THIS MAY OFFEND YOU: SCOTLAND'S "NAZI PUG" CASE AND FREE SPEECH IN THE INTERNET AGE

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INTRODUCTION

"You don't have to agree with someone to fight for their right to say what they're saying. Either you believe in free speech or you don't."
–Shappi Khorsandi[1]

How do governments protect the right to free speech and expression in a world where the internet has made it increasingly difficult to determine what is "grossly offensive" speech and what is merely a joke? Even what has been considered a "joke" has changed within the internet landscape, with growth of individuals who self-identify as internet "trolls," who derive entertainment and humor from offending others online.[2] Social media encourages informal communication and "viral" moments that shock users who view the content. Individuals broadcast their thoughts and opinions to potentially millions of individuals, even when they only intend to broadcast to a few. When people become offended by what they see, the government becomes involved. Thus, the internet's ease of communication has blurred the line between what speech is offensive enough to warrant government action and what speech is not.

This problem is seen in a viral video out of Scotland involving a man and his girlfriend's dog. In *PF v. Mark Meechan*, the Judiciary of Scotland found a man guilty of violating Section 127 of the Communications Act 2003[3] for posting a video to the internet of his girlfriend's dog, which he had trained to react to Nazi sayings and

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[1] Shappi Khorsandi, *The Conviction of Count Dankula Sets a Dangerous Precedent for Freedom of Speech*, INDEPENDENT (Mar. 23, 2018, 3:30 PM), https://www.independent.co.uk/voices/count-dankula-freedom-of-speech-comedy-joke-iran-offended-a8270631.html [https://perma.cc/2YSM-EKU2].

[2] Some scholars define "trolling" as the "practice of behaving in a deceptive, destructive, or disruptive manner in a social setting on the Internet with no apparent instrumental purpose." Erin E. Buckels, Paul D. Trapnell, & Delroy L. Paulhus, *Trolls Just Want to Have Fun*, 67 PERSONALITY & INDIVIDUAL DIFFERENCES 97, 97 (2014), available at http://dx.doi.org/10.1016/j.paid.2014.01.016; *accord* Michael Nuccitelli, *Internet Trolls: Cyber Environment Dependent with Sadistic, Psychopathic, and Narcissistic Traits,* DARK PSYCHOL. (2014), https://darkpsychology.co/internet-trolls/ [https://perma.cc/SBJ6-6ZUD]. While that definition paints a sadistic nature to the practice, the online Urban Dictionary definition for Internet Troll is "someone who posts controversial, inflammatory, irrelevant or off-topic messages in an online community . . . with the primary intent of provoking other users into an emotional response or to generally disrupt normal on-topic discussion." *Internet Troll*, URBAN DICTIONARY (2019), https://www.urbandictionary.com/define.php?term=Internet%20Troll [https://perma.cc/TW6B-EVU4].

[3] Communications Act 2003, c. 21, § 127 (Scot.), http://www.legislation.gov.uk/ukpga/2003/21/section/127 [https://perma.cc/2CMB-56LT].

imagery.[4] The Sheriff Court concluded that Meechan's use of Nazi imagery and statements like "gas the Jews" to get the dog to respond in the video constituted using a public communications network to send types of messages that are deemed "grossly offensive," despite Meechan stating that his intent was satire and meant to shock the audience.[5] As the internet makes the proliferation of media simpler, what is the role of the government in determining what is or is not a joke? Should the law treat Mark Meechan the same way that it would treat an individual intentionally promoting Nazi propaganda? Should Mark Meechan be held criminally liable for the offense of his joke to others?

This Note argues that criminal liability should not be the case. This Note will examine *PF v. Mark Meechan*, as well as the statute Meechan was charged with violating. Part II will explore Section 127 of the Communications Act 2003—its inception, its role in criminal prosecutions in the past, and the subsequent guidelines and recommendations for prosecuting subjective determinations of speech. Part III will present holdings of the Supreme Court of the United States, examining how the United States handles offensive speech on the internet and the role of the courts in patrolling speech. Finally, Part IV will recommend that Scotland amend its application of Section 127 and analyze how these recommendations would affect cases like Mark Meechan's in the future.

I. BACKGROUND

How did Mark Meechan get to this point? This Part will outline the circumstances of Mark Meechan's case. This Part will also describe the statute under which Meechan was prosecuted—Section 127 of the Communications Act 2003. The Act was repurposed from earlier statutes covering threatening individuals over public communications networks. These statutes were slightly amended over time and applied to speech on the internet, which eventually resulted in the prosecution of Mark Meechan.

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[4] PF v. Mark Meechan Sentencing Statement, http://www.scotland-judiciary.org.uk/8/1962/PF-v-Mark-Meechan [https://perma.cc/3TUH-P2H6] [hereinafter Meechan Sentencing Statement].

[5] *Id.*

A. THE "NAZI PUG" VIDEO

In 2018, Mark Meechan, a thirty-year-old man from Scotland, known as "Count Dankula" on YouTube, was convicted of a hate crime.[6] In April 2016, Meechan wanted to annoy his girlfriend, Suzanne Kelly.[7] To do so, he hatched an idea for a video. He stated that his girlfriend thought her dog was very cute, so he trained it to be the "least cute thing that I could think of . . . a Nazi."[8]

He trained and filmed his girlfriend's dog, a pug named Buddha, to perform "Nazi salutes" and to respond to statements including "gas the Jews" and "Seig Heil" by raising its paw.[9] Although he denied any wrongdoing, Meechan was arrested following complaints about the video, which was viewed on YouTube over three million times.[10]

Meechan, a self-described free speech advocate, maintains that the video has been taken out of context. Despite his reasoning, the Scottish courts found him guilty of communicating a "grossly offensive" video under the Communications Act.[11] The court found that the video was "anti-Semitic and racist in nature."[12] At sentencing, the court stressed that Meechan's justification of a joke did not remove his culpability in the case:

> The fact that you claim in the video, and elsewhere, that the video was intended only to annoy your girlfriend and as a joke and that you did not intend to be racist is of little assistance to you. A joke can be grossly offensive. A racist joke or a grossly offensive video does not lose its racist or grossly offensive quality merely because the maker asserts he only wanted to get a laugh.
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> In any event, that claim lacked credibility. You had no need to make a video if all you wanted to do was train the dog to react to offensive commands. You had no need to post the video on your unrestricted, publicly accessible, video channel if all you wanted to do was annoy

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6 Andrew Black, *Man Fined for Hate Crime After Filming Pug's 'Nazi Salutes'*, BBC NEWS (Apr. 23, 2018), https://www.bbc.com/news/uk-scotland-glasgow-west-43864133 [https://perma.cc/2VWP-FT89].

7 *Id.*; Auslan Cramb, *YouTube User Convicted of Hate Crime Over Pet Dog's 'Nazi Salutes'*, TELEGRAPH (Mar. 20, 2018), https://www.telegraph.co.uk/news/2018/03/20/youtube-user-convicted-hate-crime-pet-dogs-nazi-salutes/ [https://perma.cc/EW5J-HXKY].

8 Count Dankula, *M8 Yer Dugs a Nazi*, YOUTUBE (Apr. 11, 2016), https://www.youtube.com/watch?v=SYslEzHbpus [https://web.archive.org/web/20190526042952/https://www.youtube.com/watch?v=SYslEzHbpus]. The video has since been removed by YouTube for violating YouTube's policy on hate speech.

