



We're Nearly All Victims Now!

How the politics of victimhood is undermining our liberal culture

David G. Green

CIVITAS

We're Nearly All Victims Now!

We're Nearly All Victims Now!

How the politics of victimhood is undermining
our liberal culture

Second Edition

David G. Green

CIVITAS

First Published October 2006
Second Edition Published September 2019

© Civitas 2019
55 Tufton Street
London SW1P 3QL

email: books@civitas.org.uk

All rights reserved

ISBN 978-1-906837-99-0

Independence: Civitas: Institute for the Study of Civil Society is a registered educational charity (No. 1085494) and a company limited by guarantee (No. 04023541).

Civitas is financed from a variety of private sources to avoid over-reliance on any single or small group of donors. All the Institute's publications seek to further its objective of promoting the advancement of learning. The views expressed are those of the authors, not of the Institute.

Typeset by Typetechnique

Printed in Great Britain by 4edge Limited, Essex

Contents

Preface to the second edition	vi
Preface to the first edition	viii
Introduction	1
1 Why modern victimhood is not compatible with liberalism	5
2 Impact on democracy	26
3 Victim status and legal equality	42
4 Hate crime reform	63
Notes	89

Preface to the Second Edition

When the first edition was published in 2006 it was already obvious that identity politics had taken hold. The phenomenon has been recognised by many writers, though sometimes called the politics of grievance or victimhood. It involves calling for political recognition of the victim status of a group identified by a characteristic its members are believed to be unable to change. The most obvious such characteristic is race and modern identity politics first emerged in the USA as a response to America's bitter legacy of race relations.

In this second edition I focus on the emergence of hate-crime laws that treat crimes against a politically-recognised group as more serious than crimes against everyone else. Hate crimes were initially created in England and Wales by the 1998 Crime and Disorder Act. The Act provided that crimes such as assault and criminal damage were more serious if carried out with racial motivation. Under the original legislation the maximum penalty for assault causing actual bodily harm was five years, but if it is aggravated by a display of racial hostility the maximum was seven years. Later the provision was extended to religious hostility.

Under the 2003 Criminal Justice Act, a murder is regarded as 'particularly' serious if it is religiously or racially aggravated, or aggravated by sexual orientation, which means that the starting point for the sentence is 30

years before other aggravating or mitigating factors are considered. Many other murders have a starting point of only 15 years. In effect the law treats the murder of someone belonging to one of these ‘protected’ categories as twice as serious as the murder of anyone else.

Initially, the preferential treatment applied only to racial groups but it has gradually been extended to five groups – called the five centrally monitored strands by the Home Office – and many others are campaigning for similar protection. During consultation to agree which hate crimes to monitor, the College of Policing identified 21 additional groups.¹ Now the Law Commission has been asked by the Government to carry out a consultation on extending the current laws.

At some point if all demands are met, there will be so few people left out that we might ask ourselves what was wrong with having one law for all. If we were asked to name one defining characteristic of a free society most of us would single out impartial justice – clear laws that apply equally to all and that are applied by independent judges sworn to act without fear or favour, malice or ill will.

The purpose of this publication is to examine whether we made a mistake in treating crimes against politically-recognised identity groups as more serious than crimes against others. Is it time to reinstate equality under the law for every citizen, regardless of their identity group? And above all, how can we restore freedom of expression, now so grievously impaired by identity politics?

David Green, 2019

Preface to the First Edition

We have all noticed that terms such as racism, sexism, ageism, disablism, Islamophobia, and homophobia have become commonplace in public discussion. Like most people I have occasionally laughed at some of the more absurd uses of this language, but in recent years the politically-recognised victim status described by this list of 'isms' and phobias has begun to do lasting harm to our liberal culture. Moreover, the officially protected victim groups are no longer in the minority but add up to 73% of the population.

Many were surprised to learn in June 2006 that the law now considers the murder of a gay man as a more serious crime than the murder of someone who is not gay. The murderers of Jody Dobrowski on Clapham Common were given 28 years when, according to the judge, if they had voiced no hostility towards the victim's sexuality, the sentence would have been halved. The case sparked some media comment. Was it really worse than the murder of medical student, Daniel Pollen, in Romford, Essex in July 2005 – a killing that was captured on CCTV and appeared to be without obvious motive? The judge thought so in June 2006, and the 'starting point' for calculating the sentence of Daniel Pollen's killer will be only 15 years. Is animosity to gays a worse motive than, for example, a calculated killing to silence a witness – perhaps when a rapist murders his female victim to prevent her giving evidence? Or is it

worse than a drive-by shooting that takes innocent life at random?

Singling out groups for special protection has had the inevitable consequence that others have begun to ask 'Why not us too?' Initially race was the only protected category when the 1998 Crime and Disorder Act created 'hate crime', but Muslim leaders complained and religion was soon added. Then pressure groups representing disabled people, as well as gays and lesbians, demanded to be included. The Government quickly agreed. Special legal status has now been given to four groups, and harsher penalties are available for crimes committed against individuals because of their sexual orientation, race, religion or a disability. But why stop at four? The Commission for Equality and Human Rights (CEHR), when it begins its work in 2007, will protect the same four groups plus two others, defined by gender and age. If the CEHR demands that crimes against women should also be officially classified as 'hate crimes', what intellectually coherent case could be made against it? And if members of Age Concern called for old people to be added to the list, what arguments could be used against them? Sooner or later, with only a minority of people outside the protected groups, we might ask ourselves what was wrong with the law before 1998? Is it not more consistent with our tradition of legal equality to believe that to murder or assault anyone, whoever they are, regardless of the group they identify with, is equally wrong?

We might go further and ask ourselves whether we have fallen into the trap that George Orwell warned about in *Animal Farm* – the corruption of the ideal of equality by power? Initially the 'seven commandments' on the farm wall included 'All animals are equal'. Later, the wall was repainted overnight leaving only one commandment: 'All

animals are equal, but some animals are more equal than others.'

Some other episodes seem to fit the pattern. Groups who have been politically recognised as victims are starting to use their power to silence people who have had the cheek to criticise them. A phone call to the police by victim activists has led to people who have made perfectly reasonable contributions to public debate being warned off. Lynette Burrows, for example, argued that gay adoption was more risky for children than adoption by a married couple, and was questioned by the police. And so too was Sir Iqbal Sacranie who, while leader of the Muslim Council of Britain, voiced the disapproval of his religion for homosexuality. We may agree or disagree with these commentators, but if police power can be used to silence critics, have the victims becoming the aggressors, as Orwell warned? These are among the questions this short book tries to answer.

I am very grateful to Civitas researcher, Nick Seddon, for his assistance with Chapter 3 and to Norman Dennis, Justin Shaw and Ken Minogue for their invaluable comments on all the chapters.

David Green, 2006

Introduction

To be a victim is to be harmed by an external event or oppressed by someone else, things that most people avoid wherever possible. Yet a striking feature of modern Britain is that many people want to be classified as victims. They do so because of the advantages it brings. Victimhood makes it possible to demand special protection in the workplace not available to other employees. It makes it possible to benefit from quotas, like the targets that require government departments to ensure that a defined percentage of public servants are from ethnic minorities. And it may be possible to demand that police powers are used against people who criticise you.

The word victim still retains its old meaning, and victims still inspire ordinary sympathy from kindly people. But today to be classified as a victim is to be given a special political status, which has no necessary connection with real hardship or actual oppression. Victimhood as a political status is best understood as the outcome of a political strategy by some groups aimed at gaining preferential treatment. In free societies groups often organise to gain advantages for themselves, but the increase in the number and power of groups seeking politically-mandated victimhood raises some deeper questions, as subsequent chapters will explain. Group victimhood is not compatible with our heritage of liberal-democracy in three particular ways: it is inconsistent

with the moral equality that underpins liberalism; it weakens our democratic culture; and it undermines legal equality.

First, the rise of victimhood is incompatible with Britain's heritage of liberalism because it treats group identity based on birth, especially racial identity, as more important than the personal qualities of each individual. This cuts into the foundations of liberalism, which traditionally set out to release the best in individuals by freeing them from the constraints that might be imposed by their origins. Among the basic building blocks of liberalism is the idea that individuals should be judged by the personal qualities they can change and not by the characteristics ascribed to them by any accident of birth. To make assumptions about individuals based purely on ascribed characteristics such as parentage or race is to be prejudiced. Liberalism has insisted that individuals can rise above their circumstances. They can change, improve, or grow in skill, understanding and moral outlook. Consequently to attach paramount importance to ascribed characteristics today is to reverse hundreds of years of progress in triumphing over prejudice. The result has been to undermine a central component of liberalism: the sense of personal responsibility founded on moral equality, on which a free society relies. This concern is the subject of Chapter 1.

Second, as Chapter 2 discusses, the quest for preferential status has had a harmful effect on our democratic process. In any democratic system there is a tension between two tendencies: majoritarian democracy and deliberative democracy. At its best our system is deliberative. Policies are made, not by gaining power and forcing decisions through, but by open debate that relies on modifying the opinions of others through the mutual learning that may emerge from listening and reflecting before deciding, a view

classically expressed by Milton in *Areopagitica*: 'Let [Truth] and falsehood grapple; who ever knew Truth put to the worse, in a free and open encounter?'²

Victim groups encourage a majoritarian view, which emphasises gaining advantage at the expense of others. We are used to interest groups pressing their case as part of a democratic process that allows opposing views to be accommodated through reasoned discussion and compromise. But modern victim groups create entrenched social divisions by defining opponents as oppressors who, not only must be defeated by the state, but silenced by the state. It weakens the toleration and give-and-take that have been central to our political culture, and even encourages aggression. The underlying assumption of the growing culture of victimhood has been that one group is the victim and another is the oppressor: women are the victims of male discrimination; ethnic minorities of white discrimination; and disabled people of discrimination at the hands of the non-disabled. Moreover, victim status can insulate a group from criticism that would apply to anyone else. It does so by implying that all critics must be oppressors. The pseudo-psychiatric term 'Islamophobia', for example, suggests not simply that every criticism of Muslims is motivated by unreasonably exaggerated fear or hostility. It is a statement that any criticism of Muslims is evidence of clinical pathology. Yet, the label 'Islamophobic' is often attached to valid criticisms of particular Muslims whose behaviour has laid them open to legitimate censure.

Third, as Chapter 3 considers, legal equality has been undermined, in two senses. The creation of 'hate crimes' has weakened police and judicial impartiality. Some crimes are punished more severely when they are racially or religiously aggravated, thus treating the same crime as more serious

when committed against a member of an ethnic minority than when it is committed against a white person. Second, anti-discrimination laws have been gradually transformed so that they are no longer confined to *prohibiting* discrimination against individuals because of their group membership; on the contrary, they facilitate and even call for, preferential treatment of people defined by their group identity.

The most troubling consequence of the emergence of rule by victims is that we have become confused about the core elements of our own liberal-democratic culture. As a result, we have become weak defenders of our own precious heritage of freedom. Fundamental debates about moral equality, freedom and democracy have become confused in a fog of concern about avoiding offence even (perhaps most of all) to people who threaten us with violence. We are exhorted as individuals not only to show, but emotionally to feel, equal respect for both the core beliefs of liberalism and for rival ideas that are not compatible with a free society, even those that explicitly demand its destruction.

Chapter 4 examines how to reform hate-crime laws and focuses especially on laws that unduly inhibit freedom of speech.

1

Why modern victimhood is not compatible with liberalism

OUR TRADITION OF LIBERALISM

Britain is a liberal-democracy and, despite challenges, its guiding philosophy since the seventeenth century has been liberalism. The term 'liberalism' is somewhat ambiguous, but there is no better alternative. John Locke encapsulated the essential ideas in 1689. His ideal might be called 'homeland liberty', because it is based on the assumption that a free people living in a particular land have come together to frame a system of government for themselves. Locke used the word 'commonwealth' to describe such an independent community of people: 'By *common-wealth*, I must be understood all along to mean, not a democracy, or any form of government, but *any independent community*.'³

Locke described the essence of the English heritage of law and how it differed from the more authoritarian Continental tradition. We should have a 'standing rule to live by, common to every one of that society' which meant, 'A liberty to follow my own will in all things, where the rule prescribes not; and not to be subject to the inconstant, uncertain, unknown, arbitrary will of another man'.⁴ English law, in other words, was a method not only of exercising the power of the state, but also of excluding the state from various areas of social life – of protecting our right to use our energy, resources and

time to improve our own lives and our shared institutions as we thought best. The law provided a clear warning when force could be used against us and otherwise left us free. The tradition that has typically prevailed on the Continent is very different. Law is not a device for protecting the liberty of the individual, but rather a weapon in the hands of the authorities to enforce their will.⁵

Locke reminds us of the ultimate reason for valuing freedom. It is not so much that it has helped to make us prosperous but, above all, because it has institutionalised the moral equality of individuals. In our natural (by which he meant God-given, rather than pre-social) state, he said, there was equality, 'wherein all the power and jurisdiction is reciprocal, no one having more than another'.⁶ All individuals were moral equals in the same sense that all are equal in the sight of God. If all were to come face to face with their Maker at the end of their lives, they must be allowed to take personal responsibility for choosing fact from error and right from wrong. Consequently, there must be freedom of study, thought, discussion, conscience and action. And government should, therefore, be based on consent.

Today hostility to homeland liberty comes from three types of collectivism: the first might be called 'patriotic' collectivism, the second 'cosmopolitan' and the third 'sectarian'.

Patriotic Collectivism

The first variety of collectivism puts no serious limits on what the government can do, so that the hands of the authorities are not tied as they go about their purposes. Collectivism appeals to two main types of people: those who imagine they will be leaders, issuing instructions that are invariably said to be for the greater good; and those

who are content to be led – sometimes only too glad to give their votes to leaders who promise to release them from all the main cares and responsibilities of modern life. Much welfare spending, for instance, is calculated to appeal to this group.

Collectivists make very different assumptions from liberals about what people are like and how a society is united. For collectivists, individual character and conduct are determined by social and economic conditions. Strictly speaking deterministic theories imply that future events are inescapable, but in practice modern determinists believe that a few leaders can rise above economic and social forces. Societies are united, therefore, under the command of leaders who see things more clearly than the masses.

The liberal view is that people are moral agents, capable of exercising personal responsibility. They are united, not by leaders but by shared beliefs and commitments and their attachment to a political system based on equality under the law. Theirs is the social solidarity of people who expect a lot of one another and who demand much of themselves.

Collectivists usually put forward a well-established list of criticisms. The most common involve identifying themselves with the public good and liberals with its opposite. These claims boil down to three main assertions: liberals favour atomised individualism; liberals ignore the common good; and liberals favour unfettered selfishness or egoism. All can be rebutted.

Social atomisation was not defended by any mainstream liberal, such as Locke, Hume or Smith. How did the misunderstanding arise? Liberals were critics of the social order of their day, which was aristocratic and hierarchical. For them, in law and politics, people should be treated on their individual merits, not according to their birth.

They especially objected to the idea of inherited social superiority. In that sense they were individualists, but their individualism took the form of belief in equality before the law, a social 'invention'. They knew only too well that shared beliefs and institutions were the bedrock of society. Justice, said Adam Smith was 'the main pillar that upholds the whole edifice',⁷ but people should also seek to do right according to conscience: 'That the sense of duty should be the sole principle of our conduct, is nowhere the precept of Christianity; but that it should be the ruling and the governing one, as philosophy, and as, indeed, common sense, directs'.⁸ These were not the words of someone who thought that we are all isolated individuals. On the contrary, the liberty of the individual guided by conscience was seen as a pre-condition for mutually beneficial social interaction. Liberal individualism was from the outset a theory of the individual in society: 'The liberty of man, in society', said Locke, was 'to be under no other legislative power, but that established, by consent'.⁹

Were liberals indifferent to the common good? Locke repeatedly uses the terms the common good and the public good throughout the *Second Treatise of Government*. It is true that he was suspicious of those who *pretended* to desire the common good, as was Adam Smith, but that was an objection to pretence, not the reality. The early liberals were suspicious of those who wanted to impose religious orthodoxy allegedly for the common good, but thought that justice and free enquiry were genuine public goods.¹⁰

Did liberals celebrate selfishness and look down on public altruism? Again, liberals were very far from celebrating untrammelled egoism. Blackstone, for example, writing about self-defence, said that the 'public peace' was a 'superior consideration to any one man's private property'.

Moreover, if private force were permitted as a remedy for private injuries, 'all social justice must cease', because the strong would rule over the weak.¹¹ Locke's use of the term 'property' has given rise to the suspicion that he favoured 'property above people', but he uses the term to refer to the lives and liberties of individuals. In the language of the time, slaves were said to lack property in themselves. Far from celebrating egoism, Locke thought that 'Self-love will make men partial to themselves and their Friends'. Moreover, 'ill Nature, Passion and Revenge will carry them too far in punishing others'. Government was necessary 'to restrain the partiality and violence of men'.¹² Liberty was the right to do everything not prohibited by law, not the right to do anything whatsoever. As Locke famously insisted, liberty was not a 'state of licence'.¹³ Adam Smith left no room for doubt about his own hopes:

'to feel much for others, and little for ourselves, that to restrain our selfish, and to indulge our benevolent, affections, constitutes the perfection of human nature; and can alone produce among mankind that harmony of sentiments and passions in which consists their whole grace and propriety.'¹⁴

Homeland liberty is not anti-government but rather in favour of government that is limited to upholding a free and democratic society. It differs from the tradition often called *laissez faire* in believing that active government is necessary to uphold liberty. Insofar as any government action can be called an intervention then it advocates compatible interventions – those consistent with freedom.

