THE RISE OF EXTREME PORN

LEGAL AND CRIMINOLOGICAL PERSPECTIVES ON EXTREME PORNOGRAPHY IN ENGLAND AND WALES

ALEXANDROS K. ANTONIOU AND DIMITRIS AKRIVOS

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palgrave
macmillan

Alexandros K. Antoniou
School of Law and Criminology
University of West London
London, United Kingdom

Dimitris Akrivos
Canterbury Christ Church University
Canterbury, United Kingdom

ISBN 978-3-319-48970-4
ISBN 978-3-319-48971-1 (eBook)
DOI 10.1007/978-3-319-48971-1

Library of Congress Control Number: 2016958527

Cover illustration: Design by Samantha Johnson

Printed on acid-free paper

This Palgrave Macmillan imprint is published by Springer Nature
The registered company is Springer International Publishing AG
The registered company address is: Gewerbestrasse 11, 6330 Cham, Switzerland

To our families,
with love and infinite gratitude

Acknowledgements

We owe a huge debt of gratitude to our families for their love and never-ending patience. It would have been a lonely process without them. We would especially like to acknowledge the exceptional support offered by our charismatic friend Gauri Sinha. We would be remiss if we did not acknowledge the encouragement from our priceless friends Evangelos Alexandrakis, Georgia Vassalos and Georgia Taratsa, who stood by us through the tough times and kept a sense of humour when we had lost ours.

The completion of the empirical part of this study could not have been accomplished without the support of the Crown Prosecution Service (CPS). Indebtedness is expressed to the CPS Principal Research Officer Corrine Charles, the CPS Research Project Manager Richard Milner and the CPS Senior Policy Advisor Esther George for their generous assistance at the time when this research was conducted. In addition, special thanks must be extended to Professor Clarissa Smith for the insightful observations she offered during an interesting conversation about this research over lunch.

Last, but not least, Archontoula, Elena and Michael, Yorgos, Philip, Caroline, Nkechi, Majeks, Alison and Gary are warmly thanked for their positive attitude to our efforts.

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Introduction

Background to This Study

The classic liberal position[1] concerning obscene and pornographic material in England and Wales has been that it is lawful to possess it for private use, but not to distribute or sell it where it may harm others.[2] These restrictions are supplemented by other statutory or common law criminal offences, such as displaying an indecent matter visible from a public place[3] or outraging public decency.[4] In addition, a plethora of legislation deals with the import and export of obscene material and restricts its dissemination through different media outlets.[5] While these

[1] L Edwards, J Rauhofer and M Yar, 'Recent developments in UK cybercrime law' in Y Jewkes and M Yar (eds), *Handbook of Internet Crime* (Willan Publishing, Devon: 2010) 417.

[2] Obscene Publications Act 1959 (OPA 1959).

[3] Indecent Displays (Control) Act 1981.

[4] *R v Gibson* (1990) Cr App R 341.

[5] Customs Consolidations Act 1876, A Table of Prohibition and Restrictions Inwards; HM Customs and Excise, Volume C4: Import prohibitions and restrictions, Part 34: Indecent or obscene material, Appendix F; Broadcasting Act 1990, s 162 and Sch 15; Cinemas Act 1985, Sch 2, para 6; Video Recordings Act 1984, ss 2 and 4A; Communications Act 2003, s 3 and s 319. In addition, the Local Government (Miscellaneous Provisions) Act 1982, Sch 3 gives local authorities

A.K. Antoniou, D. Akrivos, *The Rise of Extreme Porn*,
DOI 10.1007/978-3-319-48971-1_1

measures vary in terms of their standards and objectives, they all employ a strategy which targets the source or distributor of such material.[6]

Indecent photographs of children represent in the legal system 'a different class of threat',[7] because they inherently involve 'an imbalance of power'[8] between the child in the image and the adult who produced it. The law in England and Wales covers a wide range of offences, such as the taking, making or showing of indecent photographs of children.[9] Moreover, pseudo-photographs[10] are placed on the same footing as actual photographs.[11] Whilst it may be argued that no real children are used in the production of pseudo-photographs, common arguments supporting their criminalisation suggest that they are 'instrumental in nature',[12] as they may be used in the grooming process or employed to entice other children into the same conduct. Simply possessing any indecent photograph or pseudo-photograph of a child is also illegal.[13] This prohibition constitutes an exception to the aforementioned strategy of targeting the source or distributor of the material and was taken as the model for new measures which represent a different form of control over adult pornography.

In 2005, the UK Government consulted the public on whether to criminalise the possession of 'extreme' pornographic imagery. The path to the legislative change began with Jane Longhurst's death by ligature strangulation during sexual intercourse with Graham Coutts, a man

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the power to control 'sex establishments' (meaning a sex cinema or a sex shop), including the power to exclude such businesses from certain areas.

[6] J Rowbottom, 'Obscenity laws and the Internet: Targeting the supply and demand' [2006] (February) *Crim LR* 97, 98.

[7] Edwards et al. (n 1) 417.

[8] M Taylor and E Quayle, *Child Pornography: An Internet Crime* (Brunner-Routledge, Hove: 2003) 2.

[9] Protection of Children Act 1978 (PCA 1978), s 1.

[10] Criminal Justice and Public Order Act 1994, s 84(3)(c): Pseudo-photograph means an image, whether made by computer graphics or otherwise howsoever, which appears to be a photograph.

[11] PCA 1978, s 7(8).

[12] D Howitt and K Sheldon, *Sex Offenders and the Internet* (Wiley, Chichester: 2007) 78; Y Akdeniz, *Internet Child Pornography and the Law: National and International Responses* (Ashgate Publishing Ltd, Aldershot: 2008) 22.

[13] Criminal Justice Act 1988, s 160.

whom she had known socially. Coutts had visited various pornographic websites one day before the victim's death, including a website entitled 'death by asphyxia'. The idea that consumption of pornography 'fuelled'[14] Coutts' sexual desires and ensuing criminal act was later presented by the Jane Longhurst Trust as a powerful argument for legislating against extreme pornographic websites that promote violence against women.

The Home Office consultation document stated that the proposals to strengthen the law were fostered by (a) a desire to protect those who participate in the creation of sexual material containing violence, cruelty or degradation, who may be the victim of crime in the making of the material, whether or not they notionally or genuinely consent to take part and (b) a desire to protect society, particularly children, from exposure to such material, to which access can no longer be reliably controlled through legislation dealing with publication and distribution, and which may encourage interest in violent or aberrant sexual activity.[15] The first justification sees individual viewers as generating a demand which in turn increases the production of material that may cause harm to the individuals featured in it. The first part of the second justification seems odd. It has been argued that it is unclear how it supports the introduction of a possession offence, since it would allow the prosecution of many who are exposed to the material over the Internet.[16] It was hoped, however, that by discouraging interest in the material at issue, production would discontinue and therefore, by breaking the cycle of demand and supply, the risk of members of society being exposed to it would be eliminated. The second part of the second justification raises the issue of whether such material creates harm by shaping individuals' attitudes and interest in 'aberrant' sexual behaviour.

The original proposals to outlaw possession of extreme pornography were intended to close 'a gap in existing legislation'[17] which developed

[14] *R v Coutts* [2005] EWCA Crim 52, [94].

[15] Home Office, *Consultation: On the Possession of the Extreme Pornographic Material* (Home Office Communications Directorate, London: 2005) [34].

[16] Rowbottom (n 6) 101.

[17] Home Office, *Consultation* (n 15) [35].

by reason of technological advancements capable of circumventing existing controls.[18] The material targeted is already illegal to produce and distribute under the Obscene Publications Act 1959 (OPA 1959) but is now easily accessible online. By criminalising possession, the offence is aimed at responding to the ineffectiveness of the existing legal framework in controlling certain categories of pornographic images, which are produced outside of, but procured by Internet users within England and Wales.[19]

The Home Office asserted that they were not aware of any Western jurisdiction which prohibits simple possession of such imagery.[20] Some Council of Europe member states criminalise certain forms of violent pornography. The German criminal code, for example, provides penalties for whoever 'disseminates, displays publicly, presents, produces [...] pornographic materials that have as their object acts of violence or sexual acts of persons with animals'.[21] However, it is legal to possess such material in Germany. Moreover, in Malta it is prohibited to produce, distribute and possess material depicting sexual activities with animals, though there is no ban on possession or distribution of violent pornography.[22] In the Netherlands, specific legislation prohibits only the 'production or distribution of bestiality pornography'.[23] In Sweden, however, pornographic images involving animals are authorised,

[18] Home Office, Press Release (30 August 2006), 'New Offence to Crack Down on Violent and Extreme Pornography', http://www.cjp.org.uk/news/archive/new-offence-to-crack-down-on-violent-and-extreme-pornography-30-08-2006/, accessed 10 September 2013.

[19] In 2015, 3,494 reports of alleged 'criminally obscene adult content' were made to the Internet Watch Foundation (IWF), which works within the UK to minimise the availability of sexual abuse content online. Criminally obscene adult content is defined by the IWF as 'images and videos that show extreme sexual activity that is criminal in the UK'. According to the IWF, 'almost all' of these 3,494 reports were not hosted in the UK and therefore fell outside their remit. Interestingly, none of them were assessed by IWF analysts as criminally obscene *and* hosted in the UK. In 2014, only 9 out of 3,016 reports of such content were assessed as criminally obscene *and* hosted in the UK; see Internet Watch Foundation, *Annual Report 2015* (IWF, Cambridge: 2015) 16 and Internet Watch Foundation, *Annual Report 2014* (IWF, Cambridge: 2015) 16.

[20] Home Office, *Consultation* (n 15) [55].

[21] M Stuligrosz, *Violent and Extreme Pornography*, Doc 12719 (Council of Europe, Parliamentary Assembly, Strasbourg: 2011) [67].

[22] Ibid [68].

[23] Ibid [69].

provided that no 'cruelty'[24] to animals is caused, in the sense of 'causing physical or psychological suffering'.[25] The Parliamentary Assembly of the Council of Europe has repeatedly expressed its concern over the public's increased accessibility – especially via the Internet – to extreme pornographic material and the negative impact of violent pornography on women's dignity.[26] The Assembly has also noted the great disparities between Council of Europe Member States in the regulation of pornography and the poor enforcement of existing laws on the production and distribution of violent pornography. For this reason, it has recommended that Members States criminalise the possession of violent and extreme pornography (including for personal use).[27]

The UK Parliament legislated in s 63 of the Criminal Justice and Immigration Act 2008 (CJIA 2008) to create a criminal offence of possession of an 'extreme pornographic image'.[28] It came into force on 26 January 2009 and applies to England, Wales and Northern Ireland.[29] The CJIA 2008 defines an 'extreme pornographic image' as an image of such a nature that it must reasonably be assumed to have been produced solely or principally for the purpose of sexual arousal,[30] is 'grossly offensive, disgusting or otherwise of an obscene character'[31] and portrays 'in an explicit and realistic way'[32] any of the following: (a) an act which threatens a person's life; (b) an act which results, or is likely to result, in serious injury to a person's anus, breasts or genitals; (c) an act which involves sexual interference with a human corpse; or (d) a person

[24] Ibid.

[25] Ibid.

[26] Recommendation 1981 (2011); Assembly debate on 5 October 2011 (32nd and 33rd Sittings) (see Doc 12719, report of the Committee on Equal Opportunities for Women and Men).

[27] Resolution 2001 (2014); Assembly debate on 24 June 2014 (22nd Sitting) (see Doc 13509, report of the Committee on Culture, Science, Education and Media and Doc 13536, opinion of the Committee on Social Affairs, Health and Sustainable Development).

[28] CJIA 2008, s 63(1).

[29] Scotland introduced analogous but wider provisions in the Criminal Justice and Licensing (Scotland) Act 2010, s 42. Their main differences from the English and Welsh law are discussed in Chapter 5.

[30] CJIA 2008, s 63(2) and 63(3).

[31] CJIA 2008, s 63(6)(b).

[32] CJIA 2008, s 63(7).

performing an act of intercourse or oral sex with an animal, whether dead or alive; and a reasonable person looking at the image would think that any such person or animal was real.[33] The offence was amended in 2015 to cover the possession of extreme images depicting rape and assault by penetration. More specifically, two additional categories of prohibited material were included, i.e. an image which portrays in an explicit and realistic way; (e) an act which involves the non-consensual penetration of a person's vagina, anus or mouth by another with the other person's penis; and (f) an act which involves the non-consensual sexual penetration of a person's vagina or anus by another with a part of the other person's body or anything else.[34] The changes to the offence took effect on 13 April 2015 and apply only to possession of material which occurred on or after this date.

Disgust and the Criminal Law

The criminalisation of extreme pornography raised the deeply contested questions of whether what could be seen as grossly offensive, disgusting and purportedly harmful practices enjoyed in private should be immune from prosecution. In the absence of conclusive empirical evidence on the potential links between extreme pornography and physical harm, we briefly reflect on whether the criminal law and the notion of disgust can be justifiably invoked to punish its private use.

The issue of how far morality should influence the law was hotly debated between the leading English jurist Lord Devlin and Professor Hart, whose writings were central to the discussion triggered by the publication of the 1957 Wolfenden Report on prostitution and homosexuality. Central to the Report was the assumption that the purpose of criminal law is:

[33] Ibid.

[34] CJIA 2008, s 63(7A) inserted by the Criminal Justice and Courts Act 2015, s 37; the CJIA 2008 extends to England, Wales and Northern Ireland but the amendments made to it by s 37 do not affect the law as it applies in Northern Ireland.

> . . . to preserve public order and decency, to protect the citizen from what is offensive and injurious and to provide sufficient safeguards against exploitation and corruption of others, particularly those who are especially vulnerable because they are young, weak in body or mind, inexperienced, or in a state of special physical, official or economic dependence. . . . The law [should not] intervene in the private lives of citizens or seek to enforce any particular pattern of behaviour, further than is necessary to carry out the [outlined] purposes.[35]

The Wolfenden Report drew a line between criminal justice intervention and matters of private morality. In this way, it largely mirrored Mill's principle that prevention of harm to others was the only legitimate reason for state regulation of any activity.[36] So long as people do not harm others, they should be left to make their own choices.

The validity of the distinction between public and private morality was opposed by Devlin, who believed that some common form of morality was essential to avoid society's disintegration. He compared immorality to subversive activities, in the sense that it was something against which society was entitled to guard itself. This being the case, the law had a duty to uphold the established morality of society and eradicate any behaviour that fell beyond the boundaries of social tolerance.[37] However, it was not enough to say that a majority disliked a practice. Punishment should be reserved for certain practices which generated 'a real feeling of reprobation'[38] among right-minded people, indicating that the limits of toleration have been reached. Devlin's viewpoint found judicial support in later high-profile cases, where judges felt that they were justified in positioning themselves as moral arbiters. For example, in the *Ladies' Directory* case,[39] where the House of Lords upheld the defendant's conviction of the

[35] Home Office, *Report of the Committee on Homosexual Offences and Prostitution* (Cmd 2471, 1987) 9–10; the Report recommended that prostitution should be viewed as a matter of private morality (except when it causes public nuisance) and that homosexual acts between consenting adults in private should be removed from the control of criminal law.

[36] JS Mill, *On Liberty* (The Floating Press, Auckland: 2009 [1859]) 18.

[37] P Devlin, *The Enforcement of Morals* (OUP, Oxford: 1965) 13.

[38] Ibid 17.

[39] *Shaw v DPP* [1962] AC 220 (discussed in Chapter 2).

archaic crime of conspiracy to corrupt public morals, Viscount Simonds defended the courts' power 'to conserve not only the safety and order but also the moral welfare of the State'.[40]

Influenced by Mill's ideas, Hart challenged Devlin's thesis. He argued that using the law to enforce moral values was unnecessary because there was little evidence that failure to enforce sexual morality has resulted in societies' disintegration. Moreover, the fact that some members of a society offend against one aspect of a moral code does not necessarily result in the rejection of all rules of the code by all its members, putting society's entire structure at risk. In addition, Devlin's argument rested on the unproved assumption that there exists a unanimous agreement in our society on matters concerning moral values; established morality may well be accepted in practice only by a minority of citizens.[41] Hart also strongly opposed Devlin's criterion for discerning what constitutes an immoral act, i.e. the disgust it produces in the mind of the ordinary right-thinking persons – even by its very existence – and doubted that populist views could always be correct. The exercise of individual liberty requires recognition of the principle that individuals may act freely even if others feel disgusted when they become aware of what it is they do – unless there are good reasons for prohibiting it.[42]

The 'major modern reformulation'[43] of the harm principle is that of Feinberg. Feinberg's harm principle differs from Mill's in that harm or injury is not the only reason for justifying criminalisation. In addition, he states, 'it is always a good reason in support of a proposed criminal prohibition that it would probably be an effective way of preventing serious offense [...] to persons other than the actor, and that it is probably a necessary means to that end'.[44] The prevention of offensive conduct,

[40] Ibid 267; see also *Knuller v DPP* [1973] AC 435, where the defendants were prosecuted for having published in a magazine advertisements inviting readers to contact advertisers for homosexual purposes. The House of Lords held that the offence of conspiracy to corrupt public morals could be committed by encouraging conduct which, though not in itself unlawful, might be calculated to result in such corruption; see in particular *Knuller* (n 40) 457 (Lord Reid).

[41] PJ Fitzgerald, *Criminal Law and Punishment* (Clarendon Press, Oxford: 1962) 78–81.

[42] LA Hart, *Law, Liberty and Morality* (OUP, Oxford: 1963).

[43] W Wilson, *Central Issues in Criminal Theory* (Hart Publishing, Oxford: 2002) 20.

[44] J Feinberg, *The Moral Limits of the Criminal Law: Offense to Others* (OUP, Oxford: 1985) 1.

according to this principle, '*is* properly the state's business',[45] and restrictions may be sought because of the offensiveness caused to others by the display of obscene material in public. A legislator or judge should balance the seriousness of the offence caused against the reasonableness of the offender's conduct.[46] With reference to pornography, Feinberg states:

> In the absence of convincing evidence of its causal tie to social harm, pornography ought to be prohibited by law only when it is obscene and then precisely because it is obscene. But obscene (extreme offensiveness) is only a necessary condition, not a sufficient condition, for rightful prohibition. In addition, the offending conduct must not be reasonably avoidable, and the risk of offence must not have been voluntarily assumed by the beholders.[47]

Offence is more profound in relation to disgusting or extremely violent pornographic content. However, following Feinberg, if the material triggering a reaction of disgust is reasonably avoidable or the risk of offence has been willingly undertaken, either because of curiosity or through the anticipation of pleasure, then extreme offensiveness or disgust is not a sufficient reason for its prohibition.[48] As far as extreme pornography is concerned, it is contended that such material is not widely advertised and one has to 'go and find it'.[49] It is also argued that extreme pornography viewers access it 'privately and by choice'.[50]

[45] Ibid.

[46] Ibid 26.

[47] Feinberg (n 44) 26, 142; see also DJ Baker, *The Right Not to Be Criminalised: Demarcating Criminal Law's Authority* (Ashgate Publishing, Surrey: 2011) 199.

[48] Feinberg (n 44) 142.

[49] Backlash, 'Extreme Pornography proposals: Ill-conceived and wrong' in C McGlynn, E Rackley and N Westmarland (eds), *Positions on the Politics of Porn: A debate on government plans to criminalise the possession of extreme pornography* (Durham University, Durham: 2007) 11; Backlash was created in 2005 by the Libertarian Alliance, the Spanner Trust, the Sexual Freedom Coalition, Feminists against Censorship, Ofwatch and Unfettered to collate evidence for an informed debate on censorship and 'fight plans to criminalise ownership of material the Home Office finds abhorrent'; McGlynn et al., *Positions on the Politics of Porn* (n 49) 9 fn 3.

[50] E Wilkinson, 'Perverting visual pleasure: Representing sadomasochism' (2009) 12(2) *Sexualities* 181, 193.

This being the case, the risk of offence is voluntarily taken. Therefore, s 63 fails to be justified by Feinberg's analysis.[51]

Arguments in favour of immunity from legal control are often defended on free speech grounds,[52] but more radical claims go beyond the limits of freedom of expression in support of a right to obtain and read pornography. Ronald Dworkin argues that suppression of pornography interferes with an individual's right to make their own moral decisions and determine their own sexual lifestyle.[53] He defends the right of an individual to access pornography by arguing in favour of 'a right to moral independence',[54] whereby consenting adults can determine their own moral priorities. The right to moral independence is violated when the only plausible ground for regulating pornography is the hypothesis that the attitudes about sex portrayed or nurtured in pornography are 'demeaning or bestial or otherwise unsuitable to human beings of the best sort',[55] even if this was true. Dworkin believed that governments should treat their subjects with equal concern and respect.[56] By treating one citizen's conception of a noble lifestyle more favourably than another's, the government treats citizens with unequal respect and denies an equal chance to shape the moral environment to those who have uncongenial tastes.[57] Dworkin also argues that taste does not provide an adequate basis for interfering with individuals' freedom.[58] He accepts the role of morality in controlling pornography, but criticises the use of disgust as an insufficient condition to restrain individual freedom, because feelings such as disgust do not often

[51] See also D Pereira, 'Pleasure politicised: The relevance of morality in the regulation of extreme pornography' (2011) *Bristol Law Journal* 102, 111.

[52] N Strossen, *Defending Pornography: Free Speech, Sex and the Fight for Women's Rights* (New York University Press, New York: 2000) 20–1.

[53] R Dworkin, 'Is there a right to pornography?' (1981) 1 *Oxford Journal of Legal Studies* 177, 194.

[54] Ibid.

[55] R Dworkin, *A Matter of Principle* (Harvard University Press, Cambridge, MA: 1985) 354.

[56] R Dworkin, *Taking Rights Seriously* (Harvard University Press, Cambridge, MA: 1977) 327.

[57] R Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (OUP, Oxford: 1996) 238; for a criticism of this position, see J Raz, *The Morality of Freedom* (OUP, Oxford: 1986).

[58] Dworkin (n 57) 258.

represent a well-reasoned moral stand, but rather an expression of prejudice, misunderstanding and personal revulsion.[59]

Nussbaum takes a strong line against disgust as well, arguing that it should 'never'[60] be the primary basis for making an act criminal. The author admits feelings as a basis upon which the law may act to enforce morality, but proposes that indignation is more relevant to law, for it is better correlated with damage and is 'typically based on ordinary causal thinking about who caused the harm that occurred, and ordinary evaluation about how serious a harm this is'.[61] Disgust, however, embodies 'magical ideas of contamination and impossible aspirations to purity',[62] making it an untrustworthy guide to public policy. Nussbaum prompts us to be indignant about representations of sexual violence that may pose a risk to society's moral values. Appealing to the emotion of disgust tends to cloud the issue.

Beyond Offensiveness?

Debates about the legal control of pornography also emphasise the tension between liberal ideas of sexual expression and feminist concerns about women's objectification.[63] The 1979 *Report of the Committee on Obscenity and Film Censorship* (the Williams Committee)[64] endorsed the liberal principle that prohibition of pornography could only be justified

[59] R Dworkin, 'Lord Devlin and the enforcement of morals' in R Wasserstrom (ed), *Morality and the Law* (Wadsworth, Belmont, CA: 1971) 72.

[60] MC Nussbaum, *Hiding from Humanity: Disgust, Shame and the Law* (Princeton University Press, Oxfordshire: 2004) 14.

[61] Ibid 102.

[62] Ibid 14.

[63] See MC Nussbaum, *Sex and Social Justice* (OUP, Oxford: 2000) 213–15 who suggests reconsidering the concept of objectification.

[64] The Committee was chaired by Bernard Williams. The Report was commissioned by a Labour Government and was considered 'unacceptably liberal' by the incoming Tories; J Petley, *Film and Video Censorship in Modern Britain* (Edinburgh University Press, Edinburgh: 2011) 131. Its recommendations were only partially implemented in the Indecent Displays (Control) Act 1981, the Local Government (Miscellaneous Provisions) Act 1982 and the Cinematograph (Amendment) Act 1982.

if it could be shown to cause specific harm. If pornography was seen, as the Committee saw it, as a problem of offensiveness, this could be dealt with by the deployment of the distinction between private and public displays. Material that might shock reasonable people because of the manner it portrays sexual activities should only be available through restricted outlets. Many commentators, however, approach the issue of pornography differently now.

Two major arguments have been advanced. The first seeks to lessen the power of the liberal conception of free pornographic expression by shifting attention from those who access pornography to women appearing in it and its impact on women's image more generally. It suggests that, to the extent that pornography reinforces a hostile environment which makes women reluctant to speak, the absence of legal control affords more protection to pornographers' speech, thereby undermining the influence and authority of women's speech and, by extension, their ability to participate in public realms as equal citizens. The second argument proposes that pornographic representations contribute not only to women's subordination but also violence against them. Some American feminists have argued that the law should enable women to seek civil remedies against producers of pornography on the grounds that it is a systematic practice of sexual discrimination that violates women's right to equality.[65] The idea of pornography as harmful sex discrimination against women is enshrined to some extent in the Canadian law as well.[66]

Other scholars have gone as far as suggesting that the consumption of pornography induces in some men a sexual desire for rape,[67] but this argument sees human behaviour as being wholly determined by images that individuals consume. It also fails to account for the 'catharsis model' of the relation of pornography to behaviour, according to which

[65] C MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Harvard University Press, Cambridge, MA: 1988) 140, 148, 156, 175-77, 200-1.

[66] G Robertson, *Freedom, the Individual and the Law* (7th ed, Penguin, London: 1993) 233-4; *R v Butler* [1992] 1 SCR 452.

[67] DEH Russell, *Dangerous Relationships: Pornography, Misogyny and Rape* (Sage, London: 1998) 155.

pornography may help release sexual and/or aggressive tendencies and reduce sexual crimes.[68] Finally, the difficult terrain of pornography has given rise to controversy even among feminists. The argument in favour of its legal control has been criticised for exaggerating the power of pornography and for replicating sex and gender stereotypes which the feminism approach so firmly opposes.[69]

Previous Research into s 63 of the CJIA 2008: A Brief Summary

The production, availability and consumption of pornography have been discussed by a number of authors in recent years. Despite much excellent work on the law concerning indecent images of children,[70] the legal control of extreme pornographic representations in England & Wales has not yet been fully explored.

McGlynn argues that feminist voices were barely heard in public and policy debates about the adoption of the extreme pornography measures.[71] McGlynn and Rackley criticised the 2008 legislative product as a weak version of the original proposals. The authors argue that 'the government's agenda should be focused solely on tackling harm and violence against women, rather than a moral crusade against material that is "aberrant" or simply explicit'.[72] They ground their definition of extreme pornography on the 'cultural harms'[73] that pornography

[68] D Linz and N Malamuth, *Pornography* (Sage, Newbury Park, CA: 1993) 28-49.

[69] D Cornell, *The Imaginary Domain: Abortion, Pornography and Sexual Harassment* (Routledge, London: 1995) 95, 99.

[70] P Jenkins, *Child Pornography on the Internet* (New York University Press, New York/London: 2001); T Taylor and E Quayle, *Child Pornography: An Internet Crime* (Brunner-Routledge, Hove: 2003); Akdeniz (n 12); A Gillespie, *Child Pornography: Law and Policy* (Routledge, Oxon: 2011).

[71] C McGlynn, 'Marginalizing feminism? Debating extreme pornography laws in public and policy discourse' in K Boyle (ed), *Everyday Pornography* (Routledge: 2010) 190-202.

[72] C McGlynn and E Rackley, 'Striking a balance: Arguments for the criminal regulation of extreme pornography' (2007) (Sep) *Crim LR* 677, 688.

[73] C McGlynn and E Rackley, 'Criminalising extreme pornography: A lost opportunity' (2009) 4 *Crim LR* 245, 259.

causes to society. Their concern is for images which 'normalise, even glorify sexual violence through, for example, the deliberate, misogynistic valorisation of rape'.[74]

Carline suggests that the real driving force behind the legal provisions is a 'desire to promote a moralistic agenda'[75] concerning appropriate expressions of sexuality. Leigh evaluates several 'questionable aspects'[76] of the offence and raises concerns over the practicalities of the enforcement of the legislation. Murray's broad liberal analysis includes a demand for evidence of physical harm associated with pornography and puts a high premium on participants' consent and their right to privacy.[77] From a human rights perspective, the new provisions attracted criticism from Foster for failing to impose necessary and proportionate restrictions on free speech and the right to access extreme images in private.[78] Attwood and Smith argue that opposing the offence is not simply a matter of protecting personal sexual freedoms or refusing to acknowledge the existence of harms. They prompt academics to question 'the very parameters on which the impulses to legislate in this way are based'.[79]

McGlynn and Ward support the prohibition and seek to present in their work a 'pragmatic liberal humanist critique'[80] of the regulation of pornography. They contend that opponents of the prohibition are severely affected by a 'liberal fundamentalism'[81] preoccupied with individual rights at the expense of women's equality. Moreover, Easton

[74] Ibid 249.

[75] A Carline, 'Criminal justice, extreme pornography and prostitution: Protecting women or protecting morality?' (2011) 14(3) *Sexualities* 312, 330.

[76] LH Leigh, 'Criminal Justice and Immigration Act 2008: Extreme Pornography' (2008) 172(46) *JPN* 752, 755.

[77] AD Murray, 'The reclassification of extreme pornographic images' (2009) 72(1) *MLR* 73.

[78] S Foster, 'Possession of extreme pornographic images, public protection and human rights' (2010) 15(1) *Coventry Law Journal* 21, 27.

[79] F Attwood and C Smith, 'Extreme concern: Regulating "dangerous pictures" in the United Kingdom' (2010) 37(1) *Journal of Law and Society* 171, 188.

[80] C McGlynn and I Ward, 'Pornography, pragmatism, and proscription' (2009) 36(3) *Journal of Law and Society* 327.

[81] Ibid 335.

defends the offence on 'perfectionist'[82] grounds, insofar as it is used to uphold the value of 'the right not to be subjected to degrading treatment and the promotion of human flourishing'.[83]

Attwood et al.'s collection of case studies in *Controversial Images: Media Representations on the Edge* offers 'alternatives to reactionary notions of "media effects"' and suggests ways through which we might gain a 'more subtle' appreciation of recent media controversies.[84] In particular, Kennedy and Smith's contribution, which relates to YouTube reaction videos,[85] explores the meaning and the shock horror qualities of a two-and-half minute video montage which became the subject of an attempted prosecution. Focusing on audience reaction videos and commentaries on these, the authors analyse the ways in which people react to and consume extreme and/or controversial images, arguing that their responses are more complicated than the ones often assumed by common sense views and the law.

The existing literature predominantly derives from recent official discourses concerning extreme pornography. It focuses on how the law on this particular topic should be and what may be viewed as justifiable prohibitions against such material. However, very little research has been conducted on the way in which s 63 has been used in practice by prosecutors, including Easton's evaluation of the impact of the offence with reference to ten media reports published between June 2009 and July 2011[86] as well as McGlynn and Rackley's examination of Simon Walsh's 2012 trial,[87] in which the defendant was acquitted of five counts

[82] S Easton, 'Criminalising the possession of extreme pornography: Sword or shield' (2011) 75(5) *Journal of Criminal Law* 391, 397.

[83] Ibid 413.

[84] F Attwood, V Campbell, IQ Hunter and S Lockyer (eds), *Controversial Images: Media Representations on the Edge* (Palgrave Macmillan, Hampshire: 2013).

[85] J Kennedy and C Smith, 'His soul shatters at about 0:23: Spankwire, self-scaring and hyperbolic shock' in Attwood et al. (n 84) ch 14.

[86] Easton (n 82) 412; the author asserted in her 2011 article that the 'fears of numerous over-zealous prosecutions [were] misplaced'.

[87] *R v Walsh* (Kingston Crown Court, 8 August 2012, unreported). The authors draw on public tweets and press reports, but simultaneously acknowledge that these sources of information should be treated with great caution. They conclude that the law on extreme pornography is 'misunderstood' and in Walsh's case 'misused'; see E Rackley and C McGlynn, 'Prosecuting the possession of extreme pornography: A misunderstood and mis-used law' (2013) 5 *Crim LR* 400, 400.

of possessing extreme pornographic images (EPIs) portraying anal fisting and 'urethral sounding'.[88] Without an understanding of the practical operation of the extreme pornography offence, we are left with a limited analysis which does not provide a strong basis for well-informed policy decisions. This study aims to remedy this gap in the existing literature by examining the s 63 offence from a prosecutorial and criminological perspective in order to more fully elucidate the law and its implementation in a highly controversial area.

The Aims of This Study

Throughout this book, a number of focuses are used to scrutinise the legal position with respect to extreme pornography in England and Wales. The first focus relates to the relevant developments in the legal field of obscenity and indecent images of children, both in terms of legislation and judicial reasoning. The object of this analysis is two-fold: first, to gain a deeper understanding of the interpretation of the s 63 offence, given that the proposals to outlaw possession of EPIs 'mirror the arrangements already in place in respect of indecent photographs and pseudo-photographs of children';[89] and second, to help map the terrain of the extreme pornography law, since the provisions governing EPI are not limited to ss 63–8 of the CJIA 2008.

The then Government favoured retaining the OPA and creating a free-standing offence of possession. Consequently, individuals publishing or distributing extreme pornographic material within the UK may be charged with an offence contrary to the 1959 Act,[90] and they may also

[88] T Judd, 'Extreme porn acquittal puts prosecutors in the dock' *The Independent* (London 10 August 2012) 16; N Cohen, 'Simon Walsh: The vindictive persecution of an innocent man' *The Observer* (London 12 August 2012) 35: In a sexual context, 'urethral sounding' involves 'the insertion of surgical rods into the penis'. Urethral sounds are 'slightly conical instruments for exploring and dilating a constricted urethra'; KL Moore, AF Dalley and AMR Agur, *Clinically Oriented Anatomy* (7th ed, Lippincott Williams & Wilkins, Philadelphia, PA: 2013) 425.

[89] Home Office, *Consultation* (n 15) [1].

[90] Crown Prosecution Service (CPS) Prosecution Policy and Guidance, Extreme Pornography, http://www.cps.gov.uk/legal/d_to_g/extreme_pornography/, accessed 7 June 2013.

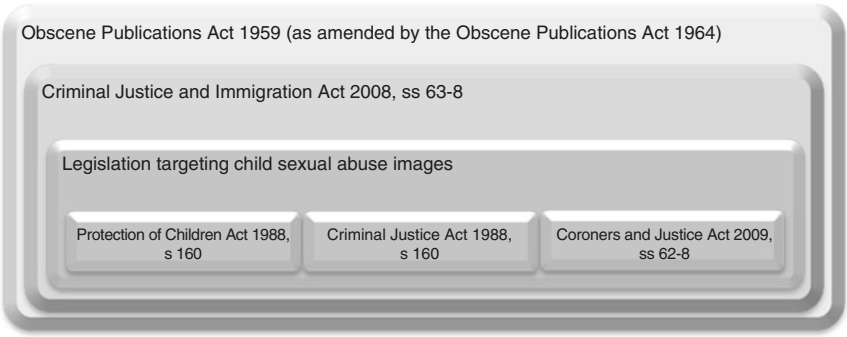

Fig. 1.1 The general obscenity framework and specific legislation

The provisions contained in the Protection of Children Act 1978 and the Criminal Justice Act 1988 tackle *indecent* rather than *obscene* material. The legislation does not define the term 'indecent'. Judicial guidance is provided in *R v Stamford* (1972) 56 Cr App R 398, where the Court of Appeal dismissed an appeal against conviction of five offences of sending an indecent article by post. Ashworth J held that obscenity and indecency were 'different steps on the scale of impropriety', with obscenity being 'the graver of the two'. The 1978 and 1988 Acts apply to photographs or pseudo-photographs, as well as tracings or derivatives of photographs or pseudo-photographs; CJIA 2008, s 69(3). Different kinds of material, like sound, text or drawings are covered by the general provisions under the OPA 1959. The Coroners and Justice Act 2009, which introduced a new offence of possession of 'prohibited' images of children, criminalises the simple *possession* of certain categories of cartoons, drawings and virtual child sexual abuse images, whereas their *publication* or *distribution* is dealt with under the 1959 Act.

be prosecuted under the new offence since they would necessarily also possess it.[91] Therefore, some of the principles distilled from the obscenity law are applicable to the dissemination of EPI (Fig. 1.1). Extreme images portraying children are dealt with under the legislation targeting child sexual abuse images. Where a suspect is found to be in possession of an EPI *of a child*, prosecutors should select charges for an offence of possession contrary to s 160 of the Criminal Justice Act 1988 or making such an image contrary to s 1 of the Protection of Children Act 1978 (Fig. 1.1).[92] For a comprehensive analysis of the law on indecent images of children, interested readers are referred to the excellent work of

[91] Home Office, *Consultation* (n 15) [49].

[92] CPS Prosecution Policy and Guidance, Extreme Pornography (n 90).

Jenkins, Taylor and Quayle, Akdeniz and Gillespie.[93] Relevant legal provisions will be discussed in this book only to the extent that they help explain the extreme pornography provisions.

The second focus is the criminalisation of extreme pornography. This book examines the origins of the offence, its legislative development and the ambitions underpinning Parliament's adoption of the new measures. In addition, it explores the substance and scope of the offence in order to identify potential weaknesses and propose amendments. Key literature on the legal control of EPI is also considered with a view to determining whether it has influenced the law. Moreover, this study aims to measure the impact of the offence by exploring how many offences have been prosecuted since the law came into force and how offenders have been dealt with.

A media criminological perspective is adopted as a third focus with a view to offering an insight into the crucial role of news media in the construction of extreme pornography as a social problem. The media analysis aims to complement its legal counterpart and thereby contextualise the subject matter. To this end, the British national press' reaction to Jane Longhurst's murder is closely examined. More specifically, the study assesses the value of Graham Coutts' case as a media product and documents the key arguments expressed in the relevant claims-making process. It also looks at the process through which the consequent 'trial by media' presented this exceptional case as the 'tip of the iceberg' and eventually translated into policy. The analysis sheds light on the attempts to 'piggyback' the issue of extreme pornography on child pornography and the textual and visual mechanisms used to establish an 'us versus them' dichotomy in the pertinent media discourse. The severity of the actual risk posed by extreme pornography and the extent to which its criminalisation could be regarded as the result of a mere moral panic is also discussed.

The fourth and final focus considers the practical operation of the extreme pornography provisions. Questions regarding the types of

[93] Jenkins (n 70); Taylor and Quayle (n 70), Akdeniz (n 12) and Gillespie (n 70); see also T Buck, *International Child Law* (2nd ed, Routledge, Oxon: 2011).

material at which the enforcement of s 63 is directed, together with concerns over the sharp increase in the number of prosecutions in the second year of its implementation,[94] led to the empirical part of this study. This seeks to address the lack of comprehensive research into the manner in which prosecutors have used the relevant legislative provisions by reviewing a sample of Crown Prosecution Service (CPS) case files involving s 63 offences. The examination of the case files focuses on the practical application of the law as reflected in prosecutors' decision-making process. An additional line of enquiry explores the thresholds of extreme pornography that emerged, where prosecutors in the sample studied were satisfied that there was sufficient evidence to provide a realistic prospect of conviction. The original proposals, outlined in the 2005 consultation document, were strongly questioned, even by those who were generally supportive, due to their vagueness and the potential breadth of the provisions.[95] In particular, concerns were expressed over the categories of images proposed to be covered, including 'realistic' depictions of 'serious sexual violence' and 'serious violence in a sexual context'.[96] These were considered by many participants in the consultation 'too broad and likely to catch too much material'.[97] In response to those concerns, the 'grossly offensive, disgusting or otherwise of an obscene character'[98] test was added to s 63 when the Criminal Justice and Immigration Bill went through its parliamentary stages. The practical effect of this standard, when taken in conjunction with the remaining elements of the offence, would be to ensure that s 63 only covers material which would be caught by the 1959 OPA, were it to be published in the UK.[99]

[94] This claim is substantiated in Chapter 6.

[95] C McGlynn and E Rackley, 'Striking a balance' (n 72) 680.

[96] As it will be discussed later, the Home Office initially proposed restricting the offence to explicit pornography containing actual scenes or realistic depictions of necrophilia, bestiality, 'serious sexual violence' and 'serious violence in a sexual context'; Home Office, *Consultation* (n 15) [39].

[97] Home Office, *Consultation on the Possession of the Extreme Pornographic Material: Summary of Responses and Next Steps* (Home Office Communications Directorate, London: 2006) 4.

[98] CJIA 2008, s 63(6)(b).

[99] Ministry of Justice Circular 2009/01, *Possession of extreme pornographic images and increase in the maximum sentence for offences under the Obscene Publications Act 1959: Implementation of section*

It is the combination of all elements of the offence that distinguishes an extreme image from an obscene image. For instance, according to the CPS guidance, a pornographic image portraying 'torture with instruments' may be deemed obscene, and its publication or distribution may be charged under the OPA.[100] Because of the 'grossly offensive, disgusting or otherwise of an obscene character' requirement, the same image may qualify as extreme, but only if the 'torture' is also depicted 'in an explicit and realistic way' and 'threatens a person's life'.[101] Thus, although there may be an overlap between obscene and extreme images, the definition of the latter is narrower than that of the former. In other words, not all obscene material is necessarily extreme. Observance of this narrower standard when applying the s 63 provisions ensures that the boundaries between extreme and obscene images are delineated.

The Case file analysis aims to determine whether the prosecution practice reflected in the present sample is in line with the prosecution practice followed in relation to obscene publications, and whether the material targeted comes under the more limited category of extreme images. The examination of these issues draws upon a comparison between the types of extreme imagery that form the subject of charges in the present sample, and the categories of pornographic material that are ordinarily prosecuted under the OPA. This is aided by the long experience crystallized in the CPS legal guidance on obscenity,[102] which is far more detailed than the guidance on extreme pornography currently available. The research findings may inform any future policy considerations into the need to revise the existing CPS legal guidance and enhance training in this area.

63–67 and section 71 of the Criminal Justice and Immigration Act 2008 (Criminal Law Policy Unit, London: 2009) [13].

[100] CPS Prosecution Policy and Guidance, Obscene Publications, http://www.cps.gov.uk/legal/l_to_o/obscene_publications/#a05, accessed 7 June 2013.

[101] CJIA 2008, s 63(7)(a); or 'results, or is likely to result, in serious injury to a person's anus, breasts or genitals' according to CJIA 2008, s 63(7)(b).

[102] CPS Prosecution Policy and Guidance, Obscene Publications (n 101).

An Introduction to Our Research Methods

As the phenomenon of law itself comprises individuals, organisational settings, institutional contexts and the interactions among them, 'fully understanding law demands research conducted using multiple approaches'.[103] A part of this study employed doctrinal research to examine the wider legal framework applicable to the legal control of extreme imagery and determine the precise state of the pertinent law nowadays. A media research framework was also employed in order to contextualise the legal debates around the criminalisation of extreme pornography and highlight the increasing role of contemporary news media in shaping public perceptions of crime and justice.[104]

This study drew on a qualitatively oriented content analysis of 251 news articles on Coutts' case published in national British newspapers between April 2003 and April 2016 and 16 case files involving s 63 offences from four CPS areas (London, South East, West Midlands and Wales).[105] In analysing our empirical data, we adopted Altheide's 'ethnographic content analysis' (ECA).[106] Using Altheide's ECA model as our primary research method ensured a robust exploratory procedure. ECA refers to an integrated method of identifying, retrieving and analysing documents for their relevance, meaning and importance.[107] The author's model underlines the role of the investigator as actively participating in their document-based research, which thus becomes a form of ethnography. ECA involves a search for underlying meanings, patterns, processes and context, as opposed to mere numerical relationships between variables.[108] It is based on a 'constant discovery and

[103] LB Nielsen, 'The need for multi-method approaches in empirical legal research' in P Cane and H Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (OUP, Oxford: 2010) 952.

[104] C Greer and E McLaughlin, 'Trial by media: Policing, the 24-7 news mediasphere, and the politics of outrage' (2011) 15(1) *Theoretical Criminology* 23.

[105] The specific criteria according to which the news articles and case files were identified as relevant to the study are discussed in Chapters 4 and 7, respectively.

[106] Sometimes also referred to as qualitative content analysis; DL Altheide, *Qualitative Media Analysis*, Qualitative Research Methods Series 38 (Sage, London: 1996).

[107] DL Altheide, 'Ethnographic content analysis' (1987) 10(1) *Qualitative Sociology* 65; Ibid 2.

[108] Altheide, *Qualitative Media Analysis* (n 107).

constant comparison'[109] of emergent themes, thereby providing the researcher with the advantage of flexibility and continuous interaction with key subjects distilled from the analysis of the documents.

The collection of the news articles was enabled via the *LexisNexis* database. *LexisNexis* is an indispensable tool to media research, especially when this spans over a long period of time, like the current one, but also presents a main disadvantage when used for qualitative research: it only offers access to their text, while omitting any accompanying images. However, nowadays, journalists rely heavily on the use of visuals to construct powerful stories[110] and for that reason it was deemed necessary to also study the printed versions of the collected articles available in the British Newspaper Library as well as those in the newspapers' online archives.

The case files review was facilitated by the CPS Strategy and Policy Directorate, following the successful submission of an external research request application form. Access to the files was provided after the CPS ensured that the appropriate level of security clearance was granted and that the research fulfilled the CPS data protection and ethical requirements. The agreed arrangement was for the files to be analysed at the CPS headquarters in London.[111] The files were securely returned to the Research Manager after completion of the on-site enquiry.

Chapter Outline

The remainder of this book is structured as follows. Chapter 2 focuses on the basic legal framework of obscenity. It examines the contemporary application of the OPAs 1959 and 1964, the extent to which they are

[109] Ibid 16.

[110] C Greer and E McLaughlin, '"Trial by media": Riots, looting, gangs and mediatised police chiefs' in J Peay and T Newburn (eds), *Policing, Politics, Culture and Control: Essays in Honour of Robert Reiner* (Hart Publishing, Oxford: 2012).

[111] Rose Court, 2 Southwark Bridge, London SE1 9H.

effective when applied online, and the prosecution practice concerning obscenity offences. Chapter 3 takes the reader through the legislative history of the offence and provides an insight into the assumptions and interests underlying it. In particular, it provides a legal analysis of the high-profile case of the murder of Jane Longhurst by Graham Coutts which prompted the campaign to ban the possession of violent pornography. It then moves on to discuss the 2005 consultation process and the passage of the 2007 Criminal Justice and Immigration Bill. Chapter 4 explores the role of news media in the construction of the extreme pornography problem and explains how these paved the way for the introduction of s 63 through their coverage of Jane Longhurst's murder. It examines the elements that made the story newsworthy as well as journalists' attempts to operate alongside criminal justice institutions and administer their own extra-legal justice. Chapter 5 provides a detailed examination of the extreme pornography offence. The analysis critically engages with legal scholarship regarding the criminalisation of this type of imagery and considers the way it has affected the development of the law in this area. Chapter 6 analyses original data pertaining to the number of prosecutions initiated and convictions obtained under s 63 since the offence came into force. It also explores sentencing trends. Chapters 7 and 8 present the findings that emerged from the CPS case files review. Chapter 7 briefly presents the overall research design and goes on to provide the wider context in which the key findings from the review should be placed. Chapter 8 explores the thresholds of extreme pornography indicated by the nature of the material in cases where prosecutors were satisfied that there was sufficient evidence to provide a realistic prospect of conviction. This chapter is divided into broader sections which mirror the classification of extreme images under s 63(7) of the 2008 CJIA, that is (a) images portraying an act which threatens a person's life; (b) images portraying an act which results (or is likely to result) in serious injury to a person's anus, breasts or genitals; and (c) images portraying bestiality. No section dealing with the fourth category of images portraying necrophilia is included, as none of the research cases in the sample studied related to images portraying acts that involve sexual interference with a human corpse. This study does not examine EPIs

depicting non-consensual sexual penetration either, as this category of prohibited material was introduced after the completion of the research at issue. Finally, Chapter 9 summarises the key outcomes of this study, considers the limitations associated with the adopted methodological approach and provides an outlook for future research.

2

Obscenity and Prosecution Practice in the Twenty-First Century

Introduction

This chapter examines the ambit of liability under the Obscene Publications Act 1959 (OPA 1959), as amended by the 1964 OPA. The Act were designed to penalise purveyors of obscene material by making it an offence either to publish an obscene article or possess it for gain[1] and stop such articles from reaching the market through seizure and forfeiture proceedings.[2] The examination of the obscenity legal framework is necessary, as all extreme pornography is deemed obscene,[3] and where there is evidence that a suspect has published or distributed EPIs, recourse may be had to the general obscenity rules.[4]

[1] OPA 1959, s 2, as expanded by the OPA 1964, s 1.

[2] Ibid s 3.

[3] Criminal Justice and Immigration Act 2008 (CJIA 2008), s 63(6)(b); this element of the extreme pornography offence is discussed in further detail in Chapters 3 and 5.

[4] The 1959 OPA also provides the tools for controlling sound, drawings and text-based stories involving children. Indecent photographs and pseudo-photographs of children are dealt with by the Protection of Children Act 1978 and s 160 of the Criminal Justice Act 1988.

A.K. Antoniou, D. Akrivos, *The Rise of Extreme Porn*,
DOI 10.1007/978-3-319-48971-1_2

Historical Background

Prior to the 1959 Act, the offence of publishing an obscene libel formed the basis for most obscenity prosecutions. Its origin dates to the medieval ecclesiastical courts which until the early eighteenth century dealt with every case concerning charges of lewdness, profanity and heresy. In 1708, the Queen's Bench in *R v Read*[5] dismissed an indictment against the publisher of the poetical bagatelle *The Fifteen Plagues of a Maidenhead*,[6] stating that obscene matters were issues for the ecclesiastical courts.[7] Approximately 20 years later, Edmund Curl was indicted for publishing *Venus in her Cloister, or the Nun in her Smock* which concerned a lesbian relationship in a convent. The court did not follow *Read*. It found Curl guilty and obscene libel entered the common law.[8]

The misdemeanour of publishing an obscene libel, the essential elements of which were publication and obscenity,[9] does not appear to have been prosecuted with any enthusiasm throughout the eighteenth century.[10] However, trade in erotic literature grew in the nineteenth century. The first major piece of legislation targeting obscene publications in England was the 1857 OPA ('Lord Campbell's Act'). This Act was intended to be a piece of preventative legislation.[11] It empowered authorities to seize obscene material before they were distributed. There was no prosecutor bearing an onus of proving guilt and no one to be punished by imprisonment or fine.[12] If the case was made out, the magistrates' power was limited to the destruction of articles presented before them. So, after Lord Campbell's Act came into force, there were two forms of procedure

[5] *R v Read* (1708) 11 Mod 142; Fortescue 98.

[6] DB Sova, *Banned Books: Literature Suppressed on Sexual Grounds* (Facts on File, New York: 2006) 70.

[7] Ibid 100 (Holt CJ).

[8] *R v Curl* (1727) 2 Stra 788, ER 899.

[9] N St John-Stevas, 'Obscenity and the Law' [1954] *Crim LR* 817, 819.

[10] John Cleland's *Fanny Hill* for example was not prosecuted when it first appeared in England in 1748.

[11] *Cox v Stinton* [1951] 2 KB 1021; St John-Stevas (n 9) 820.

[12] FJ Odgers, 'The law and obscenity: The second of two talks by FJ Odgers' (1954) (Oct) *The Listener* 613, 613.

relating to alleged obscene publications: prosecutions of a person or a company for the common law offence and proceedings under the 1857 OPA. Nevertheless, the issue of the definition of obscenity remained unresolved. Until the second half of the nineteenth century, it appeared that it was determined on an *ad hoc* basis.

The first judicial test for determining whether a particular work could be deemed obscene was formulated in *R v Hicklin*.[13] The publisher of a book containing any 'purple' passage that might have a tendency 'to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall'[14] was liable to imprisonment. The *Hicklin* test, which was consistently applied by the courts in later cases,[15] was based on the impact the most explicit, isolated passages would have on particularly susceptible members of society, and not on the work as a whole. In the absence of a literary merit defence, the protection afforded to publishers or authors of high standing was inadequate. As the Attorney General stated on appeal in a 1928 case, in which a Bow Street magistrate ordered the destruction of Radclyffe Hall's novel *The Well of Loneliness*,[16] 'the whole book as to ninety-nine one-hundredths of it might be beyond criticism, yet one passage might make it a work which would have to be destroyed as obscene'.[17]

The Advent of the OPA 1959

In the following years, it appears that the law targeting obscene publications was effectively turned into a mechanism for the suppression of serious work containing views on sexual matters which judges considered

[13] *R v Hicklin* (1867–8) LR 3 QB 360.

[14] Ibid 452 (Lord Chief Justice Cockburn).

[15] *Steele v Brannan* (1872) LR 7 CP 261; *R v Barraclough* [1906] 1 KB 201, CCR.

[16] 'Miss Radclyffe Hall's Novel: Defence to obscenity charge – Decision reserved – Large amount of evidence ruled inadmissible' *The Manchester Guardian* (Manchester 10 November 1928) 14; 'Novel condemned as obscene' *The Times* (London 17 November 1928) 5.

[17] 'Condemned novel' *The Times* (London 15 December 1928) 4.

objectionable. Censorship of sexual references in literary works was pervasive in the 1920s and 1930s,[18] and even more books were suppressed until the outbreak of the Second World War. The 'more relaxed'[19] attitude of the 1945 Labour government was succeeded by an explosion in the number of destruction orders issued by magistrates during Churchill's 1951 Conservative government. Literature censorship reached its peak in 1954, during what has been called the 'Home Office purity drive'.[20] In that year, the *Hicklin* standard was expressly approved in the *Reiter's Case*.[21] There were 132 prosecutions under the Victorian OPA, as opposed to only 39 in 1935; 111 people were convicted of publishing obscene libels, compared to 39 in 1935. Sentences were also becoming heavier.[22]

A succession of five separate prosecutions in 1954 triggered the reform of the obscenity law. All five cases involved respectable British publishers: Heinemann, Hutchinson, Barker, Secker and Warburg, and Werner and Laurie.[23] 'The English book trade had seen nothing like it for a century or more'.[24] It was the publishers themselves who stood in the dock of the Old Bailey.[25] Notwithstanding the three acquittals,[26] it was

[18] DS Kastan, *The Oxford Encyclopedia of British Literature* (OUP, Oxford: 2006) 424; N St John-Stevas, *Obscenity and The Law* (Secker & Warburg, London: 1956) 96; J Chandos (ed), *'To Deprave and Corrupt . . . ': Original Studies in the Nature and Definition of Obscenity* (Souvenir Press, London: 1982) 35.

[19] A Travis, *Bound and Gagged: A Secret History of Obscenity in Britain* (Profile Books, London: 2001) 94.

[20] CH Rolph, 'Obscenity obscured' *The Guardian* (London 11 February 1964) 8.

[21] [1954] 2 QB 16; Goddard LCJ confirmed that the law back then was the same as it was in 1868.

[22] Travis (n 19) 94.

[23] The leading figures of the publishing world were charged for publishing the books *The Image and the Search* by W Baxter; *September in Quinze* by V Connell; *The Man in Control* by C McGraw; *The Philander* by S Kauffman and *Julia* by M Bland, respectively.

[24] F Selwyn, *Gangland: The Case of Bentley and Craig* (Routledge, London: 1988) 205.

[25] A Travis, 'The war on obscenity' *The Guardian* (London 29 October 2010) Features 15; see also Lieut-Colonel H M Hyde (Belfast, North) in HC Deb 22 November 1954, vol 533, col 1012.

[26] 'Obscene Libel in Book' *The Times* (London 18 September 1954) 3. Secker and Warburg, Heinemann and Barker were acquitted. In the case involving *The Man in Control* no one, 'not even the policeman on duty at the court door could understand what was supposed to be wrong with it', Rolph commented; CH Rolph, 'Obscenity obscured' *The Guardian* (London 11 February 1964) 8.

the two convictions that caused disquiet among the literary world. The five notable trials resulted in considerable public debate, primarily conducted through *The Times*.[27] A prolonged correspondence began in October 1954 under the title 'Freedom of the Pen'.[28] The first letter, signed by seven eminent literary figures,[29] expressed serious concern over the prosecutions for alleged obscene libels: 'It would be disastrous to English Literature if authors had to write under the shadow of the Old Bailey.'[30] The cumulative effect of the 1954 cases left the obscenity law 'in utter confusion'.[31]

'Quite deeply aggrieved'[32] by the earlier prosecutions, the Society of Authors formed an unofficial committee[33] to examine the workings of the obscenity law. The Society's Draft Bill replaced the common law misdemeanour with a new statutory offence of distributing, circulating, selling or offering for sale obscene matters and suggested reforms in an attempt to address the inefficiencies of the common law offence.[34] The committee concluded in its memorandum that 'publishers and printers, being so uncertain of the law, were imposing upon authors a censorship which can be far stricter than any law can enforce'.[35]

The 1959 OPA started as a Private Members Bill and it took a five-year struggle to draft, amend, lobby and persuade.[36] This long process resulted in a two-pronged Act: the protection of literature and the improvements in reputable authors' and publishers' position were combined with

[27] See for example Graham Greene's (English author, playwright and literary critic) comment in G Greene, 'Literature and the law: Prosecutions for obscenity' *The Times* (London 5 June 1954) 7.

[28] From 28 October to 5 November 1954.

[29] B Russell, H Nicolson, C Mackenzie, JB Priestley, HE Bates, S Maugham and P Gibbs.

[30] Quoted in AS Frefe, 'Freedom of the pen' *The Times* (London 3 December 1954) 9.

[31] G Robertson, *Obscenity: An Account of Censorship Laws and their Enforcement in England and Wales* (Weidenfeld & Nicolson, London: 1979) 41.

[32] HL Deb 2 June 1959, vol 216, col 489 (Lord Birkett).

[33] Subsequently led by Sir Gerald Barry; its members included publishers (such as Sir Allen Lane, R Hart-Davis, W. Collins); authors (e.g. HE Bates, J Pudney); an MP (Roy Jenkins), lawyers and printers, as well as critics and journalists (for example, CH Rolph, Sir H Read, VS Prichett and W Allen).

[34] JP Eddy, 'Obscene Publications: Society of Author's Draft Bill' [1955] *Crim LR* 218.

[35] 'Effort to safeguard authors and publishers' *The Manchester Guardian* (30 March 1957) 2.

[36] R Jenkins, 'Obscenity, censorship and the law' (October 1959) 13(4) *Encounter* 62.

provisions empowering the police to deal with purveyors of pure pornography. The new Act reformed the law in the following ways. First, the old phrase from the *Hicklin* standard 'into whose hands a publication may fall' was abandoned. The likely audience of the matter at issue must now be considered.[37] The practical effect of this change is that adult material available in a sex shop will not be obscene merely because its effect would be to tend to corrupt a child, since this type of material will not normally be sold to a child. However, adult material published in a national newspaper which is likely to be read by a larger section of the community, including children, may be deemed obscene.[38]

Second, the new Act clarifies that a work must be considered 'as a whole'[39] and a jury may not be encouraged to decide on the basis of isolated passages. Third, a new defence of publication for the 'public good' is available[40] and applies both to proceedings for publication of an obscene article and proceedings for forfeiture.[41] The 'public good' defence is for the first time accompanied by the defendant's right to tender expert evidence with respect to the merit of the work in question.[42] Fourth, destruction orders may not be made without giving the author or the publisher any opportunity to be heard.[43] Prior to the new OPA, the summons to prove why the articles at issue should not be destroyed was addressed to the occupier of the premises where they were seized.[44] Fifth, a prosecution cannot be commenced more than two years after the commission of an offence.[45] Before the reform, works that had been freely circulated for years could suddenly become the subject of proceedings. Finally, the new OPA retained the powers available under the Customs Act 1876, according to which the Customs could seize and destroy allegedly obscene

[37] OPA 1959, s 1(1).
[38] T Crone, *Law and the Media* (4th ed, Focal Press, Oxford: 2002) 206.
[39] OPA 1959, s 1(1).
[40] Ibid s 4.
[41] Ibid s 4(2).
[42] Ibid.
[43] Ibid s 3(4).
[44] Odgers (n 12) 614.
[45] OPA 1959, s 2(3).

material without having recourse to the courts and without any opportunity for the author, publisher or importer to be heard.[46]

As Davies argues, the final Act was 'a package deal intended to please both the libertarians and aesthetes who wanted to free noteworthy literature from censorship and those who wished to see pornography vigorously suppressed'.[47] It was hoped that the new legislation would protect the publication of serious literary works and prevent 'the unpleasant procession of responsible citizenry into the dock at the Old Bailey'.[48] Before examining modern case law, it is important to explore briefly the context in which the OPA 1959 was interpreted by the courts.

A Time of 'Release and Change'[49]

The decade from 1955 to 1965 was a key period in the post-war sociocultural history of Britain. The country emerged from 'the doldrums era'[50] of the early 1950s and moved towards the 'permissiveness' of the 1960s, a period which reflected 'the erosion of traditional values and the growth of a hedonistic and anti-ascetic philosophy'.[51] The 'death' of moral and respectable Britain was accompanied by the rebirth of Liberal England.[52] The 1960s was a time of 'release and change',[53]

[46] The Customs Act 1876, except for ss 42, 43, 141, 275, 277, 283 and 285, was repealed by the Customs and Excise Act 1952.

[47] C Davies, 'How our rulers argue about censorship' in R Dhavan and C Davies (eds), *Censorship and Obscenity* (Martin Robertson, London: 1978) 11.

[48] 'Obscenity in books' *The Observer* (26 April 1959) 16.

[49] A Marwick, 'The 1960s: Was there a "Cultural Revolution"?' (1988) 2(3) *Contemporary Record* 18–20.

[50] A Aldgate and J Richards, *Best of British: Cinema and Society from 1930 to the Present* (2nd ed, IB Tauris, London: 2002) 237.

[51] C Davies, *Permissive Britain: Social Change in the Sixties and Seventies* (Pitman, London: 1975) 1. For a definition of 'anti-ascetic acts', see D Wright, *The Psychology of Moral Behaviour* (Penguin, London: 1971) 67; the author gives examples, such as 'immoral' sexual behaviour, drug-taking and drunkenness.

[52] C Davies, *The Strange Death of Moral Britain* (Transaction Publishers, New Brunswick, New Jersey: 2004) 207.

[53] Marwick (n 49) 18–20; see also A Marwick, *British Society Since 1945* (Allen Lane, London: 1982).

described as 'a raising of the demands a man may make on life and a lowering of the demands life can make on him'.[54] The key Parliament Acts of the period[55] were not part of a political agenda for social transformation, but the outcome of societal tensions.[56] As regards obscenity laws, on one view, Parliament extended the freedom to write and publish, but on another view, Parliament extirpated important safeguards against a stream of pornographic mayhem.[57]

The landmark case of *R v Penguin Books*[58] in October 1960 was the first in which the OPA was applied to a novel, giving the trial a symbolic aspect. Robertson remarked that the choice of Lawrence's novel *Lady Chatterley's Lover* as a test case 'suited the anti-intellectual temper of the legal establishment'.[59] The prosecution arguments concentrated on the author's failure to condemn supposedly immoral relationships. The thoroughly organised defence[60] emphasised the centrality of the author's 'intention'[61] and succeeded in inverting the prosecution's description of the novel as 'little more than vicious indulgence in sex and sensuality'.[62] The publisher's acquittal was a fine illustration of the aim of the legislation to provide for the protection of literature. The trial of *Lady Chatterley's Lover* was the event which 'more than any other had outwardly heralded the approach of the sexual permissive society'.[63]

[54] CH Whiteley and WM Whiteley, *The Permissive Morality* (Methuen, London: 1964) 21.

[55] Most notably, the Abortion Act and the Sexual Offences Act in 1967, the Theatres Act in 1968, the Representation of the People Act and the Divorce Reform Act in 1969.

[56] Marwick (n 49) 18–20.

[57] See for instance M Whitehouse, *Whatever Happened to Sex* (Hodder and Stoughton, London: 1977) 180–1: '[. . .] it is now a legal fact that [the] Obscene Publications Acts of 1959 and 1964 opened the floodgates to obscenity.'

[58] [1961] *Crim LR* 176.

[59] G Robertson, 'The Trial of Lady Chatterley's Lover' *The Guardian* (London 23 October 2010) 14.

[60] CH Rolph (ed), *The Trial of Lady Chatterley: Regina v Penguin Books Limited* (Penguin, Harmondsworth, Middlesex: 1961) 5.

[61] A Strevens, 'Literature, morality and the adversarial principle: The "fleshly school of poetry" quarrel and the trial of *Lady Chatterley's Lover*' (2001) 43(4) *Critical Quarterly* 31, 40.

[62] Rolph, *The Trial of Lady Chatterley* (n 60) 92.

[63] C Booker, *The Neophiliacs: Revolution in English Life in the Fifties and Sixties* (Pimlico, London: 1969) 195.

The change of attitudes in the 1960s was rapid,[64] and the pace of 'cultural revolution'[65] accelerated. The shift towards 'decensorship'[66] loosened conventional restraints on the arts. 'Television, stage and film chafed against restriction.'[67] Following the abolition of Lord Chamberlain's total powers over theatrical censorship in 1968,[68] the public stage benefited from a flow of creativity.[69] Furthermore, during the more liberal reign of John Trevelyan, then Secretary of the British Board of Film Censors, a new wave of film was cultivated due to his 'increasing leniency'[70] and 'radical permissiveness'.[71] This resulted in the relaxation of the Board's attitude[72] and the 'growing maturity of British films'[73] during the 1960s.

However, these speedy changes gave birth to influential pressure groups dedicated to fighting the manifestations of the permissive society.[74] 'A number of legal auxiliaries to the 1959 Act were recruited for the crackdown: conspiracy to corrupt public morals (a charge conveniently "invented" in 1961); the 1953 Postal Act (underground magazines were dependent on the mails); even the antique vagrancy acts.'[75] The 1970s marked the return of controls to stop the tide of permissiveness. Censorious populists led by Mary Whitehouse[76] accomplished significant

[64] Wright, *The Psychology of Moral Behaviour* (n 51) 180–1.

[65] Marwick (n 49) 18–20; see also A Marwick, *The Sixties* (OUP, Oxford: 1998).

[66] J Sutherland, *Offensive Literature: Decensorship in Britain, 1960–1982* (Junction Books, London: 1982).

[67] Ibid 2.

[68] A Aldgate and JC Robertson, *Censorship in Theatre and Cinema* (Edinburgh University Press, Edinburgh: 2005).

[69] A Aldgate, *Censorship and the Permissive Society* (OUP, New York: 1995).

[70] J Hill, *Sex, Class and Realism: British Cinema 1956–1963* (British Film Institute, London: 1986) 48.

[71] JC Robertson, *The Hidden Cinema: British Film Censorship in Action 1913–1972* (Routledge, London: 1989) 161.

[72] Aldgate (n 69).

[73] B Forbes, *Notes for a Life* (Collin, London: 1974) 343.

[74] M Muggeridge and M Whitehouse, 'Darkness in our light: John Windsor on back and front lashes after the big morality festival' *The Guardian* (London 11 September 1971) 11.

[75] Sutherland (n 66) 3.

[76] Secretary of the National Viewers and Listeners Association (which later evolved to the *MediaWatch-UK*), 1910–2001.

victories, like Handyside's conviction following the publication of *The Little Red Schoolbook.*[77] The book, which was aimed at children and discussed issues like pornography, drugs, teachers and homework, was branded by the prosecution as a manual for sex[78] and 'an invitation to lose virginity'.[79] The court accepted that the educational value of the book was 'completely outweighed'[80] by its 'depraving'[81] content. However, more to the point was the book's 'seditious'[82] character. It was viewed as being subversive to authority, rather than encouraging a constructive scepticism towards it.[83] Opposition to censorship culminated in 1976 with the prosecution of the publisher of *Inside Linda Lovelace.*[84] The not-guilty verdict demonstrated the 'extreme difficulty'[85] of securing a conviction under the OPA and exposed altogether 'a huge gulf between the Judiciary and Treasury Counsel and ordinary people'.[86] Following *Lovelace*, it was tacitly admitted that the printed word could no more be obscene.[87]

In conclusion, 'liberalisation was fought every inch, but its tide in the 1960s was irresistible'.[88] However, as the next section illustrates, it would be incorrect to suggest that obscenity law was at a turning point during the 1960s, especially because the main Acts of this period, and the practice

[77] First published in 1971 in London by 'Stage 1', whose sole proprietor was R Handyside.

[78] '"Little Red Book- close to inciting sex offences, prosecution says' *The Times* (London 30 June 1971) 2.

[79] 'QC claims "Red Book" invited promiscuity' *The Guardian* (London 21 October 1971) 6.

[80] Ibid.

[81] Ibid.

[82] M Eaton, 'Sex by the school book' *The Guardian* (London 10 July 1971) 10.

[83] '"Little Red Schoolbook" appeal fails' *The Guardian* (London 30 October 1971) 7. Handyside took his case to Strasbourg but he eventually lost his six-year battle; *Handyside v The United Kingdom* (1976) 1 EHRR 737.

[84] The book was authored by an American pornography starlet, whose claim to fame was her role in the notorious 1972 film *Deep Throat*, directed by Gerard Damiano.

[85] Lord Longford cited in M Horsnell, 'Reprints planned for Lovelace book' *The Times* (London 30 January 1976) 3.

[86] N de Jongh, 'Love and the Law Lords: Where does the law go after the Linda trial?' *The Guardian* (London 30 January 1976) 13.

[87] The 1979 Williams Report corroborated this understanding three years later; B Williams (ed), *Obscenity and Film Censorship: An Abridgement of the Williams Report* (CUP, Cambridge: 1981) 160.

[88] Sutherland (n 66) 2.

relating to obscenity, embodied two disparate tendencies: a more relaxed control over literature and extended powers over the pornography trade, instead of a uniform direction towards permissiveness.

The OPA 1964

The 1959 Act proved 'less effective'[89] than Parliament had intended in controlling the dissemination of pornography. Experience and subsequent cases revealed deficiencies in its working, in response to which the OPA 1964 was passed. First, it was held in *Mella v Monahan*[90] that packets of obscene photographs displayed in a shop window were not 'offered for sale' within s 2(1) of the 1959 Act, but an invitation to the buyer to pop in and make an offer.[91] Second, sales to police officers of the Obscene Publications Department were held to be insufficient evidence to constitute publication. In *Clayton and Halsey*, it was ruled that police officers were 'not even susceptible of being depraved or corrupted'[92] by the material supplied to them because of their occupation and experience in making test purchases. Third, it was held in *Straker v Director of Public Prosecutions (DPP)* that, although photographic negatives qualified as 'articles' under the OPA, they were not capable of being published within the meaning of s 1(3) of the Act, since they were not shown, played or projected to the public.[93] Thus, magistrates had no jurisdiction to order negatives (from which prints could be made) to be seized where there was no intention to sell the negatives themselves. Consequently, amendments were introduced to strengthen the previous Act.

While the 1959 OPA punishes publication per se, the 1964 OPA inserts an element of possession, thereby penalising any person (including

[89] HC Deb 3 June 1964, vol 695, col 1145 (Mr CM Woodhouse, Joint Under-Secretary of State for the Home Department).
[90] [1961] *Crim LR* 175.
[91] *Fisher v Bell* [1961] 1 QB 394.
[92] [1963] 1 QB 163, 168 (Lord Parker CJ).
[93] [1963] 2 WLR 598, 933 (Lord Parker CJ). The Appeal Committee of the House of Lords dismissed a petition by the DPP against this decision, known also as *DPP v Straker* [1963] 1 WLR 332.

wholesalers) who has in his ownership, possession or control an obscene article 'for publication for gain'.[94] Under the 1964 Act, a person having an obscene article for sale in a sex shop has it *for* publication for gain, notwithstanding the fact that he or she may not yet have technically offered it for sale and actually published it. Thus, the provision deals with prospective rather than actual publication. Moreover, the 1964 Act extends the application of the law to cover items which, although they are not themselves to be read, looked at, or listened to, are still to be treated as 'articles' within the meaning of s 1(2) of the OPA 1959, if they are 'intended to be used [. . .] for the reproduction or manufacture therefrom of articles containing or embodying matter to be read, looked at or listened to'.[95] As a result, a photographic negative would qualify as an 'article', even if it is not itself to be looked at but simply used to produce prints.[96]

Parallels can be drawn between the parliamentary deliberations on the 1963 Obscene Publications Bill and those that took place prior to the passage of the 1959 Act to the extent that the battle between those branded as 'philistines and prudes'[97] and those deemed 'libertines and corrupters'[98] was repeated. The difference of the 1964 parliamentary debates lies in the fact that, while the 1959 Act was born of compromise, the 1964 Act was 'the first time for over 100 years that any Government have taken the initiative in presenting an obscene publications Bill to Parliament'.[99] The anti-obscenity zeal led to more repressive measures at a time when the issue of obscenity was not at the forefront of public concern.[100] A Bill backed by the Government sought to strengthen the law regarding censorship of written or pictorial material in the middle of a period referred to as the permissive age.

[94] OPA 1959, s 2(1) as amended by the OPA 1964, s 1(1).

[95] OPA 1964, s 2(1).

[96] cf *R v Fellows* [1997] 1 Cr App R 244 (the same would apply to images kept on a computer disk in digitised form), discussed below.

[97] HC Deb 3 June 1964, vol 695, col 1210 (Solicitor-General, Mr Peter Rawlinson).

[98] Ibid.

[99] HC Deb 3 June 1964, vol 695, col 1150 (Mr Niall MacDermot).

[100] See for instance HC Deb 3 June 1964, vol 695, col 1192 (Ian Gilmour, Conservative MP for Norfolk Central): 'There are a great many other things which are far more important. One obvious thing is the gang warfare between Mods and Rockers at seaside resorts.'

The OPA 1959, s 1: The Obscenity Test

The test reads:

> An article shall be deemed to be obscene if its effects or (where the article comprises two or more distinct items) the effect of any one of its items is, if taken as a whole, such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it.[101]

Where the case is tried on indictment, the issue of whether an article is obscene is a question of fact for the jury. Although the OPA does not refer to the contemporary accepted beliefs regarding sexual explicitness or the opinion of the 'reasonable man', the jury is instructed to consider the current standards of 'ordinary, decent right-minded people'.[102]

No actual depravity and corruption need be proved. Showing a mere tendency to do so will suffice. There is no need to prove an intention to deprave and corrupt, but merely an intention to publish. As the 1959 test centres on the article itself, once it is shown that this is obscene the defendant's motivation will be immaterial.[103] However, the defendant's objective may be relevant when the 'public good' defence is raised.[104] In *Penguin*, Byrne J stated that with respect to literary merit, regard has to be paid to 'what the author was trying to do, what his message may have been'.[105] Thus, somewhat inconsistently, the literary intention is relevant to the question of literary merit, but not to the question of *mens rea*.

[101] OPA 1959, s 1(1).

[102] *R v Elliott* [1996] 1 Cr App R 432, 436 (Wright J); *R v Calder and Boyars* [1969] 1 QB 151, 172 (Salmon LJ); cf G Robertson and A Nicol, *Media Law* (4th ed, Penguin, London: 2002) 166–7.

[103] *Shaw v DPP* [1962] AC 220 (HL), 227 (Ashworth J); *Calder and Boyars* (n 102) 168 (Salmon LJ).

[104] OPA 1959, s 4; discussed below.

[105] [1961] *Crim LR* 176; Rolph, *The Trial of Lady Chatterley* (n 60) 121–2.

Meaning of 'Article'

'Article' means 'any description of article containing or embodying matter to be read or looked at or both, any sound record, and any film or other record of a picture or pictures'.[106] The aim of this provision is to bring within the scope of the legislation all articles which produce words, pictures or sounds. In *AG's Reference (No 5 of 1980),*[107] a video cassette was found to be an 'article' for the purposes of the Act and a cinema showing video films was held to be 'publishing' it by projecting the images.

