# Editorial

## Dangerous Speech and Images:  Regulating the Internet

This edition of the journal contains a collection of articles on the regulation of dangerous speech and images on the internet.  The authors address, from a number of different perspectives, the legal problems which arise from the proliferation of pictures and text on the internet and which might be deemed 'dangerous'.  The pieces discuss the extent to which legal regulation of speech and images is both desirable and attainable.  The papers present an opportunity to explore some of the common problems associated with regulating the internet, but also offer the chance to investigate in more depth the particular issues which arise in the discrete areas of interest of each author.

This special issue starts with three pieces that can broadly be defined as dealing with the banning of images.  The first is a piece by Jacob Rowbottom, who traces the history of obscenity laws and juxtaposes this alongside their modern use.  He shows how the use of obscenity laws has been transformed as a result of society's heightened attitudes towards child protection, coupled with the growing number of 'obscene' images accessible on the internet.   He shows how this has resulted in the increase in the number of people prosecuted under this legislation, and he urges us to consider the extent to which the right people are being brought within the net of criminal liability.

This is followed by Alisdair Gillespie who takes a closer look at child pornography laws.  He employs a doctrinal approach to consider the reach and extent of the legislation.  He too, identifies a recent shift in the way these laws have been applied.  He notes that these offences, at their core, are about child protection, but are increasingly being used in a way that is nothing to do with child protection, and this potentially infringes our right to freedom of expression and sexual autonomy.  This shift has arisen as a result of the concerns surrounding the proliferation of images on the internet.  He is particularly critical of the laws surrounding 'sexting' which he argues were a reaction to the belief that adolescents did not understand the implications of the internet and the consequences of their behaviour.

The issue of sexting is the topic of Chris Lloyd's piece.  He adopts a theoretical deconstructionist approach based on the work of Jacques Derrida and Maurizio Ferraris to further our understanding of the problems surrounding sexting.  His article outlines the problem caused by the sexting laws which appear to have ignored the social and technological context within which this behaviour is manifested.  Adolescents of today are 'born digital' and thus have a particular relationship with the internet which needs to be taken into account when creating laws.  Furthermore,

the fact that sexting occurs through the use of mobile phones (as opposed to laptops or desktops) also has implications for the law.

The final two pieces are concerned with the regulation of 'speech'. Chara Bakalis discusses the existing legal rules for the regulation of online hate speech. Cyberhate is an area that has gained much attention recently, and brings with it the added complexity of being a direct challenge to our freedom of speech. She argues that our current rules for regulating online abuse are inadequate - being both under and over-inclusive. She suggests a framework for reforming this area which requires us to be much more precise about the different forms that cyberhate takes, and the different harms it causes.

This special issue ends with Uta Kohl's contribution which discusses directly a concern that has implicitly underlain all the other pieces; namely, the question of whose standards of morality should take priority when criminalising dangerous speech and images. She analyses the use of the phrase 'gross offensiveness' in hate speech legislation, and argues that although expressions such as these purport to reflect the shared values of society, in practice they are interpreted in the courts in such a way that they draw from majoritarian perspectives that often repress minority views and hence reinforce the bigotry which such laws seek to mitigate.

By setting these topics alongside each other as a special issue, several shared themes and problems are uncovered.

One common theme that emerges is the question of whether online criminal behaviour requires separate legislation to offline behaviour, or whether traditional criminal offences can simply be applied to the internet. Firstly, Kohl's discussion shows how the use of terms such as gross offensiveness, were coined in a more heterogenous era and thus are unable to apply sufficiently to the new global world. Rowbottom, Gillespie and Bakalis all show the problems that arise if offline offences are transposed onto online behaviour. Both Rowbottom and Gillespie demonstrate how the application of offences originally conceived for offline behaviour to online behaviour can extend the law to an unacceptable extent. Conversely, Bakalis demonstrates that in some cases offline offences are under-inclusive and do not capture the types of harms that are committed online. Meanwhile, Lloyd's discussion of sexting suggests that even if legislation has been designed to deal with online behaviour, it needs to take account of the mode by which the behaviour is committed. This is because the use of smart phones may change the nature of the proscribed conduct.

