

FREEDOM OF EXPRESSION AND SOCIAL MEDIA: HOW EMPLOYERS AND EMPLOYEES CAN BENEFIT FROM SPEECH POLICIES ROOTED IN INTERNATIONAL HUMAN RIGHTS LAW

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I. INTRODUCTION

The emergence of social media in the twenty-first century fundamentally changed the way that people communicate and express their views.¹ In roughly two decades, social media has amassed over 3.6 billion users worldwide.² For comparison, in 2005, only about five percent of American adults used some form of social media, whereas today, roughly seventy-two percent are social media users.³ As a result, the majority of speech now occurs online.⁴

With this massive surge in users has come an abundance of legal and moral concerns, and determining which speech is acceptable in a democratic society and which is not has become more and more of a challenge for social media companies.⁵ Should individuals be able to post anything? Do free speech laws—both international and domestic—apply to private social media companies? Is it a violation of a user’s rights when social media companies flag or even remove their post?

For the most part, social media companies have been considered exempt from instruments that guarantee the right to freedom of speech, and therefore, have largely been left to navigate these issues by developing their own policies and procedures for moderating speech.⁶ However, in recent years, there have been

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1. Kiran Bala, *Social Media and Changing Communication Patterns*, 5 GLOB. MEDIA J-INDIAN EDITION 1 (2014).

2. Jessica Clement, *Number of Social Network Users Worldwide from 2017 to 2025 (In Billions)*, STATISTA (Nov. 24, 2020), <https://www.statista.com/statistics/278414/number-of-worldwide-social-network-users/#:~:text=Social%20media%20usage%20is%20one,almost%204.41%20billion%20in%202025> [<https://perma.cc/ZUA3-RPVF>].

3. *Social Media Fact Sheet*, PEW RSCH. CTR. (Jun. 12, 2019), <https://www.pewresearch.org/internet/fact-sheet/social-media/> [<https://perma.cc/5DZB-MNQ6>].

4. *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017) (stating “[w]hile in the past there may have been difficulty in identifying the most important places for the exchange of views, today the answer is clear. It is cyberspace—the ‘vast democratic forums of the internet’ in general, and social media in particular.”).

5. John Samples, *International Law and “Hate Speech” Online*, CATO INST. (July 23, 2020), <https://www.cato.org/blog/international-law-hate-speech-online> [<https://perma.cc/6A7B-FDJQ>].

6. Michael Lwin, *Applying International Human Rights Law for Use by Facebook*, 38 YALE J. ON REGUL. 53, 55 (2020).

calls for this to change.⁷ Legal scholars have suggested that social media companies should turn to established bodies of law when creating their speech policies rather than relying solely on their own assessments as to which speech is tolerable.⁸ As a potential solution, some legal experts have called for social media companies to commit to International Human Rights Law (IHRL), despite the fact that IHRL was written for governments—not private companies.⁹

In fact, the potential applicability of IHRL to private companies has piqued the interest of many—including the United Nations—since the 1990s.¹⁰ In 2003, the Norms on Transnational Corporations and Other Business Enterprises (the Norms) were drafted by an expert body of the Commission on Human Rights.¹¹ The Norms sought to impose IHRL directly on private companies and bind them in the same manner that nation-states are bound.¹² However, the Norms were ultimately rejected.¹³ Instead, in 2011, the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises proposed the Guiding Principles on Business and Human Rights (UNGPs).¹⁴ Like the Norms, the UNGPs were an attempt to apply IHRL to private companies.¹⁵ However, unlike the Norms, the UNGPs did not seek to impose direct obligations on the private sector. Rather, the UNGPs call for their voluntary adoption by private corporations and business enterprises on the theory that businesses have a duty to respect international human rights—regardless of the fact that certain international instruments may not directly bind companies.¹⁶ In the same year that they were proposed, the U.N. Human Rights Council unanimously endorsed the UNGPs.¹⁷ As a result, there is now an expectation in the international community that companies—no matter their size—comply with IHRL in their operations.¹⁸

7. See Evelyn Mary Aswad, *The Future of Freedom of Expression Online*, 17 DUKE L. & TECH. REV. 27 (2018).

8. *Id.*

9. *Id.* at 34.; see also Molly Land, *Toward an International Law of the Internet*, 54 HARV. INT'L L.J. 393 (2013); see also Lwin, *supra* note 6, at 56.

10. John Ruggie (Special Representative of the Sec'y Gen.), *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, U.N. Doc. A/HRC/17/31 (un. 16, 2011) [hereinafter *Guiding Principles*].

11. David Weissbrodt, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights*, 97 AM. J. INT'L L. 901 (2003).

12. *Guiding Principles*, *supra* note 10.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. U.N. Hum. Rts. Off. High Comm'rs, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, U.N. Doc. HR/PUB/11/04 (2011).

18. Aswad, *supra* note 7, at 39 ("The UNGPs expect companies to, among other things, develop human rights policies, actively engage with external stakeholders in assessing human rights

This means that, while private companies have traditionally been exempt from having to comply with certain international instruments, private companies are not entirely relieved of all obligations to uphold individuals' human rights.¹⁹ The UNGPs create an expectation for private companies to align their internal speech policies with international law, including the International Covenant on Civil and Political Rights (ICCPR) Article 19, which guarantees the right to freedom of expression.²⁰ Since this shift in thinking, social media companies have borne the brunt of criticism, with free speech advocates claiming that the companies' speech policies not only fail to protect the right to freedom of expression but actively infringe on this right by requiring that certain posts be flagged or completely removed.²¹ On the other hand, social media companies have also been criticized for not doing enough to prohibit hate speech and incitement of violence on their platforms.²² Article 20 of the ICCPR requires that states ban hate speech on the basis of hatred for one's nationality, race, or religion, and any speech that incites violence.²³ Therefore, social media companies have been criticized by one end of the spectrum that says the platforms are stifling free expression and have been criticized by the other end that claims that the platforms encourage hatred and violence.²⁴

This criticism, however, has not just been limited to the tech giants; companies of all shapes and sizes are beginning to come under fire for certain employment practices that are perceived as limiting employee speech.²⁵ For example, several companies have been criticized by free speech advocates for taking adverse action against employees for their social media posts.²⁶ Some view this as an infringement on employees' right to freedom of speech, whereas others

challenges, conduct due diligence to assess potential risks to human rights, and develop strategies to avoid infringing on rights.”).

19. See Guiding Principles, *supra* note 10.

20. Aswad, *supra* note 7, at 41; G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights, at art. 19, (Dec. 16, 1966).

21. David L. Hudson, *Free Speech or Censorship? Social Media Litigation is a Hot Legal Battleground*, ABA J. (Apr. 1, 2019), <https://www.abajournal.com/magazine/article/social-clashes-digital-free-speech> [<https://perma.cc/XPX2-K6G2>].

22. *How Can Social Media Firms Tackle Hate Speech*, KNOWLEDGE@WHARTON (Sept. 22, 2018), <https://knowledge.wharton.upenn.edu/article/can-social-media-firms-tackle-hate-speech/> [<https://perma.cc/454M-H6YN>].

23. Aswad, *supra* note 7, at 37.

24. Hans Bader, *Teacher Unconstitutionally Fired for Facebook Post Rejecting Concept of 'White Privilege'*, CNS NEWS (Aug. 6, 2020), <https://cnsnews.com/commentary/hans-bader/teacher-unconstitutionally-fired-facebook-post-rejecting-concept-white> [<https://perma.cc/6PJJ-BFKP>]; Hudson, *supra* note 22.

25. See *Indiana Teacher Fired For FB Post Questioning Social-Emotional Learning*, VANDERBURGH INDEP. PRESS (Feb. 24, 2020), <http://www.theofficialvipnews.com/google2badec5bb02684b.html/2020/02/24/indiana-teacher-fired-for-fb-post-questioning-social-emotional-learning/> [<https://perma.cc/LF9K-5MXN>]; see also Bader, *supra* note 24.

26. Bader, *supra* note 24.

view it as a legitimate employer action.²⁷

Just as social media companies have largely been left to deal with the issues of freedom of expression and hate speech on their platforms, private employers have been left to develop their own policies regarding employee social media use.²⁸ Many employers may be struggling to deal with the same issues surrounding freedom of expression with which social media companies have struggled. For example, should an employee be disciplined for inappropriate posts? At what point does an employee's post become hate speech? Do employers have an obligation to screen employee posts to avoid creating a hostile work environment? Can an applicant be denied a job because of comments on social media?

As the UNGPs outline, private employers are expected to comply with IHRL, no matter the industry and no matter the size of the operation.²⁹ Thus, the international community expects all private companies—not just social media companies—to adhere to international instruments, including the ICCPR.³⁰ Much like legal scholars have advocated for social media companies to develop their speech policies in accordance with IHRL, this Note advocates for the position that private employers and employees would both benefit from internal speech policies rooted in IHRL—specifically, Article 19 of the ICCPR.³¹ This Note argues that by creating employee speech policies rooted in the ICCPR, private companies would provide their employees with clearer guidance on what can and cannot be posted on their social media accounts, as well as clearer instruction to employees about when their posts may warrant adverse action. In addition, by relying on already-established law that has been accepted by the international community, private companies' speech policies would be viewed with greater legitimacy, which could help avoid wrongful termination claims and related litigation.