The Criminal Justice and Public Order Act 1994 amended s 1(3)(b) of the OPA so that it also applies to 'data stored electronically'[108] which is obscene on resolution into a viewable form. As a result, computer-generated images are covered by the 1959 Act too. Moreover, the Court of Appeal in *Taylor*[109] held that the prints processed from negatives during photographic work resulted in the creation of a new 'article', and the return of this material to its owners constituted 'publication'.[110] *Snowden* extended the ambit of the term to include DVDs.[111] The term 'article' has been widely construed. 'The only "articles" excluded would be those which provide erotic experiences by smell or taste or movement.'[112]

Where an article is regarded as a single item, e.g. a novel, the jury should look at its effect 'as a whole', rather than at the effect of isolated passages

[106] OPA 1959, s 1(2); Section 162(1)(b) of the Broadcasting Act 1990 adds material recorded in television programmes to this list.

[107] *Reference by the Attorney-General under Section 36 of the Criminal Justice Act 1972 (No 5 of 1980)* (1981) 72 Cr App R 71.

[108] Criminal Justice and Public Order Act 1994, s 168(1) and Sch 9 para (3).

[109] *R v Taylor* [1995] 1 Cr App R 131.

[110] An 'article' is also defined to include a 'record of a picture'. 'That is what a print of a photograph is, and the prints in question constitute new articles created by the process of printing'; Ibid 135 (McCowan LJ).

[111] *R v Snowden* [2010] 1 Cr App R (S) 39.

[112] Robertson and Nicol (n 102) 169. It should be noted that the obscene performance of a play, which, as opposed to its written script, is of a transient nature, does not amount to an 'article' within the meaning of the OPA. The performance of an obscene play does not amount to the publication of its script either. The Theatres Act 1968, s 2(2) makes it an offence 'if an obscene performance of a play is given, whether in public or private'.

therein.[113] Where an article consists of distinct items, e.g. a magazine, then each item must be considered individually. If the effect of any one of these items, taken as a whole, is to tend to deprave and corrupt, this is sufficient to taint the whole article. In *Goring*, it was held that if a film consisted of two or more distinct items, the prosecution was entitled to invite the court to consider the effect of one or more of such items. Robertson and Nicol argue that unless a film consists of different segments, shot by separate directors on distinct topics, the 'item by item'[114] test should not apply.[115] Otherwise, 'there is a danger of convictions based on "purple passages"'.[116] In any case, it is for the judge to decide as a matter of law whether an article can be treated as comprising distinct items.[117]

Meaning of 'Obscenity'

The 1959 Act remains silent in relation to the terms 'deprave' and 'corrupt'. In *Penguin*, Byrne J defined these as follows: 'To "deprave" means to make morally bad, to pervert, to debase. To "corrupt" means to render morally unsound or rotten, to destroy the moral purity or chastity, to [...] ruin a good quality, [...] to defile.'[118] The word corrupt is a strong one, suggesting 'conduct which a jury might find to be destructive of the very fabric of society'.[119] In order for a publication to qualify as obscene, it must constitute a threat with a corrosive effect (i.e. a change of character), and its impact must be so strong that it goes beyond a mere immoral suggestion. In practice, however, this is a fine line to draw and complex to apply. It is not necessary to prove that 'overt'[120] sexual activity ensued following exposure to an obscene article.

[113] *Penguin* (n 58).
[114] *R v Anderson* [1972] 1 QB 304, 312 (Lord Widgery CJ).
[115] Robertson and Nicol (n 102) 165.
[116] T Rees, 'Obscenity – whether films obscene "taken as a whole"' [1999] (August) *Crim LR* 670, 671.
[117] *R v Goring* [1999] Crim LR 670 (CA, Crim Div).
[118] *Penguin* (n 58) 177.
[119] *Knuller v DPP* [1973] AC 435, 491 (Lord Simon of Glaisdale); *O'Sullivan* [1995] 1 Cr App R 455, 464.
[120] *DPP v Whyte* [1972] AC 849; (1973) 57 Cr App R 74, 88 (Lord Pearson).

The tendency to deprave and corrupt can simply refer to the impact on the minds of the likely audience in terms of stimulating fantasies.[121] In addition, the concept of obscenity is not synonymous with that of sexual explicitness. Not all sexually explicit materials are of an obscene nature within the meaning of s 1.[122]

Although the 1959 Act was originally intended to deal solely with pornography,[123] depravity and corruption are not confined to matters of sexual desire. The notion of obscenity also encompasses the encouragement to take prohibited drugs. In *Calder Ltd v Powell*,[124] Trocchi's novel *Cain's Book* was found to be obscene on the grounds that potential readers of the book might be tempted by the attractive descriptions of drug consumption to experiment with heroin. Thus, the scope of the term 'obscene' can theoretically embrace promoting conduct which the court may find morally objectionable.

Depravity and corruption do not coincide with the notions of repulsion, disgust or shock. In *Calder and Boyars*, which concerned the graphic descriptions of gang violence and sexual transgression in Hubert Selby's novel *Last Exit to Brooklyn*,[125] it was held that a repugnant description or image may not necessarily deprave its potential audience, if 'instead of tending to encourage anyone to homosexuality, drug taking or senseless brutal violence, it would have precisely the opposite effect',[126] namely deter its audience from the activity at issue.

[121] Ibid: 'thoughts of a most impure and libidinous character'. See also AWB Simpson, 'Obscenity and the Law' (1982) 1(2) *Law and Philosophy* (Selection from the Proceedings of the Royal Institute of Philosophy Conference on the Philosophy of Law September 1979) 239, 245.

[122] *Darbo v DPP* [1992] Crim LR 56, where it was held that a warrant authorizing police to search for sexually explicit articles was invalid, since s 3 of the OPA 1959 allows the issue of a warrant only in relation to 'obscene' materials.

[123] The long title of the Act reads: 'An Act to amend the law relating to the publication of obscene matter; to provide for the protection of literature; and to strengthen the law concerning pornography.'

[124] *Calder Ltd v Powell* [1965] 1 QB 509, 515 (Lord Parker CJ).

[125] The *New York Times Review of Books* stated that Selby was writing about 'the distortion of love, the rottenness of its substitutes and the horror and pathos of its perversion'; 'Hubert Selby Jr' *The Times* (London 28 April 2004) 26.

[126] *Calder and Boyars* (n 102) 169 (Salmon LJ).

This limitation on the meaning of obscenity was approved by the Court of Appeal in *Anderson*[127] as the 'aversion argument'. This case related to the *Schoolkids Issue* of the *Oz* magazine,[128] which became the subject matter of the longest obscenity trial in English legal history.[129] Of particular importance were a notoriously explicit cartoon which portrayed Rupert the Bear (a British symbol of innocence) ravaging Gypsy Granny,[130] and an explicit advertisement of the magazine *Suck* which 'glorified the act of fellatio'.[131] The defendants were originally convicted on one count of publishing an obscene article, two counts of having an obscene article for publication for gain and one of sending obscene articles by post.[132] On appeal, the *Oz* editors' convictions and sentences, which were criticised as 'indefensibly severe',[133] were quashed because of two 'very substantial and serious'[134] misdirections of law regarding the definition of obscenity. First, the trial judge referred the jury to the dictionary definition of obscenity as 'filthy' or 'repulsive'. While his interpretation narrowed down the scope of obscenity and arguably favoured the defendants, it may be that his summing up put too much emphasis on the offensiveness and too little on the tendency to deprave and corrupt.[135]

[127] *Anderson* (n 114).

[128] The name of the magazine was derived from the Australian origins of its editors (Richard Neville, Felix Dennis and Jim Anderson).

[129] The trial lasted 27 working days.

[130] The creation of the American illustrator, founder of the underground commix movement, Robert Crumb.

[131] R Neville, *Hippie Hippie Shake* (Bloomsburg, London: 1995) 292.

[132] Post Office Act 1953, s 11.

[133] 'Oz terms called severe' *The Guardian* (London 13 August 1971) 5. A huge controversy erupted when their sentences were handed down: 15 months' imprisonment for the editor, Neville; 12 months for Anderson and nine months for Dennis. Thirteen Labour MPs put down a Commons Early Day Motion condemning the severity of the sentences as 'an act of revenge by the Establishment against dissenting voices'; 'Labour MPs join hippies in storm over "Oz" sentences' *The Glasgow Herald* (Glasgow 6 August 1971) 1. In addition, about 60 members of the London branch of the Nation Association of Probation Officers passed a resolution stating it was 'alarmed' at the prosecution and harsh sentences; M Berlins, 'Judge to give ruling and reasons on Monday on "Oz" men's plea for bail' *The Times* (London 7 August 1971) 1–2; 'Society versus obscenity' *The Observer* (London 8 August 1971) 6.

[134] *Anderson* (n 114) 316 (Lord Widgery CJ).

[135] DG Williams, 'Oz and Obscenity' (1972) 30(1) *Cambridge Law Journal* 15, 16.

Second, the trial judge was held to have erred in not putting over to the jury the proposition that certain depictions could be so 'filthy' that they would not corrupt and deprave, but would rather tend to cause people to feel revolted by the activities portrayed or described, with the final effect on them being 'moral'.[136] Thus, the value of the 'aversion argument' lies in its emphasis on the overall objective, general tone and impact of the publication. Before *Last Exit* and *Oz*, it was sufficient for the prosecution to pinpoint its graphic approach to sex.

The Likely Audience

The tendency to deprave and corrupt 'is not to be estimated in relation to some assumed standard of purity of some reasonable average man'.[137] What matters is the potential effect of the publication, and this cannot be considered in isolation from its likely audience (or the one which is at least predictable).[138] In addition, an article must have the tendency to deprave and corrupt not a 'minute lunatic fringe',[139] but a 'significant proportion'[140] of those people who are likely to read, see or hear it. What a significant proportion is, is a matter for the jury to decide.[141] A significant proportion does not necessarily mean a substantial proportion. It means a part which was 'not numerically negligible',[142] but which might be 'much less than half'.[143]

The persons likely to be depraved and corrupted do not need to be wholly innocent. In *DPP v Whyte*,[144] the justices found that the persons likely to purchase the articles sold by the respondent booksellers were

[136] *Anderson* (n 114) 315 (Lord Widgery CJ).
[137] *DPP v Whyte* (n 120) 863 (Lord Wilberforce); *R v Clayton and Halsey* [1963] 1 QB 163, 168 (Lord Parker CJ).
[138] *O'Sullivan* (n 119) 466–7 (Bell J).
[139] *Calder and Boyars* (n 102) 159 (Salmon LJ).
[140] Ibid 168 (Salmon LJ).
[141] Ibid 155 (Salmon LJ); *DPP v Whyte* (n 120) 865 (Lord Pearson).
[142] *DPP v Whyte* (n 120) 870 (Lord Cross of Chelsea).
[143] Ibid.
[144] *DPP v Whyte* (n 120).

males of middle age upwards who were regular customers. They ruled that since a significant proportion of these men were to be seen as 'dirty minded men . . . whose morals were already in a state of depravity and corruption',[145] there was serious doubt as to whether such minds could be said to be open to influences which articles like *Sexus Defectus* were capable of exerting. The Divisional Court dismissed the prosecutor's appeal, but on appeal by the DPP, a majority in the House of Lords held that the 1959 OPA 'equally protects the less innocent from further corruption [and] the addict from feeding or increasing his addiction'.[146] Thus, obscenity law is also concerned about those whose morals may have already been corrupted when exposed to the material at issue.[147] This finding suggests that there is a presumption that the obscenity test is of 'universal application'.[148] In this sense, it differs from the *Hicklin* test, in that the latter applied only to those whose minds were 'open to immoral influences'.[149]

The OPA 1959, s 2(1): Publishing an Obscene Article

Offences under s 2(1)[150] are triable either way. In order to ensure that consistent prosecution decisions are made, proceedings shall not be instituted except by, or with the consent of, the DPP in any case where the article at issue is a moving picture film of width 16 mm and the publication in question took place in the course of a film exhibition,[151]

[145] Ibid 862 (Lord Wilberforce).

[146] Ibid 863 (Lord Wilberforce); for the dissenting opinions see Ibid 867 (Lord Simon of Glaisdale) and ibid 876 (Lord Salmon).

[147] J Jaconelli, 'Defences to speech crimes' (2007) 1 *European Human Rights Law Review* 27, 31; see also *DPP v Whyte* (n 120) 871 (Lord Cross of Chelsea).

[148] H Fenwick, *Civil Liberties and Human Rights* (4th ed, Routledge, Oxon: 2007) 471.

[149] *Hicklin* (n 13) 452 (Lord Chief Justice Cockburn); Ibid.

[150] OPA 1959, s 2(1), as amended: 'Subject as hereinafter provided, any person who, whether for gain or not, publishes an obscene article, or who has an obscene article for publication for gain (whether gain to himself or gain to another) shall be liable [. . .].'

[151] Ibid s 2(3A), as amended by the Criminal Law Act 1977, s 53(2).

as defined in the Cinemas Act 1985.[152] According to s 1(3) of the 1959 Act, a person publishes an article when he or she:

> (a) distributes, circulates, sells, lets on hire, gives, or lends it, or who offers it for sale or for letting on hire; or (b) in the case of an article containing or embodying matter to be looked at or a record, shows, plays or projects it [or, where the matter is data stored electronically, transmits that data].[153]

In 1994, the OPA was amended so that the transmission of 'data stored electronically' amounts to 'publication'.[154] The Court of Appeal in *Fellows*[155] held that data stored in a disc had been 'shown [...] to those who [had] gained access to the archive by means which, though not available in 1959, nevertheless [could] be regarded as within the ordinary meaning of those words'.[156] So, where a person provides another with a password to enable him or her to access data stored on an electronic device, then this person 'publishes'[157] to another the matter stored. In *R v GS*,[158] the Crown appealed against a ruling that publication to one person was not an offence unless that person could reasonably be expected to publish onwards to a third person. The publication at issue took the form of chat logs, which recorded 'an explicit conversation concerning incestuous, sadistic paedophile sex acts on young and very young children'.[159] The Court of Appeal held that the judge erroneously concluded that publication to an individual could not give rise to an offence under s 2 (1) and held that transmission of comments to another individual in the case of an Internet relay chat constituted publication within the meaning of s 1(3)(b).[160] Moreover, although s 1(1) of the OPA requires the consideration of the effect of an article on 'persons' in plural, it could

[152] Cinemas Act 1985, Sch 2, para 6(3).
[153] See also *R v Barker* [1962] 1 WLR 349, 351 (Ashworth J).
[154] Criminal Justice and Public Order Act 1994, s 168(1) and Sch 9 para (3).
[155] *R v Fellows* [1997] 1 Cr App R 244, CA.
[156] Ibid 256 (Evans LJ).
[157] By virtue of the OPA 1959, s 1(3)(b).
[158] [2012] EWCA Crim 398.
[159] Ibid [2].
[160] Ibid [21]–[22] (Richards LJ).

not be argued that because there was only one likely reader the comments were incapable of meeting the obscenity test.[161]

By stretching the 1959 Act to allow prosecution for activities taking place in Internet chatrooms, this judgement demonstrates that it is possible for the OPA to keep pace with the ever-accelerating pace of technological advances. However, what was discussed in *GS* was 'fantasy and not a reference to real events',[162] and the activities recorded were represented simply in the form of text. It could be suggested that this ruling extends the scope of the Act to the effect that a person who has only an ephemeral interest in extreme fantasies and privately discusses these online with another individual may be at risk of committing a criminal offence.

The OPA 1959, s 2(5): Innocent Publication or Possession

Innocent disseminators of obscene articles may have a defence, if they prove that they had not examined the article in question and had no reasonable cause to suspect that it was such that their publication of it would make them liable to be convicted of an offence contrary to s 2.[163] Both conditions must be met; 'if the defendant has examined the article, [their] failure to appreciate its tendency to deprave and corrupt is no defence under [this section].'[164] The 'innocent publication' defence will not be available to persons who did not know that they could be prosecuted but should have known. 'The reputation of the magazine will defeat the newsagent's defence in s 2.'[165]

[161] Ibid [26] (Richards LJ); the same approach was followed in *DPP v Whyte* (n 120) 864 (Lord Pearson); see also Interpretation Act 1978, s 6(c).
[162] *R v GS* (n 158) [2].
[163] OPA 1959, s 2(5); OPA 1964, s 1(3)(a).
[164] JC Smith and B Hogan, *Smith and Hogan: Criminal Law* (11th ed, OUP, Oxford: 2005) 955.
[165] P Carey, N Armstrong, D Lamont and J Quartermaine, *Media law* (4th ed, Sweet & Maxwell, London: 2007) 142.

The OPA 1959, s 4: The Defence of 'Public Good'

A person shall not be convicted of an offence against s 2, and an order of forfeiture shall not be made, where it is proved that 'publication of the article in question is justified as being for the public good on the grounds that it is in the interests of science, literature, art or learning, or of other objects of general concern'. The defence and definition of public good depends on the identity of the medium under consideration.[166]

The onus is on the accused to establish the defence on a balance of probabilities.[167] The jury is directed to consider first whether an item is 'obscene'. If they are not so satisfied beyond reasonable doubt, they must acquit. However, if they are so satisfied, they should proceed to consider whether the defendant has made out the 'public good' defence.[168] Salmon LJ stated in *Calder and Boyars Ltd* that the proper direction to the jury when the defence under s 4(1) is raised, is that they must consider on the one hand: (a) the number of readers, viewers, etc., who they believe would tend to be depraved and corrupted by the article[169]; (b) the strength of the tendency to deprave and corrupt[170]; and (c) the nature of depravity or corruption.[171] On the other hand, they must evaluate the strength of the literary, sociological or ethical merit which they consider the article to possess. Bearing in mind the importance attached to these factors, the jury must then decide whether a publication is for the public good. It has been argued that this balancing exercise attempts to weigh up two 'incommensurable'[172] sides against each other: applying this balancing mechanism may be very difficult, since there is no common denominator into which depravity and corruption on the one hand and the artistic or other merit

[166] For books and magazines, see OPA 1959, s 4(1); for films and plays, see OPA 1959, s 4(1A); for television and sound or radio programmes, see Broadcasting Act 1990, Sch 15, s 5(2).
[167] *Calder and Boyars* (n 102) 171.
[168] *DPP v Jordan* [1976] 3 All ER 775, 786 (Viscount Dilhorne) (discussed below).
[169] *Calder and Boyars* (n 102) 172.
[170] Ibid.
[171] Ibid.
[172] Jaconelli (n 147) 32.

on the other can be translated in order to allow jurors to calculate which prevails over the other.

'Learning' has been interpreted by the courts narrowly. The term encompasses research which incorporates the required inherent merit of a product of scholarship, regardless of its value as a teaching tool.[173] By that means, s 4 is not diverted from its purpose, and defendants may not exploit this provision as a loophole to circumvent convictions. The structure of s 4 suggests that the words 'other objects of general concern' should be applied within the same dimension as the preceding words 'science, literature, art or learning'. In *DPP v Jordan*,[174] the owner of a bookshop was charged with possessing obscene articles for publication for gain. He wished to call expert evidence to show that the material in question would relieve 'deviant' persons' sexual tensions and might divert them from anti-social conduct. The defence claimed that such evidence was admissible on the basis that the psychological health of the community was 'an object of general concern'. The Court of Appeal held that expert evidence regarding the alleged beneficial effect of the material on the sexual attitudes of *some* persons was not admissible under s 4; whatever effects the material had, these were felt only by a minority of the public. Kearns argues that the bias against the supposed value of pornography in certain cases removes the possibility of adducing scientific evidence that is normally used in other circumstances.[175]

Section 4(2): The Opinion of Experts on the Merits of an Article

Expert evidence to rebut or establish a defence of 'public good' may be admitted in any proceedings under the 1959 Act. Expert opinion, the real effect of which is to negate any tendency to deprave and corrupt,

[173] *Attorney-General's Reference (No 6 of 1977)* [1978] 1 WLR 1123, 1127 (Lord Widgery CJ).
[174] [1977] AC 699, HL.
[175] P Kearns, 'The ineluctable decline of obscene libel: Exculpation and abolition' [2007] (Sep) *Crim LR* 667, 671.

is inadmissible[176] except for 'very special circumstances',[177] e.g. where the subject matter of an article is outside the experience of the ordinary person, like the effects of various methods of inhaling cocaine.[178] Ultimately, whether such an article has a tendency to deprave and corrupt remains strictly within the province of a jury equipped with this information. In *DPP v A and BC Chewing Gum Ltd,*[179] it was held that the expert opinion of child psychiatrists was admissible to demonstrate the kind of impact bubble gum 'battle swap cards' would have on children of different age groups. However, even in this 'highly exceptional'[180] case, it was for the jury to decide whether the factual effect should be deemed as depraving and corrupting.

Comparisons with Other Articles Which Are Not Materially Different

Evidence pertaining to other publications already in circulation, with a view to showing that they are as obscene as the article in question, is not relevant. 'The character of other books is a collateral issue, the exploration of which would be endless and futile.'[181] However, somewhat inconsistently, evidence relating to other books and their literary merit may be admitted in order to establish the 'climate of literature'[182] where the public good defence is raised. Expert witnesses were permitted in *Penguin* to compare *Lady Chatterley's Lover* with other works by DH Lawrence and various writers of the twentieth century in order to

[176] *Anderson* (n 114) 313 (Lord Widgery CJ); *R v Staniforth* [1975] Crim LR 291; see also Simpson (n 121) 239, 246.
[177] *Calder and Boyars* (n 102) 170 (Salmon LJ).
[178] *R v Skirving* [1985] QB 819, which concerned the book *'Attention Coke Lovers. Free Base. The Greatest Thing since Sex',* aimed at actual and potential abusers of cocaine.
[179] [1968] 1 QB 159.
[180] *Anderson* (n 114) 313 (Lord Widgery CJ).
[181] *R v Reiter and others* [1954] 2 QB 16, 20 (Lord Goddard CJ), where the appellants were charged at the Central Criminal Court upon an indictment containing seven counts of uttering and publishing obscene libels in the form of seven books; see also *Elliott* (n 102) 435 (Wright J).
[182] Rolph, *The Trial of Lady Chatterley* (n 60) 127.

examine the standards for describing sexual matters reflected in contemporary literature.[183]

The OPA provides one more situation when a comparison may be allowed. Under s 2(5), a defendant shall not be convicted of publishing an obscene matter if they prove that they had not examined the article in respect of which they are charged and had no reasonable cause to suspect that it was such that their publication of it would make them liable, because they knew that similar books were freely circulated or publishers of the same articles had been previously acquitted.

The OPA 1959, s 2(4) and Common Law Offences

In an attempt to prevent the prosecution from getting around the defences available under the OPA by charging the common law offence of publishing an obscene libel,[184] s 2(4) of the 1959 Act creates a safeguard. It provides that a person publishing an article 'shall not be proceeded against for an offence at common law consisting of the publication of any matter contained or embodied in the article, where it is of the essence of the offence that the matter is obscene'.[185] However, in *Shaw v DPP*,[186] where a majority in the House of Lords acknowledged the existence of the common law offence of conspiracy to corrupt public morals, their Lordships – Lord Reid dissenting – rejected the defendant's argument that the conspiracy charge was barred by s 2(4) and dismissed his appeal against conviction which arose out of his agreement with others to publish a directory of prostitutes containing details about their 'willingness to indulge in perverse practices'.[187] Viscount Simonds asserted that there

[183] *Penguin* (n 58); see also Rolph, *The Trial of Lady Chatterley* (n 60) 138 for Norman St John-Stevas' testimony.

[184] This common law offence was abolished by the Coroners and Justice Act 2009, s 73 on 12 January 2010.

[185] Subsection (4A), inserted by s 53(3) of the Criminal Law Act 1977, makes a similar provision with respect to a film exhibition, as defined by the Cinemas Act 1985, s 24(1), Sch 2 para 6(2).

[186] [1962] AC 220.

[187] Ibid 262 (Viscount Simonds); the purpose of the 28-page booklet was to assist prostitutes to continue offering their services, since they were no longer permitted to solicit in the streets as a result of the Street Offences Act 1959.

remained in the courts of law 'a residual power [. . .] to superintend those offences which are prejudicial to the public welfare'.[188] A countervailing judicial influence was represented by Lord Reid's rational approach that if this vestigial power existed, it should not be used then, adding that Parliament was the proper place for such matters to be settled.[189]

Conspiracy to corrupt public morals is a problematic area because it is based on the weak suggestion that there is an 'assumed moral consensus'[190] in society. The choice to prosecute under this common law offence in *Shaw*, especially in light of the supposedly 'permissive' context in which the case took place, begs the question why the OPA was not used. On the one hand, it is believed that the intention was to remove the possibility from the accused to avail himself or herself of the praiseworthy s 4 defence, for which the Society of Authors fought so valiantly in the 1950s.[191] But on the other hand, it is argued that s 2(4) never applied in principle to this offence, as it does not consist of publication within the meaning of this provision but the *agreement* to corrupt public morals through publication.[192] Hart expressed his opposition to the tradition of 'judicial moralism',[193] citing the contentious decision in *Shaw* as an example of the House of Lords 'rediscovering' the old common law offence. Against his view that law and morality are conceptually separable,[194] this offence – which was also later applied in *Knuller*[195] in relation to the publication of homosexual solicitations – was taken to connote judges' sympathy with Devlin's approach to

[188] Ibid 267–268.

[189] Ibid 275.

[190] G Robertson, *Whose Conspiracy?* (National Council for Civil Liberties, London: 1974) 18.

[191] P O'Higgins, *Censorship in Britain* (Nelson, London: 1972), cited in R Spicer, *Conspiracy: Law, Class and Society* (Lawrence & Wishart, London: 1981) 85.

[192] D Ormerod (ed), *Blackstone's Criminal Practice 2012* (OUP, Oxford: 2011) 915; *Shaw* (n 186) 236 (Ashworth J).

[193] LA Hart, *Law, Liberty and Morality* (OUP, Oxford: 1963) 7.

[194] LA Hart, 'Positivism and the Separation of Law and Morals' (1958) 71(4) *Harvard Law Review* 593.

[195] *Knuller* (n 119). The major criticism against the outcome in *Knuller* is perhaps that it perpetuates the two different streams of jurisprudence in the area of obscenity law, i.e. the OPA and the old common law; see CT Emery, 'After Oz – IT' (1972) 30 *Cambridge Law Journal* 199, 201.

enforcing a particular set of moral standards. By accepting the role of guardians of morals, the courts sacrificed 'the principle of legality which requires criminal offences to be as precisely defined as possible, so that it can be known with reasonable certainty beforehand what acts are criminal and what are not'.[196]

Another case in which the defendants failed in their argument that prosecution for common law offences was precluded by s 2(4) was *Gibson*.[197] In January 1989, a gallery owner and an artist were convicted of the common law offence of outraging public decency after having displayed in an exhibition a model's head with a pair of earrings each of which consisted of a freeze-dried human foetus. On appeal, it was argued that by virtue of s 2(4), a prosecution at common law was precluded where the essence of the offence was that obscene material had been published. However, obscene could mean something which had a tendency to corrupt (the technical meaning of s 1) or something which disgusted the public (obscene in a loose sense).[198] Lord Lane took the view that obscene carried the former meaning. The essence of the allegation in this case was outraging public decency, and the common law offence had been properly charged. As a result, the facts remained outside the scope of the Act; the obligation to consider the matter as a whole and the liberalising effect of the public good defence were circumvented. Finally, the convictions were upheld.

This was a decision that showed some judicial support for Devlin's standpoint that some acts are inherently immoral, irrespective of whether they cause harm to others.[199] It is, however, debatable whether the offence of outraging public decency is clear and coherent enough to comply with the general principle of the rule of law and the requirement of certainty under the European Convention on Human Rights.[200] As Childs remarks, the nature of criminal rules cannot be compromised

[196] Hart (n 193) 12.

[197] *R v Gibson* (1990) Cr App R 341.

[198] Ibid 344–345 (Lord Lane).

[199] See section 'Disgust and the criminal law' in Chapter 1.

[200] European Convention on Human Rights, Art 7; see further R Clayton and H Tomlinson, *The Law of Human Rights* (2nd ed, OUP, Oxford: 2009) paras. 11.507–11.514.

with nebulous terms and subjective 'outrage' tests.[201] It is perhaps unsurprising that the Law Commission recommended the abolition of the offence as far back as 1976.[202]

Applying the OPA Online

The Internet application of the 1959 Act merits specific attention, because the different challenges involved when targeting the source or distributor of obscene material online resulted in the 2005 Home Office proposals to shift criminal responsibility from the producer or disseminator of images to the consumer.[203]

As noted earlier, s 1(3)(b) of the OPA was amended so that the definition of an 'article' includes 'data stored electronically',[204] and the transmission of such data amounts to 'publication'.[205] However, under s 1(3)(b), an offence can only be committed by the publisher of the offending material, e.g. the website owner. The amended wording of s 1(3)(b) was applied in *Waddon* where obscene images had been posted by the appellant, who was residing in England, on a website whose server was based in America. He contended that the 'articles' in question had not been published in England. However, his argument was rejected by the Court of Appeal, which held that publication occurred when the images were uploaded on to a server in or outside the UK by its contributors, and that there was an additional publication when the

[201] M Childs, 'Outraging public decency: The offence of offensiveness' [1991] (Spr) PL 20, 29; the elements of the offence were clarified to some extent in *Rose v DPP* [2006] EWHC 852 (Admin) (regarding an act of oral sex performed within view of a CCTV camera in a bank foyer) and *R v Hamilton* [2007] EWCA Crim 2062 (regarding a person surreptitiously filming up women's skirts). For a detailed analysis of the common law offence of outraging public decency, readers are referred to Law Commission, *Simplification of Criminal Law: Public Nuisance and Outraging Public Decency* (Law Com No 358, 2015).

[202] Law Commission, *Conspiracy and Criminal Law Reform* (Law Com No 76, 1976) para 3.143.

[203] Home Office, *Consultation: On the Possession of the Extreme Pornographic Material* (Home Office Communications Directorate, London: 2005).

[204] Criminal Justice and Public Order Act 1994, s 168(1) and Sch 9 para 3.

[205] Ibid.

images in question were downloaded by users elsewhere.[206] If that computer was in England, it could give rise to jurisdiction for the English courts.[207]

In *Perrin,*[208] the appellant was convicted of publishing an obscene article, namely a freely accessible preview webpage of a pornography subscription website containing images of coprophilia that had been uploaded on a server abroad. The Court of Appeal rejected the appellant's submission that a prosecution should only be brought against a publisher where it could be shown that the major steps in relation to publication were taken within the jurisdiction of the court.[209] Following *Waddon*, the Court held that despite the fact that the material in question was produced and uploaded overseas, there was publication when the images were accessed (downloaded) by any viewer within the jurisdiction.[210]

Hirst criticised *Waddon* as imposing English criminal law on foreigners who host material overseas.[211] The OPA does not define 'transmitting' of data.[212] If transmission within the meaning of s 1(3)(b) simply amounts to *sending* information, then in the cases discussed, the *sending* occurred from outside the jurisdiction. However, the courts appear to have interpreted 'transmitting' broadly, namely as meaning that publication occurred where the transmission was *received. Waddon* and *Perrin* addressed the problem of lack of jurisdiction of enforcement agencies by subjecting foreign publications to the UK law, but arguably widened its territorial application.

The strategy employed by the OPA was influenced by the types of media available at the time of its enactment. Unlike print media,

[206] *R v Waddon* 2000 WL 491456, [12] (Rose LJ).

[207] Carey et al. (n 165) 149.

[208] *R v Perrin* [2002] EWCA Crim 747.

[209] Ibid [51] (Lord Justice Kennedy).

[210] Ibid [18].

[211] M Hirst, *Jurisdiction and the Ambit of Criminal Law* (OUP, Oxford: 2003) 190; M Hirst, 'Cyber-obscenity and the Ambit of English Criminal Law' (2002) 13(2) *Computers and Law* 25.

[212] The *Oxford English Dictionary* defines the verb 'to transmit' as: to cause (a thing) to pass, go or be conveyed to another person, place or thing; to send across an intervening space; to convey, transfer.

suppressing the source of obscene material on the Internet is challenging. The source may hide behind anonymity, disguise its identity or even operate outside the jurisdiction.[213] Notwithstanding the flexibility of the obscenity test, the opportunities to prosecute *Waddon* and *Perrin* arose due to the defendants being based in the UK.[214] Hence, the Home Office took the view that the OPA has been successfully applied in relation to the material published via the Internet 'where necessary links with publishers *here* have been made to enable a prosecution to be brought'.[215] However, the Home Office estimated that 'very little potentially illegal pornographic material found on the Internet originates from within the UK'.[216] In most cases, the publisher will operate from outside the jurisdiction. 'The challenge now arises from the ease of circulation of this material from abroad and this requires a different approach',[217] they concluded.

The OPA 1959 and Prosecution Practice: The Obscenity Threshold

Previous research on the practical operation of the OPA, published in 1998, revealed that apart from explicit intercourse, buggery and sexual acts with animals, violent pornographic material was also caught by the 1959 Act.[218] In the only jury acquittal in the same study, the nature of

[213] M Birnhack and J Rowbottom, 'Shielding children: The European way' (2004) 79 *Chicago-Kent law Review* 175, 188.

[214] J Rowbottom, 'Obscenity laws and the Internet: Targeting the supply and demand' [2006] (February) *Crim LR* 97, 99.

[215] Home Office, *Consultation* (n 203) [21] (emphasis added).

[216] Ibid [22]. It was asserted that the Internet Watch Foundation received no reports of UK-hosted material in 2003–4. See also Chapter 1, n 19.

[217] Ibid.

[218] S Edwards, 'On the contemporary application of the Obscene Publications Act 1959' (1998) (December) *Crim LR* 843, 848; the material included 'acts of violence including wooden chisel handles being pushed into the vagina and anus and lighted cigarettes being applied to the vagina, electrical shock and torture, and scenes involving a tyre lever being inserted into the anus, objects and animals inserted into the vagina and anus, beating and ball gags to the mouth, full body suspensions, coprophilia, and enemas'.

the material was distinguished in that it only involved 'explicit sex, fisting, urination and mild bondage'.[219] In order to facilitate the examination of the extreme pornography threshold emerging from the Crown Prosecution Service (CPS) case files in our study, it is important to first look at the obscenity threshold. This is because all elements in s 63 of the CJIA 2008, working together, should ensure that the only images covered by the 2008 Act are those which would also fall foul of the OPA.[220]

It is accepted that the judgment that liberalised 'top-shelf' material was that of Hooper J in the 2000 case of *R v VAC Ex p BBFC*.[221] Prior to this, 'nudity was acceptable and even artistic, but to erect a penis was to provoke prosecution'.[222] In the 2000 case, the British Board of Film Classification (BBFC) challenged by way of judicial review a decision made by its Video Appeals Committee (VAC) to allow an appeal brought by two distributing companies against the Board's adjudication which had refused their application to classify, in the absence of further editing, a number of videos as R18 (i.e. suitable for sale only in licensed sex shops).[223] The BBFC believed that the Committee failed to consider evidence suggesting that significant numbers of children who might be exposed to the films were potentially at risk of harm, and that classification ought to be refused as it was impossible to quantify the numbers of children at risk. The High Court, however, dismissed the application for judicial review, holding that the VAC had conducted an appropriate balancing exercise between adult's competing interests and the 'insignificant'[224] risk of the videos being viewed by, and causing harm to,

[219] Ibid.

[220] Ministry of Justice Circular 2009/01, *Possession of Extreme Pornographic Images and Increase in the Maximum Sentence for Offences Under the Obscene Publications Act 1959: Implementation of section 63–67 and section 71 of the CJIA 2008* (Criminal Law Policy Unit, London: 2009) [13].

[221] *R v Video Appeal Committee of British Board of Film Classification Ex p British Board of Film Classification* [2000] EMLR 850.

[222] Robertson and Nicol (n 102) 213.

[223] The editing required the removal of 'all shots of penetration by penis, hand or dildo as well as shots of a penis being masturbated or taken into a woman's mouth'; *VAC of BBFC Ex p BBFC* (n 221) 852 (Hooper J). The films denied classification included the memorable titles *Horny Catbabe* and *Nympho Nurse Nancy*.

[224] Ibid 871 (Hooper J).

children. Following this ruling, a new era of sexually explicit films began in the UK: 'Within a few years, the number of R18 videos being passed for classification leapt from 30 [...] to over 1,000 a year.'[225] In response, a consultation was launched by the Home Office proposing the creation of a new criminal offence of showing an R18 video to a child and failing to take reasonable care to prevent a child from watching an R18 video.[226] However, these measures were never enacted.

According to the CPS, the major factors that influence a decision in favour of prosecution under s 2 of the OPA are[227]: first, the type and 'degree' of obscenity, along with the form of its representation; second, the type and scale of any commercial venture; third, whether publication was made to a child or vulnerable adult; fourth, the likelihood of children accessing material of a degree of sexual explicitness equivalent to that of R18 material, where this is not 'behind a suitable payment barrier or other accepted means of age verification'[228]; fifth, whether the material at issue can be readily seen by the general public; sixth, the defendant's previous convictions or cautions; and finally, the degree of participation of the defendant, where the defence of 'innocent publication' is relied upon.

It is argued that the enforcement of obscenity laws is nowadays primarily aimed at 'hard-core' pornography,[229] as distinct from 'soft-core'. The former differs from the latter in that it goes beyond nudity and refers to representations of graphic sexual activity, depicting 'actual people engaged in actual intercourse (of any variety), where that intercourse is visible and apparent to anyone watching'.[230] However, the meaning of hard-core changes with time and prosecutions for obscenity

[225] M Perkins, 'Prime cuts' (2009) 38(1) *Index on Censorship* 128, 129.

[226] Home Office, *Consultation Paper on the Regulation of R18 Videos* (Home Office, London: 2000).

[227] CPS Prosecution Policy and Guidance, Obscene Publications, http://www.cps.gov.uk/legal/l_to_o/obscene_publications/#a05, accessed 30 July 2016.

[228] Ibid.

[229] Robertson and Nicol (n 102) 213; see also G Robertson, *Freedom, the Individual and the Law* (7th ed, Penguin, London: 1993) 227.

[230] N Purcell, V*iolence and the Pornographic Imaginary: The Politics of Sex, Gender and Aggression in Hardcore Pornography* (Routledge, Oxon: 2012) 202.

would not now be brought with respect to shots of genitals or actual penetration. The CPS will not normally advise proceedings in relation to material depicting: vaginal or anal actual consensual sexual intercourse, fetishes that do not encourage physical abuse, masturbation, mild bondage, oral sex and simulated intercourse or buggery.[231]

Material 'most commonly'[232] prosecuted appears to be limited to the extreme end of the spectrum of so-called hard-core pornography. These comprise activities involving perversion or degradation, e.g. urination, vomiting onto the body, or use of excreta; bondage, especially where gags are used with no apparent means of withdrawing consent; dismemberment or graphic mutilation; fisting; realistic portrayals of rape; sado-masochistic material which goes beyond trifling and transient infliction of injury; sexual acts with animals; and torture with instruments. One interpretation of the CPS list is that sexual explicit imagery which contains powerful scenes of violence is more likely to be targeted. The list does not seem to treat explicit – and possibly extreme – depictions of seemingly consensual sexual practices (e.g. fisting) as distinct from depictions of illegal and apparently non-consensual sexual activities (e.g. rape). It has also been argued that distributors of pornography involving extreme sexual violence or simulated necrophilia are not only commonly prosecuted but also regularly convicted: 'Juries, inclined to support freedom for voyeurs, are less keen to promote freedom for ghouls.'[233]

Prosecutions and Convictions in the Last Decade

Two more cases involving obscenity offences also merit discussion because they provide an insight into the contemporary application of the OPA. The 2009 case of *Walker*[234] was the first case under the 1959 Act concerning written content since 1991, when a Manchester

[231] CPS Prosecution Policy and Guidance, Obscene Publications (n 227).

[232] Ibid.

[233] Robertson and Nicol (n 102) 215.

[234] *R v Walker* (Newcastle Crown Court, 29 June 2009, unreported); 'Civil servant in court over Girls Aloud "porn blog"' *The Times* (London 3 October 2008) 28.

magistrate ordered the seizure of Britton's novel *Lord Horror*, which would have allowed the destruction of the book, had the decision not been overturned on appeal. The defendant in *Walker* was charged under the OPA after posting on his blog a detailed story about his fantasy, entitled *Girls (Scream) Aloud*. This involved the torture, rape and mutilation of the members of the British pop female group *Girls Aloud* by their coach driver, presumably for the purpose of sexual arousal.[235] Although for the defendant this blog entry was merely 'an adult celebrity parody [...] for an audience of like-minded people',[236] the CPS believed that the article in question 'was accessible to [young] people who [...] were interested in a particular pop music group'.[237] The blogger's prosecution finally collapsed when expert evidence was adduced by the defence that it would be relatively difficult to access this content without specifically knowing of its existence. Although an online search for 'Girls Aloud' would yield numerous results, this story could only be tracked down by those who would look for pornographic material of that particular nature by using search terms like 'rape' and 'murder'.

What was notable in *Walker* was that the article at issue was wholly written. The Crown decided to proceed notwithstanding the fact that the written word had been unsuccessfully prosecuted under the OPA for more than 30 years. As Robertson argues:

> The [*Lady Chatterley's Lover*] verdict was a crucial step towards the freedom of the written word, at least for works of literary merit. Works of no literary merit were not safe until the trial of *Oz* in 1971, and works of demerit had to await the acquittal of *Inside Linda Lovelace* in 1977.[238]

[235] A Hirsch, 'How to police popslash' *The Guardian* (London 4 July 2009) 28.

[236] T Owen, QC, for the defence, quoted in K Kelly, '"Murder" Blogger Cleared' *Daily Star* (London 30 June 2009) 27.

[237] D Perry, QC, for the prosecution, quoted in 'Man cleared over Girls Aloud rape fantasy blog' *The Guardian Online* (London 20 June 2009), http://www.theguardian.com/music/2009/jun/29/girls-aloud-rape-blogger-cleared, accessed 10 June 2011.

[238] G Robertson, 'The Trial of Lady Chatterley's Lover' *The Guardian* (London 23 October 2010) 14.

The 1979 Williams Committee report on obscenity and censorship also recommended that similar cases should not be pursued in the future.[239] As a result, from that time onwards, an assumption had grown that the written word fell outside the scope of the 1959 Act, to the effect that the notion of 'obscene printed material' was deemed self-contradictory. Hence, the decision to prosecute in *Walker* was rather surprising.

The 2012 case of *Peacock*[240] is also worthy of attention because the defendant's decision to challenge the CPS' view on what is obscene constituted the first test of the 1959 Act before a jury for many years. Moreover, the majority of individuals charged under the OPA plead guilty[241] and as Edwards' study shows jury trials involving obscenity offences are 'a rare breed'[242]: prosecutors prefer to induce guilty pleas or not to proceed with a case at all. This is largely attributed to the 'unworkability and vagueness'[243] of the obscenity test. The defendant in *Peacock* was a male escort who had been accused of distributing obscene DVDs for gain. The recordings in question featured hard-core homosexual acts, involving fisting, urolagnia[244] as well as bondage, domination and sado-masochism (BDSM)-oriented activities.

The CPS maintained that customers were not aware of the explicit content, and the defendant paid no attention to the identity of his buyers.[245] The defendant stated that his customers, who had particular sexual proclivities and were well informed of the controversial content, sought and paid for titles featuring a specific niche of pornography.[246]

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[239] Williams (n 87) 102, 160.

[240] *R v Peacock* (Southwark Crown Court, 6 January 2012, unreported).

[241] Perkins (n 225) 137.

[242] S Edwards, 'The failure of British obscenity law in the regulation of pornography' (2000) 6(1) *Journal of Sexual Aggression* 111, 124.

[243] Ibid.

[244] Also called 'urophilia' and 'undinism' after *Undine*, a water nymph, from the Latin *unda*, 'wave'; J Money, *Lovemaps: Clinical Concepts of Sexual/erotic Health and Pathology, Paraphilia and Gender Transposition in Childhood, Adolescence and Maturity* (Irvington, New York: 1985) 272.

[245] DA Green, 'Obscenity victory' *New Statesman Online* (London 6 January 2012), http://www.newstatesman.com/blogs/david-allen-green/2012/01/crown-court-prosecution, (accessed 29 August 2013).

[246] P Beaumont and N Hodgson, 'Obscenity law in doubt after jury acquits distributor of gay pornography' *The Observer* (London 8 January 2012) 15.

After having watched large parts of those DVDs, the jury decided that the material at issue was unlikely to deprave and corrupt its viewers.

Given the confidentiality of jury's deliberations,[247] we can surmise that the jurors might have found that the articles at issue were not obscene because severe BDSM practices would only deprave and corrupt members of the public who had not viewed this kind of material before. However, such content would not have any further 'corrupting' effect on those who had already been exposed, or those likely to be exposed, to it again. If this was their consideration, then *Peacock* can be contrasted with *DPP v Whyte*, where the House of Lords ruled that the OPA was not concerned with the corruption of the wholly innocent, but 'equally protect[ed]'[248] those who had previously been exposed to obscene material. What is perhaps paradoxical about *Peacock* is that given how cautious the defendant was about distributing the material, the only people in the UK who saw the DVDs unwillingly were the jurors themselves following the CPS action.

Finally, certain 'torture' scenes included in the DVDs apparently fall within the scope of the material whose possession the new extreme pornography offence seeks to outlaw. Under section 63(7)(b) of the CJIA 2008, fisting may be considered 'an act which results, or is likely to result, in serious injury to a person's anus'. Granted that the offence is intended to catch 'only material that would be caught by the OPA were it to be published in this country',[249] *Peacock* arguably sheds some light on the types of images it is legal to possess.

The OPA 1959, s 2(1): Prosecutions

Latest CPS figures indicate a decline in the number of prosecutions under s 2(1) (Fig. 2.1). In 2007–8, the volume of offences that reached a first hearing in magistrates' courts in England and Wales was 111. Their number rose to 152 in 2008–9, but significantly fell during the next five years.

[247] Contempt of Court Act 1981, s 8.

[248] [1972] AC 849, 863 (Lord Wilberforce).

[249] HL Deb 3 March 2008, vol 699, col 895 (Lord Hunt).

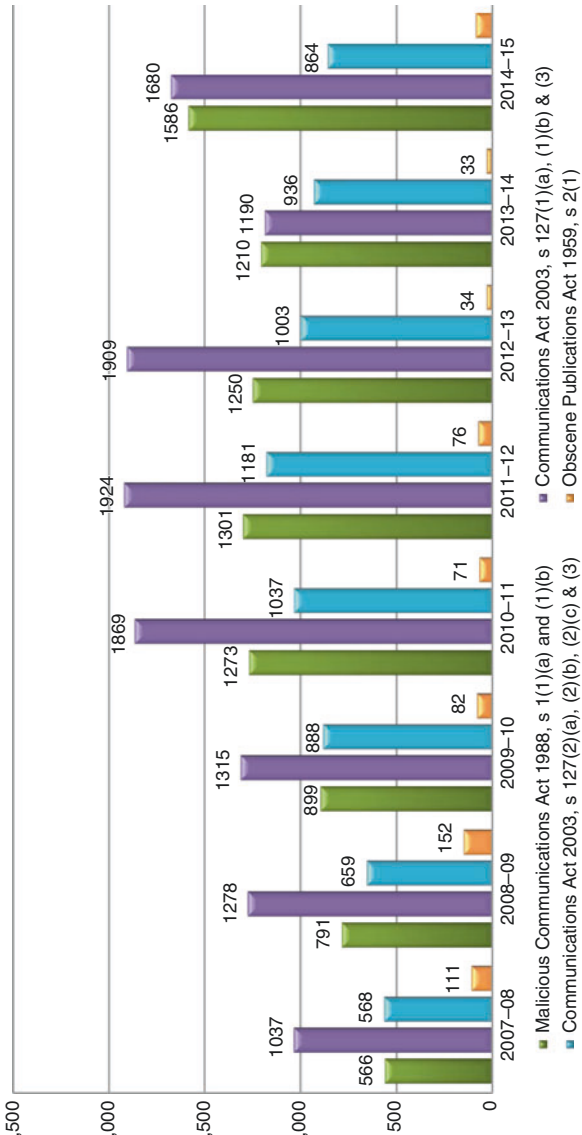

Fig. 2.1 Offences that reached at least one hearing in magistrates' courts in England and Wales under a number of specified Acts

(Crown Prosecution Service, *Violence Against Women and Girls Crime Report 2012–13* (Public Accountability and Inclusion Directorate, London: 2013) 62; Crown Prosecution Service, *Violence Against Women and Girls Crime Report 2014–15* (CPS, London: 2015) 95.

There was, however, a substantial increase in the number of offences charged in 2014–15, reaching 88 – as opposed to 33 in 2013–14. This is the highest annual figure since 2008–9. Along with the decrease in the number of prosecutions under the OPA, there is a corresponding rise in the number of offences prosecuted under s 127 of the Communications Act 2003[250] and s 1 of the Malicious Communications Act 1988,[251] presumably owing to the increasing growth of Internet and modern technology usage.[252]

The OPA 1959, s 2(1): Convictions

As Fig. 2.2 demonstrates, the number of persons found guilty for offences contrary to s 2(1) fell significantly from 2002 (42) to 2004 (25), with an increase anew in 2005 (35). The graph shows a fluctuation in the number of convictions, but their rate indicates an overall downward trend. This was reversed between 2006 (18) and 2008 (23), but there was a marked decrease in the number of convictions obtained between 2009 (19) and 2012 (3). The next two years saw a slight increase in recorded convictions, but nevertheless numbers remained at a relatively low level compared to those in the previous years. The reason for this increase in the number of prosecutions (Fig. 2.1) and convictions in recent years is unclear, but it remains to be seen whether the 2014–15 figures are the beginning of the revival of obscenity law or simply a 'blip' in an otherwise continuing downward trend.

[250] The Communications Act 2003 makes it an offence to send (or cause to be sent) a message or other matter that is 'grossly offensive' or is of an 'indecent, obscene or menacing' character (other than in the course of providing a programme service) through a public electronic communications network.

[251] Section 1 of the Malicious Communications Act 1988, as amended by s 43 of the Criminal Justice and Police Act 2001, criminalises the sending of an 'indecent, grossly offensive' or threatening letter, electronic communication (email) or other article to another person with the purpose of causing distress or anxiety to the recipient.

[252] Office for National Statistics, *Internet Access: Households and Individuals 2015* (6 August 2015), http://webarchive.nationalarchives.gov.uk/20160105160709/http://www.ons.gov.uk/ons/dcp171778_412758.pdf, accessed 19 July 2016.

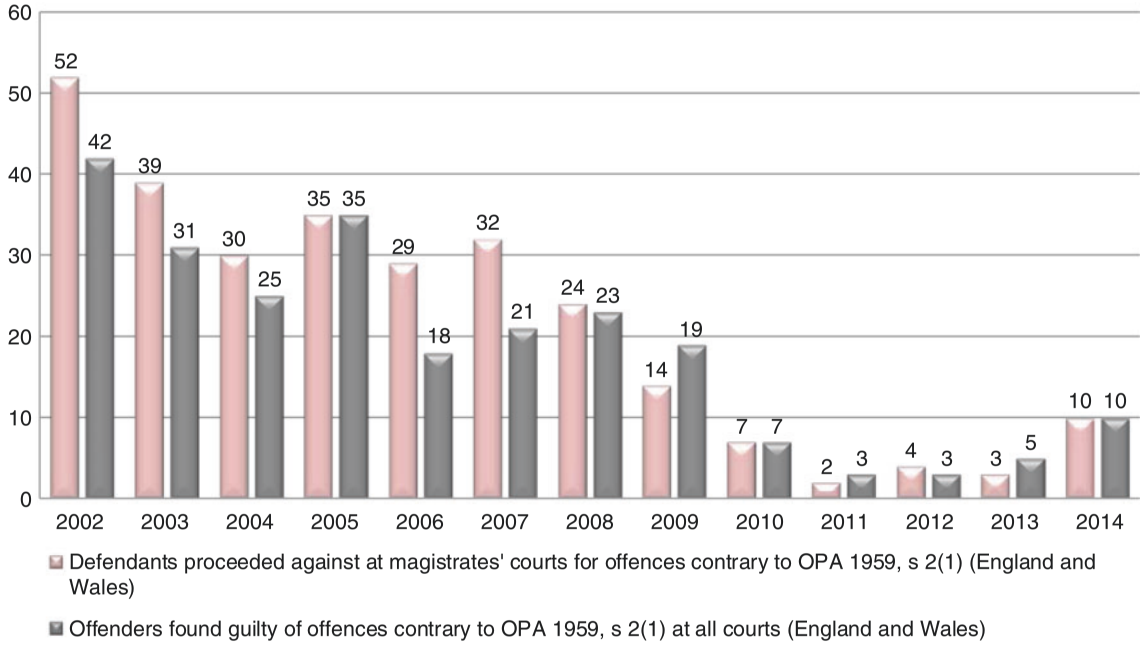

Fig. 2.2 Defendants proceeded against at magistrates' courts for offences contrary to OPA 1959, s 2(1) (England and Wales); offenders found guilty of offences contrary to OPA 1959, s 2(1) at all courts (England and Wales)

Ministry of Justice, Justice Statistics Analytical Services, Ref: 214–13 FOI 81446; Ref: 981–13 FOI 87410 and Ref 390–15 FOI 99319. The FOI requests were made by the author, and the latest figures available were received on 10 April 2013, 6 January 2014 and 28 October 2015. The figures provided relate to persons for whom these offences were the principal offences for which they were dealt with. When a defendant has been found guilty of two or more offences, it is the offence for which the heaviest penalty is imposed. The number of defendants found guilty in a particular year may exceed the number proceeded against as the proceedings in the magistrates' court took place in an earlier year, and the defendants were found guilty at the Crown court in the following year. The figures concerning 2008 exclude data for Cardiff magistrates' court for April, July and August 2008

The OPA 1959, s 3: Powers of Search and Seizure

Proceedings under s 3 replaced the proceedings for a destruction order under Lord Campbell's Act. The 1959 OPA empowers a magistrate to issue a warrant for search and seizure of obscene articles 'kept for publication for gain'.[253] Charges under s 3 are brought against the material in question rather than its publisher or distributor. If any articles are seized, the warrant also empowers officers to seize documents to show the extent of the trade.[254] The words 'kept for publication for gain' in s 3 are not confined to powers of seizure and forfeiture of obscene articles intended for publication in England and Wales. They also include articles destined for publication abroad.[255]

The Criminal Justice Act 1967 provides for restrictions on the issue of search warrants under the OPA and requires that 'information must be laid by, or on behalf of, the DPP or by a constable'.[256] The articles in question must then be brought before a magistrate who may issue a summons to the occupier of the premises from which they were seized to 'show cause why the articles [. . .] should not be forfeited'.[257] It is not necessary for each justice to examine every article, provided that a 'proper and full'[258] deliberation amongst justices enables them to reach a collective view on the material as a whole.

While forfeiture orders may be appropriate in situations where shop owners or distributors stock obscene articles and do not deserve to be convicted of a criminal charge, they may allow the police to destroy material in certain areas where they know that the jury would be

[253] OPA 1959, s 3(1).

[254] OPA 1959, s 3(2).

[255] *Gold Star Publications Ltd v DPP* [1981] 1 WLR 732.

[256] Criminal Justice Act 1967, s 25; the 1967 Act amended the law relating to the proceedings in criminal courts.

[257] OPA 1959, s 3(3).

[258] *Olympia Press Ltd v Hollis* [1973] 1 WLR 1520, 1524, where summonses were issued to the defendants to show cause why numerous copies of 34 different books should not be forfeited under s 3.

reluctant to convict. In this way, the OPA provides a wide discretion to authorities and arguably opens a back door which can be used for the 'wholly objectionable purpose of depriving publishers of their right to jury trial'.[259] It is open to debate whether s 3 proceedings serve any purpose nowadays other than to 'waste the time of the police and the local magistrates' courts'.[260]

Obscenity Offences and Sentencing

Any person who publishes an obscene article, whether for gain or not, or has an obscene article for publication for gain, may be liable on conviction on indictment to a fine or imprisonment for a term not exceeding five years or both.[261] The maximum penalty is six months' imprisonment and/or a fine not exceeding the statutory maximum summarily.[262]

In the 1982 case of *Holloway*,[263] the Court of Appeal dismissed an appeal against a sentence of six months' imprisonment for six offences of possessing obscene articles for publication for gain and made some important observations on the sentencing policy concerning offences arising from the commercial exploitation of pornography. Experience had shown that fines had become merely 'an expense of the trade',[264] driving prices up, and therefore financial penalties were seen as an ineffective deterrent against the dissemination of large quantities of illegal pornographic material.[265] As a result, the Court adopted a rather severe stance towards those individuals engaging in the trade of obscene articles, explaining that:

[259] Robertson (n 229) 230.
[260] Robertson and Nicol (n 102) 175.
[261] OPA 1959, s 2(1)(b) as amended by the CJIA 2008, s 71 with effect from 26 January 2009.
[262] Ibid s 2(1)(a).
[263] *R v Holloway* (1982) 4 Cr App R (S) 128.
[264] Ibid 131.
[265] *R v Commissioner of Police of the Metropolis Ex p Blackburn* (The Times, 7 March 1980).

> the only way of stamping out this filthy trade is by imposing sentences of imprisonment on first offenders and all connected with the commercial exploitation of pornography: otherwise front-men will be put up and the real villains will hide behind them. . . . For first offenders, sentences need only be comparatively short, but persistent offenders should get the full rigour of the law.[266]

Lawton LJ stressed, however, that the matter was 'very different',[267] and a sentence of imprisonment would be inappropriate, when it came to a newsagent who might be caught having an 'odd'[268] pornographic magazine among other legally sold articles. Instead, he or she could be discouraged from repeating his or her carelessness by a 'substantial' fine.[269]

Both appellants in *Doogashurn*[270] and *Knight*[271] were shopkeepers selling obscene articles as part of their general trade. The first pleaded guilty to 14 counts of possessing an obscene article for publication for gain whereas the second to 17 counts. The Court of Appeal held in both cases that the offences called for substantial immediate terms of imprisonment. However, the original sentences of 12 months' imprisonment were 'too long'[272] and subsequently reduced to six months, which is the standard level of sentence for first offences of this kind where the trading in question is from a small local shop.[273] In *Knight*, the fact that 'children could and sometimes did see the material displayed'[274] was deemed an aggravating factor.

In *Ibrahim*,[275] the appellant was employed in a shop selling obscene video tapes, which depicted bondage, flagellation and 'cruelty to women'.[276] He pleaded guilty to 13 counts, on three indictments, of

[266] *Holloway* (n 265) 131
[267] Ibid.
[268] Ibid.
[269] Ibid.
[270] *R v Doogashurn* (1988) 10 Cr App R (S) 195.
[271] *R v Knight* (1990–91) 12 Cr App R (S) 319.
[272] Ibid 321 (Wright J); 'too much' in *Doogashurn* (n 272) 196 (May LJ).
[273] *Knight* (n 273) 321 (Wright J).
[274] Ibid [320] (Wright J); children's comics were also on sale in the body of the shop.
[275] *R v Ibrahim* [1998] 1 Cr App R (S) 157.
[276] Ibid 158–159 (Lord Bingham CJ).

possessing an obscene article for publication for gain and was sentenced to 18 months' imprisonment on each count concurrently. It was accepted that the appellant was an assistant minding the shop and was therefore at a low level of involvement. However, the fact that he had persisted with the offences after two warnings by the police was deemed a 'severely aggravating feature'[277] and sentences totalling 18 months' imprisonment were upheld. Had the appellant been sentenced only in respect of the first occasion on which the police visited the shop, a sentence of six months' imprisonment would have been appropriate.

Lamb[278] and the more recent case of *Snowden*[279] may be considered to be cases towards the top end of the sentencing scale. The appellant in *Lamb* ran a mail order business supplying obscene videos. He was found in possession of video tapes containing images which were sadomasochistic in their orientation. He pleaded guilty to five offences contrary to s 2(1) and was sentenced to a total of five years' imprisonment in the form of consecutive sentences. The sentence exceeded in total the maximum penalty for the offence.[280] The sentencer had probably been 'influenced too greatly'[281] by the appellant's previous convictions for similar offences seven years earlier. The correct sentence should have been 30 months' imprisonment on each count to run concurrently. The appellant in *Snowden* was found to be in possession of 55 DVDs portraying sexual activity with animals, fisting, defecation and urination. His records indicated prior trade in pornographic material, the total value of which exceeded £40,000.[282] The Court of Appeal held that a sentence of 30 months was not manifestly excessive in light of the course of past trading, the number of recordings recovered from the appellant's home and the nature of the material, which in the Court's judgment constituted 'extreme obscenity'.[283]

[277] Ibid 162 (Lord Bingham CJ).

[278] *R v Lamb* [1998] 1 Cr App R (S) 77.

[279] *R v Snowden* [2009] EWCA Crim 1200.

[280] The maximum sentence which the law permitted at that time, i.e. before s 71 of the CJIA 2008 came into effect on 26 January 2009, was three years.

[281] *Lamb* (n 280) 78 (Smedley J).

[282] *Snowden* (n 281) [7]–[9].

[283] Ibid [18] (Maddison J).

Concluding Remarks

This chapter presented a brief historical account of the legal puzzles posed by the enforcement of the OPAs. The short-term success of the Victorian OPA was followed by 'an irregular but steep decline in effectiveness thereafter',[284] ending up as 'a dead letter'.[285] The two-pronged 1959 OPA strengthened the law by providing both for a punitive and a preventative weapon in the armoury against obscene matters. The 1964 OPA intended to remedy certain defects of the 1959 Act, not to amend its basic principle. The judicial sentencing practice in this area of law appears to have distinguished between individual pornographers[286] and large-scale operators.[287] The Court of Appeal confirmed in *Pace* that Lawton LJ's observations in *Holloway* remained the standard test to which sentencers should pay regard in deciding whether an offender had crossed the custody threshold.[288]

The OPA seems to have enjoyed little success. The definition in s 1(1) 'is surely one of the most uncertain and unpredictable of legal tests'.[289] Its 'extreme vagueness'[290] remains its major attribute up to this day. Although cases involving obscenity offences continue to be brought, the 1959 Act seems to be used more sparingly nowadays. The Act has attracted criticism for representing a paternalistic legislative regime.[291] Whilst its restrictions may seem appropriate for children, it is argued that they serve as a 'blunt instrument',[292] in that materials believed to deprave and corrupt their

[284] MJD Roberts, 'Morals, Art and the Law: The passing of the Obscene Publications Act 1857' (1985) 28(4) *Victorian Studies* 609, 626.

[285] 'The Streets of London and Public Morals' *Saturday Review: Politics, Literature, Science and Art*, Vol 25 (London 16 May 1868) 646. The *Saturday Review* was a London weekly newspaper established in 1855. It continued to be published until 1938.

[286] *Doogashurn* (n 272), *Knight* (n 273) and *R v Pace* [1998] 1 Cr App R (S) 121.

[287] *Lamb* (n 280) and *Snowden* (n 281).

[288] *Pace* (n 288) 123 (Judge Beaumont QC).

[289] Williams (n 135) 15.

[290] HC Deb 29 March 1957, vol 567, col 1570 (Roy Jenkins, Labour MP for Birmingham [1950–77] and member of the Society of Authors reform committee).

[291] C McGlynn and E Rackley, 'Criminalising extreme pornography: A lost opportunity' (2009) 4 *Crim LR* 245, 247; Birnhack and Rowbottom (n 213) 186.

[292] Birnhack and Rowbottom (n 213) 187.

likely audience cannot be published at all and thus cannot be accessed by consumers who are less likely to be affected.

Although the practical effects of the breadth of the obscenity law are mitigated by applying it to relatively limited categories of explicit material, the current CPS list of 'most commonly prosecuted'[293] types of activity suggests that the OPA is underpinned by conventional views of 'appropriate' sexuality. *Peacock*, which was used in this chapter as a window into the twenty-first century status of the English obscenity law, arguably demonstrates that a potential implication of the enforcement of the 1959 Act is that sexual subcultures are criticised for having an interest in practices with which the average person is thoroughly unfamiliar.

Attempts to reach an agreement on changes to the OPA have been unsuccessful thus far, the most recent being that by the late Lord Halsbury in 1999, who suggested replacing the general test with a comprehensive list of proscribed material.[294] Despite the strong criticism that has been levelled at the 150-year-old obscenity test,[295] the Home Office proposed in its 2005 consultation exercise on extreme pornography to leave the current law fully in place and advocated the creation of a free-standing offence of possession of a narrow band of highly explicit visual material. A possession offence employing the 'deprave and corrupt' standard under the OPA was not favoured. Considering that the 1959 Act aims to safeguard individuals from accessing material that is likely to undermine their moral welfare, an offence formulated in this fashion would penalise persons the Act seeks to protect.[296] In addition, the scope of the prohibited material would be overbroad, since s 1(1) currently allows the OPA to target articles involving drug taking, senseless brutal violence without necessarily containing sexual overtones, etc.[297] Before analysing the extreme pornography offence, Chapter 3 proceeds to discuss its legislative history and the justifications underpinning the criminalisation of extreme pornography.

[293] CPS Prosecution Policy and Guidance, Obscene Publications (n 227).
[294] HL Deb 18 December 1996, vol 576, cols 1593-610; HL Deb 9 March 1999, vol 598, cols 179–93.
[295] Travis (n 19) 4.
[296] Home Office, *Consultation* (n 203) [48].
[297] Ibid.

3

The Legislative History of the s 63 Offence

Introduction

The extreme pornography provisions were put forward as a response to the ineffectiveness of the current legal framework in controlling the availability of a specific class of pornographic imagery. The material covered is most likely to be hosted on websites abroad, but accessed in the UK via the Internet, thereby circumventing existing legislation, most notably the Obscene Publications Act 1959 (OPA 1959). This chapter takes the reader through the legislative history of the offence and aims to provide an insight into the concerns that led to the proposals to outlaw possession of extreme pornography and informed the final provisions in the Criminal Justice and Immigration Act 2008 (CJIA 2008 or 'the 2008 Act'). In particular, it examines the 2003 criminal case that prompted the campaign to ban the possession of violent pornography. It then moves on to discuss the 2005 consultation process and the passage of the 2007 Criminal Justice and Immigration Bill (CJIB) through both Houses of Parliament.

A.K. Antoniou, D. Akrivos, *The Rise of Extreme Porn*,
DOI 10.1007/978-3-319-48971-1_3

Background: *R v Coutts*

The extreme pornography legislation was triggered by the prosecution of Graham Coutts for the murder of Jane Longhurst in March 2003. Both the prosecution and defence agreed that the cause of the victim's death was compression of her neck by a ligature, causing her to be asphyxiated. However, it was the prosecution case at the original trial that Coutts had deliberately murdered the victim in order to satisfy his 'macabre sexual fantasies',[1] and that his conduct was the manifestation of his 'long-standing sexual fixation for women who are helpless and being strangled'.[2] The defence claimed that Longhurst's death was the result of an accident, which occurred in the course of consensual asphyxial sex 'as part of his long-standing fetish involving women's necks'.[3]

The prosecution placed ample emphasis on the fact that Coutts regularly visited a range of pornographic websites and that records on the computers seized from his home address indicated he had done so at crucial times prior to and after the victim's death.

> A time-line of [Coutts'] Internet usage compiled by one of the experts showed the particular websites he had accessed, and the search terms he had used. These included words such as 'rape', 'murder' and 'necro'. The websites visited by [Coutts] could be classified (according to the contents of the images they contained) as: 'genuine deceased appearance'; 'asphyxiation and strangulation'; 'rape torture and violent sex' and 'general pornographic'. An expert gave evidence that many of the 'asphyxiation and strangulation' images did not appear to be consensual and that the women in these clips and images appeared more like victims.[4]

No evidence or relevant research was presented by the prosecution in support of a causal link between Coutts' use of the Internet and his

[1] *R v Coutts* [2005] EWCA Crim 52, [2] (Cresswell J).
[2] Ibid.
[3] *Coutts* (n 1) [2] (Cresswell J).
[4] Ibid [40] (Cresswell J).

subsequent actions. Nevertheless, the Internet evidence was deemed admissible by the trial judge to rebut the defendant's claim. In his view, the jury:

> [were] entitled to weigh up the likelihood of [the murder] occurring by accident and it happening by coincidence within hours of a man having fuelled his fantasies for such activities by one of his regular visits to sites on his computer dealing with such activities.[5]

Evidence was tendered at trial which would have enabled a jury, if they had accepted it, to convict Coutts of manslaughter. However, the trial judge, with the support of the prosecution and the consent of the defence, did not leave an alternative count of manslaughter to the jury. Coutts decided to bank on an acquittal on the count of murder with subsequent release, rather than accept the likelihood of a finding of manslaughter with a lengthy sentence. He was finally convicted of Longhurst's murder and was sentenced to life imprisonment with a minimum term of 30 years.

On appeal, it was submitted for the appellant that, since there was evidence to support it, an alternative verdict of manslaughter ought to have been left to the jury, regardless of both parties' wishes. Lord Woolf CJ, Cresswell and Simon JJ rejected the argument on the grounds that it would have involved a different case from that put forward by the prosecution,[6] and that the jury's task would be made 'far more difficult'[7] without enhancing the interests of justice. By leave of the House of the Lords, the appellant challenged the Court of Appeal decision. Their Lordships held that the judge's failure to leave a manslaughter verdict to the jury amounted to a 'material irregularity'.[8] Although the murder count against Coutts was a strong one, no appellate court could

[5] Ibid [94] (Cresswell J).
[6] Ibid [83] (Cresswell J).
[7] Ibid [84] (Cresswell J).
[8] *R v Coutts* [2006] UKHL 39, [27] (Lord Bingham of Cornhill).

be sure that a fully directed jury would not have convicted of manslaughter.[9] Finally, the House of Lords overturned the murder conviction.

A new trial took place in June 2007. Coutts was convicted of Longhurst's murder again and sentenced to a life term, after the jurors had deliberated for 13 hours.[10] The unfortunate events of March 2003 marked the beginning of a campaign which culminated in s 63 of the CJIA 2008.

Towards 'A Lasting Memorial to Jane Longhurst'[11]

Following the retrial, the deceased's mother, Liz Longhurst, launched a campaign to have websites carrying violent sexualised material banned. Initially, she called for the Internet to be more closely regulated.[12] However, this would most likely prove inefficient. 'The problem is that if you can get one [Internet Service Provider (ISP)] to take a site down, there is so much competition to host sites around the world that it will probably appear on another before long.'[13] It is likely that some of the hard-core sites Coutts visited contravene the 1959 OPA, but the fact that they are hosted by ISP-based overseas means that the Internet industry, regulators or crime prevention and detection authorities in Britain have

[9] Ibid; the public interest in the administration of justice is best served, Lord Bingham of Cornhill stated, 'if in any trial on indictment the trial judge leaves to the jury, subject to any appropriate caution or warning, but irrespective of the wishes of trial counsel, any obvious alternative offence which there is evidence to support'; Ibid [23]. Failure to leave such a lesser alternative verdict, which could reasonably have been come to on the evidence available, would constitute a 'serious miscarriage of justice' which an appellate court should quash as unsafe; Ibid [47], [61] (Lord Hutton).

[10] H Carter, 'Teacher's killer found guilty of sex murder on retrial' *The Guardian* (London 5 July 2007) 7.

[11] HC Deb 18 May 2004, vol 421, col 173WH (David Lepper, Brighton Pavilion Labour and Co-operative MP).

[12] S Morris, 'Killer was obsessed by porn websites' *The Guardian* (London 5 February 2004) 5.

[13] 'Victim's mother in web porn plea' *BBC News* (London 4 February 2004), http://news.bbc.co.uk/1/hi/uk/3459755.stm, accessed 9 August 2013.

no jurisdiction. An Internet Watch Foundation (IWF) spokesman confirms that 'legislation over Internet content comes under the jurisdiction of the country of source, therefore the Internet Watch Foundation (IWF) and UK law enforcement agencies can only control material hosted in the UK'.[14] Thus, prosecutions under the OPA are possible only if a website is based in this country.

The victim's older sister, Sue Barnett, joined forces with her mother. They established the 'Jane Longhurst Trust',[15] the stated mission of which was 'to continually strive to uphold [the] belief that the Internet should be safe, secure and essential part of our everyday life, for ourselves, our families and most of all our children'.[16] She felt that Coutts' regular visits to violent pornographic websites were the decisive factor in him committing murder.[17] Barnett and Liz Longhurst gained support from the serving Home Secretary, David Blunkett, and from his successor, Charles Clarke.[18] In March 2004, Barnett met with Blunkett as part of her campaign to discuss her concerns. Following their meeting, the then Home Secretary briefed the US Deputy Attorney General, Jim Comey. Mr Blunkett's official spokesman stated:

> We agreed it was a significant problem, not in terms of numbers but in terms of the evil of these sites. We agreed a specific group of officials would meet jointly to work out what the next stage would be. . . . The Deputy Attorney General said it was something they had been increasingly concerned about.[19]

[14] Ibid.

[15] R Cowan, 'I want to stop another murder' *The Guardian* (16 September 2004) G2 10.

[16] See http://www.jltrust.org.uk/, accessed 19 November 2010.

[17] Cowan (n 15).

[18] 'Porn law hopes for Jane's mother' *BBC News* (London 15 August 2005), http://news.bbc.co.uk/1/hi/england/berkshire/4152498.stm, accessed 10 August 2013; 'Crackdown due on violent web porn' *BBC News* (London 15 August 2005), http://news.bbc.co.uk/1/hi/uk/4151862.stm, accessed 10 August 2013.

[19] Press Association, 'US and UK crack down on web porn' *The Guardian Online* (London, 9 March 2004), http://www.guardian.co.uk/technology/2004/mar/09/usnews.internationalnews, accessed 09 August 2013.

Moreover, two Labour MPs, Martin Salter[20] and David Lepper,[21] lent their voices in support of the campaign steps. On 9 February 2004, shortly after Coutts' conviction, the former tabled an Early Day Motion (EDM)[22] in the House of Commons, which stated:

> That this House notes with regret the horrific murder of Jane Longhurst by Graham Coutts who had become an avid user of corrupting internet sites such as 'necrobabes', 'death by asphyxia' and 'hanging bitches'; offers its full support to the family of Jane Longhurst in their call for action to be taken to close down these sites; calls on the Government to conduct a review of the [OPAs] of 1959 and 1964 and all other key legislation; and asks the Home Secretary to ensure better co-operation from the international law enforcement agencies to close down such internet sites, which are likely to incite people to do harm to others.[23]

The EDM tested the strength of feeling in the House over this matter. It attracted considerable support, with 169 MPs signing it within a period of five months. This is remarkable, since only six or seven Motions normally reach 200 signatures in an average parliamentary session.[24] A month later, a petition based on the Motion's wording was launched on international women's day (8 March 2004).

The campaign steps triggered fresh discussions about legal controls on the Internet. On 18 May 2004, David Lepper initiated a Westminster Hall debate which addressed the issue of whether an acceptable way could be found to intervene, when a person intentionally seeks out extreme material that may result in offending. Mr Lepper argued that the Internet 'provides access to the sort of material that

[20] Labour MP for Reading West (where Liz Longhurst is a constituent).

[21] Labour MP for Brighton Pavilion.

[22] EDMs are formal written motions tabled in Parliament requesting a debate 'at an early day'. Any MP may submit an EDM on any subject matter. However, very few are actually debated. They allow MPs to draw attention to an event/cause or express a view and request a debate. Other MPs may add their names in support by signing individual motions.