But why have I called the collectivists who advanced these criticisms of liberalism patriotic? Before answering that question, I need to explain what I mean by the two rival brands of collectivism, cosmopolitan and sectarian.¹⁵

Cosmopolitan Collectivism

The main inspiration for cosmopolitan collectivism is disapproval of nationalism. For cosmopolitan collectivists, nationalism is synonymous with aggression towards foreigners. Such critics want nation-states to be replaced by supra-national institutions, which they contend will be more likely to encourage peace. Today, the utopian internationalism of the cosmopolitan collectivists attaches itself to the United Nations and the European Union.

But, as many writers have shown, there is no necessary connection between a legitimate love of the culture and beliefs of a particular country and aggression towards foreigners. George Orwell famously distinguished between love of country (patriotism) and hostility towards other nations (nationalism). More recently, philosophers such as David Miller of the University of Oxford have tried to restore the legitimacy of respect for 'nationality' – the beliefs and institutions that we hold in common and which work to the advantage of all.¹⁶ In any event, there is no guarantee that a nation that surrenders some of its capacity for self-government to a supra-national agency will be less likely to engage in war than one that retains the ability to make its own laws.

Sectarian Collectivism

The third fundamental critique of homeland liberty, sectarian collectivism – the topic of this book—is based on 'identity politics'. According to sectarian collectivists, all hitherto existing societies have been divided between victim and oppressor groups. Ideas such as impartial law or the common good are smokescreens created to conceal the power of oppressor groups. Some groups recognise themselves to be victims. Other groups suffer from a false

consciousness of well-being and justice. In their case, better-informed sympathisers have to point out to them that they are oppressed and exploited.

Sectarian collectivism does not consist merely in forming groups to press for improvements or the redress of grievances; rather it demands political recognition for permanent victim status, entitling groups to special protection or preferential treatment.

Because their status is based on group membership, and because of the assumption that the politically salient characteristics of members are the same, absurdities and contradictions frequently arise for the reason that group members are not in reality all the same. For example, all members of ethnic minority groups that have successfully established their state-supported victimhood are taken to be victims and their oppressors are assumed to be whites. In reality, many successful and wealthy members of an ethnic minority can be much better off than many of the white people who are 'oppressing' them.

Multiculturalism is one of the variants of sectarian collectivism, or identity politics. The underlying idea is that all the cultural beliefs and practices associated with ethnic groups must be given equal standing with those of the host community, even if they are illiberal or incompatible with each other and with the culture of the host society.

The underlying problem is treating group membership as the basis for political status. Historically, homeland liberty has been based on individuals. As we have seen, this does not mean 'isolated individuals', but it does mean that each person is in one sense alone as a moral equal. Originally this idea derived from the Christian view that all are the children of God and would one day be judged. Each person, whether rich or poor, therefore faced an obligation to lead a good

life. This assumption of moral equality became a powerful argument against slavery, but also against theories attaching importance to fixed or ascribed social status. Liberalism from the time of Milton and Locke held that, regardless of the circumstances into which people are born, all must be free to lead their life according to their conscience.

Modern identity politics, however, does not treat the individual guided by conscience as the main building block of society, freely entering into, or (more likely) resolving to uphold an already-existing liberal order for the public benefit. On the contrary, group membership is more important than individual characteristics. And the common good is not sought, but rather group advantage at the expense of others, who are defined as oppressors.

Multiculturalism can sound like a plea for pluralism. But 'multiculturalism' in its current sectarian-collectivist connotation of the equal status and worth of all cultures, and the desirability of a society being composed of many ethnic groups, is not at all the same as 'pluralism' in the sense commonly deployed in sociology and politics during the twentieth century. Pluralism in the latter sense meant that, unlike the totalitarian societies of Nazism and Communism, society was not coincident with the state. In political theory, emphasis was placed upon a multi-party system as one of the hallmarks of a pluralistic society. People could move voluntarily from membership of a group when its codes and disciplines no longer corresponded with their own beliefs, preferences or needs. Pluralism meant that the law was silent about the practices of all groups that were acting within the confines of laws that allowed large scope for variety.

Once a measure of imperfect religious toleration was granted during the seventeenth century, for example, Catholics could take the view that the bread and wine were

transubstantiated into the body and blood of Christ without fear of persecution and Protestants could treat them as mere symbols. The law neither approved nor disapproved of transubstantiation as a doctrine.¹⁷ Before toleration, the law had required particular beliefs to be held, with killing heretics the frequent result. During the sixteenth century the official requirements changed several times in quick succession as Henry VIII (who persecuted Catholics for heresy) was followed by Edward VI (who whitewashed churches and destroyed religious art to eliminate Catholic 'idolatry' as he saw it), then Mary Tudor (who persecuted Protestants) and then Elizabeth I (who fought against both Catholics and Protestant dissenters).¹⁸ These changes gave rise to writings and a popular song that poked fun at the Vicar of Bray, who retained his position, despite needing to keep changing his fundamental beliefs.

Our laws have invariably tried to avoid giving a seal of approval to, much less coercive insistence on, particular lifestyles. Our laws largely prohibit harmful practices and otherwise leave us free. Thus, equal recognition until recently meant being left alone by the state – for the law to be silent on a wide range of beliefs and behaviours. Identity politics, by contrast, demands laws that bestow political recognition on certain beliefs and that authorise their state-enforced preferential treatment.

In the 1970s and 1980s, sectarian collectivism made significant inroads into the hitherto patriotic collectivist Labour party. Today, sectarian collectivism is associated with the left in politics. Sectarian collectivism – identity politics – had one idea in common with statist of the old Labour party who advocated nationalisation, extensive regulation and state welfare – namely antagonism to a liberal society. But until the 1970s mainstream Labour party

members and leaders (as writers such as Norman Dennis have argued) were patriotic statists.¹⁹ They thought the government should take the lead in bringing about reform and were inclined to glorify the state as embodying the best in people and to contrast the altruism of the public sector with the selfishness of the market. But, they wanted to change the country they loved – to build Jerusalem in England's green and pleasant land – not to destroy it.

By the 1970s the patriotic collectivists in the Labour party were losing out to elements that were antagonistic to the entire social order. The Trotskyites, an identifiable and familiar group wedded to the violent revolution of the international working class, achieved notoriety in the late 1960s and in the 1970s and 1980s. Their influence continued to grow in the Labour party until they were confronted by Labour leader Neil Kinnock from the mid-1980s onwards. Their strategy was essentially to inflame any dispute in order to expose what they saw as the hypocrisy of bourgeois society. Although much weakened by the 1990s, Trotskyites were still able to score occasional victories. Imran Khan, the solicitor representing the Lawrence family before and during the Macpherson inquiry, for example, stood as a candidate for Arthur Scargill's avowedly Trotskyite Socialist Labour Party at the 1997 General Election.²⁰

Other beliefs, no-less hostile to the established liberal order, also took root in the 1970s and 1980s, especially identity politics that went wider than (and sometimes ignored altogether) the identity politics of working-class solidarity. Because the aim was to use political power to impose particular beliefs hostile to liberalism, it is properly understood as a variety of collectivism, but it was a divisive brand of statism, aiming to use government power to advantage one group over another. Like Marxists

before them, these 'post-modernists' interpreted society as divided between oppressors and victims. But the victims and oppressors were no longer the non-affluent proletariat on the one hand and the capitalist, on the other: they were black versus white; woman versus man; disabled versus able-bodied; gay versus straight.

During the 1960s and 1970s Herbert Marcuse was the most influential voice, perhaps displaced now on the shelves of university libraries by Michel Foucault. Many of these pre-cursors of post-modernism were Marxists, from Gramsci onwards, who were trying to understand why the western white proletariat had failed to fulfil the revolutionary mission ordained to it by historical necessity. Their explanation was partly that the workers had been bought off by riches, but above all, that they had been deceived by the false consciousness their oppressors had succeeded in inculcating into them. Behind the façade of freedom and prosperity was the reality of a ruling elite who ran things to suit themselves. The task was to replace them by undermining the system through which they maintained control. The capitalist's control of the means of material production had not, as Marx had thought, been decisive. Rather the key to capitalist power was control over the means of 'mental production' – the education system, the mass media, and the socialisation of the child within the family of life-long marriage. Revolutionaries should, therefore, take over the media, the entertainment industry, and the arts and the education system. And the bourgeois family had to go. Most children acquired their subservience to the ruling elite from their parents, and so the loyalty of men and women to each other and their children through marriage must be weakened. What better weapon than the possibility of sex with many partners without the

responsibility of children (made possible by contraception) or the risk of sexual disease (for a time naively assumed to be possible)? The first steps of the long march through the institutions need not begin on the factory floor, but in the bedroom. Children brought up in fatherless families would be less sure of themselves, less attached to prevailing ideas, and consequently more vulnerable to the appeals of political activists. And if, in addition, their schools taught them that all ideas are of equal worth, because we have no way of judging the good from the bad, then young people would be far more easily manipulated by the new elitists who wanted to replace the old rulers. For a time these doctrines became the received wisdom of large sections of the intellectual left.

As part of a brilliant 'deconstruction' of the Macpherson report, Norman Dennis has succinctly explained some of the key post-modernist doctrines. According to Marcuse, revolutionaries should search for 'outcasts and outsiders' from 'the exploited and persecuted of other races and colours' as well as 'the victims of law and order' (that is, the criminals).²¹ In the view of others, such as Adorno, they should try to free society from the domination of facts to reveal the truth as seen only by enlightened thinkers. They must fight 'the present triumph of the factual mentality'. For liberals, facts are great levellers that can be used by anyone, whether humble or mighty, to puncture the pretences of elites who think they know best. Yet, many intellectuals from the 1970s onwards were drawn towards the post-modernist critics of 'the factual mentality', who sought, by banishing statistics and other empirical findings from the argument, to make their own elitism impregnable to criticism. As such, their theories were no more than an excuse for their own brand of authoritarianism.²²

This sectarian collectivism was sometimes closely

allied with what I have called cosmopolitan collectivism, the doctrine of internationalists whose enthusiasm for international agencies over national democracies leaves no legitimate place for love of country. (Roger Scruton, turning the tables on the 'phobia' phrasemongers, calls them oiks – people afflicted with the mental disease of oikophobia, the pathological fear or hatred of their own home.)²³ Though sectarian collectivism and cosmopolitan collectivism are otherwise very different from one another, they are united in their hostility towards patriotism.

To sum up: the English heritage of liberty is based on the idea of an independent community of people understood as a kind of membership association that had founded a system of self-government to protect personal security, encourage open and representative government, and provide for individual liberty under the law. Personal security is provided by assigning the government a monopoly of force, which must be deployed according to law understood in a particular sense. There is to be a 'government of laws, not politicians' to prevent the arbitrary use of power; and the law must apply equally to all, to prevent favouritism. Open and democratic government was to be accomplished, not through majoritarian democracy, which implied enforcing fixed opinions, but by encouraging deliberative democracy – listening and reflecting before deciding. Individual liberty meant being free to do anything not expressly prohibited by law, including the enjoyment of freedom of expression – and *a fortiori* the enjoyment of freedom of thought and attitude; the freedom to form, join and leave associations without the permission of state officials; and the right to leave the country and to move freely within it.

Sectarian collectivism puts no limits on potential uses of state power and is, therefore, incompatible with the rule of

law. Moreover, it undermines equality before the law by supporting (as Chapter 3 shows) legal reforms that have increased penalties for 'hate crime'.

VICTIMHOOD IS NOT COMPATIBLE WITH MORAL EQUALITY

I have already argued that the core value of liberalism is the moral equality of individuals. It underpins the idea of equality before the law. It's easy enough to see why establishing a faction to gain advantage might lead to unfairness, but why claim that liberalism itself is threatened?

As some members of ethnic minorities have noted, seeking victim status can have a harmful effect on the victims themselves. Black American writers such as Shelby Steele have argued that it undermines self-respect.²⁴ But liberalism has always assumed a certain type of individual and a certain type of society. Individuals have been perceived as capable of bearing responsibility and of being inspired by the ideal of making a positive contribution to the advance of civilisation, perhaps modestly seen as 'doing your bit' or more grandly as aiming to emulate the greatest accomplishments of the human race so far. It was assumed that every facet of life could be improved and that all should play their part. Such individuals were not victims of circumstance, nor content to show obedience, let alone expected to show deference to superiors. They would make their way using their talents to the full, expecting hardships and pain and hoping they would have the strength of character to overcome them. *Pilgrim's Progress*, first published in 1678, and almost as widely read as the Bible until well into the 20th century, summed up the ideal to aim for.

The tendency of modern victimhood to deny personal responsibility, however, is not the fatalism displayed by

some religions. Victims are not said to be powerless in the face of God or nature. On the contrary, their oppressors are to blame for any unwelcome outcomes. Victims are never blamed – it's always someone else. As many writers have acknowledged, including Charles Murray in his impressive survey of *Human Accomplishment*, civilisation has advanced by individuals pushing themselves to the limit – pursuing 'transcendental' values: truth, the good and the beautiful – not wallowing in self-pity and delighting in blaming others.

The strong focus of liberal writers on the potential of individuals to change draws our eye to the most fundamental of all the building blocks of liberalism, the ideal of moral equality. It is the core value, the gut instinct, the visceral belief, so much so that we often get confused about how far to take it. Sometimes weight is attached to equal *outcomes* when to do so contradicts moral equality – the latter implies being able to make our own unique contribution and since we are all different it leads to different results. To suppress these outcomes is to suppress individuality.

A desire to sympathise with victims has also led us astray, particularly by encouraging a flight from personal responsibility. Victim status is closely allied with the medicalisation of life. Conditions like 'stress' have been re-interpreted as states of mind that can only be overcome with expert therapy or counselling. But they are further examples of the escape from personal responsibility. Another example is post-traumatic stress disorder, previously understood as being upset after a serious incident like an accident. This condition too can only be resolved with help from highly trained counsellors, though financial compensation helps.

The result of this attitude is that genuine victims become less able to handle pain or loss. Instead of coping, they say to themselves, it should not have happened. And instead of

digging deep within for strength, or sharing their problem with a friend or relative, the victim asks, 'Who is to blame and who should compensate me?' No one, it seems, should ever have to sacrifice anything, or struggle against adversity.

In America in the 1970s it became common to define black people as victims, and it was a white academic, William Ryan, whose book *Blaming the Victim*,²⁵ first published in 1971, supplied the catch-phrase still in common use. The new 'blame the victim' ideology, Ryan accepted, was very different from the old racism. Its adherents included sympathetic social scientists with a genuine commitment to reform, but they had been duped. Old racists believed that blacks were defective because they were 'born that way', but the emphasis on character and personal responsibility was not an improvement because it still located the explanation within the victim rather than in 'the system'.

For Ryan and similar academics, to assign any responsibility to a person was blaming the victim. All human conduct should be explained as the outcome of outside forces – the system. The public policy conclusion was that political power should be used to modify the 'outside forces'. He cites an activist friend of his who tried to do everything he could to generate citizen support for the welfare rights movement, including 'heartbreaking stories of life on welfare'. To Ryan's disgust, most of his listeners seemed 'unable to rid themselves of the ingrained belief that getting money without working for it – no matter how worthy and touching the recipient may be – is illicit, slothful and vaguely criminal.'²⁶ In Ryan's world-view, there was no place for such misguided qualms of conscience.

Ryan's line of reasoning appeals to our sympathy. Many American blacks were mistreated. No reasonable person could fail to condemn lynchings and the systematic denial

of civil rights in the Deep South. But as inspirational leaders like Gandhi and Martin Luther King showed, it is how the victim reacts that matters most. They should not be quiescent; they should resist injustice, but in a manner compatible with a mutually respectful moral community. They should not replace the white man's hate with their own, but build a better world for all in order to maintain the values which allow diverse peoples to live together in peace. Martin Luther King's views were based on moral principles which could serve as a basis for freedom. He appealed to the best in people. Ryan appealed to the lower human instincts.

Moreover, in reality 'victims' may have contributed to their own predicament. If the remedy does, in practice, lie within the control of the victim then any observer should be free to say so. Traditionally many American blacks reacted to their situation by hard work, good character, thrift, self-sacrifice and family loyalty. As a strategy it worked, as the millions of American blacks who made it to the middle-class can testify, and as many black writers including Thomas Sowell and Walter Williams have convincingly argued. It also worked for Jews and many other ethnic groups in America.