The next section of this Note, Part II, begins by providing background on the Maya Forstater and Harry Miller cases, both of which demonstrate the intersection of social media and the workplace and highlight many of the controversies surrounding employee speech online. Part II then outlines Article

27. Veronica Ivy, *J.K. Rowling's Maya Forstater Tweets Support Hostile Work Environments, Not Free Speech*, NBC NEWS (Dec. 20, 2019), <https://www.nbcnews.com/think/opinion/j-k-rowling-s-maya-forstater-tweets-support-hostile-work-ncna1105201> [<https://perma.cc/C84D-EKFB>].

28. Katrina Grider et al., *Social Media Posts During Turbulent Times: FAQs on Employee Rights and Employer Responsibilities*, NAT'L L. REV. (June 22, 2020), <https://www.natlawreview.com/article/social-media-posts-during-turbulent-times-faqs-employee-rights-and-employer> [<https://perma.cc/JF77-ASRP>].

29. Guiding Principles, *supra* note 10.

30. *Id.*

31. See Aswad, *supra* note 7; see also Hilary Hurd, *How Facebook Can Use International Law In Content Moderation*, LAWFARE (Oct. 30, 2019), <https://www.lawfareblog.com/how-facebook-can-use-international-law-content-moderation> [<https://perma.cc/UT5X-9DYW>]; see also Lwin, *supra* note 6.

19 of the ICCPR and how it has traditionally been applied, and it follows with a discussion of the UNGPs and the framework legal scholars have proposed in order for Article 19 to apply to social media companies. Part III examines how this framework could be applied to private, non-social media companies in order to create and implement their own employee speech policies.

II. HISTORY/BACKGROUND

A. *The Maya Forstater Case*

In December 2018, the Center for Global Development—a think tank located in London, England—chose not to renew the contract of one of its researchers.³² The researcher—a woman named Maya Forstater—served as a visiting fellow at the think tank starting in January of 2015, focusing primarily on international tax-related issues.³³ According to Forstater, the Center for Global Development chose not to renew her contract at the end of 2018 because she expressed “gender critical” views in a series of Tweets.³⁴ More specifically, Forstater claimed that her contract was not renewed because she expressed the belief that individuals cannot change their biological sex.³⁵

In November 2019, Forstater filed suit against the Center for Global Development, alleging that her views on gender were a philosophical belief under the Equality Act 2010 and that she had suffered discrimination for holding such a belief.³⁶ Forstater did not enter into another employment contract with the Center for Global Development; she contended that she was “an applicant for employment and so subject to the protection of the Equality Act 2010.”³⁷ At trial, the Central London Employment Tribunal acknowledged that Forstater genuinely believed that “sex is biological and immutable.”³⁸ However, it ultimately denied Forstater’s claim, stating that “[Forstater’s] view, in its absolutist nature, [was]

32. *Forstater v. CGD Europe & Ors* [2019] UKET 2200909 (UK). This case was overturned on appeal by *Forstater v. CGD Europe*, [2021] 6 WLUK 104, UKEAT/0105/20/JOJ. The appellate court held that the tribunal erred in its application of *Grainger V.*

33. Matt Drake, *Researcher Who Lost Job for Tweeting ‘Men Cannot Change Into Women’ Loses Employment Tribunal*, INDEPENDENT (Dec. 19, 2019), <https://www.independent.co.uk/news/uk/home-news/maya-forstater-transgender-test-case-equalities-act-employment-tribunal-a9253211.html> [<https://perma.cc/W23Q-AEUZ>]; *Forstater*, [2019] UKET 2200909 (UK) ¶ 3; Maya Forstater, *I Lost My Job for Speaking About Women’s Rights*, MEDIUM (May 4, 2019), <https://medium.com/@MForstater/i-lost-my-job-for-speaking-up-about-womens-rights-2af2186ae84> [<https://perma.cc/4U9J-2XSJ>].

34. *Forstater*, [2019] UKET 2200909 (UK) ¶ 3.

35. Clive Coleman, *Maya Forstater: Woman Loses Tribunal over Transgender Tweets*, BBC NEWS (December 19, 2019), <https://www.bbc.com/news/uk-50858919> [<https://perma.cc/LP4W-53FA>].

36. *Forstater*, [2019] UKET 2200909 (UK) ¶ 3.

37. *Id.* ¶ 22.

38. *Id.* ¶ 82.

incompatible with human dignity and fundamental rights of others.”³⁹

While employment tribunals in the United Kingdom do not create binding legal precedent, their decisions carry significant weight and can even deter similarly-situated plaintiffs from bringing suits in the future.⁴⁰ Free speech advocates expressed concern about the decision in the Forstater case, claiming that it could prevent individuals from expressing their honestly-held belief that a man can never become a woman and vice versa.⁴¹ Others saw the Forstater case as a victory for the protection of transgender persons.⁴²

B. The Harry Miller Case

Not even a full month after Forstater’s contract with the Center for Global Development was terminated, another case surfaced in the United Kingdom concerning “gender critical” views and Twitter.⁴³ In January of 2019, a man named Harry Miller was investigated by the Humberside Police in northeast England for Tweets that were allegedly “transphobic.”⁴⁴ Humberside officers visited Miller—a shareholder at a plant and machinery company—at his workplace after they received an anonymous tip stating that Miller’s business was “dangerous” for transgender employees.⁴⁵ The anonymous informant stated the following to Humberside Police: “I was so alarmed and appalled by his brazen and transphobic comments that I felt it necessary to pass it (sic) on to Humberside Police as he is the chairman of a company.”⁴⁶

Police officers told Miller that he had not committed any type of crime but that his tweets about transgender individuals constituted a “non-crime hate incident.”⁴⁷ The College of Policing, which is the professional body for policing in the United Kingdom, defines a non-crime hate incident as “any non-crime incident which is perceived, by the victim or any other person, to be motivated by a hostility or prejudice based on a person’s disability, race, religion, sexual orientation or gender identity or perceived disability, race, religion, sexual orientation or gender identity.”⁴⁸ While the College of Policing guidelines do not

39. *Id.* ¶ 84.

40. *Maya Forstater: Woman Loses Tribunal over Transgender Tweets*, *supra* note 35.

41. *Id.*

42. *Id.*

43. *UK Judge: Police Probe of “Transphobic” Tweets Was Unlawful*, CT. ROOM NEWS SERV. (Feb. 14, 2020), <https://www.courthousenews.com/uk-judge-police-probe-of-transphobic-tweets-was-unlawful/> [<https://perma.cc/2BR9-KZSF>].

44. *Id.*

45. Clive Coleman, *Harry Miller: Police Probe Into ‘Transphobic’ Tweets Unlawful*, BBC NEWS (Feb. 14, 2020), <https://www.bbc.com/news/uk-england-lincolnshire-51501202> [<https://perma.cc/C5RB-XP38>]; *Miller v. The College of Policing* [2020] EWHC 225 (Admin) ¶ 87.

46. *Miller*, [2020] EWHC 225 (Admin) ¶ 60.

47. *Harry Miller: Police Probe Into ‘Transphobic’ Tweets Unlawful*, *supra* note 45.

48. *Hate Crime/Hate Incidents*, W. YORKSHIRE POLICE, <https://www.westyorkshire.police.uk/advice/abuse-anti-social-behaviour/hate-crime/hate-crime> [<https://perma.cc/9CK4-D3MQ>].

consider non-crime hate incidents to be criminal offenses, such incidents are logged as crime reports,⁴⁹ and “data regarding non-crime hate incidents is collected and held by local police forces.”⁵⁰

Like Forstater, Miller sued, claiming that the Humberside Police interfered with his right to freedom of expression.⁵¹ The High Court of Justice ruled in Miller’s favor.⁵² It held that “given the importance of not restricting legitimate political debate . . . [the anonymous informant]’s upset did not justify the police actions towards [Miller][,] including turning up at his workplace and then warning him about criminal prosecution, thereby interfering with his . . . rights.”⁵³ “The police’s treatment of [Miller] . . . disproportionately interfered with his right to freedom of expression, which is an essential component of democracy.”⁵⁴ However, the High Court rejected Miller’s broader claim that the College of Policing’s guidelines that allow police departments to log “non-crime hate incidents” are unlawful.⁵⁵ Rather, it concluded “that . . . the mere recording of a non-crime hate incident based on an individual’s speech is not an interference with his or her rights under Article 10(1)” of the European Convention on Human Rights.⁵⁶ Nor did the High Court find that the policy was unlawful at common law.⁵⁷

Miller appealed this decision, claiming that the policy itself is unlawful, and the Court of Appeal agreed with him; it held that the College of Policing’s recording of non-crime hate incidents was unlawful because, in the majority of cases, police have no discretion not to record a non-crime hate incident—even when the complaint is absurd.⁵⁸ But in the near future, many social media posts that are reported to police—like those posts created by Miller—may still be lawfully logged by local police departments if the College of Policing makes some minor tweaks to its policy, giving officers more discretion not to record absurd allegations.⁵⁹ Therefore, this could still have major implications for

49. *Miller*, [2020] EWHC 225 (Admin) ¶ 71.

