The Bar Council

Law reform essay competition 2025: highly commended – Yousif Shami

We have never had a Cheka, a Gestapo or a Stasi': the case for repealing section 127 of the Communications Act

Introduction

English law has traditionally protected free speech – imperative in a liberal democracy – but drawn the line at speech that is defamatory or calculated to provoke a breach of the peace.[1] In Sedley LJ's oft-quoted words in *Redmond-Bate v DPP*: 'Free speech includes not only the inoffensive but the irritating, the contentious, the eccentric, the heretical, the unwelcome and the provocative ... Freedom only to speak inoffensively is not worth having.'[2] These are undoubtedly fine words. But, as Lord Toulson said in a different case, 'fine words butter no parsnips.'[3]

It comes as a shock to many that sending nasty messages online can be a criminal offence in the UK. The principal offender, section 127 of the Communications Act 2003, has had a good workout in recent years. Famously, Paul Chambers, delayed at Doncaster Airport and frustrated at possibly not getting to see his girlfriend, was arrested for 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!!'.[4]

Chambers' prosecution in 2010 sparked a national debate, with his trial – dubbed the 'Twitter joke trial' – attracting widespread public support. His conviction was eventually quashed in 2012 after the High Court saw sense and conceded that 'a message which does not create fear or apprehension in those to whom it is communicated, or who may reasonably be expected to see it, falls outside [section 127]'.[5] In other words, it was a joke. A crass joke, but a joke nonetheless. But for every such high-profile case, there are thousands of others that fall under the radar. In 2023 alone, there were 12,183 arrests under section 127 – the equivalent of about 33 per day.[6]

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[1] *R v Central Independent Television* [1994] Fam 192, 203; *R v Shayler* [2002] UKHL 11 [21].
[2] [1999] 7 WLUK 495, 251.
[3] 3 *R (Guardian News and Media Ltd) v City of Westminster Magistrates' Court* [2012] EWCA Civ 420 [1].
[4] *Chambers v DPP* [2012] EWHC 2157 (Admin
[5] ibid [30].
[6] Charlie Parker, 'Police make 30 arrests a day for offensive online messages' *The Times* (4 April 2025) <https://www.thetimes.com/uk/crime/article/police-make-30-arrests-a-day-for-offensive-online-messages-zbv886tqf> accessed 23 August 2025.

Its broadness, subjectivity, and paperchase of clarifications and guidelines all positively invite misunderstanding, such that its supporters and critics cannot even agree on when it applies. Hence, in February 2022, on the recommendation of the Law Commission,[7] the government proposed scrapping section 127,[8] before shortly abandoning the plan, insisting it was not a threat to free speech.[9] This essay seeks to revive that proposal, arguing for the repeal of section 127 on the basis that it has been outpaced by technological change and is ill-suited to addressing online harms, stifling perfectly legitimate discourse on the assumption that it is morally and legally reprehensible because it causes offence.

The current provision

Section 127 of the Communications Act 2003 makes it an offence to send, by means of a 'public electronic communications network' (PECN), a message that is 'grossly offensive or of an indecent, obscene or menacing character'.[10] None of these terms is defined in the Act itself, and the courts have held that they are ordinary English words that 'do not bear some special meaning'.[11] This is clearly a very broad remit, and there is considerable ambiguity in the wording – what makes something 'grossly offensive' as opposed to merely 'offensive'? The best way to gauge what falls within the scope of section 127 is to look at some past cases:

- Joseph Kelly: sentenced to 150 hours of community service for a tweet about Captain Tom Moore, a British Army officer who raised more than £32 million for the NHS by walking 100 laps of his garden before his 100th birthday. On 3 February 2021, the day after Moore died, Kelly tweeted: 'The only good Brit soldier is a deed one, burn auld fella, buuuuurn'.[12]
- Matthew Woods: sentenced to 12 weeks' imprisonment for posting jokes on Facebook about missing children April Jones and Madeleine McCann. Woods' posts included: 'Who in their right mind would abduct a ginger kid?' and 'I woke up this morning in the back of a transit van with two beautiful little girls, I found April in a hopeless place.'[13]
- Isabella Sorley: sentenced to 12 weeks' imprisonment and fined £800 for