We can gain greater insight into liberalism by comparing it with societies based on a tribal or clan social structure.²⁷ Liberalism implies a form of government based on the equal political status of citizens. Moreover, a liberal-democracy is made up of individuals and voluntary associations, not clans or great families. It creates a sphere in which individuals govern their own actions. We each are assumed to have a political role in addition to a non-political, private or family life. Under liberalism, religion and the state are separate, with religion in the private sphere, whereas few tribal societies separate the two.²⁸ Clan or tribal societies generally make no distinction at all between the political and private spheres.

In a liberal society the law creates a private sphere, where custom and moral pressure may hold sway but only in so far as they are the violence-free custom and moral pressure of a neighbourhood-community or voluntary association that individuals are free to leave for another community or association. In a clan or tribal society, however, there is only one sphere of control. Law must be obeyed under both liberal and non-liberal systems, but in a clan/tribal society customary social rules cannot be ignored either. In a liberal society a person may be born a farmer and become a scientist. There is the assumption, and to a large extent the reality, that individuals can change and improve. In the pure form of societies based on custom there is no such possibility. A daughter who flouts the will of parents may be killed, a practice mis-named 'honour killing' because it is said to uphold the 'honour' of the family. These ties have loosened in many contemporary societies, but they remain a force that cannot be ignored without risk.

As Larry Siedentop, in his neglected book *Democracy in Europe*, has argued, the main reason why Islam is so hostile to Western liberalism is that it senses the presence of Christianity behind it, a feeling that is entirely justified. Kant's universal guiding principle – 'Act so that the rule of your conduct can be adopted by all rational agents' – was a secular version of the Christian injunction 'to love your neighbour as yourself'.²⁹ In Islamic societies non-believers are not equal under the law. And there is no question of loving neighbours who have left the faith. Moreover, Christianity emphasises equal conscience, whereas Islam typically demands equal submission or obedience.

The Christian claim is ontological – all are believed to be born to exercise judgement and to be guided by their conscience. Inequalities at birth are a fact, but no such status

is permanent. No one is born to rule. And no one may be assumed to have superior knowledge without their claims being tested. Christianity has always emphasised conscience rather than mere obedience, a doctrine that ultimately led to governments based on liberal constitutionalism, which protected freedom of conscience for all. A government that protected all sects equally was preferable to the hope that your sect might gain control and impose its view by persecution. By the time of the Glorious Revolution in 1688, the lesson of the previous 150 years had been that the other sects were just as likely to take power. For everyone to abandon hope of being the persecutor was in the best interests of all. As Lord Acton claimed in his classic essay 'The History of Freedom in Christianity', the great achievement of the seventeenth century was for all sects to accept that toleration benefited everyone. The desire for freedom of worship was the 'strongest motive' in 1688, said Acton, and earlier struggles had taught that it was only by limiting the power of governments that the freedom of churches could be assured. That great idea, he wrote: 'teaching men to treasure the liberties of others as their own, and to defend them for love of justice and charity more than as a claim of right, has been the soul of what is great and good in the progress of the last two hundred years.'³⁰

The individual freedom offered by liberalism was, however, a demanding taskmaster. To do right an individual must sincerely choose the right course and not merely follow orders or comply out of fear. Slavish obedience without thought has generally been strongly frowned on by the Christian church. This is not to say that it is always unacceptable for an individual to follow the authority of church leaders and to hold beliefs as a matter of faith (that is without proof or the possibility of it), it is only to claim that

an individual who is so inclined should accept the authority of a bishop or adhere to a faith as a conscious individual choice.

This claim, perhaps, requires, a little more defence. The Christian idea of conscience is not based on the idea of the completely autonomous individual, utterly separate from the wider society with its inherited customs and practices. It takes it for granted that there is a moral tradition contained in the Bible and the teachings of religious leaders, which should be taken into account by all believers. The idea of autonomy chiefly meant that unthinking obedience was not enough. Each was expected to conduct a moral struggle in the light of established authority, which was not fixed for all time, but open to interpretation. But just as scientists who hope to advance human knowledge must work with the methods for testing hypotheses recognised by their fellow scientists, so religious believers are expected to accept public tests of 'truth for the time being'. In the Catholic church, for example, doctrine could change only by holding a council of bishops, but in more decentralised churches a simple meeting of the congregation might suffice. Moreover, the 'sacred text' also has a different status in Christianity compared with Islam. Under Islam, there are still modernist reformers who regard the Koran as the verbatim word of God, whereas all but a handful of Christian sects regard the Bible as man's interpretation of the word of God, thus allowing for the possibility of earlier mistakes and leaving open the possibility of new interpretations in the light of changing events.

A liberal society permits groups to form for the pursuit of very different lives, including lifestyles based on obedience, but if membership of the group is not voluntary then its existence is not compatible with liberalism. A liberal constitution not

only permits pluralism, it protects individuals who pursue a particular life, perhaps of self-transformation. It is taken for granted that no family or private group should be able to stop adults from following their own conscience. In clan societies, however, there is no private sphere in which individuals can go their own way. There is only time-hallowed custom to which obedience is due.

Thus, liberalism protects individuals from the state itself and from private wrongs and pressures, some of which may result from religious or ethnic solidarities. This means that there is a limit to what private groups can do to their members. Marriage, in particular, must be entered into freely. And each must be free to join or to leave their group.

Not all the protected identities threaten liberalism to the same extent. The variant usually called multiculturalism is the most dangerous. But by emphasising the group over the individual, all group identities weaken respect for moral equality and the sense of personal responsibility that goes with it.

To summarise: freedom for groups is not the same as freedom for individuals if the group does not respect freedom of conscience. Moral equality is the belief that every individual has the potential for rational autonomy and seeing right from wrong. From this view, it follows that people should not be treated differently solely because of inherited group characteristics – including race and gender, as well as the religion of parents and inherited status and wealth, or the lack of it.

2

Impact on Democracy

The term democracy is often used as if it were unambiguous, but there is an important difference between 'majoritarian' and 'deliberative' democracy. In liberal countries constitutions have typically been enacted (or evolved in Britain's case) to both strengthen and limit public decision making. We often speak of constitutional safeguards or limits as if the only aim were to curtail the power of government. Such limits have always been fundamental to avoidance of the abuse of power, but constitutions also seek to improve the quality of decision-making by requiring open discussion and building in delays to ensure that all points of view are heard and hasty decisions avoided. And as Chapter 1 mentioned, some emotionally charged issues, especially concerning religious belief, have been kept outside the political domain to make it easier for debate to take place in an atmosphere of mutual learning through discussion and compromise.³¹

Behind the tradition of constitutional government are assumptions about the human condition, particularly the belief that all humans are fallible and that we need the help of others through open discussion to arrive at better judgements. In particular, liberals have mistrusted entrenched, hereditary power and wanted a constitution to create a sphere of personal security in which individual talent and moral qualities could thrive. Constitutions lock-

in safeguards against our worst selves to ensure deliberative democracy, that is learning through discussion, limits on power, and the exclusion of issues that can never be resolved by reasoned debate.

Earlier, I argued that modern victimhood is a political status that is sought after because of the advantages it brings. One consequence has been to weaken our democracy by encouraging a self-serving approach to the political process. Above all, seeking victim status encourages the invention and nursing of grievances. The underlying problem for victim groups is that once they have been given preferential treatment their power increases and, thereby, undermines the case for special treatment. As a result, some groups make strenuous efforts to maintain their victim status by exaggerating their sufferings. Four main strategies for gaining and maintaining victim status may be singled out: highlighting historic grievances; falsely claiming to have been 'insulted'; widening the definition of the group to increase political clout; and putting factual claims about their status beyond rational contradiction.

Highlighting historic grievances

The main criterion for victim status is that an oppressor imposes some kind of hardship. The most attractive hardships are those not experienced at all by the person laying claim to victim status or those suffered by someone else, which explains the appeal of historic grievances suffered by earlier generations. The wrong may have been real at the time, as it was with slavery, but ethnic minorities today may have suffered no direct ill effects from the eighteenth-century slave trade. Indeed, some will be descendants of the tribes who captured other Africans and sold them as slaves to European and Arab traders.

Increasing touchiness

Another opportunity is created by taking offence at innocent remarks or valid criticisms that are redefined as insults. This phenomenon explains the prevalence of speech codes. Feminists, for example, got away with claiming that words ending in 'man' excluded women. The term 'chairman' proved especially fruitful. It has been the custom for hundreds of years to address a male chairman as 'Mr Chairman' and a female as 'Madam Chairman'. The spelling never implied that only men could chair a meeting, but by claiming otherwise a grievance was invented and carefully nursed. The spelling of the word 'chairman' was proof of grievance in its own right and preferential treatment could be demanded without experiencing any real hardship or inconvenience.

One of the more perverse strategies has been to claim that living in a tolerant society is an insult. It takes the form of demanding, not merely toleration for group habits, but equal respect. Thus activists among gay men say that they feel insulted if their behaviour in private is merely tolerated. Legal toleration is not enough and gay relationships must be put on an equal footing with heterosexual relations. In some ways the behaviour of such groups resembles that of adolescents in a bad mood. They are not going to be satisfied with anything less than total surrender to their will. An important part of the strategy is to establish that the victim is the sole judge of when language is offensive. To keep oppressors and sympathisers on the hop, every now and then they change the words that cause offence. In recent years the use of the term 'mental handicap' has been redefined as insulting.

For many years a distinction was made between mental illness and mental handicap. The former was a condition

that could be overcome through therapy and the latter one that could not. A person with a physically damaged brain, for example, will never fully recover. The pressure group, the Royal Mencap Society, however, prefers to use the term 'learning disability' and criticised the journalist Dominic Lawson for describing his own daughter, who has Down's Syndrome, as mentally handicapped. Mencap alleged that the term stigmatises people and Lord Rix, the president of the Royal Mencap Society, wrote to the *Independent* claiming that people with a learning disability regarded the term mental handicap with 'horror and disdain'.³² The subject stimulated strong feelings and several 'letters to the editor' followed. One parent of a boy with a mental handicap argued that the term 'mental handicap' was 'an accurate and widely understood description'. We should, he said, 'use the correct term and dismiss the fabricated stigma'.³³

The latest manifestation of hypersensitivity is the claim that some words are 'microaggressions'. Incorporating the term 'aggression' implies an attack, when nothing of the kind has taken place.³⁴

In some cases, the 'victims' themselves do not even ask for preferential treatment. Their champions have called upon local authorities, for example, to remove Christmas symbols to avoid insulting Muslims. However, spokesmen for Muslims had not requested any such sensitivity and expressed surprise that a local authority might think that way. In some cases it seems that secularist groups are seizing the opportunity to remove religious symbols from the public sphere, when the both Muslim and Christian leaders have an attitude of mutual tolerance.

Similarly, when a 10-year old boy in Greater Manchester was taken to court by the police for racist abuse, the Muslim Council of Britain (MCB) said it thought it was unnecessary.

Tahir Alam, chairman of the MCB education committee was quoted in the *Daily Mail* as saying: 'With children as young as that we should work around these things so they develop respect for one another. The issue of racism is, of course, very serious but we should educate them, not take them to court'.³⁵ The action of the police appears to have been partly the result of a desire to improve the image of the police post-Macpherson.

Category creep – getting in on the act

To gain political recognition it is necessary to build a coalition to put pressure on political parties that respond to pressure as a form of 'consumer demand'. This need encourages groups to define themselves as widely as possible, to increase their voting impact. But it is not just that existing groups seek recruits, it is also that individuals who previously did not see themselves as victims change their attitude in order to profit. I recall a successful American business leader telling me about his mixed feelings about using his victim status. He was a Puerto Rican who had been very successful in America without playing the 'race card'. Yet, when his daughter was 18 he learned that he could get her into a better college if he highlighted her race. He believed in 'making it' on your own merits, but admitted that the temptation was too much and he seized the opportunity to benefit his daughter, despite his feelings that it was unjust.

Disability appears to have been most vulnerable to expansion. For many years disabled people, for example, had well-defined problems such as deafness, blindness or being confined to a wheelchair. In America, the process of 'category creep' has gone furthest, such that recovering alcoholics and obese people now claim to be covered by the Americans With Disabilities Act. The British Government was aware

of the danger when the 1995 Disability Discrimination Act was passed and explicitly excluded by statutory instrument some potential disabilities, including 'a tendency to set fires', just in case arsonists tried to claim to be on a par with paraplegics. This expedient has not prevented recruitment reaching over one-fifth of the population.³⁶

From the outset giving special legal recognition to a group created envy and led to demands from other groups to be similarly recognised. The US Congress passed the first modern hate-crime law, the Hate Crime Statistics Act (HCSA) in 1990. It directed the US Attorney General to collect data on crimes that demonstrated 'manifest evidence of prejudice based on race, religion, sexual orientation, or ethnicity.'³⁷ But the list excluded gender, which led to a campaign that resulted in the Violence Against Women Act 1994. The coalition in favour of HCSA, however, actively opposed including gender prejudice in the 1990 Act because, it said, statistics were already collected on domestic violence and rape. Moreover, they argued that gender crime did not have the element of 'victim interchangeability'. One of the main campaign groups, the Anti-Defamation League (ADL) said in 1990:

'[A] substantial majority of women victims of violent crimes were previously acquainted with their attackers. While a hate crime against a black sends a message to all blacks, that same logic does not follow in many sexual assaults; victims are not necessarily interchangeable in the same way.'³⁸

Some campaigners made it clear that they wanted to exclude gender to avoid competition. In one of the first authoritative analyses of hate crime, James B. Jacobs (professor of law at New York University School of Law) and Kimberly Potter (then a researcher at NYU) concluded that 'at this symbolic

level groups perceive themselves to be in competition with one another for attention.³⁹ Advocacy groups are judged and judge themselves on their ability to procure legislation that affirms the worth of their members. Jacobs and Potter argue that US laws of the 1980s and 1990s were 'symbolic statements requested by advocacy groups for material and symbolic reasons and provided by politicians for political reasons.'⁴⁰

In response to continuing pressure after 1990, Congress passed the Hate Crime Sentencing Enhancement Act in 1994. Sentences were to be harsher if 'the defendant intentionally selected any victim or property as the object of the offense because of the actual or perceived race, colour, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person.'⁴¹

This was a much shorter list of identity groups compared with the hate-crime laws passed by US states. In 1998 Jacobs and Potter listed these politically recognised prejudices. Some states included Native Americans, immigrants, the physically and mentally handicapped, union members, non-union members, right-to-life and pro-choice groups, members of the armed forces, and those involved in civil rights activities. Washington DC had the widest list, including age, personal appearance, family responsibility, marital status, political affiliation and matriculation.⁴²

Putting factual claims beyond rational contradiction

When a group has a weak evidential case for its demands, it is common to try to downgrade the importance of evidence. One approach is to replace evidence with emotional appeals to distract attention from the lack of supporting facts. The claim that any criticism is 'blaming the victim', described in Chapter 1, is one such ploy. In some cases the process

resembles the invention of permanent victimhood, captured by words such as islamophobia, homophobia and disablism, which imply that the groups concerned are the constant victims of their oppressors. It takes for granted that someone is a victim when that is the factual claim to be established.

Another approach is to frame supporting arguments in terms that prevent factual contradiction, especially by asserting claims that cannot be tested. To assert the presence of prejudice or bias in human affairs as proof of discrimination is one such device. But prejudice and bias are attitudes of mind. They are not actions and they may or may not lead to discriminatory actions. Whether or not there has been a discriminatory act in any particular case needs to be established. Unwitting attitudes of mind are even more useful. If the person with the attitude does not know he or she has it, how could anyone else know? And yet, the presence of such unwitting attitudes has been assumed to be a reality. Moreover, the possibility of 'positive' unwitting attitudes is neglected. For example, many people (unwittingly) are afraid of being accused of racism and bend over backwards to avoid giving offence. It is precisely this semi-conscious sense that is being exploited by protagonists for victim status. But, in any event, the law should always rest on demonstrated facts, not attitudes of mind – witting or unwitting.

The term 'institutional racism', as defined by the Macpherson Inquiry, provides one of the worst examples of putting issues beyond evidence. The Macpherson definition was this:

'The collective failure of an organisation to provide an appropriate and professional service to people because of their colour, culture, or ethnic origin. It can be seen or detected in processes, attitudes and behaviour which amount

to discrimination through unwitting prejudice, ignorance, thoughtlessness, and racist stereotyping which disadvantage minority ethnic people. It persists because of the failure of the organisation openly and adequately to recognise and address its existence and causes by policy, example and leadership.'⁴³

The starting point for the Macpherson concept of 'institutional racism' is an outcome unfavourable to an ethnic minority. However, whether the outcome was because of their ethnic status is an empirical question that is assumed by this definition to be an established truth. This inadequacy is further compounded by talking of unwitting prejudice. But there may be prejudice without discrimination and it always remains to be established by investigation whether or not there has been either prejudice or actual discrimination.

It is worth unpacking some of this terminology a little more. The term 'prejudice' has two common meanings. One is to pre-judge without evidence or experience. The second is to form an adverse judgement about an individual or to treat an individual unjustly based on such pre-judgement. We inevitably make judgements about individuals based on their membership of a group, because some qualifications or types of behaviour are more common in such groups. It is a fact of human experience (and therefore not a pre-judgement) that group membership tells us something about individuals. Certain qualities are more common among the French than the British. People born to a certain culture are influenced by it. Someone raised as a Catholic in Italy, for example, is more likely to be against abortion than someone raised without religion in Soviet Russia.

