Islamophobia, ‘Gross Offensiveness’ and the Internet

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Abstract: This article argues that restrictions on expression based on ‘gross offensiveness’ or similar public morality notions embedded in speech offences are not and cannot be politically neutral and be evenly applied to political speech, no matter who is the author. Such concepts draw on a majoritarian perspective purporting to be reflective of unified base values of the ‘national community’. The article explores why such concepts of unacceptable speech are a poor fit for a deeply heterogeneous community, and all the more so on the internet, where those who engage in public discourse are even more numerous and more diverse in ethnic, cultural, political and social terms. Set against such a diverse speech landscape the prohibition of ‘gross offensiveness’, or what are considered the outer boundaries of acceptability, is repressive of minorities and of challenges to conventional opinions and existing power dynamics, and is liable to reinforce the very bigotry it seeks to relieve.

Keywords: ‘gross offensiveness’ – freedom of expression – free speech - political expression – multiculturalism – internet – social media – heterogeneity – islamophobia – extremism – xenophobia

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1. Introduction

This article seeks to contribute to the debate on extreme, hate, inflammatory or 'grossly offensive' speech on the internet, and to the discussion about the role that law may or may not play in fighting hatred and prejudice and, by implication, in building tolerance and multiculturalist mindsets within a political community. The focus here is *not* on communications that are directed at a particular individual through, for example, bullying, trolling or shaming,[1] but rather on speech that is abusive more generally and targeted at groups (e.g. xenophobic, homophobic or misogynist speech) and so arguably damaging to the public sphere and at times also to public order and security (e.g. inflammatory speech or speech that incites hatred). Abusive speech of many variations appears rampant on the internet.[2] Long gone are the days when the internet was hailed solely as a positive force for political mass participation and democratisation, and for empowering the disenfranchised and stimulating better communications and understanding across social, cultural and political divides.[3] This article argues that speech offences based on 'gross offensiveness' or similar public morality notions are not and cannot be politically neutral or be applied evenly to political speech, no matter who is the author. Such concepts draw on a majoritarian perspective purporting to be reflective of unified base values of the 'national community'. At the same time, it should be acknowledged that even the discussion below is based on foundational assumptions, for example, that a liberal speech landscape is *prima facie* desirable, an assumption which is not universally shared.

Using recent cases involving online speech, the article explores how and why concepts of unacceptable 'offensive' speech are a poor fit for a deeply heterogeneous community, and all the more so on the internet, where those who engage in public discourse are even more numerous and more diverse in ethnic, cultural, political and social terms. The discussion concludes that – set against such a diverse speech landscape – the prohibition of 'gross offensiveness' (or what is considered the outer boundaries of acceptability) becomes deeply repressive of minorities and of challenges to conventional opinions and existing power dynamics, and is liable to reinforce the very bigotry that it seeks to suppress.

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[1] These types of communications raise separate considerations in so far as they often cause severe harm to particular individuals. Jon Ronson, *So You've Been Publicly Shamed* (Picador, 2015). Pew Research Centre, 'Online Harassment' (21 October 2014) http://www.pewinternet.org/2014/10/22/online-harassment/; 'Five internet trolls a day convicted in UK as figures show ten-fold increase' *The Telegraph* (24 May 2015).

[2] For an overview of the different phenomena of 'abusive' behaviour on social media and potentially applicable criminal law, see House of Lords Select Committee on Communications, *Social Media and Criminal Offences* (29 July 2014, HL Paper 37); Maura Conway, 'Terrorism and the Internet: New Media – New Threat?' (2006) 59 *Parliamentary Affairs* 283.

[3] This shines through much of the early legal and political literature. A well-known legal example is *American Civil Liberties Union v Reno* 929 F Supp 824, 881 (ED Pa 1996), referring to the 'most participatory marketplace of mass speech that this country – and indeed the world – has yet seen.' For a more recent critical perspective, see Zizi Papacharissi, 'The Virtual Sphere 2.0 - The Internet, the Public Sphere, and Beyond' in Andrew Chadwick, Philip N. Howard (eds), *Routledge Handbook of Internet Politics* (Routledge, 2009) 230.

2. Legal Avenues for Protecting a Diverse Public Sphere

Law and regulation that focus on media and speech[4] may approach the task of dealing with abusive speech in broadly two ways: either, indirectly, by safeguarding a diverse public sphere and a pluralist media landscape that facilitate the expression of conflict and, ideally, reconciliation;[5] or, directly, by outlawing and supressing such speech. Both would appear to contribute to the law's general 'responsibility… to prevent explosions and to defuse the threat of violence by creating security in diversity,'[6] as observed by Cotterell, in the context of clashes arising from claims by different groups to recognition of their uniqueness. In respect of the first indirect avenue traditional mass media has, in the past, been criticised for having failed to account for all groups of society equally:

> 'A democratic media system should both enable opposed or separate groups to express themselves effectively, and aid a process of communal understanding and equitable compromise. Elites tend to manage society in a way that serves their interests, and to present this as being in everyone's interest. It is desirable therefore that groups outside the structure of privilege should have the media resources to question prevailing ideological representation, explore where their own group interest lies, and be able to present alternative perspectives.'[7]

Whilst the internet, at first glance, seems to be the very resource that promises to give 'groups outside the structure of privilege' a voice within the public sphere, cyberspace also exacerbates the polarisation of embedded views, crowd thinking and political hatred, and thus, yet again, creates a risk of silencing dissenters and political minorities.[8] The reasons for this phenomenon are varied and multi-layered. Undoubtedly, part of the explanation lies in the fact that the internet allows speakers to hide behind a veil of anonymity[9] and the existence of the 'echo chamber' effect in many online groups.[10]

This article explores the second possible avenue for legal intervention in the form of the criminalisation of certain speech. The discussion focuses, in particular, on 'grossly offensive' speech, but the arguments can be extended to other extreme speech proscriptions defined in equally broad public-morality terms.[11] Such direct restrictions on speech are more

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[4] For example, alternative avenues likely to be more effective long-term remedies to prejudice and hatred, than any regulation of speech or the speech environment, are measures designed to improve education or reduce inequality.

[5] James Curran, *Media and Power* (Routledge, 2002) 239, referring to one of the functions of mass media in liberal democratic societies to 'facilitate the expression of conflict and difference… [and] assist in social conciliation.'

[6] Roger Cotterell, 'Law and Community: a New Relationship?' (1988) 51 Current Legal Problems 367, 386.

[7] Ibid [internal marks omitted].

[8] House of Lords Select Committee on Communications, above n 2. But see, Jennifer Brundidge, Ronald E Rice, 'Political engagement online – Do the information rich get richer and the like-minded more similar?' in Andrew Chadwick, Philip N. Howard (eds), *Routledge Handbook of Internet Politics* (Routledge, 2009) 144; Steven Johnson, 'Is Facebook the enemy of truth and civil unity?' *The Guardian* (2 January 2016).

[9] See generally Eric Barendt, *Anonymous Speech: Literature, Law and Politics* (Hart Publishing, 2016) Ch. 6.

[10] There is some empirical evidence to show that, while online participants seek to avoid exposure to diversity, they are only partially successful: '[w]hile an overwhelming amount of political diversity may exist online, people may not be overly enthusiastic about exposing themselves to it… [but are often inadvertently exposed] to political disagreement online.' Brundidge and Rice, above n 8, 152.

[11] Section 5(1) of the Public Order Act 1986 provides: 'A person is guilty of an offence if he— (a) uses threatening or abusive words or behaviour, or disorderly behaviour, or (b) displays any writing, sign or other

contentious than the indirect facilitative approach, but have been justified on a number of grounds, including the protection of the freedom of expression of the group targeted by the abusive speech.[12] In other words, it is censorship that is at least partly designed to enable open and frank exchanges across the political spectrum. Philosophically it aligns with Habermas' notion of a public sphere that must facilitate 'argumentative speech' as a unifying and consensus-bringing force to discover universal truths though the force of the better argument.[13] This in turn requires an 'ideal speech situation' where 'power differences between participants must be neutralised such that these differences have no effect on the creation of consensus.'[14] So facilitating reasoned argumentation may justify a 'cleansing' of the public sphere from abusive speech in order to give everyone a relatively equal starting point. This argument undoubtedly has intuitive appeal. In Europe this approach is put in place through the criminalisation of racist, hate and other inflammatory or grossly offensive speech.[15] Conversely, such censorship is rejected in the US but for the rare occasions when the 'advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.'[16] Its rejection is based on the potential for governmental abuse flowing from more widely defined speech restrictions.[17]

The discussion below questions the European position, i.e. the possibility of establishing such an open public sphere through the even-handed criminalisation of certain speech, in particular in the deeply heterogeneous speech environment of the internet. As, however, the online world is now an integral and even dominant part of the public sphere and media landscape, the arguments made below have implications for media regulation more generally. The core argument made is that the criminalisation of 'grossly offensive' speech ultimately implements a majoritarian consensus that is prejudicial towards minorities or, more accurately, those holding minority views, even when framed in cosmopolitan terms. As will be seen, this does not mean that minorities never benefit from the protective provisions, but rather that ambiguities are resolved against them.

