16

COMMUNICATION OFFENCES

16.1 CRIME, COMMUNICATION, AND PUBLICATION

A 'communication' is ordinarily a positive act, although someone can also communicate by omission. Whether in the form of an act or an omission, a communication is in principle capable of amounting to a crime, just like any other act or omission. In Chapter 11, an example discussed was section 2 fraud, which requires, among other things, the dishonest making of a false representation. A false 'representation' can be made by an act or an omission. Depending on the circumstances, an example of false representation by omission might be applying for a job that requires a clean record, without mentioning that one has previous criminal convictions.[1] However, as a basis for a criminal offence, 'communication' can be controversial, even in cases of fraud. Such offences may come into conflict with the right to freedom of expression under Article 10 of the ECHR and Article 19 of the International Covenant on Civil and Political Rights.[2] The UK Parliament abolished the general offence of criminal defamation, even when the false statement that damaged someone's reputation was known to be false at the time it was made.[3] Why?

One important reason concerns the importance of protecting certain kinds of speech from criminalization, such as political speech. As Lord Thomas remarked, in support of the abolition of the crimes of seditious and criminal libel:

> The ability of individuals to criticise the state is crucial to maintaining freedom. In this day and age, when we have so many journalists, bloggers and so forth who give us their

[1] https://www.cps.gov.uk/legal-guidance/fraud-act-2006 (last accessed 01/09/2021).

[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] Coroners and Justice Act 2009, s 73.

> views all the time, we should get rid of anything that may in any way curb their criticisms of the state. We need a vigorous culture of free speech in order to keep government up to the mark.[4]

Defamation law has always been—and in many mainland European jurisdictions continues to be—a classic 'go to' remedy for political officials seeking to intimidate their rivals into silence. In that context, the importance of ensuring that political debate remains vigorous and unhindered by the threat of criminalization is greater than that of punishing the propagation of falsehood even when it causes reputational damage.[5] As former New Zealand Prime Minister Sir Geoffrey Palmer has argued:

> in a free and democratic society, defaming the government is the right of every citizen. In times beset with threats of terrorism we should not close the open society. To do so would only encourage its enemies.[6]

By contrast, when fraud is committed solely with the intention to make a financial gain, or to impose a financial loss or risk of loss, it is not committed in a context in which freedom of speech as a value casts a protective cloak around the (false) speech. So, for example, I should in general be free to vent my frustration online about the poor service I feel I received at a holiday hotel, even when I am aware that I may not know the full facts and could be misleading people. By contrast, if I deliberately post a fake Tripadvisor review with the intention of causing the hotel to lose booking customers (an intention to cause a financial loss or risk of loss), other things being equal, that may fall within the scope of the offence of fraud. The nature of D's intention in communicating or publishing damaging or offensive material may also have an important effect on whether or not that act may be criminalized, even in cases where there is no intention to make a gain or to cause a (financial) loss. A recent example is the criminalization of so-called revenge porn. In this example, the offence involves someone disclosing intimate sexual images of the victim to one or more other people (without the victim's consent), in order to cause distress to the victim.[7] Even so, the offence is rightly hedged by important defences aimed at protecting the justifiable disclosure of information. So, it is a defence, for example, that the images amount to journalistic material which D believes it is in the public interest to publish, and where D reasonably believed that the disclosure was necessary for the purposes of preventing, detecting, or investigating crime.

[4] https://publications.parliament.uk/pa/ld200809/ldhansrd/text/90709-0013.htm (last accessed 20/04/2021), col 849.

[5] As a state response to false information, it could be disproportionate to criminalize false speech, while remaining proportionate to permit private law actions for damages when false claims have led to reputational harm.

[6] Cited at https://publications.parliament.uk/pa/ld200809/ldhansrd/text/90709-0013.htm (Last accessed 15/04/2021), my emphasis.

[7] Criminal Justice and the Courts Act 2015, s 33, as amended by the Domestic Abuse Act 2021, s 69. See the Law Commission's proposals for further offences.

It is, though, not only political speech, or rights to vituperation, that require protection from criminalization. Literary work, and artistic expression more generally, will attract high levels of protection, not least under Art. 10. That may be so, even when they contain false claims or—a separate matter—obscene content (see below). We should also note that freedom of expression is not necessarily confined to the communication of messages. Literary or artistic work may be protected as a form of expression, even when it fails to communicate—and was not intended to communicate—any particular message. In that regard, the law may be concerned with 'publication' as a form of expression, whether or not the publication involves the communication of a message. For example, the posting of a video clip showing someone who has committed suicide is a 'publication', even if its publication is not meant to, and does not, communicate any particular message.[8] As we will see, whether or not the publication of such a clip is an offence depends on whether or not it amounts to an 'obscene' publication.