As Norman Dennis has shown, such group generalisations, sometimes called stereotypes, are a useful and unavoidable part of the human condition. Prejudice, in its pejorative

sense, is judging an individual in advance of experience or persisting with a judgement regardless of contrary evidence. For example, one group generalisation about the English might be that they are dry and unemotional. However, it would be an unjustified prejudice to insist that, because William Shakespeare was an Englishman, he must be dry and unemotional.

Stereotyping, says Dennis, is judgement based on 'experience of the *chance* that a person from this group or category is *more likely* to behave in one way than another'.⁴⁴ Such a view might also be called a bias, that is, an inclination towards a point of view or a preference for or against something. For example, we may be inclined to trust people who are well dressed rather than people who are scruffily attired. Our assumption could easily be mistaken but we have many momentary interactions with strangers when we have little option but to rely on such rules of thumb.

Our assumptions about group characteristics are generalisations that may or may not be true in particular cases. Moreover, as statistical generalisations they may be true of only a minority of group members. For example, a higher proportion of black Britons compared with white Britons have been to jail, but it's still only a minority of black men who have been imprisoned. The same would be true in America, but it did not stop black presidential candidate, Jesse Jackson, arguing that he had been reasonable when he was relieved to discover, on turning round in the street one dark night, that the footsteps he heard behind him were those of a white man. He had made an estimate of the risk of being attacked based on a group generalisation. He had not made a statement about all black Americans.

Stereotypes and prejudice are part of the human condition. A stereotype (based on a group generalisation)

may be justified or not, and a prejudice (pre-judgement, whether adverse or not) may be unavoidable or not until direct experience can replace it. But both are attitudes of mind and, even when they exist, it still remains to be established whether or not discrimination occurred. Thomas Sowell gives an example from South Africa, where prejudice undoubtedly existed and laws explicitly prohibited the employment of blacks, but where the costs of not employing blacks were such that otherwise prejudiced employers hired them. The construction industry would have failed if building companies had not employed black workers. And in the Transvaal clothing industry all blacks were banned from working under apartheid laws, but in 1969 the majority of the workforce was black.⁴⁵ In these cases, then, there was prejudice and *legal* discrimination, but less *actual* discrimination than the law required.

Moreover, minorities may continue to flourish despite not only prejudice but also discrimination. Malaysia has restricted university access for the Chinese, but has been unable to impede their success. Throughout the 1960s, to give but one example, the Chinese minority were awarded over 400 degrees in engineering whereas the native Malays received only four.⁴⁶

The important lesson is that we can avoid mistakes by basing our concern to avoid discrimination on evidence of actual behaviour and demonstrated outcomes. The mere presence of attitudes of mind is not proof of discrimination.

THE CONSEQUENCES FOR DEMOCRACY AND CONSTITUTIONALISM

These stratagems for gaining and keeping victim status and the preferential treatment that goes with it have a harmful effect on our democratic system. Here are three such effects.

Weakening the ideal of limited government

Limited government is useful, not only because it defines the sphere in which the state can use legitimate force, thus leaving people free to improve their lives as they believe best in the remaining private domain, but also because it keeps heated issues, which are not easily resolved through the exchange of views or a spirit of compromise, outside politics. Victim politics tends to draw such contentious issues back into the political process with the result that it becomes more fraught and irrational.

Increasingly victim groups demand that hotly-disputed issues be made subject to police power. As described in Chapter 3, differences of opinion about the best arrangements for adopting children have led to police action,⁴⁷ and so too have claims by Sir Iqbal Sacranie, then head of the Muslim Council of Britain, that homosexuality increased the risk of disease. In both cases, issues best resolved by the clash of opinion and the weight of evidence had been made a matter of force.

Many differences can only be handled, especially in a diverse society, by agreeing to disagree. Large realms of disagreement, especially in matters of faith, are not open to rational dispute, and are best kept outside politics. In the past, liberals argued that the best way to respect different points of view was for the law to be silent about them.

Undermines reason and mutual understanding

A further consequence of emphasising mutually exclusive group identities is that the potential to settle differences through reason itself is weakened. This problem is over and above the tendency to assert claims that cannot be tested, as touched upon earlier. I have in mind occasions when the non-victim is defined as incapable of understanding the plight of

the victim: no white can understand the predicament of a black person; no man can comprehend the predicament of a woman. Any comment the outsider makes is unavoidably prejudiced and so the possibility of resolving conflicts by the exchange of views is ruled out.

The sensitivity that requires others to adjust to the self-defined sense of grievance of the victim is sharply in contrast with the morality of freedom Kant had in mind when he formulated the 'categorical imperative'. And it is not consistent with the 'golden rule' – do unto others as you would have them do unto you – which also enjoins us to take the feelings of others into account. For centuries, moral systems have urged us to try to see ourselves as others see us; to sympathise with the feelings of other people; and not to exempt ourselves from observing rules which apply to everyone else. But victim status justifies a quite different ethos. Only the victim can judge. This makes the sensitivity required very different from the ordinary civility expected in a typical daily exchange. Victim status is the perfect excuse for self-exemption from rules that rightly apply to others. It is not compatible with the mutual respect of free and responsible persons. The American lesbian feminist writer, Tammy Bruce, who began to see some of the flaws in the intellectual positions she had earlier defended, has shown how many activists were motivated by what she calls 'malignant narcissism'.⁴⁸ That term may strike many as a little too severe, but she is right to emphasise that victimhood often focuses on the imperial self.

Why is the Government so keen to identify itself with a campaign against hate crime? It is best understood as a consequence of modern careerist politics. There are still many MPs who are guided by moral principles, but a large number are career-driven with few moral commitments.

They seek success. Embracing identity politics serves two purposes. First it means that blocs of votes can be bought with promises of preferential treatment. And second, siding with apparent victims bestows moral legitimacy which can be used to appeal to non-aligned voters. Today, this sending of messages is often called virtue signalling.

There is also an emotional reward in siding with a victim, especially if it is costless. Political leaders weigh the costs and benefits of support, and discover that they can often please a group without antagonising others. Politics becomes symbolism, being 'on the record' against prejudice, or 'sending messages – we are on your side, vote for us!⁴⁹ In America, the first federal hate-crime law, the 1990 Hate Crime Statistics Act, was designed explicitly to 'send a message to the citizens of this country'.⁵⁰

The effect has been the Balkanisation of society and the distraction of political leaders from pursuit of the common good. We used to try eliminate race and religion from politics. But advantages such as public-sector jobs, university places and public-sector contracts can be gained through victim status. The possibility of preferential treatment encourages groups to rely on their victimhood, rather than their citizenship or personal effort. They define success as getting more preferential laws passed. Moreover, it has a harmful effect on members of victim groups. When classified as victims it discourages members of groups from highlighting their successes. Asian Americans, for example, have been successful but have tended to play it down.⁵¹

The wrong people benefit

A major side effect of victimism is that the wrong people benefit. Victim groups include a spread of different types of people. Some black Americans, for example, are rich

and some poor. Because there is a higher concentration of poverty among black Americans compared with white Americans, privileges have been demanded for all blacks, including the rich. For example, quotas guaranteeing ethnic minorities access to universities have been enacted to compensate black Americans, but relatively few of those who have gained university places have come from poor backgrounds.⁵²

Indeed, group privileges have often been harvested by the wrong people, that is the already-successful members of ethnic groups. For example, one of the mistakes made in America was to give preferential treatment to ethnically owned businesses as a strategy for alleviating poverty. Few consider it to have been a success. If anything, 'contract compliance' has benefited the already-successful members of minorities. Under the Small Business Act businesses owned by ethnic minorities were entitled to a proportion of government contracts. However, the American minority businessmen who were awarded these contracts were in no sense 'deprived'. They enjoyed a personal 'net worth' above that of all Americans.⁵³ Middle class feminist women often make similar demands. They claim that women in the past have been discriminated against, and insist upon job promotions today, when they have personally suffered no loss and may not deserve on merit the job appointment they seek.⁵⁴

The assumption is made that the most important thing about a person is their group membership. Moreover, all group members are assumed to have had shared experiences, when they may not have done so. This assumption is significant because all group members can claim to have suffered hardships experienced by only a few members.

However, awareness that well-off people are using

the political system to advantage themselves weakens confidence in democracy itself and encourages more people to take a cynical view of the public sphere. They may see it as less the domain for pursuing the common good and more the place to press your own interests – because if you don't others will.

Conclusions

I argued earlier that there is an authoritarian or anti-democratic dimension to the modern quest for victim status. Is this claim justified? Norman Dennis has succinctly described how doctrines that cannot be tested by any member of the public play into the hands of elitists who believe they have unique insights into social realities, sufficient to justify using political power to impose their view when they can. In the face of such claims, reliance on evidence is a great leveller; and the obligation to state factual claims in a way that anyone can test is a great equaliser.⁵⁵

Liberalism emerged precisely as an antidote to groups who believed they had a special insight and a special right to control the 'ignorant' masses. Post-modernists who think they see social realities more clearly are, in this sense, no different from the champions of the divine right of kings, or aristocrats who thought they were born to rule. Authoritarians think that the arguments are already settled. The task is to act on the superior insight of the few, not to waste time questioning it. People must be moved to action, not given a licence to prevaricate. Liberalism's reply has always been: if you think you know something the rest of us don't, then submit it to the test of public criticism! Or in Popper's more exact vocabulary, state your theory in such a way that it can be refuted by evidence.

3

Victim status and legal equality

By requiring the consent of Parliament, following open discussion by all who might be subject to proposed laws, and by requiring that laws must apply equally to everyone, the intention of liberals was to reduce the risk that law would be abused to benefit particular groups at the expense of others. As Hume remarked in the 18th century, apart from purely personal loyalties three main types of political faction were found: based on affection (such as loyalty to a clan or noble family); principle (such as religious doctrine); or interest (such as a desire for monetary gain). Power had been constantly abused to benefit the favourites of the monarch, the religion favoured by the crown, and the landed or commercial interests with influence at court. The liberal alternative was for all members of society to seek only those laws that were for the good of all.

Historically, we have been accustomed to groups putting forward arguments for laws to be passed in order to give them an advantage. However, the expectation that law should serve the common good has generally made it necessary for anyone seeking private gain to claim that there is some public benefit involved. Manufacturers and traders, for instance, have not usually called for protection from competition so that they can make bigger profits,

but to protect jobs and contribute to the prosperity of all. Even though some claims to act in the public interest have been false, nevertheless the idea that law ought to serve the common good has put limits on abuse.

In the modern era, laws privileging trade unions should have alerted us to the dangers of giving preferential treatment to organised groups. In 1901 the Taff Vale Railway Company successfully sued the rail workers' union for losses suffered during a strike. As a result, the Liberal Government passed the Trade Disputes Act in 1906 removing trade union liability during strikes. Unlike everyone else, trade unions were henceforth able to break contracts without legal consequences. By the 1960s and 1970s trade union immunity was being frequently abused and by the late 1970s the legal protections given to trade unions in recognition of their weakness were widely seen as absurd. The victim had become the oppressor and, following a series of strikes in which union power was abused, the laws were reformed in the 1980s.

Despite this experience, preferential policies have been introduced in the UK, threatening the liberal ideal of equality under the law. But victim groups are not just political factions pressing for preferential treatment. They also undermine one of the fundamental building blocks of a free society, the equal legal status of its members. The impartiality of the main criminal justice agencies, the courts and the police, has been weakened. For example, when ethnicity is involved, judges have been officially advised not to be impartial. And the creation of 'hate crimes' has led to the abandonment of the ideal of even-handedness in policing.

WEAKENING THE IMPARTIALITY OF THE POLICE AND JUDGES

In 1999 a booklet produced by the Equal Treatment Advisory Committee for the Judicial Studies Board, the official agency for advising judges, began with the statement that: 'Justice in a modern and diverse society must be "colour conscious", not "colour-blind".' And in order to emphasise the point, a list of nine 'do's and don'ts' included: 'Be "colour conscious" not "colour blind".'⁵⁶ The police have gone the further still. The laws against alleged 'hate crimes' have become a rationale for using police powers against innocent people who have had the temerity to venture an opinion disliked by a politically-defined victim.

Hate crime

The government publishes regular hate crime statistics, the police have published operational manuals, the Crown Prosecution Service (CPS) has a section of its website dedicated to hate crime, and the Law Commission is in the process of consulting about whether or not to extend protected status to further groups. The Law Commission has usefully described the three types of law that are involved: the aggravated offences, the enhanced sentences, and stirring up hatred.

Aggravated offences: In 1998 the Crime and Disorder Act (CDA) created the possibility that assault, harassment, criminal damage and public order offences could be racially aggravated.⁵⁷ For example, the normal maximum sentence for common assault is six months. If racially aggravated, it is two years. Muslims objected that they were not specifically included (although, because most are Asians, they were covered as members of an ethnic minority) and as a result

under the Anti-Terrorism, Crime and Security Act 2001, the 1998 Act was amended to include crimes that were 'religiously aggravated'.

An offence in the CDA was racially aggravated if:

- (a) at the time of committing the offence, or immediately before or after doing so, the offender demonstrates towards the victim of the offence hostility based on the victim's membership (or presumed membership) of a racial group; or
- (b) the offence is motivated (wholly or partly) by hostility towards members of a racial group based on their membership of that group.

Enhanced sentencing: The law on enhanced sentencing is contained in sections 145 and 146 of the Criminal Justice Act 2003. Section 145 covers hostility based on race and religion. It applies to the sentencing of anyone convicted of an offence where hostility is proved, except an aggravated offence under the 1998 CDA (which already carry higher sentences). Section 146 covers hostility based on disability, sexual orientation and transgender identity.

The sentence that a judge passes using enhanced sentencing cannot exceed the maximum penalty. For example, the maximum sentence for an assault is six months' imprisonment, so the maximum sentence for an assault which involved hostility on the basis of disability, sexual orientation or transgender identity is also six months' imprisonment. Sentencing is solely for the judge, and not the jury, but it must be stated in open court that the offence was aggravated by unlawful hostility.

Stirring up hatred: Part III of the Public Order Act 1986 criminalises certain acts that are intended to stir up or likely

to stir up racial hatred. Part IIIA of the 1986 Act makes similar provision for certain acts intended to stir up religious hatred (after the 2006 Racial and Religious Hatred Act) and to stir up hatred against a group defined by sexual orientation (after the 2008 Criminal Justice and Immigration Act).

Racial hatred is defined as 'hatred against a group of persons defined by reference to colour, race, nationality (including citizenship) or ethnic or national origins'. Religious hatred is defined as 'hatred against a group of persons defined by reference to religious belief or lack of religious belief'.

The actions covered by the 1986 Act include:

- the use of words or behaviour, or the display or written material;
- the publication or distribution of written material;
- the public performance of a play;
- the distribution, showing or playing of a recording of images or sounds;
- the broadcasting or a programme including images or sounds; and
- the possession of inflammatory material.

There are some significant differences between the Part III and Part IIIA offences. The words, behaviour or material must be 'threatening, abusive or insulting' for the purposes of the Part III offences on racial hatred, whereas they must be 'threatening' for the purposes of the Part IIIA offences on hatred based on religion or sexual orientation.

The Part III offences can be committed either where the defendant intended to stir up racial hatred, or where it was likely (having regard to all the circumstances) that

such hatred would be stirred up. The Part IIIA offences can only be committed where the defendant intended to stir up hatred.

There is a strong 'freedom of speech' defence for religious hatred offences in Clause 29J of the 1986 Public Order Act. This states that nothing in Part IIIA:

'shall be read or given effect in a way which prohibits or restricts discussion, criticism or expressions of antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs or practices of their adherents, or of any other belief system or the beliefs or practices of its adherents, or proselytising or urging adherents of a different religion or belief system to cease practising their religion or belief system.'

The Racial and Religious Hatred Act was given royal assent in February 2006, but fortunately it was in a much weaker form than originally planned by the Government. Before its amendment in the House of Lords, the Government intended to enact a law that would have allowed the police to be sent in to silence individuals who criticised a religion, much as police power has been used to suppress critics of same-sex adoption or Islamic critics of homosexuality. Initially the Government strongly resisted inclusion of Clause 29J.

Our own history should have warned us of the dangers. The slaughter and disruption of Britain's own civil war, which ended with the execution of the King in 1649, turned the minds of many to the discovery of a political philosophy that would allow people who disagreed strongly nevertheless to live together in the same country. Among the main threats to this ideal of a free society were autocrats and theocrats. David Hume was among the most severe critics of religious leaders:

We may observe, that, in all ages of the world, priests have been enemies to liberty; and it is certain, that this steady conduct of theirs must have been founded on fixed reasons of interest and ambition. Liberty of thinking, and of expressing our thoughts, is always fatal to priestly power, and to those pious frauds, on which it is commonly founded.⁵⁸

Democracy has encouraged efforts to see the other person's point of view, to seek agreement rather than to quibble, and where possible, to compromise. For all groups to be subject to open criticism, including mockery and ridicule, has been a great leveller. In its original form the new law could have been used to persecute non-believers by dragging them through the courts, or to allow valid criticisms to be interpreted as incitement of hatred.