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visible representation which is threatening or abusive, within the hearing or sight of a person likely to be caused harassment, alarm or distress thereby.'

[12] Eric Barendt, *Freedom of Speech* (2nd ed, OUP, 2007) 174, more generally 166-177. See also Art 10(2) of the European Convention of Human Rights which allows restrictions on speech designed to protect the autonomy and dignity of the targeted group (i.e. 'protection of the rights of others'), to show moral disapprobation (i.e. 'protection of morals') or to guard against speech as a precursor to ideologically driven action and thus a threat to public order (i.e. 'prevention of disorder'). See also David Anderson, *The Terrorism Acts in 2014 – Report of the Independent Reviewer on the Operation of the Terrorism Act 2000 and Part 1 of the Terrorism Act 2006* (September 2015) para 9.4.

[13] Jürgen Habermas, *The Philosophical Discourse of Modernity; Moral Consciousness and Communicative Action* (MIT Press, 1990); *Justification and Application: Remarks on Discourse Ethics* (MIT Press, 1993); critiqued in Bent Flyvbjerg, 'Ideal Theory, Real Rationality: Habermas Versus Foucault and Nietzsche' (2000), Paper for the Political Studies Association's 50th Annual Conference', The Challenges for Democracy in the 21st Century, London School of Economics and Political Science, 10-13 April 2000, http://dx.doi.org/10.2139/ssrn.2278421.

[14] Flyvbjerg ibid 3.

[15] The European Court of Human Rights still allows restrictions on hate or inflammatory expressions even in the absence of imminent lawless actions or direct incitement to violence or discriminatory acts: *Jersild v Denmark* (1995) 19 EHRR 1; *Lehideux & Isorni v France* (2000) 30 EHRR 365; *Féret* v. *Belgium* (ECrtHR, Application No 15615/07, 16 July 2009); *Le Pen v France* (EcrtHR, Application No. 18788/09, 20 April 2010), but it has inched towards this standard in *Gül and others v Turkey* (ECrtHR, Application No 487 /02, 8 June 2010) para 42.

[16] *Brandenburg v Ohio* 395 US 444, 447 (1969). John Stuart Mill, 'On Liberty (1859)' in Stefan Collini (ed), *J S Mill: On Liberty and other writings* (CUP, 1989) 1, 56: 'An opinion that corn-dealers are starvers of the poor, or that private property is robbery, ought to be unmolested when simply circulated through the press, but may justly incur punishment when delivered orally to an excited mob assembled before the house of a corn-dealer…'

[17] *New York Times v Sullivan* 376 US 254 (1964).

This argument is illustrated with three cases that have applied the cosmopolitan test developed under s.127 of the Communications Act 2003 to online speech. Section 127 criminalises 'grossly offensive' or similar speech, which is not further defined in the Act:

> 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.[18]

Each of the three cases examined engages – in very different ways – with the current Islamic thematic which has extreme sensitivities at both ends of the spectrum: the legitimate expectations of respect and tolerance by the Muslim community versus the security concerns arising from Islamist terrorism and ideology. For this reason, the topic provides an ideal testing ground for the feasibility of *evenly* implementing 'speech intolerance' in the name of greater 'tolerance'.[19] Yet, the argument is undoubtedly contentious, not least because arguing against speech restrictions on the basis of its bias tendency also means allowing for often very offensive speech to remain in the public domain without the possibility of any legal recourse. This is an uncomfortable position to take, given that it might appear to condone such speech. That is not the case; the contention is simply that in a community that is highly diverse in cultural, social and political terms, there are few, if any, shared understandings as to what amounts to intolerable speech over and beyond the speech that is likely to trigger an imminent lawless act. In such a community, content restrictions implement dominant viewpoints on intolerability at the expense of minority ones. That problem does not go away by advocating more caution with prosecutions, as per CPS Guidelines in respect of s.127 offences,[20] because 'harm', even when limited to 'serious harm', in the form of being 'grossly offended' remains specific to cultural and political groupings and is thus contested in a heterogeneous society.

In terms of the wider debate on the freedom to speak offensively, and in particular the freedom to publish anti-Islamic cartoons,[21] the discussion lends complementary support to the view that the Western allowance for 'public morality' exceptions to freedom of expression is irreconcilable with its simultaneous denial of the possible legitimacy of blasphemy or defamation of religion offences within the international human rights framework.[22] The

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[18] Crown Prosecution Service, *Guidelines on prosecuting cases involving communications sent via Social Media* (June 2013, updated March 2016); House of Lords Select Committee on Communications, *Social Media and Criminal Offences* (29 July 2014, HL Paper 37); Jacob H Rowbottom, 'To Rant, Vent and Converse: Protecting Low Level Digital Speech' (2012) 71(2) Cambridge Law Journal 355; Lilian Edwards, 'Section 127 of the Communications Act 2003: Threat or Menace?' (2012) 23 SCL Journal; Ian Cram, *Citizen Journalists: New Media, Republican Moments and the Constitution* (Edward Elgar, 2015) Chapter 3. Garton Ash, *Free Speech: Ten Principles for a Connected World* (Atlantic Books, 2016); Ivan Hare, James Weinstein (eds), *Extreme Speech and Democracy* (OUP, 2009).

[19] Cram ibid, 471.

[20] There were no less than 21,320 s.127 prosecutions between 2004 and 2015; see David S. Wall, 'Crime, Security and Information Communication Technologies: The Changing Cybersecurity Threat Landscape and its Implications for Regulation and Policing' in Roger Brownsword, Eloise Scotford, and Karen Yeung (eds), *The Oxford Handbook of Law, Regulation, and Technology* (OUP, 2017).

[21] See, e.g. David Keane, 'Cartoon Violence and Freedom of Expression' (2008) 30 Human Rights Quarterly 845.

[22] Neville Cox, 'The Freedom to Publish 'Irreligious Cartoons'' (2016) 16 Human Rights Law Review 195, 207f convincingly arguing that the Shari'a principles are the 'public morality' in Islamic societies and hate speech laws conventionally attach to social groups that have, historically, suffered disadvantage or persecution.

discussion here shows a similar double standard in the implementation of s.127, but ultimately argues for fewer rather than more speech restrictions, considering the impossibility of accommodating the huge plurality of moral and political values under the umbrella of 'gross offensiveness'[23] without fatally compromising the right to express oneself freely.