In this chapter, we will not be concerned with offences of possession, but it is important to note that communication offences are often buttressed by such offences. For example, under s 1 of the Obscene Publications Act 1964, it is an offence to have an obscene article for publication or gain. Another example is the possession of extreme pornographic images, contrary to s 63 of the Criminal Justice and Immigration Act 2008, as amended by s 37 of the Criminal Justice and Courts Act 2015. Section 63 of the 2008 Act defines an extreme image as one that is 'grossly offensive, disgusting or otherwise of an obscene character', and involves one of the following:

(a) an act which threatens a person's life,

(b) an act which results, or is likely to result, in serious injury to a person's anus, breasts or genitals,[9]

(c) an act which involves sexual interference with a human corpse,

(d) a person performing an act of intercourse or oral sex with an animal (whether dead or alive),

and a reasonable person looking at the image would think that any such person or animal was real.

There will be an ordinary 'harm principle' justification for this offence, insofar as it does something to diminish a significant risk that individuals, animals, or corpses will in fact be subjected to rape, torture, or mutilation to satisfy a demand to view such acts. The same goes for the offence of possessing prohibited images of children.[10] By contrast, as we will see, it is far less clear whether the harm principle is satisfied in cases involving 'obscene' publications.

[8] https://www.theguardian.com/technology/2018/feb/02/how-youtubes-algorithm-distorts-truth (last accessed 01/09/2021).

[9] Images of rape and non-consensual penetration were subsequently added to the list in 2015.

[10] Coroners and Justice Act 2008, ss 62–67.

16.2 OBSCENE PUBLICATIONS

Governments have always been preoccupied with the legal suppression of publications, or other acts, involving the (supposedly) outrageous and unspeakable, because they are so often driven to pass legislation by pressure created by alleged public outrage, following particular egregious incidents brought to people's attention in the media. The Crown Prosecution Service lists no less than 12 different statutes and one common law offence (outraging public decency) which prosecutors may need to consider in this area, before they even come on to what is commonly regarded as the main statute, the Obscene Publications Act 1959. It is, for example, an offence under the Theatres Act 1968, punishable by up to three years' imprisonment, to put on a play which is obscene so as to have a tendency to corrupt or deprave (a concept further considered below).[11] Given the threat posed to freedom of expression by such legislation, it will be important to consider at all times the nature of the harm-based justification for any given offence. In a well-known passage, the European Court has said, in an obscenity case, that:

> Freedom of expression constitutes one of the essential foundations of . . . a [democratic] society, one of the basic conditions for its progress and for the development of every man. Subject to Article 10(2), it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'.[12]

Bearing these points in mind, is it ever enough to justify criminalization, and especially imprisonment, that something published or displayed publicly is simply 'obscene'? Arguably, this is too broad and vague a category to give adequate guidance on—or to capture—what it is wrong to publish because the publication may cause harm. Suppose, for example, that a play or publication poses a serious risk of encouraging the sexual abuse of children, or the non-consensual infliction of unlawful violence more generally. Would it not be better to focus on such cases by creating specific offences of encouraging child sex offences or offences of violence,[13] thus making clearer what is wrong from a harm-focused perspective, rather than relying on the vague notion of obscenity? The problem with using the broader concept of obscenity to capture such cases, convenient though it may be, is this. A publication may appear to be 'obscene' simply because it is gross and disgusting, as opposed to something liable to lead to harmful conduct. In *Perrin*,[14] for example, people were filmed engaging in consensual sexual acts involving faeces. In such a case, is the loathsome and perverse nature of the content in itself really a sufficient justification for criminalization, even if it is obscene? To answer that question, we need to consider the meaning of 'obscenity' in law.

[11] https://www.cps.gov.uk/legal-guidance/obscene-publications (last accessed 08/09/2021).
[12] *Handyside* v *UK* (1979–80) 1 EHRR 737, at para 49.
[13] Subject to a defence of lawful or reasonable purpose.
[14] [2002] EWCA Crim 747.

