

Written evidence from Eric Kaufmann (FOE0087)

The Social Construction of Harm: Why the Law Must Clarify Tradeoff Points Between Free Speech and Equality Claims

The Joint Committee on Human Rights (JCHR) needs to clarify, as a matter of urgency, where the boundary between free speech and hate speech (or other equality duties) lies.

It is not sufficient to say the JCHR is pro-free speech and against hate speech because there is tension between these principles. To fail to specify the boundary between these is to hand power to administrative officials in institutions such as universities to interpret the law in an ideological manner which almost always violates free speech. Left activism and identity-based social taboos mean that virtually all internal pressure in institutions favours speech restrictions. The JCHR and Equalities 2010 Act are often name-checked by activist staff to legitimise this illiberalism.¹ It is thus vital for the JCHR to specify the concrete limits to equality duties and hate speech; and the tradeoff threshold points at which equality and harm claims are permitted to override free speech.

I will provide data to show how group-based psychological harm and emotional safety claims are strongly ideologically constructed, and thus not a reliable basis for restricting speech in law and public policy.

In this paper I make two key points:

- 1) It is important not to permit socially-constructed subjective states to be considered legal harms. This would constitute a major regression back to the honour culture of the pre-1820 period, when words were considered tantamount to violence.
- 2) It is vital to appreciate that many of the ‘harms’ being invoked to restrict freedom of speech and conscience are socially constructed by today’s dominant ideology of left-modernism, a fusion of liberal group categories with socialist conflict theory.² I shall demonstrate with data how these harms are not objective, but vary widely by the ideological disposition of an individual.

The Social Construction of Harm

It is reasonable to limit free speech which can be demonstrated to be libellous, or which is almost certain to cause serious harm, such as publicising suicide, which has been scientifically linked to copycat suicides.

It is not reasonable to include subjective ‘harm’ as experienced by highly sensitive individuals, nor ideologically-manufactured ‘harms’ such as purported slights to groups – typically those defined on the basis of race, gender or sexuality – that have been sacralized by a left-modernist ideology which is increasingly powerful in elite institutions such as universities.

¹ Adekoya, Remi, Eric Kaufmann and Tom Simpson, *Academic Freedom in the UK* (Policy Exchange)

² Kaufmann, E. (2004). *The Rise and Fall of Anglo-America: The Decline of Dominant Ethnicity in the United States*. Cambridge, MA, Harvard University Press; Kaufmann, E. (2018). *Whiteshift: Populism, Immigration and the Future of White Majorities*, Penguin UK.; Kaufmann, E. 2020. ‘Liberal Fundamentalism,’ *American Affairs*, Winter, 2020

That is, we should expect all citizens, including members of protected categories, to display a high level of resilience to potential verbal slights. This is a hallmark of healthy individuals, and thus a goal of Cognitive Behavioural Therapy (CBT) training, which teaches people not to ‘mindread’ nefarious motives into the utterances of others, and not to ‘catastrophise’ about the motivations of others.³ Healthy societies are characterised by what Bradley Campbell and Jason Manning term ‘dignity culture’. This culture, whose mantra is ‘names can never hurt me’ replaced the ‘honour culture’ of the past, in which verbal slights could only be settled by duel and violence. Today, what the authors term ‘victimhood culture’ is seeking to restore the damaging and divisive notion that words are violent harms.⁴

Psychological trauma can only be automatically assumed for those who directly experienced violence, such as soldiers with PTSD, or holocaust survivors. Beyond this, people have a choice whether to inhabit a trauma narrative. For instance, I am the grandson of someone who escaped the Holocaust, but this does not give me the right to shut down criticism of a Jewish person or of Israel. Should someone who is ethnically Irish invoke the trauma of the famine or anti-Catholicism to silence criticism of Ireland or the Pope?

The sociology of emotions teaches us that society has great leeway in teaching us when to express emotions (should men cry less than women?) and what to feel in particular situations.⁵ Similarly, trauma is not automatic for members of designated protected groups, but involves a large measure of socially-constructed emotion. Left-modernist ideology encourages designated disadvantaged groups to choose trauma narratives wherever possible. This level of ideological construction renders subjective trauma fluid and manipulable, and thus not a sound basis for reason and law.

Cultural left ideology works to sensitise society to an ever greater range of ‘microaggressions’ such as words (‘Latino’), statues (Churchill), phrases (‘I don’t notice people’s race’), modes of attire (‘cultural appropriation’), or even words (‘niggardly’, ‘blackboard’). The latter fall under what sociologists Peter Berger and Thomas Luckmann, in their landmark book of the same name, the *Social Construction of Reality* (1966).⁶ That is, these are not self-evident harms, but left-modernism encourages members of totemic groups to experience them as such.

Surveys show that minorities generally reject these attempts: most are not offended by so-called ‘microaggressions’. Synthetic left-modernist terms such as ‘Latinx’ and ‘womxn’ have essentially no purchase among the groups they claim to apply to.⁷ We need the JCHR to send a firm signal that what psychologist Nick Haslam terms the ‘concept creep’ of therapeutic terms such as bullying, harassment, prejudice, racism, transphobia and so forth will not be permitted to distort the law and the policies of institutions like universities. The meaning of

³ Lukianoff, G. and J. Haidt (2018). *The coddling of the American mind : how good intentions and bad ideas are setting up a generation for failure*. New York City, Penguin Pres

⁴ Campbell, B. and J. Manning (2018). *The rise of victimhood culture: Microaggressions, safe spaces, and the new culture wars*, Springer.

