, following feedback to the consultation, 'clarification of the wording' of the public interest factors to be considered for prosecution under section 1 of the MCA or section 127 of the CA have been implemented by the new guidelines:

> A prosecution is unlikely to be both necessary and proportionate where:
>
> a. The suspect has expressed genuine remorse;
> b. Swift and effective action has been taken by the suspect and/or others for example, service providers, to remove the communication in question or otherwise block access to it;
> c. The communication was not intended for a wide audience, nor was that the obvious

[62] *Keir Starmer QC* (n 35).
[63] Crown Prosecution Service, 'Consultation on the Interim Guidelines on Prosecuting Cases involving Communications sent via Social Media: Summary of Responses' (*The Crown Prosecution Service*, 20 June 2013) <http://www.cps.gov.uk/consultations/summary_of_responses_on_social_media_guidelines.pdf > accessed 21 March 2014.
[64] Crown Prosecution Service, 'Guidelines on prosecuting cases involving communications sent via social media' (*The Crown Prosecution Service*, 20 June 2013) <http://www.cps.gov.uk/consultations/social_media_guidelines.pdf> accessed 21 March 2014.
[65] ibid, paras 12(4)-13; 29-45.
[66] ibid, para 33.
[67] ibid, para 13.

> consequence of sending the communication; particularly where the intended audience did not include the victim or target of the communication in question; or
>
> d. The content of the communication did not obviously go beyond what could conceivably be tolerable or acceptable in an open and diverse society which upholds and respects freedom of expression.
>
> This is not an exhaustive list, however, and each case must be considered on its own facts and its own individual merits.[68]

Each of these factors were cited in the DPP's original statement (justifying his decision not to prosecute Thomas).[69] Therefore, although they do not add anything substantively new to our understanding of the DPP's understanding of the public interest, they codify that approach in a legally compelling manner.

The first of the factors listed (*viz* genuine remorse) scraped through the consultation, as it received 20 responses in favour of its inclusion and 19 which were not (a further 10 respondents did not answer the relevant question).[70] The second factor (*viz* blocking access) received 11 responses in favour of its inclusion and 18 which were not (30 respondents did not answer), and yet no revision was made to exclude it.[71] The third factor (*viz* wide audience) received 16 responses in favour of its inclusion and 11 which were not (33 respondents did not answer) which, similar to the first factor, exemplifies borderline approval.[72] The fourth factor (*viz* freedom of expression) received 14 responses in favour of its inclusion and 11 which were not (34 respondents did not answer).[73] How troubling that this enormously inhibiting factor should survive consultation by a margin of 3 replies, in a wider context of mostly borderline approval. The corresponding record of some respondents who 'considered that [some] categories of message, such as those relating to sexism or gender inequality, are always extremely harmful'[74] is also interesting, as no comments pertaining to how these responses impacted on the final guidelines are included. Presumably they did not have any. Perhaps they are not 'obvious' enough (borrowing the restrictive language of the fourth factor) to justify interference with freedom of expression. Once again, the voice of queer agendas appears lost in a quagmire of free speech rhetoric.

[68] ibid, para 44.
[69] *Keir Starmer QC* (n 35).
[70] *Crown Prosecution Service* (n 64) 6.
[71] ibid.
[72] *Crown Prosecution Service* (n 64) 7.
[73] ibid.
[74] ibid.

Although 59 respondents were party to the consultation,[75] the figures cited by the consultation document (and by the author, *supra*) indicate a breakdown of responses provided by 49, 59, 40 and 59 replies to the four public interest factors respectively. The sums do not add up. It is unknown whether this is merely a typographical error, but it certainly invites further investigation. Moreover, on average, over half of respondents did not answer the relevant questions, which makes it difficult to deduce the constitution of the remaining pools. Basing the consultation's outcomes on figures of such questionable derivation casts some doubt on its credibility as a footing for the final guidelines.

These anomalies, together with various criticisms raised by the queer perspectives included in this paper, make it highly desirable to either reconsider the CPS guidelines or introduce legislative reform. Beneficial change via either route can be accomplished by lowering the evidential threshold for homophobic communications which undermine fundamental queer agendas, and reconsidering public interest factors engineered on the back of a decision which reprieved a grossly offensive homophobic tweet.

CONCLUSION: THE CARROT OR THE STICK?

Through the prism of queer lived experiences,[76] it has been argued that the principle of free speech is sometimes not a carrot to strive for, but a stick which distances foreign reasoning from ascendency. CLS, and QLT specifically, have been used to demonstrate how the law does not sufficiently cater for homosexual agendas, and the negative impact this may have on the gay community. The umbrella of free speech does not protect society from every rainfall of injustice, and must be substituted with a shelter from homophobic oppression when the downpour is sufficiently heavy to mandate that switch.

Dust seems to be settling on an unsettling arrangement of legal principle. When it comes to freedom of speech, homophobic oppression is simply some unfortunate collateral damage. Custodians of this view would ardently posit that the principle of free speech should be upheld in near absolute terms, guarded by an impossibly high evidential threshold and a flawed public interest test, despite its oppressive costs. In light of this paper, it is hoped that legislators and prosecutors will agree it is necessary to re-think the powers available to discourage societal conduct which not only oppresses the interests of homosexual individuals, but which erodes the value of their identity; subjugates their culture; represses their pride, and shackles their ability to implement change.

[75] *Crown Prosecution Service* (n 64) 3.
[76] *Chris Ashford* (n 61).