Under s 2(1) of the Obscene Publications Act 1959, it is an offence if D:

(1) publishes an obscene article for gain or not; or

(2) 'has' an obscene article for publication for gain (whether gain to himself or gain to another).[15]

This offence directly engages people's rights to freedom of expression under Article 10, and creates wide-ranging potential for the criminal law to be used to suppress freedom of speech, especially given that it is not restricted to commercial publication. That the offence carries a five-year maximum prison sentence means that it should receive the strictest scrutiny in the courts, in terms of its general scope and with regard to proportionality in its use. In that regard, the courts have held that when obscene material is published with a view to making a financial gain, a prison sentence imposed may be justified and proportionate, even for a first offence.[16]

Crucial to the offence is clearly the meaning of 'obscene', the circumstance element of the offence. As well as being vague and essentially contested by nature, this term creates a natural focus in people's minds on sexual activity, a focus that may be misleading. For example, publishing pictures of body parts scattered on the ground following an explosion might in some circumstances be an obscene publication, even though it has no connection with sexual activity. 'Obscene' is defined in s 1 of the 1959 Act as follows:

> an article shall be deemed to be obscene if its effect or (where the article comprises two or more distinct items) the effect of any one of its items is, if taken as a whole, such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it.

If the language of the 1959 Act sounds antiquated—and it does—that is because Parliament in 1959 did not trouble itself to provide a more modern definition of obscenity, one that made the risk of harm and the protection of liberty the focal concerns. Instead reliance was placed the definition authoritatively set down at common law as long ago as 1868.[17] The restriction of obscene publications to those with a tendency to deprave and corrupt those likely to read them (hereinafter: 'the forbidden tendency') does provide some form of seemingly harm-based check on the scope of the offence. For example, to return to the example of *Perrin* given above,[18] the fact that unusual or even repulsive sexual activity is depicted will not necessarily make a publication obscene in law. To satisfy the law's definition of obscenity, the article published must have the forbidden tendency.[19] However, this check on the scope of the offence is a weak one.

[15] This longstanding offence must be set alongside the offence contrary to the Protection of Children Act 1978 of creating an obscene article containing an image or pseudo-image of a child, and offences involving the depiction of extreme pornography: Criminal Justice and Immigration Act 2008 s 63, as amended by the Criminal Justice and Courts Act 2015 s 37.

[16] *Perrin* v *UK* (ECHR, Application no. 5446/03, 3rd February 2003).

[17] *Hicklin* (1868) LR 3 QB 360.

[18] [2002] EWCA Crim 747.

[19] *Darbo* v *DPP* [1992] Crim LR 56.

To begin with, what matters is solely that there is a 'tendency' to deprave and corrupt: no one need in fact have been depraved and corrupted, or even realized that they were at risk of that happening to them. Secondly, there is the obvious point that 'deprave' and 'corrupt' are themselves concepts little or no clearer than the concept of obscenity itself. For example, it has been held that a publication could be obscene if it described drug-taking in favourable terms, in that there was then a risk that readers might think it acceptable to try drug-taking (the forbidden tendency).[20] That proposition risks creating the bizarre consequence that whether or not describing drug-taking in favourable terms has the forbidden tendency (a moral-evaluative question) may hinge on whether or not the drug in question has been added to the law's list of prohibited substances (a regulatory question). For, if encouraging drug-taking in general is what creates the forbidden tendency (irrespective of its illegality), then would a publication that extolled the virtues of smoking cigarettes or heavy drinking also be an 'obscene' publication?[21] Even more broadly, what about a publication directed at budding politicians encouraging them to lie, if need be, to attain office? We should also note that the forbidden tendency involves a (supposed) harm to the mind—depraved and corrupted thinking—irrespective of whether any later conduct is or may be engaged in that is attributable to such thinking. So, a publication that encourages or cultivates depraved fantasies may be obscene, even if such fantasies are never likely to be acted out.[22] We must also bear in mind, first, that a 'publication' can include (say) an electronic message[23] or the creation of an image transmitted online for viewing by only one other person,[24] and second, that the offence can be made out even if D had no intention to deprave and corrupt.[25] That raises the prospect that the criminal law now extends its reach into the private moral world of consenting adults, without an adequate harm-based justification for doing so, although it is always possible that a prosecution (or the imposition of a harsh penalty) in such a case will be regarded as disproportionate, under Art. 10.[26]

Crucial to the legal standing of offences such as obscene publication offences, viewed in the light of the requirements of Article 10, will be the defences available to the accused. The absence of any requirement to prove intent to deprave and corrupt ought to raise significant questions about the compatibility of the s 2 offence with the right to freedom of expression. However, the 1959 Act does provide D with certain specific

[20] *John Calder Publications* v *Powell* [1965] 1 QB 509.