9 *Id.*

10 Cramb, *supra* note 7.

11 Meechan Sentencing Statement, *supra* note 4.

12 *Id.*

> your girlfriend. Your girlfriend was not even a subscriber to your channel. You posted the video, then left the country, the video went viral and thousands viewed it before she had an inkling of what you were up to. You made no effort to restrict public access or take down the video.[13]

The court concluded that this case concerned "only the narrow fact-based question of whether the Crown proved beyond reasonable doubt that [Meechan's use] of [a] public communications network . . . to post the video onto [his] channel" violated Section 127 of the Communications Act 2003.[14] Although the court found that the Crown met its burden, it stated that the finding "establishes only [Meechan's] guilt of this offense [and] establishes nothing else and sets no precedent."[15]

Still, Meechan's prosecution incited widespread concern online, from comedians to free speech advocates. Well-known English comedian Ricky Gervais tweeted: "A man has been convicted in a UK court of making a joke that was deemed 'grossly offensive'. If you don't believe in a person's right to say things that you might find 'grossly offensive', then you don't believe in Freedom of Speech."[16] The Index on Censorship stated that "freedom of expression includes the right to offend."[17] Adam Wagner, a high-profile human rights barrister, called Section 127 "dangerous to free speech" and argued that prosecuting a "message for 'gross offence' is subjective and open to abuse, unnecessarily going beyond separate laws against hate speech."[18] A GoFundMe page was established for Meechan, titled "Fund The Count Dankula Appeal," which raised over £195,000 in ten months.[19]

As a result of the guilty verdict, Meechan was fined £800.[20] Despite what may be considered a lenient outcome, Meechan pledged to appeal his conviction, citing concerns that it set a legal precedent. "A

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[13] Meechan Sentencing Statement, *supra* note 4.

[14] *Id.*

[15] *Id.*

[16] Ricky Gervais (@rickygervais), TWITTER (Mar. 20, 2018, 8:16AM), https://twitter.com/rickygervais/status/976115287991910400?lang=en [https://perma.cc/EZ75-SLNJ].

[17] Lizzie Dearden, *Man Who Taught Girlfriend's Pet Pug Dog to Perform Nazi Salutes Fined £800*, INDEPENDENT (Apr. 23, 2018, 11:46AM), https://www.independent.co.uk/news/uk/crime/count-dankula-nazi-pug-salutes-mark-meechan-fine-sentenced-a8317751.html [https://perma.cc/AMV5-MHKL] [hereinafter Dearden, *Man Fined £800*].

[18] *Id.*

[19] *Fund the Count Dankula Appeal*, GOFUNDME (Apr. 24, 2018), https://www.gofundme.com/fund-the-count-dankula-appeal [https://perma.cc/YQG5-DHJB].

[20] Dearden, *Man Fined £800*, *supra* note 17.

really dangerous precedent has been set for people to say things, their context to be completely ignored and then they can be convicted for it."[21] He noted apprehensions about the nature of Section 127 prosecutions: "You don't get to decide the context of what you said, other people don't get to, the court gets to—that's dangerous."[22] He also noted a generational difference with the judge that presided over his trial:

> The judge was a lot older, he's from a different generation. There are jokes you would tell your friends, but you would never repeat them to your grandmother. . . . One of my main gripes with the case is [that] I was being judged by a man who doesn't understand my world.[23]

Meechan contested both his conviction and sentence, but was refused leave to appeal by the Appeal Court in Edinburgh.[24] The Court stated that the appeal was "not arguable and in each of its elements [was] wholly misconceived."[25] It dismissed Meechan's arguments, and even stated, "[i]t must be observed that in the circumstance the appellant was fortunate that the learned sheriff was not considering custody as an option."[26] The Court also accused Meechan of attempting to intimidate the Court by referencing "a publicly-funded appeal," referencing the GoFundMe page.[27] However, Meechan has refused to comply. He stated in a video that he would refuse to pay the fine by the deadline imposed by the Court.[28] Instead, he opted to donate his court fine to Glasgow Children's Hospital Charity.[29] Meechan understood the consequences of this decision:

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[21] *Id.*

[22] *Id.*

[23] Stuart MacDonald, *'No Crime' Scots 'Nazi Pug' Yob Mark Meechan Would Rather Go to Jail Than Pay £800 Fine Over Clip – Despite Crowdfunding Almost £200k for Legal Fees*, SCOTTISH SUN (Aug. 7, 2018, 12:57 PM), https://www.thescottishsun.co.uk/news/3035738/scots-nazi-pug-yob-mark-meechan-would-jail-fine-appeal-200k-legal-fees/ [https://perma.cc/JB6G-XQDP].

[24] Lizzie Dearden, *Count Dankula: Man Who Taught Pug to do Nazi Salute has Appeal Refused*, INDEPENDENT (Aug. 8, 2018, 6:24 PM), https://www.independent.co.uk/news/uk/crime/count-dankula-nazi-pug-video-appeal-refused-youtube-court-case-gross-offence-a8483201.html [https://perma.cc/88GL-7CDY] [hereinafter Dearden, *Count Dankula has Appeal Refused*].

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *See* Count Dankula, *Young Independence 2018 – Count Dankula*, YOUTUBE (Nov. 15, 2018), https://www.youtube.com/watch?v=79teD7lP_dA [https://perma.cc/KVY6-FFZG].

[29] Victoria Weldon, *Nazi Dog Youtuber Mark Meechan Donates Court Fine to Charity*, THE HERALD (Apr. 30, 2018), https://www.heraldscotland.com/news/16193487.nazi-dog-youtuber-donates-court-fine-to-charity/ [https://perma.cc/WVY3-R5TF]. Meechan posted his thank you note from the charity online and wrote the caption: "Oh dear, I went to pay my fine and my finger must have slipped. Silly me." *Id.*

> I'm going to jail. I'm obviously not happy about the fact that I'm going to have to go to jail, but I'm more than prepared to do it for what I believe in. I absolutely refuse to sacrifice my principles.[30]

Meechan may now petition the Scottish Criminal Cases Review Commission.[31] Whether or not Meechan's case has the legal standing to be overturned or reviewed, this case is an excellent example of issues with government prosecution of speech and why Section 127 is a vague, flawed statute to be applied for social media cases.

B. SECTION 127 OF THE COMMUNICATIONS ACT 2003

The development of individuals' conduct on the internet has resulted in a common misconception—that the internet is a "Wild West," law-free zone.[32] In the United Kingdom, the most commonly used provision to prosecute internet communications is Section 127(1)(a) of the Communications Act 2003. While the original legislation was not intended for criminal prosecutions based on social media, that has changed over time.

1. Background of Section 127 of the Communications Act 2003

Section 127 is a "modern post-Internet provision" whose antecedents predate the internet era.[33] One antecedent, section 10(2)(a) of the Post Office Act 1935, made it a crime to send any message by telephone which is "grossly offensive or of an indecent, obscene or menacing character."[34] For sixty-eight years, this language governed these types of messages, usually one-on-one communications over the telephone.[35] The language went relatively unchanged from 1935 to 2003.