The second theme to emerge is linked to the issue about whether there is a need to create new online criminal offences. It is the question about identifying the harm

caused by online behaviour.  Is the harm the same as that caused by the offline versions of the same conduct?  Or is there something about the fact that the behaviour manifests itself on the internet that makes it distinctive?  Gillespie argues that it was anxiety over the proliferation of images on the internet that led to child pornography laws being used in a way beyond what was originally envisaged by the legislation.  Rowbottom contends that it was the difficulties faced by the police and prosecutors in policing the sheer amount of obscene material on the internet that caused them to shift their attention from those who create or distribute the material, to those who view it, even though it is unclear what the harm is in viewing this material.  Similarly, Lloyd shows the sexting offences were created to punish consensual behaviour without a clear explanation as to what harm is caused.  Equally, Bakalis asks this question directly and concludes that the harm caused by online hate speech is significantly different from that off offline speech and so needs separate consideration.  Kohl's discussion addresses this question indirectly.  By bringing attention to the inadequacies of the 'gross offensiveness' test, it is clear that we need a more modern way of identifying the harm caused by such 'dangerous' speech and images.

Ultimately, it becomes clear from the articles that part of the reason we do not understand the harm we are trying to regulate in this area is because we still have little idea about the long-term impacts that the internet has on society generally, and more specifically on individuals.  It is only 20 or so years since the internet has reached mainstream use, and only a little more than 10 years since user-generated content became prolific on the internet. Consequently, it is only very recently that researchers have begun to look more carefully at the potential harm caused by certain aspects of internet use, such as considering the harm caused to individuals through incessant exposure to pornographic material, or hate speech, or terrorist propaganda.  It is becoming clear that there are real life consequences of harm (see Gillespie, Rowbottom and Bakalis) and so it is paramount that the criminal law steps in to protect the victims of harm, but equally crucial that it is not over-zealous in its regulation of our conduct.  It is vital to recognise that the internet itself is not to blame for these behaviours, but ultimately it is discriminatory social structures and inequalities that are often at the heart of the issue.

The third shared theme in the pieces is the issue about the legitimacy of regulation in this area, particularly in relation to the incursions on freedom of expression that would ensue if excessive limitations are placed on the types of speech and images which appear on the internet.  These questions have been debated by others,[1] but

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[1] See for example, Russell L. Weaver *From Gutenberg to the Internet:  Free Speech, Advancing Technology, and the Implications for Democracy* (Carolina Academic Press, 2013) and eds. Clive Walker and Russell L. Weaver

the distinctive contribution of these papers is to consider these issues from the perspective of the criminal law.  Kohl's article is directly concerned with this question and she cautions against the use of expressions such as 'gross offensiveness' as they masquerade as core values that can, in fact, be detrimental to minorities.  Bakalis instead suggests that freedom of speech needs to be balanced against other shared values of society such as equality, national security, and public safety.  Inevitably, once we have a clearer idea of the long-term harm (if any) that these behaviours have, then the concerns Lloyd, Gillespie, and Rowbottom have about the rationale for legislation can be more easily assessed against the potential incursions on freedom of speech.

A fourth theme lies in the practical difficulties with implementing legislation in this area.  It is evident that the law struggles to keep abreast of technological advances which adds complexity to the policing of these behaviours.  For example, Lloyd has shown how the CPS has opted not to implement the sexting provisions because of the sheer number of offences that are being committed.  Similarly, Bakalis highlights how the level of cyberhate on the internet threatens to overwhelm the police.  She also touches on the jurisdictional problems that exist when trying to police material that appears on platforms in other countries.  Rowbottom demonstrates how the police focus on those who view pornography - as opposed to those who create and distribute it – because it is much easier to prosecute them.  Gillespie's article shows the difficulties surrounding issues such as proving whether or not the image in question is indeed that of a 'child'.  And Kohl's discussion sheds light on the problem of finding a way of judging the merit of the material in question in a diverse society but where the lawmakers and judges do not necessarily reflect this diversity.

The challenges that remain are great.  We need a greater understanding of the harm caused by dangerous speech and images on the internet in order to be able to find a way of regulating this behaviour in such a way that does not impose on our freedoms unnecessarily, in a way that is practical from a policing and jurisdictional point of view, and which gives adequate protection to victims.  It is hoped that discussions such as those in this special issue bring us a small step closer to finding an appropriate framework for regulating online behaviour.

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*Free Speech in an Internet Era:  Papers from the Free Speech Discussion Forum,* (Carolina Academic Press, 2013).