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Postgraduate Research

## PhD by Publication Supporting Statement

**Student Name:** Laura Scaife  
**Title:** The Effective Regulation of Social Media  
**School:** University of Kent  
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**Mode of Study:** Law  
**Supervisory Chair:** Prof. Helen Carr\*  
**Other supervisors:** Dr Kirsty Horsey

*Note: please indicate the main supervisor with an asterisk.*

# Summary of Existing Published Work

## Introduction, Aims & Methodology

At its broadest level, my book *The Handbook of Social Media and the Law*, considers the array of overlapping and existing legislation that seeks to 'govern' social media platforms and social media users, analysing from both criminal and civil perspectives the laws that regulate the way in which stakeholders are able to interact with social media.

In my book, I analyse the law doctrinally and offer a contemporary analysis of social media as an ever-shifting "lawscape", which continually presents regulatory challenges. Drawing on this this systematic doctrinal analysis, I have subsequently been able to consider from a theoretical and conceptual perspective the effectiveness of the regulation of social media, which has allowed me to offer an original analysis, which any future effective regulation in this area must acknowledge, namely that the regulation of social media will always retain an element of reactivity to technological development. In this summary, I therefore suggest that, as underpinned by my doctrinal analysis, a regulatory model must be devised that can grow with technology, that is alive to cultural sensitivities and the organisational constraints of both the regulator and regulated entities. In this summary, I therefore assert that truly responsive social media regulation would embrace and engage with the disruptive nature of the environment which it seeks to *assist*, rather than *command*. This observation with regards to the need for future research makes an important contribution to the contemporary problem of the regulation of disruptive technologies as it explores and acknowledges their uniqueness. It has allowed me to suggest that future research in this area must explore and subsequently address how the law fails to take into account the way in which such technologies operate, and problematically viewing them through existing legal lenses, designed for legal dilemmas that predate Web 2.0 and do not possess the necessary fluidity. My overall work therefore makes a novel and significant contribution to improving the overall effectiveness and coherence of the body of law and policy that already exists.

In this summary, I explain how the requirement for research in this area stems from the wide adoption of Internet enabled smart devices, which have made social media ubiquitous. Social media is analogous to a modern day religion that many observe devoutly on a daily basis, with not only millions of 'casual' users, but also its various preachers (finding form as e.g. influential bloggers, and celebrity Twitter account holders) and their devoted followers. It has arguably been afforded a status akin to a basic human need, quenching a thirst for knowledge that we never knew we had. The globules of information processed via social media spill forth shape and carry our collective and individual identities (for example in relation to politics, jurisdiction, legal system, social norms, shared values, religion, history, culture etc.). Such valuable and private aspects of our personalities, which are some of the most valuable digital 'commodities' that we, as human beings possess, are now passing back and forth across the giant uncharted digital oceans that collectively represent social

media content generation which takes place on Web 2.0.<sup>1</sup> A strong theme identified within this summary, as a result of the doctrinal analysis contained in my book, is a consideration of the limitations of reforming existing regulation as opposed to devising regulation that takes into account the very nature of social media itself. Through reflecting on my doctrinal analysis and considering this in light of regulatory theory, it makes important observations that must form part of a reform agenda that can be tested against practical outcomes.

### ***Why should social media be regulated?***

A question in this summary which I suggest must form an important part of any future attempts to regulate social media is whether, even if regulation is possible, it is desirable? A critique of governmental and legal regulatory interventions, adopting universalist free speech arguments<sup>2</sup> could be advanced that such public entities have no place in responding to individual choices.<sup>3</sup> Examples of speech, as explored in my book, may be undesirable (e.g. hate speech), but it could be argued that such is the consequence of freedom of choice.<sup>4</sup>

The concept of a truly free flow of information facilitated by Web 2.0 is utopian, but this does not accord with the creation of the Internet, from which the environment for Web 2.0 developed. The Internet was a public-sector creation, which only later came under private control.<sup>5</sup> Relatedly, the regulation though which proprietary, civil and criminal rights are conferred and defended fosters an environment in which the development of the Internet can exist. It has been commonly advanced that regulation is a curb on free speech, producing a chilling effect, but this is not the case. For example, without competition law to govern anti-competitive practice and allow for market entrants to create platforms and products, there would not be a range of new products for consumers to make use of; without intellectual property rights platform providers could not define and defend their proprietary rights in the software they create, thus monetising their intellectual property. I agree with Sunstein, that without legal protection of any kind:

*'...all sides would be left with the struggle to show superior force. In such an environment only the very strongest player would win the battle for dominance and with such a monopoly could curb privacy and freedom of expression if the market did not allow for freedom of competition. The question is not should we have regulation but instead, what sort of regulation should we have?'*<sup>6</sup>

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<sup>1</sup> See Sauter (2014) p.824:

'on Facebook, people write and update status messages not just as a form of communication, but as a means of shaping understandings of self and establishing normative ways of acting, and sometimes transgressing them.'

Social networks therefore represent a powerful new arena for developing and expressing identities (Hargittai (2007), McKenna and Seidman (2008), Shah (2008), Turkle (1995) or even users "inner narcissus", mesmerised by their own reflection in the Web 2.0 waters (Buffardi and Campbell (2008), Dalsgaard (2008) Hills (2008), Rosen (2007) Turkle (2011). Such validation does not depend on adherence to democracy, of course it is boosted by characteristics of liberalism and democracy, such as autonomy and equality but it is not necessarily dependent on it and can apply in non-liberal contexts, hence they have applicability beyond liberal societies.

<sup>2</sup> Raz (1995).

<sup>3</sup> Sunstein, 2010 p.152; Perry-Barlow.

<sup>4</sup> Spar (2001) p. 9. For a recent example of how content posted online, can have future consequences for individuals see the resignation of Toby Young from the Office of Students for comments made in articles and via various social media outlets. Rawlinson, K. *Toby Young Resigns from the Office for Students after Backlash*, The Guardian 9 January 2018. Accessible via <<https://www.theguardian.com/media/2018/jan/09/toby-young-resigns-office-for-students>> Accessed 9 January 2018.

<sup>5</sup> Sunstein (2010) p. 157.

<sup>6</sup> Sunstein (2010) p.156-160.

## **What form should regulation take?**

The regulation of the dynamic quality of Internet content generation has been the subject of debate.<sup>7</sup> Social media concentrates this dynamism into a digital vortex with its speed, reach and permanence.<sup>8</sup> Social media is a Shakespearean stage of sorts where we are all merely players, projecting a performance artistry of what we wish the community to see. It creates an environment where those with views outside of the mainstream can surf the highest waves to troll others, effect political change and rise to become public figures (even President).<sup>9</sup> Never before could a kernel of truth, “alternative fact” or lie shake our very beliefs to the core, or even affect the course of political history.<sup>10</sup>

It is little wonder therefore that in the context of the development of information technology, Barlow declared:

*‘Law adapts by continuous increments and at a pace second only to geology in its stateliness. Technology advances in lunging jerks, like the punctuation of biological evolution grotesquely accelerated. Real world conditions will continue to change at a blinding pace and the law will get further behind, more profoundly confused’.*<sup>11</sup>

Barlow's ‘permanent mismatch’ has even led some scholars to suggest that the Internet cannot be regulated. Steinert-Threlkeld sums up this conceptual position with remarkable brevity: *‘some things never change about governing the Web. Most prominent is its innate ability to resist governance in almost any form’.*<sup>12</sup> However such an analysis is steeped in regulatory histrionics, using old paths to travel to the new. Social media facilitated by Web 2.0 has the potential to offer vast opportunities and intrepid digital explorers have to discover these new frontiers before they can be shaped, described and regulated.

To date, despite a focus on individualised problems associated with the regulation of social media, the question of its *effective* regulation in a holistic sense remains largely unaddressed.<sup>13</sup> The originality of the subsequent research I have applied to my book's doctrinal analysis is to query the ways in which social media has become subject to regulation and to ask why such existing models do not match the needs of the medium. From my doctrinal analysis, I have concluded that there are limitations of trying to place a dynamic, spontaneous and far reaching medium into existing legislation which was not designed to regulate it and which were originally conceptualised for much more static forms of

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<sup>7</sup> Lessig, L. 2008, *Code: And Other Laws of Cyberspace*, Version 2.0; Steinert-Threlkeld, T. ‘Of Governance and Technology,’ Interactive Week Online, 2 October 1998.

<sup>8</sup> Eight of the world's most popular social networks flush out an astonishing amount of content every minute and the social media high seas, double in size every two years. By 2020 it is estimated will reach 44 trillion Gigabytes (See <http://www.emc.com/leadership/digital-universe/2014iview/executive-summary.htm>).

