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Harmful comments on social media

Kathryn Chick

Abstract

Social media has become a breeding ground for malicious, abusive, and offensive communications. These comments when posted online can contribute to or cause, *inter alia*, depression, anxiety, and isolation. However, where communications have caused harm to others, the restrictive guidelines issued by the Crown Prosecution Service can make it difficult to engage the law and prosecute the communicator. The justifications for the high threshold set are largely associated with protecting the right to freedom of expression. This article critically analyses these guidelines, arguing that too much protection is afforded to freedom of expression at the cost of many harmful comments going unchallenged. It is argued that harmful speech posted online should not warrant the same protections as other forms of speech such as political and intellectual speech. Although not all online comments result in harm, and while there are non-legal means to deal with unpleasant comments, it should be easier for those genuinely harmed to take legal action if necessary.

1 Introduction

Social media is considered to be one of the greatest revolutions since television and is often praised for the benefits it has brought to society and to individual users.¹ Its popularity stems from the ‘sense of membership, commitment and reciprocity’² that it offers, as well as its

¹ Gavin Sutter, ‘Nothing New Under the Sun: Old Fears and New Media’ (2000) 8 *International Journal of Law and Information Technology* 338.

² Tony Fitzpatrick, ‘Critical Cyberpolicy: Network Technologies, Massless Citizens, Virtual Rights’ (2000) 20(3) *Critical Social Policy* 375, 382.

global reach, which allows access to information and ideas that were previously unobtainable.³ However, social media has been recognised as a ‘double-edged sword’.⁴ Despite the positive attributes of digital communications, there are drawbacks, including harms that can be caused to people in a way that offline communications cannot.

When harmful comments have been posted online, there are two Acts under which an offence may have been committed: the Malicious Communications Act 1988 (MCA) and the Communications Act 2003 (CA). Under section 1 MCA, it is an offence to send to another person an electronic communication conveying a message that is indecent, grossly offensive, threatening or contains information that is known or believed to be false. The sender’s purpose, or one of their purposes, in sending it must have been to cause distress or anxiety to the recipient or to any person to whom they intended its content to be communicated.⁵ Under section 127 CA, a person is guilty of an offence if he ‘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’. It is also an offence under this provision to send a message known to be false using a public, electronic communications network for the purpose of causing annoyance, inconvenience or needless anxiety to another person.⁶

However, before a person can be prosecuted under the MCA or CA, the Crown Prosecution Service (CPS) must decide whether to proceed with the case. In order to prevent inappropriate or unmeritorious prosecutions, the CPS established guidelines to regularise its treatment of these cases.⁷ This article focuses on the CPS Guidelines on

³ Peter Coe, ‘The Social Media Paradox: An Intersection with Freedom of Expression and the Criminal Law’ [2015] *Information & Communications Technology Law* 16.

⁴ Maya Hertig Randall, ‘Freedom of Expression in the Internet’ (2016) 26 *Swiss Review of International and European Law* 235, 247.

⁵ MCA 1988, s 1(b).

⁶ CA 2003, s 127(2).

⁷ Andrew Ashworth and Mike Redmayne, *The Criminal Process* (4th edn, OUP 2010) ch 7.

Prosecuting Cases Involving Communications Sent via Social Media (CPS Guidelines or the Guidelines).⁸

The CPS Guidelines impose a high threshold for prosecuting cases under section 1 MCA or section 127 CA, which has been justified because of the importance of safeguarding the right to freedom of expression. Freedom of expression is a human right protected under Article 10 of the European Convention of Human Rights, incorporated into domestic law via the Human Rights Act 1998. Article 10 provides that everyone has the freedom to hold opinions and receive and impart information and ideas without interference by public authority.⁹ It is a qualified right which can be restricted where prescribed by law and where such restrictions are necessary in a democratic society for the protection of *inter alia* the reputation or rights of others.¹⁰ As the CPS affords significant protection to freedom of expression, prosecution is rendered unlikely in many circumstances, resulting in the potential for some meritorious cases going unchallenged.

This article discusses whether the CPS Guidelines have struck the right balance between freedom of expression and protection from harmful communications on social media. Section 1 explains what the CPS Guidelines set out and what constitutes ‘harmful comments’ online. Section 2 critically analyses the CPS Guidelines, and raises issues with the current balance between freedom of expression and protection from harm. Section 3 demonstrates that the justifications for freedom of expression do not apply to harmful comments posted online and therefore should not be given such significant weight in the CPS Guidelines. Section 4 considers why freedom of expression on social media can be more harmful than face-to-face communication,

⁸ Director of Public Prosecutions, ‘Guidelines on Prosecuting Cases Involving Communications Sent Via Social Media’ (2013) CPS <http://data.parliament.uk/DepositedPapers/Files/DEP2013-1025/social_media_guidelines.pdf> accessed 15 October 2018.

⁹ Human Rights Act 1998, sch 1, art 10(1).

¹⁰ *ibid* art 10(2).

explaining why protection of harm should be given more weight than freedom of expression in the CPS Guidelines.

2 The definition of harm and CPS guidelines

The CPS Guidelines for prosecuting harmful communications that have been posted on social media centre around a notion of *harmful* communications. This section explores the legal definition of harmful communications and their treatment by the Guidelines.

2.1 Harm

Leading academic Joel Feinberg defines harmful conduct as that which interferes with a person's interests.¹¹ Feinberg believes that a person's most important interests are their 'welfare interests,' which include *inter alia*, physical and psychological wellbeing, emotional stability and the ability to engage in normal social intercourse.¹² Some argue that online communication could not possibly lead to harm, and that the potential harm flowing from speech is less significant than the danger from action,¹³ or that speech can only be harmful if it leads to action which causes harm, such as inciting violence.¹⁴ As Feinberg recognised, various experiences can cause distress, offence or irritation without precluding any welfare interests.¹⁵ Wounded pride, hurt feelings, anger, embarrassment, and shame are all feelings of the moment that will pass, and cannot be classed as harms.¹⁶

It is accepted that comments made to an individual online can cause temporary emotions, which need not be dealt with by law as they are not necessarily harmful. However, if one becomes so consumed with

¹¹ Joel Feinberg, *The Moral Limits of the Criminal Law Volume 1: Harm to Others* (OUP 1987) ch 1.