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[30] Dearden, *Count Dankula has Appeal Refused*, *supra* note 24.

[31] *Id.*

[32] *See generally* Alfred C. Yen, *Western Frontier or Feudal Society?: Metaphors and Perceptions of Cyberspace*, 17 BERKELEY TECH. L. J. 1207 (2002).

[33] Lilian Edwards, *Section 127 of the Communications Act 2003 – Threat or Menace?*, PANGLOSS (Sept. 21, 2012, 1:57 PM), https://blogscript.blogspot.com/2012/09/section-127-communications-act-2003.html [https://perma.cc/M45C-SSKP].

[34] DPP v. Collins [2006] UKHL 40, [6] (appeal taken from [2005] EWHC 1308 (Admin)).

[35] The language of that subsection was largely reproduced in Section 66(a) of the Post Office Act 1953. Post Office Act 1953, 1 & 2 Eliz. 2 c. 36, § 66(a) (UK), http://www.legislation.gov.uk/ukpga/Eliz2/1-2/36/section/66/enacted. It was again reproduced in Section 78 of the Post Office Act 1969, replacing "by means of a public telecommunication service" with "by telephone" and "any message" with "a message or other matter." Post Office Act 1969, c. 48, § 78 (UK), http://www.legislation.gov.uk/ukpga/1969/48/section/78/enacted. This

Then, to accommodate the internet, the phrase "a public telecommunications system" was revised to "a public electronic communications network" when it was adopted to section 127(1)(a) of the 2003 Act.[36] Although Section 127 was intended to adapt to the internet's changing landscape of information, the Act continues the status quo without regard to how communications are exchanged in the current online culture.

2. Section 127 and Criminal Prosecutions

Section 127 criminalizes sending "a message or other matter that is grossly offensive or of an indecent, obscene or menacing character" through a public electronic communications network.[37] The defendant in each case must be shown to have intended or to have been aware that the message was "grossly offensive, indecent or menacing."[38] The defendant's intent or awareness can be inferred from the terms of the message or from the defendant's knowledge of the likely recipient.[39] The crime is committed by the conduct of sending the message. Thus, there is no requirement that any person see the message or be offended by it.[40]

In *Director of Public Prosecutions v. Collins*, the seminal opinion interpreting the Section, the Lords of Appeal outlined a summary of the legislation that suggested two conclusions.[41] The first conclusion is that the purpose of the Section and its predecessor sections "is not to protect people against receipt of unsolicited messages which they may find seriously objectionable,"[42] but "to prohibit the use of a service provided and funded by the public for the benefit of the public for the transmission of communications which contravene the basic standards of our society."[43]

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language was largely re-enacted in the Telecommunications Act in 1981 and 1984. British Telecommunications Act 1981, c. 38, § 49 (UK), http://www.legislation.gov.uk/ukpga/1981/38/section/49/enacted; British Telecommunications Act 1984, c. 12, § 43 (UK), http://www.legislation.gov.uk/ukpga/1984/12/section/43/enacted.

[36] *Compare* Post Office Act 1953. Post Office Act 1953, 1 & 2 Eliz. 2 c. 36, § 66(a) (UK), *with* Communications Act 2003, c. 21, sec. 127.

[37] Communications Act 2003, c. 21, sec. 127.

[38] *Id.*

[39] DPP v. Collins [2006] UKHL 40, [11].

[40] Jacob Rowbotton, *To Rant, Vent, and Converse: Protecting Low Level Digital Speech*, 71 CAMBRIDGE L. J. 355, 363 (2012).

[41] DPP v. Collins [2006] UKHL 40, [6].

[42] *Id.* [7].

[43] *Id.* But note that the protection under "section 1 of the Malicious Communications Act 1988, . . . does not require that messages shall, to be proscribed, have been sent by post, or telephone, or *public* electronic communications network." *Id.* (emphasis original).

The second conclusion is that reading the plain text of the legislation dictates that the "actus reus of the offence is the sending of a message of the proscribed character by the defined means. The offence is complete when the message is sent," and "it can make no difference that the message is never received . . . [n]or . . . can the criminality of a defendant's conduct depend on whether a message is received."[44]

The Lords of Appeal also found that "it is for the Justices to determine as a question of fact whether a message is grossly offensive."[45] In making this determination, the Justices must "apply the standards of an open and just multi-racial society, and . . . the words must be judged taking account of their context and all relevant circumstances."[46] Because "usages and sensitivities may change over time[,] . . . [t]he test is whether a message is couched in terms liable to cause gross offence to those to whom it relates."[47] Despite the earlier mention of actus reus, the Section "provides no explicit guidance on the state of mind which must be proved against a defendant to establish an offence," except that the defendant "must intend his words to be grossly offensive to those to whom they relate, or be aware that they may be taken so."[48]

The central question of *Collins* was whether somebody could be prosecuted under Section 127 for using the public telecommunications system to leave racist messages.[49] Between January 2002–2004, a constituent made a number of telephone calls to the office of David Taylor, the Member of Parliament ("MP") for North West Leicestershire.[50] The constituent would either speak with staff members or would leave recorded messages.[51] He "held strong views on immigration[,] asylum[,] and the provision of public support to immigrants and applicants for asylum."[52] The constituent would rant and shout, reference "Wogs," "Pakis," and "Black bastards," and use the N-word.[53] As noted in the opinion of the case, staff members working in Mr. Taylor's office described themselves as "shocked, alarmed and depressed" by the

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44 *Id.* [8].
45 *Id.* [9].
46 *Id.*
47 *Id.* [9].
48 *Id.* [10].
49 *See id.* [1]–[3].
50 *Id.* [2].
51 *Id.*
52 *Id.*
53 *Id.*

language.[54] The Lords of Appeal ultimately found that the messages "were grossly offensive and would be found by a reasonable person to be so."[55] As a grievance from a constituent to his MP, the Lords of Appeal stated, the language used "can only have been chosen because of its highly abusive, insulting, pejorative, offensive character" and "[t]here was nothing in the content or tenor of these messages to soften or mitigate the effect of this language in any way."[56]

More recently, in 2012, Daniel Thomas—a semi-professional soccer player—posted a homophobic message on Twitter related to UK Olympic divers Tom Daley and Peter Waterfield.[57] Despite not directly tagging either Daley or Waterfield in the tweet, the message was available to all of Thomas' Twitter followers and later became more widely distributed after gaining attention.[58] Thomas was arrested and interviewed, and then the matter was referred to Crown Protection Services ("CPS") Wales to consider whether Thomas should be charged with a crime.[59] Due to the publicity of the message, the Director of Public Prosecutions issued a "Statement on Tom Daley case and social media prosecutions" which addressed the question of whether the message was so "grossly offensive" as to be criminal and, if so, whether prosecution was required in the interest of the public.[60] Focusing on the specific context and circumstances in the case, the Director of Public Prosecutions ("DPP") reasoned that:

> (a) however misguided, Mr. Thomas intended the message to be humorous; (b) however naïve, Mr. Thomas did not intend the message to go beyond his followers, who were mainly friends and family; (c) Mr. Thomas took reasonably swift action to remove the message; (d) Mr. Thomas had expressed remorse and was, for a period, suspended by his football club; (e) neither Mr. Daley nor Mr. Waterfield were the intended recipients of the message and neither knew of its existence until it was brought to their attention following reports in the media;

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54 *Id.*

55 *Id.* [13].