<sup>9</sup> For example Milo Yiannopoulos, a prominent Troll who became a Breitbart journalist as a result of his controversial postings online, was banned from Twitter for encouraging racist attacks on actress Leslie Jones (see Altman, J. *The whole Leslie Jones Twitter feud, explained* USA Today 25 Jul, 2016. Accessible via <<http://college.usatoday.com/2016/07/25/the-whole-leslie-jones-twitter-feud-explained/>>. He was disinvited from the Conservative Political Action Conference for a remark in defense of relationships between ‘younger boys and older men’. See Robinson, N *What We'll Tolerate and What We Won't* Current Affairs, 27 February 2017. Accessible via <<https://www.currentaffairs.org/2017/02/what-well-tolerate-and-what-we-wont>>.

<sup>10</sup> Blakely, R. *The Tweets, the Tantrums – President Trump's First Month* The Times Sunday Magazine, published 25 February 2017. Accessible via <<http://www.thetimes.co.uk/article/the-tweets-the-tantrums-the-leaks-president-trumps-first-month-cwdd2h989>>.

<sup>11</sup> Perry-Barlow, J. ‘*The Economy of Selling Ideas: Selling Wine without Bottles on a Global Net*’ available at <http://www.eff.org/EconomyOfIdeas.html>. Accessed 12 July 2016.

<sup>12</sup> Steinert-Threlkeld, T ‘Of Governance and Technology,’ Inter@ctive WeekOnline, October 2, 1998. Quoted in Lessig, L. *Code : And Other Laws of Cyberspace*, Version 2.0, Basic Books, 2008. ProQuest Ebook Central.

<sup>13</sup> There is some work in the field of co-regulation. See Marsden, C. (2012) p. 212. However, there is as of yet no comprehensive attempt to address the overarching regulation of social media in a holistic manner.

communication, designed to regulate one-to-one communications, rather than one to many.<sup>14</sup> For example, in my book I explore how social media is a product of technological innovation and how the law operates indirectly through other modalities such as the technology itself.<sup>15</sup> As a result of reflecting on my doctrinal work, in this summary I suggest that social media is a fluid and original medium, requiring its own conceptualisation, rather than a re-conceptualisation of existing regulation. Consequently, the context in which law operates and the reciprocal relationship between technology and rules must be considered in parallel when proposing a regulatory model suitable for the complex demands presented by social media.

The detailed doctrinal analysis of aspects of social media regulation as contained in my book, has subsequently allowed me to explore contextually, why existing laws fail due to their reactionary nature. Through my doctrinal research, I have developed considerable doctrinal knowledge, with specific expertise on criminal and civil law matters covering defamation,<sup>16</sup> hate speech, offensive communications, data protection and, crucially, how the regulation of social media is located within existing legal frameworks which were not designed to meet the issues of legal novelty which they raise. My book has therefore allowed me to build on, and enter into a scholarly conversation about the meaning and impact of these legal developments, as well as their limitations in addressing the needs for regulatory reform.

In addition to asking whether such a space is capable of being regulated, through reflecting on my doctrinal analysis, I have also considered who will or should regulate it. In the vast majority of circumstances, regulation is not the domain of one sovereign state, but extends to the world, prompting an important question as to how, common with other global issues, regulation can evolve within multi-level governance (state, international conventions etc.). In my book I undertook a comparative analysis, drawing extensively on the jurisprudence of the European Court of Human Rights as well as, drawing on examples of social media regulation internationally. In particular, the book draws upon analysis, jurisprudence and scholarship emanating from the USA given its constitutional commitment to the protection of freedom of expression, in order to consider common thematic issues. For example, the First Amendment to the US Bill of Rights frames a strong pro-speech culture, yet the USA has also seen a rise in social media vigilantism, its use as a Presidential channel of communication, fake profiles and private entrapment. My book also considers jurisdictions which take a different approach to expressive rights, such as France and Germany, which restrict certain speech notably with regards to anti-Semitism and denial of the holocaust,<sup>17</sup> as contrasted against jurisdictions which are pro expression such as the USA under the First Amendment<sup>18</sup> as well as jurisdictions which take a more pro-state approach to regulation such as China and South Korea.<sup>19</sup>

As an applied legal scholar, my research is directed towards identifying and resolving legal problems within the technological and commercial parameters in which they operate. My

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<sup>14</sup> Such as telephone communications, see DPP v Chambers [2012] EWHC 2157 at [27].

<sup>15</sup> See Scaife, L. (2015) Chapters 1 and 2. For a recent example see the character increase on Twitter from 140 to 280 characters, 'Twitter to Expand 280-Character Tweets' BBC News 7 November 2017, accessible via <http://www.bbc.co.uk/news/technology-41900880> Accessed 13 November 2017.

<sup>16</sup> Twitter is a fast moving and often aggressive forum where the restriction to 140 characters requires users to express themselves in striking terms. Very often, tweets can best be categorised as 'vulgar abuse' rather than statements of fact (see McGrath & Anor v Dawkins [2012] EWHC B3 (QB) [52]). Harm may, therefore, be more difficult to establish in comparison to a "serious media publication".

<sup>17</sup> See Scaife, L. (2015) France pp.72-3; Germany pp.45, 160, 319.

<sup>18</sup> See Scaife, L. (2015) United States pp.44-45, 77-8, 94-95, 149, 159, 228-9, 240, 357-8, 350.

<sup>19</sup> See Scaife, L. (2015) 1: China pp.2, 48, pp.160-2 Korea (South) pp.162-3; Spain pp.14, 280-4.

book also considers the role of policy and soft law (e.g. in the form of guidance notes that inform the interpretation of privacy legislation). This has allowed me to offer an analysis that even these innovations operate in a top-down fashion,<sup>20</sup> pre-supposing that top-down regulation is desirable, effective and determinative (i.e. that something is either the subject of regulation or it is not).

The doctrinal analysis undertaken in my book has therefore allowed me to observe that there is a need for further research into developing a solution to the problem of regulating social media, which allows speech to flow. This has led me to raise the important question in this summary as to what further theoretical investigation is required into what more responsive fluid models could be adopted to effectively regulate social media. My overall body of work is cutting edge as, to date, no other scholar has comprehensively sought to consider why social media is a current legal problem requiring a re-conceptualisation of the regulatory environment seeking to govern it, as opposed to merely re-stating the legal problems the medium facilitates (e.g. hate speech, privacy infringement etc.) or suggesting short-term regulatory 'cures' to problems as they arise.

In this summary I suggest that, adopting the analogy of the regulation of the sea, the law should allow speech to flow in and out of protected areas, so that law abiding vessels which choose to be part of a socially responsible, respectful and self-governing system, based on effective principles and standards, can sail through "harbour entrances" as they wish, in accordance with the accepted rules and conventions. The systems and regulation will similarly evolve over time through a process of review, whilst building up customary courses and standards of Internet behaviour based on underlying common principles which should be agreed are desirable of protection and common interest, representing collaboration between the legislators, developers and the community itself.

A more critical, responsive and iterative approach to the regulation of expressive social media content is required. I suggest that what must be devised is a regulatory model that can grow with the technological state of the art, which is alive to cultural sensitivities and organisational constraints of both the regulator and regulated entities. In summary, my argument is that regulation can be devised which is responsive, because it knows the environment that it seeks to *assist*, rather than attempting to *command* it. The legislative modelling should consequently be alive to performance sensitivities and changes in tides. This summary rejects the notion that regulation is an inherently restrictive force, instead I find that regulation should foster a regulatory environment in which the Internet, and the web, and social media have the potential to flourish.

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<sup>20</sup> The Crown Prosecution Services Guidelines on Prosecuting Cases with a Social Media Element state:

These guidelines set out the approach that prosecutors should take when making decisions in relation to cases where it is alleged that criminal offences have been committed by the sending of a communication via social media. The guidelines are designed to give clear advice to prosecutors who have been asked either for a charging decision or for early advice to the police, as well as in reviewing those cases which have been charged by the police. Adherence to these guidelines will ensure that there is a consistency of approach across the CPS... These guidelines are primarily concerned with offences that may be committed by reason of the nature or content of a communication sent via social media. Where social media is simply used to facilitate some other substantive offence, prosecutors should proceed under the substantive offence in question. (Emphasis added).

No attention is paid to the unique nature of social media itself, presupposing that existing regulation can be applied to social media so long as the guidance is followed.