[21] Smith, Hogan, and Ormerod, Smith, *Criminal Law*, 16th edn (2021), ch 30.1.2.2.

[22] *DPP* v *White* [1972] 3 All ER 12.

[23] But if the message is automatically deleted having been read, it may not amount to a published article. So, liability to prosecution may depend on the kind of messaging service being used, raising an issue of fair warning under Article 7: Alisdair Gillespie, 'Obscene Conversations, the Internet and the Criminal Law' [2014] Crim LR 350.

[24] *Smith* [2012] EWCA Crim 398. The individual for whom the article is published must obviously be the one liable to be depraved and corrupted, in such a case.

[25] *Calder and Boyars Ltd* [1969] 1 QB 151. By contrast, on a charge of conspiracy to corrupt public morals, there will be a need to prove that this was D's intention.

[26] *Scherer* v *Switzerland* (1994) 18 EHRR 276.

defences. For example: in virtue of s 2(5) of the 1959 Act and s 1(3)(a) of the Obscene Publications Act 1964 Act, D will be acquitted upon proof that he or she:

(1) had not examined the article, and

(2) had no reasonable cause to suspect that it was such that his publication of it, or his having it, as the case may be, would make him liable to be convicted of an offence under s 2.

As both (1) and (2) must be satisfied if the defence is to be made out, the defence is little more than a fig leaf. By contrast, a more meaningful defence is provided by s 4. The defence applies where an article has been found to be obscene, but nonetheless:

> . . . a person shall not be convicted of an offence against section two of this Act . . . if it is proved that publication of the article in question is justified as being for the public good on the ground that it is in the interests of science, literature, art or learning, or of other objects of general concern.

Whether or not a publication can plausibly be said to have served one of these interests is a matter on which the jury may hear expert evidence, in virtue of s 4(2). In *Calder and Boyers Ltd*,[27] the Court understood the role of the jury, in applying this defence, as follows. The jury should:

> consider, on the one hand, the number of readers they believe would tend to be depraved and corrupted by the book, the strength of the tendency to deprave and corrupt, and the nature of the depravity or corruption; on the other hand, they should assess the strength of the literary sociological or ethical merit which they consider the book to possess. They should then weigh up all these factors and decide whether on balance the publication is proved to be justified as being for the public good.

It is arguable that this misunderstands the defence, gives too broad a discretion to the jury, and creates an unacceptably high degree of uncertainty for publishers of controversial literature or scholarship. The defence in s 4 does not ask the jury to conduct an all-but impossible balancing act, involving essentially incommensurable factors: on the one hand, the nature and degree of the obscenity, the strength of the forbidden tendency, and the potential reach of that tendency; on the other hand, the strength of the literary, scientific, scholarly, or ethical merit of the work. The defence in s 4 in fact asks the jury to consider a simpler question: is an admittedly obscene publication to be regarded as free from the taint of criminality, because it was published in the interests of science, literature, art, learning, or some other objects of general concern, and is hence for the public good? There is no warrant for the suggestion in *Calder and Boyers Ltd* that, even if a publication did serve one of these interests, it might nonetheless still be regarded as a criminally obscene publication: say, because of the sheer number of potential readers who might be depraved and corrupted, or because (in the case of,

[27] *Calder and Boyars Ltd* [1969] 1 Q 151, at 172.

say, a scholarly article) the publication was in a low-ranking journal and thus of lesser merit than something published in a prestigious journal.[28]

16.3 OTHER COMMUNICATION OFFENCES

When, in 1895, the Marquess of Queensbury wished publicly to accuse Oscar Wilde of having engaged in sexual activity with another man, he did so by delivering a card to the porter at the Albermarle Club in London where Wilde was dining, with the accusation openly written on it.[29] As recently as 1985, the Law Commission gave as the title to a law reform paper on the subject of malicious and offensive communication: 'Poison Pen Letters'.[30] Such paper forms of communication are now dwarfed in importance by the ubiquity of electronic communication. Accordingly, the advent of electronic forms of communication has transformed the landscape of offences of malicious or offensive communications. The 'first copy cost' (and the reproduction cost) of non-electronic forms communication is relatively high by modern standards—a letter or poster must be written or printed, and then delivered to each person intended to receive it, or physically placed somewhere that people can see it. By contrast, email, social media platforms, and messaging apps are all designed to reduce first copy and reproduction costs of communication (not least when the communication of images is concerned). That has understandably led to a dramatic scaling up of the sheer volume of communication. For example, in the political sphere, focusing on just one social media platform—Twitter—no less than 99 million Tweets involving political content were sent from the first primaries in March through to Election Day in the US mid-term elections in 2018–19.[31] Desirable in themselves, in many ways, these developments have come with a downside. This is that malicious or offensive communications can instantaneously be spread by 'keyboard warriors' to a large number of people, perhaps by employing different forms of communication (and different online identities) to convey the same message repeatedly in different fora. Very commonly, people can do this in the confident expectation that inflammatory messages will be spread further by others, a point of significance given that broadly 'negative' messaging tends to be more widely circulated than positive messaging (see below).