Due to the determined efforts of many members of the House of Lords, the Act was weakened, chiefly by requiring proof of intent to cause religious hatred and by inserting Clause 29J. Given the willingness of the police leadership to allow politically-defined victim groups to deploy police power against their critics, clause 29J was very necessary.

General offences and hate crime: Also very important are the general public order offences, particularly causing harassment, alarm or distress under the Public Order Act 1986, sections 4, 4A and 5. These powers are frequently used, often in their racially or religiously aggravated form under the 1998 Act. There are also a number of other criminal offences that could be used to prosecute online hate crime. Section 1 of the Malicious Communications Act 1988 makes it an offence to send indecent, grossly offensive, threatening or false electronic communications if the purpose, or one of the purposes, of the sender is to cause the recipient distress or anxiety. And section 127 of the Communications

Act 2003 makes it an offence to use a public electronic communications network to send a message, or other matter, that is grossly offensive or of an indecent, obscene or menacing character; or to send a false message 'for the purpose of causing annoyance, inconvenience or needless anxiety to another'.

Harassment or stalking offences under sections 2, 2A, 4 or 4A of the Protection From Harassment Act 1997 could also be used.

What have these legal changes meant in practice? I will focus on two concerns. First, crimes against members of politically recognised victim groups are considered as more serious than those against other people. And second, police power has been used to suppress legitimate public discussion, under the guise of preventing 'hate crime'.

Writing only a few years after the hate-crime laws were passed, the barrister Francis Bennion described several cases in which police powers were used to intimidate people. Since then there have been many more.

The examples reveal the extent to which the leadership of the police has been captured by special interest groups who hope to use police power against their legitimate critics.⁵⁹ Some of the cases involving public figures have attracted press attention. Remarks about the Welsh by Tony Blair⁶⁰ and Christina Odone, for example, led to police investigations. When she was a panellist on BBC Question Time, journalist Christina Odone remarked during an exchange about Cardiff possibly hosting the 2012 Olympics instead of London that, from now on, the English 'are not going to be talking about the "leeks", and they are not going to be talking about the "little Welshies"'. A viewer complained about the latter phrase to the police who told Ms Odone during a telephone conversation that her comments constituted a 'race incident',

but not a crime.⁶¹ Although no punishment was meted out, the police had been used to intimidate her.

An even more blatant attempt to use the police to intimidate critics was made by Wyre Borough Council during 2005. Apparently in an effort to win the Navajo Charter Mark for Equality & Diversity, gay rights leaflets had been displayed on council premises. Mr Joe Roberts, aged 73, told the council that this offended his Christian beliefs, and he asked if he could display his Christian literature alongside the gay rights leaflets. The Council reported Mr Roberts to the police, who came to his house. According to Mr Roberts:

'They warned me that being discriminatory and homophobic is in line with hate crime. The phrase they used was that we were 'walking on eggshells'. I asked the officer, if I phoned the police with a complaint that the Council were discriminating against Christians would he go to interview them?'⁶²

A Council spokesman said Mr Roberts and his wife Helen had 'displayed potentially homophobic attitudes', and admitted that the Council had referred the matter to the police, 'for further investigation with the intention of challenging attitudes and educating and raising awareness of the implications of homophobic behaviour'.⁶³ The police said they had given 'words of suitable advice' but, in truth, they had willingly been used to intimidate someone who was merely venturing a legitimate opinion in a free society.

Sam Brown was an Oxford undergraduate who went out in May 2005 to celebrate the end of exams. Emboldened by a drink or two he had said to a mounted police officer: 'Excuse me, do you realise your horse is gay'. Two squad cars were sent to arrest him. He was detained in a police cell overnight and given a fixed penalty notice for £80, which he refused to pay. The case came to court in January 2006

and the Crown Prosecution Service dropped the case at the last minute because there was not enough evidence to prove that his behaviour had been disorderly. The police disagreed and insisted that he had made 'homophobic comments that were deemed offensive to people passing by'.⁶⁴

The police took the view that the remarks were offensive and charged him under section 5 of the 1986 Public Order Act with behaviour 'likely to cause harassment, alarm or distress'. The case reveals the major difficulty with hate crime, namely that facts do not matter. Ambiguity initially crept in when 'racist incidents' were said to be racist if somebody thought they were, whether their claim was true or not. The ACPO hate-crime document repeatedly states that the facts are immaterial. When speaking of secondary victimisation (when a person is dissatisfied with the police service) it says this:

'If, as victims of hate crimes or incidents, individuals experience indifference or rejection from the police this in effect victimises them a second time. Secondary victimisation takes place whether or not the police are indifferent or reject the victims if that is how the victim feels about the interaction. Whether or not it is reasonable for them to feel that way is immaterial. **The onus falls entirely on the police to manage the interaction to ensure that the victim has no residual feelings of secondary victimisation.**'⁶⁵

This mentality is not new and nor did it begin with the Macpherson report on the murder of Stephen Lawrence, as some have argued. Macpherson reported in February 1999 that the ACPO definition of a racist incident was as follows:

'A racial incident is any incident in which it appears to the reporting or investigating officer that the complaint involves an element of racial motivation, or any incident which includes an allegation of racial motivation made by any person.'

Macpherson recommended replacement by a simpler form of words: 'A racist incident is any incident which is perceived to be racist by the victim or any other person'.⁶⁶

As Francis Bennion has shown, ACPO policy, reinforced by Macpherson, has removed the test that the law should expect conduct considered appropriate by a reasonable person. Bennion quotes the distinguished judge, Lord Macmillan:

'In the daily contacts of social and business life human beings are thrown into, or place themselves in, an infinite variety of relations with their fellows; and the law can refer only to the standards of the reasonable man...'⁶⁷

Of course, these days a judge would refer to the reasonable 'person' not 'man', but the vital point is clear enough. By pandering to the desires of victim groups with an axe to grind, the police have stopped being the representatives of the 'reasonable person' and become the plaything of political activists or petty-minded members of the public.

At the time of the First Edition in 2006 there were many rank and file police officers who disapproved of the way their impartiality had been undermined. Gradually, the recruitment of new officers since then has meant the replacement of officers trained in the tradition of impartiality by those who have learnt how to demonstrate their gender, race or diversity awareness (or that they are 'woke'). In one recent case a 19 year-old female candidate for the police service had passed to the interview stage and was asked what she would do if she needed advice. She replied, 'I would go to my sergeant and ask him for help.' She failed the interview for saying 'him', thus revealing her lack of gender awareness.

Her treatment was the common experience of long-serving

officers who began their careers in a service that upheld the view that the police should be even-handed – that justice was blind – but who now find they are treated like misfits in need of ‘retraining’ in diversity awareness. The new atmosphere was highlighted in 2002 at the annual conference of the Police Federation, when John Denham, the police minister, said that it was time to ‘get down to the nitty gritty’ on training of officers. His comment provoked a rebuke from PC Chris Jefford of the Met’s training directorate. He told the minister that, if he used the term nitty gritty, he would face a discipline charge because the term was considered racist. PC Jefford said police had been told ‘nitty gritty’ was thought to have been a term used to describe slaves in the lowest reaches of slave ships.⁶⁸ The BBC subsequently included the term in its online e-cyclopedia, concluding that the origin of the term was obscure and citing experts who thought it had little, if any, connection with slavery.⁶⁹ But that had not prevented it from becoming a prohibited term in police circles.

THE BACKGROUND

Hate crime is essentially an American import. By 1998 the term had been in use in America for over a decade. The first modern use of the term is credited to two American legislators who promoted the Hate Crime Statistics Bill in 1985. The term was used increasingly in the media, frequently to argue that America was experiencing an epidemic of hate crime. By the 1990s it found its way into the law journals, although many academics preferred to speak of bias crime.

The wider context is the rise of identity politics. In America from the 1960s hostility to individuals because of their race was strongly condemned after decades of discrimination. Discrimination was prohibited and preferential programmes

were introduced to improve educational and employment opportunities. Hate crime laws were passed from the mid-1980s in many US states and extended identity politics to crime and punishment. Offenders who were judged to have been prejudiced were punished more severely.

The British Government claims that hate crime is rising, when on one of the two measures it quotes it is falling and on the other it is only going up because of increased recording. The Government asserts that hate crime has a stronger emotional impact on victims compared with other crimes, but the evidence is subjective and thin on the ground. And it contends that perpetrators of hate crime are more culpable because other members of the victim's identity group are affected, when many other crimes also affect other people.

Because the Government wants to be able to say that hate crime is increasing it has made it as easy as possible to report it and has encouraged increasingly trivial incidents to be seen as hate crimes. Often racial or religious epithets are uttered in the course of personal disputes, which in themselves are not crimes. By its own admission, many offenders are young people who are sometimes criminalised for very little.

The claim that hate crime is increasing

The Government published an action plan in July 2016 and a review of its implementation in October 2018. The 2016 foreword by Home Secretary, Amber Rudd, claimed there had been an increase in reports of hate crime. The document linked the increase to animosity expressed after the EU referendum, but admitted 'it is too early to be sure how widespread the problem is'. The report aimed to increase reporting by encouraging the use of third-parties and working with groups that were said to 'under-report'.⁷⁰ The

inspectorate of police found in 2018 that victims are often not aware they have experienced a hate crime and so they have to be encouraged to see prejudice.⁷¹

However, the danger of encouraging self-reporting by advocacy groups is that it leads to exaggeration in the hope of mobilising public action. The police established the True Vision website to make online reporting easier.⁷² Complainants do not even have to give their name. The website says:

‘The police take hate crime very seriously and will record and investigate this offence even if you do not want to give your details. However, you must note that the investigation and ability to prosecute the offender(s) is severely limited if the police cannot contact you.’

The political dynamic is that an increase in hate crime (preferably one that can be called an epidemic) is needed to justify action. This is only possible by lowering the bar and including minor insults. From 1998 there was a steady growth in prosecutions until 2008-09, when the number fell for the first time. In 1998-99 1,602 people were charged with a racist crime. The number increased steadily to 7,430 in 2005-06. From that year the statistical series was altered to include crimes that involved religious as well as racial aggravation. The updated figures show that 8,868 defendants were prosecuted for crimes involving racial or religious aggravation in 2005-06. The number increased to 13,008 in 2007-08 but the Crown Prosecution Service Hate Crime Report, published in December 2009, showed a fall in the number of defendants prosecuted to 11,624. This was the first fall since 1998. As if to compensate, the Government set up systems to encourage people to report more ‘hate’ incidents to the police.

The Cross-Government Action Plan on hate crime of September 2009 declared that the Government's objective was to increase the reporting of hate crime.⁷³ The CPS website confirms that it defines a racist incident as 'any incident which is perceived to be racist by the victim or any other person' in order to 'increase the level of reporting of racist incidents'. Since 1996 there has been a 'steady increase every year'.⁷⁴ In addition, alleged victims are able to report incidents to third-parties, such as a local voluntary association, instead of the police.

The cross-government action plan knowingly exaggerates under-reporting. The main text says 'there is sufficient information from victim surveys to indicate the scale of the problem'. It compares police figures of 57,055 racist incidents with the British Crime Survey estimate of 207,000. But hidden in the footnote it says that 'a direct comparison between BCS and police recorded crime figures is not possible because police recorded crime only refers to four crime types whereas BCS estimates could refer to all crime types.'⁷⁵

By March 2008 all 42 CPS areas had Hate Crime Scrutiny Panels, whose role was to look at 'finalised hate crime case files' to ensure that correct policies had been followed. Also by March 2008 they had Community Involvement Panels, whose members include activists who 'challenge' racist and religious discrimination.

The 42 Hate Crime Scrutiny Panels are made up local victim groups with a lawyer as chairman to encourage alleged victims to bring forward more complaints. The first was established in 2004 (initially as a race crime scrutiny panel). These panels have become fishing expeditions for more business. The CPS defines itself on its own website as 'the largest law firm in the UK' and its attempts to search out

opportunities to prosecute people for hate crime are more compatible with the attitude of a profit-maximising business than a public service.⁷⁶ The CPS is starting to resemble the law firms that advertise on television their ability to win compensation for people who tripped on the pavement. The advert would go something like this: Has anyone ever called you a bastard? Did he call you a black bastard? If so, call now and free of charge you could have the satisfaction of seeing him put in jail.

Normally the Government is very keen to show that it has reduced crime, but hate crime is different. The foreword to the CPS Hate Crime Report 2008-09, by Keir Starmer, says that the CPS has sustained racist crime prosecutions and 'increased the volume of homophobic and transphobic, and disability hate crime cases being prosecuted'. On the next page, however, there is evidence that in its anxiety to encourage reporting and prosecutions the CPS is scraping the barrel. There had been an increase in cases failing because of 'victim issues' including non-attendance at court and 'cases where the evidence of victims did not support the case'.⁷⁷

The police have been caught up in the campaign and are urged to set up hate-crime units. The cross-government action plan makes it clear that 'no hate incident or hate crime is not serious enough to report'.⁷⁸ In London some officers privately complain that they are being required to define trivial spats between people as hate crimes, when they would prefer to deal with more serious offences. The purpose of a legal system is to replace heated demands for private vengeance with calm and collected justice. Instead of pursuing the common good, the last Government abused its power to urge the Crown Prosecution Service to whip up demands for vengeance among victim groups who it hoped would display their gratitude at election time.

Despite the Home Secretary saying there had been an increase in reports of hate crime, paragraph 15 of the 2016 action plan says that there had been a fall in hate crime according to the Crime Survey England and Wales (CSEW): a decline of 56,000 incidents to 222,000 on average for the three years from 2012/13 to 2014/15. However, police recorded hate crime rose from 44,471 in 2013/14 to 52,528 in 2014/15, largely because of improved recording.

The follow-up report of 2018 claims that hate crime is still under-reported as shown by comparing the CSEW with police records.⁷⁹ However, the inspectorate of police argued that the CSEW and police data are not comparable because the CSEW includes other 'strands', namely age and gender.⁸⁰ In particular, there is a disparity between the CSEW and police figures because the CSEW covers hate incidents rather than crimes.⁸¹

The desire to show that the problem is getting worse occurred in America in the 1990s and one of the first systematic studies concluded that we were witnessing the 'social construction' of a hate crime epidemic.⁸²

Hate crime hurts more

According to the 2016 hate crime action plan: 'Hate crime has a particularly harmful effect on its victims, as it seeks to attack an intrinsic part of who they are or who they are perceived to be: their race, religion, sexual orientation, disability or transgender identity.'⁸³ The claim is reinforced in paragraph 9: 'Hate crimes are pernicious; they send a message that some people deserve to be targeted solely because of who they are or who they are believed to be.' The report by the inspectorate of police also accepted that hate crime was 'particularly distressing'.⁸⁴

Research is said to show that victims suffer greater

distress.⁸⁵ The 2016 action plan says that the CSEW found that victims of hate crime are up to four times more likely to suffer more serious psychological impacts than ‘non-targeted crime’.⁸⁶ But the evidence is inconclusive and relies on subjective reports of emotional responses given to the CSEW. Moreover, the sample sizes are very small.

An attempt has been made to test the hypothesis by Paul Iganski and Spiridoula Lagou in the *Routledge International Handbook on Hate Crime*, 2018. They found that the amount of distress was not because victims suffered more serious offences, but because for each category in their study hate crime victims were more likely to report being affected ‘very much’. However, their study is based on a very small numbers of hate-crime victims. There were only 14 cases of ‘serious wounding’ and 46 of ‘other wounding’.⁸⁷

Some American studies have found that hate and non-hate victims suffered equally. In one study the impact on hate-crime victims was less because the crime did not affect their self-esteem. The group was the target, not the individual. It was not personal.⁸⁸

Greater culpability because of the impact on the wider group

It is frequently assumed that hate crime is worse than other crimes because it instils fear in other group members. But, all crimes affect others. All victims feel emotions such as shock, anger and fear. Many crimes instil fear in people other than the immediate victim – child abductions make all parents fearful, jogger rapes in parks frighten all women, as do sexual assaults by taxi drivers, such as the recent attacks by an Uber driver. School shootings and drive-by murders, too, spread alarm. And when people learn about a spate of burglaries in their locality it worries everyone.

Problems with punishing prejudice

In the USA the majority of hate crimes are committed by teenagers. In the 1990s 70% of perpetrators were under 19 and 40% under 16. Is applying harsher punishment the best way to reduce offending among teenagers? Jacobs and Potter challenge the claim that harsher sentences will reduce offending and argue that sending deterrent messages to them is inferior to institution building, such as providing family or support networks.⁸⁹ This is the usual argument put forward by crime policy makers but for hate crime, perhaps without being fully aware of their assumptions, they favour severity of punishment over child welfare.

Victims are also perpetrators and have their own prejudices

Victim status relies on the condition being permanent, but many members of victim groups are also perpetrators of crimes, including hate crimes. This was the root of the police failure to deal with grooming gangs in the UK. Muslims of Pakistani origin were defined as a victim group and the police feared that they would be accused of racism if they acted against them.