¹² *ibid* 37.

¹³ Martin H. Redish, 'Self-Realisation, Democracy, and Freedom of Expression: A Reply to Professor Baker' (1981–82) 130 *University of Pennsylvania Law Review* 678.

¹⁴ K.C. O'Rourke, *John Stewart Mill and Freedom of Expression: The Genesis of a Theory* (Routledge 2001).

¹⁵ Feinberg (n 11).

¹⁶ *ibid*.

feelings of offence or otherwise, to the extent that their welfare interests have been precluded, that ought to be considered harmful and the law should intervene.¹⁷ Thus, for the purposes of this article, harmful comments are those posted online that have the effect of precluding a person's welfare interests.

2.2 CPS guidelines

To decide whether online comments should be prosecuted, the CPS follows its two-stage Full Code Test. First is the evidential stage, which requires there to be enough evidence to provide a realistic prospect of conviction.¹⁸ If a case does not have sufficient evidence, the prosecution must not go ahead.¹⁹ Second, the prosecution must be necessary in the public interest. For this stage, things to consider include the seriousness of the offence committed, the culpability of the suspect, the circumstances of and the harm caused to the victim, the suspect's age and maturity at the time of the offence, the impact on the community, and whether prosecution is a proportionate response.²⁰ If these stages are satisfied, then a prosecution can commence.

As regards communications sent via social media, the CPS has categorised four different types of communication that could be prosecuted:

1. communications that may constitute credible threats of violence or damage to property;
2. communications that specifically target an individual(s) which may constitute stalking or harassment;
3. communications that may be a breach of a court order; or
4. communications that do not fall into any of the categories

¹⁷ *ibid.*

¹⁸ CPS, 'About CPS' <<https://www.cps.gov.uk/about-cps>> accessed April 2019.

¹⁹ *ibid.*

²⁰ CPS, 'The Code for Crown Prosecutors' <<https://www.cps.gov.uk/publication/code-crown-prosecutors>> accessed April 2019, para 4.8.

above, which may be considered grossly offensive, indecent, obscene or false.²¹

As this article discusses harmful communication that could be prosecuted under the MCA or CA, it focuses on the fourth category.

The CPS Guidelines dictate that at the evidential stage, cases that fall under this fourth category are to be subjected to a ‘high threshold’ and that ‘prosecution is unlikely to be in the public interest.’²² This implies that the CPS has little concern for the harm that certain online comments can cause. This high threshold is justified on the basis that a lower threshold would give rise to a floodgate of trivial cases,²³ and would create the potential for a chilling effect on freedom of expression. Prosecutors are advised to ‘exercise considerable caution before bringing charges’ under section 1 MCA and section 127 CA.²⁴ Furthermore, the CPS states that ‘the age and maturity of suspects should be given significant weight, particularly if they are under the age of 18’.²⁵ Therefore, the CPS affords significant protection to freedom of expression and it is unlikely that many cases under the fourth category will satisfy the Full Code Test.

However, this article argues that there is a marked difference between expressing views strongly and deliberately setting out to cause harm.²⁶ Too much weight has been given in favour of freedom of expression, leading to harmful comments going unchallenged.

²¹ Director of Public Prosecutions, ‘Guidelines on Prosecuting Cases Involving Communications Sent Via Social Media’ (2013) CPS <http://data.parliament.uk/DepositedPapers/Files/DEP2013-1025/social_media_guidelines.pdf> accessed October 2018.

²² *ibid* para 13.

²³ *ibid* para 33.

²⁴ *ibid* para 34.

²⁵ *ibid* para 46.

²⁶ Graeme Broadbent, ‘Malicious Communications Act 1988: Human Rights’ (2007) 71 *Journal of Criminal Law* 288.

3 Justifying the current CPS guidelines

This section interrogates the justifications put forward by the CPS in support of their guidelines. It questions whether these justifications warrant the current restrictive policy adopted *vis-à-vis* prosecuting harmful communications.

3.1 The floodgate argument

The CPS Guidelines justify the high threshold for prosecuting alleged offences under section 1 MCA or section 127 CA on the basis that to do otherwise would lead to a flood of cases due to the millions of messages sent on social media every day.²⁷ The floodgate argument is the notion that certain cases should not be prosecuted because to do so would ‘swamp the courts with [future] litigation.’²⁸ Undoubtedly, not all instances of unpleasant expression online have caused the readers harm, and they should not all be taken to court.²⁹

However, it is not inevitable that a lower threshold for prosecution would lead to a floodgate of cases. There are avenues other than court which are used to resolving issues on social media, such as blocking or reporting. Blocking someone often prohibits that person from contacting you in any way or viewing your posts,³⁰ and reporting comments to the social networking site provides a channel for possible removal.³¹ These are widely used tools, as 46% of girls aged 11–21 would report offensive behaviour online to the social media site.³²

²⁷ Director of Public Prosecutions (n 21) para 33.

²⁸ Ronald Dworkin, *Taking Rights Seriously* (Duckworth 1977) 100.

²⁹ HM Government, *Internet Safety Survey Green Paper* (2017).

³⁰ Facebook, ‘Unfriending or Blocking Someone’

<https://www.facebook.com/help/1000976436606344?helpref=hc_global_nav> accessed April 2019.

³¹ Facebook, ‘How to Report Something’ <<https://en-gb.facebook.com/help/263149623790594/>> accessed April 2019.

³² Girlguiding, ‘Girls’ Attitudes Survey’ (2018)

<<https://www.girlguiding.org.uk/globalassets/docs-and-resources/research-and-campaigns/girls-attitudes-survey-2018.pdf>> accessed April 2019, 4.

Therefore, it cannot be claimed with certainty that a lower threshold would lead to a flood of cases.

Nonetheless, to deny prosecution on this basis seems unfair. As noted by Gur, the floodgate argument ignores the conduct of the alleged and ignores the harm caused to the victim.³³ It also ignores the merits of a case.³⁴ Instances of harmful communication could go unchallenged as a result of this. The floodgate principle underpinning the CPS Guidelines fails to adequately consider the potential for harm to be suffered by online readers.