56 *Id.*

57 Press Release, Keir Starmer, Director of Public Prosecutions, DPP Statement on Tom Daley Case and Social Media Prosecutions (Sept. 20, 2012), http://blog.cps.gov.uk/2012/09/dpp-statement-on-tom-daley-case-and-social-media-prosecutions.html [https://web.archive.org/web/20120922040558/http://blog.cps.gov.uk/2012/09/dpp-statement-on-tom-daley-case-and-social-media-prosecutions.html].

58 *Id.*

59 *Id.*

60 *Id.*

> and (f) it was, in essence, a one-off offensive Twitter message, not part of a campaign, and not intended to incite others.[61]

As such, the DPP concluded that the message was not so grossly offensive that criminal charges needed to be brought.[62]

Included in the DPP's Statement regarding the Tom Daley case was a warning and suggestion regarding the growing number of cases involving Section 127 and the use of social media. The DPP stated:

> The recent increase in the use of social media has been profound. . . . And the context in which this interactive social media dialogue takes place is quite different to the context in which other communications take place. Access to social media is ubiquitous and instantaneous. Banter, jokes, and offensive comment are commonplace and often spontaneous. Communications intended for a few may reach millions.
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> Against that background, [we have] the task of balancing the fundamental right of free speech and the need to prosecute serious wrongdoing on a case by case basis. That often involves very difficult judgment calls. . .In some cases it is clear that a criminal prosecution is the appropriate response to conduct which is complained about, for example where there is a sustained campaign of harassment of an individual, where court orders are flouted or where grossly offensive or threatening remarks are made and maintained. But in many other cases a criminal prosecution will not be the appropriate response. If the fundamental right to free speech is to be respected, the threshold for criminal prosecution has to be a high one and a prosecution has to be required in the public interest.[63]

This statement by the DPP highlighted issues presented by subsequent cases. That same month, the police arrested a man over an offensive Facebook tribute page set up following the fatal shooting of two female police officers in Manchester. The police noted the public pressure for the arrest: "[the Facebook page caused] outrage to many people and [prompted] them to ask us what we are doing to deal with these people."[64]

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[61] *Id.*

[62] *Id.*

[63] *Id.*

[64] *See* Hellen Carter, *Police Killings: Man Arrested over Dale Cregan Facebook Page*, THE GUARDIAN (Sept. 20, 2012, 9:13 AM), https://www.theguardian.com/uk/2012/sep/20/police-killings-arrest-cregan-facebook [https://perma.cc/PQJ4-JE3T]. Facebook removed the tribute page. Ewan Palmer, *Fiona Bone and Nicola Hughes Murder: 'Dale Cregan Hero' Facebook Page Removed from Site*, INT'L BUS. TIMES (July 2, 2014, 4:45 BST), https://www.ibtimes.co.uk/dale-cregan-hero-facebook-murder-police-officers-385969 [https://perma.cc/B3VD-MRLU]. In February 2013, Cregan pleaded guilty to the murder of two policewomen. Nigel Bunyan, *Dale Cregan Pleads Guilty to Double Police Killing*, THE GUARDIAN (Feb. 12, 2013, 4:10 PM), https://www.theguardian.com/uk/2013/feb/12/dale-cregan-trial-guilty-plea [https://perma.cc/JND9-VLLK].

A month later, a nineteen-year-old man pleaded guilty to making "grossly offensive" remarks about a missing five-year-old-girl on his Facebook page and was subsequently sentenced to twelve weeks in prison.[65]

In *Chambers v. Director of Public Prosecutions*, Paul Chambers, a twenty-six-year-old man, was irritated that an airport which he was to travel through was closed due to heavy snowfall.[66] Chambers responded to this by tweeting: "Crap! Robin Hood airport is closed. You've got a week and a bit to get your shit together otherwise I'm blowing the airport sky high!"[67] Five days later, the duty manager of the airport read the tweet and communicated it to the police.[68] Chambers was convicted of sending a message of a "menacing character," and the lower court upheld this on the grounds that the message was "menacing *per se*"[69] and that Chambers was aware that his message was of a menacing character.[70]

Despite this finding, however, the Divisional Court overturned the conviction. The Divisional Court found that the message was not of a menacing character because Chambers intended it as a joke.[71] The Court emphasized that the message did not represent a terrorist threat and was not sent to anyone at the airport or anyone responsible for airport security, and that the "grievance addressed by the message is that the airport is closed when the writer wants it to be open."[72] The Court also emphasized that "[t]he language and punctuation [were] inconsistent with the writer intending it to be taken as a warning," and additionally noted that it would be unusual for "a threat of a terrorist nature to invite the person making it to be readily identified."[73] The Court even noted that it was "unsurprising, but not irrelevant" that no one who read the message after it initially appeared thought anything of it.[74] The Court additionally ruled that Twitter, though a private company, is considered a "public electronic

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[65] *See* Joshua Rozenberg, *April Jones Facebook Comments: Should Matthew Woods be in Prison?*, THE GUARDIAN (Oct. 9, 2012, 6:18 AM), https://www.theguardian.com/law/2012/oct/09/april-jones-facebook-comments-prison [https://perma.cc/HCP8-A8PA].

[66] Chambers v. DPP [2012] EWHC 2157, [5]–[12].

[67] *Id.* [12].

[68] *Id.* [13].

[69] *Id.* [1], [17]–[18]. The Crown Court found "that an ordinary person seeing the 'tweet' would see it in that way and be alarmed." *Id.* [17].

[70] *Id.* [17]–[18].

[71] *Id.* [38] ("the mental element of the offence is directed exclusively to the state of mind of the offender, and that if he . . . intended the message as a joke, even if a poor joke in bad taste, it is unlikely that the mens rea . . . character will be established.").

[72] *Id.* [31].

[73] *Id.*

[74] *Id.* [32].

communications network" because it is processed and disseminated through the internet.[75]

Despite these prosecutions, the public continued to urge further prosecution of similar incidents due to the pervasiveness and increasing variety of trolls, bullies, racists, and other online vandals. Unable to parse through what is considered harmless and what is considered "grossly offensive" speech, practitioners and scholars needed guidance on how to apply Section 127 with consistency, predictability, and certainty.

3. Prosecutorial Guidelines for Section 127

In his statement regarding the Tom Daley case, the Director of Public Prosecutions noted that there will most likely be many more of these cases.[76] To combat this issue, the DPP announced that he intended to issue guidelines on social media cases for prosecutors.[77] The DPP observed that the "time has come for an informed debate about the boundaries of free speech in an age of social media."[78]

The Crown Office and Procurator Fiscal Service ("COPFS") in Scotland, which has jurisdiction over Mark Meechan's case, opted to also issue guidance on Section 127. The COPFS advised taking a "robust approach" to offensive material.[79] Its guidance borrowed much of the language of the guidelines published by England and Wales, citing cases such as *Chambers v. Director of Public Prosecutions*.[80] It stressed the importance of context—that it would be "a highly material and relevant consideration for prosecutors in assessing . . . whether the conduct complained of is criminal and whether it is in the public interest to prosecute."[81] Furthermore, the guidance considered calling the intention of those who post the communications into question:

> Some individuals may genuinely not have intended that the communication reach a wide audience and may for instance have just

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[75] *Id.* [23].

