

Annual Review of Substantive Criminal Law: Developments in 2023

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Abstract

This article analyzes significant legislative amendments and judicial decisions that impacted substantive criminal law in 2023, focusing on key developments. As anticipated, the year's criminal law reforms addressed contemporary societal challenges, including the non-consensual creation and distribution of sexual images and the emergence of deepfake technology. In response, new criminal prohibitions against the production and dissemination of such images were enacted, and penalties for the fraudulent use of deepfakes were increased.

This article contends that criminalizing offenses related to sexual images is essential to protecting the privacy associated with sexual activities. Such images can expose victims to increased risks of harm, including physical attacks and severe emotional distress caused by unwanted public association with sexual conduct. Furthermore, while deepfakes can be used to perpetrate fraud, their inclusion as an aggravating factor for sentencing should primarily be justified by the potential to reduce costs rather than by perceived increases in the risk of victimization.

Turning to judicial developments, the Constitutional Court adjudicated on the constitutionality of offenses related to mandatory tender offers and electoral fraud. Although the Court has established a consistent framework for evaluating vagueness challenges, the precise contours and application of this doctrine require further examination. Accordingly, this article re-examines the void-for-vagueness doctrine through two illustrative cases, aiming to clarify the minimum

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requirements for criminal legislation in instances of legislative delegation to the executive (mandatory tender offers) and judicial interpretation (fictitious residency for electoral purposes).

In essence, this article emphasizes the potential opportunity costs arising from the unintended deterrence of lawful activities. Consequently, the standard of knowability should consider not only those subject to criminal liability but also those whose behavior may be affected and thus (mistakenly) deterred. By adopting an efficiency-based approach to vagueness, unconstitutional statutes should be identified as those incurring higher opportunity costs from deterring lawful conduct than the benefits of preventing unlawful behavior. Criminal legislation should be constitutionally sound prior to delegation when it properly demarcates the scope of targeted behavior and should not be rectified through post-legislative judicial interpretation.

Keywords: sexual image, revenge porn, deepfake, aggravated fraud, void for vagueness, mandatory tender offer, electoral fraud