3.2 Chilling effect on speech

The CPS Guidelines stress that a lower threshold for prosecuting cases under section 1 MCA and section 127 CA could lead to a potential chilling effect on speech. Coe suggests that if speech online is not protected, it could impede the dissemination of information.³⁵ Similarly, Stein argues that users may stop expressing their opinions and beliefs online or may even stop using the sites altogether for fear of being prosecuted.³⁶

However, these arguments are flawed. As social media has become a key instrument for communication today, it is unlikely that people would stop using it altogether.³⁷ Furthermore, social media exists to encourage people to become more open and connected with the world and to share ideas with others.³⁸ It would be a positive outcome if

³³ Noam Gur, 'Ronald Dworkin and the Curious Case of the Floodgates Argument' (2018) 31(2) *Canadian Journal of Law & Jurisprudence* 323.

³⁴ *ibid.*

³⁵ Coe (n 3).

³⁶ Bethany Stein, 'A Bland Interpretation: Why a Facebook Like should be Protected First Amendment Speech' (2014) 44 *Seton Hall Law Review* 1255.

³⁷ Ian J Lloyd, *Information Technology Law* (8th edn, OUP 2017).

³⁸ Kathleen Chaykowski, 'Mark Zuckerberg Gives Facebook A New Mission' (*Forbes*, 22 June 2017)

<<https://www.forbes.com/sites/kathleenchaykowski/2017/06/22/mark-zuckerberg-gives-facebook-a-new-mission/#c5891b91343b>> accessed

harmful comments online were deterred.

Expression has certainly been restricted in other areas of law. For instance, the *ProLife Alliance*³⁹ case concerned the BBC refusing to show a broadcast on television because it contained graphic images of abortion. The House of Lords claimed that the reference to ‘rights of others’ under Article 10(2) is capable of including the sense of outrage felt by the public who ‘in the privacy of their own homes had turned on the television ... and been confronted by gratuitously offensive material.’⁴⁰ Thus, in other areas of law, speech or other forms of expression which are likely to have a negative impact on the recipient have been deterred by the threat of punishment. It therefore follows that comments posted on social media that have harmful effects on the reader should also be deterred. The CPS Guidelines ought to lower the threshold and have less concern for the chilling effect on speech and more consideration for victims of harmful online communications.

3.3 Public interest

The CPS Guidelines state that comments posted on social media are unlikely to be in the public interest. In fact, the Law Commission noted that a significant proportion of prosecutions under section 1 MCA and section 127 CA are linked to communications targeting high-profile figures.⁴¹ Recently, there has been an increase in Members of Parliament (MPs) receiving harmful comments on social media. For example, in 2018 MP Jess Phillips received over 600 rape threats on Twitter.⁴² Whilst these cases are rightly being prosecuted, the CPS is wrong to consider that mainly cases involving victims in the public eye

March 2019.

³⁹ *R (ProLife Alliance) v British Broadcasting Corporation* [2003] UKHL 23.

⁴⁰ *ibid* [91].

⁴¹ Law Commission, *Abusive and Offensive Online Communications: A Scoping Report* (Law Com No 381, 2018) [5.74].

⁴² Kevin Rawlinson, ‘Labour MP Calls for End to Online Anonymity After 600 Rape Threats’ *The Guardian* (London, 2018)

<<https://www.theguardian.com/society/2018/jun/11/labour-mp-jess-phillips-calls-for-end-to-online-anonymity-after-600-threats>> accessed 5 March 2020.

are worthy of prosecution. With 88% of people in Great Britain online,⁴³ anyone has the potential to be harmed on social media,⁴⁴ not just public figures.

Significant harm can be caused to victims by online comments, and it should be a matter of public interest to protect these victims, no matter who they are.⁴⁵ Certain comments are capable of causing psychological, emotional, and social harm, which may increase feelings of depression, isolation, and anxiety.⁴⁶ In adults this can cause them to miss work;⁴⁷ likewise, children might stop attending school.⁴⁸ This could have long-lasting impacts on an individual as it could affect their livelihood or education.⁴⁹ The psychological impacts of harmful online comments can be so profound that people as young as 12 years old have committed suicide following such incidents.⁵⁰ This demonstrates just how serious an impact harmful online comments can have on a victim's mental wellbeing.⁵¹

It follows that the CPS is wrong to claim that prosecution is unlikely to

⁴³ Office for National Statistics, 'Adults' Media Use and Attitudes Report' [2018] <https://www.ofcom.org.uk/__data/assets/pdf_file/0011/113222/Adults-Media-Use-and-Attitudes-Report-2018.pdf> accessed April 2019, 109.

⁴⁴ HM Government (n 29).

⁴⁵ Krupa Patel, 'Cyberbullying: What's the Status in England?' (2012) 13 San Diego International Law Journal 589.

⁴⁶ Cybersmile, 'How Is Cyberbullying Different from Traditional Bullying?' (2014) <<https://www.cybersmile.org/blog/how-is-cyberbullying-different-from-traditional-bullying>> accessed February 2019.

⁴⁷ Robin Kowalski and others, 'Bullying and Cyberbullying in Adulthood and the Workplace' (2018) 158(1) Journal of Social Psychology 64.

⁴⁸ Patel (n 45).

⁴⁹ Sally Kift and others, 'Cyberbullying in Social Networking Sites and Blogs: Legal Issues for Young People and Schools' (2009) 20(2) Journal of Law, Information and Science 60.

⁵⁰ Cybersmile, '12-Year-Old Cyberbullying Victim Posted RIP on Social Media Before Taking Her Own Life' (Cybersmile 2019) <<https://www.cybersmile.org/news/12-year-old-cyberbullying-victim-posted-rip-on-social-media-before-taking-her-own-life>> accessed April 2019.

⁵¹ Patel (n 45) 594.

be in the public interest as harms flowing from harmful comments can be catastrophic. It should be considered a matter of public interest to ensure that social media is not used to harm others and that, where harm has been caused, prosecution is available.