Consider, by way of example, the spread of false or misleading political information.[32] How far we have travelled, with regard to this phenomenon, from the age of

[28] It is worth noting that if D is charged with a conspiracy to corrupt public morals at common law, this defence has no application, although the prosecution would be prevented from seeking to circumvent the application of the defence by resorting to this charge: Smith, Hogan, and Ormerod; Smith, *Criminal Law*, 16th edition (2021), ch 30.1.7.2.

[29] http://www.back2stonewall.com/2021/02/gay-lgbt-history-feb-18-oscar-wilde-accused-sodomite.html.

[30] Law Commission, *Poison Pen Letters* (LC Rep 147, 1985).

[31] https://blog.twitter.com/en_us/topics/company/2019/18_midterm_review.html (last accessed 09/06/2021).

[32] See, generally, Jeremy Horder, *Criminal Fraud and Election Disinformation: Law and Politics* (2022), ch 2.

'poison pen letters' may be gauged by considering the use of (semi-)automated bots, fake Twitter or Facebook accounts that enable the spread of false claims though re-tweets and 'likes', and the role of non-state agencies organizing internet 'trolling' on a wide scale. An example of the significance of this development is the finding that, from 2014 onwards, the St Petersburg-based Internet Research Agency at one point was reported to have controlled 3,814 human accounts and 50,258 bots on Twitter (with which nearly 1.5 million US citizens had some interaction), and 470 Facebook accounts that reached at least 126 million Americans.[33] Similarly, in the lead-up to the UK referendum on leaving the European Union, it was widely reported that more than 150,000 twitter accounts sourced in Russia posted content on Brexit.[34] This is important, because a recent study of 126,000 news stories distributed on Twitter between 2006 and 2017 revealed that falsehoods (as established by fact-checking organizations) were 70 per cent more likely to be retweeted than true stories.[35] Quite obviously, similar possibilities exit for the spread of offensive messaging, and in particular hate speech. In pursuit of its own policy of preventing the platform from becoming a vehicle for hate speech, Facebook removes between 3 and 4 million posts adjudged to involve hate speech each quarter.[36] From January to June 2020, of the 1,927,063 items of content removed by Twitter, some 1,564,465 items were categorized by Twitter as 'abuse/harassment' or as 'hate'.[37] In Germany, hate speech and 'political extremism' are the most common reason given by platforms for content restriction or removal (41.2 per cent of cases) with defamation and insult being the reason in 19.8 per cent of cases.[38] Having facilitated the development of the problem, social media platforms still struggle—without a realistic threat of state enforcement—to remain a credible part of the solution.

There are a number of (mostly somewhat outdated) ways in which the law seeks to address these problems through criminalization, while seeking to maintain a free speech culture: not an easy balancing act. The law must strike the right balance, while

[33] Jean-Baptiste Vilmer et al, *Information Manipulation: A Challenge for Our Democracies* (2018), https://www.diplomatie.gouv.fr/IMG/pdf/information_manipulation_rvb_cle838736.pdf, 85. America is yet to adopt measures to require transparency in relation to internet political advertising by overseas entities: see https://www.brennancenter.org/our-work/research-reports/honest-ads-act-explained (last accessed 15/04/2021).

[34] The Guardian, 4 November 2017, https://www.theguardian.com/politics/2017/nov/04/brexit-ministers-spy-russia-uk-brexit (last accessed 15/04/2021); Ewan McGaughey, 'The Extent of Russian-backed Fraud Means the Referendum is Invalid' (2018), https://blogs.lse.ac.uk/brexit/2018/11/14/the-extent-of-russian-backed-fraud-means-the-referendum-is-invalid/ (last accessed 15/04/2021).