[7] Law Commission, *Modernising Communications Offences:* A final report (Law Com No 399, 2021).
[8] Department for Digital, Culture, Media and Sport, 'Update on the Law Commission's Review of Modernising Communications Offences' (4 February 2022) <https://questions-statements.parliament.uk/written-statements/detail/2022-02-04/hcws590> accessed 23 August 2025
[9] HC Deb 5 December 2022, vol 724, col 46.
[10] Communications Act 2003, s 127(1)(a).
[11] *Connolly v DPP* [2007] EWHC 237 (Admin) [9]-[10]; *R v Anderson* [1972] 1 QB 304.
[12] Matt Mathers, 'Man who sent "grossly offensive tweet" about fundraising hero avoids jail' *The Independent* (30 March 2022) <https://www.independent.co.uk/news/uk/crime/tom-moore-man-tweet-jail-sentence-b2026696.html> accessed 23 August 2025
[13] Steven Morris and Dan Sabbagh, 'April Jones: Matthew Woods jailed over explicit Facebook comments' *The Guardian* (8 October 2012) <https://www.theguardian.com/uk/2012/oct/08/april-jones-matthew-woods-jailed> accessed 23 August 2025.

tweeting at feminist writer Caroline Criado-Perez and Labour MP Stella Creasy, who were campaigning for the UK's next £10 banknote to feature a woman. Sorley's tweets included: 'Kill yourself before I do; rape is the last of your worries; I've just got out of prison and would happily do more time to see you berried'.[14]

- Daniel Thomas: arrested for a tweet about UK Olympic divers Tom Daley and Pete Waterfield. Thomas tweeted: 'If there is any consolation for finishing fourth at least Daley and Waterfield can go and bum each other #teamHIV.' Ultimately, no charges were brought against Thomas, with Keir Starmer, then Director of Public Prosecutions (DPP), concluding that the tweet was only intended to be seen by friends and family, not Daley and Waterfield.[15]

- Azhar Ahmed: sentenced to 240 hours of community service and fined £300 for a Facebook post about six British soldiers killed in Afghanistan. Ahmed wrote: 'People gassin about the deaths of soldiers! What about the innocent familys who have been brutally killed ... Your enemy's were the Taliban not innocent harmless familys. All soldiers should DIE & go to HELL!'.[16]

These examples give a broad idea of the kinds of messages that tend to be prosecuted under section 127. There is no requirement of proof of receipt; the offence is committed when the message is sent,[17] and the test is 'whether a message is couched in terms liable to cause gross offence to those to whom it relates', taking account of its context and all relevant circumstances.[18] Crown Prosecution Service guidelines note that prosecutors should only proceed with charging if they are satisfied that the communication in question is more than offensive, shocking, or disturbing; satirical, iconoclastic, or rude comment; or the expression of an unpopular opinion or 'banter'[19]– factors to be assessed with reference to 'contemporary standards ... the standards of an open and just multi-racial society'.[20]

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[14] Andrew Griffin, 'Jailed troll sorry for Caroline Criado-Perez death threat tweets' *The Independent* (17 November 2014) https://www.independent.co.uk/tech/jailed-troll-sorry-for-caroline-criadoperez-death-threat-tweets-9864611.html > accessed 23 August 2025.

[15] Martin Hickman, 'Chief prosecutor reveals lenient stance after footballer is cleared of abusing Tom Daley' *The Independent* (20 September 2012) <https://www.independent.co.uk/news/uk/crime/chief-prosecutor-reveals-lenient-stance-after-footballer-is-cleared-of-abusing-tom-daley-8160648.html> accessed 23 August 2025.

[16] Jerome Taylor, 'Azhar Ahmed, a tasteless Facebook update, and more evidence of Britain's terrifying censorship' *The Independent* (10 October 2012) <https://www.independent.co.uk/voices/comment/azhar-ahmed-a-tasteless-facebook-update-and-more-evidence-of-britain-s-terrifying-new-censorship-8204212.html> accessed 23 August 2025.

[17] *DPP v Collins* [2006] UKHL 40 [8].

[18] ibid [9].

[19] Crown Prosecution Service, 'Communications Offences' (updated 24 March 2025) <https://www.cps.gov.uk/legal-guidance/communications-offences> accessed 23 August 2025.

[20] *Collins* (n 17) [9].

An analogue law in a digital age

A small proportion of online messages are truly nasty. There is a strong case for carefully targeting the worst examples. The difficulty lies in doing so without inadvertently criminalising swathes of other messages. Those targeted must therefore be precisely defined and identifiable. This is where section 127 falls down. Some of the messages it captures – such as incitement to violence, stalking, and harassment – are obviously unacceptable and already unlawful under existing legislation.[21] They are defined by law and can be identified with a fair degree of accuracy.