3. A Cosmopolitan Test for 'Grossly Offensive' Online Speech?

A. A Cosmopolitan Test and its Potential Shortcomings

Section 127 of the Communications Act 2003 proscribes speech on a public electronic communications network that is 'grossly offensive or of an indecent, obscene or menacing character'.[24] This speech offence is ostensibly politically neutral and not tied to particular values. Still, it is inevitable that the meaning of what is or is not 'grossly offensive' varies across space and time and is rooted in a particular social and political community, which shines through existing jurisprudence on s.127. The key case laying down the test for s.127 is *DPP v Collins* (2006).[25] Here Collins, feeling aggrieved about the British government's immigration and asylum policy, called the office of his MP and, whilst speaking to his staff and the answering machine, made numerous racial slurs ('Pakis', 'Wogs', 'Niggers'). The House of Lords, allowing the appeal by the DPP, held that the messages were 'grossly offensive' because 'they would be found by a reasonable person to be so.'[26] They involved language that is 'beyond the pale of what is tolerable in our society.'[27] Lord Bingham commented on the historic purpose of s.127 in terms of prohibiting the use of a public utility (funded by the public for the benefit of the public) for communications which 'contravene the basic standards of society'.[28]

Whilst both the 'reasonable person' and the 'basic standards of society' have an air of neutrality and disconnection from time and space and invoke the idea of a consensus, Lord Bingham made a point of stressing the significance of imbuing 'grossly offensive' with meaning in a concrete social setting. He noted that 'the words must be judged taking account of their context and all relevant circumstances… Usages and sensitivities may change over time. Language otherwise insulting may be used in an unpejorative, even affectionate, way, or may be adopted as a badge of honour ("Old Contemptibles").'[29] Despite his reference to the quintessentially English phrase of 'Old Contemptibles',[30] he framed his idea of the proper standard in clearly multi-cultural and pluralistic language. Although 'gross offensiveness' defied a definitive yardstick, it required the application of 'the standards of an open and just multi-racial society… [that is] of reasonably enlightened, but not perfectionist, contemporary

See also Jeremy Waldron, 'Dignity and Defamation: The Visibility of Hate' (2010) 123 Harvard Law Review 1569.

[23] For a comparable position, see Cram, above n 18.

[24] See also s.1 of the Malicious Communications Act 1988 under which it is an offence to send 'a message which is indecent or grossly offensive; a threat; or information which is false and known or believed to be false by the sender…'

[25] [2006] UKHL 40.

[26] *DPP v Collins* [2006] UKHL 40, [13]. The 'reasonable person' test is also applicable to the more general offence in s.5 of the Public Order Act 1986; see for example *Norwood v Director of Public Prosecutions* [2003] EWHC 1564.

[27] *DPP v Collins* [2006] UKHL 40, [12].

[28] *DPP v Collins* [2006] UKHL 40, [7].

[29] *DPP v Collins* [2006] UKHL 40, [7].

[30] It is a reference to Wilhelm II's alleged order, in August 1914, to 'exterminate ... the treacherous English and walk over General French's contemptible little army' concerning the British Expeditionary Force of the British Army. Later, survivors of the British army called themselves 'The Old Contemptibles'.

standards.'[31] With that standard the House of Lords endorsed the multicultural spirit which the European Court of Human Rights laid down in *Handyside v UK* (1976) when it observed that the demands of 'pluralism, tolerance and broadmindedness' require that not just favourable or inoffensive ideas and information are protected by freedom of expression, but also those that 'offend, shock or disturb the State or *any* sector of the population.'[32] Having said that, in *Handyside* the multicultural spirit is, at least in principle, attached to the wide legal tolerance to be given to expression rather than, as in *Collins,* to the law's intolerance of certain expression.

The *Collins* standard seems eminently cosmopolitan and was clearly imposed in the most well-intentioned liberal spirit. Yet, what is the 'society' beyond the pale of which expression must not go? Is there such a homogeneous society that can agree upon its basic standards? The final sentence of Lord Bingham's key passage foreshadows the inherent tension that lies in any attempt to define a uniform speech standard whilst also trying to accommodate a plurality of religions, cultures and political persuasions. He concludes: 'The test is whether a message is couched in terms liable to cause gross offence to those to whom it relates.'[33] The suggestion is that the message should ultimately be judged through the perspective of its target, but this sits uneasily with the test of the 'reasonably enlightened person' who purports to represent society more generally. Implicitly this sentence hints that there may be very different conceptions of 'gross offensiveness' depending on which group in a heterogeneous society makes the judgment. The tension comes through explicitly in Lord Carswell's conclusion that for a 'gross offensiveness' finding it was critical that 'reasonable citizens, not only members of the ethnic minorities referred to by the terms, would find them grossly offensive.'[34] So while the perspective of the insulted minority and that of the reasonable citizen may coincide, the resolution of any divergence in their perspectives is driven by that of the reasonable citizen.

Such resolution is not as unproblematic as it might appear, as shown below. At this point in more general terms, the potential shortfalls of the test are two-fold. First, the resolution based on the views of the 'enlightened citizen' is liable to repress profound disagreements on basic values between different groups in society, and not just with outliers,[35] under the façade of a consensus of reasonableness. Some of these disagreements are not reconcilable with reference to the 'basic standards'. There is the possibility that the 'enlightened citizen' will consider the minority unduly sensitive and indeed unreasonable in respect of its beliefs and values. For example, the Justices at first instance in *Collins* found the racial slurs offensive, but not grossly offensive; yet members of the Pakistani community might take a different view on that. Thus, in a rather illiberal way, the enlightened majority may foreclose the option of restricting speech highly offensive to a minority, whilst at the same time being able to demand such treatment in reverse. This is not a fanciful scenario, as shown in the third case discussed below. Furthermore, the Independent Reviewer of the UK Terrorism Acts noted, in the context of non-violent extremist speech, that extremism tends to be less noticeable:

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[31] *DPP v Collins* [2006] UKHL 40, [9].
[32] *Handyside v United Kingdom* (5493/72) [1976] ECHR 5, [49] (7 December 1976) [emphasis added].
[33] *DPP v Collins* [2006] UKHL 40, [9].
[34] *DPP v Collins* [2006] UKHL 4, [22].
[35] Neville Cox, 'The Clash of Unprovable Universalisms – International Human Rights and Islamic Law' (2013) 2 Oxford Journal of Law and Religion 307; Abdulaziz Sachedina, 'The Clash of Universalisms: Religious and Secular in Human Rights' (2007) The Hedgehog Review 4; A. E. Mayer, 'Universal Versus Islamic Human Rights: a Clash of Cultures or a Clash with a Construct?' (1993-94) 15 Michigan Journal of International Law 307.

'… when it comes from one's own community. Thus, Muslims who engage in non-violent protest against insulting depictions of the prophet meet the Prevent definition of extremism, and can safely be reminded of the principle that the freedom only to speak inoffensively is not worth having. Yet few would think of categorising as extremists those who urge the prosecution of Muslims for insulting the war dead by burning poppies on Armistice Day (indeed 82% of Britons approved of such prosecutions in 2011).'[36]

In other words, we tend to judge the speech or behaviour of the Other much more readily as 'extreme' than acts or words by our own community that might be judged equally 'extreme' from another cultural perspective. The same applies to 'gross offensiveness' which refers to the edges of acceptability from a very specific social and cultural viewpoint.

This is not to deny the public character of morality; judgements of 'gross offensiveness' are not simply private individual opinions or feelings disconnected from community values. However, what is denied here is the existence of a singular national community that shares a set of common values. The problem is in itself far from new. Already in the late 1950s Lord Devlin courted controversy with *The Enforcement of Morals*[37] when he suggested that the law-maker should ascertain the moral values of society to create appropriate criminal law by looking to the 'reasonable man', who is 'not to be confused with the rational man. He is not expected to reason about anything, and his judgement may be largely a matter of feeling. It is the viewpoint of the man in the street… the man in the Clapham omnibus.' The feelings of the Clapham omnibus man, allegedly representative of common morality, had to be respected:

> 'Those who are dissatisfied with the present law on homosexuality often say that the opponents of reform are swayed simply by disgust. If that were so it would be wrong, but I do not think one can ignore disgust if it is deeply felt and not manufactured. Its presence is a good indication that the bounds of toleration are being reached. Not everything is to be tolerated. No society can do without intolerance, indignation, and disgust.'[38]

'Gross offensiveness' protects the sensibilities of 21st century society and *its* 'intolerance, indignation, and disgust.' The Clapham omnibus man has become the 'reasonably enlightened but not perfect citizen' who is arguably more liberal than the former. Yet, as a matter of methodology, the test, and its focus on upright popular sentiment, appears largely unchanged. 'Common morality' fills the empty vessel of 'public morality' offences to oppose differences within, and changes to, society and thus is potentially still as discriminatory of minorities as it was in the 1960s. How this is played out today is illustrated below.