[35] Soroush Vosoughi, Deb Roy, and Sinan Aral, 'The Spread of True and False News Online' (2018) 359 Science 1146.

[36] https://ec.europa.eu/digital-single-market/en/news/annual-self-assessment-reports-signatories-code-practice-disinformation-2019.- (last accessed 15/04/2021). About a quarter of these decisions were appealed, leading to the content being restored in roughly 10% of cases.

[37] https://transparency.twitter.com/en/reports/rules-enforcement.html#2020-jan-jun (last accessed 19/05/2021).

[38] Thomas Kasakowskij et al, 'Network Enforcement as Denunciation Endorsement? A Critical Study on Legal Enforcement in Social Media' (2020) 40 Telematics and Informatics 101317, part 3. See, further, Law Commission, *Hate Crime Laws: Final Report* (Law Com No. 402, 2021).

also honouring Parliament's courageous decision to abolish the offence of criminal libel (defamation), a decision discussed at the outset of this chapter. The law seeks to do this by focusing on harm caused, intended, or threatened by certain kinds of offensive communication that is different from the harm to reputation that is the central concern of defamation law. For example, an offensive communication might be intended to cause emotional distress or to put someone in fear of attack, rather than to harm that person's reputation as such. In that regard, we should note that, in some instances, people will have recourse to private law remedies for damage to their reputation caused by defamatory communications; but these cases are only a sub-set of those with which the law is concerned. For example, a communication to someone plausibly but falsely claiming that their spouse has been killed in a car accident may cause enormous distress and upset, but it is not a communication that is actionable under defamation law because it does not adversely affect the person's reputation. So, some other kind of remedy—such as a criminal offence—may be needed and appropriate to deter the communication of such false claims.

Section 127 of the Communications Act 2003 is designed to address these issues, and applies in relation to improper use of public electronic communications network (including the internet):

> A person is guilty of an offence if he—
>
> (1) sends by means of a public electronic communications network a message or other matter that is grossly offensive or of an indecent, obscene or menacing character.
>
> (2) A person is guilty of an offence if, for the purpose of causing annoyance, inconvenience or needless anxiety to another, he—
>
> (a) sends by means of a public electronic communications network, a message that he knows to be false, [or]
>
> (b) causes such a message to be sent.[39]

There were 254 charges under s 127 in 2017.[40] Alongside this offence should be set the more serious offence created by s 1(a)(iii) of the Malicious Communications Act 1988.[41] In part, this makes it an offence to a send a letter, electronic communication, or article of any description which conveys an indecent or grossly offensive message, or a message which involves a threat. In part, though, s 1(a)(iii) also makes it an offence to convey 'information which is false and known or believed to be false by the sender', in circumstances where one of D's purposes in communicating in the proscribed way was 'that it should . . . cause distress or anxiety to the recipient or to any other person to whom he intends that or its contents or nature should be communicated'.[42] There were

[39] The penalty upon summary conviction is a sentence of imprisonment for a term not exceeding six months or a fine not exceeding level 5 on the standard scale, or both. See, further, Law Commission for England and Wales, *Abusive and Offensive Online Communications: A Scoping Report* (Law Com No 381, 2018).

[40] Law Commission, n 39, at para 4.55.

[41] See also the Public Order Act 1986, s 18.

[42] See the discussion in Law Commission, n 39 above, ch 4. An offence may be met with a fine and or a sentence of imprisonment for up to two years.

2626 charges under s 1(1)(a) in 2017,[43] most of these being likely to have concerned 'grossly offensive' or 'threatening' communication.

As in other areas in which the law makes it criminal to send particular kinds of communication, or to publish certain kinds of item, the Communications Acts offences address conduct that strikes at the heart of people's rights under Art. 10. No one doubts that, for example, it is right to prohibit (say) sending death threats or known-to-be false claims that someone is to be targeted in a terrorist assassination. However, many cases will raise free speech controversies that pose questions about whether the criminal law properly reflects claims that the UK has a 'free speech culture'. Consider the case of *Connolly v DPP*.[44] D sent photographs of aborted foetuses to pharmacists who sold the 'morning-after' pill. Her challenge to a conviction under s 1 of the 1988 Act failed when the Court found that the pictures were legitimately found by the justices to be grossly offensive, and to have been sent with the purpose of causing distress or anxiety to the recipients. The Court held that 'indecent' and 'grossly offensive' are ordinary English words, without specialized legal meaning. Most importantly, the Court went on to find that her conviction under the 1988 Act was, in the circumstances, proportionate (for the purposes of Article 10), because D's intention was not to contribute to public debate but to cause distress and anxiety to individuals, individuals who were not themselves public figures. That seems right, but more problematic is the idea that one does not have a 'right' intentionally to cause distress or anxiety (or, under the 2003 Act, annoyance, inconvenience, or needless anxiety)—a point we will come back to later.