[23] EDM 583, 'Murder of Jane Longhurst and Internet Sites Promoting Necrophilia', tabled on 9 February 2004 (Session 2003–4).

[24] 'What Are Early Day Motions?' (Parliament UK), http://www.parliament.uk/about/how/business/edms/, accessed 10 August 2013.

fed Graham Coutts' fantasies – and it doubtless led to Jane's death'.[25] He went on to discuss an action plan he presented to the Home Secretary, suggesting (among others) the re-evaluation of the strengths and weaknesses of the OPA and the examination of whether there should be a criminal offence of possession of images that Coutts accessed: 'We must not only act in any way that we can against the suppliers but [also] consider action against the consumers,'[26] he stated. Mr Lepper pointed to the role of credit card companies, which could be involved by 'putting a financial squeeze on the providers of extreme images'.[27] Judy Mallaber[28] also drew attention to the purchasing power afforded by internationally branded credit cards, which may fuel the traffic in extreme images: 'The industry must find a way to prevent people from using credit cards to feed their appalling obsessions and [...] cut off the financing of the appalling industry at the knees.'[29]

Martin Salter underlined the complex issues involved in tackling 'depraved and corrupting Internet sites'.[30] He differentiated these from websites hosting child sexual abuse images and characterised them as 'a different beast; a different animal altogether'.[31]

> How do we bring in a regulatory framework for sites that are hosted abroad, often anonymously, which can move from the United States to South America, and then possibly across to Europe, taking advantage of disparities within the regulatory framework across the globe?[32]

Mr Salter added that there was merit in encouraging personal computer suppliers to build in filters 'from day one',[33] and that further work

[25] HC Deb 18 May 2004, vol 421, col 169WH.
[26] Ibid col 172WH.
[27] Ibid col 171WH.
[28] Labour MP for Amber Valley.
[29] HC Deb 18 May 2004, vol 421, col 183WH.
[30] Ibid col 173WH.
[31] Ibid col 174WH.
[32] Ibid col 175WH.
[33] Ibid col 176WH.

could be done with ISPs to provide blocking software.[34] However, Jane Griffiths[35] pointed out that the EU Directive 2000/31/EC on electronic commerce exempts ISPs from liability, if they inadvertently grant access to material that could violate either the OPA 1959 or the PCA 1978.[36]

Tim Loughton[37] emphasised the impact that 'unimaginably horrible scenes'[38] can have. He underlined their potential link to criminal conduct, though he did not offer any evidence to substantiate his claim:

> To some sad individuals, that is purely entertainment, for whatever form of gratification; to impressionable children, it could prove traumatic and result in long-standing disturbed behaviour. At its worst, especially for people with a propensity to mental illness, it could serve to change their behaviour and promote copycat actions, or as an instruction manual for people committed to performing illegal acts of violence.[39]

Vera Baird[40] maintained that merely viewing sexual violence or enactments of it amounted to 'an aspect of abuse'[41] and increased the demand for such material, thereby encouraging 'future abusers to plumb new depths'.[42] Change was 'urgent',[43] she concluded. However, Jane Griffiths pointed out that Parliament has sometimes reacted emotionally to cases like that of Longhurst's murder but warned that 'emotions make

[34] Ibid.

[35] Labour MP for Reading East.

[36] HC Deb 18 May 2004, vol 421, col 180WH.

[37] Conservative MP for East Worthing and Shoreham.

[38] HC Deb 18 May 2004, vol 421, col 178WH; Mr Loughton went beyond pornographic imagery and specifically referred to a website called 'ogrish.com', on which one may access according to him 'footage of real suicides, an autopsy on a middle-aged woman, a bricklayer murdered by a co-worker after a drunken argument about a soccer match, a cross-dresser who died of asphyxiation after sniffing model aeroplane glue, burnt Iraqi persons, various cancer-related images, and an Iraqi killed by a sword to the back of his neck'; Ibid col 177WH.

[39] Ibid col 178WH.

[40] Labour MP for Redcar.

[41] HC Deb 18 May 2004, vol 421, col 181WH.

[42] Ibid.

[43] Ibid col 182WH.

bad law'.[44] She suggested that Parliament should consider the issue 'in a cold and rational way'.[45]

In response to the concerns raised, the Parliamentary Under-Secretary of State for the Home Department, Paul Goggins, acknowledged that in 1959 publication of obscene material was prioritised over possession, but the development of the Internet has made a major difference.[46] He remained sceptical of the claims concerning the link between viewing extreme images and causing harm to others. He stated: 'It may seem common sense to all of us that repeatedly looking at an image can accustom the viewer to it and make it appear normal, but the evidence is rather more difficult to evaluate.'[47]

The 2004 Westminster Hall debate on 'Internet Extreme Images' was the foremost precursor of an intense debate that followed over the subsequent four years and the first step on a long road. On 23 November 2005, Liz Longhurst presented a petition of 50,000 signatures to the House of Commons, requesting the then Labour Government to legislate in respect of 'extreme Internet sites promoting violence against women in the name of sexual gratification'.[48] The bereaved mother described it as an influential 'support document'[49] for the Home Office future plans, hoping that a new law, 'a wonderful memorial to Jane Longhurst'[50] in Martin Salter's words, would be introduced during the then Parliament. The Labour MP stated:

> This campaign has taken a huge amount of time and effort but it has struck a chord right across the country and this massive petition demonstrates the strength of feeling behind our demand to clean up the Internet.

[44] Ibid col 180WH.
[45] Ibid.
[46] Ibid col 191WH.
[47] Ibid.
[48] Entitled 'The Jane Longhurst Campaign Against Violent Internet Pornography', a copy of which is available at http://www.martinsalter.com/pdf/jane-longhurst-petition.pdf, accessed 10 August 2013.
[49] M Prior, 'My daughter's killer cannot win' *BBC News* (London 23 November 2005), http://news.bbc.co.uk/1/hi/england/berkshire/4462712.stm, accessed 10 August 2013.
[50] Ibid.

> We are now pretty confident that the Government is serious about bringing forward proposals to change the law to treat violent Internet pornography in the same way as child pornography.[51]

As a result of two years' commitment and intensive work for the family, the Home Office and the Scottish Executive produced a joint consultation paper.

Consultation: On the Possession of Extreme Pornographic Material[52]

The consultation document began by drawing attention to the impact of the digitalisation era on the attempts to control the production and distribution of violent pornography. It explained that the proposed measures were aimed at addressing contemporary challenges posed by the global nature of the Internet, which makes it very difficult to prosecute those operating from abroad.[53] All interested parties were invited to contribute to the consultation process and offer their views on proposals to strengthen the criminal law by making it an offence to possess EPIs involving adults. These were described as featuring:

> the torture of (mostly female) victims who are tied to some kind of apparatus or restrained in other ways and stabbed with knives, hooks and other implements. These acts are usually presented in a sexually explicit context so that it is clear that the purpose of the material is sexual gratification, although the violence itself may not be sexual. . . . There is also extensive availability of sites featuring violent rape scenes. Within this category there is a growing trend for scenes purporting to be filmed in real

[51] 'Anti-porn petition handed to MPs' *BBC News* (London 23 November 2005), http://news.bbc.co.uk/1/hi/england/4460828.stm, accessed 10 August 2013.

[52] Home Office, *Consultation: On the Possession of the Extreme Pornographic Material* (Home Office Communications Directorate, London: 2005).

[53] Ibid 1.

> time which heightens their impact. Depictions of necrophilia and bestiality are also widely available.[54]

More specifically, the consultation paper outlined four categories of images, which the then Government intended to make unlawful to possess[55]: (a) intercourse or oral sex with an animal; (b) sexual interference with a human corpse; (c) serious violence in a sexual context; and (d) serious sexual violence. 'Serious violence' was defined as involving or appearing to involve 'serious bodily harm'[56] in a sexual context or setting, such as images of suffocation or hanging with sexual references in the presentation of the scenes.[57] 'Serious bodily harm' was intended to cover 'violence in respect of which a prosecution of grievous bodily harm could be brought in England and Wales or in Scotland'.[58] Additionally, 'serious sexual violence' was qualified as involving or appearing to involve 'serious bodily harm' where the violence was sexual.[59]

In terms of penalties, two options were presented: (a) a penalty of less than three years, which was the maximum penalty provided by s 2(1)(b) of the 1959 OPA at the time or (b) the increase of the penalty for OPA offences to five years and the imposition of a maximum penalty of two years' imprisonment for possession of material falling within the first two categories and three years' imprisonment for possession of images coming under the remaining ones.[60]

Parallels were drawn between EPIs and images of child sexual abuse. The consultation document stated that a similar approach has been adopted with respect to the criminalisation of simple possession of indecent photographs and pseudo-photographs of

[54] Ibid [5].
[55] Ibid [39].
[56] Ibid [41].
[57] Ibid [40].
[58] Ibid [41]. However, as will be discussed in Chapter 5, the final provisions that made it into the Act are *not* intended to expressly link into the case law with respect to 'grievous bodily harm' under the Offences Against the Person Act 1861.
[59] Ibid [40].
[60] Ibid [53].

children,[61] but simultaneously noted that the arguments were 'less clear-cut'[62] in respect of violent and abusive adult pornography. It will suffice to note here the direct harm involved in the process of producing indecent images of children (IIOC): 'The reality of child pornography is that it cannot be produced without a child being sexually abused',[63] Tate affirms. This is an 'essential truth', the author adds, 'which above all else, separates it from adult pornography'.[64] The application of the direct harm rationale was difficult to apply to EPIs, especially because the consultation proposed banning possession of 'actual scenes or *realistic*'[65] depictions of the specified types of material: while it is possible that extreme pornographic content may record 'serious sexual violence' or an actual rape, it is also equally possible that this kind of content may portray 'acts in the theatrical sense of shows performed'[66] by consenting professionals without necessarily involving the commission of a criminal act in the same way that IIOC do.[67]

A different premise was, therefore, needed to support the legal proposals to proscribe possession of extreme pornography. According to Murray, this was found in the 'indirect harm approach',[68] which has been applied to the criminalisation of indecent *pseudo-photographs* of children. Their production involves the use of computer graphics programs, which facilitate the manipulation of images. 'The resultant image would look like a child but has never involved the use of a real child.'[69]

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[61] Ibid [26].

[62] Ibid [26].

[63] T Tate, 'The child pornography industry: International trade in child sexual abuse' in C Itzin (ed), *Pornography, Women, Violence and Civil Liberties* (OUP, Oxford: 1992) 204.

[64] Ibid.

[65] Home Office, *Consultation* (n 52) [38] (emphasis added).

[66] L Williams, 'Power, Pleasure and Perversion: Sadomasochistic Film Pornography' (1989) 27 *Representations* 37, 46.

[67] M Eneman, 'The New Face of Child Pornography' in M Klang and A Murray (eds), *Human Rights in the Digital Age* (Cavendish, London: 2005) 28.

[68] AD Murray, 'The reclassification of extreme pornographic images' (2009) 72(1) *Modern Law Review* 73, 77.

[69] A Gillespie, 'Defining child pornography: Challenges for the law' (2010) 22(2) *Child and Family Law Quarterly* 200, 212.

Nevertheless, there is substantial evidence to suggest that virtual 'child pornography' can incite sexual exploitation of real children[70] or be used as a means of facilitating the seduction of new victims.[71] Thus, failure to break the cycle of production and consumption of pseudo-photographs intensifies the potential risk of other children being sexually exploited through future involvement.[72]

Murray asserts that the consultation document placed significant emphasis on the indirect harm approach by stating: 'We consider that it is possible that such material may encourage or reinforce interest in violent and aberrant sexual activity to the detriment of society as a whole.'[73] It was also explained that the threat of proceedings might deter potential users and protect participants:

> The main risk addressed is that possession of extreme pornographic material is part of a cycle of supply and demand, encouraging the production of such material which may lead to the harm of the individuals involved in making it, whether or not they consent to participate.[74]

However, the difficulty in applying the indirect harm approach to extreme pornography is that, in contrast to pseudo-photographs of child abuse, the

[70] DW Bower, 'Holding virtual child pornography creators liable by judicial redress: An alternative approach to overcoming the obstacles presented in Ashcroft v Free Speech Coalition' (2004) 19(1) *BYU Journal of Public Law* 235, 241; E Quayle and M Taylor, 'Child pornography and the Internet: Perpetuating a cycle of abuse' (2002) 23(4) *Deviant Behaviour* 331, 332; MC Seto, JM Cantor and R Blanchard, 'Child pornography offenses are a valid diagnostic indicator of pedophilia' (2006) 115(3) *Journal of Abnormal Psychology* 610.

[71] RP Tyler and LE Stone, 'Child pornography: Perpetuating the sexual victimization of children' (1985) 9(3) *Child Abuse and Neglect: The International Journal* 313; E Quayle and M Taylor, *Child Pornography: An Internet Crime* (Brunner-Routledge, Hove: 2003) 73; Y Akdeniz, *Internet Child Pornography and the Law: National and International Responses* (Ashgate Publishing Ltd, Aldershot: 2008) 22–3; E Martellozzo, *Online Child Sexual Abuse: Grooming, Policing and Child Protection in a Multi-Media World* (Routledge, Oxon: 2012) 104; S Smallbone, WL Marshall and R Wortley, *Preventing Child Sexual Abuse: Evidence, Policy and Practice* (Willan Publishing, Devon: 2000) 164; SL Goldstein, *The Sexual Exploitation of Children: A Practical Guide to Assessment, Investigation, and Intervention* (2nd ed, CRC Press, New York: 1999).

[72] cf N Levy, 'Virtual child pornography: The eroticization of inequity' (2002) 4(4) *Ethics and Information Technology* 319, 321.

[73] Home Office, *Consultation* (n 52) [27].

[74] Ibid 22 (Annex C: Partial Regulatory Impact Assessment).

link between pornographic representations and measurable consequences in the real world is equivocal. Millwood Hargrave and Livingstone observe that research on media harm 'can only offer evidence towards a judgement based on the balance of probabilities rather than on irrefutable proof'.[75] It was also acknowledged in the consultation document that consensus on this empirical matter has not yet emerged:

> [W]e are unable, at present, to draw any definite conclusions based on research as to the likely long term impact of this kind of material on individuals generally, or on those who may already be predisposed to violent or aberrant sexual behaviour.[76]

Nevertheless, the Home Office stated: '[The material under consideration] [. . .] depicts suffering, pain, torture and degradation of a kind which we believe most people would find abhorrent.'[77] It was stressed that their intention was to 'send a clear message that it has no place in our society.'[78]

Responses to the Consultation[79]

The consultation process elicited 397 responses, which included both favourable and adverse reactions. The Home Office summarised the outcome of the consultation exercise as follows:

> Opinions were sharply divided: the vast majority of the responses to the proposals to strengthen the law to create a new offence of possession of a

[75] A Millwood Hargrave and S Livingstone, *Harm and Offence in Media Content: A Review of the Evidence* (2nd ed, Intellect Books, Bristol: 2009) 245.

[76] Home Office, *Consultation* (n 52) [31].

[77] Ibid 11.

[78] Ibid [i], 1 (Executive Summary), [27].

[79] All responses to the 2005 consultation cited in this chapter are numbered and referenced according to the five 'Pornographic Consultation Books' that can be found at Durham Law School, 'Home Office Extreme Pornography Consultation Responses 2005', http://www.dur.ac.uk/law/research/politicsofporn/responses/, accessed 10 August 2013.

> limited category of extreme pornography were either strongly supportive or strongly opposed. A majority of organisations responding were in favour: a majority of individuals responding opposed the proposals.[80]

However, this general statement undermined the actual divide. Overall, 223 individual respondents were against the proposals, while only 90 were in favour. From those respondents classed as 'organisations',[81] 18 opposed the creation of the offence, while 53 supported it (Table 3.1).

Opponents of the legal provisions were largely individuals. Many of them cited the arguments raised by Backlash, which identifies itself as 'an umbrella organisation providing academic, legal and campaigning resources defending freedom of sexual expression'.[82] Opposition was also expressed by a number of sexual freedom organisations, such as the Sexual Freedom Coalition, SM Pride, as well as anti-censorship organisations, like Cyber-rights & Cyber-liberties. Supporters were drawn from organisations that Petley described as 'police forces, moral entrepreneurs and groups representing women, children and religious interests'.[83] Notwithstanding the fact that 'a clear and substantial numerical majority opposed the proposals',[84] the responses to the consultation were misrepresented, allowing the then Home Office Minister

Table 3.1 Breakdown of respondents to the 2005 consultation exercise

	In favour	Against	Not stated	Totals
Individuals	90	223	0	313
Organisations	53	18	13	84
Totals	143	241	13	397

[80] Home Office, *Consultation on the Possession of the Extreme Pornographic Material: Summary of Responses and Next Steps* (Home Office Communications Directorate, London: 2006) 3.

[81] The term 'organisations' indicated responses received from police forces, campaigning groups, charities, religious groups, professional bodies, government and regulators.

[82] Backlash, 'About us', http://www.backlash-uk.org.uk/wp/?page_id=94, accessed 10 August 2013.

[83] J Petley, 'To the censors, we're all Aboriginals now' *Spiked Online* (2 July 2007), http://www.spiked-online.com/newsite/article/3556#.Ugi_C9JM-t0, accessed 12 August 2013.

[84] Ibid.

Vernon Coaker to declare that 'the vast majority of people find these forms of violent and extreme pornography deeply abhorrent'.[85]

It is important to consider the main arguments advanced in the consultation process in order to understand how the responses informed the then Government's subsequent steps. The discussion that follows summarises the key themes that emerged.

The Growth of the Internet and the Need to Strengthen the Law

Some respondents considered the problem to be much broader than the extreme images of sexual violence at which the proposals were aimed. Supporters took the view that even mainstream pornographic material had a deleterious impact both on society and participants. Hence, they took the view that tighter restrictions should be imposed against the increased availability of all types of pornography found online, in top-shelf magazines, films and television broadcasts.[86] Others expressed the belief that society had become desensitised into thinking of pornography as a normal, innocuous form of entertainment and maintained that an amendment of the law was required.[87] The Police Federation, the British Association of Women in Policing and all 18 police forces that responded were also in favour of strengthening the law in this area.

[85] R Ford, 'Mother wins fight for new law against violent porn on the net' *The Times* (London 31 August 2006) 6.

[86] Response No 375 (Lilith Project; an organisation that identifies itself as 'a pan-London, second tier, violence against women agency'); response No 357 (Object; an organisation that describes itself as 'a UK-based organisation that challenges the objectification of women in the media, advertising and sex industries'); response No 219 (Justice for Women; an organisation the stated mission of which is to 'contribute to the global effort to eradicate male violence against women, which includes sexual and domestic violence'); response No 330 (The Christian Institute; a nondenominational Christian charity established for 'the furtherance and promotion of the Christian religion in the United Kingdom'; response No 295 (The Lawyers' Christian Fellowship, which – according to them – exists 'to bring the whole Good News of Jesus Christ within the legal world').

[87] Response No 255 (MediaWatch-UK; a pressure group that campaigns for socially responsible broadcasting and against offensive and harmful content in the media).

Evidence Base Limitations

Supporters of the proposed plans agreed with the Home Office that certain material is objectionable, notwithstanding the absence of conclusive research results as to the existence of a causal relationship between viewing extreme images and the commission of offences:

> Irrespective of the lack of evidence demonstrating a proven causal link between extreme pornography and sexual violence, and the ostensible consent of the participants; it is our belief that the degradation of women in these extreme materials is underpinned by the gendered nature of power relations and such sexualised representations worsen the continued subordination of women.[88]

The Director of the Child and Woman Abuse Studies Unit (CWASU) at London Metropolitan University stressed that her interest has 'never' been in 'proving' direct causal links between pornography and sexually violent acts, but in suggesting that the availability of pornographic imagery creates a cultural content which 'devalues women's humanity'.[89] Other respondents offered experiential evidence from their own area of expertise.[90] For instance, an organisation which is 'concerned with the failure of the law to deal effectively with men's violence against women'[91] commented:

> It does not matter that research cannot prove conclusively that pornography has negative effects. We have worked with women who have been used in the making of pornographic material and seen the harm, physically and psychologically that it has done to them.[92]

[88] Response No 303 (Rights of Women; they identify themselves as 'a women's voluntary organisation committed to informing, educating and empowering women concerning their legal rights'); see also response No 175 (West Midlands Police).

[89] Response No 307 (Professor L Kelly for the CWASU of the London Metropolitan University).

[90] Response No 176 (Barnardo's); response No 37 (His Honour Judge Heath, Lincoln Crown Court).

[91] Response No 219 (Justice for Women).

[92] Ibid.

Another organisation providing services to women, men and children experiencing domestic violence and social exclusion stated:

> This imagery provides the cultural backdrop against which the abuse of women is mainstream and endemic. Legislation to strengthen the possibility of prosecution in this area would send out a strong signal of disapproval to the individuals who believe that easy accessibility equals an acceptance of their behaviour.[93]

The official organisation representing psychologists in Britain, the British Psychological Society (BPS), cited developing pieces of research on the negative effects of exposure to violent pornography on children and predisposed adults. However, none of them permitted the conclusion that exposure to such content causes harm to non-predisposed adults.[94]

Those who opposed the proposals cited the lack of evidence as a reason against legislating in this area. Some of the BPS's members replied separately dissenting from the view taken. The Society was also criticised for supporting rather than decrying the unscientific basis of the proposed law: Burr et al. denounced the Society's response as being 'partial and selective'[95] in nature, recommending 'extremely authoritarian'[96] measures based 'not so much on evidence, but on assertion and argument'.[97] A non-profit civil liberties organisation stated that the proposed measures were founded 'solely on moral and political grounds rather than on public safety'.[98] Bondage, domination and

[93] Response No 303 (Wearside Women in Need); see also C Phillipson, 'The reality of pornography' in C McGlynn, E Rackley and N Westmarland (eds), *Positions on the Politics of Porn: A Debate on Government Plans to Criminalise the Possession of Extreme Pornography* (Durham University, Durham: 2007) 20.

[94] M Popovic, 'Establishing new breeds of (sex) offenders: Science or political control?' (2007) 22 (2) *Sexual and Relationship Therapy* 255, 261.

[95] V Burr, T Butt, N King, K Milnes, R Goldstein and JL Smith, 'Extreme pornography consultation' (2006) 19(5) *The Psychologist* 268, 268–9.

[96] Ibid.

[97] Ibid.

[98] Response No 124 (Cyber-rights & Cyber-liberties; a non-profit organisation which has been involved in the Internet policy-making processes of the UK Government, the EU, the Council of Europe and the United Nations).

sadomasochistic (BDSM)-affiliated respondents particularly stressed that 'criminalising the possession of material relating to a person's own sexuality amounts to criminalising that sexuality itself by the back door'.[99] Backlash commented that the measures would actually increase, rather than restrict, the availability of the extreme images and argued that they would discourage those who seek to educate and promote 'safe play' practices.[100]

Moreover, individual respondents underlined the potential cathartic effect of such imagery by citing the examples of countries like Denmark, where the decriminalization and the ensuing increased consumption of pornography in the 1960s were associated with a broader downward in sex offences registered by the police.[101] However, the Denmark model was challenged by other respondents who asserted that 11 categories of sexual crime were repealed at that time, thereby affecting sex crime statistics.[102]

Serious Incursion into Individuals' Freedoms

The Home Office acknowledged that the proposals would impact the freedom of individuals to view what they wished in the privacy of their own homes, but argued that the offence would be compatible with Articles 8 and 10 of the European Convention on Human Rights (ECHR).[103] Nevertheless, opponents commented that the then Government was acting in a manner inappropriate for a democratic Western country by outlawing a form of expression simply on the

[99] Cited in Home Office, *Next Steps* (n 80) 10.

[100] Backlash, '"Extreme" pornography proposals: Ill-conceived and wrong' in McGlynn et al., *Positions on the Politics of Porn* (n 93) 10, 12.

[101] B Kutchinsky, 'The effect of easy availability of pornography on the incidence of sex crimes: The Danish experience' (1971) 29(2) *Journal of Social Issues* 163–181; Kutchinsky suggested that the availability of pornography was 'the direct cause' of this decrease. See also R Ben-Veniste, 'Pornography and sex crime: The Danish experience', *Technical Reports of the Commission on Obscenity and Pornography, Vol. 7* (US Government Printing Office, Washington, DC: 1971).

[102] Response No 255 (n 87) (Mediawatch-UK).

[103] Home Office, *Consultation* (n 52) [57]. The official Government position on this matter is discussed in greater detail below.

grounds that the majority would find it abhorrent.[104] The statement in the consultation paper that the new offence was required to 'protect society, particularly children from exposure to such material'[105] was criticised on the basis that controlling access to children did not constitute a sound justification for restricting access to adults. It was further suggested that it was important to ensure that the proposals should 'not provide a precedent leading to an irresistible (and escalating) series of demands for curbs on how people express themselves and on what they are entitled to see'.[106]

Spanner Trust, a UK organisation established to campaign for the right of adults to participate in consensual BDSM activities, obtained a legal opinion from Rabinder Singh QC on the compatibility of the proposals (as originally drafted) with Articles 8 and 10 of the ECHR. According to Singh, 'it is seriously arguable that the proposed measures go too far to strike a fair balance between the demands of the general interest of the community and the requirements of the protection of an individual's fundamental rights'.[107] Professor Gavin Phillipson took, however, a different view: 'To assert that the ECHR gives one a "right" to make or view staged enactments of an appalling crime, simply for the purposes of sexual arousal, is [...] a strikingly unattractive stance.'[108] He defended the 'noble aims' of right to free speech, i.e. 'the protection of human dignity, the facilitation of human flourishing and the enhancement of democracy',[109] but concluded that the

[104] Response No 217 (Campaign against Censorship; an organisation that identifies itself as 'the successor to the Defence of Literature and the Arts Society that was founded in 1968 to assist writers, artists, and others threatened by censorship, and to campaign for reform of censorship laws'); see also response No 301 (Sexual Freedom Coalition; a pressure group which 'promotes and defends the right to freedom of sexual expressions between consenting adults'), expressing concern over the potential 'invasion of privacy, singling out and harassment of otherwise law-abiding individuals and groups leading an alternative lifestyle'.

[105] Home Office, *Consultation* (n 52) [34].

[106] Response No 395 (British Telecommunications Plc).

[107] Response No 39, [28].

[108] G Phillipson, 'Pornography, difference and the limits of freedom of expression', obtained through personal communication (email); his argument is cited partially in McGlynn et al., *Positions on the Politics of Porn* (n 93) 35.

[109] Ibid 8.

depiction of rape or sexual assault in an arousing way was not a use of free speech 'that respects and recognises the duties and responsibilities that the [ECHR] tells us come with that right'.[110]

The List of Images Set Out in the Consultation Paper

The categories of 'sexual violence' and 'serious violence in a sexual context' raised concerns even from supporters of the proposed law. This was because their wording appeared to be quite broad. In addition, they seemed to overlap and depend on subjective interpretations. As Backlash pointed out, 'the consequence of such vague definitions is that people will not know if they are breaking the law (or not) until they have been through the trauma of a trial'.[111]

Other respondents were concerned that the wide scope of the definitions would cover material broadcast via mainstream media outlets.[112] The British Board of Film Classification (BBFC) argued that the provisions would impact its existing regulatory regime: 'Realistic depictions of serious violence are a very common feature of modern, mainstream films and videos, and many such depictions will have a sexual context.'[113] According to the Board, the proposals could have unintended consequences on classified works such as 'erotic thrillers'[114]; hence, it was suggested that they should be expressly excluded from the ambit of the law.[115]

Problems with the imprecise scope of the listed material were also raised by the sector responsible for the technical infrastructure of the Internet. Some organisations were reluctant to express an opinion on the public policy question of what kind of material should be criminalised,

[110] Ibid 7.

[111] Backlash, '"Extreme" pornography proposals: Ill-conceived and wrong' in McGlynn et al., *Positions on the Politics of Porn* (n 93) 12.

[112] Response No 235 (Channel 4); response No 249 (BBC).

[113] Response No 194.

[114] Ibid.

[115] Ibid.

but underlined the need for unambiguous provisions, enabling an objective, prompt and simple assessment as to whether certain material would come under the proscribed classes.[116]

Moreover, concerns were voiced about the term 'serious bodily harm' being defined in relation to grievous bodily harm (GBH). It was thought that the term deserved 'much greater clarity',[117] because the interpretation of the definition of GBH tended to result in 'divided opinions'[118] that were deemed 'very unhelpful'[119] in the context of the suggested measures. It was also argued that, since GBH was 'often not distinguished from wounding',[120] the proposed offence would cover a wide variety of images depicting 'commonplace'[121] forms of pornography, such as spanking, beating, particularly if any skin was broken.

The proposal to include 'realistic' depictions of the specified types of material was identified as problematic. Although the BBFC took into account that there was no intention to cover text or cartoons, it maintained that:

> The gap between animated and live action images in terms of realism narrows year by year through advance in CGI [computer-generated imagery] technology and a 'realistic depictions' test may be difficult to frame in a manner which effectively separates the two in practice.[122]

Cyber-rights & Cyber-liberties contended that it was unacceptable for a person to be imprisoned for up to two years for having a sexually explicit

[116] Response No 359 (Telewest Communications; broadband communications and media group); response No 260 (London Internet Exchange; an organisation which describes himself as 'the largest and most successful Internet exchange point in Europe'); response No 395 (British Telecommunications Plc); response 288 (Internet Service Providers Association; the trade association for companies involved in the provision of Internet services in the UK).

[117] Response No 210 (Internet Watch Foundation).

[118] Ibid.

[119] Ibid.

[120] Response No 374 (The National Council for Civil Liberties, aka 'Liberty'. They noted that both wounding with intent and grievous bodily harm with intent were offences under s 18 of the Offences Against the Person Act 1861).

[121] Ibid.

[122] Response No 194 (BBFC); similar points were raised in response No 249 (BBC).

image of someone looking dead (i.e. a realistic depiction), but not actually dead.[123]

By contrast to the aforementioned categories, there was a near-unanimous agreement among respondents that it should be illegal to possess images depicting bestiality and necrophilia.[124] Those associating themselves with BDSM activities believed that such acts lack consent, the presence of which is an inherent characteristic of BDSM practices. Other individual participants in the consultation expressed the opinion that 'sexual interference with a corpse' needed further clarification, as they were concerned that it would cover mainstream horror and vampire movies. With respect to bestiality, some organisations argued for the revision of the existing offence under s 69 of the Sexual Offences Act 2003 ('intercourse with an animal') to include oral sex with an animal[125] or for the expansion of the definition of bestiality in the proposals to include 'sexual interference' with an animal corpse.[126]

Broadening the Scope of the Proscribed Material

Supporters of the new possession offences advocated the widening of the specified types of material. For example, it was put forward that militant executions (beheadings), 'eating of faeces or urine'[127] and 'belonophilia (needles)'[128] should also be caught. The inclusion of written or printed fantasy material of extreme nature (e.g. child rape) was also proposed for inclusion.[129] Moreover, Tim Loughton MP and Theresa May MP submitted on behalf of the Conservative Party that the scope of the offence should be extended to cover 'sites which contain blatant

[123] Response No 124 (n 98) (Cyber-rights & Cyber-liberties).

[124] As identified in Home Office, *Consultation* (n 52) [5].

[125] Response No 175 (West Midlands Police). Chapter 5 offers a more detailed discussion of the relation between s 69 of the 2003 Act and s 63(7) of the CJIA 2008.

[126] Ibid; the same point was raised in response No 91 (Hampshire Police).

[127] Ibid (West Midlands Police).

[128] Response No 212 (Nottinghamshire Police, Sexual Exploitation Investigation Unit and Dangerous Persons Management Unit).

[129] Response No 284 (Kent Police, Protection of Adults and Children Team).

guidance on for example how to commit rape without leaving any traces'[130] on the grounds that they constitute 'incitement to commit illegal sexual acts'.[131] It was further suggested that the definitions should be expanded to encompass 'incitement to gender hatred'[132] on the basis that 'women are the victims of pornography with men disproportionately the creators, distributors and consumers of pornography'.[133]

Enforcement and Penalties

Potential difficulties in the practical implementation of the suggested law were also highlighted in the consultation exercise.[134] The BBC asked in particular how the police experience in relation to the offence of possession of indecent photographs of children would inform the implementation of the new measures.[135] The Internet Service Providers Association also expressed the view that enforcement would prove problematic due to the lack of clarity in the provisions.[136]

Of the 143 supporters of the proposals, more than one-third (54) preferred the heavier penalty (second option),[137] while only three of them indicated the lower penalty as an option. The remaining did not state a preference. The overwhelming majority of the police forces and police organisations which responded took the view that the higher penalty was more appropriate. For the opponents, the issue of penalties

[130] Response No 262.

[131] Ibid.

[132] Response No 303 (Wearside Women in Need).

[133] Ibid.

[134] Response No 254 (UKERNA; the organisation that runs the JANET computer network which connects UK universities, further educations colleges, research councils, specialist colleges and adult and community learning providers); response No 371 (NTL; cable communications company); response No 359 (Telewest Communications; broadband communications and media group).

[135] Response No 249 (BBC).

[136] Response 288 (n 116) (Internet Service Providers Association).

[137] The second option was to impose a penalty for possession of three years and increase the penalty for OPA offences to five years in order to maintain the distinction; see further Home Office, *Consultation* (n 52) [53].

was not relevant, but some indicated that if the offence was introduced they would prefer the lower penalty (first option),[138] or alternatively a fine or confiscation of equipment.

The Revised Provisions

Following consideration of the responses received, the Home Office stated:

> The concern over this kind of extreme material, which is already illegal to publish or broadcast in this country, remains strong. Controls in place to prevent such extreme material from being available here are being circumvented by technological advances, weakening the protections which have existed, particularly for the young and vulnerable who may come into contact with it. Controlling the use of this extreme material is therefore more important. We therefore continue to believe that tightening up the law to cover possession of such material is justified.[139]

In light of the comments offered, the original proposals were subsequently amended. The threshold of violence and the scope of the provisions were clarified to some extent. The first requirement for the offence was an objective test for the jury to establish that the material under consideration was 'pornographic', namely 'solely or primarily produced for the purpose of sexual arousal'.[140] It was believed that this standard would exclude works of artistic merit, news, documentaries by mainstream broadcasters and works classified by the BBFC. The second requirement was also an objective test for the jury in relation to 'actual scenes or depictions which [would] appear to be real acts'.[141] This was aimed at activities which could be 'clearly seen'[142] and material which

[138] The first option was to impose a penalty of less than three years; Ibid [53].
[139] Home Office, *Next Steps* (n 80) 5.
[140] Ibid 6.
[141] Ibid.
[142] Ibid.

Table 3.2 Change to the classification of EPIs (2005–6)

Home Office, Consultation (August 2005)	Home Office, Next Steps (August 2006)
1. Intercourse or oral sex with an animal; 2. Sexual interference with a human corpse	1. Intercourse or oral sex with an animal; 2. Sexual interference with a human corpse; 3. Serious violence

would be 'genuinely violent'[143] or would convey 'a realistic impression of fear, violence and harm'.[144]

Moreover, the amended proposals reduced the original four categories to three. The first two of the previous ones were left intact. However, the categories of 'serious violence in a sexual context' and 'serious sexual violence' were replaced by a single one of 'serious violence' (Table 3.2). It was acknowledged that the words 'in a sexual context' caused confusion and were deemed unnecessary given the pornography standard described above.

In order to address the lack of precision of the violence threshold, initially suggested at GBH level, the Home Office concluded that the offence should apply to depictions of 'acts that appear to be life threatening or are likely to result in serious disabling injury'.[145]

In response to concerns raised by broadcasters and the Internet industry, defences would be introduced to cover those who could prove: (a) that they had a legitimate reason for being in possession of an extreme image; (b) that they came across the material accidentally; or (c) that they received unsolicited copies of the unlawful images.[146] In other words, the defences would mirror those provided for the offence of possession of IIOC under s 160(2) of the CJA 1988. As there was no intention to interfere with the mainstream entertainment industry, the Home Office proposed an additional defence for those who possess

[143] Ibid.
[144] Ibid.
[145] Ibid.
[146] Ibid 7.

an unaltered version of a work for which a classification certificate has been issued by a designated authority.[147] As regards penalties, the Home Office suggested a maximum penalty of three years' imprisonment for possession of material portraying 'serious violence' and a lesser penalty for possession of material falling within the remaining categories. It was stated that this differentiation would reflect 'the seriousness of the offences shown or depicted'.[148] The Government finally introduced the CJIB on 26 June 2007.

The Criminal Justice and Immigration Bill

Clause 64(1) of the Bill proposed to make it an offence for a person to possess an extreme pornographic image, punishable by up to three years' imprisonment. An image would be deemed 'pornographic', if it 'appeared' to have been produced 'solely or principally for the purpose of sexual arousal'.[149] The definition of an extreme image, and therefore the content of the material intended to be covered by cl 64(6), differed to some extent from the categories of images outlined in the revised proposals (Table 3.3).[150]

The proposed defences remained the same as those presented in 2006 following the consultation process.[151]

The single category of 'serious violence' in the 2006 revised proposals had raised the violence threshold, but limited the scope of the offence to images of 'serious, disabling injury',[152] thereby excluding milder BDSM material. The 2007 Bill, however, lowered the threshold to 'serious injury' and restricted the ambit of the offence to certain body parts, i.e. a person's anus, breasts or genitals. This meant that serious injury to the buttocks or other body parts would not be covered and as a result some

[147] Ibid.
[148] Ibid.
[149] CJIB 2007, cl 64(3).
[150] Ibid cl 64(6).
[151] Ibid cl 66; Home Office, *Next Steps* (n 80) 7.
[152] Home Office, *Next Steps* (n 80) 6.

Table 3.3 The re-classification of EPIs (2005–7)

Home Office, Consultation (August 2005)	Home Office, Next steps (August 2006)
1. Intercourse or oral sex with an animal; 2. Sexual interference with a human corpse	1. Intercourse or oral sex with an animal; 2. Sexual interference with a human corpse; 3. Serious violence
CJIB 2007	
1. An act which threatens or appears to threaten a person's life; 2. An act which results in or appears to result (or be likely to result) in serious injury to a person's anus, breasts or genitals; 3. An act which involves or appears to involve sexual interference with a human corpse; 4. A person performing or appearing to perform an act of intercourse or oral sex with an animal, where (in each case) any such act, person or animal depicted in the image is or appears to be real.	

BDSM practices would be taken out of reach. McGlynn and Rackley criticised the re-classification of extreme images as being weak.[153] Depictions of rape, according to the authors, would constitute serious injury only if harm to the anus, breasts and genitals was caused. Therefore, it would remain legal to download material showing 'vicious acts of forced sex',[154] which, according to their opinion, 'sustain a culture in which sexual violence is normalised and legitimised'.[155] Hence, they suggested that references to specific body parts should be removed and the clause should be amended to read as follows: 'An act which results in or appears to result (or threatens to result) in serious injury.' They summarised the added value of their proposed changes as follows:

> The impact of including 'threatens serious injury' is that it may encompass almost all rapes, since a threat of serious injury is inherent in all rape; whereas 'likely to result' only covers depictions of acts as shown.

[153] C McGlynn and E Rackley, 'The politics of porn' (2007) 157(7285) *NLJ* 1142.
[154] Ibid.
[155] Ibid.

> In addition, serious injury would not be limited to anus, breasts and genitals but may include mental injury, possibly also covering depictions of rape.[156]

Following its first and second reading, the CJIB was sent to Committee, where a detailed examination of its wording took place on 16 October 2007. Two particular issues were addressed at Commons Committee. Both were raised by Harry Cohen.[157]

'Where Is the Evidence?'[158]

The first issue related to the absence of evidence supporting the assertion that possession of EPIs, as defined in the Bill, is linked to the risk of commission of serious offences. Mr Cohen referred to the Rapid Evidence Assessment (REA),[159] which was produced by the Government in September 2007, i.e. after the first reading of the Bill, in order to corroborate their argument in favour of the alleged harmful effects of extreme pornography. The REA of the pornography effect literature was conducted for the Home Office and the Department of Health as part of a programme of research undertaken by the latter into the health and mental health effects of prostitution; pornography and trafficking; rape and sexual assault; and sexual offending. Its key findings were summarised as follows:

1. The REA supports the existence of some harmful effects from extreme pornography on some who access it. These included increased risk of developing pro-rape attitudes, beliefs and behaviours, and committing

[156] Ibid.

[157] Labour MP for Leyton and Wanstead.

[158] HC Public Bill Committee, Criminal Justice and Immigration Bill, 16 October 2007, col 31, http://www.publications.parliament.uk/pa/cm200607/cmpublic/criminal/071016/am/71016s01.htm, accessed 15 August 2013.

[159] C Itzin, A Taket and L Kelly, *The Evidence of Harm to Adults Relating to Exposure to Extreme Pornographic Material: A Rapid Evidence Assessment (REA)*, Ministry of Justice Research Series 11/07 (Ministry of Justice, London: 2007).

sexual offences. Although this was also true of some pornography which did not meet the extreme pornography threshold, it showed that the effects of extreme pornography were more serious.
2. Men who are predisposed to aggression or have a history of sexual and other aggression were more susceptible to the influence of extreme pornographic material. This was corroborated by a number of different studies using different methods and different samples.
3. The REA found no formal research studies of the effects on those who participate in making extreme pornography.[160]

It finally concluded that:

> pornography raises complex moral and political issues and strong feelings amongst those with opposing views. Taken together, however, the methodologies employed and the findings of studies reported in the REA provide a scientific basis on which to consider the harm effects on victims, including the damage it does to the attitudes, beliefs, fantasies, desires and behaviour of some of those who use it.[161]

However, the REA attracted severe criticism for being a completely one-sided account, used as an 'ad hoc justification'[162] for the legislation. Attwood and Smith stressed that it was authored by three academics, well known for their anti-pornography stance.[163] Their research should not have been presented as conclusive, especially because a 'vast body of work [...] has discredited and refuted the basic premises of the mass

[160] Ibid [iii].

[161] Ibid [v].

[162] C Smith, 'Where is the evidence' *The Guardian Online* (London 24 December 2007), http://www.guardian.co.uk/commentisfree/2007/dec/24/wherestheevidence, accessed 14 September 2013.

[163] One of them responded to the 2005 consultation; see response No 307 above submitted by Professor L Kelly for the CWASU of the London Metropolitan University, arguing: 'Our interest has never been in "proving" direct causal links between pornography and specific acts of sexual violence, [...] but to suggest that the existence and now virtual ubiquity of pornography creates a cultural context which devalues women's humanity and dignity.'

communications effects research tradition from which they drew their conclusions'.[164] For instance, the REA proceeded on the basis that laboratory effects demonstrated by research subjects can be directly linked to real-life effects. However, it is doubtful whether findings derived from the short-term nature and artificial circumstances of experimental research can be applied to ordinary contexts of media use.[165] Moreover, Attwood and Smith argued that effects were assumed, as were the causes and harms which ought to have been found.[166] The authors concluded that REA findings were in essence shaped to fit the Bill:

> Even those researchers whose work is the basis of the REA suggest that the evidence does not justify legal action against the producers of pornographic materials: Why then should we accept such evidence for the criminalisation of possession?[167]

The REA was also attacked in Committee by Mr Cohen, who stated that it was 'worrying'[168] that the Assessment was produced 'long after the Bill had been published'.[169] He criticised it on the basis that it failed to unveil any further evidence, particularly in relation to effects on those who participate in producing extreme pornography.

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[164] F Attwood and C Smith, 'Extreme concern: Regulating "dangerous pictures" in the United Kingdom' (2010) 37(1) *J Law & Soc* 171, 175; see also J Toynbee, 'Media making and social reality' in D Hesmondlhalgh and J Toynbee (eds), *The Media & Social Theory* (Routledge, London: 2008) 267.

[165] Millwood Hargrave and Livingstone (n 75) 245–46; D Linz, S Penrod and E Donnerstein, 'The Attorney General's Commission on Pornography: The gaps between "findings" and facts' (1987) 4 *American Bar Foundation Research Journal* 713, 714: 'Laboratory investigations of the psychological and behavioral effects of violent pornography [. . .] also have certain built-in methodological limitations. Most prominent among these is the use of artificial measures of aggression that prohibit direct exploration of experimental findings to situations outside the laboratory.'

[166] Attwood and Smith (n 164) 176.

[167] Ibid 174.

[168] HC Public Bill Committee, Criminal Justice and Immigration Bill, 16 October 2007, col 31, http://www.publications.parliament.uk/pa/cm200607/cmpublic/criminal/071016/am/71016s01.htm, accessed 15 August 2013.

[169] Ibid.

In response, Maria Eagle, Parliamentary Under-Secretary of State for Justice, defended the REA by arguing that although it did not find any formal studies concerning the impact on those who take part in the making of extreme images, it did find that 'there were some harmful effects on some of those who viewed it, particularly men who were predisposed to aggression or had a history of sexual aggression'.[170] Therefore, the REA showed that there was cause to have concern in certain circumstances 'for what is no doubt, a smallish number of the population who might be susceptible to their behaviour being affected by viewing "extreme" pornography'.[171]

'Why Does This Legislation Concentrate on Material of a Sexual Nature?'[172]

Mr Cohen also expressed concern over the potential impact of violent images of a non-sexual nature and queried why since 'there are thousands and thousands of horror films that show people being cut up'[173] this legislation concentrates only on material of a sexual nature. Maria Eagle responded that regulatory and statutory controls over such images were already in place. Horror movies are under the purview of the BBFC for example, while violent and sexual imagery is targeted by the 1959 OPA. The Board would refuse to classify material depicting 'explicit and extreme pornographic material produced for the purposes of sexual arousal that also includes real or very realistic violence'.[174] She explained that it was this unclassifiable material – available from overseas via the Internet – with which the proposed law was concerned.

[170] Ibid.
[171] Ibid.
[172] Ibid.
[173] Ibid col 32.
[174] Ibid.

Possession of Extreme Images Extracted from Mainstream Movies

The discussion about the extreme pornography provisions proceeded further during the second sitting of the Committee in the afternoon session of 16 October 2007. Charles Walker[175] spoke of terrestrial television series and films on general release on cinemas which, according to him, 'routinely'[176] depict 'brutal, violent pornography towards women'.[177] He referred to 'problems and contradictions'[178] apparently created by cl 65 of the Bill: the prohibition of possession of an extreme image under cl 64 did not apply to an 'excluded' image, which was defined as an image which formed part of a series of images contained in a recording of the whole or part of a classified work.[179] However, such an image would not constitute an excluded one, if it was contained in a recording of an extract from a classified work, and it appeared that it was extracted solely or principally for the purposes of sexual arousal.[180] The ensuing discussion, which Murray names 'the *Casino Royale* debate',[181] marked a key development in the final formulation of the offence.

In the fourth sitting of the Committee in the afternoon of 18 October 2007, Liberty's Director of Policy, Gareth Crossman, shed light on the inclusion of cl 65 into the Bill. He started by commenting on the wording 'appears to' in cl 64(6) of the Bill (Table 4.3). Mr Crossman stated:

> . . . 'appears to' clearly covers things that are not real such as acting and representation. Because it was realised that by putting that wording

[175] Conservative MP for Broxbourne.

[176] HC Public Bill Committee (n 168) col 67.

[177] Ibid.

[178] Ibid.

[179] CJIB 2007, cl 65(2). The exclusion of classified films would ensure that individuals who were in possession of a video recording of a film certified by the BBFC would not be prosecuted, even if the film at issue contained an image which contravened cl 64, but was justified by the context of the work as a whole. The issue of excluded images is discussed in greater detail in Chapter 4, in which s 64 of the Criminal Justice and Immigration Act 2008 is analysed.

[180] Ibid cl 65(3).

[181] Murray (n 68) 82.

> in a lot of certified material in films could fall into the definition, it was necessary to introduce a defence that the film might be certified, but if an excerpt is taken from a certified film it becomes an offence again. This offence ties itself up in knots somewhat because it is trying to identify the correct parameters of the criminal law by setting them so broadly that little loopholes have to be created that are, frankly, not particularly impressive.[182]

He then introduced into the debate the example of whether possession of a series of extracted images from the mainstream movie *Casino Royale*,[183] which obtained a '12' certificate from the BBFC,[184] could be defined as extreme pornography under cl 64. Mr Crossman apparently referred to the scene in which the desperado Le Chiffre captures and tortures James Bond by striking him in the testicles with a large, knotted end of a thick rope. Le Chiffre demands a piece of information but Bond refuses to reveal it. Then, Le Chiffre brandishes a knife with the implied purpose of castrating him. Mr Crossman observed that this scene could fall within cl 64(6)(b): 'An act which results in or appears to result (or be likely to result) in serious injury to a person's [...] genitals.' If it was extracted from the film 'solely or principally for the purpose of sexual arousal',[185] the protection under cl 65 would be removed. Liberty's Policy Director was concerned over the validity of the legal provisions (as drafted) because of the prospect of:

> criminalising activity where you are dealing with something that, in itself, is perfectly legal – a film that has been censored and given a '12' certificate; a part might be extracted for the purpose of sexual arousal and the possession of that extract becomes a crime.[186]

[182] HC Public Bill Committee, Criminal Justice and Immigration Bill, 18 October 2007, col 122, http://www.publications.parliament.uk/pa/cm200607/cmpublic/criminal/071018/pm/71018s01.htm, accessed 15 August 2013.

[183] *Casino Royale* (2006), directed by Martin Campbell.

[184] '12A' and '12' categories are awarded for cinema films and video works, respectively, where the material is suitable, in general, only for those aged 12 and over.

[185] CJIB 2007, cl 65(3)(b); now, CJIA 2008, s 64(3)(b).

[186] HC Public Bill Committee (n 182) col 124.

The proposed legal provisions were greeted with scepticism by other MPs as well. Edward Garnier[187] underlined the 'huge degree of uncertainty and subjectivity'[188] inherent in cl 64(3), which defined an image as 'pornographic', if it 'appeared to' have been produced solely or principally for the purpose of sexual arousal.

> Who is to decide whether it so 'appears'? Is it the judge, the policeman, the viewer or the maker? . . . I can think of any number of extreme images which are disgusting and unattractive to look at, but the prosecution will have to prove that an image appears to some unknown person to have been produced solely or principally for the purposes of sexual arousal.[189]

Mr Crossman shared his concern and stated that it would be very difficult for a judicial or jury determination to be consistent about convictions and acquittals.[190]

Following the concerns raised in Committee regarding the ambit of the new offence, further amendments were necessary in order to: first, clarify the definition of the term pornographic in cl 64(3); second, reclassify the content of the material to be covered by cl 64(6); and finally, ensure that mainstream movie content was not criminalised when extracted from its original content.[191] As it did not prove possible to table amendments in time for the Report stage in the Commons, it was agreed that these matters would be considered while the Bill was before the Lords.

The CJIB Before the Lords

On 9 January 2008, the Bill was introduced in the House of Lords. The clauses were reordered and cl 64 became cl 113. The key definitions of the terms 'pornographic' and 'extreme', which remained unaltered,

[187] Conservative MP for Harborough.
[188] HC Public Bill Committee (n 182) col 124.
[189] Ibid col 125.
[190] Ibid.
[191] Murray (n 68) 84.

could now be found in cls 113(3) and 113(6), respectively. After the Bill received its first and second readings, it was sent to Committee on 5 February 2008. Clause 113 was extensively debated in the afternoon session of 3 March 2008.[192]

Lord Hunt of Kings Heath, Parliamentary Under-Secretary of State for Justice (Labour) and sponsor of the Bill, moved Amendment No 122B which sought to replace the word 'appears' in cl 113(3) with the words 'is of such a nature that it must reasonably be assumed'. As a result, the definition of the term 'pornographic' in the Bill read: 'It *is of such a nature that it must reasonably be assumed* to have been produced solely or principally for the purpose of sexual arousal.'[193] The amended wording sought to make clearer that:

> the question of whether or not material is pornographic is a matter on which a jury can simply take a view by reference to the nature of the material before them. It is not a question of the intentions of those who produced it.[194]

Amendment No 125B introduced two significant changes. The first redefined the term extreme. The original phrasing in cl 113(6), i.e. 'an extreme image is an image of any of the following' was reworded as follows: 'An image falls within this subsection, if it portrays in an explicit and realistic way, any of the following.' It also removed from the listed acts all occurrences of the words 'appears to' (Table 3.4).

In addition, this part of the offence was slightly restructured so that the persons and animals depicted must be such that a reasonable person looking at the image would think they were real. However, in respect of the listed acts, the requirement is that they be 'explicit and realistic', 'rather than actually real'.[195] As Lord Hunt explained, the consequence of the provision is that 'only graphic and convincing scenes will be

[192] The Bill completed its Committee stage in the Lords on 12 March 2008 and began its Report stage on 26 March.
[193] HL Deb 3 March 2008, vol 699, col 893 (Lord Hunt of Kings Heath).
[194] Ibid col 894 (Lord Hunt of Kings Heath).
[195] Ibid col 895.

Table 3.4 The re-classification of EPIs (2005–8)

Home Office, Consultation (August 2005)	Home Office, Next steps (August 2006)
1. Intercourse or oral sex with an animal; 2. Sexual interference with a human corpse	1. Intercourse or oral sex with an animal; 2. Sexual interference with a human corpse; 3. Serious violence
CJIB 2007	**CJIB 2008**
1. An act which threatens a person's life; 2. An act which results in (or be likely to result) in serious injury to a person's anus, breasts or genitals; 3. An act which involves sexual interference with a human corpse; 4. A person performing an act of intercourse or oral sex with an animal, where (in each case) any such act, person or animal depicted in the image is or appears to be real.	1. An act which threatens a person's life; 2. An act which results, or is likely to result, in serious injury to a person's anus, breasts or genitals; 3. An act which involves sexual interference with a human corpse; 4. A person performing an act of intercourse or oral sex with an animal (whether dead or alive), and a reasonable person looking at the image would think that any such person or animal was real.

caught. The offence is thus not limited to photographs and film of real criminal offences which [. . .] would make the offence unworkable and of limited effect'.[196]

The second change introduced by Amendment No 125B added one more element to the offence as a whole in an attempt to address the concerns expressed during the *Casino Royale* debate. 'An "extreme image" must now not only be included in the list of acts set out in clause 113(6), but must also be "grossly offensive, disgusting or otherwise of an obscene character".'[197] By doing so, the Lords sought to create 'symmetry'[198] between the extreme pornography offence and the 1959 OPA rather than build on the latter, essentially because the OPA

[196] Ibid.
[197] Ibid col 894 (Lord Hunt of Kings Heath).
[198] Ibid col 895.

relates to the concept of publication – not possession – and covers a wider range of material. Lord Hunt stated that:

> it is not our intention to criminalise material that it would be legal to publish. . . . The 'grossly offensive, disgusting or otherwise of an obscene character' test is drawn from the ordinary dictionary definition of 'obscene'. When taken in conjunction with the existing elements of the offence, it will ensure that this offence catches only material that would be caught by the [OPA] were it to be published in this country.[199]

During the remaining session, Lord Faulkner expressed his concern that the Lords were potentially making illegal activities that 'no one in this House would find interesting [. . .] but which, for some people, represent an important part of their lives'.[200] Baroness Falkner endorsed the removal of the ambiguity created by the words 'appears (to)', but highlighted the subjective parameters of the proposed legislation, particularly with respect to the 'grossly offensive, disgusting or otherwise of an obscene character' standard. She concluded that:

> the Government . . . are leaving the test to be decided by juries, who could deliver very different outcomes in cases with similar content depending on the part of the country where they take place. The onus on the jury to define pornography will place good people in an invidious position on matters that are so sensitive that, if the law has to enter here at all, it should be law that is capable of being clearly understood and demarcated. These clauses will not achieve that purpose.[201]

Moreover, Baroness Miller was of the opinion that the amendments were 'helpful',[202] but acknowledged that there were 'a great number of issues'[203] with cl 113. She underscored the uncertainty caused to individuals seeking

[199] Ibid.
[200] Ibid col 898 (Lord Faulkner of Worcester, Labour Peer).
[201] Ibid col 899 (Baroness Falkner of Margravine, Liberal Democrat Peer).
[202] Ibid col 896 (Baroness Miller of Chilthorne Domer, Liberal Democrat Peer).
[203] Ibid col 897.

to regulate their conduct in line with the criminal law: 'What really worries me about it is that we are asking people to judge whether what they are seeing is going to fall within the remit of the Bill, before it ever gets to a jury.'[204] Lord Hunt accepted[205] that prosecuting possession of EPIs interfered with individuals' private lives and their rights to freely receive and impart information under Articles 8 and 10 of the ECHR, respectively.[206] However, the Government believed that any such interferences were justified as being in accordance with the law and necessary in a democratic society for the prevention of crime, the protection of morals and the rights and freedoms of others, particularly children and vulnerable adults 'from inadvertently coming into possession of this material, which is widespread on the Internet'.[207] The Government also considered that cl 113 was proportionate to the legitimate aim of breaking the circle of demand and supply of material which may encourage violence towards others in those who access it.[208]

However, the Joint Committee on Human Rights opined that it was questionable whether cl 113 was sufficiently precise and foreseeable to satisfy the requirement that an interference with the rights under Articles 8 and 10 must be 'in accordance with the law'.[209]

> An assessment of whether an image is or is not 'extreme' is inherently subjective . . . . This means that individuals seeking to regulate their conduct in accordance with the criminal law cannot be certain that they will not be committing a criminal offence by having certain images in their possession.[210]

[204] Ibid.

[205] Ibid col 894.

[206] See also Home Office, *Consultation* (n 52) [57].

[207] Explanatory Notes to the CJIB 2007, para 806.

[208] Ibid para 805.

[209] *Malone v The United Kingdom* (App No 8691/ 79) (1985) 7 EHRR 14; in *Silver and Others v The United Kingdom* (App Nos 5947/72, 6205/73, 7052/75) (1983) 5 EHRR 347 it was held that the phrase 'prescribed by law' employed in Art 10 of the Convention should be interpreted and applied likewise.

[210] Joint Committee on Human Rights, *Legislative Scrutiny: Criminal Justice and Immigration Bill, (Fifth Report)* (2007–8, HL 37, HC 269) [1.50].

The Committee was also concerned that the offence as drafted did not strike the correct balance between the proposed restrictions on the aforementioned Convention rights and the aims the Government sought to achieve.

> Given the particularly intrusive nature of the proposed offence on an intimate aspect of an individual's private life (his or her sexual conduct), weighty reasons are required to justify prosecuting people for possessing and viewing these images privately. We remain concerned that 'serious injury' may be subject to a broadly subjective assessment.[211]

Hence, the Committee recommended that the threshold for 'serious injury' should include 'permanent physical harm'.[212]

Responding to peers' concerns about the position of consenting adults who made and viewed the images privately,[213] Lord Hunt stated that it was often 'very difficult'[214] to tell from an image whether or not consent had been given, as images could be circulated far beyond those who participated in an act. The then Government's position was that the pornographic material intended to be caught was at 'the most extreme end of the spectrum'.[215] According to current law, it is not possible to give consent to the type of activity covered. The House of Lords upheld convictions for offences of causing actual and GBH during the course of consensual sadomasochistic activities in *R v Brown.*[216] Where the act

[211] Joint Committee on Human Rights, *Legislative Scrutiny: Criminal Justice and Immigration Bill, (Fifteenth Report)* (2007–8, HL 81, HC 440) [2.16]; see also G Crossman, *Liberty's Second Reading Briefing on the Criminal Justice and Immigration Bill in the House of Lords* (Liberty, London: 2008) [25].

[212] Joint Committee on Human Rights, *(Fifteenth Report)* (n 211) [2.16].

[213] HL Deb 3 March 2008, vol 699, col 904 (Lord Wallace of Tankerness, Liberal Democrat Peer).

[214] Ibid col 908.

[215] Explanatory Notes to the CJIB 2007, para 803.

[216] [1994] 1 AC 212 HL. *Brown* was upheld by the European Court of Human Rights in *Laskey, Jaggard and Brown v The United Kingdom* (Appl Nos 21627/93, 21826/93 and 21974/93) (1997) 24 EHRR 39, in which it was held that the interference with the defendants' right under Art 8 of the ECHR was justified on grounds of protection of health.

which appears to be taking place is actually occurring, and given that the threshold of the material targeted is 'very high',[217] it is likely that a criminal offence is being committed. So, even if those participating argue that they had consented to it, such consent is invalid. Therefore, in such cases, the criminalisation of possession of extreme images is arguably consistent with criminal law, in that the depicted practices also fall within its ambit. In cases of images portraying simulated activity, the Government was of the view that the prohibition of possession was justified in order to satisfy the 'legitimate aim' of protecting individuals from engaging in 'degrading'[218] activities.

In correspondence with the then Minister of State at the Ministry of Justice, Rt Hon David Hanson MP, the Joint Committee on Human Rights queried whether the offence could be justified, if conducted by consenting adults in private where no risk of physical harm is involved. The Minister responded:

> The focus of this offence is on the images themselves and the effect they may have on those who view them, not on any underlying criminal offence which may or may not have been committed. In the context of pornography, a convincing, consensual depiction of an activity can have the same impact on the viewer as an image of that activity actually taking place .... Once an image has been created, it is capable of being passed beyond those who actively consented (lawfully or not) to the activities shown, and of being circulated to a much wider audience via new technologies .... the Government considers that a focus on the lawful consent of those who participated in the creation of the image is misguided.[219]

However, according to Carline, the opinion that the consent of the individuals involved would not affect the impact of an image ignores a vast amount of research, which demonstrates that viewers' demarcations

[217] Explanatory Notes to the CJIB 2007, para 803.

[218] Ibid para 804.

[219] Letter dated 6 December 2007 from Rt Hon David Hanson MP, Minister of State, Ministry of Justice cited in Joint Committee on Human Rights, *(Fifth Report)* (n 210) Appendix 3, [30].

between watching a real act of violence and a simulated activity are actually quite sophisticated. The author maintains that the 'conflation of reality and fantasy into a singular mode of effect and affect is, at the least, problematic'.[220]

Overall, the Bill was met with significant opposition in the House of Lords, but the amendments were eventually passed. The CJIB completed its passage through both Houses on 7 May 2008 and received Royal Assent the next day. Clause 113 of the Bill ultimately became s 63 of the CJIA 2008, the first subsection of which provides that 'it is an offence for a person to be in possession of an extreme pornographic image'.[221]

Concluding Remarks

The perceived necessity of the legislation appears to have been based on a vaguely defined 'increasing public concern'[222] about extreme pornographic imagery. No information was provided during the consultation about who has expressed this concern, where it was documented and what methods were employed to measure it. 'What is certainly disturbing,' Prof Petley commented, 'is the suspicion that this particular measure has been at least partly prompted by hysterical, ill-informed and censorious press coverage of an undoubtedly disturbing case in papers.'[223] The validity of this argument will be evaluated in Chapter 4. Edward Garnier QC,[224] the then Shadow Minister for Justice who led for the opposition on the CJIB in the Commons between October 2007 and May 2008, suggested that the new law was rushed through: 'The Bill as a whole was a shambles; constructed and

[220] A Carline, 'Criminal justice, extreme pornography and prostitution: Protecting women or protecting morality?' (2011) 14(3) *Sexualities* 312, 325; Popovic (n 94) 258: '"fantasists" (e.g. violent porn users) and rapists are two different groups'.

[221] CJIA 2008, s 63(1).

[222] Home Office, *Consultation* (n 52) 1.

[223] Petley (n 83).

[224] Conservative MP for Harborough.

drafted without coherent thought.'[225] He added that the new offence was an 'over-reaction'[226] to the Longhurst murder, and that his disagreement had to do 'not with the principle of outlawing certain extreme pornography so much as the incompetent way the Bill went about doing so'.[227]

Unlike the technical concept of obscenity under the OPA, which emphasises the impact on the consumer, the category approach adopted by the initial proposals considered the parameter of the alleged harm to the individuals' well-being in the pornographic industry. However, no proof was offered in the 2005 consultation exercise in relation to any direct harm caused in the creation of extreme pornography. Hence, the 'indirect harm approach'[228] was applied. By breaking the circle of demand and supply, the Government of the day anticipated to 'lessen the human cost in its production'[229] and protect society from exposure to material which 'may encourage interest in violent or aberrant sexual activity'.[230] Nevertheless, it was expressly acknowledged that there was no evidence in support of this assertion either.[231]

Consequently, strong pressure was exerted by the so-called arch-liberals[232] who demanded convincing evidence of physical harm and causal links between viewing extreme pornography and committing acts of sexual violence. The then Government attempted to corroborate their indirect harm approach shortly after the publication of the CJIB in 2007 by largely relying on the REA. However, the latter was subject to criticism,[233] because it was deemed incapable of providing

[225] Cited in K Beaumont, 'Consumers targeted in pornography law shake-up' *LexisNexis Butterworths News* (London 19 May 2008) 24.
[226] Ibid.
[227] Ibid.
[228] Murray (n 68) 77.
[229] Home Office, *Consultation* (n 52) ii.
[230] Ibid [34].
[231] Ibid [31].
[232] C McGlynn and E Rackley, 'Criminalising extreme pornography: A lost opportunity' (2009) 4 *Crim LR* 245, 258.
[233] See also HL Deb 3 March 2008, vol 699, col 896 (Baroness Miller of Chilthorne Domer, Liberal Democrat Peer).

concrete evidence to substantiate the risk of harm and justify legal action.[234]

Parliamentary debates were dominated by occasional and unsubstantiated statements about the 'dark and evil forces'[235] that violent pornography may instil in its viewers.[236] However, the principal justification provided in favour of the legislation was based on a moral preoccupation with the 'deeply offensive'[237] nature of the 'vile material'[238] at issue. The concern over the welfare of those involved in the creation of extreme pornography was arguably not a primary focus of the Government's justifications. The Home Office statement that the option of 'doing nothing' was unattractive, because they considered 'the moral and public protection case against allowing this kind of material sufficiently strong',[239] demonstrates that a moral approach was ultimately defended. In addition, the failure to provide a strong evidential basis for the justification of the proposals made the underpinning moral premise of the legislation even more explicit.

Devlin would have probably approved of the general framework of s 63. The Government's justification for the legislation echoes his rejection of the demarcation between a realm of private, individual morality and social morality, and the need to regulate the former if an individual's behaviour falls beyond the limits of social tolerance and imperils the moral integrity of society as a whole. Legislation centred on moral arguments is, according to Devlin, justified on the grounds of the society's right to preserve its moral

[234] Memorandum submitted by Dr Clarissa Smith et al. (CJ&I 341), http://www.publications.parliament.uk/pa/cm200607/cmpublic/criminal/memos/ucm34102.htm, accessed 15 August 2013; see also D Howitt and G Cumberbatch, *Pornography: Impacts and Influences* (Home Office Research and Planning Unit, London: 1990) 83, a study which was commissioned by the Home Office itself and stressed the distinction between 'the use of pornography by "deviant" persons and the effects of pornography in creating that deviancy'.

[235] HC Deb 8 October 2007, vol 464, col 113 (Martin Salter MP).

[236] HL Deb 3 March 2008, vol 699, col 907 (Lord Hunt, Parliamentary Under-Secretary, Ministry of Justice; Labour).

[237] HC Deb 8 October 2007, vol 464, col 60 (Jack Straw, Secretary of State for Justice and Lord Chancellor).

[238] Ibid.

[239] Home Office, *Consultation* (n 52) [52].

bounds,[240] using a 'right-minded'[241] person's sincerely expressed feelings of 'intolerance, indignation and disgust'[242] as a necessary – but not sufficient – condition for legislation.[243] The Government asserted that the disgusted reaction of 'most people'[244] to extreme images was deemed a suitable measure of social tolerance. If most people share this view, then it will be established as a matter of fact through the jury. Nevertheless, as Lord Bishop of Chester put it in the Lords Committee, 'to use what most people would find offensive as a central criterion is too subjective. [. . .] To legislate on the basis that this is what most people do not like is a recipe for transient and bad law'.[245]

The offence was slightly improved in the House of Lords, but the inclusion of the 'grossly offensive, disgusting or otherwise of an obscene character' element constitutes the most controversial aspect of s 63. Establishing whether the offence has been committed is largely dependent on the appreciation of the highly subjective factor of disgust, which is likely to impact not only on its interpretation but also on its enforcement. As McGlynn and Rackley point out, the final Act is 'a lost opportunity to make a break from the moralistic and paternalistic concerns of the OPA'.[246] Having provided an insight into the rationale underlying the criminalisation of possession of extreme pornographic material in England and Wales, this study proceeds to examine in detail the value of Coutts' case as a news product and the mediatisation of the extreme pornography debate.

[240] P Devlin, *The Enforcement of Morals* (OUP, Oxford: 1965) 11: 'Society may use the law to preserve morality in the same way as it uses it to safeguard against anything else that is essential to its existence.'

[241] Ibid 15.

[242] Ibid 17.

[243] However, the criminalisation of extreme pornography on the grounds of feelings of 'disgust' is disputed. For a critique of this position, see C McGlynn and E Rackley, 'Striking a balance: Arguments for the criminal regulation of extreme pornography' (2007) (September) *Crim LR* 677, 686–7. More generally, see MC Nussbaum, *Hiding from Humanity: Disgust, Shame and the Law* (Princeton University Press, Woodstock: 2004) 13–4, 143; R Dworkin, *Taking Rights Seriously* (Harvard University Press, Cambridge, MA: 1977) 242–45, 253–4.

[244] HL Deb 3 March 2008, vol 699, col 908 (Lord Hunt of Kings Heath); Home Office, *Consultation* (n 52) [11].

[245] Ibid col 910 (The Rt Rev. the Lord Bishop of Chester).

[246] McGlynn and Rackley, 'A lost opportunity' (n 232) 259.

4

The Mediatisation of the Extreme Pornography Debate

Introduction

Moving beyond the legal history of s 63, Chapter 4 places the new offence within a broader sociocultural context where the labelling of particular individuals (in this case, sexual deviants like Graham Coutts) as 'criminals' reflects power differentials and promotes particular interests within society.[1] The role of the news media in this labelling process and their influence on the public's understanding of the matter are assessed based on an in-depth qualitative analysis of 251 relevant news reports.[2]

[1] W Morrison, 'What is Crime? Contrasting definitions and perspectives' in C Hale, K Hayward, A Wahidin and E Wincup (eds), *Criminology* (OUP, Oxford: 2013).

[2] These were all the articles containing the term 'Graham Coutts' that were published in all the national British newspapers between the time when Longhurst's death first made news (April 2003) and the time of writing (April 2016). The articles were initially located and collected through a *LexisNexis* search. There are undeniable advantages from using *LexisNexis* for media research, which mainly relate to allowing the researcher to easily access large amounts of data from the convenience of his or her computer screen. However, the database can only provide a stripped-down, strictly textual version of the respective articles of interest, which are in that way reduced to 'words reproduced on a computer screen in standardised font. Decontextualised. Arid. Colourless. And, crucially, without images'; C Greer, 'Reading the news: Critical connections'

A.K. Antoniou, D. Akrivos, *The Rise of Extreme Porn*,
DOI 10.1007/978-3-319-48971-1_4

This analysis offers an insight into the discursive practices through which journalists and other claims-makers paved the way for the introduction of the new offence, whilst highlighting the crucial interaction between media institutions and criminal justice agencies in the era of 24/7 news.

The Media as Agenda-Setting Agents and the Concern over Extreme Pornography

The debate on the broader social ramifications of Coutts' case and the criminalisation of extreme pornographic imagery did not merely take place on an official, legislative level. In fact, the legislative response to this case ensued and was, to a large extent, directly related to the claims made by numerous stakeholders in the media arena. As mentioned in the previous chapter, the rationale behind the introduction of the s 63 offence was, according to the Home Office, the 'increasing', albeit uncorroborated in the consultation document, 'public concern about the availability of this extreme material'.[3] The extensive coverage of the issue in the national British press in the months and even years following Longhurst's murder attests to the presence of such a concern: whether the news media only provided an outlet for this concern or generated it out of thin air and subsequently elevated it to alarming levels is questionable. However, there is little doubt that journalists played a key part in adding the issue to the public agenda. They published numerous articles on the circumstances on Jane Longhurst's death, documenting Coutts' arrest, trial, conviction, appeal, re-trial and

in C Greer (ed), *Crime and Media: A Reader* (Routledge, Oxon: 2010) 119–20. This can be a major shortcoming of qualitative media research, especially given the emphasis contemporary news reporting places on visuals; Y Jewkes, *Media and Crime* (3rd ed, Sage, London: 2015). In order to tackle this problem in our study, data collection was not limited to the article versions provided by *LexisNexis*, but also included their printed versions acquired through the British Newspaper Library as well as those available in the newspapers' online archives.

[3] Home Office, *Consultation: On the Possession of the Extreme Pornographic Material* (Home Office Communications Directorate, London: 2005) 1.

re-conviction and reporting on the victim's mother's (Liz Longhurst) campaign against extreme pornography as well as the reactions to the introduction of s 63.

In our media-saturated world, where images of crime and deviance are reflected in an 'infinite hall of mediated mirrors',[4] the agenda-setting role of the news media becomes more important than ever, and when these images are as gruesome as those of Jane Longhurst's murder, they are much more likely to draw the public's attention and trigger calls for action. As Cohen argues, although the media are not always successful in telling people what to think, they are very successful in telling us what to think about.[5] The wide media coverage of Coutts' crime contributed significantly to its identification as an issue which deserved everyone's attention and needed to be addressed as soon as possible. In that way, Longhurst's death came to be seen not as an individual tragedy, but as part of a broader and far more serious social problem, particularly that of 'extreme pornography'.

From a constructionist perspective, there is no objective reality but the world is only accessible to us through language.[6] A condition only acquires 'social problem' status when collectively defined as such.[7] It could therefore be argued that extreme pornographic material may have been available online or even offline long before Longhurst's murder. However, it was the reaction to this particular event (largely deriving from the high media visibility of the case) that established extreme pornography as a problem. Liz Longhurst and her daughter Sue Barnett appeared prominently in the relevant news coverage not just as indirect victims of Coutts' actions but also as key claims-makers using the power of the media to gain support for their assertions about the risks of violent pornography. They gave numerous interviews or were otherwise quoted extensively calling for stricter Internet

[4] J Ferrell and C Sanders, 'Culture, crime and criminology' in J Ferrell and C Sanders (eds), *Cultural Criminology* (Northeastern University Press, Boston: 1995) 14.

[5] BC Cohen, *The Press and Foreign Policy* (Princeton University Press, Princeton, New Jersey: 1963).

[6] V Burr, *Social constructionism* (2nd ed, Routledge, London: 2003).

[7] H Blumer, 'Social problems as a collective behaviour' (1971) 18(3) *Social Problems* 298; J Best, *Social Problems* (WW Norton & Company, London: 2008).

control.[8] In fact, they were, on some occasions, even given the opportunity to write and publish their own articles offering an insider's view on the case.[9] The discourse surrounding Coutts' crime gradually shifts from the gruesome details of Jane Longhurst's murder (which dominate the news coverage of Coutts' case until January 2004) to the fight for 'Jane's legacy'[10] and the urgent need to 'prevent other lovely young women being harmed'[11] by 'sickening'[12] websites.

Through the construction of Coutts' act as the result of the 'vile'[13] Net fantasies of 'men like Coutts' (rather than a one-off case) and the news media's increased interest in the story, Longhurst's murder became what Innes calls a 'signal crime'.[14] 'Signal crimes', Innes argues, are:

> construed as 'warning signals' about the levels and distribution of criminogenic risks and may, in the right set of circumstances, result in demands for more, or better, forms of social control.[15]

In the wake of Longhurst's death, journalists drew attention to the plethora, seriousness and apparent unmanageability of online risks, while stressing the Internet's appeal to susceptible individuals like children and young people.[16] The 'symbiotic' relationship between

[8] M Darvill and H Arkell, 'The Subhuman' *The Sun* (London 5 February 2004) 10–11; S Pook 'Internet normalised Graham Coutts's perverse impulses. That is the danger' *The Daily Telegraph* (London 15 August 2005) 4.