## *Reception of my work*

My published work has appeared in a number of well-respected peer reviewed communications journals and my primary text submitted for this PhD by publication, *The Handbook of Social Media and the Law*, published in 2015,<sup>21</sup> has been described in peer review as:

*“the seminal text in the area’ and an ‘expertly written book [which] provides an authoritative and clear road map for the multitude of stakeholders engaged with social media and the law...the text offers an accessible and analytic commentary from both a domestic and international perspective”.*<sup>22</sup>

My recent publications have been recognised by the UK Law Commission<sup>23</sup> as making a contribution to the development of a critical scholarship towards the regulation of social media and the potential for changes to the criminal law. I have also appeared on Channel 4 News discussing the arguments in favour of the regulation of social media with Jon Snow.<sup>24</sup> Consequently, my overall work is having an impact on law reform, as well as broadening academic and mainstream understanding and critique of new approaches to the regulation of this dynamic area.

## **THE WORK**

### **Part 1: What are social media and what is a ‘social network’?**

As explored in Part 1 of my book, there are two key conceptual shortcomings with regards to existing legal research relating to social media.

#### *The role of the community social media serves*

First, my book start by posing and exploring the question why law are ineffective in the existing regulatory regimes, stepping back to consider why social media is so widely adopted.<sup>25</sup>

From this analysis, I have been able to observe how social media facilitates the sharing of such communications which shape and carry our collective and individual identities (for example politics, jurisdiction, legal system, social norms, shared values, religion, history, culture etc.), which are some of the most valuable digital commodities of the self that we, as human beings possess. The significance of this analysis is that through understanding better the nature and social role of social media, as a means through which ‘an exercise of self upon self by which one tries to work out, to transform oneself and to attain a certain mode of

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<sup>21</sup> Since the publication of this volume I have published a further work exploring the social media and terrorism, considering security law, privacy and human rights in further detail. Scaife, L *Social Networks as the New Frontier of Terrorism: #Terror*. ed./ Routledge, 2017. p. 164-192 (Routledge Research in Information Technology and e-Commerce Law).

<sup>22</sup> Book Review, *Compliance and Risk Journal*, Volume 4 (2015), Issue 1, p. 15.

<sup>23</sup> See Appendix 2.

<sup>24</sup> Channel 4 News, Original Air date 5 January 2017 at 19:00 hrs. Accessible via <<https://www.channel4.com/news/is-social-media-promoting-violence>>.

<sup>25</sup> See Scaife, L. (2015) Chapters 1 and 2.

being'.<sup>26</sup> Acknowledging the significance of social media, in terms of modern social interaction and self-formation it critical if regulators and academics are to better understand the framework in which any proposed regulation and or policy must operate. I assert in this summary that this is a key foundation stage in considering the law's responsiveness to the behaviours, attitudes and cultures of the communities, which any current or proposed regulation must serve.

### *Presumptions regarding resistance to governance*

Secondly, in this summary based on my doctrinal analysis of case law, I suggest that there is a presumption that new technologies possess an innate ability to resist governance.<sup>27</sup> In the context of social media regulation, it is useful to consider the regulation of the Internet more generally. The Internet was insensitive to regulation because it was *designed* to be so by those who created it.<sup>28</sup> Therefore the failing of the existing law and the challenge for any proposed regulatory model, is that it must be able to adapt to the constraints of the relatable environment. My book therefore considers:

- the nature of the development of the platforms available online;
- the historical operational development of social media platforms;
- how a social network is defined within existing laws; and
- how social networking platforms operate from a technical an operational perspective.

Through reflecting on my doctrinal research, I have observed that there is need to focus on the nature of the regulatable space and, then to go on to consider how architecture can be designed which better meets its unique demands. As part of the research I have undertaken post publication of my book, I have considered and agree with Black and Baldwin, that to be really responsive, regulation must respond to attitudinal settings, to the broader regulatory environment, the different logics of regulatory tool and strategies, to the regime's own performance and finally to changes in each of these elements.<sup>29</sup> A conclusion that can be drawn from my analysis is that regulators must bring into their regulation modelling the platform architects who design the technological state of the art which is the subject of such regulation.

### *Research conclusions*

Through a consideration of my doctrinal analysis, in this summary I assert that social media is not ethereal, it is a manmade construct, building upon the architecture of Web 1.0.<sup>30</sup> It also represents an integral part of self-discovery and a powerful medium for social interaction, which allows users to 'figure out how to manage their daily actions and interactions within the context of the complex techno-social hybrid realities they live in, constantly navigating their

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<sup>26</sup> Foucault, M. (1986). p.2.

<sup>27</sup> Perry-Barlow, J. (1996), Steinert-Threlkeld (1998).

<sup>28</sup> The original Internet made such regulation extremely difficult as originally deployed, as one court put it: '*the Internet is wholly insensitive to geographic distinctions.*' (American Library Association v Pataki 969 F. Supp. 160 (S.D.N.Y) 1997, cited in Michael Geist, Cyber Law 2.0, 44 Boston College Law Review 323, 326-27 (2003).).

<sup>29</sup> Black, J. and Baldwin, R. (2008) p. 69.

<sup>30</sup> Scaife, L. (2015) pp. 4-7.

public appearance and their relation to self and others'.<sup>31</sup> The question for further theoretical exploration therefore becomes not one of what makes a rule effective, but what makes for effective architecture, and creates an environment in which rules can be conceptualised, nurtured and formed into courses of customary behaviour.

## **Part 2 and 3: A doctrinal analysis of why existing laws as applied to social media do not work**

Parts 2 and 3 of my book explore the limitations of locating social media within existing regulatory frameworks.<sup>32</sup> As is exemplified by the doctrinal analysis contained in Chapters 3-10, the regulation of social media content<sup>33</sup> has so far been shoe-horned into a range of existing statutes.<sup>34</sup> For example, Chapters 4–9 consider the potential for the criminalisation of online postings and the issues this presents in terms of protecting individuals' rights to freedom of expression. These chapters look at each of the key statutes under which prosecutions can be pursued and the case law that has come before the courts to date. The chapters consider aggravating and mitigating factors in relation to various types of postings such as those inciting terrorism, those which contain distasteful content, and cases about jokes which have got out of control. Each chapter considers the key elements that must be considered in order to pursue a prosecution and looks at some of the key issues that could be raised in defence.

Drawing upon a specific example, my books observations into the law's response to communications based offences demonstrates the limitations of determinative regulation and subsequent attempts to interpret it in the context of social media.<sup>35</sup> My book, notably with regards to applying statutes such as the Communications Act 2003 to social media communications, reveals the inherent weakness of existing laws, as the context in which interactive social media dialogue takes place is quite different to the context in which other communications take place, access is ubiquitous and instantaneous.<sup>36</sup> Banter, jokes and offensive comments are commonplace and often spontaneous and communications intended for a few may reach millions.<sup>37</sup>

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<sup>31</sup> Sauter, T. *What's on your mind? Writing on Facebook as a tool for self-formation* *New Media and Society* 2014 Vol 16(1) p. 824.

<sup>32</sup> Chapter 4: Communications Act 2003; Chapter 5: Malicious Communications Act 1988; Chapter 6: Serious Crime Act 2007; Chapter 7: Crime and Disorder Act 1998; Chapter 8: Public Order Act 1986; Chapter 9: Protection from Harassment Act 1997). Part 3 of my book deals with criminal offences Chapter 11: Contempt of Court Act 1981; Chapter 12: Evidence and Procedure. Part 3 of my book deals with criminal offences Chapter 11: Contempt of Court Act 1981; Chapter 12: Evidence and Procedure.

<sup>33</sup> This essay considers criminal content and privacy matters. For a review of the specific laws relating to civil offences, see Scaife (2015) Chapter 3.

<sup>34</sup> For example, in the UK cases involving criminal behaviour can be prosecuted under an umbrella of existing legislation including the Protection from Harassment Act 1997, the Malicious Communications Act 1988, the Crime and Disorder Act 1998 (See *R v Cryer* (Unreported) 21 March 2012, Newcastle Magistrates' Court), the Public Order Act 1986 (see *R v Stacey*, Swansea Crown Court (unreported); *R v Stacey*, Appeal No: A20120033 30 March 2011.), the Serious Crime Act 2007 (See *R v Blackshaw* 2011] EWCA Crim 2312; *R v Perry John Sutcliffe-Keenan* [2011] EWCA Crim 2312; *R v Ahmad Pelle*, 25 August 2011, Nottingham Crown Court (unreported); *R v Hollie Bentley* Unreported, Leeds Crown Court, 29 November 2011.) Doubts have also been expressed as to whether creating a webpage or social network group constitutes 'sending' a message (See Policy Memorandum on the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill (2011) at [34], there are a number of examples where section 127 has been used against Internet communications).

