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## Introduction

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### Background to this study

The classic liberal position<sup>1</sup> 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.<sup>2</sup> These restrictions are supplemented by other statutory or common law criminal offences, such as displaying an indecent matter visible from a public place<sup>3</sup> or outraging public decency.<sup>4</sup> In addition, a plethora of legislation deals with the import and export of obscene material and restricts its dissemination through different media outlets.<sup>5</sup> While these measures vary in terms of their standards and objectives, they all employ a strategy which targets the source or distributor of such material.<sup>6</sup>

Indecent photographs of children represent in the legal system ‘a different class of threat,’<sup>7</sup> because they inherently involve ‘an imbalance of power’<sup>8</sup> 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.<sup>9</sup> Moreover, pseudo-photographs<sup>10</sup> are placed on the same footing as actual photographs.<sup>11</sup> Whilst it may be argued that no real children are used in the production of pseudo-photographs, common arguments supporting their criminalisation suggest

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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 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] (Feb) *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).

that they are ‘instrumental in nature,’<sup>12</sup> 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.<sup>13</sup> 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 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’<sup>14</sup> 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.<sup>15</sup> 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 that are exposed to the material over the Internet.<sup>16</sup> 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’<sup>17</sup> which developed by reason of technological

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<sup>12</sup> 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.

<sup>13</sup> Criminal Justice Act 1988, s 160.

<sup>14</sup> *R v Coutts* [2005] EWCA Crim 52, [94].

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

<sup>16</sup> Rowbottom (n 6) 101.

<sup>17</sup> Home Office, *Consultation* (n 15) [35].

advancements capable of circumventing existing controls.<sup>18</sup> 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.<sup>19</sup>

The Home Office asserted that they were not aware of any Western jurisdiction which prohibits simple possession of such imagery.<sup>20</sup> 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.’<sup>21</sup> 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.<sup>22</sup> In Netherlands, specific legislation prohibits only the ‘production or distribution of bestiality pornography.’<sup>23</sup> In Sweden, however, pornographic images involving animals are authorised, provided that no ‘cruelty’<sup>24</sup> to animals is caused, in the sense of ‘causing physical or psychological suffering.’<sup>25</sup> 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.<sup>26</sup> 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

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<sup>18</sup> 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.

<sup>19</sup> 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.

<sup>20</sup> Home Office, *Consultation* (n 15) [55].

<sup>21</sup> M Stuligrosz, *Violent and extreme pornography*, Doc 12719 (Council of Europe, Parliamentary Assembly, Strasbourg: 2011) [67].

<sup>22</sup> *ibid* [68].

<sup>23</sup> *ibid* [69].

<sup>24</sup> *ibid*.

<sup>25</sup> *ibid*.

<sup>26</sup> 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).

pornography. For this reason, it has recommended that Members States criminalise the possession of violent and extreme pornography (including for personal use).<sup>27</sup>

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.’<sup>28</sup> It came into force on 26 January 2009 and applies to England, Wales and Northern Ireland.<sup>29</sup> 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,<sup>30</sup> is ‘grossly offensive, disgusting or otherwise of an obscene character’<sup>31</sup> and portrays ‘in an explicit and realistic way’<sup>32</sup> 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 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.<sup>33</sup> 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.<sup>34</sup> 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

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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 Five.

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

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

32 CJIA 2008, s 63(7).

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 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:

[...] 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.<sup>35</sup>

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.<sup>36</sup> 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.<sup>37</sup> 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'<sup>38</sup> 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,<sup>39</sup> where the House of Lords upheld the defendant's conviction of the 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.'<sup>40</sup>

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

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<sup>35</sup> 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.

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

<sup>37</sup> P Devlin, *The Enforcement of Morals* (OUP, Oxford: 1965) 13.

<sup>38</sup> *ibid* 17.

<sup>39</sup> *Shaw v DPP* [1962] AC 220 (discussed in Chapter Two).

<sup>40</sup> *ibid* 267; see also *Knulier 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 *Knulier* (n 40) 457 (Lord Reid).

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.<sup>41</sup> 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 a 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.<sup>42</sup>

The 'major modern reformulation'<sup>43</sup> 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.'<sup>44</sup> The prevention of offensive conduct, according to this principle, 'is properly the state's business'<sup>45</sup> 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.<sup>46</sup> 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.<sup>47</sup>

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.<sup>48</sup> 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.'<sup>49</sup> It is also argued that extreme pornography viewers access it

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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.

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

‘privately and by choice.’<sup>50</sup> This being the case, the risk of offence is voluntarily taken. Therefore, s 63 fails to be justified by Feinberg’s analysis.<sup>51</sup>

Arguments in favour of immunity from legal control are often defended on free speech grounds,<sup>52</sup> 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.<sup>53</sup> He defends the right of an individual to access pornography by arguing in favour of ‘a right to moral independence’<sup>54</sup> 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,’<sup>55</sup> even if this was true. Dworkin believed that governments should treat their subjects with equal concern and respect.<sup>56</sup> By treating one citizen’s conception of a noble lifestyle more favourably than another’s, the government treats citizens with unequal respect and denies those who have uncongenial tastes an equal chance to shape the moral environment.<sup>57</sup> Dworkin also argues that taste does not provide an adequate basis for interfering with individuals’ freedom.<sup>58</sup> 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 represent a well-reasoned moral stand, but rather an expression of prejudice, misunderstanding and personal revulsion.<sup>59</sup>

Nussbaum takes a strong line against disgust as well, arguing that it should ‘never’<sup>60</sup> 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

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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.