The Acts also provide important protection against racist abuse.[45] For example, in *DPP v Collins*,[46] a constituent rang an MP's office and, in discussion and in messages left on the answerphone, used exceptionally derogatory and racist language to describe black and minority ethnic people, although none of those to whom he addressed this language fell into these categories. He was charged under s 127 of the 2003 Act with sending grossly offensive or obscene messages. Although initially acquitted, the House of Lords allowed the prosecutor's appeal, on the grounds that what mattered, for the purposes of the 2003 Act, was whether the messages were in fact grossly offensive or obscene, and not whether an individual to whom they were addressed, or who heard them, found them to be so.[47] It was a question of fact in all the circumstances whether a message was grossly offensive, applying the standards of an open and just multi-racial society. Importantly, the House of Lords rejected the argument that the s 127 offence was an unnecessary and disproportionate interference with freedom of expression, finding that s 127 was a legitimate way in which to protect the rights and freedoms of others.

[43] Law Commission, n 39, para 4.7. [44] [2007] EWHC 237 (Admin).

[45] See further *R (on the application of Chabloz)* v *CPS* [2019] EWHC 3094 (Admin).

[46] [2006] UKHL 40.

[47] On the fact-sensitive nature of the test, in relation to 'menacing' messages, see *Chambers* v *DPP* [2012] EWHC 2157 (Admin).

Again, the decision in *Collins* seems right on the facts, but the breadth of the findings in law do give rise to issues under Art. 10. For example, if what matters, for the purposes of s 127, is whether or not a message is grossly offensive or obscene, irrespective of how it is viewed by a recipient, then s 127 will catch even consensual communications between adults. That has the potential to bring s 127 into conflict with the right to privacy, which includes the right to privacy respecting correspondence, under Art. 8. In that regard, the decision brings into question the legitimacy of 'chat lines' dedicated to explicit conversations between adults.[48] It has been held that, under s 127(1) of the 2003 Act, the fault element is satisfied not only when D intends a message to be 'grossly offensive or of an indecent, obscene or menacing character' but also when D realizes that the message may be so interpreted.[49] This means that, for example, even if D's primary motivation is to tell a joke, or to make a contribution to public debate, if D is nonetheless reckless—appreciating that a message may have one of the forbidden characteristics—D may be found guilty, unless the conveying of the message is regarded as justified in the circumstances (and hence not reckless).[50] An important point is that, even in a case in which it was D's intention to cause distress, anxiety, annoyance, or inconvenience, it does not follow that a conviction should necessarily be regarded as justified. Surely, in some cases, it may be justified to send messages—for example to politicians or public commentators who have made controversial remarks—even if the messages are intended to be found annoying by their recipients? It is worth considering this point further, in relation specifically to false statements (prohibited by both the 1988 and the 2003 Acts), when made in political contexts.[51]

The Law Commission has rightly cast doubt on whether the purpose-based restrictions in the two Acts are consistent with a robust commitment to free speech in political contexts:

> Strictly speaking, [s 127(2)] could, for example, cover a politician or political commentator who regularly posts social media messages in order to annoy others – perhaps those with whom they disagree politically. The implications for the freedom of expression would be particularly acute if the offences were prosecuted and enforced in this way.[52]

The problem identified here is that no one could possibly have the unqualified right not to be annoyed, or even made anxious, by what someone else has falsely said. Otherwise, for example, a politician (X) who falsely said that the streets where his or her elected political opponent (Y) lived were now far less safe to walk at night as a result of Y's policies could be convicted, if X's intention was make Y feel anxious when walking home. It is undoubtedly important that those seeking to play a part in a country's political life should

[48] Smith, Hogan, and Ormerod, n 20 above, ch. 30.6.2.

[49] *Chambers* v *DPP* [2012] EWHC 2157 (Admin).

[50] However, in the case of jokes or contributions to public debate, it is always possible that an individual prosecution may be found to have been disproportionate. On prosecuting in social media cases, see the CPS guidance, https://www.cps.gov.uk/legal-guidance/social-media-guidelines-prosecuting-cases-involving-communications-sent-social-media (last accessed 13/09/2021).