[76] Starmer, *supra* note 57.

[77] *Id.*

[78] *Id.*

[79] CROWN OFFICE & PROCURATOR FISCAL SERVICE, GUIDANCE ON CASES INVOLVING COMMUNICATIONS SENT VIA SOCIAL MEDIA 1, http://www.copfs.gov.uk/images/Documents/Prosecution_Policy_Guidance/Book_of_Regulations/Final%20version%2026%2011%2014.pdf. [https://perma.cc/F4XN-NEPS] [hereinafter COPFS GUIDANCE].

[80] *Id.* at 9.

[81] *Id.* at 3.

> sent it to a close group of friends and, either through inadvertence, or because the original post has been re-sent/re-tweeted it has in fact reached a wider audience and caused great upset or offence.[82]

The guidance additionally stressed the high threshold for communications to be considered criminal activity: "general satirical comments, offensive humour or provocative statements which might be distasteful or painful to some will not reach that high threshold."[83] However, although those communications fall below the threshold, individuals "cannot be allowed to believe it is acceptable to peddle hatred or make anonymous threats of violence and harm from their computers. Such on-line dialogue crosses the limits of conventional discourse and may amount to a criminal offence."[84]

The COPFS guidance provides a factor-based analysis for prosecutors to utilize when determining whether to prosecute "grossly offensive" online speech:

> Prosecutors should only consider action in this category of cases where they are satisfied there is sufficient evidence that the communication goes beyond being:
>
> - Offensive, shocking or disturbing; or
> - Satirical, iconoclastic or rude; or
> - The expression of unpopular or unfashionable opinion even if distasteful to some or painful to those subjected to it; or
> - An exchange of communication that forms part of a democratic debate[.][85]

After determining that these factors have been met, the prosecutor should consider whether action is required in the public interest. The guidelines pose specific considerations for prosecutors at this point:

> Prosecutors must consider each case on its own facts and circumstances however some particular factors which *may* weigh against prosecutorial action being both necessary and proportionate are:
>
> - The suspect has expressed *genuine* remorse and particularly where this has been done spontaneously and expeditiously

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[82] *Id.* at 9.
[83] *Id.* at 3.
[84] *Id.*
[85] *Id.* at 10.

> - Swift and effective action has been taken by the suspect to remove the communication in question, to have it removed by others or otherwise to block access to it.[86]

Scholars cautioned that although the guidelines are a step in the right direction, they still leave much discretion in the hands of the state and do not adequately explain what conduct qualifies as criminal behavior that requires court action.[87] Some scholars argue for the standard for "grossly offensive" content to be weaker and for the individual posting the content to be warned before jumping to criminal prosecution.[88] Others argue to completely scrap the legislation since the history of the Communications Act 2003 was not intended to apply to cases where an individual is broadcasting a message to the public, but rather to cases involving one-to-one communications between individuals over a public utility.[89] These critiques echo the fact that Section 127 has been repurposed as an avenue for prosecution in cases that would have never warranted intervention were they not published online.

II. OFFENSIVE SPEECH IN THE UNITED STATES

Within the United States, the First Amendment embodies a legal and cultural norm. Though equally as divisive as other amendments to the Constitution, the First Amendment's treatment of offensive speech is a question that garners more attention as the internet changes how individuals communicate. As then-professor Elena Kagan stated

> I take it as a given that we live in a society marred by racial and gender inequality, that certain forms of speech perpetuate and promote this inequality, and that the uncoerced disappearance of such speech would be cause for great elation. I do not take it as a given that all governmental efforts to regulate such speech thus accord with the Constitution.[90]

This Part outlines American case law involving offensive speech—raising the question if Mark Meechan been an American and posted this video of the pug Buddha, would he have been arrested? This

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[86] *Id.*

[87] *Social Media Prosecutions: Guidelines Not Enough*, SCL: EDITORIAL 1 (Sept. 26, 2012, 12:38 PM), https://www.scl.org/blog/2568-social-media-prosecutions-guidelines-not-enough [https://perma.cc/5WG6-7Y4S].

[88] *Id.* at 2.

[89] *See* Edwards, *supra* note 33.

[90] Elena Kagan, *Regulation of Hate Speech and Pornography After R.A.V.*, 60 U. CHI. L. REV. 873, 873 (1993).

Part will not only note the lessons that can be learned, but also the challenges that come with the American approach.

A. CASE LAW ON OFFENSIVE SPEECH

Generally, American law treats individuals in society as able to avoid or ignore offensive messages, which reduces the amount of regulation needed.[91] In a 1975 Supreme Court case, Justice Powell noted that regulating speech solely to protect others from hearing it could "empower a majority to silence dissidents simply as a matter of personal predilections" and that individuals can deal with hate speech by disagreeing or turning away.[92] As noted by Justice Brandeis in his concurrence in *Whitney v. California*, "it is hazardous to discourage thought, hope, and imagination . . . the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; . . . [o]nly an emergency can justify repression."[93]

In *Chaplinsky v. New Hampshire*, the Court upheld a statute that stated, in part, that "[n]o person shall address any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place, nor call him by any offensive or derisive name . . . with intent to . . . offend or annoy him."[94] The Court saw a distinction due to morality:

> There are certain and well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. *It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.* Resort to epithets or personal abuse is not any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument.[95]

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[91] *See generally* Erznoznik v. Jacksonville, 422 U.S. 205 (1975).

[92] *Id.* at 210–11.

[93] Whitney v. California, 274 U.S. 357, 375–76 (1927) (Brandeis, J., concurring).

[94] Chaplinsky v. New Hampshire, 315 U.S. 568, 569, 574 (1942).

[95] *Id.* at 571-72 (emphasis added) (footnote omitted) (quoting Cantwell v. Connecticut, 310 U.S. 296, 309–10 (1940)).

However, the Court shifted from this line of reasoning, upholding the statute based on the likelihood that the banned speech will "cause acts of violence by the person to whom, individually, the remark is addressed."[96]

The 1949 case *Terminiello v. Chicago* illustrates the changing American attitude of the First Amendment toward less regulation.[97] In that case, the Court held that "freedom of speech . . . is . . . protected against censorship or punishment, unless shown likely to reduce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. . . . There is no room under our Constitution for a more restrictive view."[98]

The Court specifically dealt with issues of offensive speech in the 1952 case *Beauharnais v. Illinois*.[99] There, the Court imposed narrowly tailored limits on speech regarded as hateful or offensive, including "lewd and obscene, the profane, the libelous and the insulting or 'fighting' words—those which by their very utterances inflict injury or tend to incite an immediate breach of the peace."[100] Although this is an important case in the jurisprudence of offensive speech, the legal analysis in this case differed from later cases.[101] In a subsequent civil case, *New York Times Company v. Sullivan*, the Court set a high burden of "actual malice" needed to win a defamation claim against a public person, favoring an absolutist approach of free speech.[102]

The absolutist approach continued. In 1969, the opinion in *Watts v. United States* stated that statutes criminalizing threatening speech "must be interpreted with the commands of the First Amendment clearly in mind."[103] That same year, the Court decided the first modern hate speech case—*Brandenburg v. Ohio*.[104] Brandenburg was a leader of the Ku Klux Klan who was convicted of advocating the use of violence and assembling in Ohio due to a film that showed a Klan rally.[105] The film showed individuals using pejorative terms for minorities and also showed hooded

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[96] *Id.* at 573 (quoting cases).