3.4 Age of the sender

The CPS Guidelines state that significant weight should be given to the age and maturity of the sender, particularly those under the age of eighteen. This is justified on the grounds that ‘children may not appreciate the potential harm and seriousness of their communications’.⁵² Thus, the CPS has tilted the scales further in favour of the rights of young persons to freedom of expression. However, it is contended that young people should be held responsible where their online comments have intentionally caused harm.

The age of criminal responsibility in England and Wales is 10,⁵³ and therefore when contemplating whether to prosecute a young person between the ages of 10 and 18, the CPS ought to recognise their capability to accept criminal responsibility for their actions. It is accepted that many people under 18 will send messages online that are not intended to harm the recipient and that merely cause them to feel temporary emotions of sadness, embarrassment or shame *inter alia*. As previously argued, this sort of speech should not be prosecuted. However, under 18s are capable of intending to cause harm to the recipient. For example, a high school student in America wanted to publicise his hatred towards his school teachers and created a website dedicated to them.⁵⁴ The website was titled ‘Teacher Sux’ with profane comments and pictures posted relating to the teachers, including a picture of one teacher’s decapitated head with blood dripping down her neck.⁵⁵ Furthermore, the website invited visitors to donate money

⁵² Director of Public Prosecutions (n 21) para 46.

⁵³ Crime and Disorder Act 1998, s 34.

⁵⁴ Renee Servance, ‘Cyberbullying, Cyber-harassment, and the Conflict Between Schools and the First Amendment’ [2003] *Wisconsin Law Review* 1213.

⁵⁵ *ibid*.

towards paying a hit man to kill one of the teachers.⁵⁶ This exhibits the potential harms associated with online communication by under 18s and explains why the CPS Guidelines ought to be less considerate to young people who intentionally and successfully harm others online.

Having considered how the CPS's justifications for a high threshold are disputable, this article will now discuss the rationale underpinning the current protections offered to the right to freedom of expression by the CPS.

4 Freedom of expression on social media

As the CPS Guidelines give significant weight to freedom of expression on social media, this section will critically analyse the Article 10 right justifications. It demonstrates why harmful comments posted online should not be protected by the right to freedom of expression and establishes why the CPS ought to reconsider the balance it has struck between freedom of expression and protection from harm. To do so, the justifications for freedom of expression, as laid out by Lord Steyn in *ex p Simms*,⁵⁷ are critically analysed in turn.

4.1 The right to freedom of expression

For years, freedom of expression has been regarded as a right which carries 'high importance'⁵⁸ as the cornerstone of a free society.⁵⁹ These beliefs have survived for centuries and, as a consequence, freedom of expression is now considered to be a fundamental human right as per Article 10 of the Human Rights Act 1998. Article 10 protects most forms of speech, including 'those that offend, shock or disturb the State or any section of the population.'⁶⁰ Nonetheless, not all forms of speech are afforded equal levels of protection.

⁵⁶ *ibid.*

⁵⁷ *R v Secretary of State for the Home Department, ex p Simms* [2000] 2 AC 115, 126.

⁵⁸ *Reynolds v Times Newspapers* [2001] 2 AC 127, [200].

⁵⁹ Stephen Gard, 'Book Review – Defending My Enemy: American Nazis, the Skokie Case, and the Risks of Freedom' (1981) 32 *Hastings Law Journal* 711.

⁶⁰ *Handyside v United Kingdom* [1976] ECHR 737, [49].

4.2 Hierarchy of speech

Over time, European and domestic courts have developed a hierarchy of speech,⁶¹ distinguishing between political, educational, and artistic expression.⁶² At the pinnacle of the hierarchy lies political speech.⁶³ As Scott LJ stated in *Lyon v Daily Telegraph*, ‘it is in the public interest to have a free discussion of matters of public interest.’⁶⁴ An additional benefit for affording greater protection to political speech is that it ‘is a basic safeguard against irresponsible political power’.⁶⁵ The increased value of political speech was recognised in *Campbell v MGN* whereby the dissemination of information concerning Naomi Campbell’s drug addiction was found to be ‘of a lower order than ... political information’.⁶⁶ Lady Hale went on to state that below political speech sits educational speech due to its ability to help individuals play their ‘full part in society and in our democratic life’.⁶⁷ Both political and educational speech would fall under media law, and freedom of expression expert Rowbottom’s category of ‘high-value’ speech. Rowbottom has carried out extensive research on freedom of expression online in the past decade, providing this article with a modern typology to refer to.⁶⁸ High-value speech is distinguishable for being professionally produced, aimed at a wide audience and/or well researched in advance.⁶⁹

Further down the hierarchy lies commercial and artistic expression, which is afforded much less protection.⁷⁰ And finally, at the bottom lies

⁶¹ Mark Elliot and Robert Thomas, *Public Law* (3rd edn, OUP 2017) 843.

⁶² *Campbell v MGN Limited* [2004] UKHL 22, [148].

⁶³ *ibid* [148].

⁶⁴ *Lyon v Daily Telegraph* [1943] KB 746, [752].

⁶⁵ J G Fleming, *The Law of Torts* (9th edn, Law Book Company 1998) 648.

⁶⁶ *Campbell* (n 62) [29].

⁶⁷ *ibid* [148].

⁶⁸ University of Oxford, ‘Jacob Rowbottom’ <<https://www.law.ox.ac.uk/people/jacob-rowbottom>> accessed January 2020.

⁶⁹ Jacob Rowbottom, ‘To Rant, Vent and Converse: Protecting Low Level Digital Speech’ (2012) 71(2) *Cambridge Law Journal* 355.

⁷⁰ Richard Clayton and Hugh Tomlinson, *The Law of Human Rights* (2nd edn, OUP

offensive, hurtful, and indecent speech, which is seldom protected.⁷¹ It is suggested that these forms of speech be grouped under Rowbottom's 'low-level expression', which is defined as amateur, spontaneous, inexpensive to produce and often akin to everyday conversation.⁷² As section 127 CA concerns speech that is grossly offensive, indecent, or menacing and section 1 MCA covers speech that is grossly offensive, indecent, threatening or false, the speech on which this article is centred constitutes low-level expression.

4.3 Justifications for freedom of expression

Having established the hierarchy of different forms of speech, the next part of this paper critically analyses the main justifications for freedom of expression. It is argued that these justifications are only applicable to high level speech and thus, low-level speech should be restricted where it causes harm to the recipient.