[9] L Longhurst, 'We can't sit back and let another young girl die like my daughter' *Mail on Sunday* (London 15 February 2004) 23; S Barnett, 'How Blunkett CAN shut down the websites that killed my sister' *Mail on Sunday* (London 14 March 2004) 27.

[10] E Addley, 'Jane's legacy' *The Guardian* (London 2 September 2006) 31.

[11] L Longhurst quoted in D Sapsted '30 years' jail for internet pervert who lured lover's best friend to her death' *The Daily Telegraph* (London 5 February 2004) 2–3.

[12] L Fisher, 'These protesters say it's their right to watch sadistic porn online. Tell that to the mother of the girl murdered by a man addicted to it . . . ' *Daily Mail* (London 3 January 2009) 28.

[13] Leader, 'Voice of the Daily Mirror: Crack down on these vile Net perverts' *Daily Mirror* (London 5 February 2004) 6.

[14] M Innes, 'Crime as signal, crime as memory' (2004) 1(2) *Journal for Crime, Conflict and the Media* 15.

[15] Ibid 16–17.

[16] T Utton, 'The children who call their computer a best friend' *Daily Mail* (London 25 February 2004) 31; J Ridley and C Goldwin 'Porn Gener@tion: How Britain is getting turned on by sex on the Internet' *Daily Mirror* (London 8 March 2004) 18–19.

the incident, its reporting and the consequent heightened sense of vulnerability felt by the public towards this 'Web of evil'[17] put pressure on policymakers to take action that would regulate online content more effectively.[18]

The Government's decision to outlaw the possession of EPIs through the Criminal Justice and Immigration Act 2008 (CJIA 2008) was a result of the aforementioned pressure. It marked the success of the Longhurst family's campaign and was, more specifically, regarded as a personal victory for Liz Longhurst,[19] marking her 'ownership'[20] of the extreme pornography problem. This ownership meant that Liz Longhurst's arguments were the most influential in shaping how others (the authorities, the media, the public) viewed the problem and its proposed solutions. Writing in *The Sun*, the then Home Secretary David Blunkett characterised Liz Longhurst's 'crusade against violence and pornography on the Internet'[21] as:

> an example of how individuals can be successful in turning policy around and turning tragedy into triumph. . . . [A]ll of us have a duty to ensure that, in a world where there are enough crazy acts already, we don't allow others to incite, stimulate or gratify those with sick minds.[22]

Because of her 'owner' status, Jane Longhurst's mother did not just feature in articles reporting on her daughter's death but also in a number of other news reports about cases allegedly involving the 'dark side'

[17] M Symons, 'Let's put an end to this Web of evil' *Daily Express* (London 6 February 2004) 13.
[18] M Yar, 'Public perceptions and public opinion about Internet crime' in Y Jewkes and M Yar (eds), *Handbook of Internet Crime* (Willan, Devon: 2010) 111.
[19] J Slack, 'Victory for mother who went to war on violent websites' *Daily Mail* (London 30 August 2005) 21; D Mackay 'Snuff it out: Mum of murdered Jane wins violent porn viewing ban' *Daily Mirror* (London 31 August 2006) 16.
[20] Best (n 7).
[21] D Blunkett, 'Liz leads fight to end violent porn' *The Sun Online* (London 1 April 2008), http://www.thesun.co.uk/sol/homepage/news/columnists/blunkett/article988550.ece, accessed 17 November 2010.
[22] Ibid.

of the Internet.[23] By persuading the media, members of the public (the 50,000 signatures of support attest to this) and ultimately the Government of the need to crack down on violent porn websites, the Jane Longhurst Trust and Liz Longhurst in particular 'won' the corresponding *social problems game*[24]: a game that involved various different *activities* and *players* and whose outcome had serious consequences for those targeted by s 63 as well as the British society at large. This was not a game played just for 'fun' but one whose *prize* was the power to lead social change by altering society's views on (extreme) pornography. Whether Liz Longhurst managed through s 63 to bring about the desired social change or this was resisted is debatable. Given that the law on the possession of extreme pornographic material was only recently extended to include images of rape (discussed in Chapter 5), it could be argued that this social change may still be ongoing.

Going back to the role of the news media in this social problems game, the extent to which the concern over the risk posed by violent porn sites was legitimate or completely disproportionate to the actual threat, i.e. the product of a 'media panic' needs to be further explored. In either case, it can be argued that the claims-making process that followed Longhurst's murder and eventually led to the introduction of s 63 would not have been the same, had journalists not paid any or as much attention to the matter. In order to acquire an insight into the impact that Coutts' case as a media product had on the passage of the new legislation, it is essential that the newsworthiness of the story, and more specifically the elements responsible for its high and long-lasting media prominence, be more closely examined.

[23] For her comments on Vincent Tabak's case, see J Johnston 'Corrupted by the Internet' *Daily Mail* (London 31 October 2011) 6–7; for her critique of Google's lack of action in the 'war against extreme porn', see R Mason and M Evans, 'Mother of woman murdered by porn obsessive calls for Google to "get act together"' *Telegraph Online* (London 31 May 2013), http://www.telegraph.co.uk/news/uknews/crime/10091939/Mother-of-woman-murdered-by-porn-obsessive-calls-for-Google-to-get-act-together.html, accessed 23 June 2016.

[24] D Loseke, *Thinking about Social Problems: An Introduction to Constructionist Perspectives* (2nd ed, Aldine de Gruyter, Hawthorne, NY: 2003) 20 (emphasis in the original).

The Newsworthiness of Jane Longhurst's Murder

Murdered by 'The Subhuman'[25]

The facts of Longhurst's case construct a powerful narrative which is newsworthy in its own right, that is, irrespective of the potential reasons behind Coutts' crime and the claims that were subsequently made about the corrupting influence of extreme pornography: this was the story of a 31-year-old woman (Longhurst) strangled to death by a 35-year-old man (Coutts) who then kept her body in a storage unit and had sex with it for three weeks before finally dumping it and setting it alight on a common near Pulborough, West Sussex.[26]

Sex and violence are the two themes that form the core of Longhurst's story, through which the threshold of importance required for an event to make news[27] is met. Death and violence are media-favourite topics.[28] Hall et al. argue that, because violence has evident negative consequences, any crime associated with it can be lifted into news visibility.[29] Nevertheless, violence has become so pervasive in recent years that not all violent incidents receive the same amount of media attention. Unless it presents additional newsworthy elements or offers a fresh angle to an existing set of stories, even a serious violent crime like homicide can be reported as a mundane event that requires minimal explanation or follow-up[30] and that can be 'tucked away on the inside pages'[31] of the newspaper. Violence that is fatal and of a sexual nature is more likely to

[25] Darvill and Arkell, *The Sun* (n 8) 11.

[26] A Jowers 'Music miss strangled and dumped in a lock-up' *Daily Star* (London 15 January 2004) 23.

[27] Jewkes (n 2).

[28] B Naylor, 'Reporting Violence in the British Print Media: Gendered Stories' (2001) 40(2) *The Howard Journal* 180.

[29] S Hall, C Critcher, T Jefferson, J Clarke and B Roberts, *Policing the Crisis* (Macmillan, London: 1978).

[30] Naylor (n 28).

[31] P Schlesigner, H Tumber and G Murdock, 'The media politics of crime and criminal justice' (1991) 42(3) *British Journal of Sociology* 397, 411.

be regarded as extraordinary and therefore deserving increased media attention. That is mainly due to its potential to cause a greater dramatic effect than incidents of 'routine' violence or even titillate readers.[32] Naylor suggests that there is a gender differential in the reporting of sexual violence, stressing the 'heightened visual, sexual or sympathetic appeal'[33] of female over male victims. Journalists' tendency to associate violence with sex is such that the two notions often become inextricably intertwined with each other. Stories of sexual violence feature so frequently and prominently in the news that they are in direct disparity with the number of incidents indicated by official statistics[34] and, to a large extent, responsible for an exaggerated fear of sexual victimisation among women.[35]

Taking all the aforementioned studies into account, it is no surprise that Coutts' case, involving erotic asphyxiation, death and necrophilia, became front-page news. Throughout the relevant press coverage (especially in the reports published after the discovery of Longhurst's body and during Coutts' trial), there is great emphasis placed on the brutal and sexual nature of the committed crime, which aims to shock[36] and clearly echoes pre-existing 'serial-killer' narratives that readers are likely to be already familiar with from popular culture. Due to the increasing penetration of information technologies in our everyday lives, media representations of crime are never mere representations but become an integral part of the reality they represent through a process of 'media looping',[37] that is, by circling back to amplify, distort and redefine the criminal experience.[38]

[32] R Reiner, 'Media made criminality: The representation of crime in the mass media' in M Maguire, R Morgan and R Reiner (eds), *The Oxford Handbook of Criminology* (OUP, Oxford: 2002); Jewkes (n 2).

[33] Naylor (n 28) 183.

[34] J Ditton and J Duffy, 'Bias in the newspaper reporting of crime news' (1983) 23(2) *British Journal of Criminology* 159.

[35] C Greer, *Sex crime and the media: Sex offending and the press in a divided society* (Willan, Devon: 2003).

[36] Ibid.

[37] P Manning, 'Media loops' in F Bailey and D Hale (eds), *Popular Culture, Crime and Justice* (Wadsworth, Belmont, CA: 1998).

[38] J Ferrell, 'Cultural criminology' (1999) 25(1) *Annual Review of Sociology* 395.

This process of media looping is evident in Coutts' case, where the constructed narrative is reminiscent of the cases of notorious serial killers like Ted Bundy and Jeffrey Dahmer or fictional characters like Patrick Bateman (*American Psycho*), Norman Bates (*Psycho*) or Hannibal Lecter (*Silence of the Lambs)*; killers with sexual motives known for targeting innocent, unsuspecting victims (mainly women), raping, interfering with their bodies or even keeping them as trophies; murderers who have had an immense influence on popular culture and who have come to be viewed as personifying evil.[39] Having killed only one person, Graham Coutts cannot be considered a serial killer *stricto sensu*, but it could be argued that the media reporting of his crime draws on the available cultural repertoire of 'serial killer' stories in order to offer an explanation of the nature and social significance of his act.

In accordance with the conventions of the 'serial killer' genre,[40] Coutts is portrayed as being driven by a pathological state of mind which renders him unable to control his deviant sexual urges and for whom the planning, execution and concealment of his attack serves a ritualistic function. Through a gradual process of demonisation, Coutts is transformed from 'a quiet and polite man'[41] who reportedly '[hadn't] got it in him'[42] to kill another person into a 'trophy killer'[43]; a 'fiend'[44]; a 'pervert' who 'murdered [an] attractive teacher, [. . .] stored her body for a month'[45] and 'repeatedly molested [it] in order to fulfil a "bizarre and macabre sexual fantasy"'.[46] Although the construction of

[39] B Jarvis, 'Monsters Inc: Serial killers and consumer culture' (2007) 3(3) *Crime, Media, Culture* 326.

[40] PL Simpson, *Psycho Paths: Tracking the Serial Killer Through Contemporary American Film and Fiction* (Southern Illinois University Press, Carbondale and Edwardsville: 2000).

[41] T Leonard, 'Cops quiz musician over Jane' *Daily Star* (London 26 April 2003) 6.

[42] M Hamilton, 'Graham did not kill Jane' *Sunday Mirror* (London 27 April 2003) 16.

[43] C Gysin, 'The "trophy killer"' *Daily Mail* (London 15 January 2004) 35.

[44] V Allen, 'Strangled for sex . . . Kept dead in a box' *Daily Mirror* (London 15 January 2004) 4.

[45] G Swift, 'Strangled, stored in box . . . then burned' *Daily Express* (London 15 January 2004) 34.

[46] C Milmo, 'Musician kept body of teacher to fulfil macabre fantasy' *The Independent* (London 15 January 2004) 8.

Coutts as an 'ordinary, decent guy'[47] rather than a 'monster'[48] is short-lived (being most prominent in the pre-trial stage of the coverage, that is, between April and August 2003), such differences in Coutts' image between early and later reports are very important: they underline the power of news language to establish 'otherness' through a labelling process that, in this case, consolidates Coutts' status as a sexual deviant, an 'outsider',[49] a 'folk devil'.[50]

A closer look at the headlines of the relevant reports – which have the power to determine the angle of the story, predisposing readers to expect a specific type of narrative[51] – reveals precisely how this narrative of exclusion and dehumanisation[52] was constructed in Coutts' case. When Coutts is identified as a suspect and then arrested and charged for Longhurst's murder, the relevant headlines define him by his gender[53], his profession[54] or his relationship to the victim.[55] He is perceived as being an ordinary member of society, having the ability to develop normal social relationships with other people. His neighbours were reportedly surprised or even shocked by his arrest.[56] At the same time, Coutts' partner and Longhurst's friend Lisa Stephens stated in the *Daily Mail* that she had spoken to Longhurst's partner Malcolm Sentance,

[47] Johnston, *Daily Mail* (n 23) 6.

[48] H Arkell, 'I stand by him' *The Sun* (London 5 February 2004) 11.

[49] H Becker, *Outsiders: Studies in the Sociology of Deviance.* (The Free Press, New York: 1963).

[50] S Cohen, *Folk Devils and Moral Panics: The Creation of the Mods and Rockers* (3rd ed. Routledge, London/New York: 2002 [1972]).

[51] TA van Dijk, *Racism and the Press* (Routledge, London: 1991); H Fulton, 'Analysing the discourse of news' in H Fulton, R Huisman, J Murphet and A Dunn (eds), *Narrative and Media* (CUP, Cambridge: 2005); KS Johnson-Cartee, *News Narratives and News Framing: Constructing Political Reality* (Rowman & Littlefield Publishers, Inc, Lanham, MD: 2005).

[52] M Conboy, *The Language of the News* (Routledge, London/New York: 2013).

[53] A Lee, '*Man*, 35, held over teacher's murder' *Daily Express* (London 26 April 2003) 13; J Burleigh, '*Man* charged with murder of music teacher Jane Longhurst' *The Independent* (London 30 April 2003) 2 (emphases added).

[54] S Wright and R Yapp, '*Musician* quizzed in Jane murder inquiry' *Daily Mail* (London 26 April 2003) 5; M Wallace, '*Guitarist* charged on Jane murder' *The Sun* (London 30 April 2003) 9 (emphases added).

[55] M Sullivan, 'Murdered Jane: Cops quiz *best friend's lover*' *The Sun* (London 26 April 2003) 9; L Fisher, 'Police free *pal's boyfriend*' *Daily Mirror* (London 26 April 2003) 7 (emphases added).

[56] Fisher, *Daily Mirror* (n 55).

who apparently didn't believe that Coutts was guilty either: he told her that '[his] heart [went] out to Graham' and that he saw Coutts' arrest as a result of the police's failure to find the real perpetrator ('they [the police] are grasping at straws').[57] The more the story remains in the news in the months and years following Coutts' arrest, the more his original image as an ordinary person and the doubts about his guilt are revisited, mostly in light of the available incriminating evidence against him. The news construction of the accused as a 'ghoulish murderer'[58] or a 'beast'[59] encouraged an interpretation of the relevant events within a common sense, individualist framework[60], a framework that stressed Coutts' individual responsibility and the risk that his own 'sick perversions'[61] and those of people like him posed to 'innocents like Jane Longhurst'.[62]

As Coutts' 'perversions' come under scrutiny during his trial, they come to be regarded as the most defining feature of his identity, that is, his 'master status'[63] which overrides all his other subordinate statuses. Coutts' sexual deviance therefore serves as the prism through which all his other qualities (for instance, being a man, a musician or a future father) are made sense of. Once this negative master status has been attached to Coutts' public image, a process of 'retrospective interpretation'[64] is triggered through which past events in Coutts' life are examined in a new light because of Longhurst's murder. Going back to the links that Coutts' story presents to the 'serial killer' genre, the fact that he only killed one person becomes, through the reinterpretation of his past behaviour, insignificant. The exploration of his (sexual) past could be

[57] Wright and Yapp, *Daily Mail* (n 54) 5.

[58] J Chapman, 'Ghoulish murderer obsessed with Net porn jailed 30 years' *Daily Express* (London 5 February 2004) 8.

[59] J Lawton, 'Beast in panic claim outrage' *Daily Star* (London 14 December 2015) 10.

[60] Jewkes (n 2).

[61] S Carroll, 'Silent over killer' *Daily Mirror* (London 11 February 2004) 23.

[62] E Verity, 'Yes, we can clean the Web up – and we must' *Mail on Sunday* (London 8 February 2004) 27.

[63] Becker (n 49).

[64] E Schur, *Labeling Deviant Behavior* (Harper & Row, New York: 1971).

essentially regarded as providing the origin story of a serial killer, which documents the awakening of his 'sordid and evil'[65] sexual fantasies.

Coutts may have not killed any of his previous sexual partners, but the message communicated through the narration of their experiences is that they are lucky to be alive, since they could have easily met the same fate as Longhurst. Similarly, it is also inferred that, a 'sex monster'[66] like Coutts would, in all probability, not stop at Longhurst murder but would continue to kill until apprehended and forced to stop by the police. In her interview for the *Sunday Mirror*,[67] Coutts' former girlfriend Sandra Gates describes him as a 'control freak', who could be very 'charming' on the surface, but was a 'sex-obsessed weirdo' underneath. She states that he enjoyed choking her during sex and peeping at her daughters as they bathed. She also talks about Coutts' feeling that one day he would 'rape, strangle and kill a woman' and how he turned down her advice to seek medical help. The authors of the article draw attention to the fact that Gates looked 'eerily similar' to Longhurst (a similarity also substantiated on a visual level), thereby suggesting that, just like serial killers,[68] Coutts had a specific pattern for choosing his victims. 'I was shocked but not surprised that he finally killed someone', Gates concludes. 'Everyone says it could have been me. He is an evil, perverted psychopath and is where he belongs, in prison. Hopefully he will never be able to hurt another woman again.' Moreover, Coutts' girlfriend at the time of Longhurst's murder, Lisa Stephens, told the *Sunday People*[69] that, although she could see that he was nervous about the police investigation, she had assumed that this was because the victim (Jane Longhurst) was his friend and not because he was the one who had killed her. Finally, Georgina Langridge, whom Coutts had allegedly tried to

[65] T Judd, 'Teacher's "sordid and evil" murderer jailed for life' *The Independent* (London 5 February 2004) 11.

[66] Chapman, *Daily Express* (n 58).

[67] M O'Riordan and G Hodgson, 'Exclusive: My hell with sex strangler love' *Sunday Mirror* (London 8 February 2004) 8–9.

[68] Simpson (n 40).

[69] P Gallagher and C Collins, 'My Internet sex pervert lover killed my best pal and defiled her body . . . but I still took our baby twins to visit him in jail' *Sunday People* (London 8 February 2004) 28–29.

film with his video camera in a swimming pool changing room, regards Longhurst's murder six years later as an inevitable consequence of the magistrates' failure to uphold the charges against him in her case. She expresses her conviction that, had Coutts been punished for the incident in 1997, this might have inhibited his sexual fantasies. In a prophetic letter she wrote to the judges after Coutts' acquittal, she invited them to 'accept responsibility for any further offences this person [would] commit'.[70]

A direct consequence of this labelling process is that Coutts is, as explained earlier, ultimately stripped of all his 'human' qualities and ultimately becomes a 'subhuman'.[71] This view echoes Lombroso's[72] ideas on the atavistic origin of criminal behaviour, that is, it regards criminals like Coutts as throwbacks to a more primitive stage of human evolution. The presumed atavistic motivation of the offender constitutes yet another element that Coutts' story has in common with 'serial killer' narratives.[73] From this perspective, people like Coutts are considered to be beyond rehabilitation and therefore the main justifications invoked for punishing them are retribution[74] and incapacitation.[75] Coutts' 'subhuman' status as well as the retributive and incapacitative functions of his punishment is clearly reflected in the most recent reports of our sample: these were published in December 2015 and involve Coutts' £40,000 compensation claim against the Prison Service for his delayed transfer to hospital over a panic attack. This claim is described as 'ludicrous', 'outrageous', 'preposterous', 'ridiculous'.[76]

[70] D Pilditch, 'I warned the courts about this disgusting murderer. They did NOTHING' *Daily Express* (London 24 February 2004) 27.

[71] Darvill and Arkell, *The Sun* (n 8) 11.

[72] C Lombroso, 'Insanity and crime, 1876, 1884 and 1889' in N Rafter (ed), *The Origins of Criminology: A Reader* (Routledge, Abingdon: 2009).

[73] Simpson (n 40).

[74] 'I hope he rots in prison for the rest of his life'; Sue Barnett, quoted in H Weathers, 'My sister was murdered by a man obsessed with violent internet porn. So why won't anyone help me to close these websites down?' *Daily Mail* (London 30 September 2004) 54.

[75] '[T]aking men like Coutts out of circulation could prevent another tragedy like Jane's'; Leader, *Daily Mirror* (n 13) 6.

[76] S Whittingham, 'Make prisoners hand ludicrous compensation payouts to crime victims, says MP' *Express Online* (London 21 December 2015), http://www.express.co.uk/news/uk/628693/Make-prisoners-hand-compensation-payouts-crime-victims, accessed 20 June 2016.

Coutts is a 'continuing danger to society'[77] who 'forfeited his human rights'[78] when he strangled Jane, states Liz Longhurst.

An Ideal Victim?

Coutts' negative image is, throughout the relevant news coverage, juxtaposed with that of his victim, Jane Longhurst, who is chiefly portrayed as a 'kind, honest [. . .] young woman who'd never hurt a soul'[79]; a 'talented violinist'[80] and a 'popular teacher'[81]; 'someone who enriched the lives of those who met her'[82]; 'a diamond who sparkled from every angle'[83]; a person 'so trusting and caring'[84] that was 'easy bait'[85] for men like Coutts. This construction of Coutts' victim as the 'perfect girl'[86] further reinforces the 'human interest' appeal[87] of the story by stressing the social impact of Longhurst's death. Readers are invited to follow a human drama[88] which, beyond the perpetrator and his victim, also involves a grieving family seeking justice for its murdered member[89] as well as the apparently long list

[77] Liz Longhurst quoted in R Bishop, 'Mum of murdered teacher "appalled" by killer's compensation claim because he was "forced to wear prison uniform"' *Mirror Online* (London 13 December 2015), http://www.mirror.co.uk/news/uk-news/mum-murdered-teacher-appalled-killers-7003834, accessed 20 June 2016.

[78] Liz Longhurst quoted in A Crick, 'Mother's blast over killer's bid for cash' *The Sun* (London 15 December 2015) 17.

[79] V Allen, 'Killed by the Internet: Jane's family demand vile porn Web ban as murderer gets life' *Daily Mirror* (London 5 February 2004) 1, 4.

[80] S Bird, 'How internet fuelled a sick sex obsession' *The Times* (London 5 February 2004) 5.

[81] Milmo, *The Independent* (n 46) 8.

[82] Judd *The Independent* (n 65) 11.

[83] Chapman, *Daily Express* (n 58) 8.

[84] Weathers, *Daily Mail* (n 74) 54.

[85] Johnston, *Daily Mail* (n 23) 7.

[86] Darvill and Arkell, *The Sun* (n 8) 11.

[87] Jewkes (n 2) 53.

[88] P Golding and P Elliott, 'News values and news production' in S Thornham, C Bassett and P Marris (eds), *Media Studies: A Reader* (3rd ed, New York University Press, New York: 2009).

[89] Longhurst, *Mail on Sunday* (n 9).

of Longhurst's friends, colleagues and pupils trying to come to grips with her death.[90]

The extensive coverage of her murder indicates that Jane Longhurst ranks high in the 'hierarchy of victimisation'[91] although not to the point of being regarded as an ideal victim. Christie argues that, in order for someone to acquire 'ideal victim' status, he or she needs to be weak (as opposed to the offender who is big and bad); to be carrying out a respectable project; to be blameless for his or her victimisation and to not have any personal relationship with the offender.[92] Had Longhurst been a young child or an elderly woman or had she, at least, been attacked outside the school where she was working by a complete stranger, this would, in all probability, have facilitated the construction of her murder as an unambiguous case of ideal victimisation. However, the facts that she was Coutts' friend, that she would often go swimming with him and that she had for some reason gone to Coutts' flat before she died[93] raise questions over how close the relationship between the two actually was. Since the victim died in a private space and as a result of a private (sexual) act, the speculation over the precise circumstances of her death is inevitable. This speculation adds a mystery dimension to the story,[94] which gradually moves from the initial 'whodunnit' to the subsequent 'whydunnit'. If Longhurst was having a sexual relationship with Coutts, and if she consented to asphyxial sex the day she died, she does not qualify as an ideal victim; in fact, even the slightest doubts over what happened that day suffice to prevent her from obtaining this status.

Just like with Coutts, Longhurst's sex life also comes under scrutiny in the wake of her death in order to ascertain whether she was, at least partly, also to blame for it. On the one hand, Coutts' criminal defence

[90] N Adams, 'Man held again over Jane murder' *Daily Express* (London 29 April 2003) 8; S Morris, 'Killer was obsessed by porn websites' *The Guardian* (London 5 February 2004) 5.

[91] C Greer, 'News media, victims and crime' in P Davies, P Francis and C Greer (eds), *Victims, Crime and Society* (Sage, London: 2007) 22.

[92] N Christie, 'The ideal victim' in E Fattah (ed), *From Crime Policy to Victim Policy* (Macmillan, Basingstoke: 1986) 19.

[93] Fisher, *Daily Mail* (n 12).

[94] C Wardle, 'Crime reporting' in B Franklin (ed), *Pulling Newspapers Apart: Analysing Print Journalism* (Routledge, London: 2008).

was based on the argument that Longhurst's death was an accident during consensual erotic asphyxiation.[95] Longhurst's former colleague Ruth Davis claimed that the victim had confided to her that she found breath-control sex exciting,[96] while another colleague, Tanya Clark, suggested that Longhurst was having relationship problems with Malcolm Sentance.[97] On the other hand, two former lovers of Jane Longhurst (Lincoln Abbotts and Michael Downe) insisted that they had a 'normal' sexual relationship with her that involved no asphyxia (as opposed to Coutts' deviation from sexual norms).[98] Even His Hon Judge Hone, QC, told Coutts at retrial that 'he had no doubt the jury was sure it was inconceivable that Jane Longhurst had consented to what [he had done]'.[99]

As explained earlier, the dominant discourse around Longhurst's death favoured her construction as an 'innocent victim' killed by an 'evil predator'. Nevertheless, with reference to Christie's work, the issue of adult consent in what society regards as deviant sexual practices is too controversial for everyone to agree that Longhurst is an ideal victim, and the same argument can also be made for Coutts' 'ideal offender' status. This controversy, which goes beyond Longhurst's murder and is also reflected in the consequent debate on the criminalisation of extreme pornography,[100] would have been absent had this been a 'stranger-danger' case of paedophilia. The prevalent cultural perception of children as vulnerable and unable to make independent judgements[101] would, in that case, ensure a public consensus on the 'idealness' of the victim. It could, however, be suggested that, although Jane

[95] D Sapsted, 'Sex strangling "was a mistake"' *The Daily Telegraph* (London 24 January 2004) 6.
[96] V Allen, 'Strangled tutor "liked kinky sex"' *Daily Mirror* (London 28 January 2004) 18; M Darvill, '*"Murder"* victim found strangle-sex exciting' *The Sun* (London 28 January 2004) 12 (emphasis added).
[97] Anonymous, '"Murder girl" woe' *The Sun* (London 29 January 2004) 23.
[98] D Rice, 'I can't talk about it' *Daily Express* (London 22 January 2004) 30.
[99] Bishop, *Mirror Online* (n 77).
[100] T Utley, 'Please, Mr Blair, we don't need any more laws that can't be enforced' *Daily Mail* (London 1 September 2006) 12.
[101] KH Robinson, *Innocence, Knowledge and the Construction of Childhood* (Routledge, Abingdon: 2013).

Longhurst is not an ideal victim herself, her mother is: indirectly victimised by Coutts' act, Liz Longhurst is old and blameless for what happened; she does not have a personal relationship with Coutts; she is carrying out a righteous project (requesting that her daughter's killer and other like-minded individuals posing a threat to social order be punished).[102] From this perspective, the possession of these attributes by Liz Longhurst renders her daughter's victimisation less contentious. As a result, Jane Longhurst still manages to achieve the 'ideal victim' status, even if only by proxy.

The Visual Appeal of the Story

The visual appeal of Longhurst's murder is also directly related to the amount of media attention it received. Images constitute an essential element of twenty-first-century crime reporting which contributes significantly to the construction of unequivocal, personalised stories focusing on the emotions, actions and reactions of the depicted individuals.[103] In the contemporary, visual-driven culture,[104] news stories – and by extension the events they report on – often turn into spectacles produced for 'infotainment' purposes, that is, aiming to not just inform but also entertain the targeted audience.[105] The availability of an image can determine whether an event will break into news visibility.[106] News photographs appear to be accurate representations of reality and to have 'naturally' selected themselves[107]; in fact, however, they promote an interpretation of the reported events within a dominant

[102] Christie (n 92).

[103] C Greer, 'Crime and media: Understanding the connections' in C Hale, A Hayward, A Wahidin and E Wincup (eds), *Criminology* (OUP, Oxford: 2013); Jewkes (n 2).

[104] E Carrabine, 'Just Images: Aesthetics, ethics and visual criminology' (2012) 52(3) *British Journal of Criminology* 463.

[105] R Surette, *Media, Crime and Criminal Justice* (5th ed, Wadsworth Belmont: 2015).

[106] C Greer and E McLaughlin, '"Trial by media": Riots, looting, gangs and mediatised police chiefs' in J Peay and T Newburn (eds), *Policing, Politics, Culture and Control: Essays in Honour of Robert Reiner* (Hart Publishing, Oxford: 2012).

[107] S Hall, 'The determination of news photographs' in C Greer (ed), *Crime and Media: A Reader* (Routledge, Oxon: 2010[1973]) 132.

ideology framework and, in interaction with the article's headline and lead paragraph, establish the angle of the story.[108]

The accompanying photographs in the coverage of Longhurst's murder play a vital role in indicating the key actors of the constructed news narrative (Coutts, Jane Longhurst and, to a lesser extent, Coutts' previous partners and Longhurst's mother, sister and boyfriend) and in establishing the killer/victim dichotomy. The photographs of Jane Longhurst included in our sample add to the dramatic effect of the story by highlighting that the deceased was a young, photogenic woman who could have had her whole life ahead of her, had this not been abruptly ended by Coutts. She is depicted playing the viola[109], smiling happily[110], relaxing on a chair with her hands behind her head[111], having a picnic[112], wearing a gown at her graduation ceremony.[113] At the same time, Coutts' photographs show him looking serious at the camera[114], smiling[115], holding tightly his electric guitar[116], captured on CCTV carrying the large cardboard box where he had kept Longhurst's body and buying the petrol can he used to burn it.[117]

Kitzinger draws attention to the widely shared expectation that sex offenders look different from 'normal people'; an expectation largely deriving from their stereotypical media portrayal as being 'loners', 'dirty',

[108] Fulton (n 51).

[109] Lee, *Daily Express* (n 53); Jowers, *Daily Star* (n 26).

[110] M Darvill, 'Killer's 9 visits to body of his victim' *The Sun* (London 15 January 2004) 15; Slack, *Daily Mail* (n 19).

[111] Swift, *Daily Express* (n 45).

[112] C Gysin and B Taylor, 'The killer honed on the Web' *Daily Mail* (London 5 February 2004) 17.

[113] L Pritchard and G Dhaliwal, 'It took us less than 24 hours to cripple the two grotesque pornographic websites that drove a pervert to strangle this teacher. Why does the Government insist nothing can be done to clean up the Internet?' *Mail on Sunday* (London 8 February 2004) 8.

[114] Judd, *The Independent* (n 65); Morris, *The Guardian* (n 90).

[115] S Bird, 'Teacher strangled "to satisfy macabre sexual fantasy"' *The Times* (London 15 January 2004) 3; R Smith and V Allen, 'Killed by the Internet: Play dead for me' *Daily Mirror* (London 5 February 2004) 5.

[116] E Shank, 'Jane's killer had 50 snuff pictures on his computer' *Daily Star* (London 22 January 2004) 14; D Sapsted, 'Teacher 'strangled for sexual kicks and kept in box' *The Daily Telegraph* (London 15 January 2004) 11.

[117] Allen, *Daily Mirror* (n 79); Darvill and Arkell, *The Sun* (n 8).

'obviously mentally unstable' or 'having staring eyes' so that 'when you see a photo you think, oh, yeah, I can tell'.[118] Greer maintains that the seeming 'normality' of the sex offender in some cases is even more disquieting and has a greater capacity to shock than his or her conformity to the stereotype.[119] That is because it suggests that such 'wicked' individuals are not necessarily strangers living in the margins of society and being easily distinguishable from ordinary people but people who are ostensibly normal and whom we may know and trust in our everyday lives.

As far as Coutts' photographs included in the relevant news reports are concerned, the *Sunday Mirror* story on (Longhurst look-alike) Sandra Gates' ordeal as Coutts' girlfriend contains an old photograph of a quite different looking (younger, bespectacled, overweight) Coutts which could possibly be seen as fitting the preceding stereotype.[120] However, in all the other photographs of the sample, Coutts appears to be normal; his 'sex killer' status is only established through the interaction with the textual elements of the corresponding articles (especially the headlines and captions), which add a second level of signification to the accompanying images[121]: through captions like 'Killer: Perverted monster Graham Coutts' and the use of terms like 'Ghoulish Murderer' in the headline,[122] readers are encouraged to interpret Coutts' apparently neutral expression as apathy. His smiling face next to the headline 'Play dead for me' and the caption 'Pervert'[123] could be regarded as lack of remorse for what he did. The electric guitar held by Coutts[124] becomes a phallic symbol[125]

[118] J Kitzinger, 'A sociology of media power: Key issues in audience reception research' in G Philo (ed) *Message Received* (Longman, London: 1999).

[119] Greer, *Sex Crime and the Media* (n 35).

[120] O'Riordan and Hodgson, *Sunday Mirror* (n 67).

[121] R Barthes, 'The rhetoric of the image' in S Heath (ed), *Image-Music-Text* (Fontana Press London: 1977).

[122] Chapman, *Daily Express* (n 58) 8.

[123] Smith and Allen, *Daily Mirror* (n 115) 5.

[124] Allen, *Daily Mirror* (n 44); S Morris, 'Man kept dead victim as trophy in storage unit' *The Guardian* (London 15 January 2004).

[125] S Waksman, *Instruments of Desire: The Electric Guitar and The Shaping of Musical Experience* (Harvard University Press, Cambridge, MA: 1999); D Pattie, *Rock Music in Performance* (Palgrave Macmillan, Basingstoke: 2007).

denoting the sexual nature of his crime. The CCTV footage of Coutts removing a box from a storage facility and buying petrol becomes incriminating evidence; it brings 'authenticity' to the story and allows readers to follow the 'trail of [Longhurst's] murder',[126] offering an insight into the relevant police investigation. The meaning attached to the printed images through the captions (that this is not just *a* box but *the* box 'containing Jane's body'; that the petrol can that 'evil' Coutts so 'calmly' buys was used to burn her corpse) increases the shock value of the story by bringing readers face-to-face with the practicalities of Coutts' gruesome and carefully orchestrated attack. This CCTV footage reinforces readers' sense of horror, repugnance and powerlessness to prevent the events unfolding before their eyes, while satisfying their voyeuristic curiosity[127] just like true crime TV shows or fictional crime dramas (e.g. *Making a Murderer* or *CSI*) would.

Beyond the individual (visual and textual) elements of each news story, it is mainly their placement on the page and concatenation which permits the development of a coherent and eloquent narrative[128] that favours a particular explanation of (or 'frames'[129]) the relevant events. In that sense, the interaction between the serious faces of Coutts, Liz and Jane Longhurst, the implicating CCTV footage from the storage facility, the respective captions ('Twisted', 'Pain', 'Body in box') and the headline 'Aghast' in the *Daily Mirror* article by Allen[130] provides readers with all the pieces of the puzzle required to understand what happened, who was responsible and what the consequences of the reported incident were. Similarly, Jane Longhurst's seemingly stern look in the *Daily Express* article

[126] Allen, *Daily Mirror* (n 79) 4.

[127] Jewkes (n 2).

[128] R Barthes, 'The photographic message' in S Heath (ed), *Image-Music-Text* (Fontana Press, London: 1977); G Kress and T van Leeuwen, 'Front pages: (The critical) analysis of newspaper layout' in A Bell and P Garrett (eds), *Approaches to Media Discourse* (Blackwell Publishers, Oxford: 1998); Fulton (n 51).

[129] E Goffman, *Frame Analysis: An Essay on the Organization of Experience* (Northeastern University Press, Boston: 1986) 21.

[130] V Allen, 'Aghast: Heartbreak of mum as daughter's pervert killer wins murder appeal' *Daily Mirror* (London 20 July 2006) 35.

by Rice[131] and the direction to which her head is turned (to the right, where the picture of a smiling Coutts has been placed) suggest that his claim about being unable – as stated in the headline – to talk about the incident because it was 'too upsetting' should be met with scepticism.

Moreover, apart from the ways in which the visual components of each story interact with each other, their interaction directly with the reader is equally, if not more, important. The inclusion of images where the depicted individuals 'break the fourth wall'[132] by looking directly at the camera and, by extension, the reader has the power to heighten the appeal of the story and get the reader much more actively involved in the construction of meaning. Pictures of Coutts and Longhurst looking straight at us do not merely facilitate personalisation but also play on the notion of 'cultural proximity'[133]: they place the committed crime within readers' existing framework of values and concerns, thereby highlighting its 'relevance' to them. It could be argued that all the reports on Longhurst's murder ultimately invite their consumers to participate in a ritual moral exercise,[134] allowing them to reaffirm their collective identity as law-abiding citizens by condemning the deviant acts of people like Coutts. However, when readers meet the victim's, the perpetrator's or the bereaved mother's gaze, this exercise becomes much more straightforward, personal and unambiguous. They are no longer observing the reported incidents from a distance, but are encouraged to put their morality to the test; to react to a matter that should be everyone's concern and choose the side of righteousness; to feel sorrow for the 'talented and much-loved young lady'[135] who lost her life; to be repulsed by 'perverted sex killer'[136] Coutts; to empathise with 'devastated'[137] Liz Longhurst and applaud

[131] Rice, *Daily Express* (n 98) 30.

[132] PJ Auter and DM Davis, 'When characters speak directly to viewers: Breaking The Fourth Wall in Television' (1991) 68(1–2) *Journalism & Mass Communication Quarterly* 165, 165.

[133] Greer, *Sex Crime and the Media* (n 35); Jewkes (n 2).

[134] J Katz, 'What makes crime news?' (1987) 9(1) *Media, Culture and Society* 47.

[135] Swift, *Daily Express* (n 45) 34.

[136] G Hodgson, 'Ex love of body in box killer moves back to murder house' *Sunday Mirror* (London 6 February 2005) 33.

[137] Fisher, *Daily Mirror* (n 55) 7.

her perseverance to have extreme pornographic sites banned in the UK.[138] 'I want to stop another murder,' states Longhurst's sister, Sue Barnett, in the title of Cowan's article in *The Guardian*.[139] A close-up picture of her covers the entire left side of page 11. Its caption reads 'After hearing what I heard in court I couldn't stick my head in the sand [about the risks of extreme pornography].' With her eyes facing the camera, she gives the impression of looking directly at the reader as if asking 'Can *you*?'

The portrayal of Longhurst's murder as everyone's concern was primarily based on claims about the allegedly detrimental influence of the Web on men like Coutts. The role of the Internet as a key component of the relevant news coverage and the constructed 'extreme pornography' problem will be the focus of the following section.

One Sex Crime Story to Rule Them All?

By paraphrasing JRR Tolkien,[140] the above title suggests that, as far as its media coverage is concerned, Coutts' case is not yet another sex crime story. As mentioned earlier, Longhurst's murder was in its own right extraordinary enough to meet the threshold of importance required to make national news when it occurred (April 2003). However, what is initially regarded as extraordinary in media terms soon becomes ordinary with journalists shifting their attention to 'new' crimes.[141] Such 'media fatigue'[142] seems to be minimal in Longhurst's case which, although no longer receiving the same amount of coverage as in the past, is still 'alive'

[138] Slack, *Daily Mail* (n 19).

[139] R Cowan, 'G2: I want to stop another murder' *The Guardian* (London 16 September 2004) 10–11.

[140] 'One ring to rule them all' is a line inscribed on the well-known magic ring of invisibility forged by the Dark Lord Sauron in JRR Tolkien, *The Lord of the Rings (Part 1): The Fellowship of the Ring* (HarperCollins Publishers, London: (2008 [1954]).

[141] P Schlesinger and H Tumber, *Reporting Crime: The Media Politics of Criminal Justice* (Clarendon, Oxford: 1994).

[142] J Kitzinger, 'The gender politics of news production: Silenced voices and false memories' in C Carter, G Branston and S Allan (eds), *News, Gender and Power* (Routledge, London: 1998).

and keeps coming back to the news more than a decade after Coutts committed his crime.[143] It is therefore vital that the reasons behind the news media's long-lasting interest in this crime be more closely examined. This prolonged media life of Coutts' story could be partly attributed to the fact that it took years of litigation for his case to be finalised. The constructed media narrative follows Coutts through the different stages of the criminal justice process (arrest, trial, appeal, retrial), informing readers of the latest developments on the case. It thereby adds novelty[144] to the story while establishing continuity[145] with previously published reports on Longhurst's murder. Nevertheless, it can be argued that the latter incident primarily owes its extended media presence to its association with the 'dark side' of the Internet.

'Killed by the Internet'[146]

Without its Internet angle and aside from all the other elements contributing to its newsworthiness (discussed in the previous sections), Longhurst's murder would have probably been treated as a one-off incident, and journalists' interest in it would have died down much earlier. In other words, had it not been for the claims about Coutts' obsession with extreme pornographic sites as well as Liz Longhurst's relentless – and ultimately successful – campaign against them (which led to the introduction of the s 63 offence), it is unlikely that the case would have acquired its aforementioned 'signal' function.[147] Taking the preceding *Lord of the Rings* reference a step further, the Internet 'ring' in Longhurst's case (i.e. the framing of her death as an Internet problem) achieves the opposite effect from Tolkien's magic artefact. Instead of making those 'wearing' it invisible, it allows them, as will be demonstrated here, to attain a

[143] The latest reports in our sample were from December 2015.

[144] S Chibnall, *Law and Order News* (Tavistock, London: 1977).

[145] J Galtung and M Ruge, 'The structure of foreign news: The presentation of the Congo, Cuba and Cyprus Crises in Four Norwegian Newspapers' (1965) 2(1) *Journal of Peace Research* 64.

[146] Allen, *Daily Mirror* (n 79) 1.

[147] Innes (n 14); see also M Innes, 'Signal crimes and signal disorders: Notes on deviance as communicative action' (2004) 55(3) *The British Journal of Sociology* 335.

heightened level of visibility in the corresponding claims-making process: in particular, to draw attention to and gain legitimacy for their claims; to make connections to previous criminal cases and suggest that they are all part of the same problem; finally, to prompt policymakers to respond to this putative problem and influence the way in which subsequent cases come to be made sense of.

The 'Evil Web' frame, which constructs Longhurst's murder as a product of Coutts' fixation with extreme pornography that is easily accessible online, is not present in the early reports of the relevant coverage which focus mostly on the ferociousness of the committed crime. This frame only appears and starts acquiring news prominence right after Coutts' conviction: on 5 February 2004, it features on all the newspapers of our sample which gradually become more and more interested not on Coutts' individual pathology but on how his deviant sexual fantasies are allegedly catered for by the Internet. Headlines like 'How internet *fuelled* a sick sex obsession',[148] '*Killed by* the Internet',[149] 'Killer was *obsessed by* porn websites'[150] or 'The killer *honed* on the Web'[151] (emphases added) downplay human agency and largely present the Internet as being the true culprit in Longhurst's murder. This view is supported by Longhurst's family: Liz Longhurst acknowledges the key role that the 'vile' and 'monstrous' websites visited by Coutts played in her daughter's murder; similarly, Malcolm Sentance states at the end of Coutts' trial that 'Jane would still be here today if it was not for the internet.'[152] The constructed 'Evil Web' frame, which is further developed in the subsequent months and years, consists of three main components[153]: (a) grounds (identifying the nature of the problem – 'evil men like Coutts' nurture their 'bizarre and macabre sexual fantasies

[148] Bird, *The Times* (n 80) 5.
[149] Allen, *Daily Mirror* (n 79) 1.
[150] Morris, *The Guardian* (n 90) 5.
[151] Gysin and Taylor, *Daily Mail* (n 112) 16–17.
[152] S Bird, 'Murder teacher's mother demands online porn ban' *The Times* (London 5 February 2004) 5.
[153] J Best, *Threatened Children: Rhetoric and Concern about Child-Victims* (University of Chicago Press, Chicago: 1990); Best (n 7).

[. . .] by surfing online for sick images')[154]; (b) warrants (explaining why action needs to be taken – easy access to images of extreme sexual violence could '[make] the perverse desires of men like Coutts appear somehow normal and acceptable',[155] thereby increasing the risk of victimisation for vulnerable women like Jane Longhurst); and (c) conclusions (specifying what needs to be done – 'How many innocents like Jane Longhurst have to die before the Government and the Internet industry' decide to 'clean the Web up' from such 'grotesque' and 'depraved' websites?).[156]

Through its construction as part of a broader Internet problem, Coutts' crime is elevated to a new level of newsworthiness. By placing Longhurst's murder within this 'Evil Web' frame, journalists build on the increasing contemporary concern over the effect the Internet has on its users (especially on children) and its pre-existing public perception as a criminogenic medium.[157] This allows them to present the incident within the familiar context of cyber-deviance while adding a novel element to it, i.e. that of extreme pornography. In a process of convergence, parallels are drawn to a number of other incidents (involving cannibalism, suicide, violence against women and, most frequently, paedophilia),[158] which are also assumed to be somehow related to the Internet. Within the created 'signification spiral',[159] these apparently similar cases come to be regarded as just the 'tip of the iceberg' in a much

[154] Symons, *Daily Express* (n 17) 13.

[155] C O'Brien, 'How Sue created good from tragedy' *Mail on Sunday,* (London 12 November 2006) 33.

[156] Verity, *Mail on Sunday* (n 62) 27.

[157] DS Wall, 'Criminalising cyberspace: The rise of the Internet as a "crime problem"' in Jewkes and Yar, *Handbook of Internet Crime* (n 18); M Yar, 'Public Perceptions and Public Opinion about Internet Crime' in Jewkes and Yar, *Handbook of Internet Crime* (n 18).

[158] For the links established between Coutts's crime and the respective cases of Armin Meiwes, Carina Stephenson, Vincent Tabak, Nathan Matthews, Jamie Reynolds, Mark Bridger, Stuart Hazell, see Verity, *Mail on Sunday* (n 62); P Bracchi, 'Murdered by porn' *Mail Online* (London 12 December 2013), http://www.dailymail.co.uk/news/article-2522846/High-profile-cases-child-killers-hooked-extreme-porn-just-tip-iceberg.html, accessed 24 June 2016; F Gibb, 'Calls grow for internet porn curbs' *The Times* (London 3 December 2013) 8; T Morgan, 'Another young name on list of deaths linked to violent porn' *The Daily Telegraph* (London 12 November 2015) 20.

[159] Hall et al. (n 29).

deeper problem posed by a morally corrupting medium which in its current state resembles an 'ungovernable Wild West'.[160]

It is very important to look more closely at the links established through the use of the 'Evil Web' frame between extreme adult pornography and child abuse imagery. The association of Coutts' case with those of child killers allegedly obsessed with child pornography like Mark Bridger and Stuart Hazell, let alone killers who had been found in possession of both violent adult and child pornography like Vincent Tabak,[161] has been crucial to the construction of the 'extreme pornography' problem. 'My daughter, too, was strangled by a man obsessed with violent images' states Liz Longhurst in the wake of Joanna Yeates' murder, and it is this statement that makes the subheading of a two-page spread entitled 'Corrupted by the Internet' in the *Daily Mail* of the 31 October 2011.[162] Similarly, emphasising the alleged similarities between the individual cases even more in a *Mail Online* article two years later, Longhurst writes:

> Coutts, Tabak, Hazell and Bridger looked at this [pornographic] stuff – then went off and killed innocent women and children. How can there not be a link? We are all affected by things we see – to deny that is nonsensical.[163]

Such claims are indicative of the rhetorical technique of 'piggybacking',[164] which involves the attempts often made by claims-makers to connect a new troubling condition to a well-established problem in order to add legitimacy to their claims. By piggybacking extreme adult pornography on child pornography, Liz Longhurst and the journalists

[160] Verity, *Mail on Sunday* (n 62) 27.

[161] Mark Bridger and Stuart Hazell killed five-year-old April Jones and 12-year-old Tia Sharp, respectively, in 2012. Vincent Tabak killed 25-year-old Joanna Yeates in 2010. See also n 158.

[162] Johnston, *Daily Mail* (n 23) 6–7.

[163] L Longhurst, 'Violent online porn drove pervert to kill my Jane' *Mail Online* (London 31 May 2013), http://www.dailymail.co.uk/news/article-2334115/Violent-online-porn-drove-pervert-kill-Jane-Mother-81-believes-daughter-alive-internet-giants-listened-calls-ban-sick-websites.html, accessed 26 June 2016.

[164] Loseke (n 24).

making similar connections clearly build on the dominant perception of children as innocent and vulnerable, trying to benefit from the consequent public consensus on the unacceptability of child pornography.[165] Since there is no such consensus for adult pornography (even of an extreme nature), the invocation of child pornography in this case suggests that the risks posed by the former are equally serious, thereby rendering the calls for the criminalisation of such material less contentious.

Jane Longhurst's categorisation as a victim of the Internet – and not just of the person who physically took her life – indicates that the number of individuals that have already been affected by this problem is actually much higher. Aside from the number of names included in this victims' list, the view supported by the aforementioned process of convergence that the latter list comprises not just of young women but also of children adds to the appeal of the story and allows for an even greater dramatic effect to be achieved. That is because children represent innocence and hope for the future and, as a result, their victimisation comes to be seen as symptomatic of society's moral barometer.[166] At the same time, the impression created that not just Coutts but a group of 'like-minded fantasists'[167] are out there 'feed[ing] their deviant sexual cravings from cyberspace'[168], and that it is only a matter of time before they seek to act these out in real life stresses the supposed risk for potential future victims. The near-ubiquity of the Internet in contemporary Western societies[169] means that no one – let alone vulnerable young women and children – is safe from such individuals. The sense of increased vulnerability that permeates the relevant news reports facilitates the construction of the matter as everyone's problem and

[165] P Jenkins, *Beyond Tolerance: Child Pornography on the Internet* (New York University Press, New York: 2001); Robinson (n 101).

[166] Jewkes (n 2).

[167] J McCartney, 'Do we really have a right to view rape?' *The Sunday Telegraph* (London 4 September 2005) 28.

[168] Barnett, *Mail on Sunday* (n 9) 27.

[169] A Cavanagh, *Sociology in the Age of the Internet* (McGraw Hill/Open University Press, Maidenhead: 2007).

underlines the alleged need for urgent action. '[O]ne thing's for sure', Madeley and Finnigan conclude in their *Daily Express* article:

> [Extreme pornographic] sites are on the increase and they are corrupting bigger and bigger numbers of men. Net abuse leads to real abuse, as surely as night follows day. If we don't act to stop it, we will all rue the day.[170]

This statement constitutes a typical example of the technological determinism[171] which permeates the coverage of Jane Longhurst's murder and is at the core of her mother's fight against violent pornography. Liz Longhurst's calls for greater Internet control in the aftermath of her daughter's death – which are supported in leading articles in *The Sun* (2004),[172] the *Daily Mirror*,[173] the *Daily Express*[174] and the *Sunday People*[175] as well as in several other reports in the remaining newspapers of our sample[176]– focus more on the Internet medium per se rather than the individual motivations of its users. It is, to a large extent, assumed that Coutts' crime was a result of 'his lust fuelled by a constant *diet* of Internet pornography'[177]; of Coutts '*feasting* on [extreme pornography] websites'[178]; of the Web '*nurtur [ing]*'[179] and '*feeding* the basest *appetites*'[180] of sexual deviants like him (our emphases). All these edible metaphors reinforce Coutts' deviant status

[170] R Madeley and J Finnigan, 'Shut down these sick websites' *Daily Express* (London 7 February 2004) 20.

[171] M Wykes, 'Harm, suicide and homicide in cyberspace: Assessing causality and control' in Jewkes and Yar *Handbook of Internet Crime* (n 18).

[172] Leader, 'The Sun says: Web of evil' *The Sun* (London 5 February 2004) 8.

[173] Leader, *Daily Mirror* (n 13).

[174] Symons, *Daily Express* (n 17).

[175] Leader, 'Voice of The People: We must halt Net feeding evil lust' *Sunday People* (London 8 February 2004) 8.

[176] Bird, *The Times* (n 80); Cowan, *The Guardian* (n 139); Anonymous, 'Ban pervert sites' *Daily Star* (London 25 February 2004) 13; Ridley and Goldwin, *Daily Mirror* (n 16); Verity, *Mail on Sunday* (n 62); Pook, *The Daily Telegraph* (n 8); J Lewis, 'Sadism, masochism and misogyny' *The Independent* (London 2 September 2006) 34.

[177] Chapman, *Daily Express* (n 58) 8.

[178] Fisher, *Daily Mail* (n 12) 28.

[179] L Wilson, 'This murder trial showed me the dangers of violent pornography' *The Guardian* (London 27 November 2008) 45.

[180] Utley, *Daily Mail* (n 100) 12.

(he cannot live without extreme pornography just like normal people cannot live without food) and portray his behaviour as an inevitable consequence of the consumption of such material online.

Exploring the Intricacies of the 'Evil Web' Frame

The view that Coutts killed Longhurst in his attempt to imitate the pornographic images and videos he had been accessing on the Web echoes the perennial question of media effects research and especially the 'hypodermic syringe' model. According to this model, the mass media have an immediate effect on human behaviour, which can be likened to that of a drug injected into a vein.[181] Longhurst's mother and sister state that they acknowledge the Internet's potential to be a 'wonderful tool which connects people in many positive ways'[182] and do not consider it responsible for directly causing Jane's death; instead, they argue that their main concern about the Internet is the risk of it serving as an 'echo chamber'[183]: a virtual space where individuals with a pre-existing propensity for violence like Coutts could share their deviant fantasies with other like-minded users, eventually coming to regard these as normal and living them out in the physical world.[184] This view that exposure to extreme pornography online increases the risk of offending posed by those already predisposed to sexual violence was, as seen in Chapter 3, also supported in the consultation process by The British Psychological Society.[185] This added credibility[186] to the claims that had previously been made by the

[181] W Lippman (1922) cited in R Petty, P Briñol and J Priester, 'Mass media attitude change: Implications of the elaboration likelihood model of Persuasion' in J Bryant and MB Oliver (eds), *Media Effects: Advances in Theory and Research* (Routledge, New York: 2009) 126.

[182] Barnett, *Mail on Sunday* (n 9) 27.

[183] C Sunstein (2001) cited in N Newman, W Dutton and G Blank, 'Social media and the news: Implications for the Press and Society in M Graham and W Dutton (eds), *Society and the Internet* (OUP, Oxford: 2014) 136.

[184] Cowan, *The Guardian* (n 139).

[185] The British Psychological Society, *Response to the Home Office consultation: 'On the possession of extreme pornographic material'* (The British Psychological Society, London: 2005), http://apps.bps.org.uk/_publicationfiles/consultation-responses/Extreme%20Pornography%20response.pdf, accessed 23 June 2016.

[186] Loseke (n 24).

Longhurst family. Nevertheless, the argument that easy access to violent Internet pornography could merely trigger rather than cause real-life sex crimes like Longhurst's murder is inconsistent with claims made by Liz Longhurst that '[i]f the sites had not existed, [. . .] her daughter would still be alive'.[187] The same could also be said for Brighton Pavilion MP David Lepper, who campaigned alongside Longhurst for a crackdown on extreme pornography websites and is quoted stating that '[the Web] led to Jane's death'.[188]

In addition, the influence of the Internet on Coutts' crime is also emphasised by its portrayal as a result of 'excitation transfer'. Excitation transfer theory looks at the short-term effects of media violence.[189] It is based on the idea that, because the physiological arousal induced by exposure to violent media content dissipates slowly, this can transfer to and intensify the individual's emotional reaction to real-life situations occurring immediately after viewing, thereby increasing the likelihood of aggression. As far as Coutts is concerned, the fact that he had spent two hours looking at websites dedicated to necrophilia the day before Longhurst's murder and that he kept returning to these sites intermittently in the period he was visiting Longhurst's body in the storage facility[190] could be seen as indicating a transfer of his aroused emotions from the virtual to the physical world. From this perspective, the relationship between watching violent pornographic videos online and behaving violently in real life is far more than a mere correlation. 'Internet porn is,' as Glover puts it in the *Daily Mail*, 'a poison seeping through society' whose consequences are unclear until another 'depraved' man decides to turn his online 'murder fantasies' into reality.[191]

The quest to establish a causal link between media and actual violence in Coutts' case, which frequently plays on the confusion between

[187] Pook, *The Daily Telegraph* (n 8) 4.

[188] A Hirsch, 'How to police popslash' *The Guardian* (London 4 July 2009) 28.

[189] D Zillmann, 'Television viewing and physiological arousal' in J Bryant and D Zillmann (eds), *Responding to the Screen: Reception and Reaction Processes* (Erlbaum, Hillsdale: 1991).

[190] McCartney, *The Sunday Telegraph* (n 167).

[191] S Glover, 'Internet porn is a poison seeping through society. We can, and must, stop its spread' *Daily Mail* (London 31 October 2011) 14.

correlation and causality, may have focused on the risks of the new Internet medium but, in fact, reflects an issue 'as old as the hills'.[192] From the alleged links between comic books and juvenile delinquency[193] to *The Sun*'s 'Burn Your Video Nasty' campaign in the wake of Bulger's murder[194] and the concerns expressed over violent video games after the Columbine High School shooting or Stefan Pakeerah's murder,[195] media violence has been a recurring theme in the public agenda and one that tends to attract a lot of news media attention.[196] The use of the 'Evil Web' frame in the coverage of Longhurst's death provides an uncomplicated explanation to the problem, which neglects the lack of conclusive evidence regarding media effects[197] and overlooks more intricate issues involving the potential cathartic effect of vicarious participation in media violence[198]; the deeper social roots of sexual violence; the extent to which the socialisation process is responsible for the alleged propensity for violence of men like Coutts; the boundaries of freedom of expression and the subjectivity of terms like 'extreme' and 'obscene.'[199]

Such complex issues do not receive as much attention as the supposed Internet risks in the relevant news coverage.[200] Commenting on Jane

[192] Lewis, *The Independent* (n 176) 34.

[193] F Wertham, *Seduction of the Innocent* (Rinehart, New York: 1954).

[194] J Petley, *Film and Video Censorship in Modern Britain* (Edinburgh University Press, Edinburgh: 2011).

[195] J Newman, *Videogames* (2nd ed, Routledge, London: 2013).

[196] T Sasson, *Crime Talk: How Citizens Construct a Social Problem* (Aldine de Gruyter, New York: 1995).

[197] D Gauntlett, 'The worrying influence of "Media Effects" studies' in C Greer (ed), *Crime and Media: A Reader* (Routledge, Oxon: 2010).

[198] B Kutchinsky (1973) cited in D Gunter, *Media Sex: What are the Issues?* (Routledge, London: 2014) 162.

[199] J Beyer and J Petley 'Is it time to abolish obscenity legislation?' *The Guardian Online* (London 5 March 2009), https://www.theguardian.com/commentisfree/libertycentral/2009/mar/05/pornography-obscenity-legislation, accessed 24 June 2016.

[200] Some notable exceptions include L Longhurst, 'Beautifully haunting and ambiguous? Not to me. Pictures like these killed my Jane' *Mail on Sunday* (London 12 September 2004) 38–39; J Smith, 'Why do men want to hurt women?' *Independent on Sunday* (London 8 February 2004) 23; McCartney, *The Sunday Telegraph* (n 167); D Rowan, 'Censor the internet? Try catching the wind' *The Times* (London 31 August 2005) 16; J Bakewell, J Bindel, H Combe, J Coutinho and

Longhurst's 'legacy' in *The Guardian*, Baroness Bakewell and Jeremy Coutinho of feminist organisation OBJECT argue that, although one could access violent pornography online without any harmful effects, the introduction of the new offence is an important step in the fight against the objectification of women and the 'mainstreaming of a porn aesthetic'.[201] The issue of gendered violence is also raised in the aftermath of Longhurst's death in a number of other feature articles: Smith maintains in *The Independent* that, despite the Internet's contribution to the proliferation of violent pornography, its content should be considered a symptom rather than a cause in cases like Longhurst's murder.[202] Such crimes, she notes, have been occurring long before the invention of the Web and are the by-product of the widespread misogyny embedded within the dominant patriarchal culture. In a similar vein, Lewis stresses in the same paper the need to fight the 'social cancer' of misogyny. Unlike Smith, however, she believes that the Internet plays a key role in fostering it. Therefore, restricting access to extreme pornographic material that has the power to '[infiltrate] your imagination and [make] you a worse person' is crucial in tackling this issue.[203] Furthermore, even Liz Longhurst,[204] whose campaign focused on the 'dark side' of the Web, acknowledges that the problem is, in fact, not limited to the Internet but involves a broader cultural glamorisation of sexual violence. Her reaction to Elle Macpherson's advertising campaign, depicting faceless models in their lingerie holding knives and mopping up blood from the floor, is indicative of this position. She considers such pictures, associating sex with violence with a view to titillating viewers, to be equally threatening to the material Coutts had accessed online. The fact that they appear in

B Greer, 'G2: The legacy of Jane Longhurst' *The Guardian* (London 1 September 2006) 18–19; Lewis, *The Independent* (n 176); C Sarler, 'Please get interfering government ministers out of our bedrooms' *The Observer* (London 3 September 2006) 11; Utley, *Daily Mail* (n 100); A Billen, 'Sex, guys and videotapes' *The Times* (London 17 December 2007) 19; Leader, 'An intrusive and unnecessary law' *The Independent* (London 30 December 2008) 30; M Synon, 'Laws on porn won't combat sexual violence' *Daily Mail* (London 11 September 2006) 14.

[201] Bakewell et al., *The Guardian* (n 200) 19.

[202] Smith, *Independent on Sunday* (n 200).

[203] Lewis, *The Independent* (n 176) 34.

[204] Longhurst, *Mail on Sunday* (n 200).

mainstream media, she concludes, do not make these images any more acceptable but only far more pervasive.

With regard to the Government's decision to outlaw the possession of extreme pornography, Holly Combe of Feminists Against Censorship and playwright Bonnie Greer discuss in *The Guardian* the risks that this encloses[205]; particularly, that it could potentially criminalise legitimate, private sexual behaviour between consenting adults and that the emphasis it places on the corrupting influence of the Internet essentially absolves killers of responsibility for their actions. Likewise, in its leading article of the 30 December 2008, *The Independent* criticises the new legislation for being vaguely worded and for placing unnecessary restrictions on people's sex lives, thereby creating 'sexual freaks' and promoting the Government's conservative agenda.[206] However, Orr's article in the same newspaper the following day offers a rather different view on the matter.[207] She supports the new law which she regards as aiming to only limit people's actions and not their thoughts. She highlights that in Britain a person does not by law have the right to consent to receive an act that will cause extreme harm for sexual pleasure and thus dismisses the concerns about the new law criminalising the depiction of 'perfectly legal' acts as 'absolute rubbish'. In contrast, Sarler[208] condemns the 'vote-grabbing' politics behind the introduction of the new legislation, while stressing that any evidence of a cause/effect relationship between media and real violence is circumstantial. Exposure to extreme Internet content is, in fact, more likely to prevent those with violent urges from acting on them and to help them keep these under control. At the same time, in a very interesting article that deviates from the usual anti-Internet *Daily Mail* perspective, Utley[209] argues that all of us are exposed to images of violence (from Christian iconography to Renaissance art to violent films and video games) on an everyday basis without turning into

[205] Bakewell et al., *The Guardian* (n 200).
[206] Leader, *The Independent* (n 200) 30.
[207] D Orr, 'A law that limits people's actions, not their thoughts' *The Independent* (London 31 December 2008) 22.
[208] Sarler, *The Observer* (n 200) 11.
[209] Utley, *Daily Mail* (n 100).

killers; this therefore indicates that the violent behaviour of people like Coutts is a product not of media influence but of deeper psychological factors. The author voices his concern about the enforceability of the new law which will, in his view, expect uncertain judges and juries to decide on what is extreme pornography and what is not. He maintains that it will criminalise harmless men resorting to pornography out of curiosity or sexual inadequacy and will place an unnecessary burden on the – already busy with more serious offenders – police and prison services.

As far as the implementation of the new legislation is concerned, Rowan suggests that any effort to censor the Internet is as easy as trying to 'catch the wind'[210]; that is because the websites allegedly posing a threat are often hosted abroad, and the UK authorities therefore have no jurisdiction to shut them down. Most importantly, contrary to child pornography, there is no international consensus on the risks of extreme adult pornography nor clarity over the key elements distinguishing it from regular pornography. Rowan argues that further attention needs to be paid to the 'dark side' of human nature rather than that of the Internet medium and highlights the potential ramifications of only having access to Government-approved online content in what is considered to be a democratic society. He concludes that, since the 'extremity' of pornographic content is ultimately in the eye of the beholder, the new law could eventually permit an uncontrollable criminalisation of any consensual adult sexual practices regarded by the 'moral majority' as unacceptable.

Going back to the impact that the adopted Internet angle had on the appeal of the constructed narrative, there is no doubt that the concerns expressed over the 'dark side' of the Web in Coutts' case could be regarded as the latest incantation of a 'blame the media' journalism.[211] However, such a view does not adequately reflect the crucial role played by the Internet in the relevant news coverage. In their study on the

[210] Rowan, *The Times* (n 200) 16.

[211] M Wykes, 'Harm, suicide and homicide in cyberspace: Assessing causality and control' in Jewkes and Yar, *Handbook of Internet Crime* (n 18).

reporting of Web-related suicides, Thom et al. identify the Internet as the 'x-factor' that determines the newsworthiness of a suicide incident.[212] A similar argument could be made about the role of the Internet in Coutts' case and its ability to bring together and present all the other components of the story in a new light, thereby constructing a far more coherent, emotionally powerful and ultimately newsworthy narrative. Although Longhurst's murder would have made news irrespective of any Internet claims, the preceding analysis suggests that its media life would have probably been much shorter and less prominent had the 'Evil Web' frame not been employed. It is only through this frame that the relevant events reach a whole new level of importance and unpredictability and that a single case of sexual violence acquires a 'signal' function: it comes to be seen as part of a broader and much more serious problem which puts vulnerable women and children at risk, a problem that deserves everyone's attention and that we all have a moral responsibility to respond to as soon as possible. By highlighting the extent of the problem and the alleged need for immediate solutions, the construction of Coutts' crime as an Internet problem allows the promotion of a conservative agenda (involving greater regulation of online content and by extension of citizens' sexual behaviour) in a way that its alternative construction as a one-off case could probably never do. For all these reasons, in cases like Longhurst's murder, the Internet could be considered the 'x-factor' boosting the newsworthiness of the reported events or even be elevated to a cardinal news value in itself.

Media Justice in Context

The ideological role of the news media in explaining Coutts' behaviour, particularly in constructing Longhurst's murder as the result of an Internet problem rather than an isolated incident, needs to be considered within the broader context of the 24/7 news mediasphere and the

[212] K Thom, G Edwards, I Nakarada-Kordic, B McKenna, A O'Brien and R Nairn, 'Suicide online: Portrayal of website-related suicide by the New Zealand media' (2011) 13(8) *New Media & Society* 1355.

demands and challenges that contemporary media professionals are faced with. From a political economy perspective, the production of media content is a market-driven process where decisions are made based on which stories are most likely to attract the public's attention and therefore generate the most profit. With profit being their ultimate goal, privately owned media institutions tend to avoid taking commercial risks and rely primarily on previously successful formulae, favouring stories that are often emotionally charged, easy to grasp, unambiguous and in line with the dominant ideology.[213] This tendency is evident in Coutts' case, which is, as shown in the preceding sections, largely constructed in the news as an appealing 'human interest' story about a bereaved mother fighting a morally justified battle against the 'evil' individuals and websites responsible for her daughter's death. The links to serial killer narratives establish Coutts' otherness, while the use of the 'Evil Web' frame stresses the relevance of the problem to the general public, bringing it to everyone's doorstep. According to Simpson,[214] while serial killers are portrayed as outsiders, they are at the same time projections of society's deepest fears so, in this case, quasi-serial killer Graham Coutts and those like him could be deemed to be reflecting contemporary British society's increasing preoccupation with the 'dark side' of cyberspace. Any alternative views[215] deviating from the preceding dominant narrative are downplayed in the relevant coverage. This could be attributed to the risk that their focus on complex or controversial aspects of the matter could impede the story's commercial success by confusing and disengaging readers.

Coutts was not solely tried at Lewes Crown Court and, following his House of Lords appeal, the Old Bailey. He was also 'tried' in a news

[213] P Golding and G Murdoch, 'Culture communications and political economy' in J Curran and M Gurevitch (eds), *Mass Media and Society* (3rd ed, Arnold, London: 2000).

[214] Simpson (n 40).

[215] Particularly, views regarding the relevant events (whether Jane Longhurst had consented to asphyxia sex), the effects of extreme pornography (the possibility that watching such material is harmless), the cultural normalisation of violence against women (whether sexual violence is endemic in our society), the regulation of online content (whether it is possible to prevent access to websites hosted abroad) or the legitimacy of the new law (whether it places unnecessary restrictions on consensual adult sexual practices); for more information, see the previous section.

media-led process in the 'court of public opinion'.[216] While engaged in the commercial and ideological exploitation[217] of Coutts' case, the news media often act as proxies for public sentiment and seek to administer a parallel form of justice, aiming to complement or overhaul that administered by formal criminal justice institutions.[218] In this 'trial by media', which plays on readers' moral sensibilities confirming crime news' function as a 'ritual moral workout',[219] there is no requirement for due process and impartiality. This allows a sensationalist, one-dimensional exploration of Coutts' actions and motives, which diminishes him to a 'subhuman' status[220] and largely constructs the accused as 'guilty until proven innocent'.[221] Longhurst's death serves both as an indication and a product of Coutts' alleged atavism. Presented with materials like CCTV footage or the claims made by Longhurst's family and Coutts' past girlfriends irrespective of whether these have been admitted in court or not, readers are invited to leave the restrictive formalities of criminal proceedings aside, to discover the alleged truth behind Coutts' crime, reach their own 'verdict' and reaffirm their moral values by condemning his behaviour.

Apart from demonising Coutts and portraying him as deserving to be punished severely for his crime,[222] this process of media justice also highlights the perceived failures of the criminal justice institutions dealing with his case. 'He's evil. Why cut his jail by four years?' asks Liz Longhurst expressing her anger at the Court of Appeal's decision to reduce Coutts' minimum sentence from 30 to 26 years.[223] Similarly, the

[216] C Greer and E McLaughlin, 'Trial by media: Policing, the 24–7 News mediasphere, and the politics of outrage' (2011) 15(1) *Theoretical Criminology* 23.

[217] Cohen (n 50).

[218] H Machado and F Santos, 'The disappearance of Madeleine McCann: Public drama and trial by media in the Portuguese Press' (2009) 5(2) *Crime, Media and Culture* 146.

[219] Katz (n 134) 68.

[220] Darvill and Arkell, *The Sun* (n 8).

[221] Greer and McLaughlin (n 216) 27.

[222] 'I hope he doesn't kill himself. He should suffer,' states Jane Longhurst's partner Malcolm Sentance in Darvill and Arkell, *The Sun* (n 8) 11.

[223] R Smith, 'He's evil. Why cut his jail by four years? Anger of murdered Jane's family' *Daily Mirror* (London 22 January 2005) 35.

Daily Express story[224] on Coutts' alleged secret past as a 'swimming pool Peeping Tom' does not just reinforce Coutts' status as a 'pervert', but it also stresses the fact that the supposed victim (Georgina Langridge) had, as the title of the article states, 'warned the courts about this disgusting murderer [and] [t]hey did NOTHING' (emphasis in the original). Coutts' recent lawsuit against the Prison Service also raises questions about the current criminal justice system, which is seen as favouring perpetrators over victims. Commenting on Coutts' compensation claim, criminologist David Green of the Civitas think-tank maintains that 'our convicted criminals make a mockery of the justice system by inventing injuries and then playing games with the system. We should not give them the time of day'.[225]

As the focus of the relevant 'trial by media' expands to include all offenders like Coutts, journalists in newspapers like the *Mail on Sunday* do not limit themselves to debating the need for and effectiveness of the new law. Instead, they get actively involved in the fight against extreme pornography by 'crippling the [...] grotesque pornographic websites' that allegedly drove Coutts to kill Longhurst.[226] Pritchard and Dhaliwal describe how they had two sites shut down by informing their billing companies of the extreme pornographic nature of their content; the companies then removed their services from these websites, rendering them unable to accept payments from subscribers. The authors argue that restricting access to such websites even when hosted abroad is far from impossible. They suggest that any claims to the contrary on the Government's part show an extraordinary and morally unacceptable unwillingness to act. In fact, the *Mail on Sunday*'s efforts to close down 'two of the most foul, sadistic and brutal sites'[227] in that way are also praised by Labour MP Stephen Pound and the then Junior

[224] Pilditch, *Daily Express* (n 70) 27.

[225] A Martin and A Dolan, 'SICKENING: Porn addict who strangled young teacher is demanding a £40,000 payout from the taxpayer – after having a panic attack in jail' *Daily Mail* (London 14 December 2015) 5.

[226] Pritchard and Dhaliwal, *Mail on Sunday* (n 113) 8.

[227] L Pritchard 'Blunkett and US law chief join war on killer websites' *Mail on Sunday* (London 29 February 2004) 43.

Home Office Minister Paul Goggins.[228] The first proposes that the Government should consider adopting the *Mail*'s approach in order to fight extreme Internet pornography effectively, while the second underlines the need for international cooperation. In the aftermath of its campaign, the *Mail on Sunday* regards the Government's decision to target those accessing extreme pornographic websites in the UK but not their foreign-based owners as a wasted opportunity.[229] According to Liz Longhurst, while the new law is 'a step in the right direction', it 'does not go far enough'.[230] Supporting the newspaper's initiative, she suggests that '[w]e must shame the Government into taking action against the payment processing firms'. At the same time, Internet companies like Google, Facebook and Microsoft are criticised for not sufficiently contributing to this fight against violent online pornography on the pretext that they have to respect users' freedom of expression. 'Where was my daughter's freedom?', asks Liz Longhurst who urges these firms to 'get their act together'.[231] Similarly, Government adviser John Carr calls for Google to show 'moral leadership'[232] and restrict access to pornographic sites as this would encourage other companies to follow suit.

Concluding Remarks

This chapter looked at the social reaction to Coutts' crime and the subsequent debate over the risks of extreme pornography as these were reflected in the relevant news coverage. Concluding this discussion on the role of the news media in the construction of the extreme

[228] For more information, see also HC Deb 23 February 2004, vol 418, cols 9–10.

[229] Anonymous, 'Chance to curb Net porn being wasted' *Mail on Sunday* (London 20 March 2005) 44.

[230] Liz Longhurst quoted ibid.