The real vice of section 127 is that it is not limited to messages capable of being defined and identified. Instead, it targets messages based on highly vague categories: 'grossly offensive', 'indecent', 'obscene', and 'menacing'. The range of messages caught by these terms is almost infinite, and the test is almost entirely subjective. Many things that are anodyne to the overwhelming majority of users may be 'grossly offensive' to particularly sensitive, fearful, or vulnerable minorities – or be portrayed as such by manipulative pressure groups. At a time when even universities are warning adult students against exposure to material such as Chaucer's rumbustious references to sex,[22] historical or literary depictions of slavery and other forms of cruelty,[23] and, ironically, Orwell's *1984*,[24] the harmful propensity of any message is a matter of opinion. It will vary from one internet user to the next.

Recent section 127 cases, however, have gone further, extending its application not just to public but also to private communications. However shocking the above-listed cases may be, there is at least a degree of logic in section 127's application: in each, the messages were available for public viewing and liable to cause gross offence. That stands in marked contrast to cases such as *Cobban v DPP*,[25] in which six former Metropolitan Police officers were convicted for sending 'racist, misogynistic, sexist, homophobic, and disablist' messages in a private WhatsApp group.[26]

There is no question that messages of this kind would make for grim, deeply unpleasant reading, and had they still been serving officers, there would have been a strong case for the Metropolitan Police to suspend or expel them. But it was accepted ~~that the messages in questi~~on were sent within a closed group, were never intended for wider circulation or expected to be read by the types of persons or communities referred to negatively in them, and none of the consenting recipients found the

[21] Public Order Act 1986, ss (1)-(4); Protection from Harassment Act 1997, ss (2)-(2A).
[22] Frankie Vetch, 'The Canterbury Tales given trigger warning over "expressions of Christian faith"' *The Telegraph* (13 October 2024) <https://www.telegraph.co.uk/news/2024/10/13/canterbury-tales-trigger-warning-christian-faith-chaucer/> accessed 23 August 2025.
[23] James Beal, 'Exeter University trigger warning for "problematic" Huckleberry Finn' *The Times* (25 August 2022) <https://www.thetimes.com/culture/books/article/exeter-university-trigger-warning-for-problematic-huckleberry-finn-p0kmv32g9> accessed 23 August 2025.
[24] Brian McGleenon, 'George Orwell's 1984 slapped with "offensive" warning as woke madness hits new heights' *Daily Express* (23 January 2022) <https://www.express.co.uk/news/uk/1554489/George-Orwell-1984-offensive-warning-university-northampton-woke> accessed 23 August 2025.
[25] [2024] EWHC 1908 (Admin).
[26] ibid [1].

messages offensive.[27] Remarkably, the sentencing judge found the fact that the officers had conversed in private not mitigating, but aggravating; in being covert, the judge said, their messages were even more damaging than if they had been made in public.[28] Pursue that logic to its conclusion and it risks pushing the boundaries of the law into troubling levels of state intrusion into private messages.

Recognising this issue, the Divisional Court sought to confine its decision to the facts, placing particular emphasis on the status of the senders as officers.[29] However, any interpretation that a PECN – defined as 'a service provided and funded by the public for the benefit of the public for the transmission of communications'[30] – extends to private social media or even end-to-end encrypted messaging (privately funded and run on private servers) is untenable and illustrates classic legislative mission creep. Some may argue that, because the internet allows one-to-many communication, messages sent there can be more damaging and should therefore be caught by section 127. What is beyond doubt, however, is that such an application is the result of historical accident, not conscious legislative design.

As narrated by Lord Bingham in *DPP v Collins*, the genealogy of section 127 can be traced back to at least the Post Office (Amendment) Act 1935, which was designed to prevent harassment via telephone – a one-to-one, intentional, and direct method of communication.[31] In fact, the wording of section 127 is drawn almost verbatim from that Act,[32] with Lord Bingham emphasising that section 127's purpose was 'not to protect people against receipt of unsolicited messages which they may find seriously objectionable.'[33] However, when the legislation was updated by the Telecommunications Act 1984 to cover emerging 'telecommunication systems',[34] the same standards were applied despite fundamentally different methods of communication.