(A) Autonomy and self-development

Freedom of expression has been justified on the grounds that it helps the autonomy and self-development of individuals;⁷³ one argument being that hearing a range of ideas and opinions can help to educate and improve knowledge.⁷⁴ This aligns with Mill's view that freedom of expression exists primarily for the sake of the hearer.⁷⁵ For Mill, it is not the act of expressing one's thoughts that carries value, but the need for people to hear a variety of opinions, in order to achieve their own genuine thoughts and individualism.⁷⁶ Furthermore, Redish argues that without free speech, persons could not reach their full intellectual potential.⁷⁷

2000) [15].

⁷¹ Rowbottom (n 69).

⁷² *ibid.*

⁷³ Eric Barendt, *Freedom of Speech* (2nd edn, OUP 2007) 16.

⁷⁴ *ibid.*

⁷⁵ John Stuart Mill, *On Liberty* (1st edn JW Parker & Son 1859).

⁷⁶ O'Rourke (n 14).

⁷⁷ Redish (n 13).

Though the ability to express oneself freely is important in order to educate the masses, it is likely that only high-level speech is going to provide valuable knowledge. As stated by Lady Hale, intellectual and educational speech is only important for giving individuals the ‘potential to play a full part in society and in our democratic life’.⁷⁸ Thus, only speech that is political or otherwise in the public interest will lead to an individual’s development of knowledge. It follows that harmful speech posted online, such as comments or posts that bully, harass, or cause distress to the reader, should not be justified on this basis.

In a similar vein, but in juxtaposition to Mill’s belief that freedom of expression is for the sake of the hearer, Feldman argues that freedom of expression is for the sake of the speaker: it enables freedom of conscience, personal identity, and self-fulfilment.⁷⁹ Greenwalt submits that to suppress communication is the most serious impingement on our personalities compared to any other restraint on liberty.⁸⁰

Some have argued that all communication, including poor taste jokes and offensive comments, can be justified as they allow the speaker to choose how to present themselves to society.⁸¹ Although an opinion may be considered ‘wrong’ by the majority, it is important to protect expression that is unpopular. Society has a right to try to convince people that certain beliefs are flawed, but should not attempt to prevent their expression.⁸² In fact, the law currently defends expression which the majority consider wrong or offensive, and this article agrees that speech which is merely unpopular but not harmful should not be prosecuted.

⁷⁸ *Campbell* (n 62) [148].

⁷⁹ David Feldman, *Civil Liberties and Human Rights in England and Wales* (2nd edn, OUP 2002).

⁸⁰ Kent Greenwalt, *From the Bottom Up: Selected Essays* (OUP 2016) 377.

⁸¹ Rowbottom (n 69).

⁸² O’Rourke (n 14).

(B) Discovery of truth

The right to freedom of expression is often justified on the basis that it leads to the discovery of the truth.⁸³ In order for something to be ‘true’, it must be accurate and in accordance with fact or reality.⁸⁴ For Mill, the only way to discover the truth is to weigh all competing opinions against each other.⁸⁵ Gordon refers to this as the ‘marketplace of ideas,’ whereby all opinions and thoughts are exchanged, pushing out bad ideas and allowing good ones to thrive.⁸⁶ It is believed by some that it is only from the free competition of ideas that the truth can genuinely emerge.⁸⁷ This is not to say that opinions which are bad or false are to be suppressed, because to do so would be to assume infallibility.⁸⁸ Instead, the free marketplace of ideas should incorporate all opinions, which people can discuss with each other and determine for themselves whether an opinion is pernicious or false.⁸⁹

One benefit of the marketplace of ideas is that it continues to make room for new opinions. There is no such thing as an ‘objective truth,’⁹⁰ as what is considered to be factual or reality is changing constantly.⁹¹ New discoveries are leading to realisations that what was once considered to be true is now, in fact, false.⁹² For example, smoking was once considered to be healthy. This is supported by Emerson who contends

⁸³ C Edwin Baker, ‘Scope of the First Amendment Freedom of Speech’ [1978] 25 UCLA Law Review 964.

⁸⁴ Oxford Dictionary, ‘Truth’ <<https://en.oxforddictionaries.com/definition/truth>> accessed March 2019.

⁸⁵ Mill (n 75).

⁸⁶ Jill Good, ‘John Stuart Mill and the Marketplace of Ideas’ (1997) 23(2) Social Theory and Practice 235.

⁸⁷ Jacob Salwyn Schapiro, ‘John Stuart Mill, Pioneer of Democratic Liberalism in England’ [1943] Journal of the History of Ideas 127.

⁸⁸ Mill (n 75).

⁸⁹ Raymond Wacks, *Understanding Jurisprudence: An Introduction to Legal Theory* (5th edn, OUP 2017) 259.

⁹⁰ *ibid.*

⁹¹ Samuel Arbesman, *The Half Life of Facts* (LLC Gildan Media 2012).

⁹² *ibid.*

that there is no way of suppressing the false without also suppressing the true.⁹³

The truth justification is not only popular amongst philosophers and academics, but also judges and lawmakers. For instance, section 2 of the Defamation Act 2013 provides a truth defence whereby expression that has significantly harmed one's reputation can be justified because it was true. To uncover to the world something of which it was previously ignorant is, for Mill, an extremely important service one human can provide for their fellow persons.⁹⁴ However, it is submitted that the justification of truth should only be applicable in situations where the speech involved is high level, in order to unveil something which is in the public interest.

Low-level speech – including offensive or harmful expression directed at an individual, especially one who is not a public figure – should not be defended on the basis of truth. For example, in 2010 Tyler Clementi committed suicide after his roommate filmed him having sex with a man and uploaded it online, stating he was gay.⁹⁵ The fact that the roommate's comments were based on his own observations and perception should not justify him expressing them. The harm caused by some low-level (offensive or hurtful) speech makes the value of their truth worthless. Thus, this justification should not be applicable to harmful speech directed at individuals and accordingly, the CPS should give less weight to freedom of expression in such cases.

⁹³ Thomas Emerson, 'The Right of Privacy and Freedom of the Press' (1979) 14 Harvard Civil Rights Civil Liberties Law Review 329.