50. *Id.* ¶ 155.

51. *Id.* ¶ 15.

52. *Id.* ¶ 289.

53. *Id.* ¶ 283.

54. *Id.* ¶ 289.

55. *Id.* ¶ 237. However, in December of 2021, this decision was overturned in *Miller v. The College of Policing* [2021] EWHC Civ 1926.

56. *Id.* ¶ 237.

57. *Id.* ¶ 172.

58. Alexander Topping, *Police Who Warned Man About ‘Transphobic’ Tweet Acted Unlawfully*, GUARDIAN (Feb. 14, 2020), <https://www.theguardian.com/society/2020/feb/14/transgender-tweet-police-acted-unlawfully> [<https://perma.cc/24QL-Q6VE>]; see also Adam King, “Non-Crime Hate Incidents” Aren’t Gone Yet, THE POST – UNHERD (Dec. 22, 2021), <https://unherd.com/thepost/non-crime-hate-incidents-arent-gone-yet/> [<https://perma.cc/G2P3-NT5K>].

59. Izzy Lyons & Joani Walsh, *Social Media Posts Referred to Police Could Show Up on DBS Background Checks Despite Not Being a Crime*, TELEGRAPH (Nov. 19, 2019),

individuals seeking employment with certain employers because non-crime hate incidents can show up on enhanced background checks.⁶⁰

In the United Kingdom, an organization called the Disclosure and Barring Service (DBS Services) is responsible for conducting background checks for applicants.⁶¹ Enhanced DBS checks—which are common for jobs requiring work with children and vulnerable adults—show any criminal convictions and cautions that a job applicant may have.⁶² This could include “‘spent and unspent convictions, cautions[,] plus any information held by local police that’s considered relevant to the role being applied for.’”⁶³ If police believe that a non-crime hate incident is relevant for a particular role, the DBS Service has indicated that it could show up on an enhanced check.⁶⁴ Therefore, while the UK police claim that an individual being cited for a non-crime hate incident is not being logged in the system as a criminal *per se*, individuals could effectively be treated as convicted criminals during the application process for certain jobs.⁶⁵

C. *The Impact of the Forstater and Miller Cases on the Workplace*

The Forstater and Miller cases have glaring similarities. Both involved individuals tweeting their opinions about transgender individuals,⁶⁶ and both involved individuals bringing lawsuits, claiming that their right to freedom of speech was violated.⁶⁷ The Forstater and Miller cases also share another, less obvious commonality: the employer-employee relationship and the workplace.⁶⁸ In the Forstater case, the Center for Global Development discontinued its employment contract with Maya Forstater.⁶⁹ In the Miller case, the Humberside Police initially showed up to Miller’s place of work after it received a complaint that his business was not safe for transgender employees.⁷⁰ The Miller case also highlights the fact that social media posts that are referred to local police

<https://www.telegraph.co.uk/news/2019/11/19/social-media-posts-referred-police-could-show-dbs-background/> [<https://perma.cc/2MNF-ADA9>]; *see also* King, *supra* note 58.

60. *Id.*

61. Amber Rolfe, *DBS Checks: What You Need to Know*, <https://www.reed.co.uk/career-advice/dbs-checks-what-you-need-to-know/#:~:text=A%20DBS%20check%20is%20a,the%20Disclosure%20and%20Barring%20Service> [<https://perma.cc/4XJX-D6FR>].

62. *Id.*

63. *Id.*

64. *Id.*

65. Lyons & Walsh, *supra* note 59.

66. *Harry Miller: Police Probe Into ‘Transphobic’ Tweets Unlawful*, *supra* note 45; *Maya Forstater: Woman Loses Tribunal over Transgender Tweets*, *supra* note 35.

67. *Forstater*, [2019] UKET 2200909 ¶ 82 (UK); *Miller*, [2020] EWHC 225 (Admin) ¶ 7 (UK).

68. *See generally Forstater*, [2019] UKET 2200909 (UK); *see also Miller*, [2020] EWHC 225 (Admin) (UK).

69. *Miller*, [2020] EWHC 225 (Admin) ¶8 2 (UK).

70. *Id.* ¶ 87.

departments as being offensive or inflammatory can show up on enhanced background checks, thereby reducing an applicant's chances of employment or completely disqualifying an applicant from certain fields of work.⁷¹

The emergence of social media over the past two decades has substantially blurred the lines between the workplace and the private lives of employees.⁷² The Forstater and Miller cases are representations of just how blurred those lines have become with regard to freedom of speech.⁷³ Increasingly, employees are using social media outside of work to express their political beliefs—such as their thoughts on sex and gender.⁷⁴ These cases show that taking adverse action against a person for social media posts is a highly contentious decision and will likely be met with public criticism and even litigation.⁷⁵

This Note does not attempt to analyze either of these cases or determine whether the outcome for either Maya Forstater or Harry Miller was “correct.” Therefore, any discussion of either of these cases on the merits is beyond the scope of this Note. Instead, these cases merely demonstrate many of the issues that employers may face when deciding whether to take adverse action against an employee or whether to reject an applicant for social media posts. These cases also demonstrate how the workplace can impact the right to freedom of expression.

The rest of this Note will utilize the Forstater and Miller cases at times to demonstrate how, by relying on Article 19 of the ICCPR, employers would have a much more solid foundation for taking adverse employment action and would enhance their decision-making processes with respect to employee discipline and discharge. The next sections of this Note will introduce Article 19 of the ICCPR and the Guiding Principles on Business and Human Rights. The next sections will also discuss how the incorporation of international human rights law in private companies' employee speech policies can provide clarity and legitimacy and help to avoid much of the fallout that occurred in the Forstater and Miller cases.

71. Rolfe, *supra* note 61.

72. John F. Birmingham Jr. & Jeffrey S. Kopp, *Demonstrators in the Midst? Handling Political Activity in the Workplace*, NAT'L L. REV. (Feb. 20, 2019), <https://www.natlawreview.com/article/demonstrators-midst-handling-political-activity-workplace> [<https://perma.cc/HH4D-8PS8>].

73. *See Forstater*, [2019] UKET 2200909 (UK); *see also Miller*, [2020] EWHC 225 (Admin).

74. Birmingham & Kopp, *supra* note 72.

75. *See Maya Forstater: Woman Loses Tribunal over Transgender Tweets*, *supra* note 35; *see also* Gaby Hinsliff, *Maya Forstater's Case Was About Protected Beliefs, Not Trans Rights*, THE GUARDIAN (Dec. 22, 2019, 2:00 AM), <https://www.theguardian.com/commentisfree/2019/dec/22/maya-forstater-case-about-protected-beliefs-not-trans-rights> [<https://perma.cc/RWM7-VAB5>]; *see also Harry Miller: Police Probe Into 'Transphobic' Tweets Unlawful*, *supra* note 45; *see also Miller*, [2020] EWHC 225 (Admin) ¶ 18 (UK).

D. International Law and the Right to Freedom of Expression

1. ICCPR Article 19

Freedom of expression is a fundamental right that includes a variety of different types of communication, including the following: “political discourse, commentary on one’s own and on public affairs, canvassing, discussion on human rights, journalism, cultural and artistic expression, teaching and religious discourse.”⁷⁶ The right to freedom of expression is a cornerstone of democratic society; without this freedom, “the enjoyment of other rights is not possible” and the protection of other human rights is unattainable.⁷⁷ Like the First Amendment of the U.S. Constitution, various treaties provide for the freedom of individuals to express themselves without interference.⁷⁸ Article 19 of the International Covenant on Civil and Political Rights (ICCPR) is the most “relevant” of these international instruments.⁷⁹ It states that

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary;
 - i. For respect of the rights or reputations of others;
 - ii. For the protection of national security or of public order, or of public health or morals.⁸⁰

Article 19 guarantees each individual the right to freedom of expression but generally only applies against state actors (i.e., nation states or other government institutions).⁸¹ However, there have been increased calls by scholars for Article

76. Emily Howie, *Protecting the Human Right to Freedom of Expression in International Law*, 20 INT’L J. SPEECH-LANGUAGE PATHOLOGY 12, 13, 15 (2017) (citing UN Human Rights Committee (2011) *General Comment No. 34, Article 19, Freedoms of Opinion and Expression*, UN Doc. CCPR/C/GC/34).

77. *Id.*

78. *See* International Covenant on Civil and Political Rights art. 19, Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter *ICCPR*].

79. *See* Aswad, *supra* note 7, at 35-36 (explaining that “[t]he International Covenant on Civil and Political Rights (ICCPR) is the most relevant treaty on the topic of freedom of expression. This treaty, which was opened for signature in 1966, has 172 State Parties, including the United States.”).