**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.

**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.

evaluation about how serious a harm this is.<sup>61</sup> Disgust, however, embodies ‘magical ideas of contamination and impossible aspirations to purity,’<sup>62</sup> 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.<sup>63</sup> The 1979 *Report of the Committee on Obscenity and Film Censorship* (the Williams Committee)<sup>64</sup> endorsed the liberal principle that prohibition of pornography could only be justified 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.<sup>65</sup> The idea of pornography as harmful sex discrimination against women is enshrined to some extent in the Canadian law as well.<sup>66</sup>

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<sup>61</sup> *ibid* 102.

<sup>62</sup> *ibid* 14.

<sup>63</sup> See MC Nussbaum, *Sex and Social Justice* (OUP, Oxford: 2000) 213-15 who suggests reconsidering the concept of objectification.

<sup>64</sup> 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.

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

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



Other scholars have gone as far as suggesting that the consumption of pornography induces in some men a sexual desire for rape,<sup>67</sup> 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 pornography may help release sexual and/or aggressive tendencies and reduce sexual crimes.<sup>68</sup> 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.<sup>69</sup>

### 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,<sup>70</sup> 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.<sup>71</sup> 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.’<sup>72</sup> They ground their definition of extreme pornography on the ‘cultural harms’<sup>73</sup> that pornography causes to society. Their concern is for images which ‘normalise, even glorify sexual violence through, for example, the deliberate, misogynistic valorisation of rape.’<sup>74</sup>

Carline suggests that the real driving force behind the legal provisions is a ‘desire to promote a moralistic agenda’<sup>75</sup> concerning appropriate expressions of sexuality. Leigh evaluates several ‘questionable aspects’<sup>76</sup> of the offence and raises concerns over the practicalities of the enforcement of the legislation. Murray’s broadly liberal analysis

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

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.

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.

includes a demand for evidence of physical harm associated with pornography, and puts a high premium on participants' consent and their right to privacy.<sup>77</sup> 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.<sup>78</sup> 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.'<sup>79</sup>

McGlynn and Ward support the prohibition and seek to present in their work a 'pragmatic liberal humanist critique'<sup>80</sup> of the regulation of pornography. They contend that opponents of the prohibition are severely affected by a 'liberal fundamentalism'<sup>81</sup> preoccupied with individual rights at the expense of women's equality. Moreover, Easton defends the offence on 'perfectionist'<sup>82</sup> 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.'<sup>83</sup>

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.<sup>84</sup> In particular, Kennedy's and Smith's contribution, which relates to YouTube reaction videos,<sup>85</sup> 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

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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.

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 & 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.

2011<sup>86</sup> as well as McGlynn and Rackley's examination of Simon Walsh's 2012 trial,<sup>87</sup> in which the defendant was acquitted of five counts of possessing extreme pornographic images portraying anal fisting and 'urethral sounding.'<sup>88</sup> 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 extreme pornographic images (EPI) 'mirror the arrangements already in place in respect of indecent photographs and pseudo-photographs of children;'<sup>89</sup> 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,<sup>90</sup> but they may also be prosecuted under the new offence since they would necessarily also possess it.<sup>91</sup> Therefore, some of the principles distilled from the obscenity law are applicable to the dissemination of EPI (Figure 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

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

<sup>87</sup> *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.

<sup>88</sup> 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* (7<sup>th</sup> ed, Lippincott Williams & Wilkins, Philadelphia, PA: 2013) 425.

<sup>89</sup> Home Office, *Consultation* (n 15) [1].

<sup>90</sup> Crown Prosecution Service (CPS) Prosecution Policy and Guidance, Extreme Pornography <[http://www.cps.gov.uk/legal/d\\_to\\_g/extreme\\_pornography/](http://www.cps.gov.uk/legal/d_to_g/extreme_pornography/)> accessed 7 June 2013.

<sup>91</sup> Home Office, *Consultation* (n 15) [49].

Justice Act 1988 or making such an image contrary to s 1 of the Protection of Children Act 1978 (Figure 1.1).<sup>92</sup> For a comprehensive analysis of the law on indecent images of children, interested readers are referred to the excellent work of Jenkins, Taylor and Quayle, Akdeniz and Gillespie.<sup>93</sup> Relevant legal provisions will be discussed in this book only to the extent that they help explain the extreme pornography provisions.