[231] J Halliday and A Topping, 'Net firms under fire for "paltry" donations to anti-abuse charity: Companies must help protect children, says MP: Google, Facebook and Microsoft in spotlight' *The Guardian* (London 1 June 2013) 9.

[232] T McTague, 'Google, search your conscience' *Daily Mirror* (London 1 June 2013) 19.

pornography problem, it is important to examine whether the introduction of s 63 could be considered the result of a moral panic. A concept that has been very influential in the study of deviant behaviour and most frequently associated with Stanley Cohen's (2002 [1972]) classic work on the clashes between Mods and Rockers in 1960s Britain,[233] 'moral panic' is defined by Murji as a:

> disproportional and hostile social reaction to a condition, person or group defined as a threat to societal values, involving stereotypical media representations and leading to demands for greater social control and creating a spiral of reaction.[234]

The news analysis of this chapter has revealed that Coutts' case led to a heightened level of anxiety over the alleged effects of violent pornography. This anxiety was rather volatile: it reached its peak in February 2004 (when the potential impact of the Internet on Coutts' behaviour first came under scrutiny), temporarily subsided and then reappeared again and again in the months and years that followed (in the context of Coutts' retrial and the Longhurst family's campaign) until it was finally institutionalised with the introduction of the CJIA in 2008. Through their media coverage, the relevant facts were, to a large extent, sensationalised and presented within a broader signification spiral,[235] which allowed Coutts' crime to be portrayed not as a one-off incident but as part of widespread social problem; specifically, that of cyber-deviance. Coutts himself and other sexual deviants like him and the Internet medium in general were demonised, and great emphasis was placed on the risk they supposedly posed to society's moral values. The perceived risk and sense of vulnerability led to calls for stricter regulation of online content, which eventually translated into the criminalisation of EPIs.

[233] Cohen (n 50).

[234] K Murji, 'Moral panic' in E McLaughlin and J Muncie (eds), *The Sage Dictionary of Criminology* (2nd ed, Sage, London: 2006) 250–51.

[235] Hall et al. (n 29).

Nevertheless, although Coutts' case presents several of the key elements of a moral panic identified by Goode and Ben-Yehuda (concern, hostility, volatility)[236] and Garland (the moral dimension of the social reaction and the symptomatic quality of the deviant conduct),[237] it fails to meet two other equally important criteria: consensus and disproportion. Despite journalists' and other key claims-makers' efforts to draw parallels between child and extreme adult pornography in Coutts' case, the existing consensus over the harms of the first[238] does not always extend to also cover the potential harms of the second. Unlike child pornography, the criminalisation of the possession of material that potentially depicts sexual practices between consenting adults becomes the subject of controversy. Although this controversy is, as discussed in this chapter, often downplayed in favour of other less complex explanations (such as the need to prevent 'perverts' like Coutts from killing innocent people), it is still present and clearly reflected in the relevant news coverage. As to whether the reaction to Coutts' case has been proportionate to the objective threat posed by sexual deviants like him and extreme pornographic sites, there is no definitive answer. That is because research attempting to establish a (causal) link between media and actual violence remains largely inconclusive.[239] It is therefore impossible to know with certainty how many of those accessing violent pornography online will end up imitating it in the physical world. However, as Jenkins argues, the fact that we are often unable to be fully aware of the nature and seriousness of the risks lurking in a dynamic new environment like cyberspace does not mean that these should be underestimated.[240] From this perspective, the risks of extreme pornography that become the main source of concern in the aftermath

[236] E Goode and N Ben-Yehuda, *Moral Panics: The Social Construction of Deviance* (2nd ed, Wiley-Blackwell, Chichester: 2009).

[237] D Garland, 'On the concept of moral panic' (2008) 4(1) *Crime Media Culture* 9.

[238] Jenkins (n 165).

[239] Gauntlett (n 197).

[240] Jenkins (n 165).

of Jane Longhurst's death may be real or exaggerated, and it is precisely due to this inability to make judgements about the objective threat[241] that the criminalisation of extreme pornography through s 63 cannot be dismissed as the result of a mere moral panic. The constituent elements of the extreme pornography offence are examined in detail in Chapter 5.

[241] S Ungar, 'The rise and (relative) decline of global warming as a social problem' (1992) 33(4) *The Sociological Quarterly* 483.

5

Deconstructing the Elements of the s 63 Offence

Introduction

The offence of possession of EPIs in part 5, ss 63–68 of the Criminal Justice and Immigration Act 2008 (CJIA 2008), came into force on 26 January 2009 by Order of the Secretary of State.[1] This chapter analyses the elements of the offence and considers its development since it came into effect.

The Elements of the Offence

Section 63 of the CJIA 2008 makes it an offence to be in possession of an EPI, unless it is an 'excluded' image under 64 or a defendant can benefit from one of the defences available under ss 65 and 66. For the purposes of the 2008 Act, the term 'image' includes not only still but also moving images (such as those in films), produced by any means.[2]

[1] CJIA 2008 (Commencement No 4 and Saving Provision) Order 2008, SI 2008/2993.
[2] CJIA 2008, s 63(8)(a).

A.K. Antoniou, D. Akrivos, *The Rise of Extreme Porn*,
DOI 10.1007/978-3-319-48971-1_5

The term also includes data, stored by any means, which is capable of conversion into an image.[3] Therefore, materials available on computers, mobile phones and any other electronic devices are covered, even if they may have never been uploaded on the Internet.

Pornographic

An image is pornographic 'if it is of such a nature that it must reasonably be assumed to have been produced solely or principally for the purpose of sexual arousal'.[4] The mere existence of a sexual dimension does not automatically mean that it must reasonably be assumed to have been produced *solely* or *principally* for that purpose. This provision simply enquires what reasonable assumption could be made in relation to the purpose of the production of the image in question and does not draw subtle distinctions between the producer, the sender and any ultimate recipient of the image. 'The circumstances in which [an image is] received are immaterial.'[5] Thus, whether the pornography threshold has been satisfied is neither a question of the producers' intention nor a question of the defendant's sexual arousal[6], it is a matter for the magistrate or jury to establish by examining the image in question. The drawback of this approach is that there might be considerable inconsistency among jurors as to what can 'reasonably be assumed' to be pornographic. Although a jury trial can serve as a potential safety net for an individual's freedoms and rights,[7] it is also deemed 'an unpredictable business'.[8] Expert evidence 'should not normally be required'[9] to prove this element,

[3] Ibid s 63(8)(b).

[4] Ibid s 63(3).

[5] *R v B* [2016] EWCA Crim 474, [15] (McCombe LJ).

[6] Ministry of Justice (MOJ) Circular 2009/01, *Possession of extreme pornographic images and increase in the maximum sentence for offences under the Obscene Publications Act 1959: Implementation of section 63–67 and section 71 of the Criminal Justice and Immigration Act 2008* (Criminal Law Policy Unit, London: 2009) [8].

[7] Lord P Devlin, *Trial by Jury* (Stevens, London: 1956).

[8] J Baldwin and M McConville, *Jury Trials* (Clarendon Press, Oxford: 1979) 132.

[9] CPS Prosecution Policy and Guidance, Extreme Pornography, http://www.cps.gov.uk/legal/d_to_g/extreme_pornography/, accessed 15 July 2016.

the Crown Prosecution Service (CPS) states, but it may reasonably be inferred that such evidence may be sought in exceptional circumstances.

Section 63(4) clarifies that where an individual image, as it is held in a person's possession, forms part of a larger series of images, the issue of whether it is of a pornographic nature must be determined with reference to the context in which it appears. The context within which the image is assessed is the context in which the defendant holds the image 'at any given time, not its original context'.[10] Where an image is an integral part of a narrative (e.g. a documentary or an artistic exhibition), which if taken as a whole could not reasonably be assumed to have been produced solely or principally for the purpose of sexual arousal, it must not be taken to be pornographic even if, were it considered in isolation, the opposite conclusion would be drawn.[11]

The scope of the term 'produced' in the definition of the term 'pornographic' is unclear. Narrowly interpreted, it would require the court to consider whether an image was created for that particular purpose. Widely interpreted, it would bring within its scope an image which may not have been originally taken for the purposes of sexual gratification but appears to have been edited to this end. It is proposed that the reference to evaluating an image 'as it is found in a person's possession' in s 63(4) favours the wider interpretation.[12]

Finally, the pornography threshold should eliminate concerns that the provision may have an impact on works of cultural or artistic merit, or other works of public interest. It was stated in the 2005 consultation paper that there was no intention to capture medical or scientific material, educational, artistic, mainstream broadcast entertainment or news footage.[13] Thus, a public good defence, similar to s 4 of the Obscene

[10] MOJ Circular 2009/01 (n 6) [11].

[11] CJIA 2008, s 63(5).

[12] M Sikand (ed), *Blackstone's Guide to The Criminal Justice and Immigration Act 2008* (OUP, Oxford: 2009) 80.

[13] Home Office, *Consultation: On the Possession of the Extreme Pornographic Material* (Home Office Communications Directorate, London: 2005) [37]. A similar approach was adopted in relation to the offence of possession of 'prohibited' images of children in the Coroners and Justice Act 2009; see Ministry of Justice (MOJ) Circular 2010/06, *Coroners and Justice Act 2009* (Criminal Law Policy Unit, London: 2010) 22.

Publications Act 1959 (OPA 1959), is not necessary, but would add clarity to the provisions and ensure consistency across the obscenity law.

Extreme

From the combination of ss 63(6)(a), 63(6)(b) and 63(7) of the 2008 Act, it follows that this element comprises the following four components:

1. The image 'portrays in an explicit and realistic way' any of the acts listed in point 1.2.

1.1. 'Portrays'

Rather than requiring that an image actually shows a specific act, s 63(7) requires that the image in question 'portrays' such an act. Consequently, prosecutors do not have to establish that the act actually occurred. Legislating in the former way would create considerable challenges for them, especially when such material is produced abroad or its source cannot be identified. This requirement can bring within the scope of the law an image which portrays what looks like serious harm being caused to a person's breasts, for example, when in reality no harm has been caused. Such an image would be illegal for anyone to possess, except for the participants, subject to the defence of participation in consensual acts (discussed below).

1.2. 'Explicit and realistic'

Both terms take the ordinary dictionary definition.[14] Some guidance in relation to the term 'explicit' is provided by the original consultation paper, which states that the offence is intended to cover 'activity which can be clearly seen and is not hidden, disguised or implied'.[15] 'Realistic' covers portrayals which seem real to life, plausible and believable. It aims to capture those scenes which 'appear to be real and are convincing, but which may be acted'.[16] By virtue of this requirement, fake portrayals

[14] MOJ Circular 2009/01 (n 6) [17].

[15] Home Office, *Consultation* (n 13) [38].

[16] Ibid [38].

involving artificial blood or poorly created human body props are likely to be excluded.[17]

2. An extreme image must portray any of the acts set out in subsection (7). These are 'explicit and realistic' portrayals of an act which:

2.1. threatens a person's life[18]

'Life-threatening' is not defined in s 63(7)(a). The ordinary English meaning applies, and it is a question of fact for the magistrate or the jury. This could include depictions of hanging, suffocation, strangulation or sexual assault involving a threat with a weapon[19] or perhaps abuse of implements with life-threatening consequences. The CPS legal guidance also specifies that in assessing whether an activity portrayed falls within this category, 'there should be no speculation of what may happen next or what could occur'.[20] Rather, it 'should be obvious on the face of the image'.[21] So, a picture of an individual wearing a fetish mask for example would not necessarily be covered. A claim that an image portrays the transmission of a sexual infection that can have 'life-threatening' consequences for the infected person's health[22] is arguably reduced to a mere conjecture and would therefore be immaterial.

2.2. results, or is likely to result, in serious injury to a person's anus, breasts or genitals[23]

'Serious injury' is not specified in the 2008 Act either. This is also a matter for the magistrate or the jury to determine. The term is not intended to link to the case law concerning 'grievous bodily harm' under ss 18 and 20 of the Offences Against the Person Act 1861 (OAPA 1861).[24]

[17] Sikand (n 12) 81.

[18] CJIA 2008, s 63(7)(a).

[19] CJIA 2008, Explanatory Notes, para 457.

[20] CPS Prosecution Policy and Guidance, Extreme Pornography (n 9).

[21] Ibid.

[22] The English courts have recognised that the transmission of a sexual infection that has serious, perhaps life-threatening, consequences for a person's health can amount to 'grievous bodily harm'; *R v Dica* [2004] QB 1257.

[23] CJIA 2008, s 63(7)(b).

Section 63(7)(b) requires in particular that the injury has to be caused to a person's anus, breasts or genitals. References to parts of the body also include body parts that have been 'surgically constructed',[25] in particular through gender reassignment surgery. The selective identification of body parts may result in proscribing some images but not others that portray serious injury to an individual's buttocks or other parts of the body.[26] McGlynn and Ward suggest that the 'oddly precise'[27] physiological specification of anus, breasts and genitals demonstrates a narrow understanding of the harm caused by extreme pornography, which, according to them, is not limited to violence against specific body parts.[28]

Serious injury could include the insertion of sharp objects (e.g. stabbing) or the mutilation of breasts or genitals.[29] The CPS highlights that intricacies may arise in proving that images portraying 'fisting'[30] fall within the serious injury category and invites prosecutors to approach such cases 'with particular care'.[31] Although the CPS guidance includes a note of caution about dealing with images depicting this practice, it is possible that prosecutors will still put forward cases of this type.

The CPS reminds prosecutors that cases relating to images portraying 'serious injury' involve 'finely balanced'[32] decisions. It notes that it would *not* normally be in the public interest to prosecute s 63(7)(b) cases in isolation, unless an aggravating factor exists. When assessing whether such a factor is present, regard should be paid to: (a) the extent of the circulation of the images; (b) whether clear and credible evidence of exploitation of the

[24] MOJ Circular 2009/01 (n 6) [16].

[25] CJIA 2008, s 63(9).

[26] Unless such images fall within s 63(7)(a) CJIA 2008 ('life-threatening').

[27] C McGlynn and I Ward, 'Pornography, pragmatism and proscription' (2009) 36(3) *J Law & Soc* 327, 349 (fn 143).

[28] Ibid.

[29] CJIA 2008, Explanatory Notes, para 457.

[30] Fisting is the sexual practice which involves the insertion of the entire hand, and sometimes part of the forearm, into the vagina (vaginal fisting) or anus (handballing or anal fisting) of a sexual partner. The medical terms for these practices are 'brachiovaginal eroticism' and 'brachioproctic eroticism' respectively.

[31] CPS Prosecution Policy and Guidance, Extreme Pornography (n 9)

[32] Ibid.

participants is available. This reflects Liberty's argument that the justification behind the offence should be the protection of participants who 'have not acted of free will, have not consented or have otherwise been coerced';[33] (c) the number of images involved; and (d) any previous conduct that may constitute bad character evidence.[34] Importantly, what is required by s 63 is likelihood of serious injury, as opposed to just a risk.[35] The CPS makes clear that the threshold for prosecuting such cases 'should be a high one'[36] and therefore trivial or transient injuries which include bruises and grazes should not be covered. Similar to life-threatening acts, the type and seriousness of injury likely to be caused should be 'obvious on looking at the image'[37] itself. Expert evidence should not ordinarily be required, but for exceptional cases.

2.3. involves sexual interference with a human corpse[38]

Although sexual penetration of a corpse is an offence under the Sexual Offences Act 2003 (SOA 2003)[39] – the essence of which is the intentional penetration of the body of a dead person by means of either a part of the body or an object – there is no wider offence of 'sexual interference' with the body of a dead person. Since interference with a corpse can occur without penetration, the anomalous situation could arise whereby it is legal to carry out certain sexual acts with a corpse, but unlawful to possess images portraying such acts.

2.4. involves a person performing an act of intercourse or oral sex with an animal (whether dead or alive)[40]

Section 69 of the SOA 2003 criminalises penile penetration of the vagina or anus of a living animal or penile penetration of an offender's

[33] G Crossman, *Liberty's Second Reading Briefing on the Criminal Justice and Immigration Bill in the House of Lords* (Liberty, London: 2007) 19.

[34] CPS Prosecution Policy and Guidance, Extreme Pornography (n 9).

[35] Ibid.

[36] Ibid.

[37] Ibid.

[38] CJIA 2008, s 63(7)(c).

[39] SOA 2003, s 70(1).

[40] CJIA 2008, s 63(7)(d).

anus or vagina by a living animal.[41] However, the SOA offence does not extend to cover oral sex by either party or with dead animals. It is apparent that the bestiality category[42] also goes beyond the SOA offence. We shall return to this issue in Chapter 8, which looks into the prosecution practice concerning such images in greater detail. The bestiality provisions received scant attention during the parliamentary debates of the Bill, and their purpose is unclear. However, some clarification is offered by the 2005 consultation paper.

First, there may be an argument for safeguarding participants from 'degradation',[43] which is one of the stated justifications underlying s 63. As noted in Chapter 2, publications involving sexual acts with animals are 'commonly prosecuted'[44] under the OPA 1959. It is argued that bestiality images are obscene not so much because of the impact they may have on their likely audience but because they constitute 'an indefensible case of human exploitation'.[45] Moreover, sexual conduct with animals is observed as a sexual offence under criminal law on the grounds that (a) it reflects some 'profoundly disturbed behaviour';[46] (b) evidence suggests a link between animal abuse and other forms of sexual offending, including child abuse[47]; and finally (c) that it offends against the dignity of both people and animals.[48] It seems therefore that the legislator has previously addressed the issue of degradation of participants in such activities. So, where does the added value of s 63(7)(d) lie? The SOA 2003 does not target depictions of such criminal conduct, but the conduct itself. In addition, the OPA targets the publication of an obscene matter, not its possession (other than for gain). Thus, s 63(7)(d)

[41] SOA 2003, s 69(1) and 69(2).

[42] As identified in Home Office, *Consultation* (n 13) [5].

[43] Ibid [34].

[44] CPS Prosecution Policy and Guidance, Obscene Publications, http://www.cps.gov.uk/legal/l_to_o/obscene_publications/#a07, (accessed 7 January 2012).

[45] G Robertson and A Nicol, *Media Law* (5th ed, Penguin, London: 2008) 214.

[46] Home Office, *Setting the Boundaries: Reforming the law on sex offences, Volume 1* (Home Office Communications Directorate, London: 2000) 126.

[47] Ibid.

[48] Ibid.

closes a loophole in the law by criminalising the mere possession of depictions of human sexual relations with animals.

Second, the consultation paper indirectly refers to the prevention of 'animal cruelty'.[49] But, are there any alternative mechanisms which can be relied upon to protect animals from abuse in the making of pornographic images of bestiality? The Cinematograph Films (Animals) Act 1937 (CFAA 1937) makes it an offence to exhibit to the public any cinematograph film, regardless of where it was produced, if in connection with its production any scene represented in that film is organised or directed in such a way as to involve (a) the cruel infliction of pain or terror on any animal or (b) the cruel goading of any animal to fury.[50] The 1937 Act applies to the exhibition of films in public cinemas, but the British Board of Film Classification (BBFC) applies the same test to video works too. However, the CFAA does not cover possession of films that have not been submitted for classification, or works for which certification has been refused, since it is concerned only with the (distribution for) public exhibition of such content. The criminalisation of mere possession of bestiality images under the CJIA 2008 appears to close that legal lacuna.

The Animal Welfare Act 2006 (AWA 2006) also provides for the prevention of harm to animals. It makes it an offence to cause or permit physical or mental suffering to a protected animal where this is 'unnecessary' and the person knew, or could be expected to know, that an animal would suffer as a result.[51] Determining whether the suffering was 'unnecessary' involves an examination of the necessity and proportionality of the suffering, and whether the conduct concerned was in all the circumstances that of a 'reasonably competent and humane'[52] person. It could be suggested that injuries to animals caused by zoophilic interactions, excluding penile penetration of the vagina or anus of a

[49] Home Office, *Consultation* (n 13) [48], 23.

[50] CFAA 1937, s 1(1); according to CFAA 1937, s 1(3), offenders may be subject to a fine or imprisonment for a maximum of three months or both.

[51] AWA 2006, ss 4(1) and 4(2). The maximum penalty for an offence under s 4 is imprisonment for a term not exceeding 51 weeks and/or a fine of up to £20,000; s 32(1).

[52] Ibid s 4(3).

living animal which is already covered by the SOA 2003, may be punishable under the 'unnecessary suffering' provisions of the AWA 2006. However, the latter is silent in relation to this matter, as it is in relation to depictions of human sexual relations with animals.

The declining number of cases of alleged animal cruelty reported to the Prosecutions Department of the Royal Society for the Prevention of Cruelty to Animals (RSPCA) as well as the downward trend in the number of defendants prosecuted and convictions secured in recent years suggest that the RSPCA is effective in its preventative role.[53] There is, however, no information as to whether any of the convictions obtained relate to 'unnecessary suffering' of animals owing to acts involving bestiality. It could, therefore, be argued that the CJIA 2008 opens an additional legal avenue for the protection of animals – apart from the protection of individuals – through the prohibition of mere possession of images involving persons who perform acts of intercourse or oral sex with them. By targeting their consumption, it is hoped that demand for such material, and as a result its production, will cease.

Thus, to the extent that harm to animals is caused, depictions of bestiality do raise issues of animal welfare. It is, nevertheless, questionable whether these are suitably dealt with by pornography laws, especially because Parliament has enacted various laws to tackle animal suffering.[54]

2.5. Extension of the s 63 terms: rape pornography

In June 2013, 'more than a hundred'[55] anti-rape groups and campaigners, including the Rape Crisis South London,[56] wrote an open letter to

[53] RSPCA, *Prosecutions Annual Report 2015* (RSPCA, West Sussex: 2015) 16–19.

[54] See also Performing Animals (Regulation) Act 1925, Pet Animals Act 1951 (as amended in 1983), Animal Boarding Establishments Act 1963, Riding Establishments Acts 1964 and 1970; Breeding and Sale of Dogs (Welfare) Act 1999, Breeding of Dogs Act 1991, Breeding of Dogs Act 1973.

[55] S Jones, 'Criminalise possession of "rape porn," say campaigners' *The Guardian* (London 7 June 2013) 19.

[56] Rape Crisis South London (RASASC) identifies itself as 'an independent organisation [. . .] providing a high standard of professional, specialist support to female survivors of sexual violence'; see http://www.rasasc.org.uk/history/, accessed 20 July 2015. Other organisations that signed the letter included the End Violence Against Women Coalition, Mumsnet, National Federation of Women's Institutes, Everydaysexism, No More Page 3 and the Association of Teachers and Lecturers.

the then Prime Minister calling for the criminalisation of possession of imagery showing both actual rapes and simulated 'non-consensual' sexual acts featuring consenting adults. They suggested that online pornography depicting rape 'glorifies, trivialises and normalises'[57] women's and girls' abuse.

> We specifically want the Government to close a loophole in the pornography legislation that allows the lawful possession in England and Wales of pornographic images that depict rape, so long as the actors are over 18. This means that images titled 'teen slut rape' and 'schoolgirl rape' are lawful to possess. Depictions of necrophilia and bestiality are criminalised by the same legislation, meaning that animals and dead people are better protected than women and girls.[58]

The mobilization in support of the ban on rape pornography was amplified in the wake of Mark Bridger's and Stuart Hazell's convictions of murder in May 2013. The first was convicted of abducting and murdering five-year-old April Jones,[59] while the second was found guilty of murdering 12-year-old Tia Sharpe.[60] The campaigners linked those crimes to the fact that both offenders were users of 'violent and misogynistic pornography'.[61]

The campaign led by Rape Crisis and the online petition organised by two academic at Durham University, which garnered over 72,000 signatures,[62] culminated in the announcement of new measures aimed at reducing access to pornography. The then Government believed that there was some evidence that viewing pornography that depicts rape may have 'a negative effect on people's attitudes, particularly the young, to

[57] Jones (n 55).

[58] Letter to the Editor, 'Banning rape images' *The Daily Telegraph* (London 18 June 2013) 19.

[59] R Osley, 'Guilty – and Bridger will never walk free' *The Independent* (London 31 May 2013) 4.

[60] S Laville, 'Stuart Hazell searched for incent websites during search for Tia Sharp' *The Guardian* (London 14 May 2013) 4.

[61] Jones (n 55); for the links established between these cases and that of Graham Coutts, and the impact of the created signification spiral on the appeal of the campaigners' claims, see Chapter 4.

[62] S Coates and M Ahmed, 'Internet to face same restrictions as sex shops' *The Times* (London 22 July 2013) 2.

sexual and violent behaviour'.[63] The Children's Commissioner 2013 report on the effects that access and exposure to pornography have on children and young people echoed similar concerns.[64]

In July 2013, the then Prime Minister, David Cameron, stated in his speech to the National Society for Prevention of Cruelty to Children (NSPCC) that a raft of reforms to protect children from 'vile images of abuse that pollute minds and cause crime'[65] would be introduced. He added that further changes would be adopted to ensure that extreme online videos are subject to the same rules as those sold in licensed sex shops[66] and unveiled plans to criminalise possession of pornography depicting rape.[67]

The Criminal Justice and Courts Act 2015 extended the terms of the extreme pornography offence to cover images portraying 'an act which involves the non-consensual penetration of a person's vagina, anus or mouth by another with the other person's penis'[68] and other 'non-consensual sexual penetration of a person's vagina or anus by another with a part of the other person's body or anything else'.[69] These categories include any image of that nature, regardless of whether the act shown is real or staged.[70] The general defences and exclusions to the offence, discussed later, continue to apply.[71]

[63] Ministry of Justice (MOJ) Circular 2015/01, *Criminal Justice and Courts Act 2015* (Criminal Law and Legal Policy Unit, London: 2015) 58.

[64] MAH Horvath, L Alys, K Massey, A Pina, M Scally and JR Adler, *'Basically . . . Porn is everywhere': A Rapid Evidence Assessment of the effects that access and exposure to pornography have on children and young people* (Office of the Children's Commissioner, London: 2013).

[65] 'Online pornography to be blocked by default, PM announces' *BBC News* (London 22 July 2013), http://www.bbc.co.uk/news/uk-23401076, accessed 14 September 2013.

[66] The Communications Act 2003, s 368E was amended by the Audiovisual Media Services Regulations of 2014, SI 2014/2916 to this effect. The changes came into force on 1 December 2014.

[67] N Watt and C Arthur, 'Cameron cracks down on "corroding influence" of online pornography' *The Guardian* (London 22 July 2013) 6; the full transcript of his speech, as delivered, is available at https://www.gov.uk/government/speeches/the-internet-and-pornography-prime-minister-calls-for-action, accessed 14 July 2016.

[68] CJIA 2008, s 63(7A)(a), as amended by Criminal Justice and Courts Act 2015, s 37(2)(c).

[69] CJIA 2008, s 63(7A)(b), as amended by Criminal Justice and Courts Act 2015, s 37(2)(c).

[70] Criminal Justice and Courts Act 2015, Explanatory Notes, para 372.

[71] As noted in Chapter 1, the changes to the s 63 offence commenced on 13 April 2015 and apply only to possession of material which occurs on or after that date. The amendments made to the CJIA 2008 by the 2015 Act do not affect the law as it applies in Northern Ireland.

Prior to the extension of the law, pornographic images depicting rape would only be captured by s 63 if a degree of sexual violence or harm was attached to the content of the said image so that the life-threatening or serious injury standard was satisfied. However, there could be instances where force was achieved with belts, chains and the physical strength of the alleged rapist, without automatically resulting in serious injury to anus, breasts or genitals. As a result, the awkward situation could arise whereby it would be unlawful to possess an image showing a staged scene of an actress being violently raped – within the parameters of ss 63(7)(a) and (b) – even if all participants consented to its creation, but it would not be illegal to possess an image showing an actual rape.

The s 63 amendments follow the example of the Scottish extreme pornography legislation.[72] This differs from that applying to England and Wales in that the Scottish offence is wider in scope. It covers obscene, pornographic images depicting 'an act which results, or is likely to result, in a person's severe injury'[73] and is not limited to images portraying serious injury to specific body parts. Moreover, the legal definition of pictures of rape or other non-consensual penetrative sexual activity in the Scottish offence is arguably stronger than that in the English and Welsh offence, as it requires reference to be made to any descriptions or sounds accompanying the image and its context.[74] Such a requirement would help clarify the remit of the English and Welsh offence.[75] In addition, the Scottish law creates a defence for those who 'directly participate' in simulated acts and retain the images for their own private use. As will be discussed later, the offence under the CJIA 2008 provides neither a defence for staged sexual acts nor a defence

[72] The Criminal Justice and Licensing (Scotland) Act 2010 (CJLSA 2010), s 42, inserted s 51A into the Civic Government (Scotland) Act 1982 (CGSA 1982), which created a new offence of possession of EPI. The offence came into effect on 28 March 2011.

[73] CGSA 1982, s 51A(6)(b).

[74] CGSA 1982, s 51A(7).

[75] C McGlynn and E Rackley, *Why Criminalise the Possession of Rape Pornography*, Durham Law School Briefing Document (Durham University, Durham: 2014).

for those who can prove that the act did not actually feature a real animal or carcase.[76]

In short, the 2015 reform was deemed essential in order to protect women's rights to dignity and equality[77] and 'send a clear message that rape is not a legitimate form of sexual entertainment'.[78] These concerns were also accepted by the Joint Committee on Human Rights which endorsed the extension of the offence 'a human rights enhancing measure'.[79] Interestingly, however, the move to outlaw possession of extreme images portraying (simulated) rape was announced after the Ministry of Justice Criminal Policy Unit stated in a letter of early May 2013 to Clare McGlynn, who worked with Rape Crisis in their campaign to change the law, that there was 'no evidence to show that the creation of staged rape images involves any harm to participants or causes harm to society at large'.[80] The Ministry had earlier asked the Internet Watch Foundation to investigate 'websites that depict or purport to depict actual rapes'.[81] The Foundation looked into a selection of 'hundreds of thousands'[82] videos online and stated:

> Many of the videos examined had high-quality technical production values, i.e. professional camerawork, lighting and sound, this often alongside obvious or unconvincing acting that would not be evident in an actual rape or sexual assault that was being filmed. Some of the participants were familiar adult film 'performers', and the technical production recognisable as highly professional.[83]

[76] CJIA 2008, s 66(1)(b) in combination with s 66(2); cf CGSA 1982, s 51C(4)(e).

[77] McGlynn and Rackley, *Why Criminalise the Possession of Rape Pornography* (n 75).

[78] 'Academics back ban on rape porn' *Durham Times Online* (Durham 22 July 2013), http://www.durhamadvertiser.co.uk/news/10564011.Academics_back_ban_on_rape_porn/, accessed 15 July 2016.

[79] Joint Committee on Human Rights, *Legislative Scrutiny: (1) Criminal Justice and Courts Bill and (2) Deregulation Bill, (Fourteenth Report)* (2013–14, HL 189, HC 1293) 17–19.

[80] P Dominiczak, 'No harm in simulated rape videos (as long as they are well made), says ministers' *The Daily Telegraph* (London 7 June 2013) 8.

[81] Ibid.

[82] Ibid.

[83] Ibid.

The Criminal Policy Unit concluded in their letter that claims that the videos glorify sexual violence were 'anecdotal'[84] and could not therefore justify a change in the law.

3. A reasonable person looking at the image would think that the person or animal portrayed in it was real.

The definition of an image is limited by the requirement that persons and animals portrayed in it must appear to a reasonable person to be real. For example, a simulated 'snuff'[85] movie would not fall foul of s 63, unless a reasonable person would think that it was a genuine snuff movie, namely that a real woman was actually killed. In the infamous 'tiger porn' case, the defendant was sent via a Bluetooth connection a short video, which depicted a man in a tiger suit describing himself as Tony the Tiger, the Frosties advert character. After engaging in a sexual act, the man was shown turning to the camera and delivered a punch-line, reported to be 'that beats the Frosties advert'. When the short video was examined by the police and prosecutors, it had no soundtrack, and the defendant was charged with being in possession of a realistic depiction of sexual intercourse with an animal under s 63(7)(d). However, upon further review it became apparent that the act portrayed did not actually involve a real tiger. The prosecution finally accepted that any reasonable person looking at the moving image would not consider it to be 'real' and decided to offer no evidence against the defendant.[86]

The precondition that 'a reasonable person looking at the image would think that the person or animal portrayed in it was real' takes out of the scope of the offence animated characters, puppets, sketches, paintings and the like.[87] This is presumably justified by the fact that the Rapid Evidence Assessment on the evidence of harm to adults

[84] Ibid.

[85] A 'snuff' film is a motion picture genre that depicts the actual murder of a person, usually a woman, without the aid of special effects; PC Godfrey, 'Law and the regulation of the obscene' in S Seidman, N Fischer and C Meeks (eds), *Handbook of the New Sexuality Studies* (Routledge, Oxon: 2006) 378.

[86] E Roberts, 'Man cleared as "tiger porn" clip revealed as joke' *Daily Post* (Liverpool 1 January 2010) 9.

[87] CJIA 2008, Explanatory Notes, para 459.

exposed to EPI[88] considered only realistic depictions, and therefore there is no evidence to support the argument that animated material has the same effect. While the Criminal Justice and Immigration Bill (CJIB) was going through its parliamentary stages, it was argued that the inclusion of this requirement demonstrates 'ignorance of the vast body of research which has examined the complexities of viewers' understandings and relationships to the "real"'.[89]

4. An image is 'grossly offensive, disgusting or otherwise of an obscene character'.

A similar phrasing is adopted by s 127(1)(a) of the 2003 Communications Act in the context of an offence of improper use of a public electronic communications network. The term 'obscene' also occurs in the 1959 OPA. The inclusion of this component suggests that s 63 is concerned not only with the potential physical harm to participants portrayed in EPI but also with a moral evaluation of their content. The OPA employs the element of morality in controlling the *production* and *circulation* of obscene material. The novelty in the 2008 Act lies in the requirement that jurors have to assess the character of adult pornographic material from a moral perspective as well in order to determine whether a defendant is entitled to *possess* it privately.

The legislation is silent as to the meaning of the words 'grossly offensive' and 'otherwise of an obscene character'. Their interpretation is likely to be subject to great variation amongst viewers. However, these terms should not be read as separate concepts. They are examples of the broader concept of 'an obscene character' and not alternatives to it.[90] It will be recalled that this element was added to the proposed provisions during the Committee Stage of the CJIB in the House of Lords. This

[88] C Itzin, A Taket and L Kelly, 'The evidence of harm to adults relating to exposure to extreme pornographic material: A Rapid Evidence Assessment (REA)' MOJ Research Series 11/07 (MOJ: London, 2007), discussed in Chapter 3.

[89] Memorandum submitted by Dr Clarissa Smith et al. (CJ&I 341), Reader in Sexual Cultures (University of Sunderland, Centre for Research in Media and Cultural Studies) during the Committee stage of the CJIB 2007, http://www.publications.parliament.uk/pa/cm200607/cmpublic/criminal/memos/ucm34102.htm, accessed 1 December 2010.

[90] MOJ Circular 2009/01 (n 6) [12].

amendment sought to clarity the alignment between the OPA and the CJIA.[91] The test draws upon the ordinary dictionary definition of 'obscene' rather than the technical definition of tending to 'deprave and corrupt', which is specifically geared to the concept of publication.[92] The practical effect of this threshold is that all elements in s 63, working together, should ensure that the only images covered are those which would also fall foul of the 1959 Act.[93]

Possession

'Possession' is not defined in the CJIA 2008. Its meaning for the purposes of s 63 was, however, considered in *R v Ping Chen Cheung*,[94] discussed below. The Court of Appeal imported in this case the concept of 'having custody or control' of the images, which was employed in earlier cases concerning unlawful possession of drugs and other offences where the defendant is required to be in possession of certain items such as indecent images of children (IIOC).[95] This section illuminates the 'deceptively simple concept'[96] of possession. The guidance provided in *Cheung* is also discussed.

General Meaning of Possession

Possession comprises a physical and a mental element.[97] In *Lambert*, where the appellant was charged with possession of a controlled drug

[91] HL Deb 3 March 2008, vol 699, col 895 (Lord Hunt of Kings Heath, Parliamentary Under-Secretary of State for Justice and sponsor of the CJIB at that time).

[92] MOJ Circular 2009/01 (n 6) [13].

[93] Ibid; see also HL Deb 3 March 2008, vol 699, col 895 (Lord Hunt of Kings Heath, Parliamentary Under-Secretary of State for Justice and sponsor of the CJIB at that time).

[94] *R v Ping Chen Cheung* [2009] EWCA Crim 2965 (CA, Crim Div).

[95] *R v Porter* [2006] 2 Cr App R 25.

[96] *R v Boyesen* (1982) 75 Cr App R 51, 53 (Lord Scarman).

[97] *R v Lambert* [2002] 2 AC 545.

with intent to supply, Lord Hope stated that the first element involved 'proof that the thing [was] in the custody of the defendant or subject to his control'.[98] The second element requires the defendant to know that the article or substance in question is under his or her custody or control.[99] However, if a person has this knowledge, he or she does not need to know the nature of the substance; 'so long as he [or she] knows that the thing, whatever it is, is under his control, it is in his possession.'[100]

So, possession is satisfied by knowledge only of the existence of the 'thing' itself and not of its qualities. Ignorance of, or a mistake as to, the extent and qualities of the prohibited articles does not prevent the accused from being in possession of it.[101] If one reasonably believes the tablets which he or she possesses to be aspirins, but they turn out to be heroin, that person is in possession of heroin tablets.[102] If, however, there is a belief that the thing is of a 'wholly different nature'[103] from what it actually is, then the result is otherwise, i.e. it disproves possession. In cases where the thing in question is found within a container, possession of the container leads to the 'strong inference'[104] of possession of its contents.[105] But if the contents are quite different in kind from what it is believed to be in the container, then there is no possession.[106]

[98] Ibid 580.

[99] *R v Boyesen* (1982) 75 Cr App R 51, 54 (Lord Scarman); *DPP v Brooks* (1974) 59 Cr App R 185, 187 (Lord Diplock).

[100] *Lambert* (n 97) 598 (Lord Clyde); see also *Warner v Commissioner of the police of Metropolis* [1969] 2 AC 256, 311 (Lord Wilberforce).

[101] *Warner v Commissioner of the police of Metropolis* [1969] 2 AC 256, 305 (Lord Pearce); *R v Lewis* (1988) 87 Cr App R 270, 276 (May LJ).

[102] *Warner* (n 101) 305 (Lord Pearce). As McDonnell states, s 28 of the Misuse of Drugs Act 1971 was enacted with full knowledge of the decision and observations in *Warner* and allows for the defence of honest and reasonable mistake; M McDonnell, *Misuse of Drugs: Criminal Offences and Penalties* (Bloomsbury Professional, West Sussex: 2010) 30.

[103] *Warner* (n 101) 305 (Lord Pearce).

[104] *R v McNamara* (1988) 87 Cr App R 246, 251 (Lord Lane CJ).

[105] *Lambert* (n 97) 599 (Lord Clyde).

[106] *McNamara* (n 104) 251 (Lord Lane CJ).

Possession and EPI: *Cheung*

In *Cheung,*[107] the appellant, a Chinese national, was stopped by the police who had seen him carrying a bulging laptop bag. The bag was found to contain eight pornographic DVDs underneath bundles of counterfeit DVDs, which gave rise to a separate charge. The pornographic images involved sexual activity with dogs, but the issue of whether they satisfied the definition of s 63 was not contested at trial. In interview at the police station, the appellant admitted that he knew the bag contained DVDs, which he was going to sell, but he had not looked at the DVDs and did not know that he possessed those of an extreme nature. He appealed against his conviction on seven counts of possessing EPI on the basis that the trial judge had failed to give an adequate direction to the jury on the requisite *mens rea* and an adequate explanation of the relevant statutory defence in s 65(2)(b) of the 2008 Act.

Defences are discussed later in this chapter, but it is worth noting at this stage that under s 65(1), a person charged with a s 63 offence has a defence, if he or she proves any of the matters mentioned in s 65(2). Among these matters are those specified in sub-s (2)(b), namely that the person had not seen the image and did not know, nor had any cause to suspect, it to be an EPI.[108] Before any question of the statutory defence under s 65(2) could arise, the prosecution had to establish: (a) that the appellant was in possession of the offending images, in the sense that they were within his custody or control in the bag he was carrying (physical possession) and (b) that the appellant had knowledge of the existence of the container *and* that the container contained something (mental possession).

However, the prosecution did not have to go so far as to prove that the appellant knew that the things, which he knowingly had in his custody or control, had the necessary quality giving rise to the offence

[107] *Cheung* (n 94).

[108] The defence in s 65(2)(b) mirrors that in s 160(2)(b) of the CJA 1988 in relation to the offence of possession of IIOC.

(for the present purposes, that the DVDs contained EPI). 'Otherwise, the defence under s 65(2)(b) would be otiose',[109] King J stated. It was sufficient that the eight pornographic DVDs at the bottom of the bag were among those which he knew he had as a generality.[110] The Court added that possession would not be made out, if the appellant believed that the items he possessed were of a 'wholly different nature' from the subject matter of the allegations: 'a belief, for example, that something which is in fact a collection of DVDs is a collection of, say, floor files [sic], might well qualify.'[111] The issue of what amounted to items of a wholly different nature was one for the jury to consider.[112] If the appellant was merely mistaken as to the quality of the article which he knew was in his possession or control, this would not be enough to prevent him from being in possession for the purposes of the offence.[113] Once possession was established, the burden shifted to the accused to prove on the balance of probabilities his defence under s 65(2).

The trial judge's summing up in *Cheung* appears to have conflated knowledge as part of the requisite *mens rea* – which was for the prosecution to establish – with the specific statutory defence upon which the appellant relied. The latter is autonomous from the requirement that the prosecution needs to prove mental possession. King J distinguished between, on the one hand, what had to be established by the Crown for the purposes of possession, by way of the appellant's knowledge before his bag was searched by the police, and on the other, what had to be established by him on the balance of probabilities by way of lack of knowledge to make out his defence.[114]

[109] *Cheung* (n 94) [15]. A similar approach was taken in *R v Collier* [2004] EWCA Crim 1411, where the appellant submitted that he had not played the videos and CD-ROMs in question and that, although he had cause to suspect that they contained indecent images, he had no cause to suspect that these were of children; see in particular [29] (Hooper LJ).

[110] *Cheung* (n 94) [17].

[111] Ibid [15] (King J).

[112] Similar to *Warner* (n 101) 305 (Lord Pearce).

[113] *Cheung* (n 94) [15].

[114] Ibid [19].

Deleted and Cached Files

The principles relating to possession of IIOC can be of help in relation to the matter of deleted or cached files.[115] Where prosecutions of IIOC- or EPI-related offences involve images that have been forensically recovered, the issue that arises is whether a defendant is still deemed to be in possession of those retrieved images. There are two scenarios in which this may occur: first, when the files at issue have been marked for deletion and second, when they have been automatically stored in the computer cache.[116]

When files are deleted, their content is not actually erased. Data from the deleted file remains behind in an area called 'unallocated storage space' for discovery through the use of data recovery or computer forensics software utilities. In *Porter*,[117] where numerous moving and still IIOC were found in the appellant's hard drives, it was held that because an average non-expert user could not normally retrieve or gain access to the files kept in the unallocated parts of the computer disc, he or she could not be said to have custody or control over them and therefore did not possess them. An exception would be where a person is shown to have intended to remain in control of an image after deletion. This would entail him or her having the capacity to retrieve the image, either through skill or software. The mental element required for the offence of possession to be made out in these cases is proof that the defendant 'did not believe that the image at issue was beyond his control'.[118]

[115] The Home Office stated in the 2005 consultation paper that the proposals to outlaw the possession of EPI 'mirror the arrangements already in place in respect of indecent photographs and pseudo-photographs of children'; Home Office, *Consultation* (n 13) [1].

[116] 'Cache' is a specialised form of computer memory which is designed to speed up the computer by prioritizing its contents. During an Internet browsing session, it holds copies of recently accessed data, e.g. a web page and pictures on it, and retains them in order to accelerate page viewing: the next time a user requests a specific page, this is accessed from the cache on his or her computer, instead of requiring the computer to visit the original web page and images from a distant web server; see I Walden, 'Computer crime' in C Reed and J Angel (eds), *Computer Law* (5th ed, OUP, Oxford: 2003) 301.

[117] *Porter* (n 95).

[118] Ibid [26] (Dyson LJ).

Unlike deleted files, the retrieval of which typically requires technical knowledge, images stored in the cache are more readily accessible, e.g. by clicking on the 'history' option of the web-browser. In *Atkins and Goodland*,[119] it was held that images stored by browser software in a hidden cache are in the defendant's possession subject to proof of knowledge of the existence and effect of the cache-memory feature. If the prosecution can prove that the defendant knew about the cache memory, by proving for example that he had changed the default settings for his computer's cache function, then a conviction is likely to be secured.[120]

Viewing

In its 2005 consultation paper, the Home Office states that 'viewing material accessed via the Internet on computers or mobile phones will be covered'.[121] But does viewing an image online amount to its possession?

Cases involving still images are relatively straightforward. These are stored in the cache, and a person is deemed in possession of them subject to the mental element being met.[122] The implication is that, unless it can be established that the defendant knew about the existence of the cache, e.g. by showing that he or she had accessed a temporary Internet file offline, 'computer illiterate defendants are able to "just look" at as many images of extreme pornography as they wish'.[123] Hence, a broader interpretation of the concept of possession that includes images unknowingly stored in the defendant's cache has been proposed.[124]

Streamed videos, however, are not saved in the computer cache. Would a person be in possession of them as well? In relation to IIOC,

[119] *Atkins and Goodland v DPP* [2000] 2 Cr App R 248, 262 (Simon Brown LJ).
[120] Walden, 'Computer Crime' (n 116) 301.
[121] Home Office, *Consultation* (n 13) [50].
[122] *Atkins* (n 119).
[123] C McGlynn and E Rackley, 'Criminalising extreme pornography: A lost opportunity' (2009) 4 Crim LR 245, 253; D Ormerod, 'Indecent photograph of child – Criminal Justice Act 1988 s 160 (1)' [2006] (Aug) *Crim LR* 748, 750.
[124] Ibid.

Jayson established that the act of voluntarily downloading and viewing an indecent image on a computer screen constituted an act of 'making' a (pseudo)photograph under s 1 of the Protection of Children Act 1978, irrespective of the time the image remained on screen. The act of making 'did not require an intention on the part of the maker to store the images with a view to future retrieval'.[125] The underlying rationale was that when an image was called up to a screen, a new copy was created and put on view. However, there is no offence equivalent to that of 'making' an image under the CJIA 2008[126]; s 63 is concerned only with possession. Where a person does not download the moving image but streams it, the physical element of possession is not satisfied, as 'the image remains on the server of the person who has uploaded it'.[127] Therefore, the question of whether a person viewing a moving streamed image is in possession of it should be answered negatively.

Excluded Images

The CJIA 2008 also targets unlawful material which has never been submitted for certification or material for which certification in the UK has been refused but is readily available from overseas via the Internet.[128] It is not concerned with images that form part of a series of images contained in a recording of the whole or part of a classified work, and therefore expressly excludes these from the scope of the extreme pornography offence through s 64.[129]

In order to untangle the intricate provisions of s 64 and illustrate how the exclusion applies, we rely on the example of a video recording of a

[125] *R v Smith and Jayson* [2003] 1 Cr App R 13, [36] (Dyson LJ).

[126] cf Protection of Children Act 1978, s 1(1).

[127] A Gillespie, *Child Pornography: Law and Policy* (Routledge, Oxon: 2011) 174.

[128] Existing legislative and regulatory controls ensure that material which is in breach of the criminal law, or has been created through the commission of a criminal offence, will not be acceptable and cuts or changes will be required; see British Board of Film Classification, *The Guidelines* (BBFC, London: 2009) 31–3.

[129] CJIA 2008, ss 64(1) and 64(2). A classified work is a video work in respect of which a classification certificate has been issued by the BBFC; s 64(7).

mainstream film from television used in Blackstone's Guide to the 2008 Act.[130] For the purposes of s 64, 'recording' means any disc, tape or other device capable of storing data electronically and from which images may be produced by any means.[131] Therefore, the same rules apply *mutatis mutandis* to other forms of digital recordings. Section 22 (3) of the Video Recordings Act 1984 (VRA 1984)[132] applies here by virtue of s 64(8) of the CJIA 2008. Section 22(3) provides that the certificate issued in respect of a classified work is invalidated following any alteration made to it. So, if a video recording is edited, it will cease to qualify as an 'excluded image'.

Initially, it must be established whether a recording is of the whole or part of a film. In doing so, any alteration attributed to technical reasons must be disregarded.[133] If, for example, only part of a classified film has been recorded because of a defect caused by technical reasons (e.g. failure of the recording system), it will still be deemed a recording of the whole of the classified film and therefore an excluded image. In addition, any alteration attributed to inadvertence on the part of a person is to be disregarded too.[134] For instance, if the time for a recording was wrongly set so that only part of the classified film was recorded, the recording would still constitute an excluded image. Although any addition to the recording would be considered an 'alteration'[135] under the VRA 1984, the 2008 Act provides that any alteration attributed to the inclusion in the recording of any 'extraneous material' (e.g. advertisements) must be ignored.[136] Extraneous material presumably extends to cover unintended recordings that form part of the programme that follows after the end of a film.[137]

[130] Sikand (n 12) 82–84

[131] CJIA 2008, s 64(7).

[132] In January 2010, the VRA 2010 came into force. This simultaneously repealed and immediately revived without amendment the VRA 1984, in order to correct a procedural error made during the passage of the latter.

[133] CJIA 2008, s 64(5)(a).

[134] Ibid.

[135] VRA 1984, s 22(3).

[136] CJIA 2008, s 64(5)(b).

[137] Sikand (n 12) 83.

If the recording at issue is found to be merely a part of a classified film, the court must proceed to examine this specific part. If the latter 'is of such a nature that it must reasonably be assumed to have been extracted (whether with or without other images) solely or principally for the purpose of sexual arousal',[138] then it is not an excluded image. When an extracted image is one of a series of images contained in the recording, regard is to be had to the image itself and the context in which it appears in the series of images in order to establish whether or not it is of such a nature that it must reasonably be assumed to have been extracted for the purpose of sexual arousal.[139] So, the context within which the image is assessed is the same under s 63(4), namely the context in which the defendant holds the image. Section 63(5) also applies in determining this question.[140]

The practical effect of s 64 is that an individual will not be prosecuted, if he or she possesses a video recording of a BBFC certified film, even if that film contains an image which falls foul of the offence under s 63 but is considered by the Board to be justified by the context of the work as a whole. If, however, a sexual scene – within the meaning of s 63(7) – constitutes the sole or predominant part of a BBFC certified film that has been recorded, it will be a matter for the judge or jury to determine the reason for which only that part has been recorded. If it 'must reasonably be assumed'[141] that this particular part was isolated for inappropriate, apparently sexual, purposes, it may be found to be an EPI. Despite Lord Hunt's assertion that the final amendments introduced in the House of Lords 'should put beyond doubt that extracts from popular mainstream films will not be caught by the offence',[142] s 64 may capture extracts of classified films available on YouTube or other websites, if extracted solely or principally for the purposes of sexual arousal.

[138] CJIA 2008, s 64(3)(b).

[139] Ibid s 64(4).

[140] Ibid.

[141] Ibid s 64(3)(b).

[142] Lord Hunt of Kings Heath OBE, Parliamentary Under-Secretary of State, Letter of 8th February 2008 to Rt Hon the Lord Kingsland QC, Ministry of Justice Correspondence about Government Amendments, http://webarchive.nationalarchives.gov.uk/+/http://www.justice.gov.uk/docs/crim-justice-corres-gov-amends.pdf, accessed 14 May 2011.

Defences

There are two categories of defences available: the first comprises general defences and the second refers to the participation in consensual acts. Both of them place the legal burden on the defendant, to be proven on the balance of probabilities.[143] An individual who inadvertently stumbles on EPI online should not normally be prosecuted. Similar to the position regarding deleted images, the determinant factor will be whether a person has control or custody of the image in question.[144]

General Defences: CJIA 2008, S 65

1. The person had a legitimate reason for being in possession of the image concerned.[145]

This covers those who can prove that their legitimate business justifies possession of EPI. The police and prosecuting authorities, those involved in the classification of films, those dealing with complaints from the public about content in the mobile and Internet industries and individuals creating security software to block such images could avail themselves of this defence.[146] However, s 65 does not provide an exhaustive list. The defence could presumably be extended to cover social workers treating sex offenders, journalists and producers of documentaries who have acquired the proscribed material during their investigation, compliance staff of broadcasters, artists possessing meritorious work and academics conducting 'honest and straightforward'[147] research. Similar to s 160(2)(a) of the CJA 1988 (which creates the same defence to possession of IIOC), the courts are entitled to a degree of scepticism in relation to cases of academic research and

[143] Similar to the offence of possession of IIOC; see *Collier* (n 109).
[144] MOJ Circular 2009/01 (n 6) [25].
[145] CJIA 2008, s 65(2)(a).
[146] MOJ Circular 2009/01 (n 6) [23].
[147] *Atkins and Goodland v DPP* (n 119) 256 (S Brown LJ).

will not readily conclude that the 'legitimate reason' defence has been made out.[148]

2. The person had not seen the image concerned and did not know, nor had cause to suspect, it to be an EPI.[149]

A person who is in possession of an EPI, but is unaware of its nature may benefit from this defence. This will apply for example where a person received an electronic copy of an image, the file name of which gave rise to no suspicion that it might be an EPI and that person kept the image without looking at it.

3. The person was sent an unsolicited copy of the image in question and did not keep it for an unreasonable amount of time.[150]

This defence covers those who receive material they have not requested and act swiftly to delete it or otherwise discard it. Deletion of an unsolicited image should normally be sufficient to protect a person. The question of reasonableness is one for the jury or magistrate to decide and depends on the circumstances of each case. In 2011, it was reported for instance that the Sunderland Magistrates' Court sentenced to 200 hours of unpaid work a 23-year-old man, who was found to be in possession of a short video clip portraying the mutilation of a man's genitals. The defendant claimed that the footage was 'going about the streets'[151] and that he did not know who had sent it to him. However, it had been on his phone 'for several months'.[152] The District Judge stated that there was no doubt that this was a 'revolting and perverted'[153] piece of video, and there was no reasonable explanation for this being on his mobile for the time it was.

[148] Ibid 257 (S Brown LJ).
[149] CJIA 2008, s 65(2)(b).
[150] Ibid s 65(2)(c).
[151] J O'Neill, 'Porn found on phone' *Sunderland Echo Online* (Sunderland 22 July 2010), http://www.sunderlandecho.com/news/local/porn_found_on_phone_1_1503344, accessed 22 May 2011.
[152] Ibid.
[153] Ibid.

The CJIA expressly places the burden of proof on the defence.[154] Liberty argues that if these general defences are relied upon, the reverse burden is 'extremely onerous',[155] as it may be difficult to establish absence of intent to obtain or keep the material. Hence, the human rights organisation suggests that the application of the defences would be fairer 'if the traditional onus of the criminal law remained on the prosecution'[156] to prove deliberate access.

Participation in Consensual Acts: CJIA 2008, s 66

In recognition of the fact that individuals may take photographs of themselves while engaging in private sexual activities, the CJIA creates an additional defence for those who appear in EPI.[157] The defence under s 66 will successfully apply if the defendant proves: first, that he or she 'directly participated' in any of the acts portrayed.[158] This means that the defence cannot be claimed by onlookers or those filming an activity (e.g. a cameraman), unless they are direct participants[159] and second, that the act portrayed was not unlawful, namely that 'it did not involve the infliction of any non-consensual harm on any person'.[160] In cases involving the newly targeted images, it is a defence for a person, who is a participant in the image and a possessor, to prove that despite what is portrayed as non-consensual penetration, consent was freely given by someone who had capacity[161] and that the act did not involve the infliction of any non-consensual harm.

[154] CJIA 2008, s 65(1).

[155] G Crossman, *Liberty's Second Reading Briefing on the Criminal Justice and Immigration Bill in the House of Lords* (Liberty, London: 2008) [33].

[156] Ibid.

[157] CJIA 2008, s 66, as amended by the Criminal Justice and Courts Act 2015, s 37(3).

[158] CJIA 2008, s 66(A2)(a).

[159] MOJ Circular 2009/01 (n 6) [28].

[160] CJIA 2008, s 66(A2)(b).

[161] Criminal Justice and Courts Act 2015, Explanatory Notes, para 373.

Non-consensual harm includes both (1) harm to which a person cannot in law consent to it being inflicted on him- or herself[162] and (2) harm to which a person can consent, but did not in fact consent to it being so inflicted.[163] As a general rule, beating another person with such a degree of violence that the infliction of bodily harm is probable is unlawful. Where such an act is proved, the issue of consent becomes irrelevant.[164] 'Such hurt or injury need not be permanent, but must, no doubt, be more than merely transient and trifling.'[165] In *Attorney-General's Reference (No 6 of 1980)*, it was ruled that: 'It is not in the public interest that people should try to cause or should cause each other actual bodily harm for no good reason [. . .] it is an assault if actual bodily harm is intended and/or caused.'[166]

However, the dicta in *Attorney-General's Reference* were considered 'vague in the extreme'.[167] It was argued that the phrase 'and/or' implied that where actual bodily harm was caused, the defendant's intention or foresight in relation to the harm was immaterial.[168] As a result, subsequent cases approached this matter as if it read 'intended and caused'.[169] Thus, consent will only be invalid, and therefore s 66 will not be applicable, where there is intentional infliction of actual bodily harm or more serious injury and the conduct is not in the public interest. The recognised exceptions in the case law provide a defence where a person participates in 'properly conducted games and sports, lawful chastisement or correction, reasonable surgical interference, dangerous exhibitions, etc',[170] 'rough and undisciplined play'[171] with no intent to injure and

[162] Ibid s 66(3)(a).

[163] Ibid s 66(3)(b).

[164] *R v Donovan* [1934] 2 KB 498, 507 (Swift J).

[165] Ibid 509 (Swift J).

[166] *Attorney-General's Reference (No 6 of 1980)* [1981] QB 715, 719 (Lord Lance CJ).

[167] M Giles, '*R v Brown*: Consensual harm and the public Interest' (1994) 57(1) *MLR* 101, 104.

[168] D Ormerod, *Smith and Hogan Criminal Law: Cases and Materials* (9th ed, OUP, Oxford: 2006) 626.

[169] *R v Slingsby* [1995] Crim LR 570; *R v Meachen* [2006] EWCA Crim 2414.

[170] *Attorney-General's Reference (No 6 of 1980)* (n 166) 719 (Lord Lance CJ).

[171] *R v Jones; Lee Smith; Nicholas; Blackwood; Muir* (1986) 83 Cr App R 375, 378 (McCowan J); the Courts-Martial Appeal Court also accepted the 'horseplay' exception in *R v Aitken; Bennett; Barson* [1992] 1 WLR 1006, 1020 (Cazalet J).

in the genuine belief by the defendant that consent was present. Amateur tattooing also forms an exception, according to *Wilson*.[172] In *Brown,*[173] a majority in the House of Lords held that, as actual bodily harm was intended and caused during sadomasochistic practices, consent was irrelevant, there being no public interest in causing harm during such sexual activities.[174] *Brown* was later upheld in the European Court of Human Rights on the grounds that the interference with the applicants' rights under Article 8 of the ECHR was justified for 'the protection of health'.[175]

Brown was followed in the subsequent case of *Emmett*,[176] where the victim, following consensual sadomasochistic sexual activities with her partner, suffered very serious injuries caused as a result of asphyxiation and her breasts being burnt. The Court of Appeal held that, although consent might constitute a defence in some circumstances, it became immaterial when what was done in the context of sadomasochistic practices revealed a risk of more than transient or trivial injury. *Wilson* was distinguished because it involved consensual behaviour in a spousal relationship and there was no evidence of significant harm. In *Emmett*, the potential damage was greater and the defendant was aware of this. Thus, in light of *Emmett*, the abovementioned principle has to be reframed to the effect that consent will only be invalid, and therefore s 66 will not be applicable, where there is intentional, or possibly even reckless, infliction of actual bodily harm or more serious injury, and the conduct is not in the public interest.

It has been argued that images of 'sexual asphyxiation', 'severe whipping or beating' will not be protected, unlike those portraying 'rape-play' or 'vampirism'.[177] Vampirism refers to sexual arousal attained through

[172] *R v Wilson* [1997] QB 47, 50 (Russell LJ).
[173] *R v Brown; Lucas; Jaggard; Laskey; Carter* [1994] 1 AC 212, HL.
[174] Ibid 236 (Lord Templeman).
[175] *Laskey and Ors v The UK* [1997] 24 EHRR 39, [50].
[176] *R v Emmett* (1999) *Times*, 15 October; *Independent*, 19 July.
[177] McGlynn and Rackley, 'A lost opportunity' (n 123) 255.

blood extraction.[178] This practice can take various forms: from using a hypodermic needle to collect blood from veins or making a small cut in one's skin to biting that draws blood.[179] Therefore, such an act may not be protected to the extent that it involves any harm which is calculated to interfere with the health or comfort of a participant and is more than a transient or trifling injury.[180]

Individuals taking part in the creation of images portraying bestiality and necrophilia involving a real corpse cannot avail themselves of the s 66 defence, owing to the inability of animals and corpses to consent by law. A defendant will not be convicted of an offence of possession of an EPI portraying necrophilia, if he or she proves that 'what is portrayed as a human corpse was not in fact a corpse'.[181] There is no equivalent provision for images of bestiality. Section 66(A1)(b) stipulates that the 'participation in consensual acts' defence applies where in England and Wales the s 63 offence relates to an image that portrays an act or acts within sub-s (7)(a) to (c) or (7A) of that section '*but does not portray an act within sub-s (7)(d) of that section*'.[182]

This particular elaboration constitutes a strongly worded exclusion. The precise reason behind it is unclear. Whilst the Bill was going through its parliamentary stages, the debate largely centred on images portraying life-threatening and serious injury acts. The bestiality and necrophilia provisions attracted little attention and were passed in a way that was hardly noticed. This is presumably because the illegality of such images is less controversial, especially because they partially mirror the offences under the SOA 2003. It has also been suggested that these sections received scarce attention because they 'are, perhaps, of less significance than the others in terms of the number of people and images

[178] JS Milner, CA Dopke and JL Crouch, 'Paraphilia not otherwise specified: Psychopathology and theory' in D Richard Laws and WT O'Donohue (eds), *Sexual Deviance: Theory, Assessment and Treatment* (The Guilford Press, New York: 2008) 395. It is distinguished from necrophilia, since it is sometimes directed towards the living; see RL Vanden Bergh and JF Kelly, 'Vampirism: A review with new observations' (1964) 11 *Archives of General Psychiatry* 543.

[179] B Love, *The Encyclopedia of Unusual Sexual Practices* (2nd ed, Abacus, London: 2002) 527.

[180] *Donovan* (n 137) 509 (Swift J).

[181] CJIA 2008, s 66(A2)(c).

[182] Ibid s 66(A1)(b) (emphasis added).

affected'.[183] However, as will be explained in Chapter 6, figures available at the time of writing suggest that the vast majority of convictions under s 63 concern bestiality images. The fact that s 66 does not apply to such content means that defendants engaging for example in pseudo-zoophilia (a sexual practice which refers to sexual fantasy games where a sexual partner plays the role of an animal[184] or dresses up like an animal)[185] will be acquitted only if, after reviewing all the evidence, the jury or magistrates entertain the appropriate degree of doubt whether a reasonable person looking at a pornographic and 'grossly offensive' image of pseudo-zoophilia would think that the animal portrayed was real. An explicit corresponding defence for bestiality images would help clarify the law.

Providers of Information Society Services

Section 68 and Sch 14 to the 2008 Act ensure that the provisions criminalising the possession of EPI comply with the UK's obligations under the Directive on Electronic Commerce.[186] Schedule 14 widens the territorial application of the offence by stating that providers of information society services established in England and Wales or Northern Ireland are covered by the extreme pornography provisions, even when they operate in other EEA states.[187] Schedule 14 limits the liability of Internet service providers in cases where they carry out

[183] McGlynn and Rackley, 'A lost opportunity' (n 123) 250.

[184] A Aggrawal, *Forensic and Medico-legal Aspects of Sexual Crimes and Unusual Sexual Practices* (CRC Press, London: 2009) 379; E Roudinesco, *Our Dark Side: A History of Perversion* (Polity Press, Cambridge: 2009) 124.

[185] One of San Francisco's leather bars holds an event called 'S&M Circus', where people dress as different animals and are taught to perform the same as their animal counterparts. The Roman emperor Nero would play a game where he dressed in skins of wild animals and attacked the genitals of people tied to stakes; see Love (n 179) 551–2.

[186] Directive 2000/31/ EC; the E-Commerce Directive was implemented by the Electronic (EC Directive) Regulations 2002 (SI 2002/2013).

[187] CJIA 2008, Sch 14, para 1(2). However, service providers established in an EEA state *other than the UK* are excluded from prosecution for the offence of possession of EPI; CJIA 2008, Sch 14, para 2(2).

activities necessary for the operation of the Internet, e.g. when they are acting as mere conduits for such material or storing it as caches or hosts.[188] The Criminal Justice and Courts Act 2015 amended Sch 14 to incorporate the extended definition of an EPI in England and Wales.[189]

Penalties and Procedural Matters

The s 63 offence is triable either way. Applicable sentences depend on the severity of the extremity.[190] In England and Wales, conviction on indictment will result in a maximum sentence of three years' imprisonment (or a fine or both) for possession of images portraying life-threatening, serious injury acts, rape or assault by penetration,[191] and a maximum of two years (or a fine or both) for possession of images of bestiality or necrophilia.[192] It is noteworthy that a person found guilty of the offence of intercourse with an animal or sexual penetration of a corpse under the SOA 2003 is also liable to a maximum of two years' imprisonment on conviction on indictment.[193] It appears that the CJIA 2008 treats the possession of EPI portraying these acts as being of equal severity to the substantive offences under the SOA. It should also be noted that for the purposes of proportionality, s 71 of the CJIA 2008 amended s 2(1)(b) of the OPA 1959 by raising the maximum penalty on indictment for offences under the 1959 Act from three to five years imprisonment.[194]

Offenders aged 18 or above who receive a sentence of two years' imprisonment or more may be subject to notification requirements

[188] Ibid Sch 14, paras 3 to 5.

[189] Criminal Justice and Courts Act 2015, s 37(5).

[190] CJIA 2008, s 67, as amended by the Criminal Justice and Courts Act 2015, s 37(4).

[191] CJIA 2008, s 67(2) and 67(5)(a).

[192] CJIA 2008, s 67(3).

[193] SOA 2003, s 70(2)(b) and s 69(3)(b).

[194] The new sentence does not apply to offences committed before the commencement of this section; CJIA 2008, Sch 27, para 25.

under Part 2 of the SOA 2003.[195] Finally, the existing powers under s 143 of the Powers of Criminal Courts (Sentencing) Act 2000 depriving offenders of property used for the purposes of crime apply to EPI-related offences too. This position is analogous to that held in respect of IIOC-related offences.

Responses to CJIA 2008, s 63

The criminalisation of possession of EPI has been heatedly debated by academics. Petley denounces the measures as an example of the government's '[obsessive determination] to micromanage people's personal behaviour'.[196] Wilkinson maintains that s 63 may be placed in the context of a long-established legal 'demonisation'[197] of sadomasochism.[198] Ashford presents the offence as being 'wrapped in heteronormative power'[199] and describes it as criminalising activities that form part of 'an axis of sexual evil'[200] against which the Government sought to take preventative measures as a 'moral custodian'.[201]

Foster argues that the purpose of s 63 and the basis for liability possibly remain 'out of line with human rights jurisprudence'.[202] The author maintains that the European Court of Human Rights has indicated in *Dudgeon*[203] (which concerned the criminalisation of private, consensual adult homosexual encounters) that public morality might not

[195] SOA 2003, Sch 3, paras 35A and 92A, inserted by CJIA 2008, Sch 26, para 58(2).

[196] J Petley, 'Something must be done' *Index on Censorship* (10 June 2008), http://www.indexoncensorship.org/2008/06/something-must-be-done/, accessed 10 May 2013.

[197] E Wilkinson, 'Perverting visual pleasure: Representing Sadomasochism' (2009) 12(2) *Sexualities* 181, 192.

[198] See Brown et al. (n 173) 237 (Lord Templeman): '[. . .] pleasure derived from the infliction of pain is an evil thing.'

[199] C Ashford, 'Barebacking and the "Cult of Violence": Queering the Criminal law' (2010) 74(4) *Journal of Criminal Law* 339, 356.

[200] Ibid 339.

[201] Ibid 340.

[202] S Foster, 'Possession of extreme pornographic images, public protection and human rights' (2010) 15(1) *Coventry Law Journal* 21, 27.

[203] *Dudgeon v The United Kingdom* (App No 7525/76) (1981) 4 EHRR 149.

be a sufficient ground to interfere with private life.[204] If we accept that s 63 is mainly premised on moral grounds, rather than on preventing physical or other harm, Foster concludes that it 'represents an unnecessary and disproportionate interference with private [...] life'.[205] However, the Court in *Dudgeon* based its ruling on the view that had previously been taken by the legislatures of most of the other Council of Europe countries.[206] Therefore, the test of what was necessary for the protection of morals was a foreign one based on previous decisions of other legislators. In effect, the moral convictions of a particular individual nation were set aside, because they did not conform with the position adopted in the majority of the states belonging to the Council.[207]

The extent to which the Strasbourg case law provides protection for extreme images is debatable. The European Court has been 'consistently unwilling'[208] to impose on Member States a uniform conception about the link between morality and law in relation to obscene or pornographic expression. The Court has acknowledged that different societies, when pursuing the legitimate aim of the protection of morals, enjoy a wide degree of discretion in deciding whether to restrict diffusion of such material. In *Handyside*,[209] it was held that domestic authorities were in a better position than the international judge to assess the requirements of morals and the necessity for such laws.[210]

The provisions were given a cautious welcome by McGlynn and Ward. According to them, expressions like 'screams of pain and

[204] Ibid [52].

[205] Foster (n 202) 27; cf *R v Smethurst* [2001] EWCA Crim 772, [24] (Woolf LCJ), where it was held that the offence of making indecent photographs of children had the legitimate aim of protecting children from being exploited and therefore did not contravene the provisions of Articles 8 and 10.

[206] *Dudgeon* (n 203) [60]: 'The Court cannot overlook the marked changes which have occurred in this regard in the domestic law of the member States.'

[207] C Davies, *The Strange Death of Moral Britain* (Transaction Publishers, New Brunswick, New Jersey: 2004) 155.

[208] P Mahoney, 'Universality versus subsidiarity in the Strasbourg case law on free speech: Explaining some recent judgments' (1997) 4 *European Human Rights Law Review* 364, 378.

[209] *Handyside v The United Kingdom* (App No 5493/72) (1979) 1 EHRR 737.

[210] Ibid [48].

misery'[211] that may be reflected in EPI are 'low value'[212] speech and criminalisation will instil a feeling of 'responsibility' in those who feed the trade: 'Some may be deterred, some may be prosecuted. Perhaps more importantly public consciousness about the cultural harm of extreme pornography will be raised.'[213] Attwood and Smith maintain that McGlynn and Ward's argument is premised on the 'unsupported assertion'[214] that 'pornography can nurture real injustice and ruin real lives'[215] and on the 'old-fashioned view'[216] that cultural manifestations, which do nothing to make our society 'a kinder, more compassionate or more human place',[217] require state intervention.

For Easton, the criminalisation of possession of EPI does not rest solely on evidence of imitative crimes. The author argues that the prohibition on pornography that 'extols dehumanisation and degradation'[218] can be defended on the grounds that it does not contribute to human excellence. The new provisions are justified, according to her, insofar as the ban aims to promote 'human flourishing and a "good" society',[219] which encourages autonomy and respect for the individual. 'Rejecting the celebration of violence recognises the moral worth, value and dignity of all human beings',[220] she adds. Staged extreme acts, she believes, 'still [constitute] a glorification of violence and as such may be seen as inhuman and degrading for participants'.[221]

[211] McGlynn and Ward (n 27) 349.

[212] Ibid 350.

[213] Ibid; see also Home Office, *Consultation* (n 13) 1: 'We are determined to act against publishers where we can but we believe that individuals also need to take greater responsibility.'

[214] F Attwood and C Smith, 'Extreme concern: Regulating "dangerous pictures" in the United Kingdom' (2010) 37(1) *Journal of Law and Society* 171, 172.

[215] McGlynn and Ward (n 27) 327.

[216] Attwood and Smith (n 214) 172.

[217] McGlynn and Ward (n 27) 349.

[218] S Easton, 'Criminalising the possession of extreme pornography: Sword or shield' (2011) 75(5) *Journal of Criminal Law* 391, 398.

[219] Ibid 397.

[220] Ibid.

[221] Ibid 400–401.

However, Easton's argument rests uncomfortably with the idea that other simulated images which could be deemed extremely cruel and demeaning for participants are given a classification for public or private viewing. For instance, the 'silly, crass and queasy'[222] 2005 American film *Hostel*, directed by Eli Roth, which depicts 'depressingly yucky'[223] dismembered limbs, as well as 'gallons of gore',[224] and presents women as a 'honey-trap bait for a horrifying torture ring',[225] has been rated '18' by the BBFC[226] and characterised as an example of modern consumerism.[227] Films often contain very graphic portrayals of serious criminal offences of violence, but are nevertheless certified for mainstream viewing, and there is a remote possibility that criminal proceedings will be instituted. It is therefore hard to escape the idea that pornographic depictions of 'suffering' and 'abuse' are isolated and unfairly singled out by the law.

It may also be argued that the offence lacks coherence in considering the depiction of extreme violence without a sexual context less 'harmful' than violence in a sexual context. This is because material which portrays extreme violence without any sexual connotation falls outside the scope of the Act, unless it can reasonably be assumed that it has been produced solely or principally for sexual gratification. Leigh suggests that framing s 63 in terms of extreme violence irrespective of motivation would have better responded better to the rationale of the legislation 'assuming it to be public mischief in the nature of moral degradation and not simply the prohibition of sexual arousal'.[228]

[222] P Bradshaw, 'Hostel' *The Guardian* (London 24 March 2006) 7.

[223] Ibid.

[224] Ibid.

[225] Ibid.

[226] See BBFC, Releases, 'Hostel (2005)', http://www.bbfc.co.uk/releases/hostel-2005, accessed 15 July 2016.

[227] JF Rauger, 'Les films préférés des critiques du "Monde" en 2006' *Le Monde Online* (Paris 27 December 2006), http://www.lemonde.fr/cinema/article_interactif/2006/12/27/les-films-preferes-des-critiques-du-monde-en-2006_849933_3476_2.html, accessed 4 June 2013.

[228] LH Leigh, 'Criminal Justice and Immigration Act 2008: Extreme Pornography' (2008) 172(46) JPN 752, 755.

McGlynn and Rackley criticised the original CJIA 2008 provisions as weak, failing to proscribe what they name 'pro-rape websites'[229] on which a rape may be staged, but nevertheless presented to 'glorify sexual violence through the deliberate, misogynistic valorisation of rape'.[230] According to the authors, legislative action against rape images is justified on the basis of the 'cultural harm'[231] to which such content contributes. They have sought to distance themselves from a polarised position dictated by moralist reactions.[232] They do not suggest that the viewer of pornographic images of rape will necessarily commit acts of sexual violence, but stress that tolerating such images contributes to the formation and maintenance of a cultural context in which sexual violence is condoned.[233]

It may, however, be suggested that this view conflates actual rape with pornographic representations involving rape fantasies in the sense of 'lurid male fantasies of violating helpless women'.[234] Any video evidence of an actual rape would constitute prima facie evidence of a criminal offence under s 1 of the SOA 2003. However, in the case of simulated rape and its depiction, there is no indication of actual harm. 'The very essence of [the] heinous crime [of rape] is unwanted sex. That does not mean, though, that the unmitigatedly evil nature of real rape extends as well to unreal rape.'[235] Fantasy means the opposite of reality, the untrue.