<sup>35</sup> The Communications Act 2003 is only one example of the limitations of the existing law, for further examples both civil and criminal; see Scaife (2015), Part II.

<sup>36</sup> As Eady, J. stated in the civil case of *Smith v ADVFN* [2008] EWHC 1797 (QB) at [14 in relation to comments on an Internet bulletin board: '... [they are] like contributions to a casual conversation (the analogy sometimes being drawn with people chatting in a bar) which people simply note before moving on; they are often uninhibited, casual and ill thought out; those who participate know this and expect a certain amount of repartee or 'give and take'.'

<sup>37</sup> See Scaife, L. (2015) Chapter 4.

Since the publication of my book, events such as the 2015 General Election<sup>38</sup> and in May 2016, the UK's Referendum concerning membership of the European Union, as well as the UK's subsequent snap-General Election, became an active vessel for voicing political views,<sup>39</sup> leading to social media platforms becoming a vessel for an equivalent of political road rage.<sup>40</sup> The surrounding commentary that ensued also led to a rise in reported hate crime.<sup>41</sup> In the USA, the run up to the 2016 election of President Donald J Trump saw an increase in social media adoption as an integral part of his campaign. The blitzkrieg energy of the campaign trail has continued into his presidency,<sup>42</sup> such as his use of social media after signing an executive order banning immigrants from seven Middle Eastern and African countries from the US for 90 days.<sup>43</sup> Such Tweets, data leaks and accusations regarding Russian spying led to broadcast and social media speculation, as well as the coining of the phrase "fake news".<sup>44</sup> More recently political discourse traded between US President Trump and North Korea's President Kim Jong-Un, via social media has also led to significant social and broadcast media coverage, with regards to national security and who of the two has a bigger nuclear button.<sup>45</sup> Further to the publication of a 'Fire and Fury' a book written by Michael Wolff about President Trump, the Commander in Chief took to social media to defend his worthiness to sit in office.<sup>46</sup>

It could be argued that such consequences are a risk of engaging with the medium, when one chooses to submit information to the public realm. However, other examples explored in my book, such as contempt of court, incitement to riot during the 2012 London Riots, football hooliganism and racist speech highlight that the content played out on social media fall squarely within the remit of the criminal law.<sup>47</sup> For instance the amount of negative "trolling" aimed at high profile figures, including female UK Members of Parliament<sup>48</sup> and high profile

<sup>38</sup> See *Monroe v Hopkins* [2017] EWHC 433 (QB).

<sup>39</sup> Polonski, V. *Social Media Voices in the UK's EU Referendum* Accessible via <<https://medium.com/@slavacm/social-media-voices-in-the-uks-eu-referendum-brexit-or-bremain-what-does-the-internet-say-about-ebbd7b27cf0f#gg68vebd0>>.

<sup>40</sup> Cosslett, R. *Family rifts over Brexit: 'I can barely look at my parents'* The Independent, published 27 June 2016. Accessible via <https://www.theguardian.com/lifeandstyle/2016/jun/27/brexit-family-rifts-parents-referendum-conflict-betrayal>, Accessed 12 June 2016.; Wood, A. *52% Blamed EU for their Problems, Blame Social Media for Yours* The Memo published 29 June 2016h Accessible via <<http://www.thememo.com/2016/06/29/brexit-social-media-eu-half-blamed-the-eu-for-their-problems-blame-social-media-for-yours/>> Accessed 12 June 2016.

<sup>41</sup> York, C. *Post-Brexit Racism Documented on Social Media* published 2 July 2016 The Huffington Post. Accessible via <[http://www.huffingtonpost.co.uk/entry/post-brexit-racism\\_uk\\_5777be69e4b073366f0f1d06](http://www.huffingtonpost.co.uk/entry/post-brexit-racism_uk_5777be69e4b073366f0f1d06)> accessed 5 July 2016. Examples of the postings can be viewed in a Facebook Album entitled 'Worrying Signs' created to document alleged incidents in which people have been targeted with xenophobic comments, accessible via <[https://www.facebook.com/sarah.leblanc.718/media\\_set?set=a.10101369198638985&type=3&pnref=story](https://www.facebook.com/sarah.leblanc.718/media_set?set=a.10101369198638985&type=3&pnref=story)>.

<sup>42</sup> Tweets accessible via @realDonaldTrump.

<sup>43</sup> Blakely, R. *The Tweets, the Tantrums – President Trump's First Month* The Times, published 25 February 2017. Accessible via <<http://www.thetimes.co.uk/article/the-tweets-the-tantrums-the-leaks-president-trumps-first-month-cwdd2h989>>. Accessed 26 February 2017.

<sup>44</sup> The Tweets @realDonaldTrump: "Intelligence agencies should never have allowed this fake news to 'leak' into the public. One last shot at me. Are we living in Nazi Germany?"

<sup>45</sup> For example see an interview cited in Rifkind, Hugo *The Truth (sort of) about Fake News: America's* NBC News, for example, aired an interview with an 18-year-old called Dimitri (not his real name), who boasted he had made more than \$60,000 in six months by creating stories for fake news websites that looked like real websites. His headlines, we learnt, included "Obama Illegally Transferred DOJ Money to Clinton Campaign!" and "BREAKING: Obama Confirms Refusal to Leave White House, Announces SICK Plan to Stay in Power". The article was 100,000 times on Facebook. Author John Eagan commented of the article "All you have to do is read it. Anybody who shared that without reading it? Those people were going to vote for who they voted for anyway." As quoted in The Times, February 25 2017. Accessible via <<http://www.thetimes.co.uk/article/the-truth-sort-of-about-fake-news-j6n2lnvgx>>.

<sup>46</sup> 'Trump Tweet on Nuclear Button keeps North Korea's Kim 'on his toes' Reuters, 7 January 2018. Accessible via <<https://www.reuters.com/article/us-northkorea-missiles-usa/trump-tweet-on-nuclear-button-keeps-north-koreas-kim-on-his-toes-haley-idUSKBN1EW0PS>>. Accessed 7 January 2018.

<sup>47</sup> See Wulfsohn, J. *Twitter Explodes Over Trump's Latest 'Sloppy Steve' Tweet: 'Backboard-Shattering'* Mediaite 6 January 2018. Accessible via <<https://www.mediaite.com/online/twitter-explodes-over-trumps-latest-sloppy-steve-tweet-backboard-shattering/>>

<sup>48</sup> Scaife, L. (2015) pp.177, 182.

<sup>49</sup> See Scaife, L. (2015) pp.147-150.

feminist campaigners<sup>50</sup> has led to the formation of the Reclaim the Internet Campaign<sup>51</sup> and discussions as to what extent the reform of the legislation relating to harassment need to be addressed.<sup>52</sup> Recently the Crown Prosecution Service released figures, which show that there were 4,908 reports in which Facebook and Twitter were a factor in reported crimes, compared with 556 in 2008.<sup>53</sup> In the March 2017 case of *Jack Monroe v Katie Hopkins*<sup>54</sup> in response to submissions made to the court that Twitter is a 'wild west',<sup>55</sup> Mark Lewis, Jack Monroe's solicitor commented: 'Hopkins claimed that Twitter was just the wild west where anything goes. The Judge has shown that there is no such thing as a Twitter outlaw.'<sup>56</sup> Whilst an important judgment, iterating that social media is not beyond the reach of regulation, yet again the courts compared social media to the laws of the land, when it is far more diverse and fluid, like the sea.

As exemplified in my book though my doctrinal analysis of the Communications Act 2003, I assert in this summary that in adopting forms of top down regulation, and applying them to newly charted worlds by reference to the comfort of the familiar, there is an inherent danger that only some features of the event become the focus of the rule. In my view, these features are then '*projected onto future events, beyond the particulars which served as the paradigm or archetype for the formation of the generalisation*'.<sup>57</sup> In this summary I draw upon the work of Black, who observes that one of the problems associated with the creation of rules in any context, are '*their tendency to over or under inclusiveness, their indeterminacy, and their interpretation*'.<sup>58</sup> She observes that many of the issues associated with effective regulation stems from the prescriptive nature of rules as '*anticipatory, generalised abstractions*' which when '*endowed with legal status are distinctive, authoritative forms of communication*'. A recent example (which postdates the publication of my book) of the laws reactivity to public and policy pressures<sup>59</sup> is the criminalisation of revenge porn under the amended section 63 of the Criminal Justice and Immigration Act 2008,<sup>60</sup> which has a specific amendment dealing with such actions. Offenders face up to two years in jail. The amendment covers images sent on social networks, including Facebook and Twitter, and those sent by text. Yet revenge porn is not new and currently, the Crown Prosecution Service (CPS) prosecutes cases around

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<sup>50</sup> See Scaife, L. pp.147-148; *R v Isabella Sorley and John Nimmo*, Westminster Magistrates Court 24 January 2014 (unreported).