[51] See further, Horder, n 32, ch 3.

[52] Law Commission for England and Wales, *Abusive and Offensive Online Communications: A Scoping Report* (Law Com No 381, 2018) para 4.103.

not be deterred by the prospect of abuse and intimidation. In particular, evidence suggests that women more frequently make reference to the risk of being the target of public attack on their dignity as a deterrent to entering politics:[53] that is bad for democracy. However, the question is whether the criminal law has been excessively shaped in this context—as in the case of obscene publications—by the authoritarian principle. This is the principle that broad and flexible offence definitions are preferable to narrower, clearer ones, because it is better to provide prosecutors and courts with the discretion to apply open-textured offences to new manifestations of wrongs than it is to tolerate gaps in the law's protective scope simply in order to provide citizens with greater clarity on the limits to their obligations.[54] Yet, in few contexts could it be more important to guard against an authoritarian approach to criminal liability than in the case of political speech.[55]

To resolve these dilemmas, so far as false statements are concerned, the Law Commission has recently proposed replacing s 127(2)(a) and (b) of the 2003 Act—the false statement provisions—with the following offence, triable only summarily:

> [T]he defendant sent a communication that he or she knew to be false;
>
> (2) in sending the communication, the defendant intended to cause non-trivial emotional, psychological, or physical harm to a likely audience; and
>
> (3) the defendant sent the communication without reasonable excuse.
>
> (4) For the purposes of this offence, definitions are as follows:
>
> (a) a communication is an electronic communication, letter, or article; and
>
> (b) a likely audience is someone who, at the point at which the communication was sent by the defendant, was likely to see, hear, or otherwise encounter it.[56]

The offence is designed to rein in the scope of the false statement offence in the 2003 Act by (a) maintaining the concentration only on statements *known* to be false, and (b) narrowing the focus of what must be intended, by introducing a requirement that there be an intention, in sending the communication, to cause non-trivial harm to a likely audience. To provide extra flexibility, in coping with Art. 10 challenges (especially on the grounds of lack of proportionality), the offence will be subject to a defence of 'reasonable excuse'.[57] The Commission goes on to say:

> We mean for 'non-trivial emotional, psychological, or physical harm' to include, for example, distress and anxiety, but not annoyance or inconvenience which in our provisional view do not justify the imposition of a criminal sanction.[58]

[53] Law Commission, *Harmful Online Communications: The Criminal Offences* LCCP 248 (2020), paras 4.42–4.45.

[54] See Chapter 4.5.

[55] P. Petit, 'Criminalisation in Republican Theory', in R. A. Duff et al. (eds), *Criminalisation: The Political Morality of the Criminal Law* (Oxford University Press, 2014) 132, 138.

[56] Law Commission, n 52, para 6.32. See the discussion in Jeremy Horder, n 31, ch 3.

[57] In other cases, involving (say) threatening communications, the proposed offence would criminalize someone who, without lawful excuse, sends a message and where D foresees a risk that anyone 'likely' to see the message might suffer 'serious emotional distress'. The offence does not require proof that anyone was actually harmed.

[58] Law Commission, n 52, para 6.46.

This is a welcome narrowing of the scope of the communication offences in relation to false statements, although it has been argued that it does not go far enough. In a sensitive area for the criminal law, such as suppression of speech, it may be right to require proof that someone was in fact caused non-trivial harm: the mere intention to cause it is arguably not enough.[59]

Further Reading

Alisdair Gillespie, 'Obscene Conversations, the Internet and the Criminal Law' [2014] Crim LR 350

Article 19, *Law Commission Consultation on Reform of the Communications Offences* (December 2020), https://www.article19.org/wp-content/uploads/2020/12/UK-Law-Commission-response-Communications-Offences-December-22-Dec-2020.pdf

Jeremy Horder, *Criminal Fraud and Election Disinformation: Law and Politics* (Oxford University Press, 2022).

Law Commission, *Abusive and Offensive Online Communications: A Scoping Report* (Law Com No 381, 2018).

Law Commission, *Harmful Online Communications: The Criminal Offences* (2020) LCCP 248

Law Commission, *Intimate Image Abuse* (CP 253, 2021).

[59] See, for example, Art. 19, *Law Commission Consultation on Reform of the Communications Offences* (December 2020), https://www.article19.org/wp-content/uploads/2020/12/UK-Law-Commission-response-Communications-Offences-December-22-Dec-2020.pdf.