In other words, section 127's predecessors originated in a time of state monopoly over post and telephone, when it would have been impossible for an ordinary person using public facilities to broadcast their views. This remained true even at the time of the 1984 Act, as the internet was not publicly available in the UK until the early 1990s.[35] Whilst earlier prosecutors may have preferred a relatively low threshold for what constituted 'grossly offensive' to prevent yobs from making obscene calls to female telephone

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[27] ibid [2].
[28] ibid [125].
[29] ibid [93]-[99].
[30] *Collins* (n 17) [7].
[31] ibid [6].
[32] Post Office (Amendment) Act 1935, s 10(2)(a).
[33] *Collins* (n 17) [7].
[34] Telecommunications Act 1984, s 43(1)(a).
[35] Pipex, the UK's first internet service provider, began offering internet access in 1992. See Rosie Murray-West, 'From 1876 to today: how the UK got connected' *The Telegraph* (28 October 2016) <https://www.telegraph.co.uk/technology/connecting-britain/timeline-how-uk-got-connected/> accessed 23 August 2025.

operators,[36] those standards are now outdated when applied to the internet, which allows messages to be broadcast instantly into the world. At last count, 70 million messages are sent via WhatsApp and Facebook every minute, and more than 500 hours of content are uploaded to YouTube every minute.[37] It is therefore wrong to assume that legislators in the 1980s, let alone 1930s, could have predicted, or even imagined, the extent to which the internet has transformed modern communication.

Do we really need it?

During the debate on the 2013 Defamation Bill, Jeremy Browne, then Minister of State for Crime Prevention, stated:

> The Government are not seeking to criminalise bad manners, unkind comments, or idiotic views. Social media sites are not, and cannot, be an opportunity for entirely anonymous and consequence-free posting of comments that would be unacceptable in any other context ... An individual should be charged and prosecuted for the offence they commit, irrespective of whether it happens in the street or in cyberspace.[38]

This is the hallowed mantra that what is illegal offline should also be illegal online. But if that principle is to be taken seriously, the converse must also apply: if it is not illegal offline, it should not be illegal online. Section 127 clearly fails that test, as it captures more than comparable offline offences. Cases like Azhar Ahmed's are particularly troubling in this regard because the sentiments he attempted to convey, whilst undoubtedly ill-expressed and distastefully put, were of a distinctly political nature: there were no racial undertones, no attempted unpleasant humour, nor any language that could reasonably be interpreted as incitement to violence.
Ahmed had tried, albeit ineloquently, to make the point that the deaths of soldiers had received a disproportionate amount of attention compared with the deaths of civilians.

Admittedly, he did so in a crude and offensive way, but in a democratic society, political speech is given particular weight and held to a 'very high threshold',[39] reflecting the law's expectation that recipients of such communications have a 'thicker skin'.[40] Strasbourg jurisprudence identifies a hierarchy of speech, with political speech at its apex.[41] Indeed, the point Ahmed was attempting to make is one often raised in both online and offline political commentary. Similarly, would anyone suggest that,

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[36] HL Deb 19 March 1935, vol 96, col 165 (Lord Templemore).

[37] Claire Jenik, 'Here's what happens every minute on the internet' (*World Economic Forum*, 5 August 2021) <https://www.weforum.org/stories/2021/08/one-minute-internet-web-social-media-technology-online/> accessed 23 August 2023.

[38] HC Deb 17 September 2012, vol 550, cols 759-760.

[39] *R v Casserly* [2024] EWCA Crim 25 [52]; *Connolly* (n 11) [14]; R *(ProLife Alliance)* v BBC [2003] UKHL 23 [6].

[40] *Casserly* (n 39).

[41] ibid [48].

had Daniel Thomas or Matthew Woods made their inappropriate jokes to friends down at the pub rather than online, the police ought to have been called to arrest them? The implications for satire and comedy are particularly concerning here, as others have already noted the similarities between Woods' comments and those made by comedians such as Frankie Boyle.[42] Popular and well-received views do not need protection: no one is likely to report those preaching to the choir. It is precisely the ability to express unpopular or unwelcome views that makes free speech such a vital element of the 'pluralism indissociable from a democratic society'[43] – an element that section 127 threatens.

In December 2012, following Paul Chambers' successful appeal, the DPP issued interim guidelines aimed at striking a balance between free speech and criminality, clarifying when online communications may warrant prosecution: only communications constituting credible threats of violence, stalking, or harassment (such as aggressive 'trolling') that specifically target an individual or individuals, or breach a court order (for example, one protecting the identity of a sexual offence victim), would be prosecuted.[44] Revised guidelines were issued in June 2013, directing prosecutors to consider whether a message was aggravated by reference to race, religion, or other protected characteristics; whether it breached existing laws on harassment or stalking; and to take into account the age and maturity of the suspect.[45] The revisions also clarified that prosecution was unlikely where the author expressed genuine remorse, swift and effective action was taken to remove the content, or the message was not intended for a wide audience. These guidelines, however welcome, are no substitute for properly formulated legislation. Indeed, little has changed since their publication and, in practice, what is deemed 'grossly offensive' remains too often in the eye of the beholding magistrate.