<sup>51</sup> <http://www.reclaimtheInternet.com/>.

<sup>52</sup> Scaife, L. (2015) p.182.

<sup>53</sup> Crown Prosecution Service *Violence against Women and Girls Crime Report 2015-2016*. Accessible via <[http://www.cps.gov.uk/publications/docs/cps\\_vawg\\_report\\_2016.pdf](http://www.cps.gov.uk/publications/docs/cps_vawg_report_2016.pdf)>. Accessed 12 February 2017. It is debatable whether the number of crimes has increased, or if the crimes are now reported with greater frequency.

<sup>54</sup> [2017] EWHC 433 (QB).

<sup>55</sup> [2017] EWHC 433 (QB) at [71(3)]:

"The credibility of the publisher in the eyes of publishees. This is clearly a relevant question. Skillfully treading a somewhat delicate line, Mr. Price submits that Twitter is the "Wild West" of social media, and not as authoritative as (for instance) The Sun or the Daily Mail, which are established institutions, subject to regulation, that employ lawyers to check copy. On the facts of this case, I do not find this submission persuasive. I shall come to the question of whether Ms. Hopkins' mistake was or would have been obvious to all. But there is no good reason to conclude that a reader would discount the allegation because of who Ms. Hopkins is, or the fact that she published on Twitter. She is a well-known figure. She made clear at the time she was a Sun columnist".

<sup>56</sup> Cross, M. *£24,000 damages for Katie Hopkins Twitter libels in 'serious harm' test* *The Law Gazette*, 10 March 2017. Accessible via <https://www.lawgazette.co.uk/law/24000-damages-for-katie-hopkins-twitter-libels-in-serious-harm-test/5060203.article>.

<sup>57</sup> Black, J. *Rules and Regulators*, Print publication date: 1997, Published to Oxford Scholarship Online: March 2012 p. 8.

<sup>58</sup> Black, J. (2012) p.6. The jurisprudential literature on rules is extensive. For legal analyses of rules see in particular Schauer, F. (1991); Twining and Miers (1991); Hart and Sacks (1958).

<sup>59</sup> Criminal Justice and Courts Bill: Extension of the offence of Extreme Pornography (Possession of Pornographic Images of Rape and Assault by Penetration) Accessible via <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/322160/fact-sheet-extreme-porn.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/322160/fact-sheet-extreme-porn.pdf)> Accessed 17 September 2017.

<sup>60</sup> Scotland's extreme pornography offence (at section 51A of the Civic Government (Scotland) Act 1982) already captures such material.

revenge porn using a range of existing laws.<sup>61</sup> Such legislation demonstrates the on-going reactivity to the law, cementing the nature of regulation as trapped in a cycle of reacting to an event, which initiates campaigns to change the law, and then legislation occurs rather than looking at the issue from the base.

In this summary, I suggest that this creates a risk of under/over inclusiveness; regard to matters that may be irrelevant and leads to a risk those future developments may make the rule less relevant.<sup>62</sup> Such an approach therefore neglects, 'going back to basics', to understand:

*'the nature of the instrument which is being used, the properties of rules and their inherent limitations, and to see whether we can gain insights from this analysis which would enable us to make better use of rules as a regulatory technique'.*<sup>63</sup>

Thus, in this summary I agree with Schauer that *'even rules that seem now to be neither under- or over-inclusive with respect to their background justifications retain the prospect of becoming so'*.<sup>64</sup> Black suggests that this can be achieved in three ways: firstly through a better appreciation and use of different types of rules, secondly an understanding of the context in which rules operate and finally considering these issues with reference to the nature of the regulatory community and the style of regulation adopted.<sup>65</sup>

My book supports this analysis as my doctrinal research reveals that regulators as well as judges involved with the development of common law principles<sup>66</sup> have sought to finesse the application of existing statutes to the regulation of social media. Such innovations still operate in a top-down fashion,<sup>67</sup> pre-supposing that such a methodology is desirable and that it can lead to effective and determinative outcomes.<sup>68</sup> My research confirms the abstract

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<sup>61</sup> Sending explicit or nude images of this kind may, depending on the circumstances, be an offence under the Communications Act 2003 or the Malicious Communications Act 1988. Behaviour of this kind, if repeated, may also amount to an offence of harassment under the Protection from Harassment Act 1997. See Revenge Porn: the facts *A new criminal offence to tackle Revenge Porn is being introduced in England & Wales as part of the Criminal Justice and Courts Bill* Revenge Porn Factsheet: Be Aware b4 you Share. Accessible via Gov.uk [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/61111/revenge-porn-factsheet.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/61111/revenge-porn-factsheet.pdf) Accessed 12 February 2017.

<sup>62</sup> Black, J. (2012) p.8 notes: 'That this mismatch can occur for three reasons. First, the generalisation which is the operative basis of the rule inevitably suppresses properties that may subsequently be relevant or includes properties that may in some cases be irrelevant. Secondly, the causal relationship between the event and the harm/goal is likely to be only an approximate one: the generalisation bears simply a probable relationship to the harm sought to be avoided or goal sought to be achieved. Thirdly, even if a perfect causal match between the generalisation and the aim of the rule could be achieved, future events may develop in such a way that it ceases to be so'.

<sup>63</sup> Black, J. (2012) p.8.

<sup>64</sup> Schauer, F. (1991) p. 35.

<sup>65</sup> Black, J. (2012) pp.8-10.

<sup>66</sup> See Scaife, L. (2015) Chapter 4. See also footnote 42, and footnote 26.

<sup>67</sup> The CPS Guidelines state 'These guidelines set out the approach that prosecutors should take when making decisions in relation to cases where it is alleged that criminal offences have been committed by the sending of a communication via social media. The guidelines are designed to give clear advice to prosecutors who have been asked either for a charging decision or for early advice to the police, as well as in reviewing those cases which have been charged by the police. Adherence to these guidelines will ensure that there is a consistency of approach across the CPS. These guidelines are primarily concerned with offences that may be committed by reason of the nature or content of a communication sent via social media. Where social media is simply used to facilitate some other substantive offence, prosecutors should proceed under the substantive offence in question. (Emphasis added). As can be seen from the introductory text, no attention is paid to the unique nature of social media itself, presupposing that existing regulation can be applied to social media so long as the guidance is followed. See Scaife, L. (2015) pages 139-152 for a discussion of the guidelines and pages 153-155 for a discussion of the weaknesses of the guidelines and how they could be refined.

<sup>68</sup> The CPS' 'Guidelines on Prosecuting Cases Involving Communications Sent via Social Media' also remind prosecutors that under the Malicious Communication Act 1988 and CA 2003 the law only applies to communications of a grossly offensive nature. Reiterating the findings of the court in DPP v Chambers, the CPS state that this meant that a communication has to be more than simply offensive to be contrary to the criminal law. Just because the content expressed in the communication is in bad taste, controversial or unpopular, and may cause offence to individuals or a specific community, this is not in itself sufficient reason to engage the criminal law. As Lord Bingham made clear in DPP v Collins there can be no yardstick of gross offensiveness 'otherwise than by the application of reasonably enlightened, but not perfectionist, contemporary standards to the particular message sent in its particular context' [2006] UKHL 40 at [9]]. It is suggested that the Courts, like their Strasbourg counterparts need to demonstrate a willingness to take into account the experience of the speaker e.g. an established

regulatory theory proposition that regulation continues to fail at the policy and/or the conceptual; the practical, and the principles based levels. In essence the summation of the critique set out in this summary is that existing laws presuppose top down regulation is possible, that escalation and de-escalation is possible and that the regulated will submit to regulation.

With regards to social media specifically, I assert in this summary that such an approach is not consistent with the way in which innovative technologies or the people who use them succumb to regulation. According to Spar, innovative technology (e.g. the compass, the printing press) go through a four phase cycle of innovation, commercialisation, 'creative anarchy' and, finally, rules.<sup>69</sup> The 'rules' phase sees the entry of the regulator into the marketplace and the technologies absorption within the traditional regulatory framework, so that what is seemingly ungovernable, is brought under control (much like the regulation of the high seas, the control of airspace etc.). Social media however, has a further angle to consider, namely human nature, concentrated into a digital vortex.