On an interrelated note, when the court referred to the 'basic standards of society' it does of course not mean any society, but it refers to British society. Such explanation appears redundant in a domestic statute, as the national framing of the offence seems uncontroversial

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[36] Anderson, above n 12, [9.16].
[37] Patrick Devlin, *The Enforcement of Morals* (OUP, 1965) based in parts on a lecture of the same title delivered in 1958 to the British Academy.
[38] ibid 17.

and must be assumed.[39] But given, for example, the international dimension of terrorism, 'extremism' has been defined – in discussion of counter-extremism measures – as 'vocal or active opposition to fundamental *British* values'[40] which were then defined as 'democracy, the rule of law, individual liberty and mutual respect and tolerance of different faiths and beliefs.'[41] Are these values peculiarly British? It may have been more inclusive to frame 'extremism' with reference to the international values of human rights.[42] In any event, the idea of 'British society' implies a tight-knit group and a consensus on core values. Normativity based on such assumed consensus becomes problematic when applied to a multicultural society and especially in the inherently heterogeneous online environment, where 'British society', or those domestic groups that identify with it, are routinely and intricately interwoven with many other cultural groups. Given that those other groups are as much within as outwith Britain, laws building on British propriety as a yardstick for online speech might make themselves vulnerable to charges of feeding nationalist sentiments.

Second, the 'reasonably enlightened but not perfect citizen', or more generally the 'reasonable person', has long been contested on the ground that behind its apparent neutrality it obfuscates class and gender inequalities.[43] With reference to s.127 type offences as applied to social media, Cram has argued that the 'law's vague demand that a speaker not insult or offend or distress… has cleansed public discourse to the point where the ability of speakers holding minority viewpoints to challenge dominant elite and orthodox opinions has been substantially impaired.'[44] The outer boundaries of acceptable speech are in fact determined by the standards of a white, educated, middle-class person in the image of the judges. This citizen naturally shows less tolerance for lower-class speech, which in its lack of sophistication tends to grossly offend more readily, as also shown below. This aspect overlaps with Rowbottom's notion of 'low-level' online speech, that is, quasi-public speech not intended for a mass audience by a less experienced and poorer speaker, who is held to account to the same standards that apply to traditional mass media.[45] For the purpose here, the majoritarian perspective reflected by the 'enlightened citizen' is elitist in so far as it is prejudiced against low-level speech.

How then has this test been applied to offensive online speech? An overarching question raised by the cases is whether and, if so, how the involvement of the internet is a significant facet that makes the application of s.127 more problematic. Was the internet just a coincidental aspect in these cases or an important trigger? This question is addressed further below. Moreover, by way of explaining the critique brought to the three cases, the analysis does not assert that the cases were wrongly decided, nor that individual judges were Islamophobic, but rather that the need under s.127 for a consensus based on British society

[39] This is a form of 'methodological nationalism' where the nation state is simply assumed to be the natural reference point for the inquiry, in this case the inquiry focuses on prevalent social norms of acceptable speech. See further, Andreas Wimmer and Nina Glick Schiller, 'Methodological nationalism and beyond: nation-state building, migration and the social sciences' (2002) 2(4) Global Networks 301. Note, although *Collins* was formally a domestic case, substantively it had international dimensions by involving racist speech in response to immigration policy.
[40] Anderson, above n 12, para 9.11 [emphasis added].
[41] ibid.
[42] The universality of the values underlying the international human rights framework has been persuasively questioned in the context of the Islamic value system, see Cox, above n 35.
[43] See, for example, Victoria Nourse, 'After the Reasonable Man: Getting over the Subjectivity Objectivity Question' (2008) 11 New Criminal Law Review 33.
[44] Cram, above n 18, 74.
[45] Rowbottom, above n 18.

values systemically requires the implementation of majoritarian values that cannot but be discriminatory. Lastly, the emphasis lies on the wider factual matrix of the cases, for example, the ethnicity and social standing of the accused, and how the abstractions of the law fall onto full-bodied breathing human individuals in their peculiar socio-economic settings. The discussion may be considered as a kind of critical story-telling.

C. Consumer Speech using the Language of Terror

The well-known Twitter joke case of *Chambers v DPP* (2012)[46] concerned Paul Chambers, who was due to fly on 15 January 2010 from Robin Hood Airport of Doncaster to meet his Twitter sweetheart in Belfast. Upon hearing a week or so earlier via a Twitter alert that the airport had closed, he tweeted 'Crap! Robin Hood Airport is closed. You've got a week and a bit to get your shit together otherwise I am blowing the airport sky high!!' That message was five days later picked up by the duty manager responsible for security of the Robin Hood Airport, whilst searching for tweets referring to the airport. He referred it to his manager, who decided that it was not a credible threat because of Chambers' name (included in his tweet) and the fact that he was still due to fly out from the airport. Nonetheless, in accordance with airport protocol, he referred it to the airport police, who then referred it to the South Yorkshire police. Shortly afterwards Chambers was arrested, charged with the s.127 offence of sending a message of 'menacing character' and convicted by the Crown Court on the basis that an ordinary person would be alarmed by the tweet, as shown by the airport staff who were 'sufficiently concerned to report it.'[47] For the purposes of this discussion, it does not matter that this case did not concern a 'grossly offensive' message but a potentially 'menacing' message that is 'a message which conveys a threat… [and] seeks to create a fear in or through the recipient that something unpleasant is going to happen.'[48] Threatening to blow up an airport at a time of high terrorist sensitivity would appear to fit that definition, and yet finally, on appeal, the conviction was overturned. It was after all only a joke, and everybody knew it or should have known it.

This case has been amply discussed, often as a case that should never have reached the courts.[49] Has this case something to offer on the even-handed application of s.127 to online political speech? At first sight, it doesn't seem to be the case. For a start, Chambers' gripe was that of a disgruntled consumer, unhappy about the possibility of a defective service delivery, a late plane, and thus not ostensibly political. Yet, one might argue that the language he used politicised his rant; for his relatively trivial consumer complaint he appropriated terrorist language of blowing things up – the language that is now deeply associated with Islamic terrorism. Judge Davies (on the bench of the first unsuccessful appeal) commented as much when she said: 'Anyone in this country in the present climate of terrorist threats, especially at airports, could not be unaware of the possible consequences.'[50] It is the mismatch of the trivial and the profound that made the case so ambiguous to deal with and

[46] *Chambers v DPP* [2012] EWHC 2157.
[47] *Chambers v DPP* [2012] EWHC 2157, [17].
[48] *Chambers v DPP* [2012] EWHC 2157, [29].
[49] See, e.g. Andrew Murray, *Information Technology Law* (2nd, OUP, 2013) 149ff; Jacob Rowbottom, 'The Protection of Expression in the UK' in Oreste Pollicino, Graziella Romeo (eds*), The Internet and Constitutional Law* (Routledge, 2016), 192, 196ff.
[50] Martin Wainwright, 'Twitter joke trial: Paul Chambers loses appeal against conviction' *The Guardian* (11 November 2010); see also *Chambers v DPP* [2012] EWHC 2157 [31].

explains the back and forth reactions by the various actors, including the courts (i.e. conviction, lost appeal, no decision because of a split court, successful appeal[51]).

Was it just a joke or not funny at all? After all, humour is one of the most context dependant and culturally sensitive communications and depends on subtle *common* understandings and *shared* social norms between speaker and listener. What is funny in one context may be offensive or menacing in another. Different communities, divergent meanings. This is in itself not a new phenomenon; yet the multitude of online communities, their internal diversity and frequent interactions and clashes with each other *is* novel. Chambers' Twitter 'community', consisting of his 600 followers of probably relatively like-minded individuals, understood without any doubt that the joke was a joke and found it not 'even minimally alarming.'[52] As his followers, they were used to his language, his ways of thinking and expressing his feelings. That context of shared understandings was not present for the airport security personnel, belonging to an offline national community, five days later. Nor was it present for the South Yorkshire Police which only concluded that the tweet presented no threat after an investigation.[53] For them the tweet was at least ambiguous (notably s.127 captures both real threats and those that appear real but are not). Indeed, as the tweet threatened relatively imminent violence it came close to the type of speech that can be outlawed with greater ease.