⁹⁴ Mill (n 75) 8.

⁹⁵ Ed Picklington, 'Tyler Clementi, Student Outed as Gay on Internet, Jumps to his Death' *The Guardian* (London, 2010) <<https://www.theguardian.com/world/2010/sep/30/tyler-clementi-gay-student-suicide>> accessed October 2018.

(C) Democracy

Freedom of expression is considered the ‘cornerstone of the survival of democratic society’.⁹⁶ This is reflected in Article 10(2), which states freedom of expression can only be restricted if, *inter alia*, it is necessary in a democratic society.⁹⁷ For Gard, the only thing that separates a free society from others is the unrestricted flow of ideas, including those which are hateful and those which are hurtful.⁹⁸ Such liberty of expression can be justified as a means of maintaining stability in society.⁹⁹ There is more likely to be resentment and rebellion if people cannot present their opinions.¹⁰⁰ Emerson believes that suppressed groups would be forced underground, making them even more dangerous to society.¹⁰¹ This is certainly true for high-level political speech, as democracy requires that individuals employ their thoughts and opinions in making political choices.¹⁰²

More specifically, the argument of democracy is used to justify freedom of expression online. Social networking sites have become *the* medium for communication and it is therefore imperative that users’ opinions are constitutionally protected.¹⁰³ With magazines, blogs, and newspapers now posting on social media, it has become an ‘information superhighway’,¹⁰⁴ creating a platform where the expression of political opinions and information are being engaged in by people who would otherwise be apathetic.¹⁰⁵ This is beneficial for a democratic society

⁹⁶ Alan Sears, ‘Protecting Freedom of Expression Over the Internet: An International Approach’ (2015) 5(1) *Notre Dame Journal of International & Comparative Law* 171, 185.

⁹⁷ Human Rights Act, sch 1.

⁹⁸ Gard (n 59).

⁹⁹ Thomas Emerson, ‘Toward A General Theory of the First Amendment’ (1963) 27 *Yale Law Journal* 877.

¹⁰⁰ Greenwalt (n 80).

¹⁰¹ Emerson (n 100).

¹⁰² Redish (n 13).

¹⁰³ Stein (n 36).

¹⁰⁴ Fitzpatrick (n 2) 388.

¹⁰⁵ Stein (n 36).

because a better informed citizenry may yield a better system of government and more deliberative political decision-making processes.¹⁰⁶ Even political figures have social media accounts which anyone can access and comment on. This is an extremely positive aspect of freedom of expression on social media, as it encourages uninhibited, vigorous, and wide-open expression on public issues.¹⁰⁷ Thus, the justification of democracy is applicable to high-level political speech.

However, the democracy argument should not justify harmful comments on social media, even if directed at a public figure. For example, in 2014 a journalist's feminist campaign resulted in harmful online comments directed at her.¹⁰⁸ One person tweeted 'you should have jumped in front of horses, go and die.'¹⁰⁹ The democracy argument should not apply here as the expression had little relation to politics, culture, or social values, and the person who tweeted that was rightly prosecuted for the harm suffered by the recipient.¹¹⁰ Therefore, harmful speech should not be protected by the CPS on the basis of democracy.

Having explained why harmful comments online are unjustifiable, this article shall now demonstrate why protection from harm ought to be given more consideration by the CPS.

¹⁰⁶ Greenwalt (n 80).

¹⁰⁷ Gard (n 59).

¹⁰⁸ Andrew Murray, *Information Technology Law: The Law and Society* (3rd edn, OUP 2016) ch 7.

¹⁰⁹ *ibid.*

¹¹⁰ *ibid.*

5 Protecting users from harm in social media

Some believe that as there is no imminent risk of physical harm, online communications cannot be as harmful as offline communications.¹¹¹ However, this section demonstrates how certain unique characteristics of social media give it the potential to amplify the impact of low-level speech on the recipient. Thus, speech that would cause temporary emotions face-to-face can cause significant harm if posted online. This section will conclude that the CPS should take more seriously the fact that social media is utilised by some to harm others and that the Guidelines ought to shift in favour of prosecuting those who do so.

5.1 Anonymity

One of the most fundamental, powerful characteristics of online communication is anonymity.¹¹² On the internet, people are able to assume different personas and use various pseudonyms in order to mask their true identities.¹¹³ For some, anonymity is a very positive aspect of the online world. Strossen maintains that without the ‘cloak of anonymity, many individuals [would] not exercise their right to freedom of expression.’¹¹⁴ Anonymity encourages speakers to share their genuine ideas and opinions, which can be done more liberally if people know that they cannot be identified.¹¹⁵ In a similar vein, Randall has argued that anonymity is ‘a shield from the tyranny of the majority.’¹¹⁶

On the other hand, Patel observes that anonymity is the most ‘fearful’ characteristic of online communications.¹¹⁷ Anonymity can also be

¹¹¹ Law Commission (n 41) [3.68].

¹¹² Patel (n 45).

¹¹³ *ibid.*

¹¹⁴ Nadine Strossen, ‘Protecting Privacy and Free Speech in Cyberspace’ (2001) 89 *Georgetown Law Journal* 2103, 2106.

¹¹⁵ Charlene Christie and Emily Dill, ‘Evaluating Peers in Cyberspace: The Impact of Anonymity’ (2016) 55 *Computers in Human Behaviour* 292.

¹¹⁶ Randall (n 4) 247.

¹¹⁷ Patel (n 45) 594.

used as a sword with the intent to cause harm to others. For example, Ask.fm is an anonymous ‘questions and answers’ website; at least four teenagers who were subject to abusive comments on Ask.fm have committed suicide.¹¹⁸ This suggests that anonymity can make online communications extremely harmful can contribute to the many factors which lead a person to commit suicide.

The psychological injury suffered by a victim who has received abusive comments online is potentially heightened where the perpetrator is anonymous.¹¹⁹ The lack of identity limits the victim’s ability to take steps to prevent further abuse.¹²⁰ For example, Weber and Pelfrey found that many teenagers who receive abusive online messages from peers confront them in person in order to reconcile.¹²¹ However, where the speaker is anonymous, this is not an option.