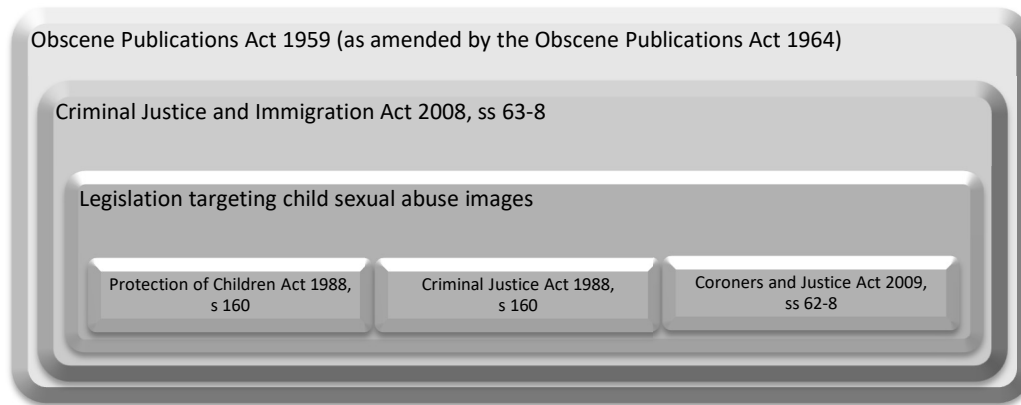


Figure 1.1 The general obscenity framework and specific legislation<sup>94</sup>

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 counter-part 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

<sup>92</sup> CPS Prosecution Policy and Guidance, Extreme Pornography (n 90).

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

<sup>94</sup> 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 only to photographs or pseudo-photographs, as well as tracings or derivatives of photographs or pseudo-photographs; CJA 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.

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 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,<sup>95</sup> 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 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.<sup>96</sup> 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.’<sup>97</sup> These were considered by many participants in the consultation ‘too broad and likely to catch too much material.’<sup>98</sup> In response to those concerns, the ‘grossly offensive, disgusting or otherwise of an obscene character’<sup>99</sup> 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.<sup>100</sup>

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

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<sup>95</sup> This claim is substantiated in Chapter Six.

<sup>96</sup> C McGlynn and E Rackley, ‘Striking a balance’ (n 72) 680.

<sup>97</sup> 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].

<sup>98</sup> Home Office, *Consultation On the Possession of the Extreme Pornographic Material: Summary of Responses and Next Steps* (Home Office Communications Directorate, London: 2006) 4.

<sup>99</sup> CJA 2008, s 63(6)(b).

<sup>100</sup> 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 Criminal Justice and Immigration Act 2008* (Criminal Law Policy Unit, London: 2009) [13].

its publication or distribution may be charged under the OPA.<sup>101</sup> 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.’<sup>102</sup> 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 files 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,<sup>103</sup> 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.

## 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.’<sup>104</sup> 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, but also highlight the increasing role of contemporary news media in shaping public perceptions of crime and justice.<sup>105</sup>

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).<sup>106</sup> In analysing our empirical data, we adopted

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**101** CPS Prosecution Policy and Guidance, Obscene Publications

<[http://www.cps.gov.uk/legal/l\\_to\\_o/obscene\\_publications/#a05](http://www.cps.gov.uk/legal/l_to_o/obscene_publications/#a05)> accessed 7 June 2013.

**102** 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).

**103** CPS Prosecution Policy and Guidance, Obscene Publications (n 101).

**104** 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.

**105** 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.

**106** The specific criteria according to which the news articles and case files were identified as relevant to the study are discussed in Chapters Four and Seven respectively.

Altheide's 'ethnographic content analysis' (ECA).<sup>107</sup> 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.<sup>108</sup> 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.<sup>109</sup> It is based on a 'constant discovery and constant comparison'<sup>110</sup> 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<sup>111</sup> 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.<sup>112</sup> 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 Two 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 effective when applied online, and the prosecution practice concerning obscenity offences. Chapter Three 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

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<sup>107</sup> Sometimes also referred to as qualitative content analysis; DL Altheide, *Qualitative Media Analysis*, Qualitative Research Methods Series 38 (Sage, London: 1996).

<sup>108</sup> DL Altheide, 'Ethnographic Content Analysis' (1987) 10(1) *Qualitative Sociology* 65; *ibid* 2.

<sup>109</sup> Altheide, *Qualitative Media Analysis* (n 107).

<sup>110</sup> *ibid* 16.

<sup>111</sup> C Greer and E McLaughlin, "'Trial by Media': Riots, Looting, Gangs and Mediatized Police Chiefs' in J Peay and T Newburn (eds), *Policing, Politics, Culture and Control: Essays in Honour of Robert Reiner* (Hart Publishing, Oxford: 2012).

<sup>112</sup> Rose Court, 2 Southwark Bridge, London SE1 9H.

the 2005 consultation process and the passage of the 2007 Criminal Justice and Immigration Bill. Chapter Four 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 Five 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 Six 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 Seven and Eight present the findings that emerged from the CPS case files review. Chapter Seven 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 Eight 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 extreme pornographic images depicting non-consensual sexual penetration either, as this category of prohibited material was introduced after the completion of the research at issue. Finally, Chapter Nine summarises the key outcomes of this study, considers the limitations associated with the adopted methodological approach, and provides an outlook for future research.