A joke for one community and an ambiguous, potentially menacing statement for another: how should the 'basic standards of society' test reconcile these two meanings created by two disparate groups? Following *Collins*, the Divisional Court held that the test is that of the 'reasonable person' and whether he or she would 'brush it aside as a silly joke, or a joke in bad taste, or empty bombastic or ridiculous banter…'[54] But how could or should a 'reasonable person' from neither group have formed a judgment about this joke? The simple answer is that deciding between the two divergent meanings as to which one is the 'better one' is rationally impossible, as both meanings are equally valid. Yet a decision had to be made. Whilst the Divisional Court purports to follow *Collins* in making this impossible choice, its summary of facts commences with a description of Paul Chambers as '26 years old at the time… [and] a well-educated young man of previous good character, holding a responsible job as an administration and finance supervisor.'[55] Perhaps the implication of this judicial scene setting is that someone like Chambers is unlikely to blow up airports, which statistically is undoubtedly true. Of course, the airport security personnel did not know these personal details of Chambers, but their lack of concern was based, according to the court, on the fact that Chambers' name appeared in the tweet and in the passenger list. In this context and as a matter of speculation, one may ponder whether the airport personnel would have reacted in the same way if his name had been Azhar Ahmed? Would they have reported the tweet with some real urgency? In that respect, it may at least be arguable that in their slow reaction to the tweet, the airport personnel displayed a certain prejudice – but no more than any enlightened citizen – based on a name, drawing valid standard inferences about Chambers' membership in the white British community.

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[51] Murray, above n 49. David Allen Green, 'The High Court is unable to agree on Twitter Joke Trial appeal' *The New Statesman* (28 May 2012).
[52] *Chambers v DPP* [2012] EWHC 2157, [13].
[53] *Chambers v DPP* [2012] EWHC 2157, [32].
[54] *Chambers v DPP* [2012] EWHC 2157, [30].
[55] *Chambers v DPP* [2012] EWHC 2157, [6].

This then brings us to the Court's actual reasoning for overturning the conviction. Considering that the 'basic standards of society' refer to an objective test, should the *actual* responses of, for example, the airport personnel, particularly where prejudiced, inform the legal test of s.127 in its cosmopolitan understanding? According to the Divisional Court, Lord Bingham's objective standard does not preclude consideration of the actual reaction to the message.[56] Indeed the lower court had failed to do so: '[n]o weight appears to have been given to the lack of urgency which characterised the approach of the authorities to this problem… [and the court had] overlooked that this [the reporting] represented compliance with their duties rather than their alarmed response to the message.'[57] Some focus on actual reactions or likely actual reactions would seem inevitable. Any hypothetical approach to judging the acceptability of content has to draw on real-world social attitudes and by doing so the 'enlightened citizen' becomes much less abstract and much more a real person from a real social context that is imbued with all the normal prejudices, fears and anxieties.

Chambers was also given the benefit of doubt in respect of establishing his *mens rea*. The court held that where a message was intended as a joke, even as a poor joke, this would not by itself prove that the accused was 'aware of or … recognised the risk at the time of sending the message that it may create fear or apprehension in any reasonable member of the public who reads or sees it.'[58] By implication, for Chambers it would be possible to make a joke of this sort and *not* entertain the possibility that he may be perceived as a risk through the eyes of the reasonable public. Would someone of the name of Azhar Ahmed be entitled to take the same innocent perspective? The likelihood is that a member of the British Muslim community would be keenly aware of the possibility that a joke like Chambers' would not be considered funny by the 'reasonable' British public when undersigned by an Arabic name. Thus Chambers, as a member of the British white community, could make a consumer joke using the language of terror that members of the British Muslim community could not make without attracting criminal sanctions.

The argument is not that Chambers ought to have been convicted, but rather that content restrictions based on moral or quasi-political acceptability are liable to replicate and reinforce the intolerance that they seek to redress, and that that problem is exacerbated by the clash of communities online. Whilst *Chambers* was celebrated as a victory for freedom of expression, its necessary contextualised assessment means that the victory belongs much more to some than others, as borne out by *Ahmed*.

B. A Muslim's Complaint about War Reporting in Mainstream Media

R v Azhar Ahmed (2012),[59] decided in the same year as *Chambers* and also set in Yorkshire, concerned Azhar Ahmed, a 19-year old Muslim man from Ravensthorpe. In response to the media coverage on the death of six British soldiers in Lashkar Gah in Afghanistan, Ahmed posted on his Facebook account:

> 'People gassin about the deaths of Soldiers! What about the innocent familys who have been brutally killed.. The women who have been raped.. The children who have been sliced up..! Your enemy's were the Taliban not innocent harmful familys. All

[56] *Chambers v DPP* [2012] EWHC 2157, [32].
[57] *Chambers v DPP* [2012] EWHC 2157, [33].
[58] *Chambers v DPP* [2012] EWHC 2157, [38].
[59] *R v Azhar Ahmed* (14 September 2012, Huddersfield Magistrates Court, District Judge Jane Goodwin; unrep).

> soldiers should DIE & go to HELL! THE LOWLIFE FOKKIN SCUM! gotta problem go cry at your soldiers grave & wish him hell because thats where he is going..'[60]

While the post attracted some 'Likes' from his Facebook group (which again appears to have consisted of between 600 and 700 members), it also drew negative attention and was widely shared on Facebook. When the mother of one of the deceased soldiers saw the post, she informed the police. Amidst protest by the English Defence League outside the court, Ahmed was convicted of 'gross offensive' speech given that the post, according to the magistrate, lay outside the protection of legitimate political opinions, even those being strongly voiced; the post was 'derogatory, disrespectful and inflammatory' and went beyond the pale of what is tolerable in our society.[61] Spared a custodial sentence only because of his youthfulness and having shown contriteness, Ahmed was sentenced to 240 hours of community service.[62]

What caused gross offense? Whilst crudely and insensitively put, Ahmed expressed a political view on two important matters of the public debate of the day: he complained of the media hypocrisy of elevating British over Afghan lives, and about British military operations in Afghanistan. Both sentiments express not uncommon left-wing political opinions and certainly do not normally attract criminal sanctions.[63] Notably, in Germany, similar expression calling all soldiers 'murderers' or 'potential murderers' received constitutional backing.[64] Furthermore, focusing purely on Ahmed's words, they neither threaten violence nor incite it – unlike Chambers. There is no mention of 'killing' soldiers, although contextualised this may be read differently. Ahmed's downfall was two-fold and, much as in *Chambers*, it was a question of his ethnic and social identity. First, the offensive meaning of his post was created once it left his own Facebook group, and was read by a wider and arguably Islamophobic audience that projected anti-British sentiments onto the post.[65] The fact that Ahmed was at first charged with the 'racially aggravated' public order offence under s.18 of the Public Order 1986 (later withdrawn) is significant, considering that the post itself contained no racial references; he did not say 'All British soldiers should die.'[66] So the racist meaning was a projection by its audience;[67] the Facebook community and the police made assumptions about which soldiers someone like Ahmed must really be referring to, even when he referred to 'all soldiers'. The offensive meaning was created by the reader, not the speaker. Whilst in *Chambers* the tweet was defused by Chambers' ethnic identity, in *Ahmed* the post was charged by his ethnic origin. The offence lay in the prejudiced eyes of the beholder which the law legitimises by recognising those 'grossly offended' feelings. The majority-minority dynamic that strongly underpins such speech disputes also comes through in *Abdul & Ors v DPP* (2011)[68] where Muslim protestors against UK military interventions in Afghanistan and Iraq were convicted of 'threatening, abusive or insulting speech' under s. 5

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[60] Richard Seymour, 'Azhar Ahmed – charged with treason over Facebook comments?' *The Guardian* (15 March 2012).

[61] Terri Judd, 'All soldiers should die' Facebook poster found guilty' *The Independent* (14 September 2012).

[62] *R v Azhar Ahmed* (9 October 2012, Huddersfield Magistrates Court, Sentencing Remarks) https://www.judiciary.gov.uk/judgments/azhar-ahmed-sentencing-remarks-09102012/

[63] For example, Noam Chomsky, *Media Control: The Spectacular Achievements of Propaganda* (2nd ed, Seven Stories Press, 2008).

[64] *Soldiers are murderer* 93 BVerfGE 266 (1995), discussed in Barendt, above n 12, 181f.

[65] For evidence of the rise of Islamophobia see Ted Jeory, 'UK entering 'unchartered territory' of Islamophobia after Brexit vote' (27 June 2016) *The Independent*, reporting that the Anti-Muslim hate monitoring group Tell MAMA has reported a '326 per cent increase in incidents in 2015'.

[66] Contrast *Abdul & Ors v DPP* [2011] 247.

[67] Seymour, above n 60.