[97] *See generally* Terminiello v. Chicago, 337 U.S. 1 (1949).

[98] *Id.* at 4.

[99] Beauharnais v. Illinois, 343 U.S. 250 (1952).

[100] *Id.* at 256.

[101] *See* Collin v. Smith, 578 F.2d 1197, 1204 (7th Cir. 1978) (discussing *Beauharnais* and whether the case would "pass constitutional muster today").

[102] N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964).

[103] Watts v. United States, 394 U.S. 705, 707 (1969).

[104] Brandenburg v. Ohio, 395 U.S. 444 (1969).

[105] *Id.* at 444-45.

figures who carried firearms.[106] The Court reversed Brandenburg's conviction on the ground that the Ohio statute was unconstitutional.[107] The Court argued that "constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[108] Thus, Ohio's law violated the First Amendment.[109]

The Court later held that actions that offend others are still protected under the Constitution. In the 1989 case *Texas v. Johnson*, the Court held that the First Amendment protected the right for individuals to burn an American flag at a protest.[110] Although the speech at issue seriously offended witnesses, the Court found that protecting offensive speech is a "bedrock principle underlying the First Amendment" and that "the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[111]

In 1992, the Court distinguished protected speech and expression from threats of physical violence in the case *R.A.V. v. Saint Paul*.[112] R.A.V. was one of a group of youths who burned a cross on the lawn of a black family's home, violating an ordinance that prohibited the display of a symbol "which one knows or has reason to know arouses anger, alarm, or resentment in others on the basis of race, color, creed, religion, or gender."[113] The Minnesota Supreme Court upheld the ordinance because the First Amendment does not protect "fighting words" on the theory that there is a "compelling government interest in protecting the community against bias-motivated threats to public safety and order."[114] The Supreme Court struck down the ordinance on the grounds that the First Amendment presumptively prohibits the regulation of speech based upon its content.[115] The Court maintained an absolutist approach and rejected Saint Paul's argument that speech should be regulated to "ensure the basic human rights of members of groups that have historically been subjected to

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[106] *Id.* at 445–46.
[107] *Id.* at 449.
[108] *Id.* at 447.
[109] *Id.* at 448-49.
[110] Texas v. Johnson, 491 U.S. 397, 399 (1989).
[111] *Id.* at 414 (citing cases).
[112] R.A.V. v. Saint Paul, 505 U.S. 377, 386 (1992).
[113] *Id.* at 379–80.
[114] *Id.* at 380–81.
[115] *Id.* at 394.

discrimination, including the right of such group members to live in peace where they wish."[116]

That same year, Congress directed the National Telecommunications and Information Administration ("NTIA") to examine the role of telecommunications in advocating or encouraging violent acts and in the commission of hate crimes against designated persons and groups.[117] The NTIA investigated speech that fostered a climate of hatred and prejudice in which hate crimes may occur.[118] The investigation failed to link telecommunications to hate crimes, but did find that "individuals have used telecommunications to disseminate messages of hate and bigotry to a wide audience."[119] The investigation recommended that the best way to fight hate speech was through additional speech promoting tolerance, as opposed to government regulation.[120] The NTIA investigation supported the case law, and business continued as usual.

For messages deemed offensive, the Court regularly stressed an individual's ability to avoid the messages: "the protection afforded to offensive messages does not always embrace offensive speech that is so intrusive that the unwilling audience cannot avoid it."[121] The Court set a strong preference against regulation, noting, "it may not be the content of the speech, as much as the deliberate 'verbal or visual assault,' that justifies proscription."[122]

After *R.A.V.*, it seemed that the Court would strike down any attempted regulation or criminalization of hateful language. In the 2003 case *Virginia v. Black*, a plurality of the Court found that while cross burning may constitute illegal intimidation in some cases, a ban on the public burning of crosses would violate the First Amendment. However, the majority held that the prohibition of cross-burning with the intent to intimidate was not unconstitutional since it banned conduct rather than expression. "A State may choose to prohibit only those forms of

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[116] *Id.* at 395.

[117] JOSEPH L. GATTUSO ET AL., U.S. DEP'T OF COMMERCE, THE ROLE OF TELECOMMUNICATIONS IN HATE CRIMES, at i (1993), available at https://www.ncjrs.gov/App/Publications/abstract.aspx?ID=157948 [https://perma.cc/BD5H-UKV9]. Telecommunications included broadcast radio, television, cable television, public access television, and computer bulletin boards. *Id.* at v–vi.

[118] *Id.* at v.

[119] *Id.* at i.

[120] *Id.* at 40.

[121] Hill v. Colorado, 530 U.S. 703, 716 (2000) (citing Frisby v. Schultz, 487 U.S. 474, 487 (1988)).

[122] Erznoznik v. Jacksonville, 422 U.S. 205, 210 n. 6 (1975) (citation and brackets omitted).

intimidation that are most likely to inspire fear of bodily harm."[123] Noting the long history of cross burnings being connected to racially-motivated violence, the Court found that cross burning was a "particularly virulent form of intimidation."[124]

The 2011 case *Snyder v. Phelps* upheld the Westboro Baptist Church's right to picket the funeral of a military member. While the Court acknowledged that Westboro's "contribution to public discourse may be negligible," the ruling rested on existing U.S. hate speech precedent: "[s]imply put, the church members had the right to be where they were."[125] *Snyder* rejected emotional pain explicitly as a justification for regulating speech, even when the speech is "particularly hurtful," and when the harm goes beyond "emotional distress."[126]

B. LESSONS & CRITIQUES OF THE AMERICAN METHOD

The American method of regulating speech can be classified as a very light touch. There are many positive aspects to light regulation on speech. For one, individuals can feel free to express their personal thoughts and opinions without the risk of fines or jail time if people do not like what they say. For another, the concept of freedom of speech is seen as a basic tenet of being in the United States. This light regulation is also particularly helpful for regulating the especially difficult form of communication that is social media. As scholars have noted:

> The law would never presume to regulate all the threatening or hateful things people say to one another, realizing that speakers often say things in the heat of the moment that are ill-considered, thoughtless, hyperbolic, and often forgotten by both the speaker and the audience within moments. Most social media, however, create a record of such thoughtless speech that can take on an entirely different meaning when read or viewed later.[127]

By setting a high bar in terms of what is considered speech offensive enough to warrant criminal prosecution, individuals—such as Mark Meechan—can post what they wish.

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[123] Virginia v. Black, 538 U.S. 343, 363 (2003).

[124] *Id.* at 352-57, 363.

[125] Snyder v. Phelps, 562 U.S. 443, 457, 460 (2011).

[126] *Id.* at 456.

[127] Lyrissa Barnett Lidsky & Linda Riedemann Norbut, *#I□U: Considering the Context of Online Threats*, 106 CALIF. L. REV. 1885, 1907 (2018).