Moreover, anonymity also empowers users to post messages in unrestrained ways,¹²² and avoid being held accountable for harm caused.¹²³ Behind ‘a mask of namelessness’, speakers are willing to say more than they would say face-to-face.¹²⁴ This increased freedom that anonymity provides reduces an individual’s inhibitions, separating their identity from their actions.¹²⁵ Therefore, anonymity increases the

¹¹⁸ Joe Shute, ‘Cyberbullying Suicides: What Will It Take to Have Ask.fm Shut Down?’ *The Telegraph* (London, 2013) <<https://www.telegraph.co.uk/news/health/children/10225846/Cyberbullying-suicides-What-will-it-take-to-have-Ask.fm-shut-down.html>> accessed March 2019.

¹¹⁹ Scott Hammock, ‘The Internet Loophole: Why Threatening Speech On-Line Requires a Modification of the Court’s Approach to True Threats and Incitement’ (2002) 26 *Columbia Journal of Law and Social Problems* 65.

¹²⁰ Michael Moore and others, ‘Anonymity and Roles Associated with Aggressive Posts in an Online Forum’ (2012) 28(2) *Computers in Human Behaviour* 861.

¹²¹ Nicole L Weber and William V Pelfrey, *Cyberbullying: Causes, Consequences and Coping Strategies* (LFB Scholarly Publishing 2014).

¹²² Liam Bullingham, ‘The Presentation of Self in the Online World: Goffman and the Study of Online Identities’ (2012) 39(1) *Journal of Information Science* 101.

¹²³ Christie and Dill (n 116)

¹²⁴ Hammock (n 120).

¹²⁵ Randall (n 4).

likelihood of harmful comments being posted on social media. The CPS Guidelines should encourage the prosecution of those who use anonymity to harm others.

5.2 Physical detachment between speakers and their audience

Communicating online allows people to distance themselves from reality. People can show a side of themselves that they would not feel comfortable doing offline.¹²⁶ The physical detachment attributed to online communication is also a cause for concern, as it removes the possibility of physically avoiding harmful communications. Online communication can be sent at any time and received any place,¹²⁷ and so harmful comments posted online can penetrate the safety of the home, meaning there is no escape.¹²⁸

The physical detachment between speakers and their audience can also be problematic because the sender cannot observe the true extent of the harm caused.¹²⁹ Physical cues such as crying are not visible to the online communicator,¹³⁰ potentially causing them to unknowingly inflict genuine harm.¹³¹

Furthermore, the fact that the recipient cannot hear the speaker's tone of voice means that misinterpretations are likely to occur.¹³² For example, a comment calling someone a 'fat cow' could be taken seriously and in extreme cases, could even lead to an eating disorder, which may not have been the speaker's intention. It is noted that where

¹²⁶ Liam Bullingham, 'The Presentation of Self in the Online World: Goffman and the Study of Online Identities' (2012) 39(1) *Journal of Information Science* 101.

¹²⁷ Kift and others (n 49).

¹²⁸ Cybersmile, 'How Is Cyberbullying Different from Traditional Bullying?' (*Cybersmile*, 14 September 2014) <<https://www.cybersmile.org/blog/how-is-cyberbullying-different-from-traditional-bullying>> accessed February 2019.

¹²⁹ Emerson (n 100).

¹³⁰ Patel (n 45).

¹³¹ *ibid.*

¹³² Cybersmile (n 129).

comments are intended to be a joke, prosecution should not be permitted. However, where a comment is sent with the intention of causing harm, but not the level of harm actually caused, the CPS Guidelines should permit the sender's prosecution.

5.3 Audience

The increasing popularity of social networking sites means that comments posted online have the potential to be viewed by a significantly larger audience compared to face-to-face communication.¹³³ Online expression can come to the attention of people beyond the speaker's intended audience. For example, in 2012 Daniel Thomas posted a homophobic message about Olympic diver Tom Daley. It had only been intended to be seen by his Twitter followers, but instead reached millions, including Tom Daley himself.¹³⁴ This instance demonstrates how, online, speakers cannot control the audience of their comments. The CPS refused to prosecute this case on the basis that, *inter alia*, the post was intended to be viewed by family and friends only.¹³⁵ However, it is contended that speakers should not be able to avoid prosecution simply because their comment reached a wider audience than intended. It is common knowledge that social media increases the potential for comments to reach far and wide,¹³⁶ and this should not excuse the speaker for causing harm to another.

If an online comment is viewed by a large audience, it is likely to significantly increase the risk and level of harm suffered by the victim.¹³⁷ For instance, in 2014, a teenage boy committed suicide after a video of him masturbating in the school bathroom went viral. The video was seen by a wide audience, some of whom began to bully the victim.¹³⁸

¹³³ Murray (n 109).

¹³⁴ BBC News, 'Tom Daley Tweet: No Action Against Daniel Thomas' *BBC News* (London, 2012) <<https://www.bbc.co.uk/news/uk-wales-19661950>> accessed April 2019; Coe (n 3).

¹³⁵ Coe (n 3) 33.

¹³⁶ Murray (n 109).

¹³⁷ Randall (n 4).

¹³⁸ E J Dickson, 'California Teenager Kills Himself After Video of Him Masturbating

This also exhibits how enabling a large amount of people to view online posts can amplify the harm caused as it widens the ‘pool of individuals’¹³⁹ who might be willing to communicate abusive and harmful messages. It follows that the potential for a large audience makes online communications more harmful than face-to-face communication. The CPS Guidelines ought to enable prosecution, even when the post in question is viewed by an unintended audience.

5.4 Instant and permanent

Once a message has been sent or posted online, it is instantly and permanently available for all to see:¹⁴⁰ ‘the internet never forgets’.¹⁴¹ This can be injurious for victims of harmful communication because something that was private can become permanently public.¹⁴² Furthermore, Moore and others note that the permanency of online attacks enables a single incident to have repeated effects.¹⁴³ Therefore, the permanency of online comments make them more harmful than face-to-face comments. Accordingly, the CPS Guidelines should encourage the prosecution of senders of harmful communications.