### *Research conclusions*

Through my subsequent reflection on my doctrinal analysis, in this summary I offer a critique that the existing law's attempts to regulate social media, does not engage with the demands of the particular regulatory challenges it is seeking to address.<sup>70</sup> Approaching the regulation of emerging technology in a top-down, determinative manner is not a satisfactory starting point for the regulation of social media, or creating effective regulation more generally. Such an approach seeks to herd certain behaviours and/or attributes, to build up a category and/or definition, which then form a basic rule.<sup>71</sup> The shortcoming of such an approach is that the basic rule is subsequently used as a net that is cast over a wide variety of circumstances, which it was not designed to accommodate. The fluidity of social media means that such modeling will never effectively serve nor effectively meet the unique challenges of the very medium, which it is seeking to regulate.

### **Part 4- Changes in Approach to Regulation and Commercial settings**

Part 4 of my book explores the laws responsiveness to institutional environments and progressive regulation. According to Black and Baldwin, to be really responsive, regulation must respond to attitudinal settings, to the broader regulatory environment, the different logics of regulatory tool and strategies, to the regimes own performance and finally to changes in each of these elements.<sup>72</sup> As a result of considering Part 4 of my book, I assert in

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broadcaster will be held to a higher standard than a member of the public (R (Gaunt) v Office of Communications 2010] EWHC 1756 (QB), [2011] ACD 17, [2010] HRLR 31, [2011] 1 WLR 663) which is not something which is considered in the CPS guidelines.

<sup>69</sup> Spar, D. *Ruling the Waves* Harvest Books; Reprint edition (2003) p. 8.

<sup>70</sup> How laws may be more effectively designed to meet the particular regulatory challenge they seek to address has been the subject matter of extensive debate (Black, J. (2012); Baldwin, R. (1990)). The test of the success of regulation is whether it meets the challenges faced by today's regulators (Black, J. and Baldwin, R. (2008) p.59). Black, J. and Baldwin, R. posit that for regulation to be effective 'regulators have to be responsive not only to the compliance performance of the regulated; ... operative and cognitive frameworks; their attitudinal settings; to the broader institutional environment of regulatory regime; to the different logics of regulatory tools and strategies; to the regimes own performance; and finally to changes in each of these elements' (Black, J. and Baldwin, R. (2008) p.61).

<sup>71</sup> Black, J. (1997) p.7 notes that rules are linguistic in nature, and consequently 'how we understand, interpret, and apply rules depends in part on how we understand and interpret language'.

<sup>72</sup> Black, J. and Baldwin, R. (2008) p. 69.

this summary that the destiny of regulation and technology are intertwined. Therefore in my view, rules cannot apply themselves, 'for the rule to be applied in a way which will further the overall aims of the rule maker, then the person applying it has to share the rule maker's interpretation of it'.<sup>73</sup> Quite simply, the tools that deliver the operational capabilities of social media sites, inform the form of the regulation.<sup>74</sup> I suggest in this summary that my doctrinal work highlights challenges to devising responsive regulation.

In Chapter 13 of my book, concerned with data privacy, I consider how there is increasing pan-European regulation currently being drafted that affects the private sector. Such regulation is drafted on a high-level principles basis which devolves its implementation to those regulated providers who have the capability to deliver technical solutions on a pan-European basis, with extra-territoriality provisions. In particular, my book considers the European General Data Protection Regulation 2018,<sup>75</sup> which seeks to regulate Information Society Services<sup>76</sup> at a conceptual level,<sup>77</sup> placing the onus on developers to design appropriate privacy tools by reference to the state of the art in technology that can deliver legally compliant solutions.<sup>78</sup>

In this regard, as a result of the doctrinal analysis I have undertaken, I have subsequently observed that scholars must engage with the proposition that technology can be used as a means of 'nudging compliance',<sup>79</sup> founded on the principle that while we behave irrationally, our irrationality can be corrected – if only the environment acts upon us, nudging us towards the right option.<sup>80</sup>

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<sup>73</sup> Black, J. (2012) p. 218.

<sup>74</sup> Lessig, L (2008), posited that regulation is not the sole product of law, but also market and social norms and is consequently more concerned with high level choice values and democracy. The law does not therefore operate directly, but also indirectly through other modalities such as the technology itself in order to 'regulate to laws own end', leading to direct and indirect regulatory effects (Lessig, 2008, Ch. 4 and 5). Therefore law can in principle regulate the architecture, and the architecture can regulate the norms, thereby avoiding a situation whereby detailed rules are created which foster a sense of 'distrust' between the rule maker and its subject (Black (2012) p. 217). Marsden, C. notes that the developer community has traditionally placed great store in self-regulation based upon codes of practice, contractual terms and community standards (Marsden 2012) with Marsden contending that 'governments have broadly accepted that a more flexible and innovation-friendly model of regulation is required, particularly in view of the rapid growth, complex inter-relationships and dynamic changes taking place in [the] Internet' (Marsden (2012) p. 212).<sup>74</sup> Consequently, given Black's observations regarding the context in which law operates and the reciprocal relationship between technology and rules, they must be considered in parallel when proposing a regulatory model suitable for the complex demands presented by social media<sup>74</sup> so that a form of regulation can be adopted which can adapt to meet new challenges where non-compliance is concealed and/or new methods of evading detection are devised so that the 'gap between rules and objectives' does not become too wide (Black and Baldwin (2008, p.81).

<sup>75</sup> General Data Protection Regulation 2016/679/EU.

<sup>76</sup> This includes social media sites; see Scaife L. 2014 p. 16-18.

<sup>77</sup> Article 25 of the GDPR states: that data controllers must take into account the state of the art, the cost of implementation and the nature, scope, context and purposes of processing as well as the risks of varying likelihood and severity for rights and freedoms of natural persons posed by the processing, implement appropriate technical and organisational measures, such as pseudonymisation, which are designed to implement data-protection principles, such as data minimisation, in an effective manner and to integrate the necessary safeguards into the processing in order to meet the requirements of the GDPR and protect the rights of data subjects.

<sup>78</sup> Recital (78) of the GDPR states: "the protection of the rights and freedoms of natural persons with regard to the processing of personal data require that appropriate technical and organisational measures be taken to ensure that the requirements of this Regulation are met. In order to be able to demonstrate compliance with this Regulation, the controller should adopt internal policies and implement measures, which meet in particular the principles of data protection by design and data protection by default...When developing, designing, selecting and using applications, services and products that are based on the processing of personal data or process personal data to fulfil their task, producers of the products, services and applications should be encouraged to take into account the right to data protection when developing and designing such products, services and applications and, with due regard to the state of the art, to make sure that controllers and processors are able to fulfil their data protection obligations. The principles of data protection by design and by default should also be taken into consideration in the context of public tenders."

<sup>79</sup> Sunstein, R. *Flexibility. Regulation: Looking Backward, Looking Forward* Administrator, Office of Information and Regulatory Affairs Administrative Law Section, American Bar Association Capital Hilton, Washington, DC, May 10, 2012.

<sup>80</sup> There is a note of caution, such systems are often designed by giving notice and choice to customers, which for Lessig can lead to a situation by which 'code becomes a means by which to transfer decisions from the public realm to the privatised realm....[i]t is a way to convert political rights into market commodities' (Lessig, L. (2008) Ch. 11 and pp. 159-63).

## CONCLUSION

The significance and originality of my overall body of work as expressed in this summary lies in its holistic coverage of doctrinal understanding and its corresponding assessment and in this summary I offer a critique of the effectiveness of the regulation of social media as a whole, notably the lack of focus on the law's failure to respond to the dynamic and iterative nature of social media.

### ***Areas for further theoretical re-engagement***

Having represented clients as a practicing lawyer and undertaken research in this area for the past few years, notably publishing the *Handbook of Social Media and the Law*, my research has allowed me to identify the following areas for further theoretical re-engagement as to how the law could be effectively reformed:

- (i) As noted in *DPP v McConnell* '*the statutes are widely drafted designed: (a) primarily to regulate one to one communications rather than one to many; and (b) to safeguard a public utility built with public money, which is now being applied to a privately owned, publicly accessed, many to many domain*'.<sup>81</sup> Consequently the current law does not take into account the spontaneity, permanence and reach of such communications.
- (ii) The context in which interactive social media dialogue takes place is quite different to the context in which other communications take place, access is ubiquitous and instantaneous. Banter, jokes and offensive comments are commonplace and often spontaneous and communications intended for a few may reach millions.
- (iii) The umbrella of legislation under which online communications are regulated, operate in a top-down fashion, pre-supposing that such a methodology is desirable and can lead to effective and determinative outcomes.
- (iv) In adopting forms of top down regulation, and applying them to newly charted worlds by reference to the comfort of the familiar, there is an inherent danger that only some features of the event become the focus of the rule and '*are then projected onto future events, beyond the particulars which served as the paradigm or archetype for the formation of the generalisation*'.<sup>82</sup>
- (v) The public lack a clear understanding as to when civil and criminal offences online may be committed. For the rule to be applied in a way which will further the overall aims of the rule maker, then the person applying it has to share the rule maker's interpretation of it.<sup>83</sup>
- (vi) Insufficient attention is paid to the role of the regulated<sup>84</sup> and the role of online writing as a process of self-formation.