80. ICCPR, *supra* note 78.

81. Hurd, *supra* note 31 (“Most international law experts agree that Article 19 applies only

19 to apply directly to private companies.⁸² Some scholars have even made the argument that Article 19 *does* bind private actors whose activities “substantially burden freedom of expression and information.”⁸³ In such situations, private companies could potentially be held to the exact same standard as nation states and could be legally required to show compliance with Article 19’s requirements for limiting speech.⁸⁴ Nevertheless, the direct application of Article 19 to the private sector appears to be limited, as it only kicks in when expression has been “substantially” burdened and where the private actor “constitute[s] as great a threat to expression and information as the state.”⁸⁵

As the language of Article 19 suggests, the right to freedom of expression is not absolute under the ICCPR.⁸⁶ States can restrict speech in some circumstances, but in order for a state party to place any kind of limitation on free speech or restrict it in any manner, it must satisfy a tripartite test, commonly referred to as the “legality, necessity, and legitimacy” test.⁸⁷ All restrictions must be

1. “provided by law” (i.e., the restriction must provide appropriate notice and must be properly promulgated) and

to states, like the rest of the ICCPR.”).

82. *Id.*

83. Land, *supra* note 9, at 395 (“...Article 19, in contrast to much of human rights law, does not in fact have a state action requirement. Non-state actors, to the extent that they interfere with the freedoms protected by Article 19, must justify their actions just as states would.”); *id.* at 445-46 (“The drafting history of Article 19(2), however, reveals that there is also a basis for applying it *directly* to the conduct of private actors. Article 19(2) provides that ‘[e]veryone shall have the right to freedom of expression,’ but does not specify whether it intends to apply this to public or private actors. In light of this ambiguity, it is appropriate to turn to the drafting history. Throughout the drafting of the ICCPR, there were two competing understandings of the scope of what became Article 19(2): ‘One was that the article was intended to protect the individual only against governmental interference. The other view was that the article should protect the individual against all kinds of interference.’ The United States and the United Kingdom, for example, both supported a draft of the article that would guarantee the ‘right to freedom of information and expression without governmental interference.’ They did not believe there was a significant threat to expression by private actors and were concerned that extending the article to private interference would lead to complications. . . . [t]he Commission on Human Rights, however, explicitly declined to include the phrase ‘without governmental interference’ because a majority of the delegates wanted the article to apply to private conduct.”).

84. *Id.*

85. *Id.* at 447.

86. See ICCPR, *supra* note 78 (stating that the freedom of expression “may therefore be subject to certain restrictions”); see also Agnes Callamard, *Expert Meeting on the Links Between Articles 19 and 20 of the ICCPR: Freedom of Expression and Advocacy of Religious Hatred that Constitutes Incitement to Discrimination, Hostility or Violence* (Oct. 2-3, 2008), <https://www.article19.org/data/files/pdfs/conferences/iccpr-links-between-articles-19-and-20.pdf> [<https://perma.cc/9U47-NQ3L>].

87. Aswad, *supra* note 7, at 36.

2. “necessary” (i.e., the speech restriction must, among other things, be the least intrusive means)
3. to achieve one of the listed public interest objectives (i.e., protection of the reputations and rights of others, national security, public order, public health, or morals).⁸⁸

State actors must show that each prong has been satisfied before restricting speech.⁸⁹

2. ICCPR Article 20

Freedom of expression can also be curtailed under ICCPR Article 20, which provides that “[a]ny propaganda for war shall be prohibited by law” and “[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.”⁹⁰ Whereas Article 19 outlines certain requirements that *allow* freedom of expression to be curtailed, Article 20 provides particular instances in which freedom of speech *must* be curtailed.⁹¹ However, Article 20 is a much more controversial provision of the ICCPR than Article 19.⁹² It is more controversial primarily because the precise meaning and scope of Article 20 are still uncertain amongst legal experts.⁹³ Because of the vagueness of Article 20, the tripartite test offered under Article 19 continues to provide the best guidance regarding restrictions on speech.⁹⁴

In order for Article 20 to offer meaningful guidance to nation states, legal scholars would need to significantly clarify the meaning behind it and how terms such as “hatred” or “incitement” should be interpreted—but such clarifications have not yet been made.⁹⁵ The United Nations Office of the High Commissioner for Human Rights completed a study to clarify Article 20, but its conclusions have also confused legal scholars.⁹⁶ Therefore, Article 20 remains somewhat unusable.⁹⁷ Article 19 should therefore control until such clarifications are made, as it is currently easier to understand and adapt, and because governments still bear the burden of demonstrating Article 19’s tripartite test has been satisfied even when restricting speech under Article 20.⁹⁸

88. *Id.*

89. *Id.*

90. ICCPR, *supra* note 78, at art. 20.

91. Lwin, *supra* note 6, at 56.

92. Aswad, *supra* note 7, at 37.

93. *Id.*

94. *Id.*

95. Lwin, *supra* note 6, at 65.

96. *Id.*

97. *Id.* at 65-67.

98. *Id.* at 67; Aswad, *supra* note 7, at 37.

E. The Guiding Principles on Business and Human Rights

Although Article 19 of the ICCPR and various other conventions generally do not apply to the private sector, international experts have long debated whether “the international human rights regime . . . could or should apply to non-state actors.”⁹⁹ For decades, legal experts have warned of the emergence of an international landscape in which multinational corporations possessed similar authority to regulate speech as governments.¹⁰⁰ “In 1977, Oxford Professor Hedley Bull predicted that the international system could morph from being based on nation-states to one in which nations would share authority over their citizens with a variety of other powerful actors, including transnational corporations.”¹⁰¹

This debate resulted in the creation of the Guiding Principles on Business and Human Rights, which call for private actors to adhere to IHRL—including the ICCPR’s dictates concerning freedom of expression.¹⁰² The UNGPs are an attempt to outline corporate responsibility with respect to international human rights and are premised on the theory that private companies, regardless of the fact that they are non-state actors, have an obligation to avoid infringing on international human rights—such as the right to freedom of expression.¹⁰³ Since their proposal in 2011, the UNGPs have received unanimous support from UN nation-states—including the United States.¹⁰⁴ They recognize “[t]he role of business enterprises as specialized organs of society performing specialized functions, [and that businesses are] required to comply with all applicable laws and to respect human rights.”¹⁰⁵

The UNGPs apply to all businesses “regardless of size, sector, location, ownership and structure,” but they do not create any legal obligations for companies.¹⁰⁶ Nor do the UNGPs burden private companies with all of the same obligations as governments.¹⁰⁷ In a practical sense, the UNGPs expect that companies will develop policies and procedures that address human rights, assess any potential human rights violations that could result from their operations, and immediately address and remedy any violations.¹⁰⁸ In determining whether a human rights violation has occurred, the UNGPs specify that companies should rely on international instruments—including the ICCPR—rather than national or regional law, which may offer fewer protections.¹⁰⁹

99. Aswad, *supra* note 7, at 34.

100. *Id.* at 30.

101. *Id.*

102. Hurd, *supra* note 31.

103. Guiding Principles, *supra* note 10.

104. Aswad, *supra* note 7, at 38.

105. Guiding Principles, *supra* note 10

106. *Id.*

107. Aswad, *supra* note 7, at 39.

108. *Id.*

109. *Id.*

III. ANALYSIS/RECOMMENDATION

A. Criticisms Regarding Implementation of the UNGPs

Given that the UNGPs do not impose any legal obligations on private actors, their implementation depends primarily on companies' willingness to commit to the principles.¹¹⁰ Critics have argued that the UNGPs are largely meaningless because they do not directly impose any obligations on private actors and that entrusting the future of human rights law to "the mere hope" that private actors will commit to the UNGPs is an absurdity.¹¹¹ But to that point, some have argued that voluntary implementation may be the best course of action for ensuring that human rights—including the right to speech—are respected.¹¹² For one, governments—especially the United States government—are unlikely to take action against private companies suspected of limiting free speech.¹¹³

Another reason is that the negotiation of an international instrument regulating corporate speech codes could result in several undesirable consequences.¹¹⁴ For example, the most current available information suggests that governments have become more strict with online speech; negotiating a new international instrument in the current global climate could reflect this trend.¹¹⁵ Thus, it is entirely possible that a new international instrument would not protect online speech or regulate corporate speech codes more resolutely than ICCPR Article 19.¹¹⁶ Furthermore, corporations are increasingly committing to align their policies—including their internal speech policies—with IHRL.¹¹⁷ One study conducted in 2016 produced data showing that about forty-six percent of all businesses and about eighty-four percent of businesses with yearly revenues of ten billion or greater have internal policies on human rights.¹¹⁸ Therefore, the data suggests that companies are willing to commit to IHRL.¹¹⁹

Despite this data, implementing the UNGPs at an operational level may not be feasible for some companies, as some critics claim.¹²⁰ However, the UNGPs address this concern by providing that "the scale and complexity of the means through which enterprises meet [their responsibilities] may vary."¹²¹ Therefore, the UNGPs provide flexibility to private companies and account for the fact that

110. *Id.* at 60.