[68] *Abdul & Ors v DPP* [2011] 247.

of the Public Order Act 1986,[69] for shouting slogans such as 'British soldiers murderers' or 'British soldiers go to hell'. In support of the conviction, Lord Gross said that while Art 10(1) of the ECHR 'must plainly extend beyond... [popular, mainstream views] so that minority views can be freely expressed, even if distasteful. [However] the focus on minority rights should not result in overlooking the rights of the majority.'[70] In so far as the majority or mainstream perspective determines what is or is not 'tasteful', 'distastefulness' is dependent on its rejection by the majority, rather than any objective criterion. This is not to say that minorities of whatever description hold 'distasteful' views, but simply that 'offensiveness' lies, by definition, outside whatever the majority considers as non-offensive. In addition, and contrary to Lord Gross, speech offenses such as s.5 or s.127 always protect the rights of the majority if only in so far as it is the majority perspective that determines which non-mainstream/minority perspective goes beyond legal acceptability and which does not, as shown further in the third case.

Second, Ahmed's downfall also lay in his lack of sophistication and emotional restraint, as acknowledged by the police in the case: 'As the… remarks of the police spokesperson makes clear, it is the tone of (and lack of sophistication in) Ahmed's words – in short – his incivility that results in him coming to the attention of police in the first place.'[71] His words are not just crude, they also have an emotive strength and convey anger and perhaps a distant threat. At a constitutional level, neither vulgarity nor strong emotion should impact on the speakers' freedom of expression, as agreed upon on both sides of the Atlantic. In the US the Supreme Court in *Cohen v California* (1971) set aside Cohen's conviction for 'offensive conduct' – by wearing a jacket with 'Fuck the Draft' printed on its back – on the basis that

> 'governmental bodies may not prescribe the *form* or content of individual expression… The constitutional right of free expression is powerful medicine in a society as *diverse* and *populous* as ours… putting the decision as to what views shall be voiced largely into the hands of each of us… [which] comport[s] with the premise of individual dignity and choice upon which our political system rests.'[72]

Notably, the court directly linked the form of the message with the diversity of speakers, implying that to do otherwise would discriminate against a certain class of speakers. It then also explicitly gave protection to emotions, referring to the 'emotive function which… may often be the more important element of the overall message sought to be communicated.'[73] Similarly, the European Court of Human Rights, although recognising that the legitimacy of speech restrictions is context-specific, has still held that the tone is an integral part of the music: 'Article 10 protects not only the substance of the ideas and information expressed, but also the form in which they are conveyed.'[74] The problem with s.127 type offences is that they are predicated on the audience's (actual or likely) emotional reaction of being 'grossly offended' and that that reaction frequently flows from the tone of the message that imbues its content with offensiveness, and in this respect s.127 certainly discriminates against crude and emotive 'low-level speech'. It was the unsophisticated and unrestrained anger implicit in

[69] See above n 11.
[70] *Abdul & Ors v DPP* [2011] 247, [49].
[71] Cram, above n 18, 88.
[72] *Cohen v California* (1971) 403 US 15, 24 [emphasis added]
[73] *Cohen v California* (1971) 403 US 15, 26, discussed in Cram, above n 18, 88.
[74] *Gül and others v Turkey* [2010] App no 487 /02, [38] and [41] respectively, following *Karataş v. Turkey* [GC], no. 23168/94, § 49, ECHR 1999-IV.

Ahmed's post that made it 'inflammatory' and thus 'beyond the pale of what is tolerable in our society'.

D. A Christian Preacher's Attack on Islam and Muslims

The above discussion is not intended to suggest that the messages in question should not have been investigated. They should have, but as security threats and not as speech that offended someone's sensibilities. Equally, the above does not seek to argue that 'gross offensiveness' or like offences always work substantively at the expense of racial or religious minorities. There are numerous cases when Islamophobes and xenophobes have been convicted for grossly offensive speech. In *Norwood v DPP* (2003)[75] a BNP member was convicted under s.5 of the Public Order Act 1986 for displaying a poster in his bedroom window saying 'Islam out of Britain'.[76] In 2010 21-year old Kalum Dyson of West Yorkshire pleaded guilty to a charge of 'sending an offensive or indecent, obscene or menacing electronic communication' in respect of the Facebook group called 'Pakis Die' and his messages including 'Help me shoot all the Pakis.'[77] These cases show that the 'basic standard of society' may also work for the protection of minorities. Importantly however, this does not mean that the 'enlightened citizen' takes the perspective of the ethnic or religious minority in these cases. After all, a slogan such as 'Pakis die' is 'grossly offensive' even from a majoritarian perspective and hardly requires a deep cultural tolerance or a strong cosmopolitan mindset.

A case which tests the limits of the cosmopolitan world view of the 'enlightened citizen' and his or her ability to see through the eyes of an offended minority is *DPP v McConnell* (2016).[78] In that case Pastor McConnell in a sermon at the Whitewell Metropolitan Church in Northern Ireland preached against Islam in the most derogatory language:

> 'Today we see powerful evidence that more and more Moslems (sic) are putting the Koran's hatred of Christians and Jews alike into practice. *Now people say there are good Moslems in Britain that may be so but I don't trust them*, Enoch Powell was right and he lost his career because of it, Enoch Powell was a prophet and he told us that blood would flow in the streets and it has happened… Islam is heathen, Islam is satanic, Islam is a doctrine spawned in hell.'[79]

In a considered judgment, McNally J concluded that, however contemptible and offensive, the utterances by McConnell were not 'beyond the pale of what is tolerable in our society' within s.127.[80] Whilst this case appears to confirm the bias discussed above, the value of the case lies in highlighting the inherent problems of s.127 type offences in the new online speech environment.

First, s.127 could only be invoked in this case because the sermon was not just delivered in the church but also streamed online. The speech would have been perfectly legal, albeit morally reprehensible, within the confines of the church. The law does not penalise grossly

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[75] *Norwood v DPP* [2003] EWHC 1564.
[76] Section 5(1)(b) which makes it an offence to display 'any writing, sign or other visible representation which is threatening, abusive or insulting.'
[77] 'Brighouse Facebook racist Kalum Dyson avoids prison term' *Huddersfield Examiner* (10 December 2010).
[78] *DPP v McConnell* [2016] NIMag 1.
[79] *DPP v McConnell* [2016] NIMag 1, [2] [emphasis added].
[80] *DPP v McConnell* [2016] NIMag 1, [24].

offensive speech per se. It is not the speech itself that is judged but the effect is has on its actual or likely audience, assuming the 'enlightened citizen' agrees. By implication, xenophobic speech is legal as long as its actual or likely audience is xenophobic.[81] McConnell's sermon became problematic, in the eyes of the law, for being streamed online and for the resultant clash with online heterogeneity. In the words of the judge: 'McConnell's mindset was that he was preaching to the converted in the form of his own congregation and like-minded people who were listening in to his service rather than preaching to the worldwide internet.'[82] Through the internet McConnell was confronted with the 'non-converted', which is figuratively the case in all 'gross offensiveness' prosecutions. There are 'non-converted' on many topics in cyberspace, and the increasingly seamless flow between online and offline communities also means any 'gross offensiveness' censorship based on the feelings of a particular online group has reflexive repercussions for offline speech, as in the above case.