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<sup>81</sup> *DPP v McConnell* [2016] NI Mag 1 at para [16].

<sup>82</sup> Black, J. (2012) p.8.

<sup>83</sup> Black, J. (2012) p.218.

<sup>84</sup> Scaife, L. (2015) pp15-155.

(viii) The role of the platform providers' liability and ability to create technologically effective system architecture needs further analysis.<sup>85</sup>

(ix) With regard to policy more generally, this would represent a unique opportunity to move from a policy centred analysis handed down for implementation, to a more action centred approach to regulatory reform.

In summation, the conclusions reached from considering regulatory theory as applied to my doctrinal analysis, supports the proposition that existing laws cannot be applied or adapted to the social media context. Social media poses new problems, requiring new solutions including a consideration of the role of co-regulation. My research reveals that this area of legal regulation is in need of further attention with regards to its successful reform. In this regard it also raises an important question, namely how can responsive regulation be created that is sensitive to the behaviour, attitude and culture of the communities which regulation must serve? I now turn to consider this issue as applied to my analogy of the regulation of the sea.

### ***The Regulatory Harbour Model- An Iterative and Dynamic Model for the Regulation of Social Media***

Much like the Internet, social media as a current legal problem is frequently characterised as somehow unique, differing from other seemingly untameable spaces, such as the sea.

This is not a satisfactory starting point, given that social media is not unique in its objects and/or events which form the subject matter of regulation, being dynamic and fluid in nature. For example in essence, until the rise of modern nations, maritime law did not derive its force from territorial sovereigns; instead it represented what was already conceived to be the customary law of the sea. As commerce moved northward and westward, sea codes developed in northern European ports, with important medieval sea codes such as the *Laws of Wisby* (a Baltic port), the *Laws of Hansa Towns* (a Germanic league), and the *Laws of Oleron* (a French island) being developed. These codes each drew inspiration from the *Consolato del Mare*, notably the *Laws of Oleron*, the second great code of maritime regulation. These codes are revered as the three arches upon which rests modern admiralty structure (the "**Three Arches**"). According to one historian, the great value of the rules which had been developed for maritime trade lay in the fact that they had been "*found by practice to be suitable to the needs of a community which knows no national boundaries –the international community of seafarers*".<sup>86</sup> The challenge therefore is to find a model suitable for such a dynamic environment whose attempts to impose a degree of artifice, works organically with social medias unique nature, rather than to impose rigid construct. The goal should be to find a way to marry social media's naturalistic, metonymic nature, with the rules and architecture so that whilst the rules may remain the "organising centre", they complement the seascape. Rules should not be an edifice whose very infringement of the

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<sup>85</sup> There is a note of caution, such systems are often designed by giving notice and choice to customers, which for Lessig, can lead to a situation by which 'code becomes a means by which to transfer decisions from the public realm to the privatised realm....[i]t is a way to convert political rights into market commodities' (Lessig, L. (2008) Chapter 11 and pp.159-63). This would need to be considered as part of any proposed review.

<sup>86</sup> Despite the decline in the historical uniformity of early maritime laws these transactions have always been international in nature often implicating several countries, which can lead to unpredictability for participants when domestic law becomes involved.

environment makes them vulnerable. Regulation can be created for anything. Tomorrow, legislators could ban social media in its entirety if they so wished. However, the test of regulation is whether it is equipped to meet the demands of the legal dilemmas which it raises and whether those persons subject to regulation, submit to it. Improved rule-making comes when the means of securing compliance is shaped having regard to the particular problem at hand, rather than by "clinging to the notion that rules shape the world" (Baldwin, 1990 p.337).

The great value of the rules which had been developed for maritime trade lay in the fact that they had been found by practice to be suitable to the needs of a community which knows no national boundaries. Just like the Law of the Sea and of the *Consolato del Mare*, which represented compilations of comprehensive rules for all maritime subjects, covering everything from ownership of vessels, the duties and responsibilities of the Master Mariners or Captains thereof, duties of seamen and their wages, freight, salvage, jettison, average contribution, and the like, enjoying an authority far beyond the port from which it hailed. Similarly a principle based approach needs to be adopted to the regulation of social media which facilitates an environment in which law, users and technology can work together to create a co-regulated principles based space, which has the necessary flexibility to adapt to the development of technology, whilst respecting core principles of human rights. Taking these principles as a base, international regulation can be developed which has the necessary flexibility to take into account the state of the art and sustain a rigorous regulatory environment, with better and more effective outcome focussed approach despite being applied, rather than artificially seeking to apply detailed rules prescribing how outcomes must be achieved.<sup>87</sup> This will facilitate the creation of an ecosystem by which the regulatory environment can adapt, based on performance assessments and consequently modifications to the approach adopted (Black and Baldwin (2012) p.140). A diagrammatic representation of what the model could look like is appended to this summary at Appendix 3.

From my doctrinal analysis, core principles such as freedom of expression, the state's ability to protect its citizens and privacy concerns (the 'arches of social media') could be adopted as the principles envisaged which must be designed and/or drafted into the vision for regulation. At this point regulation can be drafted that is sufficiently broad to protect principles, by reference to the state of the art of technology, backed by civil and/or criminal, sanctions.

Engagement with the technological community may of course lead to concerns that solutions are inconsistent and that there is a lack of transparency in decision-making as well as costs for state regulators in terms of creating continuity. It is suggested that to counter this risk and to foster a consistent approach to regulation, 'peer panels'<sup>88</sup> comprised of the main social media platform providers and policy makers could be adopted to foster the development of common language about risk and to facilitate learning.<sup>89</sup> Whilst such panels could be

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<sup>87</sup> See Black (2012) p.218: The propensity for detailed rules to fail in this manner has been recognised, at least to an extent. In particular, the moves towards the creation of interpretive communities can be seen as attempts to find ways to escape the need for precise and complex rules. Three different aspects of this development can be identified. The first is the use of rule type, the second a change, in the level of rhetoric at least, of regulatory approach, and the third an increased emphasis on the regulatee's own attitude, education, training, and competence. Each is aimed at changing the internal attitude of the regulated to the regulation; displacing the need for control by building up understandings within the regulatory system as to what the regulatee is meant to do, how it is meant to act.

<sup>88</sup> Black, J and Baldwin, R. (2012), p.143.

<sup>89</sup> See Baldwin, J. and Black, R. (2008) p.71: 'the third element of really responsive regulation is responsiveness to the logics of different regulatory strategies and tools. Different regulatory strategies can have different logics. They embody, or at least place

criticised on the basis that they lack impartiality (akin to the Press Complaints Commission) exerts and those concerned with the issues at hand can always be brought into the model. Failure to consult the technology providers however would not be consistent with the highly technical and operationally driven nature of the technologies seeking to be regulated. The solution can then be finessed to balance the government's priorities and human rights obligations and understand industries risk (such as cost, complexity of delivery etc.) in order to resolve the construction, deployment and operation of the proposed model. The roadmap can then be broken down into a series of releases, with the high overarching architectural requirements taking precedence over the successive iterations of the technological solutions used to achieve the overall legal principle. When regulation is approached in this manner the model adopted can take into account the institutional environments in which the regulators act,<sup>90</sup> whilst factoring the view of the regulated, without having the need to resort to a radical re-model of the regulatory approach which would not have the necessary flexibility to take into account the degree of institutionalism that is present in regulation and which cannot be easily divested. The goal should be iterative evolution not prescriptive arbitrary revolution.

