

## ‘Strengthening Free Speech’



**Alex Shattock**

## This talk

- Freedom of expression today
- The proposed changes
- Reasons for the proposed changes
- Lessons from the US

# Quiz



# Quiz

*Which of the following Convention rights does the HRA say that judges must have particular regard to?*

- *The right to life*
- *Freedom of expression*
- *Prohibition of torture*
- *Right to a fair trial*
- *Freedom of thought, conscience and religion*
- *Freedom of assembly and association*
- *Right to play Wordle for free, without targeted ads or a New York Times subscription, forever*

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- *Right to play Wordle for free, without targeted ads or a New York Times subscription, forever\* Not a convention right*

# Freedom of Expression in the Convention

## **ARTICLE 10**      **Freedom of expression**

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.

# Freedom of Expression in the HRA: section 12

## 12 Freedom of expression.

(1) This section applies if a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression.

(2) If the person against whom the application for relief is made (“the respondent”) is neither present nor represented, no such relief is to be granted unless the court is satisfied—

- (a) that the applicant has taken all practicable steps to notify the respondent; or
- (b) that there are compelling reasons why the respondent should not be notified.

(3) No such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed.

**(4) The court must have particular regard to the importance of the Convention right to freedom of expression** and, where the proceedings relate to material which the respondent claims, or which appears to the court, to be journalistic, literary or artistic material (or to conduct connected with such material), to—

- (a) the extent to which—
  - (i) the material has, or is about to, become available to the public; or
  - (ii) it is, or would be, in the public interest for the material to be published;
- (b) any relevant privacy code.

## The Consultation

*“Some rights, such as the right to freedom of expression, will be strengthened”*

- 205 *“The government believes that the public interest is overwhelmingly assisted by protection for freedom of expression and in a free and vibrant media.”*
- 206 ... *“the case law of the Strasbourg Court has shown a willingness to give priority to personal privacy”*
- 210... *“The government is also clear that freedom of speech and academic freedom are fundamental principles, not least in the higher education sector.”*

## The Consultation: specific proposals

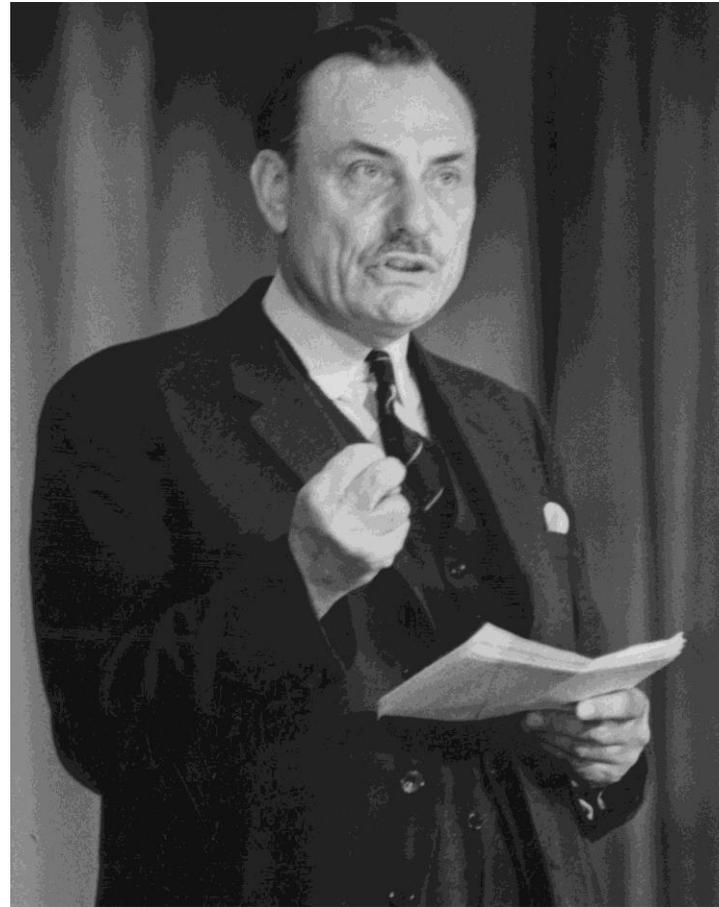
213... “The government proposes that the Bill of Rights legislation should contain a stronger and more effective provision, making it clear that the right to freedom of expression is of the utmost importance, and that **courts should only grant relief impinging on it where there are exceptional reasons.**”

215... “The government would also like the Bill of Rights to provide more general guidance on how to balance the right to freedom of expression with competing rights (such as the right to privacy) or wider public interest considerations. The government does not believe such principles should be merely left to the courts to develop. Instead, it believes **there should be a presumption in favour of upholding the right to freedom of expression, subject to exceptional countervailing grounds**, clearly spelt out by Parliament.”