Second, the case comments on the depth of the cosmopolitan mindset of the 'enlightened citizen'. McConnell's sermon levelled insults against Islam, on the one hand, and against Muslims, on the other hand. The prosecution considered that the former insults would be protected by freedom of thought, conscience and religion and freedom of expression, and thus were excluded from the prosecution, which was limited to McConnell's stereotypical statement that all Muslims were untrustworthy.[83] To put this prosecutorial decision into context, insults against Islam fall within the sphere of blasphemy (abolished as an offence in England and Wales in 2008[84]) in line with international human rights understanding.[85] In contrast, verbal attacks on Muslims, focusing on the persons rather than their beliefs, are considered a form of hate speech and have, alongside other forms of xenophobic speech, been recognised at international level as illegitimate 'defamation of religion' or more recently under the less contentious label of 'religious tolerance.'[86] In spite of the legal foundations of the prosecutorial decision, for a Muslim the prosecution would have by-passed the most offensive part of the sermon. As Cox observed with respect to the *Charlie Hebdo* cartoons:

> 'Reverence for God… is at the apex of the whole Islamic philosophy. God is the source of all morality, and therefore undermining God is immoral at a unique level, and speech which has this effect must, by definition, be profoundly (and uniquely) unacceptable… [and is] painfully and profoundly offensive to millions of Muslims – including those living in minority cultures in western societies…'[87]

In his judgment, McNally J shows an astute awareness of this minority perspective (perhaps not coincidentally given the long-standing religious conflict of Northern Ireland) when he observes that the sermon engaged solely 'in a bout of name calling' and made no attempt whatsoever to set out Islamic doctrines; then he concludes: 'Indeed I struggle to think of

[81] Even assuming that speech were to be judged objectively 'grossly offensive' regardless of the audience, a prosecution is unlikely whenever the audience agrees with the speaker as it is unlikely to be reported in these circumstances.
[82] *DPP v McConnell* [2016] NIMag 1, [20].
[83] *DPP v McConnell* [2016] NIMag 1, [20].
[84] Section 79 of the Criminal Justice and Immigration Act 2008; but the common law offences of blasphemy and blasphemous libel remain in place in Northern Ireland and Scotland.
[85] Darara Gubo, *Blasphemy and Defamation of Religion in a Polarised World: How Religious Fundamentalism is Challenging Fundamental Human Rights* (Lexington Books, 2014).
[86] Most recently, Human Rights Council Resolution A/HRC/28/L4 (19 March 2015); for a wider discussion of both types of anti-religious/Islamophobic speech, see Cox, above n 22, 200ff.
[87] Cox, above n 22, 212f.

anything more offensive to say about another person's sincerely held beliefs than that those beliefs are satanical and "spawned in hell"'[88] – arguably with a veiled critique on the prosecution for failing 'to recognise…[McConnell's] responsibilities and the rights of the Muslim community under the Articles [Art 9 and 10].'[89] His attempt to take the minority perspective seriously also shines through this question in role reversal: 'What if a Muslim had preached "Christianity is heathen, Christianity is satanic, Jesus Christ was not the son of God but spawned in hell?"'[90] Of course, the 'enlightened citizen' tends to be secular and would have difficulty to relate to an insult thus put and so, even in role reversal, there is the problem of not quite comprehending the minority perspective.

The point is not to argue that 'gross offensiveness' should have been established in respect of either of McConnell's insults. This would give political, religious, ethnic or cultural minorities of various persuasions an extensive veto on public speech and hold public discourse hostage to political correctness on innumerable fronts. The point, however, is that s.127 gives that veto over speech to the majority – as implemented in this case, and undoubtedly correctly within the law, by the decision to exclude the blasphemous comments from the prosecution and then by McNally J's judgment not to find the insults of Muslims, (that they were untrustworthy) 'grossly offensive.'

The problem with the majoritarian viewpoint is not that it is completely insensitive to minority perspectives, but that – as a matter of process – it holds the paternalistic power to decide when an insult targeted at a minority or coming from the minority goes 'beyond the pale of what is tolerable in our society', and that – as a matter of content – its decisions will invariably betray majoritarian prejudices, in this specific case, the 'secular western orthodoxy [that] is suspicious of and threatened by Islam.'[91] The law legitimises those prejudices: given that 'gross offensiveness' is not focused on the content of the speech per se, but on the (actual or likely) reaction of the listeners to the speech, it is deeply susceptible to follow, rather than lead, public or majoritarian sentiment. Even if it were to lead public sentiment, the question is who decides on the direction. At the same time, the legally sanctioned silencing of the Other and their unique perspective (whether from the extreme right or left of the political spectrum or from Islamic or any other minorities) reinforces the illegitimacy of their voice within the public sphere. In both respects the law is unlikely to contribute towards a reconciliatory debate, particularly when set against the relentless rumblings of the online community that amplifies the heterogeneity of multicultural society and cannot be silenced. McNally J seems astutely aware of the intrinsic shortcomings of his judgment in facilitating an even speech equilibrium. In reprimand of McConnell whom he had just legally legitimised, he concluded with the words of 'the Islamic scholar and poet Rumi who said: "Silence is the language of God, all else is poor translation."'[92]

4. What is 'Grossly Offensive' in Cyberspace? Who Decides?

Cyberspace exacerbates the problematic mismatch between consensus-orientated speech standards, such as s.127, and a pluralist society, in two significant ways: one, by taking large parts of online speech outside *effective* enforcement of national law and, two, by amplifying

[88] *DPP v McConnell* [2016] NIMag 1 [19].
[89] ibid.
[90] ibid.
[91] Cox, above 22, 221.
[92] *DPP v McConnell* [2016] NIMag 1, [24].

the heterogeneity of views that exist even on a purely domestic level. Each of these has profound repercussions for the effectiveness and legitimacy of national speech standards.

In relation to the first point, cyberspace has a profound impact on the effective enforcement of national legal standards. On the one hand, given the global nature of the internet, states are limited in their ability to enforce their laws vis-à-vis actors and activities outside their territories. Although a state can in principle extend its laws to acts or events originating beyond its territory which have an effect within it (e.g. foreign sites), it cannot enforce it or only with great difficulty.[93] The fact that there are no or few prosecutions against offending foreign speakers is explicable precisely by the limited enforcement power, and not by the fact that foreign speakers are inoffensive. On the other hand, national law is not simply undermined vis-à-vis online voices coming from the outside, but also vis-à-vis all the millions of voices from the inside. This is a matter of scale.[94] Traditional regulatory mechanisms are ill-equipped to deal with the decentralised nature of the internet and its democratising effect on *broad*casting; everybody has or can have a public voice online. The recent high conviction rate under s.127 undoubtedly only represents the tip of the iceberg of online 'gross offensiveness' even domestically; yet there are simply not enough resources to deal with them all.[95] As a side note, this also implies a wide prosecutorial discretion in deciding whether to go ahead with a criminal charge or not, which undermines the rule of law and lends political significance to each decision to prosecute or not to prosecute.[96] These profound challenges to the effectiveness of national law cannot but affect the perceived legitimacy of s.127 type offences purely based on practical terms. [97]

Cyberspace also creates heightened tensions for the *legitimacy* of national law, that is, laws which purport to reflect values held by national communities. In fact cyberspace lends national conceptions of proper and improper speech both more and less legitimacy. Such speech conceptions hold less legitimacy in so far as the internet confronts national communities with their own internal heterogeneity and also with the wide diversity of values from the outside, making the differentiation of internal versus external, domestic versus foreign, meaningless. In that sense cyberspace acts like a cultural mirror.[98] The ability of like-minded individuals to find each other and bypass traditional mass media gatekeepers means that a huge number of online communities have sprung into existence below and across national communities with varied social, political, religious or commercial raisons d'être. This is nowhere more apparent than on social media platforms with innumerable groups, subgroups and networks. These communities challenge – through their very existence and

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[93] For example, via blocking orders or takedown notices against local intermediaries, see Ronald J. Deibert, 'The Geopolitics of Internet Control – Censorship, Sovereignty, and Cyberspace' in Andrew Chadwick, Philip N. Howard (eds), *Routledge Handbook of Internet Politics* (Routledge, 2009) 323; Uta Kohl, *Jurisdiction and the Internet: Regulatory Competence over Online Activity* (CUP, 2007) 225ff.

[94] Milton L. Mueller, *Networks and States: The Global Politics of Internet Governance* (MIT Press, 2010) 211f. Acknowledged, for example, in *(A Young Person) v Facebook Incorporated & Anor* [2015] NIQB 61 [22]. More generally, see Wolfgang Benedek, Matthias C Kettemann, *Freedom of Expression and the Internet* (Council of Europe Publishing, 2013); Jan Oster, *Media Freedom as a Fundamental Right* (CUP, 2015).

[95] This has been documented in the case of child abuse images which would rank higher than 'gross offensiveness', in terms of regulatory urgency. Paul Peachey, 'National Crime Agency says system realistically can't prosecute all 50,000 child sex offenders' *The Independent* (20 October 2014).

[96] For a critique of the wide discretion in speech offences, see Rowbottom, above n 18.

[97] See e.g. Grant Blank, 'Should government regulate the Internet more?' *Oxford Internet Institute - Oxford Internet Surveys* (21 September 2013).