111. *Id.*

112. *Id.* at 61.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.* at 62.

121. Guiding Principles, *supra* note 10.

there is no “one-size-fits-all” approach to implementation.¹²²

Nevertheless, infusing existing policies with the UNGPs and/or creating entirely new policies rooted in IHRL is a challenging endeavor for any company.¹²³ But it is not obvious that the alternative provides an easier route—especially with respect to speech policies. Companies that have attempted to draft internal policies based on their own company values rather than external legal instruments—even large social media companies—are struggling to avoid inconsistencies when tweaking their moderation policies to address “hate speech, misinformation, disinformation, incitement of violence, and other content that cause real-world harm.”¹²⁴ The UNGPs offer an alternative, in that they encourage companies to “anchor” their internal policies in IHRL, rather than relying on “homegrown approaches.”¹²⁵

B. Advantages of Implementing the UNGPs

Despite their criticisms, the UNGPs offer several advantages.¹²⁶ The most obvious advantage is the fact that the UNGPs provide companies with clearer guidance and more consistency than policies that companies create “as they see fit.”¹²⁷ Rather than having to invent their own policies for human rights from scratch, companies can utilize international law and tailor it to their individual needs.¹²⁸ As a result, companies can have confidence that their internal policies are legitimate and measured, while conveying to the global community that they are committed to upholding international law.¹²⁹

Implementing IHRL within corporate policies is also preferable because it provides businesses with the authority to oppose pressure from foreign governments that may want companies to take action in contravention of global

122. Aswad, *supra* note 7, at 39 (“The UNGPs apply to all companies regardless of size, but ‘the scale and complexity of the means through which enterprises meet that responsibility may vary.’ This provides some measure of flexibility in their implementations.”).

123. *Id.* at 62.

124. Lwin, *supra* note 6, at 53.

125. Aswad, *supra* note 7, at 62 (“The shift towards grounding the speech codes in international human rights law merely seeks to anchor the existing global speech curation process to speech codes that are consistent with international standards for restricting speech, rather than to speech codes that are ‘homegrown’ approaches to restricting speech.”).

126. *Id.* at 64.

127. *Id.*

128. *Id.* at 65.

129. *Id.* (“For example, instead of struggling for a way to justify his decision to permit Holocaust denial posts on his platform, Mr. Zuckerberg could have cited the UN Human Rights Committee’s interpretation of ICCPR Article 19. Similarly, in the case of the YouTube videos mocking the royalty of Thailand, a corporate decision grounded in this Committee’s recommendations might have appeared more principled to Thai citizens than what they were left with—the views of lawyers in Silicon Valley.”).

expectations.¹³⁰ For example, a foreign government could put pressure on a company to take action against employees that criticize the government via social media. Instead of citing their own company values and policies, businesses would have much more leverage in this type of situation by leaning on policies backed by Article 19 of the ICCPR.¹³¹ As a result, private companies would be better able to resist corrupt governments and safeguard their employees from illicit interference with their right to freedom of expression.¹³²

From a more practical perspective, a major advantage of implementing the UNGPs is that they offer an already-existing solution to many of the issues that businesses face in creating internal policies.¹³³ There is no need for government intervention or additional international negotiation, as the UNGPs already reflect the expectations of the international community.¹³⁴ By implementing the UNGPs in their operations, private companies are also helping enforce IHRL.¹³⁵ Private companies can play an important role in enforcing IHRL, and their actions can either make it easier or more difficult for governments around the world to violate international law.¹³⁶ Therefore, by committing their policies to IHRL, private companies would help uphold the protection of human rights, not only by upholding human rights within their respective businesses, but also by making it harder for governments to commit human rights violations.¹³⁷

C. The Social Media Article 19 Framework

With respect to freedom of expression, implementing the UNGPs means that private companies would root their speech codes in Article 19 of the ICCPR. In fact, several legal scholars have advocated for the development of a framework for social media companies to root their speech policies in Article 19.¹³⁸ Essentially, this framework calls for social media companies to comply with the tripartite test outlined in Article 19 when deciding to flag or remove posts from their platforms.¹³⁹ By doing so, the scholars argue that social media companies can more effectively determine what speech is acceptable based on existing law rather than a patchwork of “quasi-legal policies” and ever-changing community standards that these companies try to reflect.¹⁴⁰

130. *Id.* at 66.

131. *Id.*

132. *Id.*

133. *Id.* at 67.

134. *Id.*

135. Land, *supra* note 9.

136. *Id.*

137. *Id.* at 414.

138. See Aswad, *supra* note 7, at 34; see also Lwin, *supra* note 6.

139. *Id.*

140. Lwin, *supra* note 6, at 55, 60 (“Facebook employees noted that even those employees with backgrounds in human rights failed to refer to concrete human rights norms during working group discussions or stakeholder engagements. Facebook employees themselves acknowledge that

Presently, social media companies make determinations about content moderation according to their own tests and do so primarily in behind closed doors.¹⁴¹ Legal scholars have condemned this approach, claiming that social media companies would greatly benefit from policies rooted in Article 19's tripartite test because it offers a "structured, public, and transparent framework."¹⁴² Thus, by expressly committing to align speech policies with Article 19's tripartite test of legality, necessity, and legitimacy, and by demonstrating that each of these prongs has been satisfied when censoring content, social media companies, according to these scholars, would greatly improve the legitimacy of their actions and instill confidence in the public.¹⁴³

D. Applying the Social Media Framework to Non-Social Media Companies

Non-social media companies can benefit from a similar commitment to Article 19 when deciding to take adverse action based on an employee's or applicant's social media posts. As the Maya Forstater case demonstrates, employers can be accused of lacking legitimacy in their decision-making processes.¹⁴⁴ Therefore, Article 19's structured tripartite test could provide private employers with the necessary guidance when making adverse employment decisions while also enhancing the legitimacy of their actions with their employees and the public.¹⁴⁵ However, the employer-employee relationship is fundamentally different from that of the platform-user relationship proposed in the social media framework above, so adapting this framework to employee speech policies would require a unique approach. The workplace "requires a degree of civility, mutual respect, and tolerance that some speech may undermine."¹⁴⁶ Nevertheless, these concerns should not diminish the importance of the right to freedom of expression.¹⁴⁷

E. How Employer Action Affects Freedom of Expression

1. Employee Discharge and Reprimand

Social media companies—despite being private companies themselves—differ from most private companies because they have the power to directly limit speech by censoring posts.¹⁴⁸ However, private companies have the ability to

'we are making rules up.' There exists no formal framework or procedures for content moderation decisions.').

141. *Id.* at 60.

142. *Id.*

143. *Id.* at 62-63.

144. *See Forstater*, [2019] UKET 2200909 (UK).

145. Lwin, *supra* note 6, at 62.

146. Cynthia L. Estlund, *Free Speech and Due Process in the Workplace*, 71 *IND. L. J.* 101, 113 (1995).

147. *Id.*

148. Aswad, *supra* note 7, at 46.

reprimand and even discharge employees, which gives them the ability to indirectly limit speech by punishing employees for certain social media posts.¹⁴⁹ Employers can also reject applicants based on social media posts.¹⁵⁰ Therefore, “[i]f employers can fire employees . . . because of their speech, then speech will be chilled[,] and expression lost.”¹⁵¹ Speech is chilled primarily because employees, who fear being reprimanded or fired by their employer for their speech—and who have no real recourse other than costly litigation—may choose to avoid speaking freely.¹⁵² Many laws exist in the United States that protect private employees from retaliatory action for certain types of speech, such as the National Labor Relations Act (NLRA), but these protections apply mostly to speech concerning the specific terms and conditions of the worker’s employment—not speech generally.¹⁵³ Regardless of these laws, it is reasonable to expect that the average worker could be deterred from speaking to some degree out of fear of discipline or termination.¹⁵⁴

Moreover, employers can take action against many employees for their social media use without due process.¹⁵⁵ In the United States, there is a presumption of “at-will” employment, meaning that unless an employee has an employment contract, he or she can be discharged for any reason or no reason.¹⁵⁶ For most workers, this is the reality of their employment situation.¹⁵⁷ Even if a worker is not at-will, companies can set grounds for discipline or discharge on the basis of freedom of contract,¹⁵⁸ which is also problematic because employment contracts can lack transparency and accountability, can lack procedural safeguards for employees, can contain unfair contract terms that reflect the power imbalance between employers and employees, can contain lower standards for restricting speech than standards set by IHRL, and can even completely circumvent international law.¹⁵⁹ As a result, in many scenarios, private employers can take adverse action against workers with few, if any, safeguards in place, leaving employees vulnerable and rendering any substantive rights that workers have to

149. See Estlund, *supra* note 146, at 102.

150. *79% of Businesses Have Rejected a Job Candidate Based on Social Media Content: Job Seekers Should Post Online Carefully*, PR NEWSWIRE (Apr. 28, 2020), <https://www.prnewswire.com/news-releases/79-of-businesses-have-rejected-a-job-candidate-based-on-social-media-content-job-seekers-should-post-online-carefully-301048157.html> [<https://perma.cc/C4U9-KEH4>].