# Why does the government want to strengthen free speech?



# Why does the government want to strengthen free speech? Culture war debates



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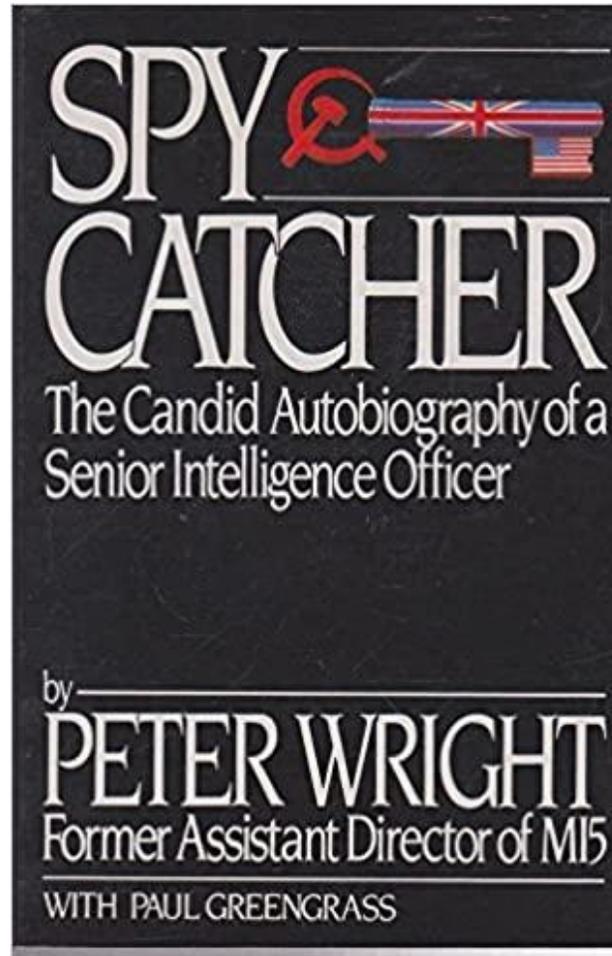


- Particular concern for Universities and “no platforming”
- See 2017 comments of then-universities minister Jo Johnson:

*“Universities should be places that open minds not close them, where ideas can be freely challenged. In universities in America and worryingly in the UK, we have seen examples of groups seeking to stifle those who do not agree with them.*

*“We must not allow this to happen. Young people should have the resilience and confidence to challenge controversial opinions and take part in open, frank and rigorous discussions. That is why the new regulator, the Office for Students, will go even further to ensure that **universities promote freedom of speech within the law**”*

# Why does the government want to strengthen free speech? Print media pressure



## Scottish Daily Mail

FRIDAY, JULY 24, 2020 70p

FREE AMAZON FIRE 7 TABLET WHEN YOU JOIN MAIL+ SEE PAGE 57

### Crabbit? Boris was positively bouncing



HENRY DEEDES SEE PAGES 8-9

**Hate Crimes Bill condemned as 'totalitarian' and 'dangerous' ++ UN Human Rights expert warns of state censorship ++ Leading QC fears it will stifle debate**