> The most important difference between a fantasy of rape and a desire for the real experience is the element of control. In the fantasy ... the helpless victim actually controls the acts of the offender.... Real terror and uncontrolled pain are not experienced in these fantasies.[236]

[229] McGlynn and Rackley, 'A lost opportunity' (n 123) 249.

[230] Ibid; see also E Rackley and C McGlynn, 'Prosecuting the possession of extreme pornography: A misunderstood and mis-used law' (2013) 5 *Crim LR* 400, 405.

[231] McGlynn and Rackley, 'A lost opportunity' (n 123) 259.

[232] C McGlynn and E Rackley, 'The politics of porn' (2007) 157(7285) *NLJ* 1142, 1143.

[233] McGlynn and Rackley, 'A lost opportunity' (n 123) 258.

[234] T Horeck, *Public Rape: Representing Violation in Fiction and Film* (Routledge, Oxon: 2004) 4.

[235] N Strossen, *Defending Pornography: Free Speech, Sex and the Fight for Women's Rights* (New York University Press, New York: 2000) 172–3.

[236] JS MacKellar, *Rape: The Bait and the Trap, A balanced, humane, up-to-date analysis of its causes and control* (Crown Publishers, New York: 1975) 51.

The extension of the offence to cover staged depictions of rape raises concerns over a potential interference with what may be viewed as a form of sexual expression and experimentation and an intrusion on individuals' rights to explore their consensual adult sexual fantasies through representations they access.

Attwood and Smith maintain that McGlynn and Rackley's argument regarding rape websites is offered as a fact and relies on specific assumptions about the ways such sites can be useful to those who access them. This is a supposition which is in essence profoundly influenced by a moralist framework, they observe. Moreover, Attwood and Smith argue that if the driving force behind the legislation is concern about violence against women, then the law should be targeting the actual practices of violence:

> Rather than address the particular structural factors and material realities which contribute to women's risk of violent attack and men's propensities to violence, the current political and legal climate seeks to demonize sexually explicit media for these crimes.[237]

In the same vein, the activist collective Feminist Fightback believe that the restriction of extreme pornography is a distraction from other policy options. They state that focusing on pornography as the primary cause of violence against women 'is not only reductive and simplistic but politically dangerous. It prevents a more in depth analysis of the causes of sexual violence'.[238]

Finally, the key role of the jury in extreme pornography cases deserves attention. The CJIA makes jurors' feelings of disgust central to determining whether a privately held image can transgress the boundaries of what 'most people'[239] find morally tolerable and constitute an EPI.

[237] Attwood and Smith (n 214) 188.

[238] K Taylor, 'Criminalising extreme porn' *New Statesman Online* (London 28 October 2008), http://www.newstatesman.com/uk-politics/2008/10/extreme-porn-violence-women, accessed 15 May 2013.

[239] Home Office, *Consultation* (n 13) i, 1, [11], [57].

The Act's requirement that 'a reasonable person' looking at it would think that the persons (or animals) depicted therein are real, 'doesn't let it off the subjective hook'.[240] It seems reasonable to suggest that jurors may offer a mixture of subjective prejudices about matters of sexual propriety that can indirectly 'infect' their consideration of evidence. Moreover, imposing notions of public morality on adult private sexual desires may be regarded by those who argue in favour of a person's right to 'moral independence'[241] as a severe invasion of an individual's private sphere.

However, Johnson argues that, far from creating a problem in the administration of the s 63 requirement that an image be 'grossly offensive, disgusting or otherwise of an obscene character', jurors' subjective feelings constitute a 'key strength'.[242] The incorporation of this morality test provides a flexible safeguard for repeatedly testing the public morality asserted by the Government. 'The fact that jurors may [...] reject prosecutions in favour of tolerance and respect for private life means that [...] the morality test will provide a mechanism for delimiting the scope of the law and ensuring its proportionate use'.[243] In support of his argument, Johnson cites Young's research, which shows that jurors do not allow their own feelings of disgust to suppress others' liberal freedoms. When they are provided with different understandings and interpretations of images by the prosecution and defence, and are properly directly by the judge, 'their own subjective feelings of disgust do *not* necessarily lead them to return guilty verdicts'.[244] The analysis of the CPS case files in Chapters 7 and 8 presents an opportunity to test these assertions.

[240] Petley (n 196).

[241] R Dworkin, 'Is there a right to pornography?' (1981) 1 *Oxford Journal Legal Studies* 177, 194.

[242] P Johnson, 'Law, morality and disgust: The regulation of "extreme pornography" in England and Wales' (2010) 19(2) *Social and Legal Studies* 147, 159.

[243] Ibid 156.

[244] Ibid 159 (emphasis in the original); citing A Young, 'Aesthetic vertigo and the jurisprudence of disgust' (2000) 11(3) *Law and Critique* 241.

Concluding Remarks

The extreme pornography provisions have been characterised as 'ill-drafted and ill-considered'.[245] Although the 'grossly offensive, disgusting or otherwise of an obscene character' element under s 63(6)(b) was regarded by Lord Hunt in the Lords Committee as the 'most significant'[246] amendment to the original proposals, its phrasing invites a great degree of subjectivity, making the s 63 offence 'the most controversial criminalisation'[247] in the 2008 Act. It is perhaps difficult to contest the argument that the extreme pornography law is 'over-inclusive'.[248] While legitimately covering acts that are already illegal, the breadth of the definition of an extreme image may allow prosecutions for possession of sadomasochistic content which may be considered disgusting by the uninitiated but may have been created in a situation where all participants consented and one or more of them suffered – or appear to have suffered – serious injury or a threat to their life as a result of their sexual predilection.[249] As Murray asserts, 'the fear is that as trading in sado-masochistic pornography is the soft underbelly of the BDSM community, police will use s 63 as a Trojan horse to regulate the underlying activity'.[250] Before exploring whether these concerns materialised, Chapter 6 provides the wider context in which the findings of the research into CPS decision-making are to be placed. It offers an overview of the prosecutions initiated and convictions obtained since the offence came into force and looks at the sentencing practice that has emerged so far.

[245] Leigh (n 228) 757.

[246] HL Deb 3 March 2008, vol 699, col 894.

[247] Sikand (n 12) 4.

[248] E Metcalfe and S Ireland, *Criminal Justice and Immigration Bill: JUSTICE Briefing for House of Lords Second Reading* (JUSTICE, London: 2008) [14].

[249] Subject to the principle established in *Brown* (n 173); AD Murray, 'The reclassification of extreme pornographic images' (2009) 72(1) *MLR* 73, 89.

[250] Murray (n 249) 90.

6

Prosecutions, Convictions and Sentencing

Introduction

The previous chapter focused on how individuals commit a criminal offence by their actions relating to extreme pornography. Chapter 6 analyses the latest figures available regarding the number of prosecutions initiated and convictions obtained under s 63 of the CJIA 2008. Sentencing trends are also discussed.

Prosecutions Since 2009

Since s 63 came into force on 26 January 2009, many prosecutions have been undertaken. The figures in Table 6.1 show the total number of offences that reached a first hearing in magistrates' courts.[1]

[1] CPS, *Violence Against Women and Girls (VAWG) Crime Report 2009–10* (CPS, London: 2010) 71; CPS, *Violence Against Women and Girls (VAWG) Crime Report 2014–15* (CPS, London: 2015) 95. At the time of writing, figures relating to s 63(7A), which was inserted by s 37 of the Criminal Justice & Courts Act 2015 (i.e. offences involving images of non-consensual penetration and rape) were not available.

A.K. Antoniou, D. Akrivos, *The Rise of Extreme Porn*,
DOI 10.1007/978-3-319-48971-1_6

Table 6.1 Number of offences charged since 26 January 2009

	2008–09	2009–10	2010–11	2011–12	2012–13	2013–14	2014–15
CJIA 2008, ss 63(1) & 63(7)	2	270	1,165	1,319	1,312	1,395	1,564

Offences data are not held in the CPS management information system by defendant.[2] It is, therefore, possible that there were only a few defendants who were charged with a large number of offences.

Although only two offences were recorded by the CPS in 2008–09, the volume of proceedings commenced under the new law has rocketed ever since. For the first time since the offence came into force, the total number of offences charged slightly declined in 2012–13, but increased again during the next two years, reaching 1,564 in 2014–15. Overall, between January 2009 and April 2014,[3] 7,027 EPI-related offences reached a first hearing.

Convictions Since 2009

Table 6.2 presents the number of defendants found guilty under s 63 offences at all courts in England and Wales by year. The figures relate to persons for whom these offences were the principal offence for which they were dealt with.[4] As Table 6.1 shows, the low number of convictions

[2] The figures relate to the number of offences in which a prosecution commenced, recorded in magistrates' courts. They provide no indication of the final outcome. There is no indication whether the charged offence was the substantive charge at finalisation either; CPS, *VAWG Crime Report 2014–15* (n 1) 93, fn 114. For a breakdown of s 63 offences that reached a first hearing in magistrates' courts from 2009 up to 21 November 2011, see Statistics Regarding Prosecutions under s 63 of the CJIA 2008, Disclosure Ref: 02/2012, dated 11 January 2012, http://cps.gov.uk/publications/docs/foi_disclosures/2012/disclosure_2.pdf, accessed 15 July 2013. The figures reveal that approximately 86 per cent of the offences charged up to 21 November 2011 (i.e. 1,922 offences out of a total of 2,236) concerned images portraying a person performing an act of intercourse or oral sex with an animal (dead or alive).

[3] CPS figures relate to financial years. This was confirmed via email communication with the Parliamentary and Complaints Unit of the CPS on 15 April 2013.

[4] When a defendant has been found guilty of two or more offences, it is the offence for which the heaviest penalty is imposed. Where the same disposal is imposed for two or more offences, the offence selected is the offence for which the statutory maximum penalty is the most severe.

Table 6.2 Defendants found guilty of s 63 offences at all courts in England & Wales by year

CJIA 2008	2009	2010	2011	2012	2013	2014
ss 63(1), 63(7)(a) and 67(2): 'an act which threatens a person's life'	0	0	3	2	2	4
ss 63(1), 63(7)(b) and 67(2): 'an act which results, or is likely to result, in serious injury to a person's anus, breasts or genitals'	4	9	11	5	6	10
ss 63(1), 63(7)(c) and 67(3): 'an act which involves sexual interference with a human corpse'	0	0	0	0	2	0
ss 63(1), 63(7)(d) and 67(3): 'a person performing an act of intercourse or oral sex with an animal (whether dead or alive)'	12	48	67	71	72	77
All defendants	**16**	**57**	**81**	**78**	**82**	**91**

Ministry of Justice, Justice Statistics Analytical Services; Ref: 349-13 FOI 82593; Ministry of Justice, Justice Statistics Analytical Services; Ref: 390-15 FOI 99319. The Freedom of Information requests were made by the authors and the data were received on 5 June 2013 and 28 October 2015, respectively

for possession of images showing life-threatening acts has remained low and relatively stable since 2011. As regards images depicting serious injury acts, there was an upward trend of convictions between 2009 and 2011, but this stopped in 2012, when the number of defendants found guilty was less than half (5) compared to that of the previous year (11). Figures went up again in the following two years, reaching ten convictions in 2014. Interestingly, there were only two convictions for possession of images portraying necrophilia between 2009 and 2014. As regards bestiality images, the rapid rise in the number of offenders convicted of possession of such material between 2009 and 2010 was followed by a steady, yet gradual increase in the following years, reaching a peak in 2014 (77). The overall rate of convictions in the same year (91) was nearly six times higher than in 2009 (16). The conviction trends can perhaps be better viewed in a graph (Fig. 6.1). Since 2009, a total of 405 defendants have been found guilty of possession of EPIs (Table 6.3).

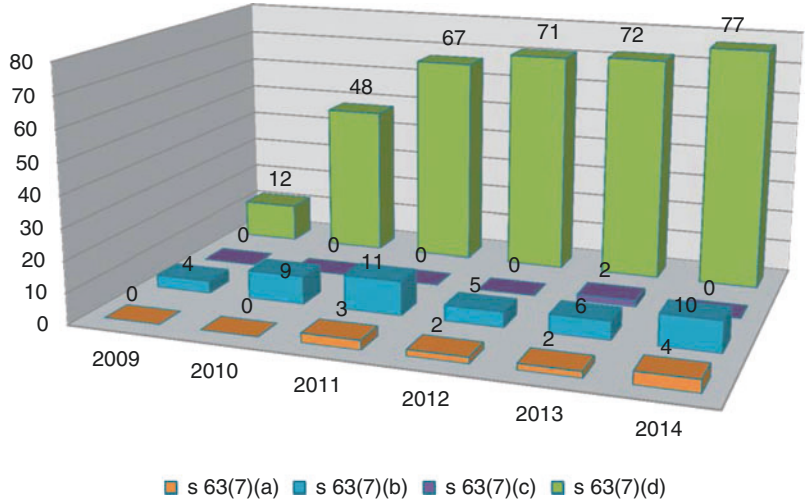

Fig. 6.1 Defendants found guilty since 26 January 2009 by year

Table 6.3 Total number of defendants found guilty under s 63 of the CJIA 2008 at all courts in England & Wales by offence (2009–14)

CJIA 2008	2009–14
ss 63(1), 63(7)(a) and 67(2): 'an act which threatens a person's life'	11
ss 63(1), 63(7)(b) and 67(2): 'an act which results, or is likely to result, in serious injury to a person's anus, breasts or genitals'	45
ss 63(1), 63(7)(c) and 67(3): 'an act which involves sexual interference with a human corpse'	2
ss 63(1), 63(7)(d) and 67(3): 'a person performing an act of intercourse or oral sex with an animal (whether dead or alive)'	347
All defendants	**405**

More than two-thirds of them (approximately 86 per cent) were convicted of possession of images portraying sexual conduct with animals (Fig. 6.2). Easton observes that this trend may reflect that either the popularity of the pornographic genre or that the police may focus on it

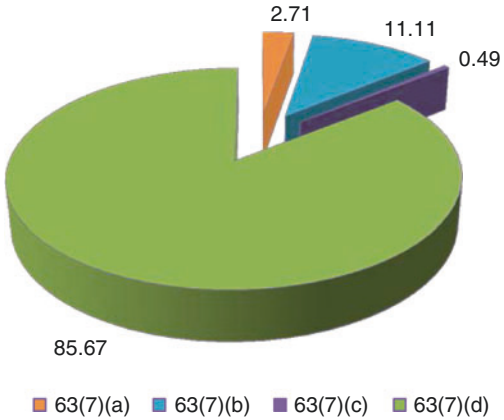

Fig. 6.2 Percentage of offenders convicted of offences under s 63 of the CJIA 2008 (2009–14)

because the levels of violence involved in such acts are less ambiguous compared to interpersonal sex.[5]

Recent Sentencing Decisions

Unlike offences related to indecent images of children (IIOC), there are no sentencing guidelines for the s 63 offence.[6] However, some recent Court of Appeal judgments offer the opportunity to examine how judges have approached the sentencing of offenders found guilty of extreme pornography offences.

[5] S Easton, 'Criminalising the possession of extreme pornography: Sword or shield' (2011) 75(5) *Journal of Criminal Law* 391, 412.

[6] *R v Wakeling* [2010] EWCA Crim 2210, [12] (Beatson J); *R v Oliver (Philip)* [2011] EWCA Crim 3114, [7] (Pitchford LJ); *R v Burns* [2012] EWCA Crim 192, [6] (Wyn Williams J); cf Sentencing Council, *Sexual Offences Definitive Guideline* (Sentencing Council, London: 2014) 75–9 and its previous version Sentencing Guidelines Council (SGC), *Sexual Offences Act 2003 Definitive Guideline* (Sentencing Guidelines Secretariat, London: 2007) 109–14, which contain detailed guidance on sentencing offences involving indecent images of children.

In *Wakeling,*[7] the appellant pleaded guilty to 11 offences of making IIOC, four offences of having IIOC and one offence of possessing EPI, which depicted a person having intercourse with horses or dogs. He received a total sentence of 14 months' imprisonment, but in respect of the extreme pornography offence he was sentenced to nine months' imprisonment to be served concurrently. On appeal against sentence, the Court held that sentencing judges 'must'[8] take into account the s 63 offence when considering the overall level of criminality and the starting point in a particular case. Referring to *Oliver (Mark David)*,[9] a Court of Appeal case giving guidance to sentencers in relation to offences involving IIOC,[10] Beatson J stated that the statutory definition of extreme pornographic material 'puts it into Level 5',[11] which embraces images of sadism or penetration of, or by, an animal. The presence of eight extreme images in the appellant's computer, and what the trial judge described as a 'remarkable amount of bestiality of the most extreme nature',[12] were deemed 'serious aggravating factors'.[13]

Oliver (Philip)[14] diverted slightly from the approach in *Wakeling*, where it was held that EPI should be classified as being at Level 5. The appellant, whose computer was found to contain three still and eight moving images involving persons performing sexual acts with animals, pleaded guilty to two counts of possession of EPI contrary to s 63(7)(d) of the CJIA 2008. He was initially sentenced to six months'

[7] *Wakeling* (n 7).

[8] Ibid [12] (Beatson J).

[9] *R v Oliver (Mark David)* [2003] 1 Cr App R 28.

[10] The former UK Sentencing Advisory Council collapsed the widely known COPINE (Combating Paedophile Information Networks in Europe Project) typology of paedophile picture collections down to five levels of severity. The Panel's analysis of increasing seriousness has been largely accepted by the Court of Appeal in *Oliver* (n 10) [12] (Rose LJ). The Court categorised the relevant levels as: (1) images depicting erotic posing with no sexual activity; (2) sexual activity between children, or solo masturbation by a child; (3) non-penetrative sexual activity between adults and children; (4) penetrative sexual activity between children and adults; (5) sadism or bestiality.

[11] *Wakeling* (n 7) [14] (Beatson J).

[12] Ibid [16] (Beatson J).

[13] Ibid.

[14] *Oliver (Philip)* (n 7).

imprisonment. As discussed in Chapter 5, by virtue of s 67(3)(b) of the 2008 Act, possession of bestiality images attracts a maximum sentence of *two* years' imprisonment. The Court of Appeal pointed out that a prosecution for possession of IIOC under s 160(1) of the CJA 1988 may result in a maximum sentence of *five* years' custody.[15] That is more than double the maximum sentence for offences of possession contrary to s 63 of the CJIA 2008. In the Court's judgment:

> the public would be surprised if the seriousness of possession of adult images should be equated with those which involve images of children. The need to protect children from those who make such images enables the court to pass sentences which have a deterrent effect in relation to children. We conclude that on principle there is *no narrow comparison* to be made between images of children and those of adults.[16]

In considering whether these offences merited a custodial sentence, the Court took into account: first, that after the images were downloaded, they were not re-accessed; and second, that the images had been downloaded before the commencement of s 63 of the CJIA 2008. Upon this factual basis, the custody threshold would not have been passed.

However, following the criminalisation of extreme pornography, the appellant in *Oliver (Philip)* downloaded a computer program ('Team Viewer'), which enabled third parties to access and control the contents of his computer remotely, thereby making the images available for distribution. The judge concluded, and the Court of Appeal agreed, that this constituted an aggravating factor of the applicant's conduct and therefore the offences to which he had pleaded guilty passed the custody threshold. Nevertheless, the Court took the view that the appellant was 'a man of exemplary character who had paid a high price in consequence of his exposure to shame and ridicule'.[17] Accordingly, his sentence was quashed and substituted by concurrent sentences of two months' imprisonment.

[15] CJA 1998, s 160(2A), as amended by the Criminal Justice and Court Services Act 2000, s 41(3)(a).
[16] *Oliver (Philip)* (n 7) [7] (Pitchford LJ) (emphasis added).
[17] Ibid [9] (Pitchford LJ).

The fact that there are no sentencing guidelines available for the offence under s 63 was confirmed in *R v C*[18] as well, where the appellant pleaded guilty to an indictment containing two counts. The first count alleged sexual activity with a child and the second possession of three extreme videos portraying women engaging in sexual acts with animals. He was sentenced to two years' imprisonment on the former count and 18 months' imprisonment on the latter to run concurrently. In his sentencing remarks, the judge stated that had the offence of possession of EPI stood by itself, a short period of imprisonment or even a community penalty would have been appropriate. However, he concluded that an overall sentence of two years' imprisonment was required as 'the combination of [the offender's] behaviour gave every indication that the actual activity could have been considerably worse'.[19]

The Criminal Division of the Court of Appeal reiterated the position in *Wakeling* that the statutory definition of extreme pornography is 'on the par with the definition by the Sentencing Guidelines Council for Level 5 offences for the possession of indecent images'.[20] Similar to *Oliver (Philip)*, the Court stressed the difference between, on the one hand, the maximum sentence available for the offence of possession of IIOC and, on the other, the maximum sentence for the offence of possession of EPI, 'which involve[d] adults and not the exploitation of children'.[21] Despite the presence of aggravating features (the appellant had shown and was prepared to show the extreme videos to others and had the means to do so), the sentence of 18 months' imprisonment for the possession of three bestiality videos was considered inappropriate and was significantly reduced to three months' imprisonment to be served concurrently with the sentence of two years' imprisonment for the offence of sexual activity with a child, which remained undisturbed.

[18] *R v C* [2010] EWCA Crim 2474.
[19] Ibid [9].
[20] Ibid [13] (The Recorder of Norwich).
[21] Ibid [15] (The Recorder of Norwich).

The appellant in *Burns*[22] was sentenced to eight months' imprisonment for one offence of possessing EPI, to which he had earlier pleaded guilty at the first available opportunity. The appellant's computer was seized by police officers after they had received a report that he was in contact with an under-age girl via social media. The forensic examination of his computer revealed that eight moving images of females engaging in sexual activities with animals were stored on it. The appellant had previously been convicted of a number of offences of sexual activity with a child. The judge justified her sentence as follows: 'These disgusting images (the possession of those) are matters which clearly do pass the custody threshold. [. . .] This level of obscenity is something in respect of which only an immediate custodial sentence is justified.'[23] Although she admitted that the quantity of the material put it into the lower category, she stated that his previous offending history was 'a significant aggravating feature'[24] which could not be ignored. The Court of Appeal agreed that the offence at issue passed the custody threshold but took the view that 'even allowing for the applicant's previous convictions [. . .], a sentence after trial of 12 months' imprisonment for this one offence of possessing eight movies would have been manifestly excessive'.[25] The Court held that the appropriate sentence after trial in this case would have been six months' imprisonment. Given that the appellant's early guilty plea and his cooperation with the investigators, the Court proposed to quash the initial sentence of eight months and substitute a term of four months.

The appellant in *Sharples*[26] was found to be in possession of a 148-seconds-long film showing an act of bestiality. He maintained that the moving image had originally been sent to his mobile phone

[22] *Burns* (n 7).

[23] Ibid [6].

[24] Ibid.

[25] Ibid [7] (Wyn Williams J). A sentence of eight months' imprisonment, after a plea of guilty, indicated that the judge considered a sentence of 12 months appropriate, which was reduced to eight by a third because of the early guilty plea in accordance with the sentencing guidelines; see Sentencing Guidelines Council, *Reduction in Sentence for a Guilty Plea Definitive Guideline* (SGC, London: 2007) [4.2].

[26] *R v Sharples (Brian Anthony)* [2012] EWCA Crim 3144.

five years earlier by a friend 'as a joke'.[27] When he realised its nature, he watched it 'out of curiosity only',[28] but he never did so again. He thought that he had deleted it, but in fact he had inadvertently transferred the illegal file onto his computer while transferring other music files onto it from his phone in order to free up space. The appellant was unaware of its existence and had never accessed it while on his computer. This was also confirmed by the forensic examiner.

None of the s 65 general offences were available to the appellant: he did not have a legitimate reason for being in possession of the image concerned; he had watched the film and had kept it for an unreasonable amount of time, albeit unintentionally. He pleaded guilty to an offence of possessing an EPI and the prosecution accepted his basis of plea. The appellant also had one previous conviction for harassment of his former partner, for which he was conditionally discharged. The pre-sentence report described him as posing 'a low risk of re-offending'.[29] Invited by the defence to impose a conditional discharge, the sentencing judge declined to do so. Although he was prepared to accept that the appellant had not solicited the image in any way, he remained sceptical about his account of how the image got onto his computer and imposed a community order of 100 hours' unpaid work, which was appealed against. It was, according to the judge's view, 'rather difficult to imagine how someone with an image like that on a mobile should not make abundantly sure that it was deleted'.[30]

However, this did not necessarily mean that the appellant did not think that he had deleted the image in question. Keith J acknowledged that 'a judge is not bound to sentence a defendant in accordance with the basis of his plea',[31] but held that there was no real basis for the judge to have doubted the appellant's claim. His culpability merely consisted in that he had not conducted sufficient checks to ensure that the film

[27] Ibid [2].
[28] Ibid.
[29] Ibid [5].
[30] Ibid [7].
[31] Ibid.

had in fact been deleted. Such a low level of culpability did not justify a community order. For this reason, the Court allowed the appeal and substituted a conditional discharge for six months.[32]

The applicant in *R v Lewis*[33] was subject to a Sexual Offences Prevention Order (SOPO) following previous convictions for sexual offences involving children. During the monitoring of his activities, his computer was found to contain 44 static and 19 moving images, which portrayed adult females performing sexual acts with animals. He pleaded guilty to two counts of possession of an EPI. He was subsequently sentenced to 12 months' imprisonment on each count to run concurrently and renewed his application for permission to appeal against his sentence after the single judge refused leave.

The sentencing judge considered the sentencing guidelines available for the possession of IIOC[34] on the grounds that there were no guidelines specific to the extreme pornography offence and that the two types of criminal conduct were of a 'similar kind'.[35] Referring to *Wakeling*, she took the view that the case before her came under the category of 'a large number of level 5 images'[36] and concluded that because of the nature of the images and the applicant's previous offending, only an immediate custodial sentence was suitable.[37] After a trial, she stated, the sentence would have been 18 months' imprisonment. A consideration of the appellant's early plea resulted in the said sentence of 12 months' imprisonment.

The applicant made three interesting submissions, which gave the Court of Appeal the opportunity to shed some light on the approach to sentencing extreme pornography offences: first, the applicant submitted that 12 of the 44 still images were duplicates of other already existing images and contended that as a result he had only been in possession of

[32] Ibid [9].

[33] *R v Lewis (John Michael)* [2012] EWCA Crim 1071.

[34] SGC, *Sexual Offences Act 2003 Definitive Guideline* (n 7).

[35] *Lewis* (n 34) [10].

[36] SGC, *Sexual Offences Act 2003 Definitive Guideline* (n 7) 113: for a person of previous good character, the sentencing range of the guidelines after a trial is 26 weeks to two year's custody.

[37] *Lewis* (n 34) [12].

32 images, a number which could not be considered large. Second, referring to *Oliver (Philip)*, it was incorrect to assess the nature of the material in question as being 'wholly analogous'[38] to IIOC of Level 5. Third, in the absence of any signs of coercion, it could be assumed that the persons featuring in the extreme movies consensually engaged in the activities portrayed 'either because their appetites genuinely extend[ed] to such behaviour or for economic gain or both'.[39]

The first submission was an 'unmeritorious point'[40] according to Beatson J. The duplicates were in fact larger images, thereby allowing the display of 'more detail more clearly'.[41] Beatson J also reiterated the position of the Court that the issue of whether a number of images could be deemed large was a matter for the judge to determine.[42] As regards the second submission, Pitchford LJ in *Oliver (Philip)* had not said that no comparison could be made between IIOC and EPI whatsoever. Instead, he stated that there was 'no *narrow* comparison'[43] to be made between images involving adults and children. In addition, neither *Oliver (Philip)* nor *C* could be deemed guideline cases, as these were different on their facts. The sentencing judge's approach was not erroneous.[44] She did not assert that the offences for which the applicant had to be sentenced were identical to the offence of possession of IIOC. Instead, she acknowledged that the two types of offending were of a 'similar kind'.[45] In light of the applicant's previous conviction for sexual offences – which was justifiably deemed an aggravating factor – and the number of images recovered (both still and moving), the Court did not find the sentence of 12 months' imprisonment to be 'too long'.[46]

[38] Ibid [13].
[39] Ibid [22].
[40] Ibid [14] (Beatson J).
[41] Ibid.
[42] The same position was adopted in *Wakeling* (n 7) [16] (Beatson J).
[43] *Oliver (Philip)* (n 7) [7] (emphasis added).
[44] This was despite the fact that she did not have before her the decision of the Court in *Oliver (Philip)*. The latter was given on 21 December 2011 and was not available when the applicant in *Lewis* was sentenced on 13 January 2012.
[45] *Lewis* (n 34) [10].
[46] Ibid [20] (Beatson J).

Lastly, the applicant's submission that the females in the extreme images consented to their participation in the sexual acts depicted was rejected. The Court of Appeal upheld the judge's view that:

> the crime was not victimless because quite often the women were trafficked or forced into involvement in making the images. The women had to be protected from sexual exploitation. The downloading of material of this sort contributed to the demand for such images and further exploitation of such women.[47]

There is some evidence in support of the Court's conclusion. It is recognised that victims of sex trafficking are 'forced'[48] into various forms of sexual exploitation, including pornography. Professor Hughes discusses, for example, the criminal proceedings initiated by the Vice Police in Latvia against the owners of an alleged 'modelling agency' ('Logo Center'), which supplied women for pornography production in other countries and maintained links to websites with bestiality and child sexual abuse imagery.[49] Other studies also indicate that trafficking victims are 'hired for pornography and bestiality'.[50] Referring to the 'real experiences'[51] of people who have sought the refuge of Wearside Women in Need, its director Clare Phillipson maintains that 'abused women [are] being forced into a profit making machine in which they suffer and die; [. . .] their deaths [are] directly linked to the sex industry. Many will have

[47] Ibid [9], [20] (Beatson J).

[48] KA McCabe, 'Common forms: Sex trafficking' in MC Burke (ed), *Human Trafficking: Interdisciplinary Perspectives* (Routledge, New York: 2013) 135; FP Bernat and T Zhilina, 'Human trafficking: The local becomes global' in FP Bernat (ed), *Human Sex Trafficking* (Routledge, Abingdon: 2011) ch 1.

[49] DM Hughes, 'The use of new communications and information technologies for sexual exploitation of women and children' (2002) 13(1) *Hastings Women's Law Journal* 129, 136.

[50] MD Enaikele and AO Olutayo, 'Human trafficking in Nigeria: Implication for human immune deficiency virus and acquired immune deficiency syndrome pandemic' (2011) 3(11) *International Journal of Sociology and Anthropology* 416, 419; S Ramage, 'Criminal prosecutions of victims of trafficking: Law Society Practice Note, 9 October 2015' (2016) 229 *Criminal Lawyer* 4, 7.

[51] C Phillipson, 'The reality of pornography' in C McGlynn, E Rackley and N Westmarland (eds), *Positions on the Politics of Porn: A Debate on Government Plans to Criminalise the Possession of Extreme Pornography* (Durham University, Durham: 2007) 22.

been trafficked from poorer European and African countries'.[52] We shall return to this matter later, as the following case raises a similar issue.

The appellant in *Livesey*[53] pleaded guilty to three s 63 offences. The extreme pornographic material recovered from his laptop computer comprised 329 still images and five moving images depicting dogs and horses penetrating females. The sentencing judge proceeded on the basis that the offences at issue involved a 'large number'[54] of images which were 'deliberately sought out'[55] by the appellant when he was working away from home. Echoing the Court of Appeal in *Lewis*,[56] the judge stated in her sentencing remarks:

> Some [of the women depicted in these images] may have been frightened or forced in performing these *unnatural acts*. . . . These women are exploited for the pleasure of *men like you* hiding behind computer screens, and no doubt if it wasn't for the fact that *men like you* searched these images out, the trade in such images would cease.[57]

The sentencing judge expressly referred to the case of *Lewis* and concluded that an immediate custodial sentence of 21 months was appropriate given the nature of the offences involved, despite the fact that the appellant had no previous convictions, had assisted the investigators, had led a respectable life, the court was satisfied that he was genuinely remorseful for his actions, and the pre-sentence report described him as presenting 'a low risk of re-offending and a low risk of harm to others'.[58] Owing to the appellant's early guilty plea, the sentence was ultimately reduced to 14 months' imprisonment on each count to be served concurrently.[59]

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[52] Ibid 21; see also Hon'ble Mrs Justice R Dalvi, 'Human trafficking: The angle of victimology, an overview' in PH Parekh (ed), *Human Rights Year Book 2010* (Universal Law Publishing, Delhi: 2010) 55.

[53] *R v Livesey (Keith)* [2013] EWCA Crim 1600.

[54] Ibid [4].

[55] Ibid.

[56] *Lewis* (n 34) [9]: 'the crime [of possession of extreme pornography] was not victimless' (Beatson J).

[57] *Livesey* (n 54) [4] (emphases added).

[58] Ibid [3].

[59] Criminal Justice Act 2003, s 144 and SGC, *Guilty Plea Definitive Guideline* (n 26).

Sitting with Davis LJ and Keith J, Lewis J held that the sentence in this case was 'manifestly excessive'.[60] Despite the large number of extreme images involved, the personal mitigation was 'extremely strong'[61] and the circumstances of this case justified 'an element of leniency'.[62] Importantly, this case was different from *Lewis*, in that the appellant in the latter had two previous convictions for sexual offences involving children, whereas the appellant in *Livesey* had none. The Court of Appeal took the view that, in these particular circumstances, the appropriate sentence after trial would have been in the order of 6 months' imprisonment before the reduction for an early guilty plea. As a result, the Court quashed the sentence of 14 months and substituted a sentence of four months for each offence to be served concurrently.[63]

The judges' sentencing remarks in *Lewis* and *Livesey* that possession of EPI is not a victimless crime are worthy of further consideration. The argument is similar to the one applied to the offence of possession of child sexual abuse images, as reflected in the Sentencing Advisory Panel's advice to the Court of Appeal: 'An offender sentenced for possession of child pornography should be treated as being in some degree complicit in the original abuse which was involved in the making of the images.'[64] Ashworth observes that this is a 'deterrent'[65] argument and a similar one can be made with respect to extreme pornography, that is, there would be no incentive to produce and fuel demand for such images, if people did not search for them. The deterrent argument seems to underpin one of the stated purposes behind the creation of the

[60] *Livesey* (n 54) [9].

[61] Ibid.

[62] Ibid.

[63] Ibid [10].

[64] Sentencing Advisory Panel, *Advice to the Court of Appeal: Offences Involving Child Pornography* (SAP, London: 2002); cf *R v Terrell* (Alexander James) [2007] EWCA Crim 3079, [28] (Ouseley J) where the Court of Appeal held that it was inappropriate to impose a sentence of imprisonment for public protection under s 225 of the Criminal Justice Act 2003 on an offender who had been convicted of making indecent images of children, because 'the link between the offending act of downloading indecent images and the possible harm [. . .] to children [was] too remote to satisfy the requirement that [the offender's] re-offending which [cause] serious harm', defined in s 224(3) of the 2003 Act as 'death or serious personal injury, whether physical or psychological'.

[65] A Ashworth, *Sentencing and Criminal Justice* (6th edn, CUP 2015) 155-6.

s 63 offence, namely the desire to protect those who may be victimised in the making of violent sexual material.[66] An 'expressive'[67] argument, namely that the offender condones the performance of sexual acts depicted by seeking and accessing the material, also seems to be implicit in the judge's sentencing remarks in *Livesey*. The repetition of the words 'men like you'[68] arguably denotes the judge's strong disapproval of the offender's conduct.

However, while those who produce extreme images bear a more direct responsibility for their eventual use, there is still room for argument about the extent to which an offender who downloads and keeps extreme images of bestiality, already available online, should be sentenced on the basis of his or her involvement in the exploitation of individuals participating in these acts. Whereas 'forcing'[69] someone into performing what the judge described as 'unnatural acts'[70] violates fundamental elements in a victim's living standard,[71] the act of merely accessing and possessing representations of such activities is arguably more diluted in its impact. Judges' views in *Lewis* and *Livesey* might be considered 'overzealous',[72] particularly because the sexual act occurred before the person who accessed its depiction became involved. While the mere act of possession of bestiality images cannot be wholly decoupled from their creation, the offender's proximity to and responsibility for the original occurrence of harm, especially where such a consequence may in some occasions pass through the participants' voluntary actions, seems to have escaped judges' attention.

[66] Home Office, *Consultation: On the Possession of the Extreme Pornographic Material* (Home Office Communications Directorate, London: 2005) [34].

[67] Ashworth (n 66) 155.

[68] *Livesey* (n 54) [4].

[69] *Lewis* (n 34) [9], [22]; Ibid.

[70] *Livesey* (n 54) [4].

[71] Such as physical integrity, autonomy and freedom from degrading treatment; see further A von Hirsh and N Jareborg, 'Gauging criminal harm: A living standard analysis' (1991) 11(1) *Oxford Journal of Legal Studies* 1.

[72] A similar point is made by Ashworth (n 66) 162 in the context of indecent images of children.

Sentencing Extreme Pornography Offences: Some Observations

In light of the data presented in this chapter, it is perhaps unsurprising that the limited guidance available on sentencing derives only from cases involving images of bestiality. A few observations may usefully conclude this part, prior to analysing the statistical information that occupy the bulk of Chapter 6.

Where a court considers an offence for which no sentencing guidance is available, the sentencing judge is entitled to take into account similar or broadly analogous guidelines. In more than half of the cases discussed, judges used the sentencing guidelines for child sexual abuse images as a point of reference. However, it should be remembered that 'there is no narrow comparison to be made between images of children and those of adults'.[73] Moreover, as Beatson J pointed out in *Lewis*, the judge's task is to evaluate each case separately by 'the essential exercise of judgment which is rightly committed to experienced trial judges'.[74] Importantly, where broadly analogous guidelines are being relied upon, this essential exercise of judgment must not result in a sentence which is 'manifestly excessive or wrong in principle'[75] for the offence(s) for which a defendant is being sentenced.

What amounts to a 'large quantity' or a 'small number' of images is rather unclear: whilst it seems self-evident that the 329 still and five moving extreme images in *Livesey* amounted to a 'large number',[76] this was less straightforward in other cases. In *Lewis*, it was held that the sentencing judge was entitled to conclude that 44 still and 19 moving EPI fell into the category of 'large number'[77] of images. In *Wakeling*,[78] however, the judge described eight extreme pornographic movies as a

[73] *Oliver (Philip)* (n 7) [7] (Pitchford LJ).

[74] *Lewis* (n 34) [19] (Beatson J); referring to *R v Roe* [2010] EWCA Crim 357, [4] (Lord Justice Hughes).

[75] Ibid [20] (Beatson J).

[76] *Livesey* (n 54) [4].

[77] *Lewis* (n 34) [14] (Beatson J).

[78] *Wakeling* (n 7).

'remarkable amount of bestiality',[79] although this number could plausibly be perceived as significantly lower compared to 19. In any event, determining the question of whether the number is large or small is primarily for the sentencing judge.[80]

In cases where IIOC-related offences were the principal ones and an offence under s 63 was charged alongside them, extreme pornography added to the overall context of the offending behaviour.[81] In *Wakeling*, for example, where the appellant pleaded guilty to several offences of making and having IIOC and one offence of possession of EPI, the presence of EPI, their quantity and what the judge described as 'bestiality of the most extreme nature'[82] were deemed 'serious aggravating factors'.[83]

It can also reasonably be inferred from the judges' reasoning that if an offence of possession of a small number of EPI stands by itself, a short period of imprisonment or even a community penalty may be appropriate.[84] An offence of possession of a small number of images downloaded before the commencement of the statutory provisions making it an offence to possess them, and kept thereafter, is unlikely to pass the custody threshold in the absence of any attempt to re-access them or any other aggravating factor.[85] Moreover, a custodial sentence of *up to six months* would be appropriate in a case where a large number of extreme images is involved but there are no other aggravating factors and the offender has no previous convictions, is of a good character and has demonstrated remorse for his actions.[86]

Previous convictions for sexual offending may be a factor that would aggravate the seriousness of an individual s 63 offence.[87] However, even

[79] Ibid [16] (Beatson J).

[80] *Oliver* (n 7); *Wakeling* (n 7) [15] (Beatson J); *Lewis* (n 34) [14] (Beatson J); *Burns* (n 7) [6] (Wyn Williams J).

[81] *Wakeling* (n 7) [12] (Beatson J).

[82] Ibid [16].

[83] Ibid.

[84] *R v C* (n 19) [9]; *Oliver (Philip)* (n 7); *Burns* (n 7); *Sharples* (n 27).

[85] *Oliver (Philip)* (n 7) [8] (Lord Justice Pitchford).

[86] *Livesey* (n 54) [9].

[87] *Burns* (n 7) [6] (Wyn Williams J).

allowing for an offender's previous conviction for sexual offences, a sentence after trial of 12 months' imprisonment for one offence of possessing a small number of EPI, and in the absence of any other aggravating features, may be considered 'manifestly excessive'.[88] Finally, the combination of previous convictions for sexual offences and the number of images involved will most likely affect the seriousness of an extreme pornography offence.[89]

None of the cases analysed in this chapter is a guideline case. The courts examined all the relevant factors and considered the appropriate sentence on that basis. Cases involving EPI may reach different levels of seriousness through a variety of routes and it is perhaps difficult to anticipate that the provision of guidelines can adequately cover all variations of the different types of EPI-related offences. However, given the broad scope of the extreme pornography offence, the high volume of prosecutions under s 63 (Table 6.1) and the increasing number of convictions (Table 6.2), there are strong reasons for providing sentencers with a more objective standard for assessing the offender's role and involvement with the images,[90] the nature of the material and the quantity thereof, especially if the offender has previous convictions.

Quantity may not necessarily be a determinant factor in deciding the seriousness of an offence and give a complete account of the offending behaviour. Nevertheless, it seems reasonable to suggest that the amount of the extreme images involved may provide an indicator of the volume of offending in some cases and must have some impact on the issue of seriousness and, therefore, the level of sentence. We are sensitive to the fact that determining with precision what constitutes a small, moderate or large amount of material is not an easy task, especially when offenders may possess hundreds or thousands of such images. This becomes more

[88] Ibid [7] (Wyn Williams).

[89] *Lewis* (n 34) [21] (Beatson J).

[90] Various media and methods can be used for accessing extreme images, e.g. an offence of possession would arguably be less serious if the offender simply viewed the images without actively storing them; see also the discussion about the element of possession in Chapter 5 (section 'Viewing').

difficult where the defendant has been indicted on a sample or specimen charges that represent other alleged offences with which the defendant has not been charged.[91] Thus, guidance to promote a more consistent approach to sentencing extreme pornography offences across England and Wales would be a useful way forward. Factors that are likely to be relatively common to these offences (e.g. period over which images were possessed, whether a collection includes moving images) need to be set out in order to ensure that they are considered equally by all courts. This would be unlikely to impose a straight-jacket on sentencing decisions. As the Court of Appeal has reiterated many times, such guidelines 'are not to be approached in a mechanical way'.[92] Judges may depart from sentencing guidelines where it is in the interests of justice to do so.[93]

Offenders Sentenced Hitherto and Average Custodial Sentence Length (ACSL)

Table 6.4 shows the number of offenders sentenced at all courts in England and Wales,[94] and provides a sentence breakdown, excluding life and indeterminate sentences. The ACSL (where available) is also considered. The figures provided relate to persons for whom the s 63 offence was the principal offence for which they were dealt with.[95] The number of offenders sentenced can differ from those found guilty, as it may be the case that a defendant convicted in a particular year and committed for sentence to the Crown Court may not be sentenced until the following year.

[91] This challenge can be overcome by treating possession of one file on the offender's computer containing numerous images as a single offence. The same solution has been suggested by the Sentencing Advisory Panel in relation to cases involving the offence of possession of indecent images of children, where it is not uncommon among Internet users to possess collections of numerous images; see Sentencing Advisory Panel, *Advice to the Court of Appeal* (n 65) [43].

[92] *Wakeling* (n 7) [14] (Beatson J).

[93] Coroners and Justice Act 2009, s 125(1).

[94] Ministry of Justice, Justice Statistics Analytical Services; Ref: 349-13 FOI 82593; Ref: 390-15 FOI 99319 (n 5).

[95] When a defendant has been found guilty of two or more offences it is the offence for which the heaviest penalty is imposed.

Table 6.4 Offenders sentenced at all courts in England & Wales (2009–14) and sentence breakdown for possession of EPI under the CJIA 2008 ss. 63(1), 63(7), 67(2) and 67(3)

Type of offence & sentence breakdown	2009	2010	2011	2012	2013	2014	Total
CJIA 2008 ss. 63(1), 63(7)(a), 67(2)							
Sentenced – *of which:*	–	**1**	**3**	**2**	**1**	**4**	11
Conditional discharge	–	–	–	1	–	–	1
Fine	–	–	–	–	–	–	–
Community sentence	–	–	2	–	–	2	4
Fully suspended sentence	–	–	1	1	1	–	3
Immediate custody	–	1	–	–	–	2	3
CJIA 2008 ss. 63(1), 63(7)(b), 67(2)							
Sentenced – *of which:*	**1**	**11**	**10**	**6**	**5**	**9**	42
Conditional discharge	1	–	1	–	1	2	5
Fine	–	–	–	–	–	1	1
Community sentence	–	6	3	2	3	2	16
Fully suspended sentence	–	2	3	2	–	3	10
Immediate custody	–	3	3	2	1	1	10
CJIA 2008 ss. 63(1), 63(7)(c), 67(3)							
Sentenced – *of which*:	–	–	–	–	**2**	–	2
Conditional discharge	–	–	–	–	–	–	
Fine							
Community sentence	–	–	–	–	–	–	
Fully suspended sentence	–	–	–	–	1	–	1
Immediate custody	–	–	–	–	1	–	1
CJIA 2008 ss. 63(1), 63(7)(d), 67(3)							
Sentenced – *of which:*	**12**	**50**	**77**	**79**	**81**	**87**	386
Conditional discharge	–	3	7	8	3	8	29
Fine	2	8	5	6	4	4	29
Community sentence	6	21	28	38	22	38	153
Fully suspended sentence	1	8	11	12	30	24	86
Immediate custody	3	10	25	13	20	12	83
Otherwise dealt with	–	–	1	2	2	1	6
Total	13	62	90	87	89	100	441

Between 2009 and 2014 only 11 offenders were sentenced for possessing EPI involving life-threatening acts. More than half of them (7) were dealt with by means of community and suspended sentences. Throughout this period, three offenders received an immediate custody. However, considering that there were no convictions for this offence either in 2009 or 2010 (see Table 6.2), the Ministry of Justice 2010 data

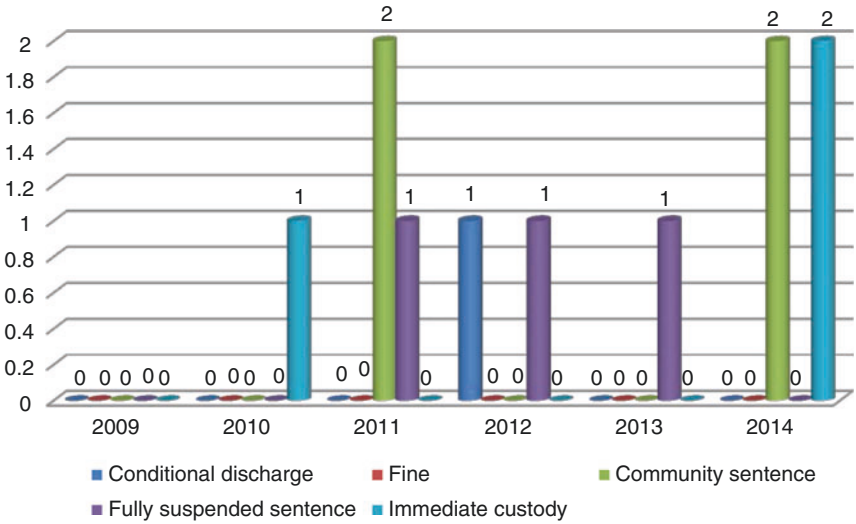

Fig. 6.3 Sentence breakdown for possession of EPI under the CJIA 2008, ss 63(1), 63(7)(a) & 67(2) (2009–14)

seem rather inconsistent in relation to this particular type of sentence. One conditional discharge, the essence of which is 'a threat or warning',[96] was imposed for this offence in 2012 (see also Fig. 6.3).

The number of offenders sentenced for possession of serious injury images in the 2009–14 period was approximately four times higher than that of offenders sentenced for possession of life-threatening images. Out of all 42 offenders sentenced up to 2014, more than one-third (16) received a community sentence. Twenty of them were dealt with by means of a custodial sentence and only five of them were given a conditional discharge (see also Fig. 6.4).

Of the two offenders sentenced for possession of images portraying acts of sexual interference with a human corpse in 2013, one received an immediate custody and the other a suspended sentence order (see also Fig. 6.5).

From 2009 to 2014, more than one-third of offenders sentenced for possession of bestiality images received a community sentence. Nearly

[96] Ashworth (n 66) 339.

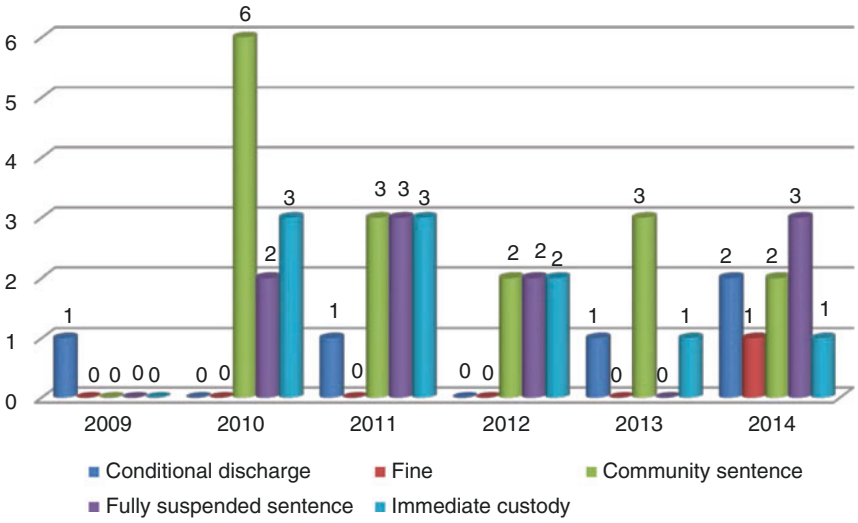

Fig. 6.4 Sentence breakdown for possession of EPI under the CJIA 2008, ss 63(1), 63(7)(b) & 67(2) (2009–14)

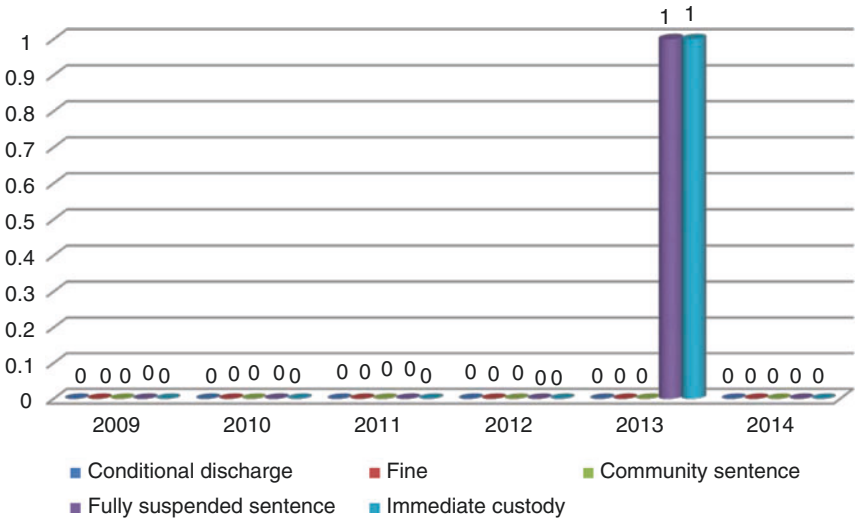

Fig. 6.5 Sentence breakdown for possession of EPI under the CJIA 2008, ss 63(1), 63(7)(c) & 67(3) (2009–14)

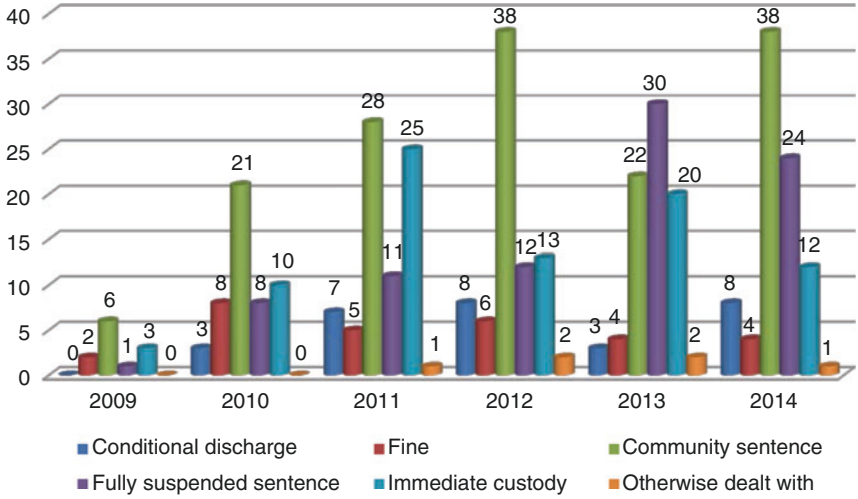

Fig. 6.6 Sentence breakdown for possession of EPI under the CJIA 2008, ss 63(1), 63(7)(d) & 67(3) (2009–14)

half of all offenders received this type of sentence in 2012 (38 out of 79), but the next two years saw an increase in the use of custodial sentences and in particular, suspended sentence orders. However, the rise in suspended sentence rates up until 2013 did not continue in the next year. Table 6.4 and Figure 6.6 also show the fluctuation in the comparatively lower number of offenders (29 in total) who were given a conditional discharge between 2009 and 2014. The number of offenders upon which a fine was levied has gradually declined since 2010, suggesting that the inclination of judges to fine defendants for offences involving such images is diminishing. Custodial sentences are reserved for the most serious offences and are passed when the offence committed, or the combination of the offence and one or more offences associated with it, 'was so serious that neither a fine alone nor a community sentence can be justified'.[97] The number of persons sentenced to immediate custody for possession of bestiality images sharply increased

[97] Criminal Justice Act, s 152(2).

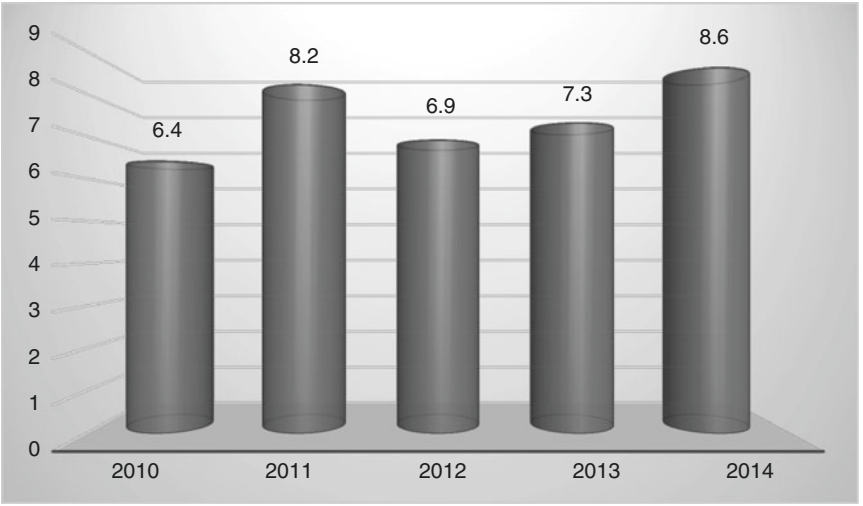

Fig. 6.7 Average custodial sentence length (months) for possession of EPI under the CJIA 2008, s 63(1) and s 63(7)(d), England & Wales (2009–14).

Ministry of Justice, Justice Statistics Analytical Services (n 5)

in the first two years of the implementation of the offence and reached its peak in 2011 (25). However, this rapid rise did not continue in the following three years, reaching in 2014 nearly half the number of offenders compared to 2011.

Average Custodial Sentence Length

Figure 6.7 presents the ACSL handed down across all courts in England and Wales for the offence of possession of an image which portrays a person performing an act of intercourse or oral sex with an animal.[98] Between 2010 and 2011, the ACSL rose by 1.8 months, but this increase did not continue in the following year: from 2011 to 2012, there was a small reduction in the

[98] The ACSL excludes life/indeterminate sentences.

average length by 1.3 months. This was followed by an upward trend in the next two years reaching 8.6 months in 2014. This figure is relatively close to the original estimation provided by the Ministry of Justice that offenders would go to prison for an average of six months.[99] The same figure is noticeably lower than the ACSL for all triable either-way offences in 2014 (12.8 months) and all previous years since the extreme pornography offence came into force.[100] It was not possible to establish the ACSL for offences under ss 63(7)(a), 63(7)(b) and 63(7)(c) of the 2008 Act, as the numbers of offenders sentenced to immediate custody were, according to the Ministry of Justice, too small to give a meaningful average sentence length.

Concluding Remarks

Chapter 6 presented a comprehensive and contemporary account of the number of defendants charged and convictions obtained since the extreme pornography offence came into effect. Latest figures indicate a steadily increasing rate of prosecutions since 2009, reaching 1,564 in 2014–15. In 2014, 103 defendants were proceeded against for s 63 offences at magistrates' courts in England and Wales (32 more compared to the previous year).[101] These figures are appreciably higher than the 30 cases per year originally expected by the Ministry of Justice.[102]

[99] R Williams, 'Police will not target offenders against law on violent porn' *The Guardian* (London 26 January 2009).

[100] The ACSL for triable either-way offences was 12.2 months in 2009, 11.8 months in 2010, 12.2 months in 2011, 12.0 months in 2012 and 12.5 months in 2013. The ACSL for possession of bestiality images was also significantly lower than that of all criminal offences in the same years: 13.7 months in 2009, 13.7 months in 2010, 14.3 months in 2011, 14.5 months in 2012, 15.5 months in 2013 and 15.6 months in 2014; Ministry of Justice, *Criminal Justice Statistics Annual Update 2015*, Table Q5.1 (offenders sentenced by offence group and type of sentence at all courts, 2005–2015), https://goo.gl/ifok2O, accessed 5 July 2016.

[101] Ministry of Justice, Justice Statistics Analytical Services; Ref: 390-15 FOI 99319 (n 5); the number of defendants found guilty in a particular year (Table 6.2) may exceed the number proceeded against, as the proceedings in the magistrates' court took place in an earlier year and the defendants were found guilty at the Crown court in the following year.

[102] Williams (n 100).

Between 2009 and 2014, a total of 441 offenders were sentenced at all courts in England and Wales for EPI-related offences. The figures presented demonstrate that a large majority of offenders sentenced during that period were dealt with by means of a community sentence (173 out of 441, representing approximately 40 per cent of all offenders). Immediate custody was imposed on less than a quarter of them (97 out of the 441). With the exception of 2009 (the first year of the implementation of s 63), the number of offenders who were imprisoned each year between 2010 and 2014[103] was higher than the 10 offenders that the Ministry of Justice anticipated would be jailed annually.[104] Recent sentencing decisions were considered as well. None of the authorities discussed in this chapter is a guideline case. It was argued that guidance to promote a consistent approach to sentencing extreme pornography offences across England and Wales would no doubt be desirable.

Any discussion on the enforcement of the extreme pornography provisions should not be limited only to statistics, as these do not sufficiently illuminate the true application of the law in this area. This study seeks to address the gap in research by providing a snapshot of the practical implementation of the legal framework targeting this type of material. The following two chapters present the main findings of a small-scale study conducted into CPS files concerning extreme pornography cases in England and Wales.

[103] That is 14 offenders in 2010, 28 in 2011, 15 in 2012, 22 in 2013 and 15 in 2014; see Table 6.4.

[104] Williams (n 100).

7

Crown Prosecution Service Case Files Review: Setting the Scene

Research Strategy and Presentation of Findings

The next two chapters provide a snapshot of the practical application of the extreme pornography provisions through the review of a sample of Crown Prosecution Service (CPS) case files. The main objective of Chapter 7 is to present specific data that will help contextualise the findings of the review. As Nielsen argues, materials in case files are constructed as part of the adversarial process and 'must be understood in context'.[1] Chapter 8 analyses prosecutors' decision-making and explores the thresholds of extreme pornography where they were satisfied that sufficient evidence to provide a realistic prospect of conviction existed. For the purposes of the case files review, a qualitative approach was employed which also included some quantitative components. This integration of both qualitative and quantitative elements gave our project more explanatory power and enhanced

[1] LB Nielsen, 'The need for multi-method approaches in empirical legal research' in P Cane and H Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (OUP, Oxford: 2010) 954.

A.K. Antoniou, D. Akrivos, *The Rise of Extreme Porn*,
DOI 10.1007/978-3-319-48971-1_7

the integrity of our findings.[2] By bringing together two lines of sight, a more comprehensive array of data was obtained and a richer picture of the prosecution practice in this area of law was painted.

Background

Before analysing prosecutors' decision-making as reflected in the files studied, it is essential to discuss briefly the role of the CPS and the general principles applied when decisions about prosecutions are made. The CPS was set up as a national prosecution service for England and Wales under the Prosecution of Offences Act (POA) 1985.[3] Prosecution of offences is now separated from their detection and investigation, which is conducted by the police.

The CPS determines the charge to be brought in all but minor routine cases.[4] By virtue of para 15 of the Director of Public Prosecutions' (DPP) Guidance on Charging, the police may charge any either-way offence anticipated as a guilty plea and suitable for sentence in a magistrates' court, provided that this is not a case requiring the DPP's consent to prosecute.[5] Given that proceedings for a s 63 offence may not be instituted in England and Wales except by or with the consent of the DPP,[6] charging decisions in extreme pornography cases are made solely by Crown Prosecutors.[7]

[2] RD Hartley, *Snapshots of Research: Readings in Criminology and Criminal Justice* (Sage, London: 2011) 374; J Brewer and A Hunter, *Foundations of Multimethod Research: Synthesizing Styles* (Sage Publications, Thousand Oaks, CA: 2006) 32; JW Creswell, *Research Design: Qualitative and Quantitative and Mixed Methods Approaches* (Sage, Thousand Oaks, CA: 2009); JW Creswell and VL Plano, *Conducting and Designing Mixed Methods Research* (2nd ed, Thousand Oaks, CA: 2011).

[3] See also Home Office, *An Independent Prosecution Service for England and Wales* (Cmnd 9074, 1983).

[4] CJA 2003, s 29 in combination with Sch 2; see also ID Brownlee, 'The statutory charging scheme in England and Wales: Towards a unified prosecution system?' [2004] (November) *Crim LR* 896.

[5] The Director's Guidance on Charging 2013 (5th ed, May 2013); guidance to police officers and Crown Prosecutors issued by the DPP under the Police and Criminal Evidence Act 1984, s 37A, http://www.cps.gov.uk/publications/directors_guidance/dpp_guidance_5.html, accessed 14 June 2013.

[6] CJIA 2008, s 63(10)(a).

[7] The requirement for DPP's consent to bring proceedings is redundant, as consent can be given on his behalf by a Crown Prosecutor by virtue of s 1(7) of the 1985 POA. In effect, what is now required is the consent of the CPS, rather than that of the DPP personally; J Sprack, *A Practical Approach to Criminal Procedure* (14th ed, OUP, Oxford: 2012) [5.38].

Charging Decisions and the Code for Crown Prosecutors Tests

In making their decisions about whether a person should be charged with an offence and if so, what this should be, prosecutors are bound by the Code for Crown Prosecutors (CCP or 'the Code'), issued by the DPP under s 10 of the 1985 POA. Following public consultation,[8] a new Code was published in January 2013. However, at the time when the research cases in this book were under consideration for charging by the CPS, the previous 2010 edition (6th) was current. The changes from the 6th to the 7th edition (2013) of the Code should not have made any material difference to the decisions taken in the sample of cases studied, as the latest CCP does not depart radically from the previous one.[9] The decision-making process requires prosecutors to evaluate the evidence presented to them by the officer involved in the investigation.[10] Cases must not proceed to trial unless the evidential *and* the public interest stages of the Full Code Test are met. These are analytically distinct and must be considered consecutively.

The Evidential Stage

Prosecutors must be satisfied that there is adequate evidence to provide 'a realistic prospect of conviction'[11] on each charge. This is an objective test, meaning that a properly directed court, acting in accordance with the law, is more likely than not to convict the defendant of the alleged

[8] *The Code for Crown Prosecutors: Consultation Document* (CPS Strategy and Policy Directorate, London: 2012), http://www.cps.gov.uk/consultations/draft_code_for_consultation_2012.pdf, accessed 7 February 2013.

[9] This chapter considers both editions. For further details on the key differences between them, see CPS Press Release, 'DPP publishes new Code for Crown Prosecutors following public consultation' (London 28 January 2013), http://www.cps.gov.uk/news/latest_news/dpp_publishes_new_code_for_crown_prosecutors_following_public_consultation/, accessed 16 July 2016.

[10] The Director's Guidance on Charging 2013 (n 5) [26].

[11] CCP (2010) [4.5]; (2013) [4.4].

charge[12] and includes a consideration of whether there is a realistic expectation of an ordered acquittal or successful submission of 'no case'. Put simply, the evidential stage requires prosecutors to predict what an 'objective, impartial and reasonable'[13] jury or bench of magistrates or judge is likely to decide.[14] In addition, prosecutors need to consider three factors: first, the admissibility of the available evidence[15]; second, its reliability[16]; and third, its credibility.[17] A case which does not pass the evidential stage 'must not proceed, no matter how serious or sensitive it may be'.[18]

The Public Interest Stage

'It has never been the rule in this country [. . .] that suspected criminal offences must automatically be the subject of prosecution.'[19] Where the evidential stage is satisfied, prosecutors must go on to consider whether, in light of the provable facts and the surrounding circumstances, a prosecution is required in the public interest. As a general rule, a prosecution 'will usually take place',[20] unless the prosecutor is satisfied that there are public interest factors against it that outweigh those in favour. The determination of the strength of the public interest is not a mathematical process of calculating which side of the scales is numerically heavier.[21] Rather, its evaluation depends on the relative value

[12] This test differs from the one that criminal courts must apply: 'A court may only convict if it is sure that the defendant is guilty'; CCP (2010) [4.6]; (2013) [4.5].

[13] CCP (2010) [4.6]; (2013) [4.5].

[14] For a critique of the evidential test, see G Williams, 'Letting off the guilty and prosecuting the innocent' [1985] *Crim LR* 115; A Sanders, 'The silent code' (1994) 144(6655) *NLJ* 946.

[15] CCP (2010) [4.7]; (2013) [4.6].

[16] Ibid.

[17] CCP (2010) [4.7d]; (2013) [4.6].

[18] CCP (2010) [4.5]; (2013) [4.4].

[19] HC Deb 29 January 1951, vol 483, col 681 (Sir Hartley Shawcross, QC, the then Attorney General; later Lord Shawcorss).

[20] CCP (2010) [4.12]; (2013) [4.8]. The Code appears to create a presumption in favour of prosecution on the grounds of public interest; see CCP (2010) [4.13]; (2013) [4.11].

[21] CCP (2010) [4.13].

placed on each particular factor.[22] The more serious the offence, or the offender's record of criminal conduct, the more likely it is that a prosecution is required.[23]

Prosecutors are also guided by a 'non-exhaustive'[24] list of factors. Many of those outlined (e.g. the threat of violence, the suspect's previous convictions) coincide with factors that militate in aggravation of sentence[25] or mirror circumstances that might mitigate the sentence. These factors are not assigned any priority and the Code does not specify how potential conflicts between them can be resolved. Moreover, the 2013 Code enjoins prosecutors to consider the impact of the offending on the wider 'community'.[26] The term is not necessarily limited to particular localities. Another factor to be weighed is 'whether prosecution is a proportionate response to the likely outcome'.[27]The cost to the CPS and the wider criminal justice system, as well as principles of efficient case management, need to be taken into account.[28] The aforementioned factors are not specific to the offence under s 63. The Code guides decision-making at a basic level: 'It is a signpost rather than a map.'[29]

Finally, it should be noted that where the intention is to hold the suspect in custody after charge, but the evidence to apply the Full Code Test is not yet available, the Threshold Test applies.[30] This is an interim measure that may be used by prosecutors in exceptional circumstances in order to manage high-risk offenders, whilst outstanding evidence is gathered by the police within a reasonable period.[31]

[22] CCP (2010) [4.13]; (2013) [4.11].

[23] CCP (2010) [4.12]; (2013) [4.12a].

[24] CCP (2010) [4.15]; (2013) [4.10].

[25] A Ashworth and M Redmayne, *The Criminal Process* (4th ed, OUP, Oxford: 2010) 204.

[26] CCP (2013) [4.12e].

[27] CCP (2013) [4.12f].

[28] For a critique of this instruction, see A Ashworth, 'The "public interest" element in prosecutions' [1987] (September) *Crim LR* 595, 597.

[29] A Hoyano, 'A study of the impact of the revised CCP' [1997] (August) *Crim LR* 556, 564.

[30] CCP (2010) [5.1]; (2013) [5.1].

[31] For further details, see Y Moreno and P Hughes, *Effective Prosecution: Working in Partnership with the CPS* (OUP, Oxford: 2008) 48.

The Case Files Review: Sampling

A list of 235 cases from 39 CPS areas was provided by the CPS for the purposes of this study.[32] The cases were described as incorporating 1,208 offences of possession of extreme pornography under ss 63(1) and 63(7) of the Criminal Justice and Immigration Act 2008 (CJIA 2008) and were finalised within the financial year 2010–11. A total of 16 cases were identified from caseloads in four of those areas for inclusion in this review. The sample size of 16 research cases and the limit of four areas were determined by the CPS. The areas invited to participate in the research were: Kent, London, Staffordshire and South Wales. These were chosen on the basis that they could supply relevant files and were diverse both in terms of their caseloads and geography (metropolitan/non-metropolitan).

Purposive sampling was preferred in order to identify cases files relevant to the research. According to Patton:

> the logic and power of purposeful sampling lies in selecting *information-rich cases* for study in depth. Information-rich cases are those from which one can learn a great deal about issues of central importance to the purpose of the inquiry, thus the term *purposeful* sampling.[33]

A small, 'purposeful random sample'[34] aimed to reduce suspicion about why certain cases were selected for study.[35] However, this was not a representative random sample. '*The purpose of a small random sample is credibility, not representativeness*',[36] Patton stresses. The selection of the units of interest was made with a view to acquiring qualitative

[32] The CPS restructured from 42 Areas into 13 in April 2011, but at the time that the sample of files was identified, the Service was organised into 42 Areas.

[33] QM Patton, *Qualitative Research and Evaluation Methods* (3rd ed, Sage Publications, Thousand Oaks, CA: 2002) 230 (emphasis in the original).

[34] QM Patton, *Qualitative Evaluation and Research Methods* (Sage Publications, Beverly Hills, CA: 1990) 179.

[35] Ibid 180.

[36] Patton, *Qualitative Research and Evaluation Methods* (n 33) 241 (emphasis in the original).

and detailed insights into prosecutors' decisions. This qualitative document analysis primarily sought conceptual adequacy, not statistical generalisation.

The following criteria governed the selection: (a) the type of offence (s) involved in each case, according to the classification of extreme images under s 63(7) of the CJIA 2008; and (b) the number of offences incorporated into each case. Cases meeting the first criterion were intended to offer an additional layer of insight into cases pertaining to images that portray life-threatening or serious injury acts, as opposed to bestiality, the content of which is arguably less controversial. Cases under the second criterion were requested with a view to maximising the pool of results. The CPS offices of the selected areas were subsequently asked to retrieve the relevant files, which were sent in response. After the sample was collated, none of the case files were excluded from the research, as all of them were found to fully meet the sample criteria.

The MG3 Form and the Extreme Images

CPS paper case files provide a legal record of the events and decisions or discussions relevant to a case. The quantitative data was collated from a wealth of documents found in them, including the file front sheets,[37] witness statements and forensic analysts' reports, exhibit lists, evidence of the defendant's bad character, the indictment, trial record sheets and correspondence between the CPS and defence solicitors or the CPS and the police.

A substantial part of the qualitative body of this study was based on MG3 forms. The MG3 form is a record of the interaction between the police investigators and the CPS up to – and including – the making of the charging decision and is used to provide an audit trail.[38] Its full title

[37] Also known as MG1 forms. There were particularly helpful in providing at a glance details about the defendant and whether or not it was a special category of case or offender.

[38] Moreno and Hughes, *Effective Prosecution* (n 31) 166, 173.

is 'MG3: Report to Crown Prosecutor for Charging Decision; Decision Log & Action Plan.' It comprises two parts:

1. **Part A: Report to Crown Prosecutor (for police completion)**: This is initially completed by police officers and needs to be submitted in respect of any suspect either where a charging decision is sought from the CPS or prior to the pre-charge consultation meeting with the duty prosecutor in cases that are not straightforward.[39] This part presents an outline of the circumstances of the case and the evidence then available. In addition, it lists the material provided to the prosecutor (e.g. videos or photographs, forensic or expert evidence), thereby allowing him or her to reach an informed review decision. It may also identify any issues on which guidance is sought.[40]
2. **Part B: Charging Decision/Advice and Case Action Plan (for CPS completion)**: The form is then completed by the CPS prosecutor, who records his or her charging decision. The form may set out the prosecutor's investigative advice accompanied by an action plan, which requests that the police undertake further investigation and details outstanding evidence to be obtained by an agreed date (often before any charging decision).[41]

The importance of the MG3 form lies in the fact that Part B is broken down into a number of headings which prosecutors are expected to consider in every single case. This ensures that their decisions cover all of the key issues required. Prosecutors should describe in the 'Case Analysis/Evidential Issues' section the exact facts of the case from the outset so that one can get a taste of what the case is about straightaway. The following two sections are crucial in that they mirror the Test set

[39] In straightforward cases, a verbal report to the prosecutor will suffice; Ibid 166.

[40] This part of the form is submitted electronically or passed on with the paper file to the prosecutor.

[41] This part of the form is normally completed following a consultation meeting where a charging decision is made. Any subsequent conference or discussion requires the completion of an MG3A form: 'Further Report to the Crown Prosecutor for a Charging Decision'. Its format replicates that of the original MG3 report.

out in the CCP. Prosecutors must identify any relevant evidential issues under the 'Evidential Criteria' section of the MG3 and outline 'factors that point to guilt'.[42] Any specific weaknesses must also be noted, together with advice on how they can be overcome. When there is sufficient evidence, then the 'Public Interest' must be considered. In this section, prosecutors are expected to balance public interest factors for and against prosecution in accordance with the Code and 'note clearly in their review how they reach their overall assessment in the particular case'.[43] Other issues that need to be addressed in this form include: 'Mode of Trial', 'ECHR', 'NWNJ' ('No Witness, No Justice'),[44] 'Instructions to Court Prosecutors' and 'Charges'. Therefore, the MG3 form was deemed critical to this research project, because of its relevance to the research aim and its key advantages. In summary, it (a) outlines the circumstances of a case; (b) ensures an audit trail of decision making; (c) details prosecutors' considerations of the Code test and (d) identifies issues that may prove to be the 'Achilles' heel' of a case.