151. Erwin Chemerinsky, *Rethinking State Action*, 80 N.W. U.L. REV. 503, 533 (1985).

152. See Estlund, *supra* note 146, at 102.

153. See Kathleen Carlson, *Social Media and the Workplace: How I Learned to Stop Worrying and Love Privacy Settings and the NLRB*, 66 FLA. L. REV. 479, 486-87 (2014).

154. See Estlund, *supra* note 146, at 102.

155. *Id.*

156. *Id.*

157. *Id.*

158. See generally *Side-Stepping Rights: Regulating Speech by Contract*, ARTICLE 19, (2018), <https://www.article19.org/wp-content/uploads/2018/06/Regulating-speech-by-contract-WEB-v2.pdf> [<https://perma.cc/9UJB-T8BH>].

159. *Id.* at 14-16.

freedom of speech largely illusory.¹⁶⁰

2. *Job Applicants*

In addition to being able to fire or discipline employees, private employers can also eliminate certain applicants from applicant pools because of their social media posts.¹⁶¹ Again, there are some limited protections for applicants but there are no laws that completely prohibit employers from denying applicants because of their social media usage.¹⁶² The most robust protection for U.S. job applicants may be the Stored Communications Act (SCA).¹⁶³ Under the SCA, it is unlawful for an employer to intentionally access a person's social media account or online webpage to obtain information without that person's authorization.¹⁶⁴

However, this protection does not apply when the applicant—or even employee—has a public social media account.¹⁶⁵ Therefore, if an applicant or employee wants to shield his or her social media posts from a private company and enjoy the protections of the SCA, he or she must utilize privacy controls.¹⁶⁶ Essentially, this means that the applicant or employee would need to make his or her social media account private.¹⁶⁷ However, making an account private limits who can see posts from that account, which could also be considered a limit on the ability to fully and freely express oneself. Tort claims, such as an invasion of privacy action, might also be available for applicants and employees.¹⁶⁸ However, this remedy appears to be limited because courts have been reluctant to find that employees have a right to privacy in social media.¹⁶⁹

3. *The Workplace as an Instrument of the Government*

The Harry Miller case demonstrates another scenario in which private employers can affect freedom of expression. As the case discusses, police in the United Kingdom have cited individuals for “non-crime hate incidents.”¹⁷⁰ However, non-crime hate incidents are problematic and could even be unlawful under Article 19 of the ICCPR, which requires that, in order to restrict speech,

160. Estlund, *supra* note 146, at 102-03.

161. *79% of Businesses Have Rejected a Job Candidate Based on Social Media Content*, *supra* note 150.

162. See Carlson, *supra* note 153, at 483-86.

163. *Id.* at 489.

164. *Id.*

165. *Id.* at 491.

166. *Id.*

167. *Id.*

168. *Id.* at 482.

169. *Id.* at 494.

170. See generally Miller, [2020] EWHC 225 (Admin). In fact, the recording of non-crime hate incidents was found to be unlawful in Miller, [2021] EWHC Civ 1926, but the court analyzed the College of Policing's policy under Common Law and Article 10 of the European Convention on Human Rights—not Article 19 of the ICCPR.

“[t]he restriction must be provided by laws that are precise.”¹⁷¹ Therefore, states “must avoid providing authorities with “unbounded discretion” to restrict speech.¹⁷² The College of Policing has come dangerously close to providing police with unbounded discretion to investigate persons for their social media posts, which could render the guidelines illegal under Article 19.

First, a hate incident is defined as “any non-crime incident which is perceived by the victim or any other person to be motivated by hostility or prejudice.”¹⁷³ By utilizing the term “victim,” instead of a more neutral designation, the definition presupposes some commission of wrongdoing and instructs police to investigate hate incidents under the assumption that a wrong has been committed and under the assumption that the complaining person has been harmed in some way. Second, an incident can rise to the level of a non-crime hate incident so long as the “victim or any other person” perceives the perpetrator’s actions to be motivated by hostility or prejudice.¹⁷⁴ This means that an incident—so long as *at least one person* believes that the perpetrator was prejudiced against or hostile to one or more protected groups—can be classified as a non-crime hate incident. Third, police can record non-crime hate incidents, irrespective of whether officers find any evidence that the incident was motivated by hate, which provides police with essentially unfettered authority to cite individuals.¹⁷⁵ This is not to say that hate crime incidents do not occur; in fact, the data suggests that hate crimes and other incidents motivated by hate are becoming more common throughout the world.¹⁷⁶ But even if the guidelines were re-written to provide police with more discretion, they could still provide police with an enormous amount of authority to cite individuals for their online comments while imposing no evidentiary requirements.¹⁷⁷

If the police were to cite an individual for a non-crime hate incident and log him or her in their database, it would effectively establish a link between the police and private employers.¹⁷⁸ Despite the fact that non-crime hate incidents are not crimes and do not impose criminal liability against the accused perpetrator,

171. David Kaye, (Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression), *Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression*, ¶ 6, U.N. Doc. A/74/486 (Oct. 9, 2019).

172. *Id.*

173. *Hate Crime/Hate Incidents*, *supra* note 48.

174. *Id.*

175. Izzy Lyons et al., *Police Record 120,000 ‘Non-Crime’ Hate Incidents That May Stop Accused Getting Jobs*, TELEGRAPH (Feb. 15, 2020, 8:33 AM), <https://www.telegraph.co.uk/news/2020/02/14/police-record-120000-non-crime-incidents-may-stop-accused-getting/> [<https://perma.cc/W3ZG-5J44>].

176. Latoya Dennis, *Number of Hate Crimes and Hate Incidents on Rise Around the World*, WUWM (Mar. 19, 2019, 11:30 AM), <https://www.wuwm.com/post/number-hate-crimes-and-hate-incidents-rise-around-world#stream/0> [<https://perma.cc/6K9B-SLAW>].

177. Lyons et al., *supra* note 175; *see also* King, *supra* note 58.

178. *Id.*

they might show up on certain background checks, thereby negatively impacting job applicants whom police have previously cited.¹⁷⁹ Therefore, these guidelines could impose real-world sanctions on individuals.¹⁸⁰

This discussion of non-crime hate incidents demonstrates how private employers can inadvertently impact freedom of expression by utilizing government-provided data in hiring decisions. As discussed earlier in this Note, governments around the world are becoming stricter when it comes to online speech.¹⁸¹ Therefore, it is entirely possible that, in the coming years, governments could pass laws or policies that are similar to the College of Policing's.¹⁸² It is also entirely possible that governments could "enforce" these laws and policies—not by arresting and punishing individuals and thereby attracting international scrutiny—but by requiring police to log certain information and provide relevant data to background check agencies, employers, etc., thereby disqualifying individuals from employment when this information appears in background checks.¹⁸³ That way, governments, rather than using the power of law enforcement, can use the workplace as an instrument for carrying out these policies, which could place private employers in a difficult position. Therefore, this is yet another way in which private employers can affect freedom of expression.¹⁸⁴

This is not an exhaustive list of ways private employers can impact freedom of expression. Rather, this section is an attempt to show that private employers *can* and *do* significantly impact speech.

F. Employer Interests

Ultimately, employers want to avoid conflicts and liability that could result from their employees' social media posts.¹⁸⁵ Just as social media companies have an interest in removing hate speech and other posts that incite violence, employers have an interest in discharging or disciplining employees who make hateful or otherwise inappropriate posts.¹⁸⁶ Internet posts are far-reaching and can last forever, which provides employers with a strong incentive to ensure employees' posts comply with any relevant laws and regulations.¹⁸⁷ Private employers have a legitimate interest in screening their employees' social media posts to ensure that their workers are not committing workplace harassment or damaging the company's culture, public image, or bottom-line.¹⁸⁸ More

179. *Id.*

180. *Id.*

181. Aswad, *supra* note 7, at 61.

182. Lyons et al., *supra* note 175.

183. Lyons et al., *supra* note 175.

184. Lyons & Walsh, *supra* note 59.

185. Carlson, *supra* note 153, at 480.

186. Grider et al., *supra* note 28.

187. Carlson, *supra* note 153, at 480-81.

188. Grider et al., *supra* note 28.

specifically, private employers have a legitimate interest in taking adverse action against employees who use social media to engage in hate speech, make posts that constitute harassment or contribute to a hostile work environment, make threats to co-workers, express an intent to commit workplace violence, or share trade secrets and other confidential or proprietary information.¹⁸⁹ Moreover, employers have an interest in prohibiting employee speech that would result in outside scrutiny, sanctions, or increased regulation, as well as any other speech that would disrupt the internal operations of the business.¹⁹⁰

