Printing press or coffee house: how should the state regulate social media?

"O *Printing*!" lamented Andrew Marvell in 1672, "how hast thou disturb'd the Peace of Mankind!". Social media is far from the first new technology to create turmoil in the body politic. For two centuries after the arrival of the first printing press in England in 1476, the state struggled to find a way to regulate this new and disruptive invention. With the expiry of the licensing laws in 1695, a compromise was reached that endured into modern times: there would be no censorship before printing, but both author and publisher would be liable if the work turned out to be treasonable, blasphemous, or defamatory. Of course, social media companies are not quite like publishing houses. They have no editors watching out for remarks that might land them in hot water. As the law recognises, it would be unfair to hold them liable in the same way as publishers when they exercise little control over the content they transmit. Perhaps, then, social media is more like another novelty that disturbed the peace of the seventeenth century realm: the coffee house.

Coffee houses were central to the development of a public sphere in England. But they were also held responsible for many evils. Fake news was rife in the coffee house, "midwife to all false intelligence". In these "seminaries of sedition", the authority of state institutions was undermined, while enemy agents spread propaganda to influence the English political process. Even Islamic extremism could flourish: as one poem ran, "When coffee once was vended here / the Al Koran shortly did appear". About the only online evil not found in the coffee houses of the 1670s was pornography, for which men "eunuched" by consuming that "newfangled, abominable, heathenish liquor" would presumably have little use.

Unsurprisingly, the Crown sought ways to control such horrors. In 1675 Charles II imposed an outright ban. When public outrage forced him to revoke it, he tried a subtler approach. Coffee houses already had to be licensed for tax purposes. Now, a condition was added to their licences, requiring them to forbid their customers from uttering "false or

scandalous reports against the government or its ministers," and to denounce them to the authorities should they do so.

This seems to be the approach being adopted by the Government in its recent White Paper on online harms. The White Paper proposes that tech companies should be subject to a statutory duty of care to their users. An independent regulator would publish guidance on how they could comply with their duty and monitor whether they did. Like the Restoration coffee house, companies would be required "to identify, flag, block or remove illegal or harmful content" and to provide "evidence of cooperation with UK law enforcement". It could be argued, in fact, that the Government is going further than Charles II ever did. The Merry Monarch was only concerned with one type of harm: sedition. The White Paper targets any number. The harms in scope stretch from terrorism to "excessive screen time". They include both crimes and "unacceptable behaviours". Aside from the fact that they all take place online, it is hard to see what holds them together. It is as though Parliament were to decide to consolidate the Protection of Children Act 1978, the Terrorism Act 2006, the Suicide Act 1961 and the Protection from Harassment Act 1997 into a single piece of legislation, and then add in some advice from the Chief Medical Officer for good measure.

Almost the only consistent theme in the White Paper is that online communication – in other words, speech – should be less free than it currently is. This is not an unreasonable view. No society treats free speech as an absolute right. Even in the United States, someone who incites a riot will go to prison and someone who defames another will have to pay damages. Every liberal democracy strikes its own balance between the harm done by allowing speech and the harm done by forbidding it. If we decide that we have gone too far in the direction of free speech, we can reverse course. But it is illogical to confine this reversal merely to online communication. Many of the most egregious abuses of the freedom of speech over the last few years have been committed by traditional media. If tweeters should be stopped from coarsening

our public discourse, should not newspapers also be stopped from calling judges “enemies of the people”? Indeed, a few years ago, they could have been: scandalising the court was a crime until 2013. If we want to make speech less free, should we not revive that offence, alongside its friends criminal libel, sedition and blasphemy? At least, unlike the untried regime proposed by the White Paper, we know both their merits and their flaws.

This is not an antiquarian argument for treating Facebook like Will’s coffee house and putting a few fake news tweeters on trial for sedition. It is an argument against confusing the medium and the message. Charles II tried to ban coffee shops when he actually wanted to stop the conversations taking place in them. Similarly, the White Paper focuses too much on where harms are taking place – online – and not enough on what kind of harms they are. Where harms are crimes, they should be prosecuted. Where they are torts, public assistance should be available to victims who want to seek compensation through the courts. True, the anonymity associated with the internet presents a challenge to this, but not an insuperable one. Unlike the Stuarts, who faced a print culture in which two-thirds of publications were anonymous, we have the technology to find out who is responsible for abuses. Make people show their face when they speak online as well as offline, and, as the judge Lord Kenyon said two centuries ago, let twelve of their compatriots decide whether it is blamable.