Following the arrest of a man who set up a Facebook group paying tribute to murderer Dale Cregan, it was suggested that 'it will always be hard for the police to tackle the decline in civility that seems to come the moment you hand people a computer, the internet and a darkened bedroom.'[46] However true this may be, it misses the point.

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[42] Adam Wagner, 'Twelve weeks in prison for sick jokes on Facebook? Really?' (*UK Human Rights Blog*, 9 October 2012) <https://ukhumanrightsblog.com/2012/10/09/twelve-weeks-in-prison-for-sick-jokes-really/> accessed 23 August 2025

[43] *Connolly* (n 11) [35].

[44] Crown Prosecution Service, 'DPP launches public consultation on prosecutions involving social media communications' (19 December 2012) <https://www.cps.gov.uk/news/press_releases/dpp_launches_public_consultation_on_prosecutions_involving_social_media_communications/> accessed 23 August 2025.

[45] David Barrett, 'Offensive online posts to escape prosecution if writers apologise, say new guidelines' *The Telegraph* (20 June 2013) <https://www.telegraph.co.uk/technology/social-media/10132657/Offensive-online-posts-to-escape-prosecution-if-writers-apologise-say-new-guidelines.html> accessed 23 August 2025.

[46] Dan Sabbagh, 'Can Facebook and Twitter do more to tackle trolling?' *The Guardian* (20 September

That should categorically not be the role of the criminal law. The law should concern itself only with messages sufficiently serious to be criminal – such as incitement to violence, stalking, and harassment – not mere incivility. There already exists a range of provisions capable of responding adequately to serious online harms. Isabella Sorley's tweets, for example, would also likely have constituted threatening communications under section 181 of the Online Safety Act 2023, which makes it an offence to send a message conveying a threat of death or rape.

Care must be taken that the (perhaps entirely justified) feelings of revulsion and disgust elicited by messages in section 127 cases do not lead us to conflate speech that is unpleasant, stupid, or in poor taste with speech that should rightly be considered criminal. Yet that is exactly what section 127 does. The fact is, on the internet, just as in wider society, some people are offensive and unpleasant. Of course, we would all prefer that people were considerate and respectful online, but, at the same time, they should be free not to be. Such speech may, by all means, be dismissed, ridiculed, or debated – but the law has no place criminalising it.

Conclusion

In *R v Central Independent Television*, Lord Hoffmann observed:

> A freedom which is restricted to what judges think to be responsible or in the public interest is no freedom. Freedom means the right to publish things which government and judges, however well motivated, think should not be published. It means the right to say things which 'right-thinking people' regard as dangerous or irresponsible. This freedom is subject only to clearly defined exceptions laid down by common law or statute.[47]

This is clearly right, but section 127 is anything but 'clearly defined'. It is worryingly vague and catch-all, representing an unnecessary and chilling encroachment on free speech, quite apart from the drain on police and court time and resources. The increasing number of prosecutions under this provision should be cause for serious concern,[48] while media coverage of individual cases puts this analysis into context.

Ultimately, it is a tale as old as time (or at least as old as electricity): technology has advanced faster than the law can keep up. The ability to reach a potentially global audience from a phone or laptop, at the click of a button, means that speech once confined to a few is now aired at large, rendering section 127 obsolete. Its repeal would represent a desirable, practical, and useful step towards safeguarding free speech. Those who incite violence or engage in stalking or harassment online should attract the attention of the law – and existing legislation already provides coherent

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2012) <https://www.theguardian.com/media/2012/sep/20/facebook-twitter-trolling> accessed 23 August 2025

[47] *Central Independent Television* (n 1).

[48] See (n 7). 12,183 arrests were made in 2023 under section 127, up from 7,734 in 2019.

and adequate protection from such harms. But to criminalise someone for making a 'joke'? Now that really is offensive: 'In this country we have never had a Cheka, a Gestapo or a Stasi. We have never lived in an Orwellian society.'[49]

Word count: 2,992

[49] *R (Miller) v College of Policing* [2020] EWHC 225 (Admin) [259].