In many cases, employers can even be held liable for an employee's social media posts if they receive a complaint and fail to adequately address the employee's alleged misconduct or if they have direct or constructive knowledge of online harassment.¹⁹¹ Employers can also be vicariously liable for employee statements if the employee is an agent of the employer.¹⁹² Traditionally, harassment "occurred within the 'four walls' of the workplace," but with the advent of the internet and social media, employees can now commit harassment online.¹⁹³ The fact that employees may be posting on social media outside of work and on their own time does not preclude companies from taking issue with the content of their posts.¹⁹⁴ In fact, some courts in the United States are starting to recognize the "permeable boundaries of the modern work place [sic]" by taking into consideration social media posts as part of their analysis for hostile work environment claims.¹⁹⁵ As a result, potential employer liability under Title VII has expanded because of "[t]he broadening conception of the workplace and increasing use of social media."¹⁹⁶

Employers are also increasingly using social media to carry out business-related functions, like marketing and customer service.¹⁹⁷ Today, it is not uncommon for a company to have a blog, Twitter account, or a Facebook profile.¹⁹⁸ As a result, the opinions expressed by employees can be mistaken for the official opinion of the organization in some circumstances.¹⁹⁹ This gives employers even more reason to ensure that their employees are not using social

189. *Id.*

190. Estlund, *supra* note 146, at 107.

191. Grider et al., *supra* note 28.; *see also* Jeremy Gelms, *High Tech Harassment: Employer Liability Under Title VII for Employee Social Media Misconduct*, 87 WASH. L. REV. 249, 269 (2012).

192. Carlson, *supra* note 153, at 481.

193. Gelms, *supra* note 191, at 249.

194. Grider et al., *supra* note 28.

195. Gelms, *supra* note 191, at 269.

196. *Id.* at 250.

197. *Id.* at 267.

198. *Id.* at 268.

199. Alonzo Martinez, *What Employers Should Consider When Drafting a Social Media Policy*, FORBES (Feb. 6, 2020), <https://www.forbes.com/sites/alonzomartinez/2020/02/06/what-employers-should-consider-when-drafting-a-social-media-policy/?sh=359209851d6e> [<https://perma.cc/85Z2-77QM>].

media to express opinions and views that could negatively impact the company's legitimate social media presence.²⁰⁰

G. Employee Interests

Employees do not entirely relinquish their interest in free speech when they agree to work for a company.²⁰¹ As the *Maya Forstater* case demonstrates, individuals still very much have an interest in expressing themselves despite the fact that they may be employed by a private company.²⁰² Employees do not want to give up their right to discuss political topics “in a normal, open, democratic way,” including policy questions that touch on controversial topics such as sex and gender.²⁰³ Ultimately, employees want to be able “to express their beliefs without fear of being discriminated against.”²⁰⁴

Many employees, however, mistakenly believe that their statements are protected by laws that protect freedom of expression, even though they are generally not.²⁰⁵ Some states in the U.S., such as Colorado, Louisiana, California, New York, and North Dakota explicitly protect employees from discharge for “off duty lawful conduct,” which includes online speech, but most employees throughout the world are not afforded this type of explicit protection.²⁰⁶ However, one can argue that society is better off if employees feel like they have the freedom to express themselves without fearing discharge or discipline. Legal instruments generally protect the right to freedom of expression for two primary reasons.²⁰⁷ The first is to encourage a “marketplace of ideas” and the second is to allow for individual self-fulfillment.²⁰⁸ If an entity interferes with the free flow of ideas by engaging in content control—whether it be a government or a private company—the “marketplace of ideas” is altered.²⁰⁹ Instead of suppressing certain ideas, it is better to expose individuals to a variety of ideas and “[I]et truth and falsehood grapple.”²¹⁰ Likewise, if individuals are not able to express certain

200. *Id.*

201. Grider et al., *supra* note 28.

202. *See generally Forstater*, [2019] UKET 2200909 (UK); *see also Miller*, [2020] EWHC 225 (Admin).

203. *Maya Forstater: Woman Loses Tribunal over Transgender Tweets*, *supra* note 35.

204. *Id.*

205. Grider et al., *supra* note 28.

206. *Id.*

207. David L. Hudson Jr., *In the Age of Social Media, Expand the Reach of the First Amendment*, ABA, https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/the-ongoing-challenge-to-define-free-speech/in-the-age-of-social-media-first-amendment/ [<https://perma.cc/WR3Y-LMD8>].

208. *Id.*

209. *Id.*

210. John Milton, *Aeropagitica: A Speech of Mr. John Milton for the Liberty of Unlicensed Printing, to The Parliament of England xxxix* (1644); *see also Hudson Jr.*, *supra* note 207.

views, they are not able to become self-actualized adults.²¹¹ Rather than fostering an environment for self-fulfillment, censorship “stunts personal growth and individual expansion.”²¹²

Private companies, despite not being state actors, can certainly impact the marketplace of ideas and individual self-fulfillment.²¹³ Employers can do so by discharging or disciplining employees for expressing certain ideas. This could have negative consequences, as employees may feel like they do not have the “breathing room” to express their genuine views and beliefs.²¹⁴ Private employers can also impact society’s interest in promoting a marketplace of competing ideas and open discourse by shutting down certain lines of thought that do not align with official company doctrine.²¹⁵

So how should these interests be balanced? Should employers be able to fire or discipline employees that risk harming the reputation of the company through their social media posts? Should employers be free to discharge or reprimand employees for posts that seem like harassment directed at other workers? Should employees be able to express themselves freely on social media, regardless of the consequences? The following sections argue that Article 19 of the ICCPR provides a solution that balances these interests and that private employers could provide clearer, more structured, and more transparent guidance to employees by rooting their internal speech policies in Article 19’s tripartite test of legality, necessity, and legitimacy.

H. Applying Article 19 to Employee Speech Policies

1. Legality

First, Article 19’s tripartite test requires that any restriction on speech must be provided by a precise, public, and transparent law.²¹⁶ This means that, if a company decides to implement the UNGPs and thereby adhere to Article 19’s requirements, it would not be able to restrict an employee’s speech solely for violating corporate policy. Rather, the restriction would need to be backed by law.²¹⁷ Private companies might discharge or discipline employees for legitimate reasons and with good intentions: to protect the image of the company and its workforce; to signal to consumers, customers, the public, etc., a commitment to combating hate speech; and even to prevent harassment.

The issue with this approach is that it leaves private companies to determine what is right and what is wrong, which provides employers with undefined

211. Hudson Jr., *supra* note 207.

212. *Id.*

213. *Id.*; *see also* Land, *supra* note 9, at 444.

214. Hudson Jr., *supra* note 207; *see also* Estlund, *supra* note 146, at 104.

215. Hudson Jr., *supra* note 207.

216. Lwin, *supra* note 6, at 67.

217. *Id.* at 67-68.

discretion.²¹⁸ Whether companies are aware of it or not, this type of self-regulation means that employers have the ability to moderate content amongst their employees and thereby shape public dialogue.²¹⁹ By adhering to the legality prong of Article 19's tripartite test, companies can avoid implementing arbitrary policies and avoid taking action against employees in contradiction of global expectations. Furthermore, by linking adverse employment decisions to public laws, employers can avoid the appearance that they are taking arbitrary action against employees. Employers "may welcome the normative guidance Article 19 offers," as it provides a potential solution for companies struggling to balance their own internal policies, domestic laws, commercial demands, company culture, and corporate responsibility initiatives.²²⁰

Committing to only restricting speech when a precise, public, and transparent law either allows or requires such action also strengthens private companies against government pressure.²²¹ Companies conduct business all around the world and even in countries that commit human rights violations. By aligning their speech codes with international law, companies can better resist pressure from these governments to suppress employee speech. Employers can also signal to employees a commitment to upholding freedom of speech in their employment practices, regardless of what any local governments suggest or even require. For example, companies conducting business in the United Kingdom may be confronted with the issue of whether to rely on data from non-crime hate incidents. Instead of relying on non-crime data that might come up during a background check, employers would gain clearer guidance by relying on Article 19's tripartite test when determining if an applicant or employee's social media post warrants that person's rejection. That way, employers would avoid relying on potentially faulty data collected for potentially unlawful reasons, avoid accusations of being complicit in human rights abuses, and signal to applicants and employees that their hiring and promotion processes are compliant with international law.²²²

This prong also requires that states uphold the right to freedom of expression by putting in place certain procedural safeguards, such as a body for independent review.²²³ Private employers, unlike nation-states, do not pass laws and do not have a judicial function.²²⁴ However, companies have the ability to draft and implement their own speech policies and employee standards.²²⁵ They are also capable of implementing their own mechanism for independent review of these policies.²²⁶

218. *Id.* at 61.

219. Samples, *supra* note 5.

220. Land, *supra* note 9, at 452.

221. *Id.* at 453.

222. Guiding Principles, *supra* note 10.

223. Lwin, *supra* note 6, at 57-58.

224. *Id.* at 68.

225. *Id.* at 60.

226. *Id.* at 58.