Moreover, when the victims are white, is it right that non-white offenders should be punished more severely than if their victim was also from an ethnic minority. In America in the 1990s the majority of victims were from ethnic minorities and about 20% of victims were white. When the first hate-crime statistics were published by the FBI in the early 1990s some campaigners complained about the identification of white victims. Jill Tregor, a San Francisco campaigner, said: 'This is an abuse of what the hate crime laws were intended to cover.' She accused white victims of using the law to punish minorities more severely.⁹⁰

If politically-mandated prejudices are singled out for greater punishment, deciding which prejudices count most has nothing to do with justice, but rather the political power of groups. This becomes clear when comparing American states. Officially recognised prejudices vary from US state to state.⁹¹ Should all prejudices be included? If some are left out, there may be resentment. If all are included we are back to equal law.

Even if hate crime applies only to ethnic minorities, a further complication is added by intra-black prejudice, usually called colourism. In America some campaigners value darkness of skin colour over lighter shades.⁹² The BBC website gives an example by De'Graft Mensah's own experience and reports a recent backlash against reports that actor Will Smith had been cast to play the father of Venus and Serena Williams in a new film. Some people were upset that Richard Williams is dark-skinned and would be played by Will Smith, who has lighter skin. They thought the role should have gone to a dark-skinned actor because it was unfair to let Will play the role.⁹³

Mixed motives

Attributing crimes to prejudiced motivation is fraught with difficulty because it is not easy to establish motive and offenders often have mixed motives. Consider the example of Colin Ferguson, a black man who murdered six white commuters and wounded 19 others on the Long Island Railroad in December 1993. The police found a note in which he expressed hatred for Asians, whites and 'Uncle Tom Negroes'.⁹⁴ Which motive should count? Should evidence of any prejudice be enough or should it be the dominant motive?

Dontay Carter targeted white men for robbery because, he said, they are all rich. He was convicted of kidnapping,

murder and attempted murder in 1993 and considered himself a victim of white oppression.⁹⁵ Should he have been punished more severely for his expression of a sweeping assumption about white people?

A British case that highlights the problems caused by mixed motivation was heard in 2008. A white person had chanted to a white police officer 'I'd rather be a Paki, I'd rather be a Paki, I'd rather be a Paki than a cop.' In *DPP v Howard* the court held that his motivation was dislike of the police, not race and so he was not guilty of a hate crime.⁹⁶

The next chapter considers how hate-crime laws could be reformed.

4

Hate crime reform

What should be done? I will advocate four main measures.

1. Stop all government policies that stir up inter-group resentment, notably publishing the gender pay gap statistics and the race disparity audit.
2. Abolish all hate crime laws, including aggravated offences under the 1998 Crime and Disorder Act, and enhanced sentences under the 2003 Criminal Justice Act. The stirring-up offences (described in chapter 3) should be confined to occasions when the perpetrator intends to encourage violence or threatens violence.
3. Scrap section 5 of the 1986 Public Order Act, but keep sections 4 and 4A.
4. Pass a new law creating an absolute right of free speech.

The Law Commission review puts us at a turning point. We can go on expanding groups that are given political recognition of their victim identities, or we can restore one law for all. The American experience after their Civil War shows how it can be done. When the fighting stopped discrimination continued, and the federal government passed new laws designed to prevent it. Some have said that the post-civil-war statutes were the first hate crime laws, but the vital difference is that they did not break

down the population into victim groups. The statutes set out to enforce civil rights for everyone. The situation was that in many places crimes by whites against blacks were not prosecuted and blacks were prevented from exercising their rights under the Constitution. Law enforcement officials were either complicit or in some cases the chief perpetrators.

Congress set out to protect the individual rights of every American and authorised federal prosecution of the Ku Klux Klan and law enforcement officials. The first statute protected federally guaranteed rights. It was a crime if 'two or more persons conspire to injure, oppress, threaten or intimidate any person ... in the free exercise or enjoyment of any right.' And one clause, intended to control the Ku Klux Klan, said:

'if two or more persons go in disguise on the highway ..., or on the premises of another, with intent to prevent or hinder [the] free exercise or enjoyment of any right or privilege ... They shall be fined ... or imprisoned not more than 10 years ...'

The second statute secured equal rights:

'Whoever, under color of any law, ... wilfully subjects any person ... to the deprivation of any rights, privileges, or immunities secured or protected by the constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such person being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined ... or imprisoned ...'⁹⁷

This appeal to unity was central to the campaigns of Martin Luther King in the 1960s and was reflected in the 1968 Civil Rights Act, which was also designed to ensure that the law protected everyone.

Should we add more groups?

There are many people who are subject to prejudice or who experience disadvantage, but lack political recognition. We can cite left-handed people, less-educated individuals, and bald people (especially when hiding baldness with a comb-over). It can be a disadvantage in some situations to be low down the alphabet, and to be relatively young within your age cohort is educationally a disadvantage. Several studies have shown that being 'summer born' is associated with lower achievement at school. Having red or ginger hair can lead to prejudice, as Harriet Harman can testify. Blonde females, especially from Essex, are often ridiculed. Some local accents are less trusted, with the result that call centres are located elsewhere. Geordies are apparently more trusted than Liverpoolians. Following the murder of Sophie Lancaster, groups such as goths could make a case for special protection. The 21 additional groups identified by the College of Police, could easily be the tip of the iceberg. However, the more groups given preferential status, the less the advantage to each one. Perhaps we may conclude that having equal laws for all is the best way after all.

Suppressing Freedom of Speech

We usually take it for granted that we have freedom of speech in the UK, but this precious right is threatened today. Socrates, who was tried in 399 BC, is often cited as one of the first martyrs for freedom of speech. He was accused of corrupting the morals of Athenian young people and sentenced to death.

For much of our own history freedom of expression was suppressed. The aim of the law was to uphold the power of the ruler. The first law that gave special protection to an influential group is usually said to have been that of

Scandalum Magnatum, imposed by Edward I in 1275. Sir William Blackstone, writing in the eighteenth century, regarded it as part of the common law in his own day:

'The honour of peers is so highly tendered by the law, that it is much more penal to spread false reports of them, and certain other great officers of the realm, than of other men; scandal against them being called by the peculiar name of scandalum magnatum, and subject to peculiar punishments by divers ancient statutes.'

When the printing press was introduced to England by William Caxton in 1476 Crown licensing of printers was introduced. Nothing could be printed without prior permission. In the early 1640s there was a brief relaxation but in 1643 Parliament restored licensing. In 1644 Milton wrote his famous essay, *Areopagitica*, urging Parliament to permit greater freedom of publication and during the civil war and under the Commonwealth there was a surge in the number of publications. But when the King was restored to the throne in 1660 there were demands for control and a new licensing Act was passed in 1662. Control continued and in 1685 the final licensing Act was passed. It lasted for seven years and when it lapsed in 1692 Parliament allowed it to continue for a time until finally refusing to renew it in 1695.

However, the state continued to prosecute people under the laws of seditious or blasphemous libel. The last successful prosecution for blasphemy occurred in 1977 when *Gay News* was charged with vilifying Christ. It was not until 2008 that the common law offences of blasphemy and blasphemous libel were abolished.

At least when the state acts it must do so through the courts, where there is a fair process and right of defence. In recent years the suppression of opinion has taken a

more primitive form, namely mobs threatening disorder. Universities have been especially vulnerable to demands to ban speakers whose views are disliked by protestors.

Bradley Campbell and Jason Manning, in *The rise of Victimhood Culture*, have explained this development as a return to a modern form of 'honour culture'. They point out the historical importance of honour cultures, in which reputation must be defended at all costs. Individuals were expected to respond aggressively to any slight or insult. It often led to duels in which honour was upheld by private enforcement.

In many Western countries it gave way to a 'dignity culture' in which individuals are seen not so much as having honour but inherent worth or dignity. Disputes are settled by independent third parties, judges, arbitrators or mediators.⁹⁸ Someone wishing to punish or suppress opinion has to appeal to a third party, which acts according to laws stipulating how a fair trial is to be conducted and guaranteeing a right of defence, sometimes with a government-funded defender.

Modern 'victimhood culture' has more in common with honour culture than dignity culture. Sometimes, there is an appeal to a third party, such as the university management when there is pressure to ban a speaker, but there is no guaranteed fair process.⁹⁹ The authorities will not necessarily listen to counter arguments or be open to challenge. In some ways, modern 'victimhood culture' resembles a return to a state of nature. There is no justice amidst the group demands for recognition, validation and submission.

The emergence of animosity to freedom of expression in universities has reinforced the tendency among the police and the Crown Prosecution Service to use force to silence opinions they dislike. During the 1960s and 1970s radical

reformers, especially among students, wanted to be left alone by the Government and they especially wanted to be free to speak their minds in criticism of the Government whenever they wished. We can see the gradual change in the balance of opinion by comparing the debate about the 1936 Public Order Act and the debate leading up to the 1986 Public Order Act. There were significant changes in parliamentary and public opinion. In both cases the Government was responding to events. In the 1930s it was worried about the fascism of Mosley's blackshirts, who disrupted public meetings and marched through the streets in uniform. The background in 1986 was a series of demonstrations and notably the miners' strike of 1984/85. The Government had been concerned since the late 1970s that it did not have the power to deal with violent disorders, especially at demonstrations.

However, despite the severity of the fascist threat, in 1936 the vast majority of MPs were concerned to protect freedom of speech. By 1986 this commitment had weakened, although initial discussion continued to focus on the protection of traditional freedoms.

Section 5 of the 1936 Act provided that any person who in any public place uses words or behaviour which is threatening, abusive or insulting with intent to cause a breach of the peace, or whereby a breach of the peace is likely to be occasioned, is guilty of an offence. The offence carried a power of arrest without warrant, and was triable summarily with a maximum penalty of 6 months and/or a £1,000 fine.¹⁰⁰ The essential element of a breach of the peace was violence or a threat of violence. If an arrest is made for breach of the peace, the officer should go to a police station and then a magistrate's court to show why under the Justice of the Peace act of 1361 the accused should not be bound over.¹⁰¹

Under the 1986 Act, however, section 5 does not require violence. The punishment is less severe. It could be a level 3 fine (up to £1,000) or if aggravated, a level 4 fine (up to £2,500). Yet, neither the green paper of 1980 nor the white paper of 1985 envisaged ending the link with violence and both showed awareness of the risk to freedom of speech. The Law Commission report of 1983 also recommended a continued link to immediate violence or a threat of violence.¹⁰²

There had been some changes before the 1986 Act. The Race Relations Act 1965 created the offence of stirring up racial hatred, but it had required *intent*. Under the 1976 Race Relations Act the test was whether hatred was *likely* to be stirred up against a racial group.¹⁰³ Intention was no longer required and the green paper of 1980 acknowledged that removal of the intention to incite hatred was contrary to the fundamental principles of British law.¹⁰⁴

The document accepted that some ethnic minority groups complained that they were sometimes caused grave offence by people who remained within the law.¹⁰⁵ It quoted Ealing Community Relations Council, which wanted a ban on the advocacy of any discrimination. But the green paper upheld longstanding British law and argued that the fundamental objection to the proposed offence was that it 'would penalise the expression of opinion as such.'¹⁰⁶

So far so good. Then in 1983 the Law Commission review of the law of public order recommended reform of the 1936 Act by ending the link to breach of the peace. However, it argued that the alternative offence should require that a defendant, acting with two or more others, must use threatening words or behaviour which is intended or is likely (a) to cause another person to fear immediate unlawful violence, or (b) to provoke the immediate use of

unlawful violence by another person.¹⁰⁷ In reality the Law Commission wanted to put into statute the established interpretation of breach of the peace.

In 1985 a white paper went on to debate the alternatives.¹⁰⁸ It proposed to adopt the Law Commission's reformulation of breach of the peace and reiterated the Government's commitment to freedom of speech.¹⁰⁹ Section 5A of the 1936 Act had been inserted by the 1976 Race Relations Act. It required no *intent* but only that views were *likely* to stir up racial hatred. The white paper of 1985 recommended that section 5A be re-cast to penalise conduct that was either *likely* to stir up hatred or which was *intended* to do so. Even at this late stage, the Government was committed to freedom of speech and said it believed that the reasonable exercise of freedom of expression should be protected, however unpleasant the views expressed.¹¹⁰

Despite this strong awareness of the dangers, the 1986 Act was passed including section 5, which abandoned the link to breach of the peace, violence or the threat of violence:

'A person is guilty of an offence if he (a) uses threatening, abusive or insulting words or behaviour, or disorderly behaviour, or (b) displays any writing, sign or other visible representation which is threatening, abusive or insulting, within the hearing or sight of a person likely to be caused harassment, alarm or distress thereby.'

Peter Thornton QC, in one of the most widely used textbooks, said that the measure had slipped through even though the power was widely reviled. It had just been used against over 4,000 miners during their strike for doing little more than shouting 'scab'.¹¹¹ He described it as 'something of an after-thought inserted in the Bill as a sweeping-up clause.'¹¹² We can conjecture that the Tory Government of the day felt

under an obligation to the police, who had taken a lot of punishment during the miners' strike, and consequently gave in to the authoritarian elements within the police.

The authorities put the power to frequent use. A parliamentary question by Lord Lester revealed the scale of prosecutions under section 5 between 2002 and 2012. In 2002, 24,677 people were proceeded against, rising to a peak of 30,933 in 2007. By 2012 the number had fallen back to 13,923.¹¹³

A campaign to reform section 5 was launched in May 2012, led by a coalition including Peter Tatchell, the National Secular Society, the Christian Institute, and Big Brother Watch. Unfortunately the campaign only called for the word 'insult' to be removed, otherwise leaving the law intact. It was reformed by the Crime and Courts Act 2013. The Government was initially opposed, but accepted that removing the word 'insult' would make no difference to its ability to bring prosecutions, since the term 'abuse' had a similar meaning. The Government had carried out a consultation about reform of section 5 in 2011. In the summary of responses, the Government revealed its thinking:

'The Government believes that behaviour such as swearing at police officers and burning poppy wreaths on Remembrance Day are completely unacceptable and the police must have the powers they need to deal with them. However, in light of the Director of Public Prosecutions' view that the word 'insulting' could safely be removed without undermining future prosecutions, the Government has decided not to reverse the amendment.'¹¹⁴

The term 'insulting' has been widely interpreted. The risk of arbitrary interpretation is encapsulated by the case of *Masterson v Holden*, a 1986 case under the 1936 Act. Two gay men were cuddling in Oxford Street, London. They

were charged with insulting behaviour whereby a breach of the peace might be occasioned and found guilty by local justices. Their appeal was heard by a divisional court (one involving two or more judges). The ruling stated:

'Overt homosexual conduct in a public street, indeed overt heterosexual conduct, may well be considered by many persons to be objectionable and may well be regarded by another person, particularly by a young woman, as conduct which insults her by suggesting that she is somebody who would find such conduct in public acceptable.'¹¹⁵

In the current climate of opinion such a ruling would be unthinkable, but the irony is that many demands today for the use of section 5 are made by gay activists who wish to silence criticism of gays and lesbians. In its evidence to the 2011 consultation on section 5, Stonewall opposed removal of the word 'insulting': 'Stonewall believes that Section 5 of the Public Order Act 1986 is a reasonable and proportional method to tackle offensive homophobic incidents that occur frequently across England and Wales. We therefore believe there is no need to amend Section 5 to remove the term 'insulting'.¹¹⁶

They should be careful what they wish for. As the case of *Masterson v Holden* showed, a change in public opinion could allow a sweeping power to be used against gays and lesbians. The best safeguard is to prevent the law from interfering with expressions of opinion as such, however objectionable the views may seem to some.

Bodies representing the police took the same view as Stonewall. The Police Superintendents Association of England and Wales said:

'It is the view of the PSAEW that the word 'insulting' should not be assessed in its own right and should be seen in the

context of the overall definition which is also to be threatening, abusive and insulting within the hearing or sight of a person likely to be caused harassment, alarm or distress thereby etc. We believe, therefore, that the comprehensive definition should remain as it allows for an objective assessment of what was said or done, assessment of the impact and the intention of the offender.¹¹⁷

The Police Federation of England and Wales said:

‘... the removal of the word ‘insulting’ from section 5 would have a detrimental impact on our society, its removal would indicate that to ‘insult’ a person or group in a way that is currently an offence is now acceptable, it is not. To allow individuals or groups to unreasonably insult others will cause resentment and would make it more difficult for police to intervene at the earliest opportunity. It is likely to be minority groups that would be found to be the target of these insults and may alienate these people further from the wider society and police.’¹¹⁸

The reform of section 5 by removing the word ‘insult’ was an empty success. Section 5 should have been scrapped in its entirety.¹¹⁹

Today it is not easy to predict when the law will be used against us. The police have been very keen to use the law in a self-serving spirit, by prosecuting people for swearing at police officers. The courts have not always been sympathetic, but variations in interpretation have added to the uncertainty.