The research did not rely on the extreme images themselves as objects of study because these were not included in the CPS files. However, data pertaining to their content were retrieved from a collection of 'secondary'[45] documents, which offered a textual analysis of the 'primary'[46] documents, that is, of the extreme images. More specifically, the qualitative analysis benefited from the 'schedules to the charges',[47] which were most commonly compiled either by police officers or forensic

[42] Moreno and Hughes, *Effective Prosecution* (n 31) 170.

[43] Ibid.

[44] This is part of the NWNJ project which aims to improve the care and consider the needs of victims and witnesses from the outset of the case. If the victim is vulnerable/intimidated an MG2 form ('Special Measures Assessment') should be completed by the officer. The prosecutor will then consider making an application for special measures.

[45] DL Altheide, *Qualitative Media Analysis*, Qualitative Research Methods Series 38 (Sage, London: 1996) 3.

[46] Ibid.

[47] The prosecution material collected for a certain case is recorded and described in documents, known as 'schedules'; R Leng, 'The exchange of information and disclosure' in M McConville and G Wilson (eds), *The Handbook of the Criminal Justice Process* (OUP, Oxford: 2002) 214.

analysts. The description columns of the schedules to the charges (also described as the 'key to the indictment') contained further particulars about the extreme images, especially where these were accessible to a normal user ('live').[48] These included (a) date and time of creation; (b) details about whether an image was a moving or static one, including its duration in the case of the former; (c) the file path, that is, the root directory and all other sub-directories that contained a file or a folder where a file resided; (d) file names; (e) file formats; (f) exhibit references and most importantly (g) their content. Written accounts of the portrayals in question spanned from laconic to very detailed descriptions.

As noted in Chapter 1, Altheide's ethnographic content analysis was used to analyse the collected data. The main advantage of this approach is that it allows for reflexive observations and the potential for refinement of data collection protocols when new themes emerge.[49] The entire case files were carefully and systematically read. Many of them were voluminous and of inordinate complexity, with documents added at different stages. In the first wave of the analysis, all of the documents were examined in order to determine which pieces of information were relevant to the research aim of this study.

Extensive coding schemas (protocols) for each of the case files were constructed to capture numeric and narrative data.[50] Several variables

[48] 'Live', as opposed to images found in unallocated space. The latter is the area of a hard drive or other storage device, which is not currently used by the file system to store files, but may have stored files previously. The process of deleting a file involves marking that file as 'deleted'. However, the file is not automatically removed from the system. Instead, the area of the disc which the file occupies is identified to the file system as available to be overwritten with new files. If files are not overwritten, they may remain on the system indefinitely, and it may be possible to recover them. It is generally not possible to determine *when* and *how* files recovered from unallocated space came to be on the system in question. Files located within unallocated space are not accessible under the normal operation of a computer system without an advanced level of understanding of computing and the use of specialist software.

[49] DL Altheide, 'Ethnographic content analysis' (1987) 10(1) *Qualitative Sociology* 65; DL Altheide, *Qualitative Media Analysis*, Qualitative Research Methods Series 38 (Sage, London: 1996).

[50] For instance, numeric data concerned the number of extreme images retrieved from a defendant's electronic equipment, the date of the Plea and Case Management Hearing or sentence length. Narrative data tended to be more descriptive and/or theoretically driven. Examples included pleas offered or a prosecutor's analysis of the element of 'possession' in his or her charging decision.

pertinent to the objectives of the research were listed on each schema to guide the data collection. Key documents in the case files were subsequently filtered through these protocols. When additional subject matters arose, the data collection template was revised to reflect these. The data were finally brought together in spreadsheets, which allowed a more thorough examination of the files across different categories of extreme images. The analysis of these spreadsheets provided an additional level of quality assurance for the review of the findings.

All defendants' details have been anonymised in compliance with CPS data protection and ethical requirements. In addition, case files have been assigned an identification code comprising five or six characters. The first two letters indicate the CPS area from which they were collected. Therefore, 'KE', 'LO', 'ST' and 'SW' stand for Kent, London, Staffordshire and South Wales, respectively. The files were also assigned two serial numbers so that each would have a different number and could be identified, especially where two or more case files were retrieved from the same area. Lastly, each code is followed by the letter 'A', 'B' or 'D', or even combinations of these letters, which reflect the classification of the images involved in each case, as categorised by s 63(7) of the CJIA 2008. Although some diversity was sought through the selection process, the sample did not include every type of offence category. Cases involving offences of possession of images that portray 'an act which involves sexual interference with a human corpse' under s 63(7)(c) were represented neither in the original frame provided by the CPS nor in the sample of cases researched. Therefore, the letter 'C' was not assigned to any of the files. So, for example (Table 7.1), the case file coded **LO09A** was retrieved from **London**; it is the **ninth** research file of the sample studied and it involved offence(s) of possession of EPIs portraying 'an act which threatens a person's life', as per **s 63(7)(a)**.

Table 7.1 An example of case files coding

CPS area	Serial number	Subsection of CJIA 2008, s 63
LO	**09**	**A**

An Overview of the Research Cases

The study involves 16 cases identified by the CPS as cases involving offences of possession of extreme pornography under ss 63(1) and 63(7) of the CJIA 2008 before 11 Crown Courts in England and Wales.[51] All cases included in this review (Table 7.2) were referred to the CPS for a charging decision and were subsequently pursued with a view to prosecution. Cases that were otherwise diverted from the formal criminal justice system without being brought to the Service's attention sat outside the scope of this research.

Of the 16 cases (16 defendants),[52] only four dealt exclusively with offences contrary to ss 63(1) and 63(7) of 2008 Act: **ST10AB, SW12D, SW14B** and **SW15BD**. In the remaining 12, the s 63 offences did not stand by themselves: in the vast majority of them (11), defendants were charged with possession of EPI alongside indecent images of children (IIOC)-related offences, most commonly possession or making of an IIOC contrary to the Criminal Justice Act (CJA) 1988 or Protection

Table 7.2 An overview of the research cases in the sample studied

	CJIA 2008, ss 63(1) and 63(7)					
Sub-section(s)	63(7)(a)	63(7)(b)	63(7)(d)	63(7)(a),(b)	63(7)(b),(d)	
	LO09A	KE01B LO07B SW14B	KE02D KE04D LO05D LO16D ST11D SW12D	ST10AB	KE03BD LO06BD LO08BD SW13BD SW15BD	
Total	**1**	**3**	**6**	**1**	**5**	**16**

[51] Southwark Crown Court, Inner London Crown Court, Kingston-Upon-Thames Crown Court, Snaresbrook Crown Court, Canterbury Crown Court, Maidstone Crown Court, Stoke-On-Trent Crown Court, Stafford Crown Court, Cardiff Crown Court, Swansea Crown Court and Merthyr Tydfil Crown Court. Judgments were pronounced in all cases between April 2010 and March 2011.

[52] The sample of research cases did not include any files with multiple offenders.

of Children Act (PCA) 1978, respectively. In one research case the principal offences with which the defendant was charged were offences contrary to s 25 of the Identity Cards Act 2006 (possession of false identity documents).

Enforcement

In all 16 research cases of the sample studied, the enforcement of the s 63 offence followed chance discovery. The extreme pornographic material was found most commonly while executing a warrant under different legislation[53] or while searching and entering registered sex offenders' homes for the purpose of risk assessment[54] or finally, through information leaked to the police.[55] Intelligence, for instance, indicated that a number of IIOC were uploaded on an 'astronomy website' (hosted in Croatia) and made available for download through a folder, which was accessed during a specific timeframe by several IP addresses administered in the UK. One of these addresses was assigned to the defendant in **KE03BD**. Following a search by the police, his electronic equipment was seized. The forensic examination revealed approximately 800 accessible ('live') IIOC and 58 EPI. Proceedings against the defendant in **SW15BD** were initiated in the context of the same investigation as that in **KE03BD**. The forensic analysis of the seized equipment 'revealed the absence of any child pornography, but did reveal the presence of extreme pornography'.[56] In **LO08BD**, the defendant pleaded guilty to 24 counts of distributing and making IIOC as well as two counts of possessing EPI. The police in this case seized the defendant's electronic equipment after they had been tipped off by his wife. She had

[53] LO16D; ST11D; ST10AB; LO05D; KE03BD; LO06BD; SW13BD; SW15BD; LO09A; SW14B.

[54] KE02D; KE01B; LO07B. The power to enter and search premises for the purpose of monitoring persons that are subject to a sex offender's register is provided by the Sexual Offences Act 2003, s 96B, as amended by the Violent Crime Reduction Act 2006, s 58.

[55] LO08BD; KE04D; SW12D. Similar cases have also been reported in the press: A magistrate, who had downloaded footage featuring extreme images, was arrested after 'an anonymous tip off'; see 'JP's Animal Porn on PC' *Daily Mirror* (London 3 March 2011) 32.

[56] SW15DB (Report to Crown Prosecutor for Charging Decision/ Decision Log and Action Plan).

surreptitiously checked the defendant's memory stick because she was concerned that he was involved in an extramarital affair.[57] In **KE04D**, the police attended the defendant's home address and seized his computer following the receipt of a memory stick containing IIOC and an anonymous letter claiming that the material stored on it belonged to him. Although difficulties were encountered in forensically linking its content to the suspect, further police inquiries led to the discovery of 15 EPI and more than 700 IIOC. Finally, had the defendant in **SW12D** not taken his computer to be repaired, the technician would not have found the unlawful images on the hard drive and the matter would have probably never been reported to the police. A number of similar cases have also appeared in the press.[58] The findings of this study add credence to the argument advanced by Leigh, who asserted shortly before the offence came into effect in 2008 that its enforcement would be 'neither consistent, nor coherent, but adventitious'.[59]

Police forces in England and Wales do not proactively engage in exploratory hunts for individuals possessing s 63 images. According to the Association of Chief Police Officers, the police conduct investigations into the unlawful possession of this material 'where found'.[60] This approach is quite different from that adopted by the Child Exploitation and Online Protection Centre (CEOP), a law enforcement agency which is committed to eradicating child sexual abuse. The real lifeblood

[57] LO08BD (Witness Statement).

[58] VHS tapes containing images of a woman engaging in bestiality were discovered when K Staples 'was caught by cops after his stash of child porn was hurled into the road when he crashed his car' 'Car Stash of Paedo' *The Sun* (London 18 September 2010) 40; R Bohling handed his computer to the police, hoping detectives would uncover clues regarding the disappearance of his son, but instead 'they found 415 images of children, as well as extreme adult porn': S White, 'Lost Teen's Father Had Child Porn' *Daily Mirror* (London 21 September 2010) 28; M Fraser pleaded guilty to s 63 charges after the driver of the bus, in which he had left his mobile phone containing EPI and IIOC, handed it to the police: 'Lost phone traps child porn gang' *Daily Express* (London 28 May 2010) 19; a failed asylum seeker from China was unanimously convicted by a jury of possessing EPI after he had been stopped and searched by the police: 'The Porn Peddler from China who Overstayed 9 Years' *Daily Mail* (London 11 February 2011) 2.

[59] LH Leigh, 'Criminal Justice and Immigration Act 2008: Extreme Pornography' (2008) 172(46) *JPN* 752, 754.

[60] R Williams, 'Police will not target offenders against law on violent porn' *The Guardian* (London 26 January 2009) 14.

of the Centre is information on how offenders operate or think and how they may benefit from technological advances to access prohibited material. A dedicated faculty translates such intelligence into assessment reports, which are in turn disseminated to local and national forces. In order to maximise policing powers, the overall approach is taken on to a wider stage by an international team, which works in partnership with overseas authorities to enhance tracking capabilities. It is debatable whether a similar strategy should also be adopted in relation to EPI. There is arguably 'a clear divide in legislation targeting images of child abuse and adult content'.[61] The steadily increasing number of countries with legislation described by the International Centre for Missing and Exploited Children (ICMEC) as 'sufficient to combat child pornography offences'[62] shows a wider consensus that IIOC should be subject to law enforcement.[63] However, worldwide attitudes to adult content vary enormously. The complexities in restraining violent adult pornographic material generated and distributed worldwide are compounded by different moral codes[64] and divergent obscenity laws across various countries.[65]

Offenders' Demographic Traits

All 16 defendants against whom proceedings were initiated in the research cases studied were males. Based on the '16+1' ethnicity classification used by the CPS,[66] offenders were predominantly recorded as

[61] F MacDonald, communications coordinator for the UK Internet Watch Foundation in 'Policing the ether' *The Guardian Online* (London 6 February 2004), http://www.guardian.co.uk/technology/2004/feb/06/internet.comment, accessed 20 July 2016.

[62] ICMEC, *Child Pornography: Model Legislation and Global Review* (8th ed, ICMEC, Alexandria, Virginia: 2016) vi.

[63] See also H Thorgeirsdóttir, 'Article 13. The right to freedom of expression' in A Alen, J Vande Lanotte, E Verhellen, F Ang, E Berghmans and M Verheyde (eds), *A Commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff Publishers, Leiden: 2006) 44.

[64] Y Jewkes, 'Public policing and Internet crime' in Y Jewkes and M Yar (eds), *The Handbook of Internet Crime* (Willan Publishing, Devon: 2010) 528.

[65] M Yar, *Cybercrime and Society* (Sage, London: 2006) 109.

[66] The '16+1' ethnicity classification is a standard classification used in the 2001 Census and adopted by the CPS. It includes 16 ethnicity categories and one 'Not Specified' category.

Table 7.3 Offender age

Age band	Number
18–24	**2**
25–34	**4**
35–44	**3**
45–64	**6**
65+	**1**
Total	**16**

White (13 out of 16). Of the remaining three offenders, one was recorded as Asian or Asian British, one as Black or Black British and one as Mixed. There was also a reasonable dispersal of age groups, with ages ranging from 18 to 65. Offenders were most likely to be aged between 45 and 64. Table 7.3 below displays a breakdown of the age bands. A further demographic variable of interest was the offenders' occupation. They possessed diverse vocational backgrounds that ranged from unskilled and semi-skilled manual workers through to higher grade administrators and professionals.[67] Two of the offenders were unemployed and one was retired.

Plea Management

Guilty pleas dominated court proceedings across all research cases (Table 7.4). Of the 16 defendants in this study, only a quarter (four) pleaded not guilty to all counts of possession of extreme pornographic material. In those cases where the defendants pleaded not guilty to all counts, two of the defendants went to full jury trial. Their cases are discussed in detail below.

[67] The coding manual employed Goldthorpe's social class categorisation, based on Marshall et al.'s summary. Three further categories were added, as indicated by Bryman: see G Marshall, H Newby and C Vogler, *Social Class in Modern Britain* (Unwin Hyman, London: 1988) 22; A Bryman, *Social Research Methods* (4th ed, OUP, Oxford: 2012) 300.

Table 7.4 Pleas entered to counts of possession of EPIs under ss 63(1) and 63(7) of the CJIA 2008 in the present sample

	Guilty to all counts	Not guilty to all counts	Guilty to some counts	Not guilty to some counts	
	LO09A	LO07B			
	KE01B	SW14B			
	KE02D	ST11D			
	KE04D	ST10AB			
	LO05D				
	LO16D				
	SW12D				
	KE03BD				
	LO06BD				
	LO08BD				
	SW13BD				
	SW15BD				
All Ds	**12**	**4**	**0**	**0**	**16**

Outcomes

Of those four defendants who pleaded not guilty to all counts, one was convicted **(SW14B)** and three were acquitted (Table 7.5). The sole conviction in this group did not follow a full jury trial: although the defendant had initially expressed an intention to plead not guilty, he tendered a guilty plea on the day of the hearing. Of the three acquittals, only one was the result of a jury verdict **(ST10AB)**. In those cases against the remaining two defendants, the judge ordered an acquittal in the first **(ST11D)** and directed the jury to return a not guilty verdict in the second **(LO07B)**. Generally, judge ordered acquittals result from problems identified after a case is committed or sent to the Crown Court. Where, for example, the defendant has already been dealt with for other offences or where evidential deficiencies have been identified, the judge may *order* a formal acquittal of the defendant. But, where at the close of the prosecution case a successful submission of 'no case' or 'unsafe' is made on behalf of the defendant, the judge may *direct* an acquittal rather than allow the case to be decided by the jury. The outcomes of the aforementioned cases relate to the nature of the extreme pornographic material subject to the charges and are discussed in greater detail in the next chapter.

Table 7.5 Case outcomes in the sample studied

	Guilty to all counts by plea	Guilty to all counts by jury	Guilty to some counts by plea	Not guilty to some counts by 'ordered' acquittal	Not guilty by 'directed' acquittal	Not guilty by a jury	
	LO09A KE01B SW14B KE02D KE04D LO05D LO16D SW12D KE03BD LO06BD LO08BD SW13BD SW15BD			ST11D	LO07B	ST10AB	
All Ds	**13**	**0**	**0**	**1**	**1**	**1**	**16**

Sentencing

This study also considered the exercise of judicial discretion in sentencing those convicted of possession of EPI. Sentences were passed on 13 defendants (Table 7.6). Of those, seven were prison sentences, with two defendants receiving a sentence of two years' immediate custody to be served concurrently with penalties imposed for offences contrary to s 113 of the Sexual Offences Act 2003 (breach of SOPO), s 1 of the PCA 1988 and s 160 of the CJA 1988. Sentencing practice in the sample appears to have differentiated between (a) defendants convicted solely of one or more s 63 offences and (b) defendants convicted of IIOC-related offences (under the PCA 1978 and/or CJA 1988) as well as EPI-related offences (under the CJIA 2008). The quantity of the EPI found did not always seem to play a weighty role in the judge's discretion in sentencing. In the seven research cases in which defendants were sentenced to immediate custody (Table 7.6), the number of extreme images recovered ranged from one to 22. The defendant in **LO08BD** was convicted of two offences of

Table 7.6 Research cases in which defendants were sentenced following conviction for possession of EPI under CJIA 2008, s 63

					Immediate custody and sentence length					
	Fine	Conditional discharge	Community sentence	Suspended sentence	0–3 months	4–6 months	7–11 months	1 year and under 2 years	2 years	
Guilty pleas		LO05D	SW12D SW15BD	LO16D KE03BD SW13BD	SW14B LO06BD	KE02D		LO09A LO08BD	KE01B KE04D	
Total	**0**	**1**	**2**	**3**	**2**	**1**	**0**	**2**	**2**	**13**

possession of two EPI and several offences of distributing and making IIOC. He received a sentence of two years' imprisonment. In respect of the two EP offences, he was sentenced to one-year imprisonment to be served concurrently. In **KE01B**, nine extreme images portraying serious injury acts were recovered from the defendant's computer tower and mobile phone. He pleaded guilty to three counts of possessing an EPI, three counts of breaching a SOPO, as well as four counts of possessing and six counts of making IIOC. He was sentenced to two years' imprisonment concurrently on each count. However, in **SW12D** and **SW15BD**, in which the offences of possession of EPI stood by themselves and the comparatively higher numbers of 137 and 146 extreme images were, respectively, recovered from the defendants' electronic equipment, the courts[68] passed community sentences.

Charging Practice: Viewing the Images

As far as IIOC are concerned, the CPS legal guidance states:

> It is important that prosecutors are familiar with the nature of the images in a case and have a proper understanding of what comes within each category but it is not mandatory for prosecutors to view the images in all cases in order to prosecute.'[69]

Further detail is provided in cases involving low-risk offenders and cases involving images falling outside of the Child Abuse Image Database (CAID). However, the approach adopted in relation to EPI is not clear from the CPS legal guidance. At the time of writing, no information is provided as to whether prosecutors are required to personally examine and assess all of the extreme images, or a proportion of them, or whether

[68] Merthyr Tydfil (SW12D) and Swansea (SW15BD) Crown Courts.

[69] CPS Prosecution Policy and Guidance, Indecent Images of Children, http://www.cps.gov.uk/legal/h_to_k/indecent_images_of_children/#a18, accessed 25 July 2016. The wording 'there is no substitute for the prosecutor viewing the images' which was included in an earlier version of the guidance (http://www.cps.gov.uk/legal/h_to_k/indecent_photographs_of_children/, accessed 29 June 2013) has now been removed.

it is appropriate to rely on a written summary description from a police officer, and if so, under what circumstances. However, the guidance introduces an additional safety valve in relation to images involving serious injury: any decision, either to prosecute or not, should be approved at Deputy Chief Crown Prosecutor level.[70]

It may be suggested that personally examining the images in question, or at least a proportion of them, is good practice. Examples of such good practice were included in the sample studied. In one research case, for instance, the images became the subject of extensive examination by the prosecutor as well as the District and Chief Crown Prosecutors.[71] In others, prosecutors requested to see the images at issue prior to charge[72] or clearly stated that they viewed either 'a short synopsis'[73] or all[74] of the extreme images recovered.

Nevertheless, it was not always possible to establish with certainty that the same practice was followed by every prosecutor in the sample. In his investigative advice, a Senior Crown Prosecutor in a different research case appeared to have relied solely on the descriptions of the images provided by the police: 'It seems on the description of the images given there would be no difficulty in classifying them as "extreme pornography" within the meaning of the Act.'[75] In delivering his charging decision, the same prosecutor stated: 'I am satisfied that the descriptions of images provided are "extreme pornography" within the meaning of s 63 CJIA 2008.'[76]

Where a written summary from a police officer is accepted by a prosecutor, questions may arise in respect of the extent to which it can be effectively relied upon so as to allow for a proper evaluation of the evidence under consideration. In one research case, for instance,

[70] CPS Prosecution Policy and Guidance, Extreme Pornography, http://www.cps.gov.uk/legal/d_to_g/extreme_pornography/, accessed 15 July 2016.
[71] ST10AB.
[72] KE02B.
[73] LO16D.
[74] LO05D.
[75] SW15BD (Investigative advice; delivered in writing, as opposed to face-to-face).
[76] Ibid (Charging decision, following a Further Report to Crown Prosecutor for Charging Decision; delivered in writing, as opposed to face-to-face).

the number of constitutive elements of the s 63 offence was reduced by the police officer to a single requirement: 'Extreme pornography has been defined in law as images which are grossly offensive, disgusting or otherwise of an obscene character.'[77] In certain research cases in the current sample, the police officers appeared as carrying a subjective predisposition towards the images: when presenting them to the suspects during police interviews, officers described their content as being 'outraging in terms of offending',[78] demonstrating 'a continued level of desire for perverse and obscene sexual graphic images'[79]; as containing 'masochism'[80]; portraying 'sadism'[81] or other 'sadomasochistic stuff'[82] supposedly indicating the suspect's 'unhealthy interest in extreme pornography'[83] or otherwise 'deviant side'.[84] However, such an approach does not comply with the Ministry of Justice guidance which states that '[domination and sado-masochism (BDSM) material] which is legally available under the Obscene Publications Act (OPA) and used by the BDSM community should not be caught by the new offence'.[85] In all the aforementioned occasions, it may be suggested that there was a divergence between the legislator's intention and the investigators' perceptions of the images. Police officers referred to such material by using sweeping catch-all terms, such as 'sadism' or 'masochism', thereby failing to consider that an image must fall foul of all the elements of s 63, particularly the parameters of s 63(7).

It is acknowledged that prosecutors are required to review every case they receive from the police. Thus, the first set of filters comprises police

[77] SW15BD (Record of Interview).

[78] KE02D (Record of Interview).

[79] Ibid (Remand Application); similar comments about the suspect's alleged 'perversion' were made in SW15BD, which also involved images falling with s 63(7)(b) of the CJIA 2008.

[80] LO06BD (Record of Interview).

[81] KE03BD (Record of Interview).

[82] SW13BD (Summary of the Interview); SW14B (Record of Interview and Case Summary).

[83] SW13BD (Summary of the Interview).

[84] SW15BD (Record of Interview).

[85] Ministry of Justice, *Further information on the new offence of possession of extreme pornographic images* (November 2008), http://www.spannertrust.org/documents/MoJ-Extreme-pornography-information-print.pdf, accessed 20 July 2016.

decisions, with prosecutors playing the role of a second filter, empowered to continue or discontinue a prosecution. The review is a 'continuing process'[86] and prosecutors may be in the position to examine the images as the case develops, even if an initial, basic threshold evaluation occurred without viewing them. However, reliance on and acceptance only of a written half-hearted summary,[87] which purports to describe the images but is tainted by misconceptions as to what constitutes an extreme image, is less likely to enable an accurate and reliable evaluation of the evidence. As Baldwin argues, 'The [CPS] has been charged with the task of independently reviewing cases prior to prosecution, and undue reliance upon the police version of events can be dangerous.'[88] It is important that prosecutors carefully exercise their judgement as to whether it is appropriate in all the circumstances to make a charging decision solely relying on a summary from a police officer describing the images. Whilst the need to see extreme images portraying a person engaging in sexual activities with animals may be less pressing – given that their content is likely to be deemed less controversial – the need to personally examine images falling within the remaining categories of s 63 is acute.

Concluding Remarks

The data presented thus far constitute a breakdown of the sample and an essential background to Chapter 8, which seeks to address the gap in research into the enforcement of the extreme pornography law by providing a snapshot of the implementation of the relevant legal framework.

[86] CCP (2010) [3.6]; (2013) [3.6].

[87] cf Baldwin and Bedward's research into investigators' summaries of interviews conducted with suspects: it was found that a third of all the summaries examined contained material that gave, according to the authors, a 'misleading or distorted view of a case' or else were generally of 'poor quality'; see J Baldwin and J Bedward, 'Summarising tape recordings of police interview' [1991] (September) *Crim LR* 671, 677.

[88] J Baldwin, 'Understanding judge ordered and directed acquittals in the Crown Court' [1997] (August) *Crim LR* 536, 544.

8

Thresholds of Extreme Pornography

Introduction

This chapter aims to explore the thresholds of extreme pornography indicated by the nature of the material in cases where prosecutors were satisfied that there was sufficient evidence to provide a realistic prospect of conviction. It is divided into broader sections which mirror the classification of extreme images under s 63(7) of the Criminal Justice and Immigration Act 2008 (CJIA 2008). The category of images portraying an act which involves sexual interference with a human corpse is excluded, as none of the research cases in the sample studied involved such images.[1]

[1] See Chapter 7, Table 7.2.

A.K. Antoniou, D. Akrivos, *The Rise of Extreme Porn*,
DOI 10.1007/978-3-319-48971-1_8

CJIA 2008, ss 63(1) and 63(7)(A): Portrayals of 'Life-Threatening' Acts

Out of the total of 16 cases reviewed, two related to offences contrary to s 63(7)(a): **LO09A** and **ST10AB**. Of these two, only the second concerned solely offences of possession of EPIs and is discussed in the following section.

In **LO09A**, the principal offences were those of possessing, making and distributing indecent images of children (IIOC) contrary to the CJA 1988 and the PCA 1978. The defendant's case originated from intelligence provided to the Metropolitan Police Service by the Federal Bureau of Investigation, which monitored a website distributing IIOC over the Internet via the Google Hello photo-sharing service. The information identified a user of an email address who had logged onto their account via a specific Internet Protocol (IP) address during a certain timeframe. A warrant was issued under s 4(2) of the PCA 1978 and a number of items were seized. The forensic examination revealed 1,482 IIOC, and 17 still and five moving images classified as extreme.[2] The defendant admitted downloading the material.

The prosecutor took the view that there was 'sufficient evidence to add a roll up charge in relation to extreme pornography'.[3] Although she requested in her charging decision a 'detailed statement setting out [the] nature of [the] material', this was not found in the file. She concluded that it was in the public interest to proceed, 'given [the remaining] charges and nature of the material'[4] on the defendant's computer. As he was in possession of a large quantity of Level 4 and Level 5 IIOC for personal use, and distributed a significant number of Level 3 images, the sentence was anticipated to be a high one.[5] The likelihood of a significant sentence resulting from a conviction constitutes, according to the Code for Crown Prosecutors (CCP),

[2] LO09A (Forensic Investigation Report, Metropolitan Police).

[3] Ibid (Charging Decision/Advice and Case Action Plan).

[4] Ibid.

[5] See the then current Sentencing Guidelines Council, *Sexual Offences Act* 2003: *Definitive Guideline* (Sentencing Guidelines Secretariat, London: 2007) Part 6A.

a public interest factor in favour of prosecution.[6] The defendant pleaded guilty to all 19 counts. He was sentenced to 15 months' imprisonment on the extreme pornography count to be served concurrently with the total 15-month term.

CJIA 2008, ss 63(1), 63(7)(a) and (b): 'Realistic' Portrayals of 'Life-Threatening' and 'Serious Injury' Acts

The second research case, **ST10AB**, somewhat made up for this lost opportunity to examine the content of images purportedly portraying life-threatening acts. This case dealt exclusively with extreme pornography offences under ss 63(7)(a) and 63(7)(b). The material that formed the subject of the charges was variously stored on electronic equipment that was found at the defendant's home in the course of a police search pursuant to a warrant. This was issued following the receipt of information concerning computer activity in search of IIOC. The forensic examination did not reveal child sexual abuse images and no further action was taken in relation to this matter. However, 2,378 still images were recovered and categorised in the computer analysis report as extreme.[7] They were described by the computer crime examiner as follows:

> There are two main series of photos found on the hard drives. The first one show a blonde female apparently dressed as a secretary in a mock office and a male intruder enters and sexually assaults the female. [H]e eventually stabs her with a large knife. A further set of images with the same female is seen on a table wrapped in what appears to be cling film and again being stabbed. Both of these sets show the female apparently dead. Another set of images show a female being tied up and sexually assaulted and then cut with a knife.[8]

[6] CCP (2010) [4.16].

[7] ST10AB (Staffordshire Police, Computer Examination Department, Computer Analysis Report). Approximately half of them (1,167) were found in unallocated clusters.

[8] Ibid (Witness Statement).

The defendant accessed the images at issue via a website based outside the UK. He had purchased a month's membership with which he was able to download as many images as he wished. These were available only in the sets of hundreds, with each set telling a story.

In his investigative advice, the prosecutor on this case addressed briefly the elements of the offence: he expressed the view that the images he inspected were extreme, 'as defined for the purposes of the legislation'.[9] In addition, he stated that possession was made out, notwithstanding the fact that the images were downloaded prior to the implementation of the extreme pornography provisions. He explained that 'the images were readily accessible to the defendant',[10] that is, they were not deleted and therefore remained in his possession. 'Their continued possession is an offence',[11] the prosecutor stressed.

Following the defendant's police interview, in which he neither admitted nor denied having committed the offence, the prosecutor applied the Full Code Test. In relation to the evidential issues of the case, he simply stated that he '[was] satisfied that the images [were] extreme pornography for the purposes of the legislation'.[12] In relation to the public interest stage, he reiterated his position above that the element of possession was met. He added that in the absence of an admission he was not able to offer an out-of-court disposal. The prosecutor authorised 16 charges and an additional 'global catchall charge to capture the possession of those which [had] not been charged as samples'.[13] The schedule supporting the separate counts on the indictment described the images as follows (Table 8.1).

No weaknesses were identified: 'none, that are apparent',[14] the Evidential Review Officer (ERO) noted in his assessment. Up to that point, nothing portended the complications that would soon arise.

[9] Ibid (Charging Decision/Advice and Case Action Plan; Review Type: *Investigative Advice*).
[10] Ibid.
[11] Ibid.
[12] Ibid (Charging Decision/Advice and Case Action Plan; Review Type: *Full Code Test*).
[13] Ibid.
[14] Ibid (ERO Assessment of File).

Table 8.1 Description of images

1.	Shows two images appear mirrored of a blonde adult female kneeling down, her torso wrapped in clear polythene with what appears to be a male standing above her holding a knife against her left breast area, her left breast and stomach appear covered in blood and there is some form of cable around the females neck.
2.	Shows the top half of a naked dark haired adult female who appears tied up to some form of rack, to her right is another adult female who would appear to be stabbing into the other females right breast a knife, there would seem to be blood around the right breast of the first female and the second female also has her left hand around the throat of the first female.
3.	Shows a blonde haired adult female lying down on a table, her body covered by clear polythene with only the head not covered, above her is a male who is stabbing a knife into the left breast of the female and there appears to be blood on the left breast and stomach of the female.
4.	Shows a partially dressed blonde adult female lying down on the floor her top half is covered by clear polythene including her head, kneeling beside her is another person dressed in white with a mask on who is pulling at the knickers of the female on the floor.
5.	Shows a partially dressed adult female kneeling down on a bed, standing behind and above her is a male who appears to be pulling at a rope which is tied around the female's neck.
6.	Shows a naked female lying down on the floor next to a bath, her face covered in clear polythene, kneeling beside her and with his hands on this polythene is a male.
7.	Shows an adult female partially dressed who appears to be tied up against a rack, her breasts torso and vagina areas appear covered in blood, there is another female to the right of the first who would appear stabbing a knife into the vagina area of the first female.
8.	Shows a partially dressed adult female kneeling on the floor behind her and standing up is a male who would appear to be pulling on some form of rope or cable that is around the throat of the female.
9.	Shows a partially dressed adult female who is lying down on a bed, her top half being completely covered with clear polythene, sitting next to her is another person who is pulling at the knickers of the female with one hand and with the other hand is against the face of the female.
10.	Shows a naked adult female kneeling down on the floor, her body covered in clear polythene, standing behind her is a male who appear [sic] to be cutting at the left breast of the female with a knife and there seems to be blood on the left breast and torso of the female.
11.	Shows a partially dressed adult female sitting on a park bench, standing behind her on the bench is a masked male who is pulling on a rope that is around the neck of the female.

(*continued*)

Table 8.1 (continued)

12.	Shows the top half of an adult female who is lying down on a table, her naked body covered by clear polythene, sitting above her is a male who appears to be stabbing the left breast of the female with a knife and there seems to be blood on the left breast and stomach of the female.
13.	Shows a partially dressed adult female who seems tied up against a rack, to her right is another female who with the left hand appears to be grabbing the right breast of the first female and with her right hand she appears to be stabbing the female with a knife in the bellybutton area of the stomach and there would seem to be blood on the breasts and torso area of the first female.
14.	Shows the torso and thigh area of a partially dressed female that would [sic] appear to be tied against a rack, to her right is another person who appears to be stabbing a knife into the vagina area of the female and there is blood around the torso, breast and vagina areas of the female.
15.	Shows a naked adult female lying in a bath, her head covered in clear polythene and standing above her out of the bath is a male who has his hands around the polythene.
16.	Shows a naked adult female who is standing up, behind her is a male who is sitting down on a bench and the male appears to be holding onto some form of cable or rope which is around the neck area of the female.

The defendant admitted that he was in possession of every image relied upon by the prosecution. He also accepted that he was solely responsible for acquiring those images, and for viewing and storing them. Thus, possession was not an issue. At the committal proceedings under s 6(1) of the Magistrates' Act 1980, the defence sought to persuade the prosecution that they had not established a prima facie case. In their skeleton argument, the defence argued in favour of discontinuance on the basis that 'the images were not *real*'.[15] It was asserted that they amounted to 'fake-death pornography. They depict[ed], in an obviously acted and *unrealistic* fashion, acts of faked stabbing and faked asphyxiation.'[16] 'Put bluntly', the defence stated: 'These images [did] not in any way resemble *actual* death photography.'[17] A few paragraphs below, it was submitted: 'It is disputed on

[15] Ibid (Defence Skeleton Argument, para 3; emphasis added).
[16] Ibid (Defence Skeleton Argument, para 10; emphasis added).
[17] Ibid (Defence Skeleton Argument, para 14; emphasis added).

the grounds of *realism* that the images in question are extreme.'[18] It was further maintained that (for the purposes of the extreme pornography provisions) 'only *actual realism* [would] suffice; therefore an act which *actually* happened, rather than a simulation of enactment of it'.[19]

The defence appeared to have conflated the terms 'real' and 'realistic' employed by the 2008 Act. Section s 63(7) provides that a reasonable person looking at the image in question would think that any such *person* or *animal* was real. There is no requirement that the same reasonable person, looking at the image, would think that any of the *activities* outlined in ss 63(7)(a) to (d) were real. As the prosecution pointed out, 'the requirement is that the images should portray the activities in a realistic way'.[20] Nevertheless, the defence commented:

> [T]his unfortunate misunderstanding of the law by the prosecution is emblematic of this prosecution as a whole. . . . [T]he prosecution do not understand the nature of their own evidence and this has [led] to an unnecessary and invasive prosecution of a private individual for his personal sexual tastes which many might not share, but which harm none.[21]

As the standard of proof that the prosecution is required to satisfy at committal proceedings is in practice 'very low',[22] the magistrates were of the opinion that there was sufficient evidence to put the accused on trial. The matter was finally committed to the Crown Court. On the day of the Plea and Case Management Hearing (PCMH), the defendant offered not guilty pleas to all 17 counts.

[18] Ibid (Defence Skeleton Argument, para 19; emphasis added).
[19] Ibid (Defence Skeleton Argument, para 38; emphasis added).
[20] Ibid (Prosecution Outline and Skeleton Argument).
[21] Ibid (Defence Skeleton Argument, para 43).
[22] D Ormerod and A Hooper, *Blackstone's Criminal Practice 2012* (OUP, Oxford: 2011) [D10.41].

The Prosecution Arguments

From the discursive comments on the documents in **ST10AB**, it appears that the defence insisted that the images did not meet the criteria to the effect that the prosecutor on the case felt the need to ask the District Crown Prosecutor for CPS Staffordshire to examine the images in person. In his information report, the latter agreed with the prosecutor's initial review that the portrayals at issue were explicit and realistic and briefly described what he viewed: 'The still images depict stabbing of breasts and genitals. A woman is shown being stabbed in the stomach and thereafter the same man is shown stabbing her in the breast.'[23] Similar to the defence, the District Crown Prosecutor also believed that the scenes were 'faked' but equated the meaning of the term realistic to the situation which would have occurred, had the act depicted been real: 'The images do in my view portray in an explicit and realistic way acts which, if real, would have threatened a person's life or else resulted in serious injury.'[24]

Moreover, the District Crown Prosecutor stated that he conferred with the Senior Policy Advisor from London's CPS Headquarters who agreed that 'the acts [did] not have to be real; only explicit and realistic'.[25] The prosecution notes found in the file also revealed that 'explicit' was construed as 'expressing in detail, leaving nothing merely implied'[26] and 'realistic' as 'simulating real or imaginary things in a way that seems real'.[27] It could be suggested that this interpretation, as opposed to that of the defence, is consistent with one of the stated public policy rationales underlying the creation of the offence: s 63 is also concerned with the effect that extreme images may have on the viewer.[28] This will depend more on whether the

[23] ST10AB (Information Report).

[24] Ibid.

[25] Ibid.

[26] Ibid (Prosecution notes as found in the file).

[27] Ibid.

[28] Home Office, *Consultation: On the Possession of the Extreme Pornographic Material* (Home Office Communications Directorate, London: 2005) [27]: 'We consider that it is possible that such material may encourage or reinforce interest in violent and aberrant sexual activity to the detriment of society as a whole.'

viewer perceives the activity portrayed to be real rather than on whether it actually took place.[29]

In addition, the District Crown Prosecutor raised with the Senior Policy Advisor his concern that 'if you could go into a sex shop and buy such images in a movie, then the case would be lost'.[30] He probably referred to the 'R18' category, which is a special classification for explicit works of 'consenting sex or strong fetish material involving adults'.[31] If similar images were held as part of a British Board of Film Classification (BBFC) classified film, then those in the case at hand would most likely be taken outside the scope of the offence, given that the s 64 defence (exclusion of classified films) would probably be made out. Consequently, the prosecution needed to address the issue of whether such images would be legally depicted in 'R18' works. For this reason, the Senior Policy Advisor suggested seeking advice from the Board. However, no further action was taken in relation to this matter at that point.

The Defence Expert Evidence

The defence procured and served expert witness reports to substantiate their argument that the images were not realistic, which (as pointed out earlier) was vaguely construed as 'actual realism'.[32] Two academics specialising in pornography studies and an Information Technology expert from an independent company prepared detailed accounts of

[29] Nevertheless, it should be borne in mind that such perceptions vary widely between viewers. For instance, a more experienced viewer could probably identify clear evidence of use of prosthetics and computer-generated imagery effects, whereas a less knowledgeable will most likely see none. Modalities of viewing and their relationship to reality and fantasy are issues beyond the scope of this study; see further M Barker and K Brooks, *Knowing Audiences: Judge Dredd – Its Friends, Fans and Foes* (University of Luton Press, Luton: 1998).

[30] ST10AB (Information Report).

[31] British Board of Film Classification, *Classification Guidelines* (BBFC, London: 2014) 24. R18 rated films may only be shown to adults in specially licensed cinemas and R18 rated video works may be supplied to adults only in licensed sex shops.

[32] ST10AB (Defence Skeleton Argument, para 49).

the disputed images' content. The two academics' reports addressed the portrayals at issue with remarkable thoroughness.

'A High-Level of Ironic Knowingness in the Production of These Images'[33]

The first academic argued that the images in question belonged to a subset of pornography entitled 'hypno/necro-porn' or otherwise 'Damsel in Distress'. The material the defendant had accessed was credited to 'Drop Dead Gorgeous', a company which dedicates itself to 'highly stylised representations'[34] of this kind of sexually explicit imagery. She explained that the majority of the sets in **ST10AB** involved two models who feature frequently in these fetish images. She stated that the company's output is characterised by an 'old-fashioned aesthetic which eschews "realism" and goes for an excessive and expressive artifice, even frivolous, play acting'.[35] All images shared the same visual style of presentation. This was described by the academic as 'highly coloured' and 'high camp',[36] in the sense of being consciously artificial and exaggerated. The expert addressed every single image following the order of the offence counts. However, she underlined that for the purposes of evaluating the issue of realism, it was important to consider the fact that the images were sold as photo-sets, not individually. The significance of the context in which the images appeared had not been picked up either by the police or the prosecution. The academic's report identified five different sets[37]:

1. Images **Nos 1, 3, 5, 10** and **12**:

In these, the female model was seemingly strangled with a whip; then wrapped in cling film and stabbed. She appeared to bleed from wounds beneath the polythene, but according to the expert,

[33] ST10AB (Expert Report on Pornography).

[34] Ibid.

[35] Ibid.

[36] Ibid.

[37] The numbers of the images correspond to the counts of the indictment (see Table 8.1).

> [the model's] expression is remarkably calmly horrified; her eyes and mouth are open but in an obviously acted way. . . . She shows no signs of involuntary discomfort such as tears, sweat, saliva, her body and face are remarkably free of any signs of injury other than those which have been painted on. The body is posed for maximum visibility which mitigates [sic] against any notion that this is a real image *or even one attempting to be realistic*; the models have a static quality which makes evident the construction of this image.[38]

Moreover, in image No 3 the male, portrayed as 'stabbing a knife into the left breast of the female', stroke a pose which was 'very theatrical and clearly for the benefit of the camera'.[39] The model in image No 5 seemed to have pulled 'a cartoon face of being strangled',[40] whilst in No 10, the blood appeared to be 'too red to be real',[41] thereby heightening its artificiality. The content of image No 12 was also deemed 'evidently staged',[42] involving 'ham-actor-posing'[43] and 'exaggerated'[44] facial reactions. The stark contrast between the description of the images outlined on the schedule of charges and the academic's detailed observations was particularly noteworthy. The expert went on to comment on the remaining:

2. Images **Nos 4** and **9** (from the 'Bagging a Nurse' photo-set):
The alleged victim's reaction was described in image No 4 as 'child's-play-death-face'[45] in a 'clearly posed'[46] image and the person's expressions in No 9 were deemed 'theatrical',[47] highlighting the fabrication of the scene.

[38] ST10AB (Expert Report on Pornography; emphasis added).
[39] Ibid.
[40] Ibid.
[41] Ibid.
[42] Ibid.
[43] Ibid.
[44] Ibid.
[45] Ibid.
[46] Ibid.
[47] Ibid.

3. Images **Nos 6** and **15** (from the 'Bath Toy' photo-set):
The academic asserted that their artificiality was evident from the fact that the model was placed on a bath towel to keep her from getting cold from the bath floor. In addition, the performers' poses were 'obviously contrived'[48] and none of them appeared to show 'realistic emotions'.[49]

4. Images **Nos 7, 13** and **14** (from the 'Slave in a Cave – Snuff' photo-set):
Similar remarks were made with respect to this set, stressing the absence of evident wounds and the artificiality of blood.

5. Images **Nos 8, 11** and **16** (from the 'Breathless Jogger' photo-set):
The expert maintained that the colour saturation and a 'clearly visible'[50] painted background in all of them marked these 'absolutely posed'.[51] For instance, she pointed out in relation to image No 8 that the adult female held on to the rope around her neck and thus was 'clearly not being strangled'.[52]

Finally, image **No 2**, which was not identified as being part of any set, was referred to by the expert as being 'extremely camp',[53] with the model's glance to the camera being 'very arch-pantomish in its quirked eyebrow'.[54]

As discussed in Chapter 3, the original clause concerning realistic portrayals ('appears to be real') was deemed badly conceived when the 2008 Act was going through its parliamentary stages. It was reported to MPs and members of the House of Lords that the draft provisions were seemingly ignorant of the research into audiences' complex understandings of the relationships between reality and fantasy in various media forms.[55] The term 'realistic' that was finally included in the statute book did not address those concerns. In her expert report, the first academic

[48] Ibid.
[49] Ibid.
[50] Ibid.
[51] Ibid.
[52] Ibid.
[53] Ibid.
[54] Ibid.
[55] Memorandum submitted by Dr C Smith et al. (CJ&I 341), http://www.publications.parliament.uk/pa/cm200607/cmpublic/criminal/memos/ucm34102.htm, accessed 22 July 2013.

referred to Hall's research, which shows that viewers' conceptualisation of media realism is multidimensional[56] and argued that the same is true with respect to pornography. Viewers use a variety of judgments in assessing different forms of pornographic texts, which she named 'modalities of response', that is:

> judgments about the relationship between what is shown and reality, so the producers of an image or images propose a relationship of their representation to reality and viewers make judgment(s) via the reading of the variety of cues or markers which are available within (and often outside) the text.[57]

She went on to outline a number of such 'cues or markers' offered in this case, which led her to believe that none of the images subject to the 17 counts should be considered realistic within the meaning of s 63: first, disclaimers on websites from which the images were obtained expressly stated that the product was fantasy and not realistic portrayals; second, a level of knowledge about how to find these images is typically required. Individuals accessing such websites are likely to be aware that what they are purchasing is 'fake-death' imagery; third, the images were saturated in exaggeration, thereby fostering a strong element of parody of mainstream pornography. For instance, the 'Bagging a Nurse' scene:

> . . . establishes its connection to mainstream pornography using the ridiculously high heels, overdone make-up and the satin nurses outfit considered trashily 'sexy' – these are all iconic in pornography but they have no place in a 'realistic' portrayal or a nurse's staffroom break.[58]

In the words of the expert, the ironic juxtaposition of 'cheeky sexiness' on the one hand and 'grotesque bloodlust' on the other put the 'pretence' at the core of those images.

[56] A Hall, 'Reading realism: Audiences' evaluations of the reality of media texts' (2003) 53(4) *Journal of Communication* 624, 638.

[57] ST10AB (Expert Report on Pornography).

[58] Ibid.

The prosecution failed to appreciate the importance of the appearance of the images as sets. Instead, these were isolated as individual images, despite the fact that s 63(4) specifically requires that where an image, as found in the person's possession, constitutes part of a series of images, its 'pornographic' nature is to be determined by reference both to the image itself and the context in which it occurs in the series of images. In **ST10AB**, the images in question were offered as a narrative collective offering movement and telling a story, in which hyperbolic horror was a key factor: 'In set 5, "Security Breach," [the model] is shown stabbed in the stomach by the man [. . .] her wide-eyed expressions and grimaces have none of the realistic pain and terror one might expect from a great actress [. . .].'[59] Considering the images separately and out of this context would not allow a reasonable person to make an informed decision on the issue of realism, because the opportunity to assess the various symbols which mark these sets as a 'photo-play' would be lost.

Finally, the technical quality and production values emerging from the images were rather basic. According to the academic, no attempt was made to achieve any verisimilitude: the lightning was bright, 'almost clinical' in some instances, suggesting that what was sought was visibility rather than a record of an actual crime. Moreover, make-up and blood were evaluated by the expert as sloppy, a characteristic which would be 'amusingly obvious' to any viewer who has watched, for example, *Crime Scene Investigation (CSI)*. None of the easily achieved bodily special effects were used. There was no sweat, no tears; hair was hardly messed-up; extremely long fingernails remained intact and small signs of effort were visible on the 'murderer's' part. Although it might not be readily understandable by the average viewer, it is precisely this lack of realism that is valued by knowledgeable fans of these productions.[60] The academic concluded that a reasonable person considering these images would be unlikely to concur with the prosecution's argument that they portrayed, in a realistic way, life-threatening or serious injury acts: 'It is my expert

[59] Ibid.
[60] Ibid.

opinion that a reasonable person's response to these images would be [. . .] the kind of laughing exclamations which accompany bad special effects.'[61]

'Clearly Faked Injuries Presented in a Highly Stylised Manner'[62]

The second academic also provided evidence on several aspects of the disputed images. In relation to their context, she argued that they were consistent with a type of pornography focusing on 'fake death' or 'death fetish', which can be found on specialist websites. This is characterised by a standard set of features and a distinctive style that is 'highly artificial, slightly camp, somewhat reminiscent of *Hammer* horror film and 1970s soft-core porn'.[63] According to her, this kind of pornography cannot be said to be explicit either in terms of the nature of the activities shown or in terms of their 'horror' attributes, which are 'rather tame'[64] in the way they are represented.

In relation to the content of the specific images, she asserted that the attacks and injuries portrayed were presented in 'a highly stylised manner'.[65] The cords and nooses used had not left marks on skin and the knife wounds were 'unconvincing'.[66] She also pointed to the 'restricted repertoire of standards shots and choreographed actions'[67] appearing in staged sets:

> [T]he knives used look like fakes and the blood used is too glossy and pink in tone to be real. In one scene, 'blood' has been used to make perfectly formed hand-prints and is clearly, paint. Wounds create remarkably little blood, while many of the shots of suffocation using plastic or cling film make it evident that the 'victim' has plenty of air to breathe.[68]

[61] Ibid.
[62] Ibid.
[63] Ibid.
[64] Ibid.
[65] Ibid.
[66] Ibid.
[67] Ibid.
[68] Ibid.

As far as the performance style was concerned, the expert argued that models' facial expressions often appeared in 'very overstated ways',[69] with poses frequently being 'excessively still and "held" for the camera'.[70] Movements and reactions were inconsistent with actual attacks or injuries. She went on to highlight features that created a 'shop dummy' effect: 'Gestures are static and melodramatic; [. . .]. In some images, the action is clearly unrealistic; for example, apparently dead victims can be seen clearly supporting their own weight'.[71]

The second academic also commented on every individual image and agreed with the first in many respects. As regards image **No 2** for example, where an adult female appeared to be stabbing a knife into another female's right breast, she took the view that 'the static pose of the characters [did] not convey any sense of the impact such a knife attack would generate'.[72] As regards images **No 7** and **No 14**, the expert asserted that in the former there was 'obviously fake blood'[73] on the supposed knife wound to the 'victim's' groin, whilst in the latter the knife used was 'noticeably fake'.[74] She concluded that it would be 'extremely difficult'[75] for a person to regard all images as portraying in an explicit and realistic way life-threatening or serious injury acts within the meaning of s 63(7):

> Not only are the actions portrayed in an exaggeratedly 'fake' manner [. . .], the use of stock scenarios and characters, the recurrence of the same performers, the studio setting, professional lighting, stiff and artificial poses, gestures and facial expression are all strongly indicative of the staging of fantasy scenarios.[76]

[69] Ibid.
[70] Ibid.
[71] Ibid.
[72] Ibid.
[73] Ibid.
[74] Ibid.
[75] Ibid.
[76] Ibid.

Finally, the third expert report stated that the images at issue were 'incorrectly identified'[77] as EPI and that a large number of them were 'blatantly'[78] neither extreme nor pornographic.

The Impact of the Expert Evidence

The prosecution sought to argue that the reports submitted by the defence were inadmissible for two reasons. The first related to the competence of the witnesses to give evidence as experts. The prosecution trial counsel asked in his submissions: 'Does extensive viewing of pornography really qualify some to regard themselves as an expert?'[79] Especially with respect to the third report, he argued that its writer was 'not an expert'[80] and her report was 'confusing and unhelpful'.[81] However, the decision about a witness' competence to give evidence as an expert is strictly a matter for the court.[82] Moreover, it was contended that realism was an issue entirely for the jury to determine. Parallels were drawn with the case law concerning the 1959 Obscene Publication Act (OPA), according to which the issue of obscenity is a matter for the jury to consider without the assistance of expert evidence,[83] save for exceptional circumstances.[84] According to the prosecution, the reports contained nothing which was not reasonably assumed to be within the normal experience and knowledge of the jury.

Nevertheless, it appears from subsequent events and correspondence that the expert witness reports written by the two academics did not pass

[77] Ibid (Extreme Pornography Grading Report).
[78] Ibid.
[79] Ibid (Admissibility of Defense Expert Reports).
[80] Ibid.
[81] Ibid.
[82] CPS Prosecution Policy and Guidance, Disclosure Manual, Chapter 36 [36.11], http://www.cps.gov.uk/legal/d_to_g/disclosure_manual/disclosure_manual_chapter_36/, accessed 22 July 2016.
[83] *R v Staniforth* [1975] Crim LR 291.
[84] *DPP v A and BC Chewing Gum Ltd* [1968] 1 QB 159; *R v Anderson* [1972] 1 QB 304, 313 (Lord Widgery CJ) (analysed in Chapter 2).

unremarked. First, the reviewing lawyer contacted the prosecution counsel and asked him to confirm whether there was still a realistic prospect of conviction, especially in light of the expert opinions.

Second, the need to instruct the prosecution's expert to respond was intensified. It will be recalled that at the pre-trial stage it was suggested that the BBFC could provide a statement confirming that the Board would not license these images for lawful sale in sex shops or other specialist retailers. It was at that point that a BBFC Senior Examiner was contacted in order to view and assess the images in question. He was asked, in particular, to comment on whether the Board would be prepared to provide an 'R18' licence classification for their legitimate sale in the UK and if not, under which statutory provision they would be rejected. The examiner argued that he was not in the position to ascertain whether the images in dispute were realistic or not, as this was a 'jury point'.[85] However, he confirmed that the CJIA 2008 did not require for the images to be real, but merely realistic. 'These words are not synonyms',[86] he stressed. In relation to images **No 7** and **No 14**,[87] he stated:

> ...were [these] image[s] submitted to the Board, it is unlikely that the Board would give this a classification certificate and so [they] would be rejected.... On rejection, the Board would be likely to cite the [CJIA] 2008.[88]

In relation to images **No 8** and **No 11**, the examiner commented that these 'would need to be given further consideration'[89] by the Board. As for the remaining, he affirmed that they would also be rejected and cited the Board's guidelines under either the Video Recordings Act 1984[90]

[85] ST10AB (Witness Statement).
[86] Ibid.
[87] See Table 8.1.
[88] ST10AB (Witness Statement).
[89] Ibid.
[90] The Video Recordings Act 2010 repealed and revived without amendment the Video Recordings Act 1984 in order to rectify a procedural error made during the passage of the latter.

or the OPA 1959. It was also noted in this statement that he examined all 16 images 'in lack of any wider context',[91] as opposed to the first academic who stressed the importance of the images appearing in sets. It could be suggested that the prosecution's strategic move to obtain the BBFC examiner's statement reflected their anxiety over the weight of defence expert reports on the images in dispute.

Third, the prosecution trial counsel, the officer in charge and the reviewing lawyer met to discuss the progress of the case after the PCMH and before the Crown Court hearing. From the minutes of this meeting, it seems that all three of them considered the distinction drawn by the two academics between 'camp/staged settings' and the meaning of the term 'realistic'. They also expressed concerns that 'the two experts [might] convince the jury'.[92]

Fourth, the prosecution felt the need to obtain further clarification of the law. The 'numerous calls'[93] made by the defendant's instructing solicitor to the reviewing lawyer contributed to this as well. The defence continued to maintain that 'the images [had to] be real in order for the case to be made out; not acted out in the staged way they [were]'.[94] They further claimed that the prosecution's reading of the law was 'wholly incorrect',[95] whereas in fact their own interpretation was mistaken. The documents in the file reveal correspondence between the CPS reviewing lawyer and the then Chief Crown Prosecutor for the CPS in Staffordshire, who expressed his firm conviction about the meaning of the term 'realistic' within the meaning of s 63:

> Having considered the Act more carefully, I am now even more convinced that our interpretation of 'realistic' is right. The section states that the image must 'portray' one of the extreme acts. A portrayal does not have to be real. The definition is *'to make a likeness of.'*[96]

[91] ST10AB (Witness Statement).

[92] Ibid (conference minutes).

[93] ST10AB (cited in email correspondence between the reviewing lawyer and the prosecution counsel; the word 'numerous' was capitalised in the original).

[94] Ibid.

[95] Ibid.

[96] Ibid (email correspondence between the CCP and the reviewing lawyer; emphasis added).

This is in line with the argument advanced in Chapter 5 that the use of the word 'portrays' in s 63(7) means that prosecutors do not have to establish that the act actually occurred. The Chief Crown Prosecutor subsequently examined the images in person and suggested running a lesser number of counts. The prosecution counsel was finally instructed to prosecute four counts only, namely (a) the existing counts 2, 3, 12 concerning offences contrary to ss 63(1) and 63(7)(b); and (b) the existing count 15 concerning an offence contrary to ss 63(1) and 63(7)(a).[97] The Chief Crown Prosecutor was not satisfied that the prosecution should proceed any further with counts 7 and 14 (i.e. images **Nos 7** and **14**): 'although unpleasant, [...] the knife appear[ed] to be inserted in the lady's lower abdomen *above* the genital region and the string/ties between the legs would not cause serious harm to her vagina.'[98]

On the day of the hearing the defence experts gave evidence and were cross-examined. The issues raised in this case, principally whether the images were realistic, were matters entirely for the jury to determine. They found the defendant not guilty on all four counts.[99] No official response on behalf of the CPS was documented in the file. The outcome in **ST10AB** does not appear to have influenced subsequent practice.

CJIA 2008, ss 63(1) and 63(7)(B): Portrayals of 'Serious Injury' Acts

Apart from **ST10AB**, eight cases of the sample studied involved 63(7)(b) offences.[100] In two of them (**SW14B** and **SW15BD)**, the defendants were charged solely with extreme pornography offences. These are examined

[97] Following the new instruction, the prosecution counsel noted in his advice that he saw 'little value in relying upon the content of [the BBFC examiner'] statement' (contained in ST10AB).

[98] ST10AB (email correspondence between the reviewing lawyer and the prosecution counsel; emphasis in the original).

[99] See Chapter 7, Table 7.4.

[100] Research cases concerning images portraying serious injury acts, excluding ST10AB: KE01B, LO07B, SW14B, KE03BD, LO06BD, LO08BD, SW13BD, and SW15BD; see also Chapter 7, Table 7.2.

separately. In the remaining six cases, the offenders were charged with possession of EPI alongside IIOC-related offences. Five out of the eight serious injury-related cases also involved offences of possession of bestiality images. This type of imagery is discussed later in this chapter. The following analysis is limited to images that fell within the scope of s 63(7)(b).

Cases Where the Offence Under ss 63(1) and 63(7)(B) Stood by Itself

The subject of the criminal proceedings in **SW14B** was a single image recovered from the unallocated space of the defendant's computer. As the report to the Crown Prosecutor for charging decision stated, his laptop was seized during a police search[101] for 'an unrelated matter' in the house where the defendant was residing temporarily. The image was described in the forensic investigator's witness statement[102] as follows:

> Adult female bound with breasts exposed, an adult male is inserting a large needle-like object through both breasts.

Similar descriptions were found in **SW15BD**:

> A static image of a naked adult female with both breasts clamped in metal frame and needles inserted through both breasts.
>
> A static image of a naked adult female with rope around left breast and needles inserted through breast and nipple.

It was stated in Chapter 5 that s 63(7)(b) could cover acts involving 'the insertion of sharp objects'.[103] However, did the aforementioned acts result in, or were they likely to result in, serious injury to that person's breasts? The brief descriptions are not particularly enlightening. In the first, the adult male is probably using a needle of a large diameter, but no

[101] Police and Criminal Evidence Act 1984, s 18.

[102] Criminal Justice Act 1967, s 9; Magistrates' Courts Act 1980, ss 5A(3)(a) and 5B; Criminal Procedure Rules 2005, Rule 27.1.

[103] Explanatory Notes to the CJIA 2008, para 457.

information is provided in relation to the way, or the precise part of the breast through which, the needle is inserted. The second and third apparently differ from the first in terms of the size of the needles used. In addition, pressure seems to be applied through the use of a metal frame and rope. These suggest increased sensitivity as they would most likely cause the skin to be stretched taut. Once again, the way the needles are inserted remains unknown.

One interpretation of the two descriptions in **SW15BD** could be that they relate to images portraying activities known as 'needle play'[104] or 'play piercing'. These practices involve participants who allow medical syringe or acupuncture needles to be lodged temporarily under a small portion of the outer layers of their skin.[105]

> The act is purely the insertion of a sharp object such as a hypodermic needle, pin or nail into the skin without the subsequent placement of a decorative piece. The piercing ritual and the seeking of the pain associated with the act provides the reason for such activities and may form part of a generalised consenting sadomasochistic experience. Such act may be focussed around the face, arms, breasts or genitals, and is often self-inflicted. . . . In extreme forms, the injuries could falsely resemble the evidence of torture.[106]

As pointed out, the way the needles are used is not clear. Can the needle's exit point be discerned for example? If it is accepted that these descriptions refer to needle play, then one needs to consider that in this practice 'the needle is never inserted straight into the nipple towards the body but always parallel so that the tip of the needle is visible on each side of the nipple once pierced'.[107] But, even if we accept that the needles in question were thrust or shoved through the flesh of the larger

[104] S Newmahr, *Playing on the Edge: Sadomasochism, Risk and Intimacy* (Indiana University Press, Bloomington, IN: 2011) 152–4.

[105] This is distinguished from permanent piercings, which are referred to as 'ringing'.

[106] B Swift, 'Body art and modification' in GN Rutty (ed), *Essentials of Autopsy Practice: Recent Advances, Topics and Developments* (Springer-Verlag, London: 2004) 165–6.

[107] B Love, *Encyclopedia of Unusual Sexual Practices* (Abacus, London: 2002) 387.

area of the persons' breasts, then the descriptions of the images beg the question: where is the blood?

The same issue arises with respect to another controversial image, described in the particulars of indictment in **SW15BD** as:

> A static image of a naked adult female with her vaginal labia being sewn together.

Following the alleged 'sewing', substantial loss of blood would reasonably be expected to be seen. However, nothing in the description attests to the presence of blood. It may be argued that this image probably portrayed a 'mock infibulation'[108] resulting from 'ringing', the term employed to describe permanent piercing. Infibulation is the medical definition for Pharaonic circumcision, which constitutes 'the most drastic and severe form of genital mutilation'.[109] In brief, it involves a serious surgical alteration of the genitals.[110] The term derives from the Latin *fibula*, namely something which fastens. So, the labia are fastened in an attempt to preserve a girl's virginity and distinguish 'respectable' women.[111] In this instance, the labia could have been permanently pierced symmetrically and then tied together. In other words, in the absence of any reference to sharp implements, bleeding or bruising – which would suggest that injury happened – it may be inferred that pre-existing piercing was used once again, but in a different fashion.[112]

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[108] Ibid 416.

[109] S Asefa, 'Female genital mutilation: Violence in the name of tradition, religion and social imperative' in SG French, W Teays and LM Purdy, *Violence against women: Philosophical perspectives* (Cornell University Press, New York: 1998) 94.

[110] H El Bashir, 'The Sudanese National Committee on the Eradication of Harmful Traditional Practices and the Campaign Against Female Genital Mutilation' in RM Abusharaf, *Female Circumcision: Multicultural Perspectives* (University of Pennsylvania Press, Philadelphia) 145.

[111] EA Roth, *Culture, Biology and Anthropological Demography* (CUP, Cambridge: 2004) 36.

[112] cf C Ashford, 'Barebacking and the "cult of violence": Queering the criminal law (2010) 74(4) *Journal of Criminal Law* 339, 351; citing C White, 'The spanner trial and the changing law on Sadomasochism in the UK' (2006) 50(2/3) *Journal of Homosexuality* 167, Ashford refers to *R v Brown*, which involved a group of men who had been engaging in BDSM, and the 'myths' that emerged around the case, most notably the 'nailing by A of B's foreskin or scrotum to a board'; *R v Brown* [1994] 1 AC 212, 246. He notes that, in truth, 'the nail had been inserted into a pre-existing piercing and this element was edited out of the three-hour video shown to the jury'.

The same could be argued in relation to the image in **SW14B**, in which 'a large needle-like object' was inserted 'through both breasts'. This could also have been facilitated through existing nipple piercing.

All these descriptions appear to share a common feature: the presence of blood is documented in none of them. 'Nipple and especially genital tissue has much higher vascular action than other tissue and is more likely to bleed profusely both during and after play piercing.'[113] If the skin was not broken and bleeding did not occur, then it is difficult to see why those images qualified as realistic portrayals of acts of serious injury to a person's breasts or genitals.

An additional image, also deemed extreme in **SW15BD**, was described as:

> A static image of a naked adult female with both breasts tied with rope.

This description most probably reflects a practice known as 'breast bondage'. This is:

> A technique used in BDSM play [which commonly involves] ropes [being] tied around the base of each breast, causing the breasts to bulge outwards. . . . Sometimes nipple clamps are placed on the nipples or other, more involved methods of tit torture are combined with breast bondage for a greater erotic effect.[114]

The details from the description tend to suggest the portrayal of a decorative – rather than functional – kind of bondage, where the appearance of the 'tied breasts' is the end result. There are no indicators of increased vulnerability. There are no indicators of loss of blood and discolouration of breasts either. In any case, the act of tying ropes around breasts bears little or perhaps no similarity to the examples of 'insertion of sharp objects' and 'mutilation of breasts' provided by the Explanatory Notes to the 2008 Act.[115] It could be suggested that the

[113] D Addington, *Play Piercing* (Greenery Press, Oakland, CA: 2006) 77.

[114] A Aggrawal, *Forensic and Medico-legal Aspects of Sexual Crimes and Unusual Sexual Practices* (CRC Press, Taylor and Francis Group, Boca Raton, London: 2009) 147.

[115] Explanatory Notes to the CJIA 2008, para 457.

description does not reflect the need for seriousness in the violence used for the threshold of the offence to be reached.

Other images that were brought within the scope of s 63(7)(b) in **SW15BD** were 'a static image of a naked female with left breast nailed to plank'; 'a static image of a naked adult female with both breasts clamped in wooden frame'; 'a static image of a naked adult female with her vaginal labia clamped with metal clamps and chains'.

Evidential and Public Interest Issues in SW14B and SW15BD

In **SW14B**, where a single image was found, the prosecutor was of the opinion that there was sufficient evidence to justify a prosecution and advised one charge of possession of EPI.

> There appears no doubt from the interpretation parts of s 63 that this is an image of extreme porn as it depicts serious injury to the breasts of a bound female and must have been produced solely or mainly for sexual gratification.[116]

She concluded that a prosecution was required in the public interest, as 'such images cannot be uncharged'.[117] Initially, the defendant pleaded not guilty and an 'old style' committal[118] took place. The defence challenged the nature of the image as extreme and sought to ask the District Judge to rule that there was insufficient evidence to proceed. However, the District Judge was satisfied that the photograph he saw 'ticked all the boxes having regard to the legal definition'.[119] He accepted that there was a prima facie case to answer and did not decline

[116] SW14B (Charging Decision/Advice and Case Action Plan).

[117] Ibid.

[118] Magistrates' Courts Act 1980, s 6(1). For the abolition of committal hearings, see Ministry of Justice Press Release, 'Faster justice as unnecessary committal hearings are abolished' (London 28 May 2013), https://www.gov.uk/government/news/faster-justice-as-unneccessary-committal-hearings-are-abolished, accessed 4 July 2016.

[119] SW14B (details of court appearances, actions, endorsements, etc.).

to commit the case to the Crown Court. The defendant pleaded guilty on the day of the hearing.[120]

The defendant's case in **SW15BD** stemmed from an international crackdown on child sexual abuse images, code-named *Operation Sledgehammer*.[121] It appears from the case file that the prosecutor on this case did not view the images but relied solely on the descriptions provided by the police. In his charging decision, he stated: 'I am satisfied that the descriptions of images provided are "extreme pornography" within the meaning of s 63.'[122] No further reference was made to the nature or content of the images. The evidential issues principally concentrated on the element of possession. In this case, the Crown encountered difficulties in proving that 'he downloaded or "possessed" the images in question as he was not the only person with access to the computer'[123] from which the material was recovered. The images were attributed to the defendant's user account, but his partner also appeared to have had physical access to the computer during the relevant period. Citing *Atkins*,[124] the prosecutor underlined in his investigative advice that 'whereas [the then suspect] may have been in physical possession of the images, his knowledge [was] intrinsic to the actus reus of possession'. In order to strengthen the prosecution case, he prepared an action plan which successfully linked 'a single suspect alone to the images, thereby proving that not only was the suspect in physical possession of the images, but he in fact created/downloaded them and thus of course had knowledge'.[125]

[120] See Chapter 7, Table 7.5.

[121] 'Austria smashes child porn ring' *BBC News* (London 13 March 2009), http://news.bbc.co.uk/1/hi/world/europe/7941935.stm, accessed 27 July 2016.

[122] See Chapter 7, p 250.

[123] SW15BD (Charging Decision/Advice and Case Action Plan).

[124] [2000] 2 Cr App R 248 (discussed in Chapter 5).

[125] In interview, the suspect, and later defendant in this case, offered 'no comment' to all questions put to him with regard to the images. His partner was eliminated as a suspect because on the date of the most recent downloading of the images she was out of the UK; travel documents were provided and immigration stamps on her passport were confirmed by the police officers. In addition, historical rotas were sought before the charging decision from both suspects' employers, confirming that at the relevant time the primary suspect's partner was at work, whereas he was not. Furthermore, the forensic analysts' reports verified that the images in question were saved by the

Furthermore, approximately 30 additional images were 'of interest'[126] to the police. These showed the defendant 'in various stages of undress, with chain clamps to his chest [. . .], with a belt buckle strapped around his penis and testicles. Some of the images where taken indoors and others in the countryside'.[127] During the police interview, when these specific images were put to the defendant to comment, the officers added that he was also portrayed as having 'some pegs and fishing weights hanging from [his] foreskin'.[128] The prosecutor made the wise decision not to charge possession of those images: 'As for the images of [his] own penis, disgusting though they may be, no offences are committed under s 63, as [he] has a defence under s 66.'[129] Finally, the prosecutor cited 'nature and seriousness' as the public interest factors tending in favour of prosecution. At the hearing at Swansea Crown Court, the defendant pleaded guilty to all counts and received a community sentence.[130]

Cases Where the Offence Under ss 63(1) and 63(7)(b) Was Charged Alongside Other Offences

This section discusses the remaining cases under the sub-category of serious injury acts. The first of the two still images brought within the scope of s 63(7)(b) in **KE03BD** portrayed 'a foot stamping on a penis'. Whilst it may be argued that bodily discomfort or pain could have been caused by the amount of force exerted on the persons' genitals, the short

defendant on electronic equipment (external hard drives, CD-ROMs etc.), and the folders on which the images were stored were dated and titled too.

[126] SW15BD (Witness Statement completed by a forensic investigator).

[127] Ibid.

[128] Ibid (Record of Interview).

[129] In his report to the Crown Prosecutor, one of the officers on the case 'respectfully requested that a charging decision be considered for an offence of outraging public decency or exposure'; Ibid (Further Report to Crown Prosecution for Charging Decision). The prosecutor, however, took the view that 'this [was] a non-starter' and that it was difficult for the Crown to establish the 'public element': 'there is no evidence of anyone else being present other than the suspect and his photographer accomplice', the prosecutor stated; Ibid (Charging Decision/Advice and Case Action Plan).

[130] See Chapter 7, Table 7.6.

description provided is not very informative. It is difficult to reach a firm conclusion as to whether the high threshold of serious injury, or likelihood of such injury, has been met. Did, for example, the image feature spiked heels resting against the male's genitals? In addition, there is nothing to suggest a movement of bringing the foot down heavily.

The second image (also a static one) was described as:

> [adult females] tied up with rope and/or gagged and their breasts [were] tortured in a way likely to result in serious injury.

The form of the alleged 'breast torture' is unclear and the 'way' this was 'likely to result in serious injury' remains unidentified. Was this achieved through breast slapping, flogging, twisting, squeezing or crushing for instance? There is no indication of severe or minor cuts that would suggest some level of injury. Other than the assumption of 'torture' and the repetition of the wording of the Act, there is little information to ascertain how the standard of s 63(7)(b) has been met. It could be argued that the image reflects a breast-oriented bondage, domination and sado-masochism (BDSM) practice, which involves the deliberate infliction of physical pain to the breasts, areola and nipples for sexual gratification. Such practices range 'from relatively safe and benign, such as the use of clothespins on the nipples, light flagellation or simple breast bondage to activities that can include great risk, such as more severe caning, amateur piercing, or being suspended by the breasts'.[131] Other evidence suggests that this practice 'can sometimes result in a woman losing her nipples, but mostly it just causes bruises – it's pretty harmless stuff'.[132] The prosecutor in **KE03BD** took the view that the evidential stage was satisfied and that a prosecution was 'undoubtedly'[133] required in the public interest, as the 'extreme images included torture'.[134]

[131] Aggrawal, *Forensic and Medico-legal Aspects of Sexual Crimes and Unusual Sexual Practices* (n 114) 149.

[132] B Rose, S/M Women's Support Group, Columbus, Ohio, interviewed on 27 February 1987; cited in TE Murray and TR Murrell, *The Language of Sadomasochism: A Glossary and Linguistic Analysis* (Greenwood Publishing, Connecticut: 1989) 133.

[133] KE03BD (Charging Decision/Advice and Case Action Plan).

[134] Ibid.

In **LO06BD**, where the defendant was also convicted for possession of 124,948 IIOC, the static image that fell foul of s 63(7)(b) depicted:

> [An] adult female standing upright, naked, with arms bound outstretched above her head. She is blindfolded with chopsticks clamped onto her nipples.

This image presumably portrayed the application of nipple clamps. These are devices used in sado-masochistic scenarios for the purposes of 'nipple discipline' or 'nipple torture'. They fit onto the nipple and may be attached to a variety of ropes, chains or wall fixtures for the purposes of deliberately inflicting physical pain.[135] In this case, the image probably portrayed some kind of 'do-it-your-self' nipple clamps. The 'chopsticks' were apparently held against each other (e.g. elastic bands could have been wrapped around each end) and in all likelihood they slightly sprang outwards to accommodate the nipple. Because of the sensitivity of this area, pain may result from this practice which can range from mild to very intense. However, no information is provided on whether any pained expression was evident on the female's face or whether any injury occurred (e.g. nerve or tissue damage). No 'sharp'[136] instruments appear to have been applied either. The prosecutor's discussion of the evidential criteria in this case centred on the IIOC-related offences and merely authorised additional charges of possession of EPI (also for possession of bestiality images, discussed later). She stated: 'There are many indecent images on the computer and my view is that it is clearly in the public interest to prosecute cases of this nature.'[137]

The defendant in **LO08BD** was arrested as a result of intelligence identifying him as a distributor of two Level 4 movies. His computer was seized by the Paedophile Unit of the Metropolitan Police. The forensic examination revealed 2,326 IIOC and two moving images which led

[135] Murray and Murrell, *The Language of Sadomasochism* (n 132) 97.
[136] Explanatory Notes to the CJIA 2008, para 457.
[137] LO06BD (Charging Decision/Advice and Case Action Plan).

to two separate charges of possession of EPI. For the purposes of this section, the image of interest was described as follows:

> Naked adult male stood against wall being kicked extremely hard in testicles and penis by two adult females (16s).