As well as being permanent, the instantaneous nature of posting messages online can be harmful as it allows people to do so without a moment’s reflection.¹⁴⁴ This means that users are ‘no longer constrained by the sound of their own voice’,¹⁴⁵ and make harmful comments they are unlikely to say to someone’s face. The CPS Guidelines should protect those who have been harmed by an unfiltered comment.

Goes Viral on Snapchat and Vine’ *Daily Dot* (2014) <<https://www.dailydot.com/irl/matthew-burdette-suicide/>> accessed April 2019.

¹³⁹ Robin Kowalski, Allison Toth & Megan Morgan, ‘Bullying and Cyberbullying in Adulthood and the Workplace’ (2018) 158(1) *The Journal of Social Psychology* 64, 65.

¹⁴⁰ Murray (n 109).

¹⁴¹ Randall (n 4) 243.

¹⁴² Coe (n 3).

¹⁴³ Moore and others (n 121).

¹⁴⁴ Patel (n 45).

¹⁴⁵ Hammock (n 120) 81.

5.5 Why should the law protect users from these harms?

Subject to the harm principle, criminal law should permit individuals to do as they wish unless their conduct harms others.¹⁴⁶ Therefore, if harmful comments are posted online contrary to section 1 MCA or section 127 CA, it should follow that the sender be prosecuted.

However, some argue that protection from certain harms should not be dealt with by law, but by individuals themselves. O'Rourke suggested that victims can simply choose to avoid what has been said.¹⁴⁷ For example, online users could 'log off and vanish,' avoiding any further harm.¹⁴⁸ However, this is a futile suggestion for two reasons. Firstly, in this digital age, online presence has become a vital form of social interaction.¹⁴⁹ Victims could end up feeling as though they are the ones being punished, especially children and young adults.¹⁵⁰ It is unrealistic to assume that people can just avoid using it. Secondly, as Stevens J stated in a US case regarding offensive language on the radio:

to say that one may avoid further offence by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow.¹⁵¹

Therefore, regarding social media, simply logging off is unlikely to protect the victim because harm has already been caused.

It is also arguable that, as opposed to logging off, one could block the perpetrator on social media or report them to the social networking site. However, this is also not always effective. The blocked person may be

¹⁴⁶ Hamish Stewart, 'The Limits of the Harm Principle' [2010] *Criminal Law and Philosophy* 17.

¹⁴⁷ O'Rourke (n 14).

¹⁴⁸ Fitzpatrick (n 2) 382.

¹⁴⁹ Christie and Dill (n 116).

¹⁵⁰ Kift and others (n 49).

¹⁵¹ *Federal Communications Commission v Pacifica Foundation* (1978) 438 US 726 [748].

able to contact the victim via other social media platforms, or they could create a new account which has not been blocked and continue to send harmful messages.¹⁵² It follows that harm caused on social media should not be dealt with entirely by the individuals themselves; rather, there should be scope for them to be dealt with by the law.

Some argue that prosecution is not a proportionate response to dealing with online communication.¹⁵³ However this article disagrees. Regarding the award of damages for libel cases, Barendt argued that damages act as a deterrent, causing people to ‘be careful about the terms in which they speak [online]’.¹⁵⁴ It is submitted that, similarly, the threat of prosecution would also have deterrent effects on harmful online comments. Also, under section 1 MCA and section 127 CA, the sentences available do not exceed two years’ or six months’ imprisonment respectively. These punishments are relatively low,¹⁵⁵ and thus should not be deemed disproportionate to the harm suffered by victims of online abuse.

Despite Rowbottom’s contention that low-level speech should under no circumstances be criminalised in light of the need to protect freedom of expression,¹⁵⁶ it is argued that the Article 10 right should not apply to harmful expression. Though the fundamentality of the right to freedom of expression is accepted, the CPS should take more seriously the harm that comments on social media can cause.

¹⁵² Amelia Butterly, ‘What People Can Still See, Even After You Block them Online’ *BBC News* (London, 2015) <<http://www.bbc.co.uk/newsbeat/article/34538297/what-people-can-still-see-even-after-you-block-them-online>> accessed April 2019.

¹⁵³ Rowbottom (n 69) 356.

¹⁵⁴ Eric Barendt, *Freedom of Speech* (2nd edn, OUP 2007) 467.

¹⁵⁵ Patel (n 45).

¹⁵⁶ Rowbottom (n 69).

6 Conclusion

This paper has argued that the CPS Guidelines for prosecuting cases under section 1 MCA or section 127 CA does not strike the right balance between freedom of expression and protection from harm. Too much protection has been afforded to freedom of expression at the risk of many harmful communications going unchallenged.

It has been contended that the CPS justifications for the current prosecution thresholds are unconvincing. To complain that a lower threshold would lead to a floodgate of trivial cases is a weak argument; it ignores the fact that online expression has the potential to cause actual harm, and the need to consider the merit of individual cases. To maintain that a lower threshold would have a chilling effect on speech is also unconvincing. Other areas of law have taken a more stringent approach to speech that is perceived as harmful. With the majority of people now online, it ought to be considered a matter of public interest to prosecute. Furthermore, the age of criminal responsibility in England and Wales is 10 and so any differential approach to prosecuting defendants according to their age must be underpinned by a clearer rationale.

The justifications offered by the CPS for the high threshold give too much weight to freedom of expression, which this article argues is wrong. This article has acknowledged the fundamentality of freedom of expression as a human right. It benefits both individuals and society at large; it encourages self-development by improving knowledge and education and by allowing individuals to express their personalities. Furthermore, freedom of expression is both a necessary and desirable component of living in a democratic society. Nonetheless, these benefits derived from freedom of expression should not be associated with low-level comments posted online with the intention of harm to others. An online comment should not be protected if it has harmed another simply because it is true. Furthermore, low-level speech should not be protected by the democracy argument because that is more

closely related to high-level political speech that is in the public interest.

Instead of protecting low-level speech that causes harm, the CPS Guidelines should shift the balance in favour of protecting victims from harm online. The unique characteristics of social media – namely anonymity, the physical detachment of the online world, the size of the audience, and the instant and permanent nature of online posting – give it the power to amplify the harm caused to recipients. Legal remedies should be available to those harmed online – logging off is not a panacea.