# NEW SNP LAW'S 'CHILLING' THREAT TO FREE SPEECH

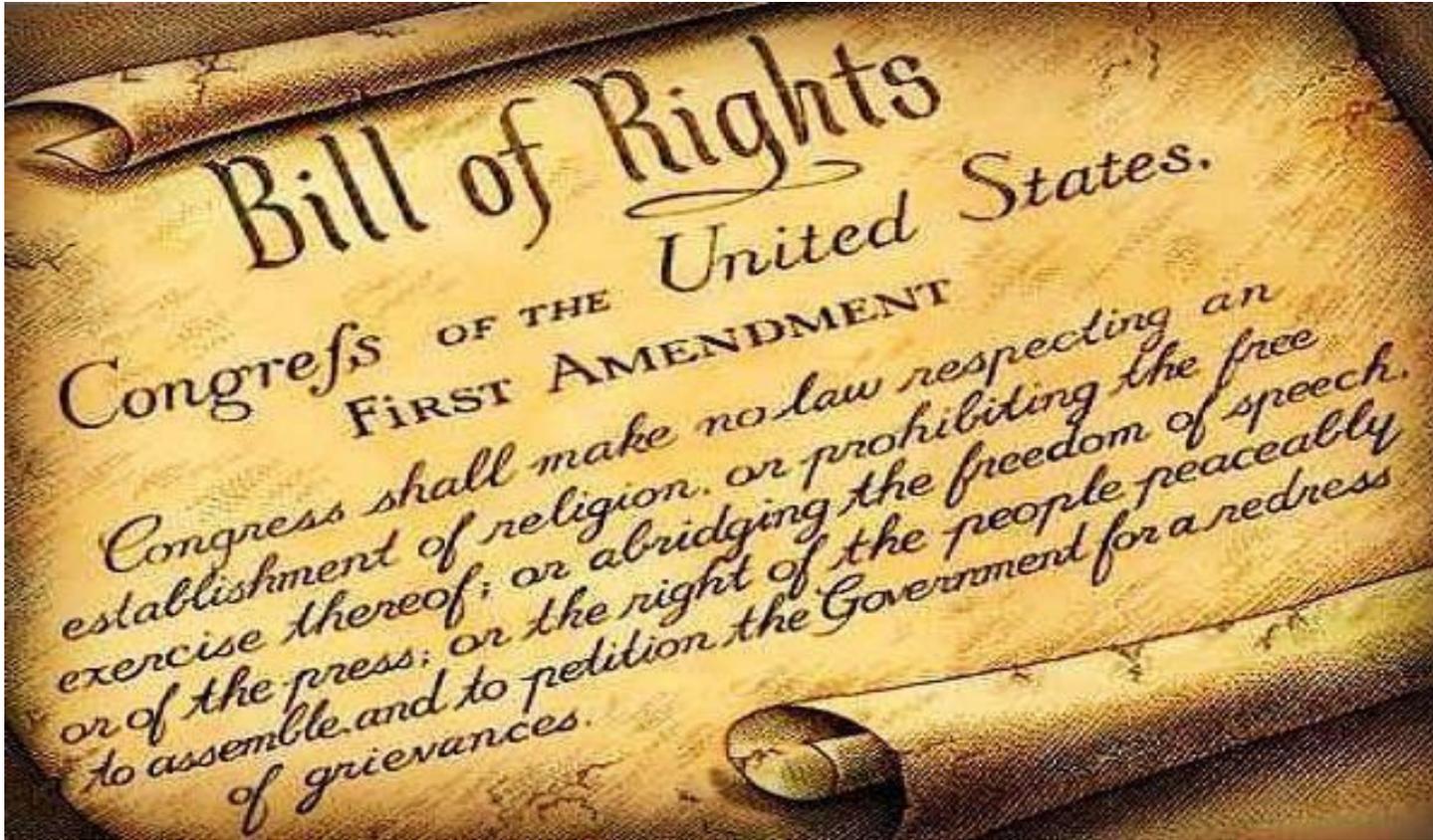
SCOTLAND will resemble a 'totalitarian state' where no one is exempt from censorship under the SNP's new hate crime laws, a UN legal expert has warned.

By Rachel Watson  
Deputy Scottish Political Editor  
works with the UN Human Rights Council, said the proposals would have a 'chilling effect on society'.  
In a scathing review of the Hate Crime Bill now going through the Scottish parliament, she said that the erosion of

freedom of speech would create a culture of silence more commonly seen in countries run by despots.  
And she cited the row over author JK Rowling's views on transgender issues as an example of how 'censored culture' would become entrenched in law as the state dictates what we say and which books we read.  
Senior lawyer Thomas Ross, QC, also warned the wording of the Bill is so vague that ordinary people will find themselves dragged through the courts for unintentionally offending someone.  
Justice Secretary Humza Yousaf has described the Bill as an 'important milestone' which shows the Government is determined to make Scotland a 'zero tolerance' society for such

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# Why does the government want to strengthen free speech? Admiration for the US



## Lessons from the US: SC cases

### ***Citizens United v Federal Election Commission*** 558 U.S. 310 (2010):

- Free speech (First Amendment) prohibits the government from restricting political campaign spending
- Corporations= legal persons
- Spending money on political adverts= expression of beliefs
- Prohibiting corporations spending money on political ads= violation of freedom of expression
  
- Hugely negative impact on American democracy: big money in politics

## Lessons from the US: SC cases

**44 Liquormart, Inc. v. Rhode Island**, 517 U.S. 484 (1996): ban on advertising alcohol prices was a breach of the First Amendment. Cf *British American Tobacco UK Ltd & Ors v The Secretary of State for Health* [2016] EWCA Civ 1182

**Consolidated Edison Co. v. Public Service Commission**, 447 U.S. 530 (1980): public utility companies can send political ads with billing statements

**R.A.V. v. City of St. Paul**, 505 U.S. 377 (1992): Burning crosses in public is free speech (“*St. Paul has sufficient means at its disposal to prevent such behavior without adding the First Amendment to the fire*”)

**Snyder v. Phelps**, 562 U.S. 443 (2011): Westboro Baptist Church allowed to picket funerals with placards displaying homophobic slurs

## Conclusion

- Preamble 1948 UDHR:

*“It is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law”*

- Free speech has developed in a worrying way in the US that seems at odds with the purpose of human rights as expressed in the UDHR
- Free speech is strong enough in the UK under the HRA and we should not seek to replicate the US approach

# Thank you for listening

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