[98] This shines through some judgements, e.g. *(A Young Person) v Facebook Incorporated & Anor* [2015] NIQB 61 (25 June 2015) [33] where the judge made an order against Facebook, not on the country-specific basis, but rather applicable to the English language sector of Facebook.

through internal rule-making e.g. Facebook's 'Community Standards' – the legitimacy of normativity flowing from national communities, i.e. held together, first of all, because of the shared physical space, the territory of the state. Those physical spaces and attendant communities are, of course, socially still meaningful given our real life existences and shared histories and cultures, but in terms of ideas, identity and sense of belonging, online communities have, in some respects, become important competitors.[99] The significance of 'communities' for legal legitimacy has been put as follows:

> '[S]ome important demands are for law that gives 'roots': moral security, or a sense of belonging in contexts that are personally significant. These are, less and less, contexts rooted in specific geographical locations. They are diverse and abstract: context of meaning rooted in communities best conceptualized as webs of understanding about the nature of social relations. Community in this sense is a mental construct… It provides people with a means of orienting themselves. It gives them their sense of identity. Hence community can be a matter of shared beliefs or values, but also of common projects or aims, or common traditions, history or language, or of shared or convergent emotional attachments.'[100]

Conversely, national speech conceptions are validated to the extent to which national identity has in fact been boosted through the confrontation with online heterogeneity. Nationality becomes an important marker of identity and security in a world that is perceived as fluid, chaotic and unstable, from which the physical (stable) world of the nation state appears to offer a welcome respite. These two opposing forces mean that national identity and normativity become strong points of contestation. Within this contestation, censorship that relies on broad standards like 'gross offensiveness' that cannot but be responsive to dominant public conscience and political ideology, may be accused of adding fuel to the fire.[101]

5. Conclusion

The discussion here questions the effectiveness of speech restrictions, such as the 'gross offensiveness' proscription, in achieving their intended outcome to cleanse the public sphere of abusive speech in an *even-handed* liberal fashion. The core of the argument is not that such censorship creates the risk of *deliberate* governmental abuse which underlies the US stance on speech restrictions. The focus here is also on biases, but these biases are of a different kind. They are the inevitable biases that arise when value judgments are called for in the application of broad moral and quasi-political tests in concrete social settings against the background of a profoundly multicultural society. The internet, internally and externally, magnifies the huge diversity of values. Against such a speech environment, a cosmopolitan speech standard can only show what might be called *surface* rather than *deep* tolerance and is thereby, however unwittingly, implicated in the intolerance it seeks to address. By contrast, deep respect for the values and sensitivities of all minorities of countless persuasions – from Jehovah's Witnesses to Scientologists – would, however desirable in principle, give rise to

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[99] See, for example, Bernard Rieder, 'Institutionalizing without Institutions? Web 2.0 and the Conundrum of Democracy' in Françoise Massit-Folléa, Cécile Méadel, Laurence Monnoyer-Smith (eds)**,** *Normative Experience in Internet Politics* (Presses des Mines, 2012) 155.

[100] Cotterrell, above n 6, 389, citing Boaventura De Sousa Santos, *Toward a New Common Sense: Law, Science and Politics in the Paradigmatic Transition* (London, 1995) Ch. 4. In addition, the internet also undermines the legitimacy of national law in so far as its application leads to the territorial fragmentation of cyberspace, and thus compromises its value as a global public resource.

[101] See Anderson, above n 12.

intolerable speech restrictions and make the public sphere a wasteland where only the blandest, uncritical and trivial exchanges could be tolerated.

This then brings to the fore another assumption that undoubtedly underlies the desire to suppress grossly offensive and similar speech through its criminalisation and that is the assumption that the suppression of such speech can stop the contagion of undesirable ideologies.[102] A stronger variant of this assumption is that such suppression may eliminate the ideas that underlie the speech. Whether, or to what extent, this assumption is valid is questionable, although it is noteworthy that authoritarian regimes significantly invest in wide-ranging censorship as a tool for demagogy and social engineering,[103] which by itself suggests the dangers of going down that route. In States with commitments to democratic processes and freedom of speech, the selective criminalisation of particular speech is bound to attract discussion and, more crucially, opposition. Education and social conditions are likely to be more powerful influencers of ideas than their criminalisation. Notably in 1972 France introduced the offence of racist speech which was followed in 1975 by two criminal convictions for 'the publication of articles suggesting that France has been invaded by immigrants who came only to claim social security benefits or that their presence has created insuperable social and economic problems.'[104] Judging the effectiveness of these convictions from a contemporary perspective, they appear wholly ineffective in light of the rise of the Far Right in France – a movement that is built on anti-immigration rhetoric.[105]

A more promising approach to online (and offline) conflicts expressed through speech might lie in thinking about the conflicts more positively[106] – not as matters to be hushed under the carpet but rather as a vital aspect of the democratic process. So rather than see the public sphere in Habermasian consensus-oriented terms (where a certain consensus is required to equalise the speech platform which then facilitates more consensus building), Foucault's contextual approach to rationality endorses resistance itself as freedom. Along his view it is accepted that vast differences in terms of world views and interests between different ethnic, gender, cultural, national groups cannot be ironed out – to create power-free communications or then consensus on the substance.[107] Differences are here to stay, and so are conflicts and resistance, and it is in the expression of those conflicts through, for example, speech, wherein freedom lies, rather than through the elimination and suppression of conflicts.[108] '[F]reedom [is not] likely to be achieved by imposing…"correct" thinking.'[109] This is resonant with the arguments made above. First, it lends support to the argument that censorship based on an apparent 'consensus' of 'gross offensiveness' can do no more than impose 'correct thinking' on communities and groups with profoundly different values and interests from the majority.

[102] Barendt, above n 12, 171.
[103] For example, Jyh-An Lee and Ching-Yi Liu, 'Forbidden City Enclosed by the Great Firewall: The Law and Power of Internet Filtering in China' (2012) (13) *Minnesota Journal of Law, Science, and Technology* 125.
[104] Barendt, above n 12,180.
[105] *Le Pen v France* (ECrtHR, Application no. 18788/09, 20 April 2010) and *Féret* v. *Belgium* (ECrtHR, Application No 15615/07, 16 July 2009) – concerning, respectively, the conviction against Jean-Marie Le Pen, the then president of the French National Front party, for making Islamophobic statements in an interview with *Le Monde* in 2008 and the conviction against Daniel Féret, the chairman of the Belgium National Front party for xenophobic leaflets distributed during election campaigns in the early 2000s; both convictions survived challenges to the European Court of Human Rights based on Art 10, the former at the admissibility stage and the latter on substance.
[106] For some anecdotal evidence of their positive effect, see Steven Johnson, 'Is Facebook the enemy of truth and civic unity?' (2 January 2016) *The Guardian.*
[107] Flyvbjerg, above n 13, 10.
[108] Flyvbjerg, above n 13, 11.
[109] Flyvbjerg, above n 13, 11.

This, in turn, denies their freedom of being heard in the public sphere. Second and related, from a Foucauldian perspective such censorship is also quintessentially an act of power and domination cloaked, procedurally, behind judicial neutrality and independence,[110] and, substantively, behind societal consensus. Let us conclude with Flyberg's apt words of warning:

> 'There is mounting evidence… that social and political conflicts produce themselves the valuable ties that hold modern democratic societies together and provide them with the strength and cohesion they need; that social and political conflicts are the true pillars of democratic society and its political and administrative institutions. Governments and societies that suppress conflict do so at their own peril. A basic reason for the deterioration and loss of vitality of the Communist-dominated societies may be in their success in suppressing overt social and political conflict. In this interpretation, a society's constant honing of its capacity for allowing and dealing with conflict is what ensures the type of flexibility in the social and political order needed for long-term viability. In a Foucauldian interpretation, suppressing conflict is suppressing freedom, because the privilege to engage in conflict and power struggle is part of freedom.'[111]

[110] Flyvbjerg, above n 13, 10, quoting Noam Chomsky and Michel Foucault, 'Human Nature: Justice versus Power' in Fons Elders (ed), *Reflexive Water: The Basic Concerns of Mankind* (Souvenir: London, 1974) 171: freedom includes the right to criticise the 'working of institutions which appear to be both neutral and independent.'

[111] Flyvbjerg, above n 13, 15.