⁵ Stets, J. E. and J. H. Turner (2006). *Handbook of the sociology of emotions*. New York, NY, Springer.

⁶ Berger, P. L. and T. Luckmann (1991). *The social construction of reality: A treatise in the sociology of knowledge*, Penguin Uk

⁷ Luis Noe-Bustamante, Lauren Mora and Mark Hugo Lopez, ‘About One-in-Four U.S. Hispanics Have Heard of Latinx, but Just 3% Use It,’ *Pew Research Center*, Aug. 11, 2020
Al-Gharbi, Musa. (2020). ‘Who Defines What ‘Racist’ Means ?,’ Musaalgharbi.com, May 15, 2020

words must be tied to existing legal precedent and the understandings of reasonable, non-ideologically-sensitised, people in society.⁸

Data

I will illustrate the problem of socially constructed harm through a discussion of racism. Survey evidence from the US and Britain suggests that ideology, life satisfaction, social trust and media exposure affects both national and personal perceptions of racism. Crime rates fell in the US almost every year from the mid-90s to mid-2010s, yet people said it had risen in the past year in all but two of those years.

Likewise with racism, though hard measures such as opposition to intermarriage, believing blacks should stay in their place or the level of lethal police violence against African-Americans declined dramatically, ideology and social media inclined many to see it as a growing problem. Thus among white liberal Americans, the share saying ‘racism is a big problem’ soared from 40 percent in 2011 to over 80 percent in 2020 while not shifting among white conservatives. There is no objective empirical data – such as racist attacks or shifts in public attitudes - that can justify this change.⁹

This is not only true of general perceptions, but of recalled personal experiences. For instance, media coverage and partisanship around the Brexit vote heightened perceptions of hate crime. Results from the 2017 British Sikh Report show that just 7 percent of Sikhs who voted Leave reported experiencing a hate crime since the Brexit vote in June 2016, but 16 percent of Remain-voting Sikhs did. It is just not credible to believe that Remain-voting Sikhs were targeted with over twice as much hate crime. Rather, this is ideologically-motivated and media-stimulated reasoning.

In the US, when asked (just as Trump had lost the election) ‘How often would you say that you experience racism in your daily life?’, 30 percent of black Democrats and Republicans said they did so at least monthly. When asked, ‘How often would you say that you experienced racism in your daily life during Barack Obama’s period in office, from 2008-2016?’, the number fell to 20 percent, but only among Democrats. When asked how much racism they had experienced ‘during Donald Trump’s period in office, from November 2016 til now?’ the number jumped to 40 percent, but only among Democrats. It is difficult to understand these enormous swings in sentiment without grasping that partisan-motivated reasoning was affecting the results.¹⁰

In Britain, university-educated minorities report more discrimination while UK-born minorities are far more likely than immigrant minorities to say that prejudice has increased in the past five years. Both are difficult to square with the actual likelihood of victimisation. The 2010 Citizenship Survey also shows that a general dissatisfaction with life is the strongest or second-strongest predictor of both personal reported experience of job discrimination, and a perception of it as a rising problem.

⁸ Haslam, N. (2016). "Concept Creep: Psychology's Expanding Concepts of Harm and Pathology." *Psychological Inquiry* 27(1): 1-17.

⁹ Kaufmann, E. (2021). ‘Perception or Reality?: The Social Construction of Racism,’ Manhattan Institute (forthcoming in January 2021).

¹⁰ Kaufmann, ‘Perception or Reality’

In the US, partisanship and ideology are nearly as important as being nonwhite in accounting for whether someone believes they have been discriminated against. There is also evidence for a major impact of social media or media exposure on liberal (especially white) Americans' perceptions of how big a problem racism is.

All told, racism, like other forms of harm, is strongly socially constructed. While not completely in the eye of the beholder, there is a significant extent to which progressives have 'defined racism down' to encompass attitudes and behaviours that would not have been considered racist previously. This is one reason for the language of microaggressions and safety, and of inventing racism by stretching its meaning without objective data to support it (ie unconscious bias, 'symbolic' racism, systemic racism). For instance, the academic term 'racial resentment', based on a 4-question scale, has recently been found by two Harvard academics to work just as well when substituting 'Lithuanian' for 'black', indicating that ideological construction rather than objective reality underlay this entire discourse.¹¹ We could say the same for transphobia and other identity-based harm claims.

Limits to free speech must, in my view, satisfy two criteria. Namely, a) the burden of proof must rest with those who would restrict speech, who must empirically prove harm against an objective reasonable person standard that is consistent with existing common law definitions of the term. Survey experiments or multivariate analyses of violent incidents, for instance, would need to be provided as evidence; and b) the level of demonstrable, objective harm must exceed a defined threshold. Even if criticism of Israel upsets some Jews and radicalises some Muslims, a free society accepts some risk of harm. Just as we do not lock down to prevent all flu deaths, or have a 5 km/h speed limit to cut all road deaths, we must accept that some level of harm is an acceptable price to pay for our hard-won freedom of expression.

02/01/2020

¹¹ Carney, R. K. and R. D. Enos (2017). Conservatism and fairness in contemporary politics: Unpacking the psychological underpinnings of modern racism.