In *Harvey v DPP*, in the words of Mr Justice Bean (who heard the appeal in 2011) in March 2009 in Bradstock Road, London, a PC and a PCSO were looking for people who might be in possession of cannabis. They found one young woman and three young men, including the defendant, Denzel Cassius Harvey, outside a block of flats. The officers

decided to search the three men. Mr Harvey objected and said, 'Fuck this man, I ain't been smoking nothing'. The PC searched the appellant but found no drugs, whereupon the appellant said, 'Told you, you won't find fuck all'. The officer proceeded to search the other two men. The officer next used his radio to carry out a name search to see if any of the group was wanted by the police. He asked the appellant if he had a middle name and the appellant replied, 'No, I've already fucking told you so'. The officer arrested Mr Harvey under section 5. A struggle ensued during which the PC alleged that the appellant assaulted him. Mr Harvey was charged, firstly with assault on a police officer and with using threatening, abusive or insulting words or behaviour contrary to section 5 of the 1986 Act. He was convicted on the latter charge and fined £50, but acquitted on the charge of assault.

Mr Justice Bean found that there was no evidence that the police officers had been caused or were likely to have been caused harassment, alarm or distress as a result of the use of those words and the conviction was quashed.¹²⁰

The Harvey case suggests that evidence must always be put forward to show that the person who was within hearing of the words was likely to have been harassed, alarmed or distressed. It cannot be inferred. Parliament has not made it an offence to swear in public as such. To be a crime the defendant must have used threatening, abusive or insulting words within the hearing of someone else who was caused or was likely to be caused harassment, alarm or distress by hearing them. Mr Justice Bean quoted Lord Justice Glidewell in *DPP v Orum*, a case in which a defendant had told the police to fuck off:

'Very frequently words and behaviour with which police officers will be wearily familiar will have little emotional impact on them save that of boredom. It may well be that, in

appropriate circumstances, justices will decide (indeed they might decide in the present case) as a question of fact that the words and behaviour were not likely in all the circumstances to cause harassment, alarm or distress to either of the police officers. That is a question of fact for the justices to be decided in all the circumstances, the time, the place, the nature of the words used, who the police officers are, and so on.’¹²¹

In *R (R) v DPP* a youth court was considered on appeal to have erred in concluding that a 12-year-old boy who made masturbatory gestures towards a police officer and called him a ‘wanker’ was guilty of using threatening, abusive or insulting words or behaviour with intent to cause harassment, alarm or distress contrary to the Public Order Act 1986 section 4A. On appeal, Mr Justice Toulson found that there was no evidence that the police officer had been caused emotional disturbance or upset by the behaviour or that the youth intended to cause distress.¹²²

These cases have put some constraints on police action, but whether a person, including a police officer, was caused harassment, alarm or distress is a matter of fact to be determined in each case. In these uncertain circumstances, the powers of the police and prosecutors will inevitably continue to be abused.

The police have also been especially keen to prosecute Christian street preachers. *Redmond-Bate v DPP* concerned three female evangelists who were preaching on the steps of Wakefield Cathedral in 1997. A crowd assembled and a police officer asked Alison Redmond-Bate to stop preaching, claiming that a breach of the peace might occur. She declined and was arrested for breach of the peace. She was later charged with obstruction of a police officer in the execution of his duty and found guilty by local magistrates. Her appeal to the Crown Court had been dismissed. The

appeal was heard by two judges in a divisional court. Lord Justice Sedley said in upholding the appeal:

'I am unable to see any lawful basis for the arrest or therefore the conviction.... There was no suggestion of highway obstruction. Nobody had to stop and listen. If they did so, they were as free to express the view that the preachers should be locked up or silenced as the appellant and her companions were to preach. Mr. Kealy for the prosecutor submitted that if there are two alternative sources of trouble, a constable can properly take steps against either. This is right, but only if both are threatening violence or behaving in a manner that might provoke violence. Mr. Kealy was prepared to accept that blame could not attach for a breach of the peace to a speaker so long as what she said was inoffensive. This will not do. Free speech includes not only the inoffensive but the irritating, the contentious, the eccentric, the heretical, the unwelcome and the provocative provided it does not tend to provoke violence. Freedom only to speak inoffensively is not worth having. What Speakers' Corner (where the law applies as fully as anywhere else) demonstrates is the tolerance which is both extended by the law to opinion of every kind and expected by the law in the conduct of those who disagree, even strongly, with what they hear. ...

To proceed, as the Crown Court did, from the fact that the three women were preaching about morality, God and the Bible (the topic not only of sermons preached on every Sunday of the year but of at least one regular daily slot on national radio) to a reasonable apprehension that violence is going to erupt is, with great respect, both illiberal and illogical. The situation perceived and recounted by PC Tennant did not justify him in apprehending a breach of the peace, much less a breach of the peace for which the three women would be responsible. No more were the Magistrates justified in convicting the appellant or the Crown Court in

upholding the conviction. For the reasons I have given, the constable was not acting in the execution of his duty when he required the women to stop preaching, and the appellant was therefore not guilty of obstructing him in the execution of his duty when she refused to comply.’¹²³

Redmond-Bate was not about section 5, although Lord Justice Sedley expressed the principles governing freedom of expression with admirable clarity. *Hammond v DPP* did concern section 5. The conviction was upheld of an elderly street evangelist who preached in the centre of Bournemouth on a Saturday afternoon in 2001 while holding a large sign with the words: ‘Jesus Gives Peace, Jesus is Alive, Stop Immorality, Stop Homosexuality, Stop Lesbianism, Jesus is Lord’. A hostile crowd of some 30 to 40 people had formed, some of whom assaulted Mr Hammond by throwing water and soil at him. The police were called but Mr Hammond refused to allow the intimidation to prevent him preaching. The police decided to arrest Hammond for breach of the peace largely for his own protection, even though his opponents had been violent. In 2002 he was convicted by local magistrates of displaying an ‘insulting’ sign causing ‘harassment, alarm or distress’ contrary to section 5 of the Public Order Act 1986. Although he died soon after conviction, in 2004 Mr Hammond’s appeal against the magistrates’ conviction went ahead. It was dismissed by the High Court, which rejected the argument that his rights of religious freedom and free expression (under Articles 9 and 10 of the European Convention on Human Rights) had been violated.¹²⁴

In giving judgment, Lord Justice May quoted Lord Reid in a House of Lords case of 1973:

‘Parliament had to solve the difficult question of how far freedom of speech or behaviour must be limited in the

general public interest. It would have been going much too far to prohibit all speech or conduct likely to occasion a breach of the peace because determined opponents might not shrink from organising or at least threatening a breach of the peace in order to silence a speaker whose views they detest. Therefore vigorous and it may be distasteful or unmannerly speech or behaviour is permitted so long as it does not go beyond any one of three limits. It must not be threatening. It must not be abusive. It must not be insulting.¹²⁵

At the time of Lord Reid's remarks, the relevant law was the Public Order Act 1936. The appeal judges in 2004 saw the law in similar terms, but disregarded the fact that the crowd had plainly caused a disturbance 'in order to silence a speaker whose views they detest'. In finding against Mr Hammond they encouraged illiberal groups to use intimidation to suppress the expression of opinions they dislike.¹²⁶

Percy v DPP was heard in 2001, when a divisional court found that it was lawful to deface the American flag in the presence of American servicemen. Ms Percy defaced the flag by putting a stripe across the stars and writing the words 'Stop Star Wars' across the stripes. She entered the military base, stepped in front of a vehicle, put the flag on the ground and stood on it. She had been found guilty under section 5 by the Thetford magistrates. On appeal Mrs Justice Hallett said:

'It is significant in my view that sections 5(3)(c) and section 6(4) of the Public Order Act specifically provides for there to be proof of *mens rea* and for the defence of reasonableness. Even where a court finds that conduct has been calculated to insult and has, in fact, caused alarm or distress, the accused may still establish on the balance of probabilities that his or her conduct was reasonable. The question of reasonableness must be a question of fact for the tribunal concerned taking into account all the circumstances.

Where the right to freedom of expression under Article 10 is engaged, as in my view is undoubtedly the case here, it is clear from the European authorities put before us that the justification for any interference with that right must be convincingly established. Article 10(1) protects in substance and in form a right to freedom of expression which others may find insulting. Restrictions under Article 10(2) must be narrowly construed. In this case, therefore, the court had to presume that the appellant's conduct in relation to the American flag was protected by Article 10 unless and until it was established that a restriction on her freedom of expression was strictly necessary.

I have no difficulty in principle with the concept that there will be circumstances in which citizens of this country and visiting foreign nationals should be protected from intentionally and gratuitously insulting behaviour, causing them alarm or distress. There may well be a pressing social need to protect people from such behaviour. It is, therefore, in my view, a legitimate aim, provided of course that any restrictions on the rights of peaceful protesters are proportionate to the mischief at which they are aimed. Some people will be more robust than others. What one person finds insulting and distressing may be water off a duck's back to another. A civilised society must strike an appropriate balance between the competing rights of those who may be insulted by a particular course of conduct and those who wish to register their protest on an important matter of public interest. The problem comes in striking that balance, giving due weight to the presumption in the accused's favour of the right to freedom of expression.¹²⁷

The conviction was quashed, but uncertainty still prevails. A court can decide one way or the other. As *Percy v DPP* showed, the Human Rights Act has added to the uncertainty.

In *Dehal v Crown Prosecution Service* the Human Rights

Act was again central. A Sikh protester had been accused of attending a Sikh Temple in Luton and intending to cause distress. He had been convicted under section 4A of the 1986 Act of intentionally causing harassment, alarm or distress. He entered the temple and left a notice accusing the temple leader of being a hypocrite and a liar. The district judge had found him to be untruthful and the Crown Court had rejected his appeal. Mr Justice Moses upheld the appeal:

'In order to justify one of the essential foundations of a democratic society the prosecution must demonstrate that it is being brought in pursuit of a legitimate aim, namely the protection of society against violence and that a criminal prosecution is the only method necessary to achieve that aim.'¹²⁸

His reasoning was:

'... the important factor upon which the Crown Court should have focused and upon which on its face it appears not to have focused is the justification for bringing any criminal prosecution at all. However insulting, however unjustified what the appellant said about the President of the Temple, a criminal prosecution was unlawful as a result of section 3 of the Human Rights Act and Article 10 unless and until it could be established that such a prosecution was necessary in order to prevent public disorder. There is no such finding or any justification whatever given in the case stated. In those circumstances, whether this case be meritorious or not, I am bound to allow the appeal. There was, in short, no basis found by the Crown Court for concluding that this prosecution was a proportionate response to his conduct.'¹²⁹

Another landmark case concerned insults aimed by one Asian at another. Mr Roshan Pal had been acquitted by Bedfordshire Justices in July 1999 of racially aggravated

common assault contrary to section 29(1)(c) and 29(3) of the Crime and Disorder Act 1998. The Director of Public Prosecutions appealed and the case was heard in 2000. The victim of the assault was Ian Edmonds, a man in his 60s and of Asian appearance, a caretaker at the Cauldwell Community Centre. In February 1999 he asked four youths (two white and two of Asian appearance), who were having a loud conversation on the back steps of the premises, to leave. They had no business at the community centre. Three of the youths left, but Roshan Pal, one of the two Asians, remained. He did so because he wished to 'make a point'. He was aggrieved by Mr Edmonds' request to leave the premises. Other people, he suggested, were often permitted to stay. He assaulted Mr Edmonds first by pushing him against an industrial bin. He called Mr Edmonds a 'white man's arse licker' and a 'brown Englishman'. He then again assaulted Mr Edmonds, kicking his right hip. Mr Edmonds did not retaliate. He again asked the Respondent to leave, which this time he did.

The appeal court accepted that Mr Pal had assaulted Mr Edmonds but considered whether or not the assault was racially aggravated, given that both men were of Asian appearance. The Crown Prosecution Service (CPS) argued that Mr Pal was demonstrating towards Mr Edmonds hostility based upon Mr Edmonds being an Asian. Lord Justice Simon Brown said: 'That, on its face, is a somewhat surprising submission given that both the Respondent and his victim were Asians.' The CPS argued that the clear inference from the words used was that the Mr Pal was accusing Mr Edmonds of 'betraying his own racial group, indeed their joint racial group, by doing the bidding of another racial group, namely white men'. Lord Justice Simon Brown summed this argument up as follows:

'Mr Edmonds [according to the DPP] was acting as an Uncle Tom; he was prepared to take the white man's part. That, he argues, is sufficient to bring this case within section 28(1)(a). As section 28(3) makes plain, the fact that Mr Edmonds being an Asian formed part only of the basis of the Respondent's hostility towards him, the major consideration being that as an Asian he was disloyal, is nothing to the point. That I have to say is not an argument I can accept. True it is that, but for Mr Edmonds being an Asian, the Respondent would not have used these words; they would have had no meaning. But I do not regard that *sine qua non* as a sufficient basis for concluding that the Respondent's hostility towards Mr Edmonds was in any material sense based on Mr Edmonds' membership of the Asian race. What he was demonstrating was not hostility towards Asians, but hostility towards Mr Edmonds' conduct that night. Not racism, but resentment.'

He then dealt with the claim that the words used 'demonstrated hostility towards Mr Edmonds based on Mr Edmonds' association with white men, i.e. antipathy not towards Asians or even a given type of Asian, but towards the white race, and hostility towards Mr Edmonds simply on the basis of his association with them'. The judge concluded:

'To my mind, however, it is an impossibly far-fetched submission to make on the facts of this case. ... It is quite unreal to suggest on the basis of the facts found that the Respondent is anti white men. He had after all been in a group with two of them just before the incident occurred.'¹³⁰
The appeal was dismissed.

The police have also shown enthusiasm for intervening in neighbour disputes. Possibly the most absurd recent case concerned a Czech woman who got into a row with a neighbour in Macclesfield in 2012. Petra Mills was found guilty of racially abusing her New Zealand-born neighbour

by calling her a ‘stupid, fat, Australian bitch’. The neighbour was from New Zealand and did not like being confused with Australians. The magistrate commented that: ‘The word Australian was used. It was racially aggravated and the main reason it was used was in hostility.’ A fine of £110 was imposed for a racially-aggravated offence. Legally, calling her a fat bitch would have been fine, but the national epithet made it a hate crime. The following year Petra Mills’ appeal to the Crown Court was heard. It was found that using the term Australian was not racist and the fine was cancelled.¹³¹

What these cases and many similar cases show is that we are now in a legal minefield, not really knowing what the law expects of us. An example of how easy it is to commit a hate crime can be found in the Government’s 2016 action plan. Stoking up hatred of Muslims and ‘demonising of Islam do not belong...’ in a country like ours, says the action plan.¹³² But only a page or so later, in paragraph 37 it refers to Islamist extremism, which is presumably not demonising Islam, but could easily be construed as such.

Recommendations

The most important single measure for ending the uncertainty would be to scrap section 5 of the 1986 Public Order Act.

Section 4 requires intention to cause a person to believe that immediate unlawful violence will be used against them or to provoke the immediate use of unlawful violence. This is a reasonable law that is compatible with our heritage of freedom. Section 4A requires intent or the actual causing of harassment, alarm or distress. There are considerable risks with section 4A but, as the Dehal case showed, the courts are willing to protect us. However, the safest course would be to scrap it.

The 1998 Crime and Disorder Act created racially 'aggravated' offences, a group of crimes that were to be punished more severely if the court found that the offender had a racial motive.¹³³ The dangers were understood when the 1998 bill was debated. An article in *The Times* (3rd October 1997) headed 'Blind Justice' said: 'The figure of justice is blindfold for a reason. Using the criminal justice system to make symbolic genuflections to political causes, however noble, only undermines the effective operation of the rule of law and fetters proper judicial discretion. Punishment should not depend on creating a statutory hierarchy of wickedness which elevates racial prejudice over any of the other ugly impulses towards criminality with which society must deal'. An earlier article in the *Daily Telegraph* (25th July 1997) had made a similar point. Headed 'Don't colour justice' it said: 'Is it any worse to mug someone because they are Asian, rather than simply for the sake of stealing their watch? Are not both crimes equally vile? Apparently not, in the view of the Home Secretary'.¹³⁴

Aggravated offences under the 1998 Act should be abolished.

Similarly the possibility of receiving an 'enhanced' sentence under the 2003 Criminal Justice Act should be scrapped. Equal laws for all should be the guiding principle of lawmakers.

Finally, we are in urgent need of an unambiguous legal right to freedom of expression. Until section 5 of the 1986 Act was passed the law was clear. A British citizen was free to say anything so long as it was not calculated to provoke unlawful violence or fear of violence. In *On Liberty* JS Mill gave four reasons why freedom thought and speech were desirable:

'First, if any opinion is compelled to silence, that opinion may, for aught we can certainly know, be true. To deny this is to assume our own infallibility.

Secondly, though the silenced opinion be an error, it may, and very commonly does, contain a portion of truth; and since the general or prevailing opinion on any subject is rarely or never the whole truth, it is only by the collision of adverse opinions that the remainder of the truth has any chance of being supplied.

Thirdly, even if the received opinion be not only true, but the whole truth; unless it is suffered to be, and actually is, vigorously and earnestly contested, it will, by most of those who receive it, be held in the manner of a prejudice, with little comprehension or feeling of its rational grounds.