However, this approach is not without its challenges. Using social media "to spread views, ideas, and opinions has been realized both by the advocates of democracy and by racist groups."[128] While this reality sparked the use of Section 127 in the United Kingdom to regulate speech, the United States largely continued with light regulation and an absolutist view of freedom of speech. Individuals within the United States have noted that this approach may not be the best way of regulating a particularly difficult form of communication.[129] When the Ku Klux Klan and white supremacist groups are using the internet as their preferred mode of communication and recruitment,[130] the "hands-off" approach of the United States and the Supreme Court may not be desirable.

III. RECOMMENDATIONS FOR SCOTLAND'S APPLICATION OF SECTION 127

If Section 127 is too much regulation, and the United States' approach is too little regulation, then there is a space for reform that is "just right." Lord Bracadale, a retired senior Scottish judge who had an illustrious judicial career, was appointed by the Minister for Community Safety and Legal Affairs at the start of 2017 to undertake a review of hate crime legislation in Scotland.[131] In May 2018, Lord Bracadale published a report for Scottish Ministers with an independent review of hate crime legislation in Scotland.[132] The Bracadale Report noted areas where individuals felt the law does not respond at all, or responds inadequately, to online hate. These included:

> [O]nline bullying and harassment . . .; misogyny and incitement to misogyny; inciting self-harm or suicide; enabling pornography to be

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[128] Alexander Tsesis, *Hate in Cyberspace: Regulating Hate Speech on the Internet*, 38 SAN DIEGO L. REV. 817, 832 (2001).

[129] *See generally* Lidsky & Norbut, *supra* note 127. Lidsky and Norbut note how the unique space of social media impacts the reactions drawn—"The same characteristics that make social media seem rife with dangerous and destructive speech magnify the potential for a speaker's innocent words to be misunderstood. People flock to social media because it encourages the spontaneity, informality, and intimacy of the spoken word; these features explain, in part, why sites like Facebook have drawn billions of users. Yet these same features create immense challenges in separating harmful from harmless speech." *Id.* at 1906–07.

[130] Tsesis, *supra* note 128, at 833–34.

[131] LORD BRACADALE, INDEPENDENT REVIEW OF HATE CRIME LEGISLATION IN SCOTLAND: FINAL REPORT 2 (2018), available at https://www.gov.scot/publications/independent-review-hate-crime-legislation-scotland-final-report/pages/1/ [https://perma.cc/HGS5-JY8Q] [hereinafter BRACADALE REPORT].

[132] *Id.*

> viewed by children; online paedophilia; publication of 'fake' news; expressions of hate through gaming platforms and sites; impersonating another person online; posting photographs or personal information without consent and with intention to harass, demean or degrade; [and] threats to an individual's life, family or home.[133]

Bracadale identified particular categories of harm which arise from online hate crime. Meechan's "Nazi Pug" video could be considered under one of these categories, namely, "harm caused by speech that is not directed at any one person in particular, but involves generalized hateful comments which 'poison the atmosphere' and demonize particular groups of individuals who share a protected characteristic."[134]

The Bracadale Report also noted the difficulty in prosecuting offenses that arise from online technology, and specifically addressed the practical issues of Section 127. The Bracadale Report states that there is potentially a wide scope to the "grossly offensive" element: by not requiring that there is an actual recipient of the message who is grossly offended, the offense is committed the moment the communication is sent.[135] As noted by critics, this is a "conduct crime" rather than a "result crime," which possibly includes an online but private conversation between two racists about holocaust denial.[136] Prosecution for sending a grossly offensive communication where no harm has in fact been caused could be potentially incompatible with individuals' freedom of expression under Article 10 of the European Convention on Human Rights.[137]

Bracadale concluded in his Report that although it is hard in the abstract to balance rights of freedom of expression against the rights of others not to be harmed, "it is generally much easier to do this once the facts, context, and language of a particular instance are considered."[138] Bracadale dismissed the concern that Section 127 should apply only to direct messages, such as emails or telephone messages, rather than indirect methods of communication, such as posting a message on a forum. Bracadale stated that he is satisfied that Section 127 can be used in relation to a wide range of online content.[139] However, Bracadale responded to

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[133] *Id.* at 70.

[134] *Id.* at 71.

[135] *Id.* at 72.

[136] *See generally*, Chara Bakalis, *Rethinking Cyberhate Laws*, 27 INFO. & COMM. TECH. L. 86 (2017).

[137] *See* BRACADALE REPORT, *supra* note 131, at 72-73; *see* Convention for the Protection of Human Rights and Fundamental Freedoms art. 10, Nov. 4, 1950, 213 U.N.T.S. 221, 230 (entered into force Sept. 3, 1953).

[138] BRACADALE REPORT, *supra* note 131, at 73.

[139] *Id.* at 74.

sentencing limitations for Section 127 by noting that amending those levels would "probably not be within the legislative competence of the Scottish Parliament" and therefore he does not recommend pursuing such a change.[140]

A. RECOMMENDATIONS FOR THE APPLICATION OF SECTION 127

Though the Bracadale Report outlined much of the critique around online hate crime prosecution and Section 127, the recommendations of the report fall short. Many of the issues and critiques surrounding the prosecution of individuals under Section 127 are due to the deeply subjective nature of the legislation. As noted in the Bracadale Report and in case law examples, the meaning of "grossly offensive" leaves room for interpretation in a broad and inconsistent fashion.[141]

The United States largely prevents a prosecutor from utilizing their discretion in charging an individual for the statements that they make online. In contrast, prosecutors in the United Kingdom have the discretion to file criminal charges for statements made online subjectively deemed "grossly offensive." Even after releasing various guidelines on applying Section 127 consistently, individuals are still left unsure about what a prosecutor might consider "grossly offensive" enough to warrant prosecution. The United Kingdom should change the legislation or guidelines in any of the following ways: 1) amend Section 127 to be a "result" crime, 2) remove ambiguous terms from Section 127, or 3) eliminate imprisonment from the maximum sentencing penalty.

1. Amend Section 127 to be a 'result' crime

One way to fix Section 127 would be to amend it to be a "result" crime that requires there to be an actual recipient of the message, who is grossly offended by it. The distinction between a "conduct" crime and a "result" crime is simple. For a "conduct" crime, the action itself is sufficient for criminal liability to be imposed, while for a "result" crime criminal liability is only available if it causes certain consequences.[142]

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[140] *Id.* at 75.

[141] *See* BRACADALE REPORT, *supra* note 131.

[142] MICHAEL HIRST, JURISDICTION AND THE AMBIT OF THE CRIMINAL LAW 118 (2003).

While some scholars note that the "exact distinction between the two types of offence are not precisely clear,"[143] this would be a large step in the right direction for Section 127 prosecutions. In the context of online communications this change would only allow for prosecution where an identified individual was "grossly offended." This change allows for a lighter regulatory touch in this specific area, but is not so light that there are no consequences at all—it is a compromise for individuals who both do not want the government to determine what is "grossly offensive speech," but also wish there to be options for identified individuals who are grossly offended by speech.