However, many employee speech policies and handbooks are vague and fail to provide precise and transparent rules or independent review.²²⁷ Even social media companies struggle to define their speech policies with precision.²²⁸ According to the UN Special Rapporteur, “[c]ompany policies on hate, harassment, and abuse . . . do not clearly indicate what constitutes an offence.”²²⁹ In order to bring their employee speech policies into compliance with Article 19, employers should craft their policies with care and precision. International law is not entirely clear at all times. For example, Article 20 of the ICCPR does not define terms such as “incitement,” which has left most legal scholars puzzled as to what this provision requires.²³⁰ Nevertheless, international law provides greater clarity than ever-changing company values and community standards, and provides employers with a solid foundation upon which employee speech policies can be developed.

2. Legitimacy

Second, Article 19’s tripartite test provides that any restriction must be to further one or more of the specified interests in Article 19, including national security, the rights and reputations of others, public order, public health, or morals.²³¹ Naturally, this means that there are a finite number of legitimate reasons for restricting freedom of expression.²³² In order for a restriction on speech to be legitimate, it must be invoked for one or more of these reasons.²³³

Therefore, in order to satisfy this prong, employers would need to specifically identify, in good faith, one of these public interests to restrict speech.²³⁴ However, it is important to note that private companies differ from governments in this respect.²³⁵ For example, private companies likely cannot justify restrictions on freedom of expression for national security reasons because national security is the special province of the state, and private companies generally do not have national security interests to safeguard (except in limited circumstances where the company is a government contractor or holder of sensitive information).²³⁶ With

227. See Gretchen Smitson, *How to Avoid Vague Employee Handbooks and Policies*, BERNIEPORTAL (May 31, 2018), <https://blog.bernieportal.com/are-my-employee-policies-unlawfully-vague> [https://perma.cc/7BZU-KD93].

228. Aswad, *supra* note 7, at 46.

229. David Kaye (Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression), *Rep. of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression*, ¶¶ 26, U.N. Doc. A/HRC/38/35 (Apr. 6, 2018).

230. Lwin, *supra* note 6, at 65.

231. *Id.* at 68.

232. *Id.*

233. *Id.*

234. Aswad, *supra* note 7, at 52.

235. Lwin, *supra* note 6, at 69.

236. *Id.* at 69-70.

that being said, private companies have the ability to restrict employee speech for many other reasons.²³⁷ Employers can, for example, restrict employee speech to protect the rights and reputations of others (i.e., the respect and reputation of the transgender community), which was on display in the Maya Forstater case.²³⁸ Additionally, private employers can restrict employee speech to protect public health (i.e., to protect the mental health of employees by prohibiting harassment or prohibiting employees from spreading misinformation about COVID-19).²³⁹

While this list is finite and appears to limit the autonomy of private businesses, it provides employers with clear guidance and instills confidence in employees. General comment 34 to Article 19 provides that “rights” is not all-encompassing.²⁴⁰ Instead, the term “rights” includes human rights that are explicitly protected by the ICCPR and other international human rights instruments.²⁴¹ Therefore, companies should not be free to determine which rights they are going to protect. Rather, they should be able to cite to specific legal instruments that guarantee certain rights before implementing employee speech policies or taking adverse action against employees for their social media conduct. This would protect employees from companies set on furthering their own agenda at the expense of individual rights.

At the same time, it protects employers because it forces them to exercise due diligence (i.e., referencing international legal instruments when drafting employee speech policies) and strengthens their internal policies by rooting them in international human rights law. Therefore, employers can do a better job of avoiding litigation—such as in the Maya Forstater case—by demonstrating a commitment to international law and by upholding their employees’ human rights. Even if an employee brings a claim for wrongful discharge, employers can mount a defense supported by codified law, rather than human resources policies that merely reflect the desires of company leaders.

3. *Necessity and Proportionality*

Third, Article 19’s tripartite test requires that any restrictions be necessary and proportionate.²⁴² This means that the least intrusive means should be utilized first when restricting speech.²⁴³ Governments have a tremendous amount of flexibility in this regard.²⁴⁴ They can impose fines, order injunctive relief, and even deprive persons of their freedom.²⁴⁵ As a result, there is a sliding scale of

237. *Id.* at 70-76.

238. *Id.* at 70; Ivy, *supra* note 27.

239. Lwin, *supra* note 6, at 74.

240. *Id.* at 70-71.

241. *Id.*

242. *Id.* at 68.

243. Aswad, *supra* note 7, at 36.

244. Lwin, *supra* note 6, at 77.

245. *Id.*

options at the disposal of nation states.²⁴⁶ According to the Special Rapporteur, states should address potentially-dangerous speech by promoting pluralism and utilizing education and counter-speech measures, rather than completely prohibiting speech.²⁴⁷ Private employers also have a sliding scale of options, albeit different from those available to nation states.²⁴⁸ These options include informal and formal warnings, employee training, reassignment, suspension, non-selection, and discharge.²⁴⁹ Employers can also promote educational, dialogue, and outreach initiatives for employees who might be vulnerable to online discrimination.²⁵⁰

In practice, Article 19's necessity and proportionality prong provides that employers should utilize the least intrusive means first, which will likely be some form of informal warning and employee education. Rather than discharging employees for social media posts, employers should utilize the various available options, starting with the least severe. Many employees may be unaware of how their social media posts can impact the company. Employees may also not be aware of how their posts can offend their coworkers. Therefore, the proper first step, for many situations, would be to address the employee individually about the posts and discuss how he or she can continue to openly engage in political discourse without damaging the company or negatively impacting other employees. If an employee continues to make harmful or harassing social media posts, employers would be justified in taking more severe measures. Over time, companies would need to periodically assess their decision making to ensure that the selected measures are helping to achieve legitimate aims and are not creating negative unintended consequences.²⁵¹ If a certain company policy infringes on employee speech without advancing the company's legitimate aims, then it should be evaluated, re-worked, or even discarded.²⁵²

To ensure that restrictions on speech are necessary and proportionate, some scholars have recommended that social media companies adopt a structured, six-factor test.²⁵³ The six factors are as follows: (1) the political and social context at the time a social media post was made; (2) the status of the speaker; (3) the intent of the speaker; (4) the content and form of the post; (5) the reach of the post (i.e., the size of the audience); and (6) the likelihood (including imminence) that the

246. *Id.*

247. David Kaye, *Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression*, ¶ 18, U.N. Doc. A/74/486 (Oct. 9, 2019), https://www.ohchr.org/Documents/Issues/Opinion/A_74_486.pdf.

248. *Why You Need to Know about Adverse Employment Actions*, ALAN LESCHT & ASSOCIATES, P.C. (Dec. 9, 2019), <https://www.dcmemploymentattorney.com/resources/blog/why-you-need-to-know-about-adverse-employment-actions/> [<https://perma.cc/WJ6R-P4AP>].

249. *Id.*

250. Aswad, *supra* note 7, at 48.

251. *Id.* at 47, 51.

252. *Id.* at 52.

253. Lwin, *supra* note 6, at 78.

post will result in violence or some other form of targeted action.²⁵⁴ Private companies should apply the same test when deciding the proper course of action for employees' social media posts. By doing so, companies would consider each of these six factors and assign each a score from one to five.²⁵⁵ After assigning a score for each factor, companies could then add each score to get a total score.²⁵⁶ This ensures that the severity of the employee's speech is taken into consideration when determining the proper course of action.²⁵⁷ Given the fact that the severity of each employee's speech can vary greatly, employers do not need to demonstrate the presence of each and every factor.²⁵⁸ Over time, scoring each of these factors would become easier as companies gain experience, which would result in better decision-making processes.

IV. CONCLUSION

Social media is a fundamental component of modern society. Individuals from all around the world use different platforms, such as Twitter, Facebook, and Instagram to express their views on a variety of different topics. However, social media companies have struggled with how to properly regulate speech on their respective platforms. In a similar fashion, non-social media companies have also struggled to determine what their role is in online content moderation. International human rights law offers a potential solution. By rooting employee speech policies in Article 19's tripartite test, rather than relying solely on what companies think is appropriate, private employers can improve the legitimacy of their speech policies.

In addition, by ensuring that Article 19's tripartite test has been satisfied, employers can demonstrate that restrictions on speech are properly promulgated, utilize the least intrusive means, and are imposed to advance legitimate public interests, as opposed to corporate agendas.²⁵⁹ At the same time, this allows employers to clearly convey their commitment to upholding the right to freedom of expression, which can improve employee confidence and morale. Over time, companies' commitment to upholding IHRL with respect to its employee speech policies could promote the advancement of international human rights around the globe. This could also result in a shift in thinking: good corporate citizenship is not banning certain types of employee speech; good corporate citizenship is respecting employees' international human rights when making employment decisions and when creating employee speech policies.²⁶⁰

254. *Id.*

255. *Id.* at 80-81.

256. *Id.*

257. *Id.* at 81.

258. *Id.*

259. Aswad, *supra* note 7, at 40.

260. *Id.* at 55.