And ... fourthly, the meaning of the doctrine itself will be in danger of being lost, or enfeebled, and deprived of its vital effect on the character and conduct: the dogma becoming a mere formal profession, inefficacious for good, but cumbering the ground, and preventing the growth of any real and heartfelt conviction, from reason or personal experience.'

He also explained why it would not be right to limit freedom of speech to opinions voiced in a temperate manner:

'Much might be said on the impossibility of fixing where these supposed bounds are to be placed; for if the test be offence to those whose opinion is attacked. I think experience testifies that this offence is given whenever the attack is telling and powerful, and that every opponent who pushes them hard, and whom they find it difficult to answer, appears to them, if he shows any strong feeling on the subject, an intemperate opponent.'¹³⁵

Articles 9 and 10 of the European Convention on Human Rights, now part of our law under the 1998 Human Rights Act, are too heavily qualified to be useful. Article 9 on 'Freedom of thought, conscience and religion' says:

'1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his

religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.'

Article 10 on 'Freedom of expression' says:

- '1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.'

The qualifications leave too much to the interpretation of the courts and create arbitrary law, which means that the European Convention on Human Rights cannot be relied upon.

Does the American First Amendment provide a model?
It says:

‘Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.’

It has been subject to different interpretations by American courts over the years but since 1969 freedom of speech has been unfettered unless the words were intended to and likely to incite ‘imminent lawless action’.¹³⁶ The court held in *Brandenburg v Ohio* that: ‘Freedoms of speech and press do not permit a State to forbid advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.’

The case concerned the Ku Klux Klan in Ohio, which had made a film sympathetic to violence and containing derogatory references to ‘Negroes’ and ‘Jews’. In the film the appellant, in Klan regalia, made a speech in which he said:

‘This is an organizers’ meeting. We have had quite a few members here today which are -- we have hundreds, hundreds of members throughout the State of Ohio. I can quote from a newspaper clipping from the Columbus, Ohio, Dispatch, five weeks ago Sunday morning. The Klan has more members in the State of Ohio than does any other organization. We’re not a revengent [sic] organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it’s possible that there might have to be some revengeance [sic] taken.’

In America expression is unconstrained by the criminal law unless it incites or produces imminent lawless action or is likely to incite or produce such action. Until the 1986 Public Order Act this was the primary guiding principle of our

own law, as the official documents that led up to the Act recognised, including the 1980 green paper, the 1983 Law Commission report and the 1985 white paper. Section 4 of the 1986 Act states the position clearly. Speech should not be constrained by the criminal law unless it incites or leads to immediate unlawful violence.¹³⁷

Conclusions

We urgently need to remind ourselves of the essential features of liberty so that we can defend it against subtle enemies. Liberty means living under equal laws intended to create the security to take personal responsibility for our own affairs. To be free is to be equal under law and to enjoy personal responsibility—the chance to follow your own plan of life. The founders of liberalism thought they were freeing every admirable human motivation. And they thought they were replacing the prejudice and bigotry that flourishes when knowledge is controlled from on high, with open discussion to which anyone can contribute. They did not think all opinions were equally worth hearing, but that everyone should be heard so that the merits of their views could be judged impartially.

Victim culture, as we see it emerging today, is not compatible with either liberty or democracy.

NOTES

- 1 College of Policing, *Hate Crime Operational Guidance*, 2014, p. 7.
- 2 Milton, J., *Areopagitica and Other Political Writings*. Indianapolis: Liberty Fund, 1999, p. 45.
- 3 Locke, J., *Second Treatise of Government*, s. 133.
- 4 Locke, J., *Second Treatise of Government*, s. 22.
- 5 For a discussion of our legal system see Scruton, R., *England: An Elegy*, London: Chatto & Windus, 2000, Chapter 6.
- 6 Locke, J., *Second Treatise of Government*, s. 4.
- 7 Smith, A., *The Theory of Moral Sentiments*, Indianapolis: Liberty Fund, 1976, p. 167.
- 8 Smith, *Theory of Moral Sentiments*, p. 269.
- 9 Locke, *Second Treatise of Government*, s. 22.
- 10 Milton, John, 'Second Defence of the People of England' (1652) in *Areopagitica and Other Political Writings*, Indianapolis: Liberty Fund, 1999
- 11 Blackstone, W., *Commentaries on the Laws of England*, vol. 3 , p. 4.
- 12 Locke, *Second Treatise of Government*, s.13.
- 13 Locke, *Second Treatise of Government*, s. 6.
- 14 Smith, *Theory of Moral Sentiments*, pp. 71-72.
- 15 For an excellent discussion see David Conway, *In Defence of the Realm*. Aldershot: Ashgate, 2004.
- 16 Miller, D., *On Nationality*, Oxford: Clarendon Press, 1995.
- 17 Catholics remained under various legal disabilities until 1829, but did not need to fear for life and limb from the Glorious Revolution onwards.
- 18 During the seventeenth century before 1688, James I, Charles I and the Commonwealth struggled against Catholics and Protestant dissenters. During the Commonwealth Puritans destroyed religious art as Edward VI had done, to eliminate what they saw as physical distractions from purity of heart.

- 19 Dennis, N. and Halsey, A., *English Ethical Socialism*. Oxford: Clarendon Press, 1988.
- 20 See below for discussion of the Macpherson report.
- 21 Marcuse, quoted in Dennis, N., *Racist Murder and Pressure Group Politics*, London: Civitas, 2000, p. 130.
- 22 Horkheimer and Adorno, quoted in Dennis, *Racist Murder and Pressure Group Politics*, p. 130.
- 23 Scruton, S., *England and the Need for Nations*, London: Civitas, 2006, Chapter 8.
- 24 Steele, S., *The Content of Our Character*, New York: St. Martin's Press, 1990.
- 25 Ryan, William, *Blaming the Victim*, 2nd Ed, New York: Vintage Books, 1976.
- 26 Ryan, *Blaming the Victim*, pp. 284-85.
- 27 This is not intended to be a description of all Islamic societies. There is considerable variety, but it is a description of some such societies, for the sake of comparison.
- 28 England is bit of a misfit because the Church of England is the established church and, therefore belongs in the political domain. However, being the established church has very little practical significance, and if the Church of England were disestablished tomorrow, few people would notice. Turkey, whose population is overwhelmingly Muslim, is also an exception because the state is secular. However, in practice the Turkish government exerts control over religious leaders when necessary.
- 29 Siedentop, *Democracy in Europe*. New York: Columbia Press, 2001, p. 191.
- 30 Acton, J., *The History of Freedom and Other Essays*, London: Macmillan, 1907, p. 52.
- 31 For an excellent discussion, see Holmes, S., *The Anatomy of Antiliberalism*. Cambridge, Mass: Harvard University Press, 1993.
- 32 *Independent*, 24 January 2006. <http://comment.independent.co.uk/letters/article340593.ece>
- 33 *Independent*, 30 January 2006.
- 34 For a fuller discussion see Hume, Mick, *Trigger Warning*, London: William Collins, 2015.
- 35 *Daily Mail*, 8 April 2006.
- 36 DTL, *Fairness For All: A new commission for equality and human rights*, Cm 6185, May 2004.
- 37 Jacobs, J. and Potter, K., *Hate Crimes: criminal law and identity politics*, New York, OUP, 1998, p.39.

- 38 In Jacobs and Potter, 1998, p. 72.
- 39 Jacobs and Potter, 1998, p. 73.
- 40 Jacobs and Potter, 1998, p. 77, p. 65.
- 41 Jacobs and Potter, 1998, p. 77.
- 42 Jacobs and Potter, 1998, pp. 30-31.
- 43 Macpherson, W., *The Stephen Lawrence Inquiry*, Cm 4262-I, London: TSO, 1999, vol. 1, p. 28.
- 44 Dennis et al., *Racist Murder and Pressure Group Politics*, 2000, p. 140.
- 45 Sowell, T., *Applied Economics*, New York: Basic Books, 2004, pp. 175-76.
- 46 Sowell, T., *Applied Economics*, p. 185.
- 47 Bennion, F.A.R., 'New police law abolishes the reasonable man (and woman)', 170 JP (21 January 2006) 27.
- 48 Bruce, T., *The Death of Right and Wrong*, New York: Three Rivers Press, 2003.
- 49 Jacobs and Potter, 1998, p. 67.
- 50 Jacobs and Potter, 1998, p. 70.
- 51 Jacobs and Potter, 1998, p. 5.
- 52 See, for example, Sowell, T., *Civil Rights: Rhetoric or Reality?*, New York: Morrow, 1984, pp. 50-53.
- 53 Sowell, T., *Preferential Policies*, New York: Morrow, 1990, p. 158
- 54 Williams, Joanna, *Women Vs Feminism: why we all need liberating from the gender wars*, London: Emerald, 2017.
- 55 Dennis et al, *Racist Murder and Pressure Group Politics*, 2000, p. 131.
- 56 *Race and the Courts: A Short Practical Guide for Judges*, Judicial Studies Board, 1999. Cited in David G. Green, ed., *Institutional Racism and the Police: Fact or Fiction?*, London: Civitas, 2000, p. 38.
- 57 Sections 29-32.
- 58 Hume, D., *Essays, Moral, Political and Literary*. Indianapolis: Liberty Fund, 1985, pp. 65-66.
- 59 Bennion, F.A.R., 'New police law abolishes the reasonable man (and woman)', 170 JP (21 January 2006) 27.
- 60 His alleged insult of the Welsh was investigated by the police: <http://news.bbc.co.uk/1/hi/wales/5167090.stm>
- 61 *Sunday Times*, 9 April 2006.
- 62 Quoted in Bennion, 2006, p. 2.
- 63 Bennion, 2006, p. 2.
- 64 *The Times*, 13 January 2006. Web: <http://www.timesonline.co.uk/article/0,,2-1982656,00.html>
- 65 ACPO, 2005, p. 11.
- 66 Macpherson, 1999, vol. 1, pp. 313-14.

- 67 Donoghue v Stevenson [1932] AC 562 at 619; quoted in Bennion, 2006, p. 1.
- 68 *Daily Telegraph*, 15 May 2002.
- 69 <http://news.bbc.co.uk/1/hi/uk/1988776.stm>
- 70 Home Office, *Action Against Hate*, July 2016, para. 4.
- 71 HMICFRS, *Understanding the Difference: the initial police response to hate crime*, July 2018, p. 45.
- 72 <http://www.report-it.org.uk>
- 73 *Hate Crime: Cross-Government Action Plan*, 2009, p. 10.
- 74 <http://www.cps.gov.uk/publications/prosecution/rrpbcrpol.html#a13>
- 75 *Hate Crime: Cross-Government Action Plan*, 2009, p. 9, footnote 8.
- 76 <http://www.cps.gov.uk/westmidlands/about/>
- 77 CPS, *Hate Crime Report 2008-09*, pp. 2-3.
- 78 CPS, *Hate Crime Report 2008-09*, p. 10.
- 79 HM Government, *Action Against Hate: The UK Government's plan for tackling hate crime – 'two years on'*, October 2018, p. 16.
- 80 HMICFRS, 2018, p. 30, note 42.
- 81 HMICFRS, 2018, p. 45.
- 82 Jacobs and Potter, 1998, p. 45.
- 83 Home Office, July 2016, para. 1.
- 84 HMICFRS, July 2018, *Hate Crime*, p. 4.
- 85 Home Office, July 2016, para. 38.
- 86 Home Office, July 2016, para. 19.
- 87 Iganski, P. and Lagou, S., 'The personal injuries of hate crime', in *The Routledge International Handbook on Hate Crime*, London: Routledge, 2018, pp. 41-42.
- 88 Jacobs and Potter, 1998, p. 84.
- 89 Jacobs and Potter, 1998, pp. 89, 91.
- 90 In Jacobs and Potter, 1998, p. 134.
- 91 Jacobs and Potter, 1998, pp. 30-31.
- 92 Jacobs and Potter, 1998, p. 19.
- 93 <https://www.bbc.co.uk/newsround/47872368>. Downloaded: 24 July 2019.
- 94 Jacobs and Potter, 1998, p. 23.
- 95 Jacobs and Potter, 1998, p. 25.
- 96 In Thornton, P. et al, *The Law of Public Order and Protest*, London: OUP, 2010, p. 75.
- 97 Jacobs and Potter, 1998, p. 37.
- 98 Campbell, B. and Manning, J., *The Rise of Victimhood Culture*, New York: Palgrave Macmillan, 2018, pp. 14-15.

- 99 Campbell and Manning, 2018, p. 16.
- 100 Home Office, *Review of the Public Order Act 1936 and related legislation*, April 1980, Cmnd. 7891, para 102.
- 101 Thornton, 2010, p. 255.
- 102 Law Commission, 123, 24 October 1983, *Criminal Law Offences Relating to Public Order*, paras. 5.40-5.41.
- 103 Home Office, *Review of the Public Order Act 1936 and related legislation*, para 104.
- 104 Home Office, *Review of the Public Order Act 1936 and related legislation*, April 1980, Cmnd. 7891, para 105.
- 105 Home Office, *Review of the Public Order Act 1936 and related legislation*, para 107.
- 106 Home Office, *Review of the Public Order Act 1936 and related legislation*, para 111.
- 107 Law Commission (No. 123), *Criminal Law Offences Relating to Public Order*, 1983, p. 59.
- 108 Home Office, *Review of Public Order Law*, May 1985, Cmnd. 9510.
- 109 Home Office, *Review of Public Order Law*, p. 14.
- 110 Home Office, *Review of Public Order Law*, p. 39.
- 111 Thornton, 2010, p. 28.
- 112 Thornton, 2010, p. 37.
- 113 Lord Faulks answering Lord Lester, House of Lords, 3 March 2014.
- 114 Home Office, *Police powers to promote and maintain public order, Section 5 of the Public Order Act 1986, summary of consultation responses and Government response*, January 2013, p. 6.
- 115 Thornton, 2010, p. 32.
- 116 Consultation response, p. 4.
- 117 Consultation response, p. 4.
- 118 Consultation response, p. 4.
- 119 Johnson, P., *Feel Free To Say It*, London: Civitas, 2013.
- 120 [2011] EWHC 3992 (Admin)
- 121 [1989] 88 Cr App Rep 261.
- 122 [2006] EWHC 1375 (Admin) in Thornton, p. 40.
- 123 Redmond-Bate v DPP [1999] EWHC Admin 733 (23 July 1999)
- 124 House of Common Library, SN/HA/4983, pp. 7-8.
- 125 Brutus v Cozens [1973], a House of Lords decision reported at AC 854, 867.
- 126 <http://www.bailii.org/ew/cases/EWHC/Admin/2004/69.html> [2004] EWHC 69 (Admin).
- 127 [2001] EWHC Admin 1125
- 128 [2002] EWHC 2154 (Admin) 9.

- 129 [2002] EWHC 2154 (Admin) 12.
- 130 <http://www.bailii.org/ew/cases/EWHC/Admin/2000/656.html>
- 131 <https://www.manchestereveningnews.co.uk/news/petra-mills-wins-court-appeal-1726448>
- 132 Action Plan 2016, para 28.
- 133 It had been an offence under the 1986 Public Order Act to stir up racial hatred, but that part of the Act was not frequently used.
- 134 Historic Hansard, 12 Feb 1998.
- 135 Mill, J.S., *On Liberty*, p. 263.
- 136 *Brandenburg v. Ohio*, 395 U.S. 444 (1969).
- 137 Speech is, of course, constrained by the civil law, notably the law of libel.

CIVITAS

Institute for the Study of Civil Society
55 Tufton Street, London SW1P 3QL

Email: books@civitas.org.uk

Tel: 020 7799 6677

Web: www.civitas.org.uk

Identity politics has been creeping into public discourse for many years. When the first edition of this book was published in 2006, it was already obvious that the politics of victimhood had taken hold. This second, updated edition takes stock of how it has developed since then, particularly in the preoccupation with 'hate crime' in recent years.

Hate crimes were initially created under the 1998 Crime and Disorder Act, which provided that crimes such as assault and criminal damage were more serious if carried out with racial motivation. Since then the definition has been extended to cover not just race but disability, transgender status, religion and sexual orientation.

Many other groups are now seeking the same protection. The College of Policing has identified 21 additional victim groups and the Law Commission has been asked by the Government to consider extending the current laws.

But, as David Green writes, this pursuit of victim status – and its recognition by public authorities – undermines the liberal ideal of equality under the law. He explores the implications of this process for the criminal justice system and for freedom of expression, and asks whether it is to time to reinstate the principle that all offences should be treated equally, irrespective of the identity group of the victim.

'At some point if all demands are met, there will be so few people left out that we might ask ourselves what was wrong with having one law for all. If we were asked to name one defining characteristic of a free society most of us would single out impartial justice – clear laws that apply equally to all and that are applied by independent judges sworn to act without fear or favour, malice or ill will.

'Is it time to reinstate equality under the law for every citizen, regardless of their identity group? And above all, how can we restore freedom of expression, now so grievously impaired by identity politics?'