Whilst such modelling may be viewed as eclectic and broad, with regards to enforcement and compliance, my research serves to demonstrate that there are several ways in which to achieve the overall principles that are deemed worthy of protection, each naturally has its own strengths and weaknesses. The approach taken towards regulation will naturally vary according to context. Similar to theoretical approaches adopted with regards to really responsive regulation,<sup>91</sup> the model and underlying analysis put forward in this paper goes beyond prescriptive approaches so as to offer the regulator and the regulate a framework for evaluating the relative merit of different approaches and players involvement and allows for the adoption of innovative combinations of regulatory logic, allowing optimal responses to be developed by the whole community, with the scope for feedback by each player in the community. In this regard, it goes further than simply providing a refinement of existing models, demanding an on-going consideration of the regulatory strategy to be adopted, beginning with principles and problems rather than the regulation itself. The regulation is responsive because it knows the environment, which it seeks to assist, rather than attempting to command it, responsive to performance sensitivities and technological developments.

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emphasis on, different under-standings of the nature of behaviours or an institutional environment, and in turn have different pre-conditions for effectiveness (namely that the institutional environment of behaviours conforms to those foundational understandings)'.  
<sup>90</sup> Baldwin, J. and Black, R. (2008) p.70.  
<sup>91</sup> Baldwin, J. and Black, R. (2008) p.70.

## Appendix 1

### Summary of Existing Published Work to be considered as part of PhD Submission

	Title	Summary	Reference
	<b><i>The Handbook of Social Media and the Law</i></b>	This book is the first to consider the significant legal developments that have arisen due to social media. Various categories and channels of social media are covered in this book, alongside the legal classification of different social networks. Social media is also considered in the context of human rights law by evaluating the implications this has had upon the development of civil and criminal law when pursuing a civil remedy or criminal prosecution in relation to online speech. As part of these discussions the book deals specifically with the Defamation Act 2013, the Communications Act 2003, the Computer Misuse Act 1990 and the Contempt of Court Act 1988 among other key issues such as seeking Injunctions and the resulting privacy implications.	<b>Publisher:</b> Routledge <b>ISBN:</b> 978-0-415-74548-2, 1st edition, 2015. <b>Author(s):</b> Laura Scaife

### Potential Law Commission project on Online Communications

*How can the law dealing with offensive online communications be made clearer?*



The Law Commission is currently consulting on our 13<sup>th</sup> Programme of Law Reform. Our wide ranging consultation will help us shape our work programme for 2017 – 2020. As part of the consultation we are asking whether consultees agree that the law on offensive communication would benefit from simplification and modernisation. This is against a backdrop of increasing problems in the area. For example, Ministry of Justice figures for 2014 showed a near ten-fold increase in convictions over a ten year period under the 1988 and 2003 Acts. On Friday 21 October 2016, the Times reported that violent offences were now at their highest level in the 14 years since comparative data records began and that internet trolling and revenge porn offences contributed more than a third of the 24 per cent rise in violent crime last year.

We know that the law governing offensive online behaviour is out of date. Legislation in this area includes Part 1 of the Malicious Communications Act 1988, which makes it an offence to send a communication intended to cause "distress or anxiety", and section 127 of the Communications Act 2003, which applies to threats and statements known to be false but also contains areas of overlap with the 1988 Act. Further offences that might be relied upon include those under the Public Order Act 1986,<sup>1</sup> the Protection from Harassment Act 1997<sup>2</sup> and the Contempt of Court Act 1981. Does this multiplicity of offences, each designed to tackle a particular problem, each with different focus and elements, create problems in charging selection and prosecution?

The problematic application of these provisions to the modern day phenomenon of social media abuse can be attributed in part to their genealogy. Section 127 is a pre-internet provision evolved from the Postal Acts of the early 20th Century, initially intended to prevent the use of public funds to broadcast objectionable messages to society. The 1988 Act was derived from a Law Commission Report on poison pen letters, not internet trolls. Further uncertainty surrounds the 1988 Act's use of the term "grossly offensive" communication, which may be so broadly defined as to fall foul of the principle of legal certainty. This concern was raised by Article 19 in their evidence to the House of Lords Communications Committee in 2014.<sup>3</sup>

Difficulties around charging decisions, and confusing legislation, have been exacerbated by a dearth of legal argument about the appropriate boundaries of online comment. Defendants frequently accept cautions or plead guilty instead of navigating a raft of statutory provisions which are seemingly misaligned with offensive online behaviour. Laura Scaife suggests that some defendants are still being pursued by the police under the wrong legislation.<sup>4</sup>

<sup>1</sup> Section 4A Public Order Act 1986.

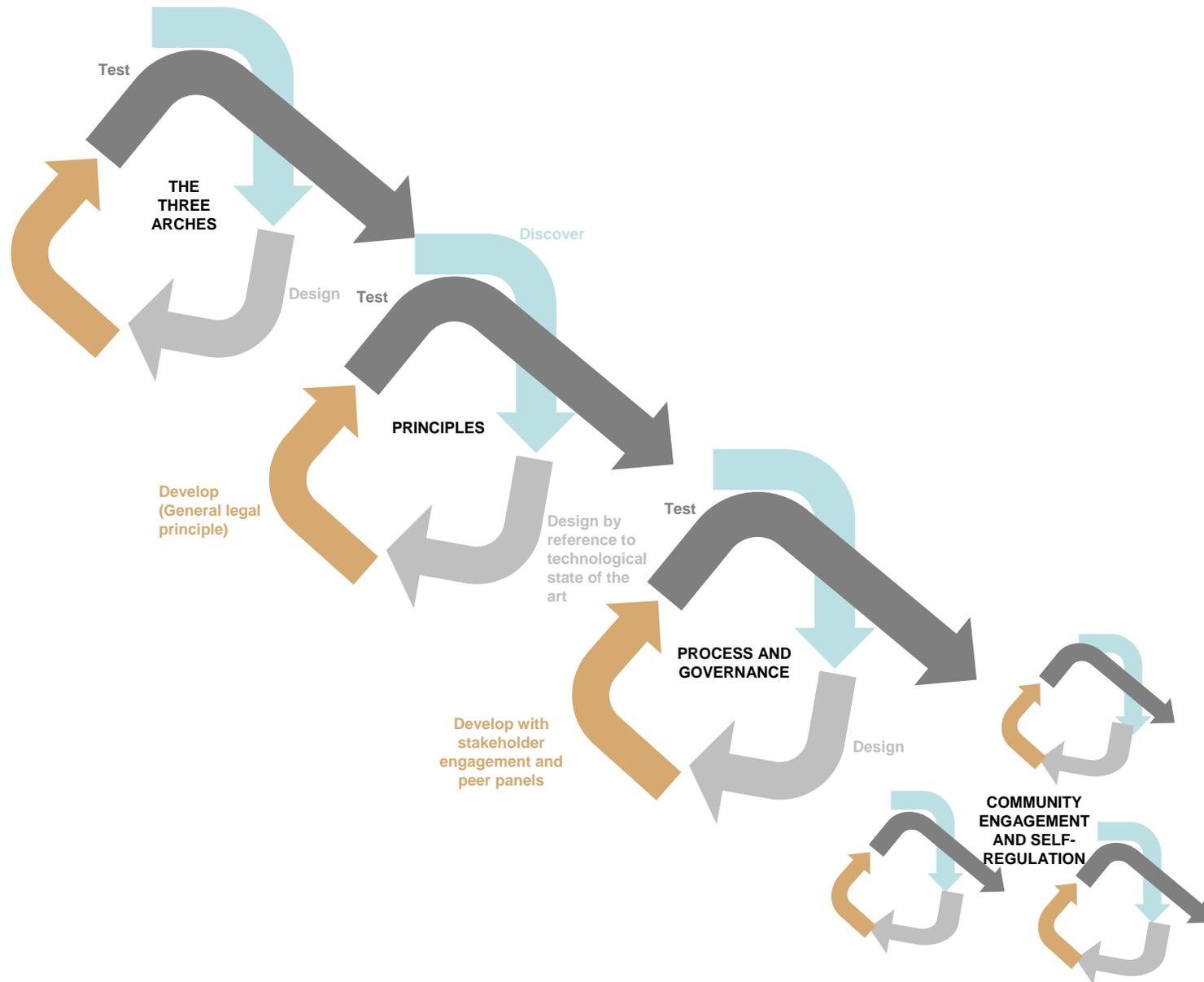
<sup>2</sup> Sections 2 and 4 Protection from Harassment Act 1997, as extended by the Protection of Freedoms Act 2012.

<sup>3</sup> <http://www.publications.parliament.uk/pa/ld201415/ldselect/ldcomuni/37/37.pdf>.

<sup>4</sup> L Scaife, "Handbook of Social Media and the Law" 2015 at 165.

## Appendix 3

### Diagrammatic Representation of the Proposed Model



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