Given that the male genitalia are characterized by a heightened sensitivity, the use of the words 'extremely hard' may provide an indication of the likelihood of serious injury involved. It seems that the image at issue portrays a 'genital torture' technique, that is, a sado-masochistic practice which may involve constriction, stretching, punching or crushing a man's genitals.[138]

However, the video's pornographic nature, which is presumed here, is open to question. It is noteworthy that the duration of this moving image is only 16 seconds. It is debatable whether this sexually charged violent scene of this length can 'reasonably be assumed to have been produced *solely* or *principally* for the purpose of sexual arousal', as required by s 63(3) of the CJIA 2008. The simple existence of a sexual dimension ('naked adult male') does not necessarily mean that the pornographic element is readily met. In this short video, no attempt is made to establish the duration of the performance. This image may be regarded as being of such a nature that it can reasonably be assumed to have been produced or edited *primarily* for the purpose of generating an emotional response of shock within a sexual context. The alleged extreme image may be graphic, but not pornographic because it may not reasonably be assumed that it was produced *solely* or *principally* to please or excite in a sexual manner. The issue of whether the pornographic element has been met is one for the magistrate or jury to determine simply by looking at the image. As discussed in Chapter 5, this is not a question of the producers' intentions nor is it a question of the sexual arousal of the defendant. However, it may be argued that the prosecutor assessing the evidential criteria of this case could have exercised her discretion to authorise charges differently.

[138] Love, *Encyclopedia of Unusual Sexual Practices* (n 107) 513.

The video content attracted no comment in the charging decision. The prosecutor was of the view that the evidential criteria were 'fully met', as the offender admitted downloading the material in question and the presence of the images on his computer was confirmed by the computer experts' analysis. In her consideration of the public interest stage of the Full Code Test, the extreme pornography charge was rather put into shade:

> The suspect is a predatory paedophile who is pat [sic] of a depraved market of those who gratuitously contribute to the sickening sexual abuse of children. It is in the public interest to prosecute as if convicted the suspect falls to be assessed as dangerous as this is a Schedule 15 CJA 2003 specified offence.

More than 6,000 images were classed as extreme in **SW13BD**. These were held on the defendant's hard drives and DVDs. He was originally arrested on suspicion of distributing IIOC following a CEOP referral. The prosecutor on this case authorised charges of possession of four EPI and selected to proceed by way of two additional 'roll-up charges' which covered the remaining material. Despite the sheer volume of images recovered, only the descriptions of those four detailed in the schedule to the indictment were obtained. Two of these reflected images portraying bestiality and are examined later.

The images in question portrayed the following[139]:

> Naked adult female with her breasts chained to a bench whilst an adult male is whipping the top of her breasts.
>
> Naked adult female with cuts and bruises over her lower body with a whip resting on her vagina.

The first short description seems to reproduce distinct elements of BDSM impact play. As Herman states in Browne et al.'s *Geographies of Sexualities*:

[139] No information was recorded as to whether they were still or moving images.

> BDSM scenes between a dominant and a submissive almost invariably involve some form of bondage, rendering the submissive immobile while the dominant exerts physical and psychological control. This often involves the infliction of pain through whipping, spanking or using a wide range of devices that prick, pinch, shock or otherwise cause pain.[140]

In a similar fashion, the first description presents an activity during which one person is physically restrained or immobile, whilst another causes pain on that person by using a whip. However, the phrasing provided is not convincing as to whether the required by the 2008 Act level of serious injury has been reached. The image could have portrayed the infliction of controlled amounts of pain. There exists no indication as to the effect of the alleged whipping either. Whipping may leave a red mark, whereas cracking a whip during a high-end activity may cut bare skin.

As regards the second image, it is clearer that abrasion and perhaps tearing of the skin occurred, but we are offered no signs of severe cuts that would qualify as serious injury in its ordinary English meaning.[141] Judging from the description provided, it is doubtful whether this image falls foul of s 63(7)(b), especially in light of the CPS legal guidance on extreme pornography which at the time specified:

> Although the Act does not state what a serious injury is, prosecutors must be aware that by the very nature of its name 'serious injury' will not include trivial or transient injuries which include bruises and grazes.[142]

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[140] RDK Herman, 'Playing with restraints: Space, citizenship and BDSM' in K Browne, J Lim and G Brown (eds), *Geographies of Sexualities: Theory, Practices and Politics* (Ashgate, Surrey: 2009) 96.

[141] As explained in Chapter 5, neither 'life-threatening' nor 'serious injury' are defined in the Act and the intention is that both should be given their ordinary English meaning; Ministry of Justice (MOJ) Circular 2009/01, *Possession of extreme pornographic images and increase in the maximum sentence for offences under the OPA 1959: Implementation of section 63–67 and section 71 of the CJIA* 2008 (Criminal Law Policy Unit, London: 2009) [15]–[16].

[142] CPS Prosecution Policy and Guidance, Extreme Pornography, http://www.cps.gov.uk/legal/d_to_g/extreme_pornography/, accessed 9 May 2013. The prosecutor's charging decision was signed on 26 June 2010. The defendant in this case was charged approximately two weeks later and was committed from Barry Magistrate's Court to the Crown Court in Cardiff early in September 2010. The CPS Prosecution Policy and Guidance was updated in mid-May 2013

The defendant fully admitted distributing and possessing IIOC, as well as possessing EPI. The prosecutor's review addressed evidential issues concerning the IIOC-related offences and outlined the specific charges but did not engage in an analysis of whether the images in question met the element of extreme under s 63(6). He was satisfied that there was sufficient evidence providing a realistic prospect of conviction and concluded that a prosecution was required in the public interest.[143]

In **KE01B**, the schedule containing descriptions of the images subject to charge outlined their content as follows:

> This still image is of a female adult with a rope wrapped tightly around each breast, causing them to swell. The rope is attached to some kind of pulley system and there appears to be two people pulling the rope, which is causing the female's breasts to stretch away from her body. Her arms appear to be tied behind her back.
>
> This is a still image of an adult female who is tied up. Clamps are attached to her genital area. Her breasts are clamped in a device. She appears to be in distress.

The first description seems to refer to a specific form of bondage that involves binding around a female's breasts. The person portrayed may be experiencing some physical discomfort, but the amount of force used by those 'pulling the rope' is unclear. The text describing the second image reveals that constrictions have been applied to this adult female too. Love explains that the amount of tension caused by clamps varies. These devices can be used to apply or increase 'mild tactile sensation'[144] or they can be part of a 'highly developed sex play used to induce more severe pain'.[145] From the description provided, it is

and this wording was removed. However, this exact phrasing was explicitly stated in the guidance at the time the prosecution decision was made.

[143] In the 'Public Interest' section of the Charging Decision/Advice and Case Action Plan document the prosecutor simply noted 'Yes'.

[144] Love, *Encyclopedia of Unusual Sexual Practices* (n 107) 113.

[145] Ibid.

unclear whether the perceived state of 'distress' amounted to serious injury or not. However, signs of this apparent state of 'distress' were sufficient to meet the s 63(7)(b) standard. No evidential issues were identified with respect to the two abovementioned images. Charges were authorised accordingly.

An Extreme Image Involving 'Serious Injury' to a Child

The evidence was insufficient, as a matter of law, to sustain a conviction in **LO07B**. The defendant was subject to a 20-year SOPO,[146] which was imposed on him following two convictions for making IIOC. His assigned public protection officers had made earlier efforts to search his home but had been unsuccessful. The defendant had been using all manner of excuses to prevent them from examining his computer. It was believed that he had reoffended by means of being in possession of further IIOC. Following a police search, he was arrested, charged and subsequently indicted on six counts.

The first five counts reflected offences of possession of IIOC of Level 1, which were found in three books. In her evidential analysis, the prosecutor added:

> The suspect is also in receipt of a DVD which shows a large man penetrating the anus of a girl who has not yet achieved puberty and harm would therefore occur to her anus; this act satisfies the constituents of the CJIA 2008.[147]

She found that there was sufficient evidence to justify a prosecution and commented that this was required in the public interest, as 'the suspect [was] a registered sex offender'.[148] As a result, an additional sixth count

[146] SOPO stands for Sexual Offences Prevention Order; Sexual Offences Act 2003, s 104; Sentencing Guidelines Council, *Sexual Offences Act* 2003: *Definitive Guideline* (n 5) [1.30]. The aim of a SOPO is to reduce the risk of future sexual harm.

[147] LO07B (Charging Decision and Advice, Specifying or Attaching Charges).

[148] Ibid. The same prosecutor acted as the reviewing lawyer in this case and noted in her review endorsement that there was public interest in prosecuting, because 'the suspect [had] a previous conviction for an identical matter;' Ibid (Review Endorsement).

was added to the indictment to reflect the alleged extreme pornography content of the DVD in question.

The documentation in **LO07B** revealed that the video in question comprised two parts[149]: (1) the first piece of the footage showed a girl holding her labia and buttocks open to reveal to the camera close-up shots of her vagina and anus. Her hands could be seen in detail but her face could not. The hands particularly could have been considered mature enough to belong to a person aged 16 or *over*; (2) the second piece showed the subject on a bed on her hands and knees with her back to the camera. Her face and hands could not be viewed. The female appeared flat-chested and was assessed as a child *under* the age of 16. A naked white male then moved onto the bed with a large erect penis and anally penetrated her. He appeared to have had some difficulty in inserting his penis and he attempted several times to be successful. The age of the female depicted was not ascertained, but the officer in charge provided an estimate. In his statement, he described the footage as follows:

> Naked young white female 12 years; exposing her vagina and her anus in close up; naked white adult male indulges in anal penetration of the naked young white female (Level 4).

It appears that he made the assumption that the female subjects of the two pieces of the footage were identical. However, there was no solid evidence to support this assertion, given that different body parts were seen in each piece.

The prosecutor did not contest the officer's claim. As is evident from her aforementioned decision, she believed that it was appropriate to charge an offence under the extreme pornography provisions. It seemed to her that because of the marked difference between the girl's slight frame and the adult male's much larger size, his act of inserting a large erect penis into the girl's anus was likely to have caused 'serious injury' within the meaning of s 63(7)(b) of the 2008 CJIA.

[149] LO07B (Borough Crown Prosecutor's assessment of the evidence in relation to count six, contained in the CPS case file).

The defendant denied both the offences of possession of IIOC and EPI and elected a jury trial. Following committal of the case to the Crown Court, Counsel's written opinion also appears to have been based on the assumption that the female subjects were the same. However, she questioned the likely age of the girl portrayed, as in the first piece of the footage her face could not be seen and her hands could be said to appear mature for a child.[150] She accepted, though with reservations, that count six could be proved without necessarily tendering medical evidence as to the age of the female in the video and the potential injury caused to her. The case proceeded without any amendments to the indictment.

At trial, the thrust of the defence's submission was that the prosecution offered no evidence upon which the jury could properly draw the conclusion that serious injury, *not just* injury, either resulted or was likely to have resulted from the featured act. There was no evidence of 'insertion of sharp objects' or 'mutilation'.[151] The fact that the female depicted might have been a child was not in itself enough to enable the jury to conclude that serious injury resulted or might have been likely to result. The Recorder stated in his ruling:

> [The prosecution] candidly accepts that the only issue here is an issue of size. . . . Whereas what is shown may be distasteful, in my judgment, there is no obvious restraint, there is no obvious distress and there is no evidence that the subject is experiencing something which is likely to cause her serious injury.[152]

The Crown failed to adduce sufficient evidence to demonstrate that the footage fell within subsection 63(7).[153] During the act at issue the female portrayed did not appear to be in demonstrable pain. The likelihood of serious injury being inflicted to her anus on this occasion was probably low. Addressing the jury, the Recorder stated:

[150] LO07B (Legal Counsel Advice, enclosed).
[151] Explanatory Notes to the CJIA 2008, para 457.
[152] LO07B (ruling regarding count six; taped transcript enclosed).
[153] CJIA 2008, s 63(6).

> Because there is no soundtrack, there are no sounds of distress. There are no obvious signs of distress displayed in the body language of the subject. No expert evidence has been called to suggest that serious injury would be likely to result from the act that you saw depicted in that image and the [injury] has to be serious. Bruising and grazing would not be enough.[154]

All the prosecution argued in relation to count six was that the jury could conclude that serious injury would be likely to result because of the disparity in size between the male and the female in the image. The Recorder concluded that this was insufficient to provide the jury with a proper evidential basis to convict the defendant and decided that, as a matter of law, count six could not proceed any further. Finally, he directed the jury to return a verdict of not guilty in relation to it.[155]

The assumption made by the officer in charge, the reviewing lawyer and Counsel that the female in the first and second pieces of footage were the same caused confusion in ascertaining the purported age of the person depicted. 'The case for providing that the female being anally penetrated was 16 years old or under would have been made easier if this assumption [was] not held.'[156] The CPS legal guidance on EPI specifically provides that if the extreme image is that of a child, prosecutors should consider charging the suspect with either an offence contrary to the PCA 1978, s 1 or an offence contrary to the CJA 1988, s 160. No consideration was given to this matter by the reviewing lawyer or Counsel. This is rather surprising, particularly because count six expressly stated that the female featuring in the video was a 'child'.[157] However, this 'warning sign' was not identified at an early stage. Placing an alternative count on the indictment could have been an appropriate

[154] LO07B (The Recorder's direction regarding count six in the presence of the jury; taped transcript enclosed).

[155] See Chapter 7, Table 7.5.

[156] LO07B (Borough Crown Prosecutor's assessment of the evidence in relation to count six) (n 149).

[157] The particulars of offence in the indictment stated (count six): '[The defendant] on the [date] had in his possession [. . .] a DVD which showed an adult male of large proportions penetrating the anus of a child who had not yet achieved puberty with his penis.'

safeguard in the circumstances of the case. This course of action was not considered by Counsel until the day of the trial and the presiding judge dismissed the application to add the alternative count, commenting that it was 'too late'.

The correct charge for the sixth count was an offence of possession of an IIOC of Level 4 ('penetrative sexual activity involving a child or children, or both children and adults') contrary to s 160(1) of the 1988 Act.[158] Such an offence would have obviated the need to adduce medical evidence in order to ascertain the age of a child or the likelihood of serious injury.[159] Count six, as originally drafted, set a high threshold. In the absence of medical evidence to prove (likelihood of) serious injury and in light of the demeanour of the female, the prospect of conviction was low. Whilst it was possible that a jury could have been persuaded to conclude that anal penetration of a subject as slight as the girl depicted was likely to have caused serious injury, this was arguably not in itself sufficient for the Full Code Test of the CCP to be satisfied. The prospect of conviction was speculative, as opposed to realistic.[160] If the charge had been properly drawn, the defendant would have probably pleaded guilty. The prosecution's failure enabled the offender in **LO07B** to evade punishment for this offence.

The former Chief Executive of the CEOP, Jim Gamble QPM, wrote to the DPP seeking an explanation for the reason count six had been indicted as opposed to possession of IIOC at Level 4. The DPP responded that s 63 of the CJIA 2008 was 'still being tested in courts' and concluded that 'this [was] a learning point that has been taken on board in relation to this comparatively new area of legislation'.[161] The defendant was convicted on the remaining five counts, each of which charged him with possession of IIOC.

[158] LO07B (Borough Crown Prosecutor's assessment of the evidence in relation to count six) (n 149).

[159] The age of the child is ultimately for the jury to consider and expert evidence on this matter is inadmissible; *R v Land* [1998] 1 Cr App R 301.

[160] LO07B (Borough Crown Prosecutor's assessment of the evidence in relation to count six) (n 149).

[161] Ibid (DPP's response enclosed; no date is provided).

CJIA 2008, ss 63(1) and 63(7)(d): 'A Person Performing an Act of Intercourse or Oral Sex with an Animal (Whether Dead or Alive)'

Out of all 16 research cases, 11 involved offences under this classification. In ten of those 11, the defendants pleaded guilty to all counts. The content of the images (both still and moving) involved human sexual conduct with a variety of living animals.[162] The images discussed in this section fell within three broad categories.

The first category included sexual activities within the scope of the offence under s 69 of the Sexual Offences Act 2003 (SOA 2003), which proscribes only penile penetration of the vagina or anus of, or by, an animal:

> Image of an adult female being penetrated by a pig's penis.[163]
>
> Movie (5mins and 55secs in duration) shows a human female engaged in full vaginal intercourse with a male dog four times, the dog ejaculate can clearly be seen dripping from the female's vagina . . . .[164]
>
> A movie clip of an adult female, anal penetration by a horse.[165]
>
> Clip starts with a female on hands and knees with a black dog mounting her from behind engaging in sexual intercourse. . . . The camera moves around to show the dog and the female from behind. The camera zooms in and shows the dogs erect penis inserted into the female's vagina. . . . Liquid can be seen running from the female's vagina and dripping onto the floor. The female helps the dog remove its penis from her vagina . . . . Video clip ends.[166]

The second category comprised oral sex with animals:

> Image of an adult female performing oral sex on a horse.[167]

[162] No descriptions of images portraying dead animals were found in the sample studied.
[163] SW12D.
[164] KE04D. Similar descriptions of vaginal penetration by a dog were also found in SW15BD.
[165] SW15BD.
[166] LO16D.
[167] SW12D. Similar descriptions were found in LO05D; LO06BD; KE02D; SW12BD.

> This footage shows a naked woman performing oral sex on a Boxer dog.[168]

Other images where described as if the initiative to engage in oral sex belonged to animals, with the intentions of human participants being downplayed:

> The footage later shows a different adult female . . . . The erect penis of a horse also penetrates her mouth.[169]
>
> A movie clip of an adult female, oral penetration by a horse.[170]

The practice of an animal performing oral sex on a human being, known as 'zooliction',[171] was also documented:

> Movie shows an adult human female . . . who undresses and masturbates, a large male dog then performs oral sex upon the female . . . .[172]

The third category encompassed acts that went beyond the scope of the SOA offence (s 69). As noted in Chapter 5, the bestiality category under s 63(7)(d) is broader and not limited to penile penetration of, or by, a live animal:

> An adult female holding the erect penis of a Great Dane dog near to her mouth.[173]

Another image under this category showed:

> The footage . . . shows a dog licking the genitals of an adult female. . . . She then masturbates the dog's penis with the hand . . . .[174]

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[168] KE02D.

[169] Ibid.

[170] SW15BD.

[171] H Miletski, *Understanding Bestiality and Zoophilia* (East-West Publishing, Bethesda, MD: 2002) 7.

[172] KE04D.

[173] KE02D. A similar description was found in ST11D.

[174] KE02D.

Moreover, an example of the practice of 'felching' was also found in the sample. Felching is the act of inserting a live animal into the anus or vagina for the purpose of receiving sexual gratification from its body movements.[175] This is achieved with fish or rodents:

> Movie (19mins and 33secs) shows a human female masturbating and inserting a clear plastic/glass tube into her vagina. The female then produces a gerbil (or other type of rodent) from a box and pushes the animal into the tube. The rodent travels down the tube, disappearing from sight into the female's vagina. The rodent is pushed through the tube, through beyond its end, the tube being withdrawn from the female's vagina. The rodent is not inside the tube when it is withdrawn. The female continues to masturbate for several minutes before the rodent appears at the entrance to the female's vagina and is retrieved by a male.[176]

In this video, there appears to be no penile penetration by the animal in question, but there is instead penetration by the use of a whole small animal.

Whilst some of the descriptions provided graphic details of the sexual activities depicted, others were limited to generic information. The following wording, for instance, was repeated in a case file twice in order to describe the content of different images of the same nature:

> These movies all involve male and female adults engaging in sexual activity with a range of different animals.[177]

Finally, a number of extreme images, predominantly moving ones, fell within two or all three of the aforementioned categories, in that they contained sexual activity involving vaginal, anal and oral or other intercourse between a number of adult participants and different animals:

[175] Miletski, *Understanding Bestiality and Zoophilia* (n 171) 7. Felching encompasses an additional meaning, which refers to human sexual interaction; see JT Parsons and C Grov, 'Gay male identities, desires and sexual behaviors' in CJ Patterson and AR D'Augelli (eds), *Handbook of Psychology and Sexual Orientation* (OUP, Oxford: 2013) 23.

[176] KE04D.

[177] KE03BD.

> Movie (15 min and 5sec in duration) shows adult human's [sic] engaged in intercourse with various animals including . . . an adult male human penetrating an orifice . . . of a cow, . . . an adult human male engaged in full penetrative intercourse with a chicken, . . . a male donkey engaged in the [sic] full penetrative vaginal intercourse with a human female . . . .[178]
>
> Female performing oral sex and having sexual intercourse with a dog (32m 44s).[179]
>
> Movie (36mins and 18sec duration) shows two human females . . . [capturing] the horse's ejaculate in a glass before the ejaculate is drunk by one of the females. Both females then, in turn, engage in full vaginal intercourse with the horse . . . .[180]

The descriptions above convey the impression of relatively clear-cut images falling foul of s 63(7)(d). Overall, the nature of such images raised doubts as to whether the evidential criteria were satisfied in none of the research cases, except for one: in **KE04D**, the content of some images could not be said to be straightforward. The prosecutor explained in her charging advice that some were 'debatable', in that they depicted:

> . . . eels having been inserted in a woman's anus . . . as well as a woman inserting her hand into what appears to be the vulva of a horse. None of these images can be said to satisfy the term 'intercourse' which is not defined in the Act; . . . penetration is not a term used in this Act.[181]

After further consideration, the prosecutor interpreted in her charging decision the term 'intercourse' widely enough to capture such content:

> I have applied the ordinary meaning of the word *as connection between a person and an animal in a sexual manner*. In the absence of authority to the contrary, attempts by the defence to whittle the number of charges should be resisted.[182]

[178] KE04D.
[179] LO08BD.
[180] KE04D.
[181] Ibid.
[182] Ibid (Charging Decision/Advice and Case Action Plan; emphasis added).

Thus, she concluded that both the evidential and public interest stages of the Full Code Test were 'clearly satisfied'.[183] In the remaining ten cases where possession of bestiality images was charged, the nature of the images did not give rise to any special considerations in relation to the CCP stages.

Out of all defendants charged with possession of images falling within the scope of sub-s (7)(d), only one pleaded not guilty to those specific charges **(ST11D)**.[184] His case originated from an investigation conducted by *Operation Solitaire*, tasked with targeting possession of IIOC via file-sharing websites.[185] Following the execution of a search warrant, officers seized electronic devices from which IIOC and extreme images were recovered. Examples of the latter included:

> Movie shows: Rottweiler dog penetrating from the rear a female adult (duration 01:13mins).[186]
>
> Movie shows: Naked adult female engaged in full sex with horse (duration 09:10mins).[187]

The defendant made a full admission to downloading IIOC but maintained that he was unaware that it was illegal to possess bestiality images. He was subsequently charged with two offences of possession and nine of making IIOC, and three additional offences of possessing EPI. The defendant tendered not guilty pleas to the extreme pornography counts, but pleaded guilty to the remaining 11. From the details of the PCMH, it is clear that these pleas were 'acceptable to the Crown'[188] and 'not guilty verdicts'[189] were entered to the counts concerning the offence of possession of EPI.

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[183] Ibid.

[184] see Chapter 7, Table 7.4.

[185] Staffordshire Police, *Staffordshire Police Authority and Chief Constable's Joint Annual Report 2009–10*, http://www.statewatch.org/observatories_files/drones/uk/police-staffs-2010-annual-report.pdf, accessed 25 July 2016.

[186] ST11D.

[187] Ibid.

[188] This was further confirmed in a letter sent by the CPS to Stoke Police on 7 February 2011; found in ST11D.

[189] Ibid.

As a rule, if the accused pleads not guilty to some or all of the counts on the indictment, a jury is empanelled to decide whether he or she is guilty. However, in certain occasions, like this one, the jurors' services are not required because the prosecution does not wish to proceed further to save on those counts to which the accused pleaded guilty. Two options are then available to the prosecuting advocate[190]: (a1) 'Lie on the file': the first is to ask that the counts to which the accused pleaded not guilty be left on the file. As there is no verdict, this does not amount to a formal termination of proceedings. However, the effect is that there can be no further proceedings against the defendant on those matters without the leave of the Crown Court or Court of Appeal; (b) offering no evidence: the second option, which was apparently the preferred one in **ST11D**, is to inform the judge that the prosecution proposes to offer no evidence in relation either to individual counts or the whole indictment. The judge then orders a verdict of not guilty with respect to each offence denied by the accused.[191] Unlike the first option, this concludes the proceedings and its effect is equivalent to an acquittal by a jury. Sprack explains that the first option is particularly useful where the defendant has pleaded guilty to other counts on the same indictment and the continuation of proceedings is no longer required in the public interest: proving the case would be a waste of time and resources in light of the guilty pleas which have already been entered. The second option of offering no evidence is more suitable 'when the prosecution genuinely think, perhaps as a result of extra evidence discovered since the committal proceedings, that the accused ought not to be convicted'.[192]

However, the nature of the images was uncontested in **ST11D**. The prosecutor's charging decision provided no indication of any evidential weaknesses either in relation to the issue of possession or any other

[190] J Sprack, *A Practical Approach to Criminal Procedure* (14th ed, OUP, Oxford: 2012) [17.09].
[191] Criminal Justice Act 1967, s 17; see also CPS Prosecution Policy and Guidance, Termination of Proceedings, http://www.cps.gov.uk/legal/s_to_u/termination_of_proceedings/, accessed 25 June 2016.
[192] Sprack, *A Practical Approach to Criminal Procedure* (n 190) [17.09].

element of the offence. Moreover, the review endorsement confirmed the existence of 'sufficient evidence'[193] to proceed. Therefore, it would be expected that if the prosecution believed that the accused was guilty as charged, they would be reluctant to offer no evidence and see him acquitted. The reason behind the prosecution's approach is unclear. The CCP states that pleas to a reduced number of charges can be accepted, if prosecutors think 'the court is able to pass a sentence that matches the seriousness of the offending'.[194] Therefore, it may be suggested that proceedings regarding the EPI-related offences were abandoned on public interest grounds following 'acceptable' pleas to other counts on the indictment, which were presumably deemed more serious. The remaining offences under the PCA 1978 and CJA 1988 (that were to be dealt with by the Crown Court) covered the criminal conduct admitted by the defendant both with respect to the duration of the offending and its seriousness, and allowed for a sufficient sentence to be passed.

Evidential and Public Interest Issues in Cases Where the Offences Under the CJIA 2008, ss 63(1) and 63(7)(d) Stood by Themselves

It was noted earlier that out of all the cases studied, 11 involved bestiality offences. In nine of those 11, possession of bestiality images was charged alongside other offences. In the remaining two, that is **SW12D** and **SW15BD**, the s 63 offences stood by themselves.[195] As is evident from their codes, **SW12D** concerned solely possession of bestiality images. **SW15BD** involved both bestiality images and images portraying serious injury acts. This research case will be discussed here only in relation to the former type of images. In both **SW12D** and **SW15BD**, the images portrayed adult females performing oral sex on,

[193] ST11D (Review Endorsement).

[194] CCP (2013) [9.2]; (2010) [10.2].

[195] Case files involving bestiality: KE02D, KE04D, LO05D, LO16D, ST11D, KE03BD, LO06BD, LO08BD, SW13BD, SW12D, SW15BD.

or being penetrated (anally or vaginally) by, horses and dogs. Evidential issues centred on the element of possession, rather than the depictions themselves.

The circumstances leading up to the discovery of the images in **SW12D** were as follows: a local school reported to the police that a computer, which was handed in for repair by the suspect to the school technician, was found to contain IIOC. Both the suspect and his mother were arrested. The computer was seized and was found to contain a significant number of extreme images too. In the interview, both suspects denied knowledge of the images. Although dates of their creation were established, it was difficult to prove who had actually downloaded the images. The computer had two username profiles, which were not password-protected. It was also accessed by third parties.[196] Given the principles in *R v Lane and Lane*,[197] the case was therefore one in which there was no realistic prospect of conviction. However, further investigation revealed that one of the suspects had engaged in an online conversation at the time the images appeared to have been searched for and downloaded. The suspect, and later defendant in this case, finally admitted that he was chatting on Facebook at the same time the images were being created. In light of this additional evidence, the prosecutor revised his initial decision and concluded that due to the 'nature and seriousness of the offence',[198] the public interest was also met and authorised charges accordingly.

Finally, in **SW15BD**, discussed earlier, the issue of possession focused on linking a single suspect alone to the images. It was proved that he physically possessed them and had the requisite knowledge.

[196] SW12D.

[197] (1986) 82 Cr App R 5; 'where two people are jointly indicted for the commission of a crime and the evidence does not point to one rather than the other, and there is no evidence that they were acting in concert, the jury ought to acquit both'; CPS Prosecution Policy and Guidance, Homicide: Murder and Manslaughter, http://www.cps.gov.uk/legal/h_to_k/homicide_murder_and_manslaughter/, accessed 27 July 2016.

[198] SW12D.

Evidential and Public Interest Issues in Cases Where the Offences Under the CJIA 2008, ss 63(1) and 63(7)(d) were Charged Alongside Other Offences

In the remaining nine cases, the content of bestiality images attracted limited or no analysis, presumably because their nature was deemed straightforward (with the exception of **KE04D**, analysed earlier). For instance, in **LO05D**, the defendant was charged with four offences contrary to s 25 of the Identity Cards Act 2006 (possession of false identity documents) and eight offences contrary to s 63(7)(d) of the CJIA 2008. According to the prosecutor, 'the images [were] disgusting and clearly covered by the categories referred to in s 63(7) of the Act'.[199] She added that the suspect accepted in interview that the computer from which the images had been recovered belonged to him and that he was the sole user. He also admitted downloading the extreme images. The prosecutor took the view that these were 'serious offences in the public interest to proceed'.[200]

In **KE02D**, where the defendant was charged with breaching of a SOPO and making IIOC, there was no discussion of the EPI other than the fact that 14 'live' 'extreme images involving penetrative sex with animals'[201] were found in the defendant's possession. In light of the remaining IIOC-related offences, the prosecutor concluded that there was sufficient evidence providing a 'RPOC'[202] and only outlined 'breach of SOPO and further related offences'[203] as the public interest factors tending in favour of prosecution.

Finally, the prosecutor in **LO16D** authorised charges of possessing and making IIOC, and possessing a single extreme image portraying bestiality. Sixteen images of the same nature were excluded, as they had been deleted and therefore 'could not be said to be in [the suspect's]

[199] LO05D (Charging Decision and Advice, Specifying/Attaching Charges; Review Endorsement).
[200] Ibid.
[201] KE02D (Charging Decision/Advice and Case Action Plan).
[202] Realistic Prospect of Conviction (RPOC).
[203] KE02D (Charging Decision/Advice and Case Action Plan).

possession'.[204] The evidential stage of the CCP was met, given that possession of the computer where the images were found was 'not denied'[205] and there was no suggestion that anyone else had access to it. Without differentiating between EPI and IIOC-related offences, the prosecutor decided that the 'nature of these charges warrant[ed] prosecution'.[206]

Discussion

According to the CCP, 'each case must be considered on its own facts and on its own merits'.[207] Therefore, drawing overarching conclusions as to the evidential and public interest criteria that most commonly influence prosecutorial discretion in cases involving extreme pornography offences is difficult. In the cases studied, it appears that images portraying acts of oral sex or sexual intercourse with living animals were approached as being relatively clear-cut, without raising any labyrinthine evidential issues. However, the content of images portraying serious injury acts did not appear to become the subject of thorough scrutiny in prosecutors' analysis of the evidential criteria. The information contained in their charging advice or decisions tended to be minimal and rather general. In the four cases where s 63 offences stood by themselves,[208] the discussion of the evidential requirements most frequently focused on the less controversial possession element of the offence.[209] The nature of the image as extreme attracted little analysis, which was often limited to the reiteration of the wording of the Act[210]; **ST10AB**, the only jury acquittal following a full trial in this sample, was an exception. In the remaining 12 cases, the discussion of the evidential

[204] LO16D (Charging Decision/Advice and Case Action Plan).
[205] Ibid.
[206] Ibid.
[207] CCP (2010) [2.3]; (2013) [2.3].
[208] ST10AB, SW12D, SW14B and SW15BD; see also Chapter 7.
[209] SW12D; SW15BD.
[210] SW14B; SW15BD.

Table 8.2 OPA 1959 and CPS charging practice

Material most commonly prosecuted:	Material normally not prosecuted:
• Sexual act with an animal; • Realistic portrayals of rape; • Sado-masochistic material which goes beyond trifling and transient infliction of injury; • Torture with instruments; • Bondage (especially where gags are used with no apparent means of withdrawing consent); • Dismemberment or graphic mutilation; • Activities involving perversion or degradation (e.g. drinking urine, urination or vomiting on to the body, excretion or use of excreta); • Fisting.	• Actual consensual sexual intercourse; vaginal/anal; • Oral sex; • Masturbation; • Mild bondage; • Simulated intercourse or buggery; • Fetishes which do not encourage physical abuse.

requirements largely centred on issues concerning the principal offences, whereas the identification of evidential criteria pertaining to the possession of EPI was comparatively less comprehensive.

By virtue of s 63(6)(b) of the CJIA 2008, all extreme pornographic material is obscene, as classified by the 1959 OPA. It was explained in Chapters 3 and 5 that the addition of the 'grossly offensive, disgusting or otherwise of an obscene character'[211] element, when taken in conjunction with the remaining ones, has the practical effect of ensuring that the offence under s 63 only covers material which would be caught by the 1959 OPA, were it to be published in the UK. Would the images in the current sample also fall within the scope of the OPA? The analysis in Chapter 2 distinguished between material which is most commonly prosecuted under the 1959 Act and material in respect of which proceedings will not normally be initiated (Table 8.2). It may be argued that prosecutors' charging decisions in the research cases studied were broadly in line with the charging practice concerning obscene

[211] CJIA 2008, s 63(6)(b).

publications. The extreme material brought within the ambit of the offence apparently portrayed rather typical BDSM practices as well as human sexual conduct with animals. If this material was published, it would most likely be caught by the 1959 OPA. The activities that involved breast 'whipping' in **SW13BD** and the use of the 'pulley system' in **KE01B** seem to overlap with the category 'torture with instruments' in Table 8.2. The same could be suggested in respect of the activities of 'needle-play' in **SW14B** and **SW15BD** – which can also be deemed forms of 'BDSM torture'[212] – and the images involving the application of nipple and breast clamps in **LO06BD** and **SW15BD**.[213] Moreover, a prosecution was 'undoubtedly'[214] required in **KE03BD**, which concerned an image portraying 'gagged' adult females whose breasts were 'tortured'.[215]

However, it should be borne in mind that not all obscene material is automatically extreme.[216] With the exception of images portraying bestiality, the range of extreme sexual and violent material which is intended to be criminalised by s 63 is *narrower* than the material outlined in the left-hand side column of Table 8.2. Therefore, it is important to differentiate between: one the one hand, sado-masochistic material or other articles portraying acts listed on the left-hand side column; these would be illegal to publish, yet lawful to possess (other than for gain); and on the other hand, sado-masochistic material or other articles portraying acts set out on the left-hand side column, which simultaneously fall within the parameters of s 63(7) of the CJIA 2008; these would be illegal to publish and also unlawful to possess.[217] In the current sample, the particulars of the charges did not always clearly identify the acts portrayed and a

[212] M DeMello, *Encyclopedia of Body Adornment* (Greenwood Publishing, Westport, CT: 2007) 281.

[213] As pointed out earlier, these images presumably portrayed BDSM-oriented activities known as 'nipple torture'; Murray and Murrell, *The Language of Sadomasochism* (n 132) 133; J Miller, *The Passion of Michel Foucault* (Harper Collins, London: 1993) 266; similar images were recovered in KE01B.

[214] KE03BD (Charging Decision/Advice and Case Action Plan).

[215] Ibid.

[216] CPS Prosecution Policy and Guidance, Extreme Pornography, http://www.cps.gov.uk/legal/d_to_g/extreme_pornography/, accessed 27 July 2016.

[217] All extreme pornographic material is obscene; CJIA 2008, s 63(6)(b).

number of the brief descriptions provided were not quite informative. Coupled with the paucity of information in the records of charging decisions as to how the content of the images met the criteria of s 63(7), the dividing line between the aforementioned categories was blurred.

It is worth pausing to note that what was classed as serious injury in the case of 'needle play/play piercing',[218] for example, is viewed by practitioners as an activity allowing for 'self-discovery, sexual pleasure, or the overcoming of personal obstacles'.[219] In addition, masochism is perceived by participants as a form of human expression that draws on 'sexual dissidence, pleasure, escapism, transcendence and the refusal of normal genital sexuality, allowing for safer sex explorations of the lived body and its transformative potentials'.[220] Thus, activities which are presumed to be 'torture' by enforcement agencies are given a different dimension by those who engage in them. In their view, they are placed at the intersection of great discomfort and sexual pleasure, where sensations of pain are sought.

As far as the public interest stage of the Full Code Test is concerned, the CCP specifies that 'prosecutors must decide the importance of each public interest factor in the circumstances of each case and go on to make an overall assessment'.[221] The weight to be attached to these factors will therefore vary on a case-by-case basis. In the sample studied, particularly in relation to the four cases where the offences under s 63 stood by themselves, the 'nature' and/or 'seriousness'[222] of the offences tended to be often identified in prosecutors' decisions as factors tending in favour of prosecution.[223] The prosecution advocate's argument in

[218] SW15BD.

[219] DeMello, *Encyclopedia of Body Adornment* (n 212) 43.

[220] C Smith, 'Pleasing intensities: Masochism and affective pleasures in porn short fictions' in F Attwood (ed), *Mainstreaming Sex: The Sexualisation of Western Culture* (IB Tauris, London: 2009) 23, citing A Beckman, 'Deconstructing myths: The social construction of "sadomasochism" versus "subjugated knowledges" of practitioners of consensual SM' (2001) 8(2) *Journal of Criminal Justice and Popular Culture* 66.

[221] CCP (2010) [4.13]; (2013) [4.9].

[222] cf CCP (2010) [4.12]; (2013) [4.12a]: 'The more serious the offence, the more likely it is that a prosecution is required.'

[223] SW14B; SW12D and SW15BD.

ST10AB echoed Easton's and McGlynn and Rackley's arguments, discussed in Chapter 5. He argued that the legislation is needed 'to regulate the use and portrayal of images that glorify sexual violence'[224]; 'to safeguard dignity and integrity of certain sections of society'[225] and particularly protect women from 'discrimination and degradation'.[226] He added that 'such regulation protects society or individuals from shock or offence and in certain cases, outrage'.[227]

In relation to the research cases where s 63 offences were charged alongside other offences contrary to different statutory provisions, in their overwhelming majority (7 out of 12) the assessment of the public interest stage emerged as a hurried ticking box paper exercise as opposed to a scrupulous process on the basis of strictly defined criteria set out in the CCP. In those case files, the consideration of public interest was limited to a brief affirmation of its presence most commonly through the recording of the word 'Yes'.[228] This created difficulties in ascertaining the precise factors considered and the weight attached to them in the decision-making process. In the remaining cases within this sub-category (5 out of 12), the discussion of the public interest stage predominantly concentrated on the principal offences and the circumstances of the defendant (e.g. record of criminal behaviour).[229]

Finally, as regards bestiality images, the argument in favour of amending the CJIA 2008 to mirror the SOA 2003, so that 'intercourse' under s 63(7)(d) is limited to 'penetration', may be justified on the grounds of avoiding the anomaly where it is lawful to perform certain sexual acts with an animal (e.g. oral sex), but not to view images of such acts.[230] Nevertheless, as the findings of this study demonstrate, pornographic

[224] ST10AB (Details of hearing).
[225] Ibid.
[226] Ibid.
[227] Ibid.
[228] KE03BD ('Undoubtedly'); KE04D ('Satisfied'); LO07B ('Yes'); LO09A ('Yes'); LO16D ('Yes'); ST11D ('Yes'); SW13BD ('Yes').
[229] KE01B; KE02D; LO05D; LO06BD; LO08BD.
[230] The same argument could be raised with respect to the term 'interference' under s 63(7)(c) regarding images of necrophilia; C McGlynn and E Rackley, 'Criminalising extreme pornography: A lost opportunity' (2009) 4 *Crim LR* 245, 251.

acts of bestiality on the Internet are broader than the activities prohibited by the SOA. The intention was probably to bring within the scope of s 63 as much pornographic material of such content as possible. The term 'intercourse', which was construed as some sort of 'connection' in **KE04D**, is extensive enough to cover an image showing an adult female merely holding an animal's (erect) penis, notwithstanding the fact that no penile penetration is portrayed. Manual masturbation by or of an animal has also been captured by s 63(7)(d),[231] notwithstanding the fact that such images are not expressly covered.[232] According to the Ministry of Justice, the s 63 offence 'is about the possession of [EPI] and the impact of such images on the viewer. It is not limited to depictions of criminal offences'.[233]

Concluding Remarks

Chapter 8 explored the prosecutorial decision-making in a sample of CPS case files involving s 63 offences. The application of the CCP evidential and public interest stages was discussed. In addition, the thresholds of extreme pornography emerging from the nature of the material that formed the subject of criminal charges was compared and contrasted with the threshold of obscenity reflected in the CPS legal guidance. The next chapter summarises our core arguments and concludes this study by providing its limitations and suggesting future research directions.

[231] KE02D.

[232] cf McGlynn and Rackley, 'A lost opportunity' (n 230) 251.

[233] MOJ Circular 2009/01 (n 141) 8.

9

Conclusions

The Extreme Pornography Problem: From a Single 'Pervert' to an 'Evil' Medium and Beyond

The Obscene Publications Act 1959 (OPA 1959) is not an Act 'which would get the first prize as a model of legislation.'[1] The notoriously obscure 'deprave and corrupt' test has attracted controversy since its inception. In the 1960s, it attempted to reach a fair 'compromise'[2] between the public interest in a free literature and the individuals' right to protect themselves from the professional purveyors of pornography.[3] With the advent of the Internet, however, it has become more difficult to police certain categories of pornographic images, since it is no longer possible to confiscate them physically, or locate the sources of such material, which is produced outside of, but procured by Internet

[1] HL Deb 23 July 1964, vol 260, col 842 (Mr Reginald Manningham-Buller, Lord Chancellor).
[2] N St John-Stevas, 'Obscenity and law reform' (4 February 1955) 194 *The Spectator* 119, 120.
[3] Ibid.

A.K. Antoniou, D. Akrivos, *The Rise of Extreme Porn*,
DOI 10.1007/978-3-319-48971-1_9

users within, England and Wales. The legislature conceived s 63 as a response to the stated ineffectiveness of the existing statutory provisions. In order to address the challenges posed by the global nature of the Internet, s 63 shifted the legal culpability from the producers and distributors to individual consumers.

The creation of s 63 was given impetus by a single incident and was the culmination of a long campaign launched by Liz Longhurst. Law does not exist in a vacuum separate from the society it aims to regulate.[4] For that reason, this study placed the newly introduced s 63 offence within a broader socio-cultural framework by looking closely at the news coverage of Graham Coutts' crime, thus documenting the claims-making process which resulted in the construction of the extreme pornography problem. The perception of the notion of 'crime' as socially constructed favours a view of the law as a means to shape public attitudes and reproduce the dominant ideology.[5] The adoption of such a constructionist approach shed light on the power dynamics of criminalisation and the rhetorical techniques employed by different parties in order to present the public, and most importantly the legislators, with a convincing argument as to why certain behaviours (in this case the possession of extreme pornography) should be outlawed. The debate on extreme pornography triggered by Longhurst's murder did not just take place in the legal and the political arenas but also in the news media, which are nowadays becoming more and more actively involved in the social problems game.[6] The alleged need to tackle the problem of extreme pornography was, according to the Home Office, based on an increasing public anxiety over such material.[7] The media analysis of Chapter 4 offered an insight into how this anxiety was captured in, or reinforced by, the relevant news stories.

[4] M Lippman, *Law and Society* (Sage, Thousand Oaks/London: 2015).

[5] Ibid.

[6] D Loseke, *Thinking about Social Problems: An Introduction to Constructionist Perspectives* (2nd ed, Aldine de Gruyter, Hawthorne, NY: 2003).

[7] Home Office, *Consultation: On the Possession of the Extreme Pornographic Material* (Home Office Communications Directorate, London: 2005) 1.

The construction of Coutts' crime as a media product involved a process of commercial and ideological exploitation.[8] From a political economy perspective,[9] Longhurst's murder attracted a large amount of media attention mainly due to its potential to turn into an easy-to-understand, unambiguous and emotionally powerful narrative that would attract readers' attention and therefore generate profit. As a sex crime story, Coutts' case was by definition newsworthy as it involved the human drama of a mother having her 'talented' and 'unsuspecting' young daughter taken away from her by a 'pervert' in an incident of serious sexual violence. The process through which Coutts' otherness was established was documented. It was argued that the relevant reports drew upon the 'serial killer' genre and portrayed Coutts as a pathological serial killer in the making who could have killed before and would definitely kill again if given the chance to do so. Coutts' 'monster' status, established both visually and textually, was consolidated through his juxtaposition to Jane Longhurst who was largely presented as an innocent victim. Although the deceased did not herself possess all the key attributes of an 'ideal victim'[10] mostly because of the doubts expressed over the nature of her relationship with Coutts, it was suggested that her mother did and, as a result, Jane Longhurst still managed to attain this status indirectly through her.

The Internet was identified as the most important component in the coverage of Longhurst's murder. The 'Evil Web' frame used to make sense of Coutts' behaviour brought the story to a whole new level of newsworthiness and was primarily responsible for its elevation to a 'signal' case.[11] It was this frame that allowed the promotion of a conservative ideology since it helped legitimise the calls for stricter control over online content which eventually materialised via the introduction of the s 63 offence. Through the claims made about the Internet, Longhurst's murder came to be seen not as a one-

[8] S Cohen, *Folk Devils and Moral Panics: The Creation of the Mods and Rockers* (3rd ed. Routledge, London/New York: 2002 [1972]).

[9] P Golding and G Murdoch, 'Culture communications and political economy' in J Curran and M Gurevitch (eds), *Mass Media and Society* (3rd ed, Arnold, London: 2000).

[10] N Christie, 'The ideal victim' in E Fattah (ed), *From Crime Policy to Victim Policy* (Macmillan, Basingstoke: 1986).

[11] M Innes, 'Signal crimes and signal disorders: Notes on deviance as communicative action' (2004) 55(3) *The British Journal of Sociology* 335.

off incident but as the 'tip of the iceberg' in the much more serious problem of cyber-deviance. The construction of Coutts' crime as part of an Internet problem appealed to pre-existing public concerns over the supposed criminogenic influence of this new medium,[12] thereby placing the issue within a familiar context while identifying extreme pornography as a novel cyber-risk. This Internet angle stressed the risk posed not just by Coutts but also by other 'perverts' like him who, under the corrupting influence of the Web, were reportedly highly likely to regard their deviant sexual fantasies as normal and attempt to live them out in the physical world. A clear 'us versus them' dichotomy was established and readers were invited to reaffirm their moral values[13] by condemning people like Coutts and protecting those mostly at risk of being victimised by them. It was suggested that anyone with Internet access could be a potential victim and, for that reason, the matter deserved everyone's attention and required immediate solutions. The alleged urgent need for action was emphasised through the creation of a signification spiral,[14] which underlined the severity of the problem by drawing parallels between Longhurst's murder and other Internet-related crimes (especially, cases of child pornography). It was argued that by 'piggybacking'[15] extreme adult pornography on child pornography, journalists and other claims-makers attempted to present both as equally threatening; more specifically, to benefit from the existing consensus on the unacceptability of the child pornography[16] in order to gain support for the criminalisation of extreme adult pornography.

Despite its appeal, the 'Evil Web' frame did not go unrebutted in the reports analysed. Concerns were expressed about the limitations of media effects research, the allegedly endemic misogyny of patriarchal societies, the boundaries of freedom of expression, the challenges of

[12] DS Wall, 'Criminalising Cyberspace: The Rise of the Internet as a "Crime Problem"' in Jewkes and Yar, *Handbook of Internet Crime* (Willan, Devon: 2010).

[13] J Katz, 'What makes crime news?' (1987) 9(1) *Media, Culture and Society* 47.

[14] S Hall, C Critcher, T Jefferson, J Clarke and B Roberts, *Policing the Crisis* (Macmillan, London: 1978).

[15] Loseke (n 6).

[16] P Jenkins, *Beyond Tolerance: Child Pornography on the Internet* (New York University Press, New York: 2001).

implementing the new law, and the risk of potentially criminalising consensual adult sexual practices. However, such complex and controversial issues were, in all probability, seen as having a negative impact on the newsworthiness of the story, which is why they did not receive as much news attention as other straightforward explanations such as those about 'evil' Coutts and the 'evil' Web.

Coutts' 'trial by media'[17] reached a 'guilty' verdict far before its judicial counter-part and added credence to the dominant argument that the Internet was to blame. By administering their own uncomplicated and largely retributive extra-legal form of justice, the news media worked in parallel with, and often highlighted the failures of, formal criminal justice agencies. The existing criminal justice system was criticised for being lenient and ineffective. Similarly, in order to compensate for the Government's alleged unwillingness to effectively regulate the Internet, newspapers like the *Mail on Sunday* became actively involved in what was seen as a righteous fight against extreme pornographic sites. The news reporting of Coutts' case paved the way for s 63 by giving voice to the increasing morality-based concerns over such websites. However, it was pointed out that, despite the efforts of those arguing for their criminalisation, there was ultimately no general consensus on the risks extreme pornography websites posed, let alone an ability to evaluate with certainty the nature and severity of the objective threat.[18] The introduction of the new extreme pornography offence should therefore not merely be dismissed as the outcome of an institutionalised moral panic.

Considering the Challenges of s 63

The Government that introduced s 63 did not originally provide an authoritative evidential foundation for the alleged public disquiet that led to the proposals. The arguments concerning direct and indirect harm

[17] C Greer and E McLaughlin, 'Trial by media: Policing, the 24–7 news mediasphere, and the politics of outrage' (2011) 15(1) *Theoretical Criminology* 23.

[18] S Ungar, 'The rise and (relative) decline of global warming as a social problem' (1992) 33(4) *The Sociological Quarterly* 483; Jenkins (n 16).

supposedly caused by extreme pornography were not sufficiently substantiated by the hurriedly published REA.[19] Moreover, the evidence on which it was decided that there was a solid empirical basis for the extension of the terms of s 63 were far from satisfactory. However, as Partington observes,

> in some cases, policy choices will be made that positively fly in the face of published research. Policy-makers, particularly those who are dependent on the popular vote for their power, often find that to adopt policies that might seem to arise logically from research findings would lead to measures that are politically unacceptable.[20]

'Very little'[21] is known about the relationship between pornography (of any sort) and actual sexual activity. Therefore, attributing responsibility to a communications channel for dangerous behavioural changes is tenuous and 'detracts from dealing with real crime.'[22]

Highly subjective factors played a major role in every stage of the gestation of the Criminal Justice and Immigration Act (CJIA)'s definition of extreme pornography. In the absence of concrete harm-based justifications, s 63 seems to be founded on abstract notions of disgust and ideas about the protection of morals. This is also evidenced in Lord Hunt's statement in the third sitting of the Report stage of the Bill:[23]

> I actually felt very sick [seeing the images], because they were pretty disgusting images and I frankly find it horrific that they are available

[19] C Itzin, A Taket and L Kelly, 'The evidence of harm to adults relating to exposure to extreme pornographic material: A Rapid Evidence Assessment (REA)' MOJ Research Series 11/ 07 (MOJ: London, 2007).

[20] M Partington, 'Empirical legal research and policy-making' in P Cane and H Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (OUP, Oxford: 2010) 1021.

[21] M Taylor and E Quayle, *Child Pornography: An Internet Crime* (Brunner-Routledge, Hove: 2003) 75.

[22] M Wykes, 'Harm, suicide and homicide in cyberspace: Assessing causality and control' in Y Jewkes and M Yar, *Handbook of Internet Crime* (Willan Publishing, Devon: 2010) 379.

[23] Lord Hunt was the then Parliamentary Under-Secretary of State for Justice and sponsor of the CJIB.

> and that people can see them. I am sorry, but I do not take this very liberal approach of 'if it does no harm to the people taking part, why should we worry about it?' I do worry about it and about the access that people have to that kind of disgusting material. . . . We are targeting that material not on account of offences which may or may not have been committed in the production of the material, but because the material itself . . . is to be deplored.[24]

The final text of s 63 does not seem to have satisfied neither the supporters nor the opponents of the offence. Those who favoured a stricter legal response were probably disappointed because the law was limited to specific categories of violence and harm. Simultaneously, several substantial obstacles must be overcome in the path to a conviction, including the 'explicit and realistic' test and the 'grossly offensive, disgusting or otherwise of an obscene character' threshold. From the opponents' viewpoint, the greatest challenge is that s 63 may criminalise portrayals of consensual sexual practices involving adults.[25]

The offence is vaguely drafted. The need for prosecutors to apply subjective views, which may vary in respect of the same image, seems likely to arise with reasonable frequency. It is doubtful whether the unstable element of disgust in s 63(6)(b) is capable of producing consistent precedent. It should perhaps be framed in such a way so as to exclude images which, although they present sexuality in a manner that does not conform to notions of 'human excellence,'[26] are nevertheless 'a genuine exploration of sexual identity or fantasy'[27] and not likely to implant harmful sexual dispositions.[28] If the assertion that extreme pornography is associated with alarming behavioural patterns is

[24] HL Deb 21 April 2008, vol 700, cols 1357–1358.

[25] AD Murray, 'The reclassification of extreme pornographic images' (2009) 72(1) *Modern Law Review* 73, 90.

[26] S Easton, 'Criminalising the possession of extreme pornography: Sword or shield' (2011) 75(5) *Journal of Criminal Law* 391, 398, 402.

[27] H Fenwick and G Phillipson, *Media Freedom Under the Human Rights Act* (OUP, Oxford: 2006) 479.

[28] Ibid.

considerably undermined by future research, then what should be outlawed is possession of any material featuring participants who were actually harmed or coerced.[29] The side-effect of this approach is that there will be times when prosecutors will be faced with insurmountable difficulties in proving that actual harm was caused. However, supporters of this approach would argue that this is perhaps a price worth paying to ensure that individuals' 'right to moral independence'[30] is not being interfered with.

With respect to images of bestiality, it could be suggested that the major arguments in favour of criminalising their possession, namely that animals are maltreated and that they are incapable of giving valid consent,[31] function as a smokescreen to conceal the fact that this issue has been traditionally clouded by a fog of 'profound abhorrence.'[32] In the Animal Welfare Act 2006, the Parliament explicitly declared its support for the obligation to provide for the wellbeing of animals in custody. But, as discussed in Chapter 5, such an obligation is not created in a way that expressly diminishes the risk of animals being physically or mentally injured as a result of sexual interactions with humans. The SOA 2003 completes the puzzle, but is not concerned with the possession of depictions of such sexual conduct. The CJIA 2008 addresses this loophole in the law. For this reason, it is not suggested that the provision should be abolished. However, breaking the demand and supply circle of portrayals of bestiality, irrespective of whether or not they contain animal cruelty, could equally be achieved by integrating measures that criminalise their possession into animal welfare legislation.[33] If it is accepted that the provisions under s 63 may be justified only on the basis of a concern over sexual violence

[29] Ibid 480.

[30] R Dworkin, 'Is there a right to pornography?' (1981) 1 *Oxford Journal of Legal Studies* 177, 194.

[31] S Ramage, 'An examination of the laws concerning bestiality' (2009) 16(December) *Criminal Law News* 1, 2.

[32] Home Office, *Setting the Boundaries: Reforming the law on sex offences, Volume 1* (Home Office Communications Directorate, London: 2000) 126.

[33] cf Germany's recent move to reverse a 1969 decision to legalise zoophilia and introduce a ban on bestiality through a revision of animal welfare law; see K Connolly, 'Germany to ban bestiality under animal welfare law' *The Guardian* (London 28 November 2012) 21.

and harm to humans,[34] then the inclusion of bestiality images serves little purpose other than to reinforce disgust-based justifications for the criminalisation of EPIs. The removal of this provision from s 63 would perhaps enable the offence to distance itself from the notion of disgust and clarify its focus.

Prosecutions and Convictions Under the OPA, S 2(1) and the CJIA 2008, s 63

Between 2014 and 2015, 1,564 extreme pornography offences reached a first hearing in magistrates' courts in England and Wales.[35] By contrast, only 88 offences contrary to s 2(1) of the OPA were charged in the same period.[36] One interpretation of the data analysed in Chapter 2 is that the 1959 Act has been markedly underused in the last six years.[37] Nevertheless, it could be suggested that obscene content is nowadays controlled through another statutory guise, namely the CJIA 2008 which appears to be substantively replacing the OPA, *sub silentio.* The concept of obscenity survives in the extreme pornography legislation[38] and the numbers of prosecutions and convictions under s 63 are steadily growing. However, no evidence has been presented thus far as to the extent to which the increasing prosecutions and convictions of offenders have stemmed the proliferation of images of sexual violence and successfully advanced the stated aims of the legislation, as indicated in the 2005 consultation document.[39]

[34] C McGlynn and E Rackley, 'Criminalising extreme pornography: A lost opportunity' (2009) 4 *Crim LR* 245, 251.

[35] Chapter 6, Table 6.1.

[36] Chapter 2, Fig. 2.1.

[37] Chapter 2, Figs 2.1 and 2.2.

[38] CJIA 2008, s 63(6)(b).

[39] Home Office, *Consultation: On the Possession of the Extreme Pornographic Material* (Home Office Communications Directorate, London: 2005) [34].

The Crown Prosecution Service (CPS) Case Files Review

Our study provided an opportunity to examine the application of the extreme pornography law by prosecutors and the ways in which their interpretation of the s 63 test influenced their inclination to put extreme pornography cases forward. Concerns expressed at the time the legislation was passed that the offence would be used as 'a proxy to crack down on the activities of fetish communities,'[40] to some extent appear to have been borne out in practice. One interpretation of the findings in the sample studied is that, on the basis of their description, the overwhelming majority of images brought within the scope of s 63(7)(b) portrayed BDSM-oriented practices.[41]

The cases in which s 63 offences were charged alongside other statutory offences involved allegations of some gravity (e.g. making IIOC). The discussion of the evidential requirements in the files under this category primarily centred on issues concerning the principal offences, notwithstanding the fact the Code for Crown Prosecutors (CCP) requires that 'prosecutors must be satisfied that there is sufficient evidence to provide a realistic prospect of conviction against each suspect *on each charge*.'[42] Where the evidence concerning the principal offences were strong and the allegations were of a serious nature, prosecutors tended to be satisfied that a prosecution was evidently required[43] and appeared less inclined to put extreme images under strict scrutiny. As a result, less effort was expended in considering how the evidence relating to the content of the EPI could be strengthened. It may be suggested that the severity

[40] Murray (n 25) 90.

[41] Namely all images discussed in KE01B, KE03BD, LO06BD, LO08BD, SW13BD, SW14B, SW15BD; that is seven out of nine case files involving images falling within s 63(7)(b) of the CJIA 2008. The eighth case file (ST10AB) referred to a niche pornography market. In the ninth (LO07B), the judge directed an acquittal; see Chapter 8.

[42] CCP (2010) [4.5]; (2013) [4.4] (emphasis added).

[43] cf CCP (2010) [4.12]; (2013) [4.12a]: 'The more serious the offence, the more likely it is that a prosecution is required.'

of the principal charges prevailed over other considerations and arguably weakened the application of the Code stages in relation to extreme pornography offences. There were also few signs in these files that public interest considerations pertaining to s 63 offences arose in the decision-making process.

As regards research cases in which the offences under ss 63(1) and 63(7) stood by themselves, the discussion of the evidential requirements in prosecutors' charging decisions most commonly concentrated on the more technical element of possession, while the nature of the images became the subject of very limited analysis. Particularly with regard to life threatening or serious injury images, there was little evidence to suggest that prosecutors' decisions were based on the application of strictly defined evidential criteria, with the exception of the images in **ST10AB**. In terms of the public interest stage, the factors that were predominantly indicated as tending in favour of prosecution were the 'nature' and/or 'seriousness' of the offences.

Although charging decisions in all 16 cases of the present sample followed the structure of the MG3 form, the discussion in Chapter 8 revealed that its 'Evidential Criteria' and 'Public Interest' sections specifically pertaining to extreme pornography offences contrary to ss 63(7)(a) and 63(7)(b) were not always enriched to contain the level of case- or image-specific detail expected. In addition, the schedules to the indictment indicated minimal and often general information. With the exception of cases involving images portraying bestiality, there were many occasions in which there could be considerable scope for disagreement about whether an image satisfied the evidential requirements. In ideal circumstances, a case file would contain a full assessment of all the elements of the offence. It seems that the CCP guidelines may occasionally appear remote from practice. As a result, the line of demarcation between on the one hand, material which is *illegal to publish and lawful to possess* and on the other, material which is *illegal to publish and unlawful to possess*, was not clearly drawn (Fig. 9.1). Prosecutors should consider whether it would be beneficial to fully endorse the MG3 form to reflect the principle that the test of whether an EPI comes within the terms of s

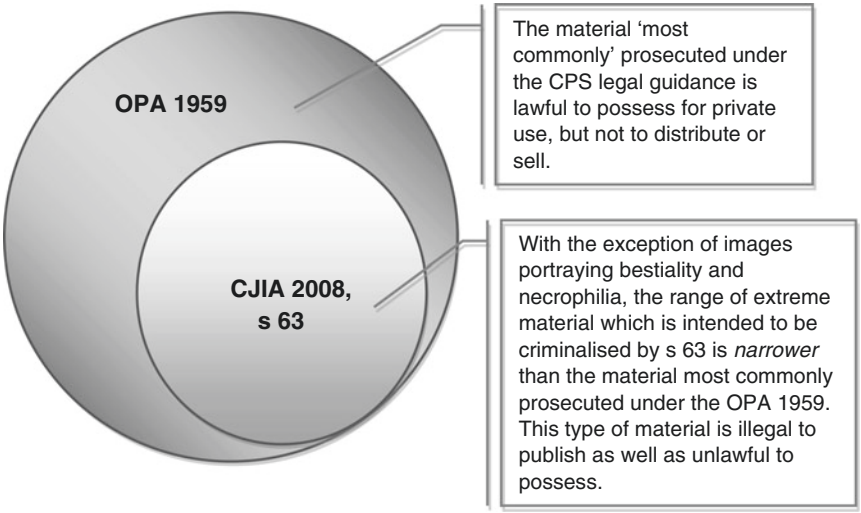

Fig. 9.1 The OPA 1959 and CJIA 2008, s 63

63 is not simply whether it is 'obscene'; rather, it is a test of whether *all* parameters of s 63(7) are satisfied.[44]

The 'judge directed' acquittal in **LO07B** and the jury acquittal following a full trial in **ST10AB** deserve special attention: first, **LO07B** assists in clarifying the fundamental differences between EPI on the one hand and IIOC on the other. The former can be viewed as a particular sub-set of obscenity, whereas the latter covers a broader range of material. An extreme image is an image 'of an obscene character'[45] and always involves adults, but an extreme image that features children constitutes an 'indecent' one. Second, **ST10AB** represents a distinct example of thorough, imaginative and deeper consideration of the evidence available, in contrast to the

[44] See Ministry of Justice Circular 2009/01, *Possession of extreme pornographic images and increase in the maximum sentence for offences under the OPA 1959: Implementation of ss 63–67 and s 71 of the CJIA 2008* (Criminal Law Policy Unit, London: 2009) [13].

[45] CJIA 2008, s 63(6)(b).

remaining research cases in which the examination of the extreme images emerged as a cursory exercise.

LO07B: Extreme Pornographic Images of Children

A key learning point arose from **LO07B**. Prosecutors should not charge an offence contrary to s 63(1) of the CJIA 2008 in preference to an offence contrary to s 160(1) of the CJA 1988; when they are in doubt as to whether the person portrayed in an image is a child, alternative counts should be put forward.[46] Prosecuting an offence under s 160(1) is comparatively less complicated[47]: all the prosecution is required to prove is that the photograph is 'indecent' and that the defendant is in possession of it. Obscenity and indecency are at either end of the same scale, with obscenity being 'the graver of the two.'[48] Therefore, it is easier to establish indecency. Section 63 sets a higher standard by virtue of s 63(6): an extreme image is an image which falls within one of the categories outlined in subsection (7) *and* is one of an obscene character. In **LO07B**, the image in question portrayed a pre-pubescent girl being anally penetrated. The prospect of failing to prove the 'indecent' nature of this content was remote. Furthermore, proof of possession was relatively easy in this context, especially on the basis of the evidence provided by the forensic analysts' reports. Thus, in cases involving images depicting children, legislation targeting child sexual abuse images is more appropriate. Such provisions suitably address the severity of the criminal conduct at issue and provide the courts with adequate sentencing powers. The penalties available under the 1988 and 2008 Acts differ considerably. If the offence relates to an image portraying any act within section 63(7)(a) or (b) of the CJIA 2008 the offender is liable, on conviction on indictment, to imprisonment for a term not exceeding three years,[49] whereas a person shall be liable on conviction

[46] A Gillespie, 'Case comment: Objective standards of indecency' (2011) 75(4) *Journal of Criminal Law* 264, 266.
[47] Ibid.
[48] *R v Stamford* (1972) 56 Cr App R 398, 405 (Ashworth J).
[49] Or a fine, or both; CJIA 2008, s 67(2)(b).

on indictment of an offence under s 160(1) of the CJA 1988 to imprisonment for a term not exceeding five years.[50]

ST10AB: 'Realistic' Portrayals

This case offered an opportunity to illuminate the term 'realistic' under s 63(7). The premise of the jury verdict can be no more than a mere supposition,[51] but nevertheless, the following observations may be advanced. In **ST10AB**, the element of possession was not in dispute: it was agreed between the prosecution and the defence that the defendant viewed, downloaded and saved each image. Furthermore, an 'extreme pornographic image' is an image which is both pornographic and extreme.[52] The pornographic element was also beyond question. From the Court minutes, it appears that one of the experts testifying for the defence, replied positively to the prosecution's question whether the images could be classed as pornography. In addition, the second expert testified that the material at issue was of 'explicit nature' and in her report she referred to 'death fetish' as a 'niche pornography market.' However, as discussed in Chapter 5, even if an image is pornographic, it will not come within the terms of the offence, unless it also satisfies all the remaining aspects. Extreme is an image which both falls within s 63(7)[53] and is 'grossly offensive, disgusting or otherwise of an obscene character.'[54] In light of the not guilty verdict in this case, it can be deduced that the jurors were probably persuaded either that the images could not be brought within the scope of s 63(7) and therefore acquitted; or that the images did fall within s 63(7), but they did not find them 'of an obscene character.'

[50] Or a fine, or both; CJA 1988, s 160(2A), as amended by the Criminal Justice and Court Services Act 2000, s 41(3)(a).

[51] Contempt of Court Act 1981, s 8.

[52] CJIA 2008, s 63(2).

[53] Ibid s 63(6)(a).

[54] Ibid s 63(6)(b).

If the first supposition is true, the jury was presumably satisfied that the *persons*, rather than the *scenes* themselves, were 'real,' as required by s 63(7). The crux of the matter was whether the images portrayed life-threatening and serious injury acts in a 'realistic' way. In the experts' reports, it was stressed in several instances that the scenes were photographed 'in ways which highlight[ed] [their] fabrication.'[55] Thus, the status of the images as staged was signalled throughout the photo-sets. Additionally, the District Crown Prosecutor for CPS Staffordshire clearly stated that he believed the images were 'faked; if for no other reason than one female appear[ing] in several scenarios.'[56] However, according to the prosecution, even if the actual motives of the persons portrayed were not to hurt or cause harm in any way, their intentions were irrelevant. The material issue in this case was 'what was depicted from the images that those persons appeared in.'[57] Whilst this is true, the prosecution seemingly failed to persuade the jury that 'what was depicted' also satisfied the threshold of realism required by s 63(7). This is precisely where the expert evidence played in all likelihood a catalytic role in orchestrating the defendant's acquittal. It was the presence of specific aesthetic features in the images that probably convinced the jury: first, the excessive emphasis on poses; second, the often 'melodramatic' facial expressions accompanied by poor harm acting of choking or pain; and third, a number of stylistic conventions which generated 'an ironic reference to the production values of much mainstream porn production.'[58] The amalgam of these factors contributed to the erosion of realism in the images at issue. Put simply, the jury in **ST10AB** must have thought that they did not even qualify as realistic because they were merely 'spoof.'

If, however, it is accepted that the jury did think that the images portrayed 'in an explicit and realistic way' life-threatening and serious injury acts, then the not guilty verdict most likely means that they did

[55] ST10AB (Expert Report on Pornography).
[56] Ibid (Information Report).
[57] Ibid (Prosecution arguments).
[58] Ibid (Expert Report on Pornography).

not find the images to be 'grossly offensive, disgusting or otherwise of an obscene character.' If so, this outcome lends credence to Johnson's notion that this limb of the s 63 test provides a powerful tool for narrowing the scope of the extreme pornography provisions, thereby limiting the circumstances in which conventional sexual morality is imposed on others.[59] In addition, the not guilty verdict arguably supports Young's view that properly directed juries, when presented with different readings and interpretations of images offered by the opposing prosecution and defence standpoints, do not necessarily allow their personal feelings of disgust to influence their deliberations.[60]

Limitations of the Present Study

For the purpose of the research into prosecutors' decision-making in cases involving s 63 offences, it was not possible to obtain a representative sample of all cases contained in the original frame provided by the CPS, as the Service imposed a cap on the number of files to be reviewed. The relatively small number of 16 research cases is not, nor is intended to be, statistically representative of CPS caseloads, nor of all cases concerning extreme pornography offences. Consequently, the type of decision-making exemplified by this sample does not necessarily reflect general practice.

The purposive sampling was governed by the research aim, namely detailed, qualitative insights, as opposed to quantitative or statistically based conclusions. The sample of files presented an opportunity to discuss initial, theoretically informed empirical findings, but provided only a partial insight into CPS decision-making concerning cases of this type. It is also conceded that documents in the files were not necessarily indicative of the information available to prosecutors at the decision-making stages. For example, oral briefings or consultations with

[59] P Johnson, 'Law, morality and disgust: The regulation of "extreme pornography" in England and Wales' (2010) 19(2) *Social and Legal Studies* 147, 156; see the discussion in Chapter 5.

[60] A Young, 'Aesthetic vertigo and the jurisprudence of disgust' (2000) 11(3) *Law and Critique* 241 cited in Johnson (n 59) 159.

investigators at charging appointments may not always have been adequately recorded in a paper case file. It is likely that certain pieces of information were passed on verbally and therefore were not available for consideration in this research project.

Moreover, the analysis of prosecutors' decision-making drew upon the descriptions of images, as opposed to the images themselves, found either on the schedules to the indictments or the MG3 forms in each research case. This is a limitation which should be borne in mind when making observations based on the findings of this small-scale study. As noted earlier, the content of MG3 forms across the overwhelming majority of research cases tended to be less detailed when addressing s 63 offences. The inadequate recording of decisions and the reasons behind them does not facilitate external research nor does it assist in the internal monitoring of the quality of those decisions. Previous reports issued by Her Majesty's Crown Prosecution Service Inspectorate also attest to the unsatisfactory overall quality of initial and continuing review endorsement.[61] Nevertheless, it should not be neglected that prosecutors face time limitations and other practical constraints which may not always allow for the recording of an exhaustive analysis of all elements of s 63 and dimensions of the offending

[61] Her Majesty's Crown Prosecution Service Inspectorate (HMCSPI) has repeatedly drawn attention to this issue in previous reports: HMCPSI and Her Majesty's Inspectorate of Constabulary (HMIC), *A Report on the Joint Inspection into the Investigation and Prosecution of Cases involving Allegations of Rape* (HMCPSI and HMIC, London: 2002) [8.54]; HMCPSI and HMIC, *Violence at Home: A Joint Thematic Inspection of the Investigation and Prosecution of Cases Involving Domestic Violence* (HMCPSI, London: 2004) [7.18]; HMCPSI, *A Follow Up Review of CPS Casework with a Minority Ethnic Dimension: Executive Summary* (Thematic Report 4/04) (2004) [38]; this follow-up review notes that the quality of review endorsement had improved, yet the recording by prosecuting advocates of decisions taken at court was 'less satisfactory.' The Thematic Inspection on discontinuance also notes that 'disappointingly there were still samples of poor endorsements on files in which prosecutors gave inadequate or no reasons for the decision'; see HMCPSI, *Thematic Review of the Decision-making and Management in Discontinued Cases and Discharged Committals* (HMCPSI, London: 2007) [2.7], [4.11]; see also G John, *Race for Justice: A review of CPS decision making for possible racial bias at each stage of the prosecution process* (Gus John Partnership, 2003) [18]: approximately 6% of the 15,000 case files received for the purposes of this project, were found to be unusable on account of the 'poor quality of file endorsement' and was therefore excluded outright from the files that constituted the sample researched. Similar points are made in [31], [33], [99], [124].

conduct. Therefore, it is possible that these are simply failures of record keeping without necessarily affecting the decisions themselves.

Finally, decisions about a certain case are taken at several points in the formal criminal justice system. This study addressed only those made by the CPS. It was not designed to consider matters concerning the investigation of cases. These are dealt with by the police and were beyond the remit of this research. Cases not brought to the Service's attention also sat outside the scope of this study.

Suggestions for Future Research

This section suggests potentially fruitful avenues for future enquiry in order to expand our knowledge on this topic. Given the limitations of this small-scale study, a larger sample of files would provide a more comprehensive representation of the decision-making process in cases involving this type of offences. Researchers are also encouraged to incorporate views of other criminal justice agencies such as prosecutors or defence lawyers.

This study did not include any cases in which a decision to discontinue a prosecution before committal had been taken. Another fertile area for future research may therefore include extreme pornography cases that did not proceed to trial. Research designed to address this issue could yield valuable insights into the reasons for which the CPS recommended 'No Prosecution'[62] or discontinued a case after it was charged. Moreover, it could explore whether there are any links between the reasons for a 'No Prosecution' or discontinued case and the elements of the s 63 offence.

An additional direction for future empirical research in this field could be the examination of suspects' experiences. From the records found in the sample, it became apparent that many of them felt very

[62] Previously known as 'No Further Action'; the term was recently introduced by the CPS for the purpose of describing cases which led to 'No Prosecution' decisions for evidential, public interest and other reasons.

uncomfortable during the police interview, as they found the process of commenting on the extreme images recovered from their electronic equipment quite embarrassing. As Sanders and Young observe, 'there has been an explosion of criminal justice research in the last twenty-five years, but most of it is "top-down," trying to solve the system's problems; very little has been "bottom-up," asking what it feels like for suspects and defendants.'[63]

Finally, the CPS updated their guidelines on extreme pornography in May 2013, that is, after the cases considered in this sample were finalised. The new guidance was discussed in Chapter 5. Had this been issued earlier, some of the cases in the sample studied would have probably been decided differently by prosecutors. Future research may also investigate the impact of the reviewed guidance on various aspects of the prosecution practice concerning s 63 of the 2008 Act.

[63] A Sanders and R Young, 'From suspect to trial' in M Maguire, R Morgan and R Reiner (eds), *The Oxford Handbook of Criminology* (4th ed, OUP, New York: 2007) 982.

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A.K. Antoniou, D. Akrivos, *The Rise of Extreme Porn*,
DOI 10.1007/978-3-319-48971-1

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