2. Amend Section 127 to remove ambiguous terms

Another option to consider, if the statute cannot be interpreted as a "result" crime, then Section 127 should be amended to remove ambiguous terms. As previously noted, the current language of "grossly offensive" is ambiguous and can lead to inconsistent prosecution. As with Lord Bracadale in Scotland, the UK Government also requested the Law Commission of England and Wales to review the law relating to online offensive communications. In their report, the Commission concluded that "abusive online communications are, at least theoretically, criminalized to the same or even a greater degree than equivalent offline offending."[144] The Commission outlined considerable scope for reforms that specifically speak to the inconsistent prosecution seen with Section 127:

> - Many of the applicable offences do not adequately reflect the nature of some of the offending behavior in the online environment, and the degree of harm it can cause.
> - Practical and cultural barriers mean that not all harmful online conduct is pursued in terms of criminal law enforcement to the same extent that it might be in an offline context.
> - More generally, *criminal offences could be improved so they are clearer and more effectively target serious harm and criminality*.

[143] *See, e.g.,* Matthew Goode, *The Tortured Tale of Criminal Jurisdiction*, 21 MELBOURNE UNIV. L. REV. 411, 437–38 (1997).

[144] Law Commission, *Scoping Report on Abusive and Offensive Online Communications* (2018), https://www.lawcom.gov.uk/abusive-and-offensive-online-communications/ [https://perma.cc/R3VE-WP78].

> - The large number of overlapping offences can cause confusion.
>
> - *Ambiguous terms such as "gross offensiveness" "obscenity" and "indecency" don't provide the required clarity for prosecutors*.[145]

By removing "grossly offensive" and replacing it with more specific areas of prosecution, there will at least be more transparency for the public. For instance, if Scotland decides that any reference to Nazi imagery is enough to warrant a closer look at the speech and context surrounding that reference, then Nazi imagery should be listed within the statute. If that were the case, at least individuals could anticipate what posts would be prosecutable. This change would increase transparency and make Section 127 more clear for individuals and prosecutors.

3. Eliminate imprisonment from the maximum sentencing penalty

Even without the prior two reforms, Section 127 could be greatly improved by eliminating imprisonment from the maximum sentencing penalty. Under the current Section 127, an offense may only be prosecuted summarily (i.e., before a sheriff sitting without a jury) and is subject to a maximum penalty of 6 months' imprisonment, a fine up to £5,000, or both. In short, there is no need to have a custodial sentence for situations such as Mark Meechan's case.

Even within its current framework, there are other means of prosecuting individuals if their online communications rise to the level of requiring a custodial sentence. For instance, one case was considered so serious that the case was prosecuted on indictment, rather than through Section 127.[146] In that example, the individual "had used Twitter to express his hatred of Shias and Kurds and called for them to be killed as the Jews had been in Nazi Germany" and had also sought information on how to join ISIS.[147] The accused was prosecuted under the Offensive Behaviour at Football and Threatening Communications Act 2012 (Scotland); "[h]e pled guilty and was sentenced to sixteen months' imprisonment, a sentence which would not have been possible if he had been prosecuted under Section 127."[148]

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[145] *Id.* (emphasis added).

[146] BRACADALE REPORT, *supra* note 131, at 74.

[147] *Id.*

[148] *Id.*

Another option for situations that warrant a custodial sentence would be for Scotland to extend the Malicious Communications Act 1998—a Section 1 offense under that legislation covers similar conduct but, as of now, only extends to England and Wales.[149] This approach also allows for prosecution on indictment before a jury and permits a longer custodial sentence. While other options exist within the UK for addressing matters that rise to the level of a custodial sentence, Section 127 and its vague application is not an appropriate means. As such, the imprisonment option for sentencing should be eliminated from the legislation.

B. APPLYING THE RECOMMENDATIONS TO MARK MEECHAN'S CASE

If Section 127 of the Communications Act 2003 was reformed as per the previous recommendations, it is possible that Mark Meechan would have never been prosecuted in the first place. When speaking about his case in 2018, Meechan hit on why Section 127 of the Communications Act 2003 is not suited for criminal prosecution:

> In my video I gave context to what I was doing. I was getting a cute dog to react to a vulgar phrase in order to annoy my girlfriend. The phrase "gas the Jews" is a horrible phrase. It is and people will be offended by hearing it. But there was no direction [or] instruction to actually harm anyone within my video. It was made about two years ago and I have yet to hear of any anti-Semitic attacks carried out because someone was inspired by a pug. You just need to analyze the context in which the phrase was said.[150]

First, if Section 127 was interpreted to be a "result" crime, then a specific individual would have needed to be so "grossly offended" by Meechan's video that they file a formal complaint. There might indeed have been such a grossly offended individual. The alteration of Section 127 to require a result would be a compromise between no prosecution and a prosecution than currently required.

Next, if Section 127 was amended to remove the ambiguous term "grossly offensive," then it is unlikely that Meechan would have been prosecuted in the first place. It would require, as previously suggested, Scotland to specifically outline Nazi imagery as a subject that could be

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[149] *Id.* at 75.

[150] *Man Who Taught Dog Nazi Salute is Hosted by British Nationalist Party at an EU Parliament Conference*, JEWISH TELEGRAPHIC AGENCY (Sept. 13, 2018, 7:39 AM), https://www.jta.org/2018/09/14/global/british-nationalist-party-invites-eu-parliament-man-taught-dog-nazi-salute [https://perma.cc/KL3H-76BA].

deemed "grossly offensive" enough to trigger a higher level of scrutiny of that speech. Without that next step, Meechan's video would not fall under "indecent" or "obscene" communication, nor "involve the communication of false information about an individual or group of individuals which results in adverse consequences for that individual or group of individuals"—the other types of communication proscribed by Section 127.[151]

Finally, if Section 127 was *only* amended to eliminate imprisonment from the maximum sentencing penalty, this would not affect Meechan's circumstance. It only would have prevented the Court from stating, "it must be observed that in the circumstance the appellant was fortunate that the learned sheriff was not considering custody as an option."[152] However, removing imprisonment goes directly to the argument against this statute—it is too broad and draconian for the type of online speech it is being used to regulate. If Meechan's video of his pug would not have been prosecuted before the internet, then why should imprisonment—literal incapacitation from society—be an option as a penalty now?

IV. CONCLUSION

To argue that Mark Meechan's actions do not warrant criminal prosecution is not to endorse his words and actions. As a comedian writing about Meechan's case noted:

> In the video, we see him teach the dog to do a Nazi salute at the command of (and I find these words hard even to type) "gas the Jews" with the same intonation you might use when telling a dog, "here boy!" Horrible. I don't find it funny. If you do then in my opinion, you're a tool. "In my opinion" is key here. I am not the arbiter of what is funny. Neither is the law.[153]

The current Section 127 of the Communications Act 2003, even with the subsequent prosecutorial guidelines, leaves much to be desired regarding the subjectivity and levels of enforcement. By amending Section 127 to be a "result" crime, removing ambiguous terms, and eliminating imprisonment from the maximum sentencing penalty, Scotland and the United Kingdom as a whole will be better able to use their resources to

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[151] COPFS GUIDANCE, *supra* note 79, at 4.

[152] Dearden, *Count Dankula has Appeal Refused*, *supra* note 24.

[153] Khorsandi, *supra* note 1.

prosecute actual threats of violence made online and allow for their citizens to have certainty. With these changes, individuals like Mark Meechan will not be lauded as free speech warriors but will be able to post statements or videos online without fear of ambiguous, subjective prosecution or imprisonment. As Justice Louis Brandeis has noted, "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by process of education, the remedy to be applied is more speech, not enforced silence."[154]

[154] Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).