CHAPTER TWO

CRIMINALIZING CHILD PORNOGRAPHY AND BEHAVIOUR RELATED TO SEXUAL GROOMING

Despite the number of existing offences that can apply to behaviour related to child pornography or sexual grooming, it is only relatively recently that the law has specifically targeted these phenomena. In 1978, the first piece of legislation directed at individuals involved in the creation and distribution of indecent images of children was introduced, namely the Protection of Children Act (PCA). The specific criminalization of behaviour relating to grooming has occurred even more recently, under the Sexual Offences Act 2003 (SOA).

Initially in this chapter, I analyse the legal response to child pornography. The relevant statutory provisions to be found in the PCA, the Criminal Justice Act 1988 (CJA) and the SOA and case law surrounding child pornography are elucidated and analysed in section one. Then, in section two, I examine and assess the scope of the offence of meeting a child following sexual grooming to be found in the SOA. Finally, in the third section, I explore what lies beneath the surface of the law's response to child pornography and grooming. Here, I identify a number of societal and legal concerns that have been the driving force behind the creation of the current statutory provisions aimed at child pornography and grooming and the way in which the harms of both phenomena have been legally constructed.

CRIMINALIZING CHILD PORNOGRAPHY

The offences under the Protection of Children Act 1978

Various statutory offences relating primarily to the creation and distribution of child pornography are to be found under the PCA. An individual

commits an offence if he takes or makes, or permits to be taken, an indecent photograph or pseudo-photograph of a child (s. 1(1)(a)), distributes or shows such a photograph or has such a photograph in his possession for the purpose of showing or distributing it (s. 1(1)(b) and (c)), or publishes an advert that gives the impression that the advertiser distributes or shows such photographs or intends to do so (s. 1(1)(d)). Therefore, although the PCA catches indecent photographic material, it does not extend to written material or drawings taken from an individual's imagination that portray behaviour of a sexual nature involving a child.[1] A defence is available to a person charged with an offence under s. 1(1)(b) and (c) of the PCA if he had a legitimate reason for distributing or showing or having in his possession the photographs in question, or if he had not seen the photographs and did not know or have cause to suspect that they were indecent.[2]

Judicial interpretation of the word 'make' was provided in the case of *Atkins* v. *DPP*, in which Brown LJ held that the word was to be given its 'natural and ordinary meaning'. In this context, this meant 'to cause to exist; to produce by action, to bring about'.[3] He further held that whilst it is possible to make an indecent photograph of a child through intentional copying, an offence is not committed under s. 1(1)(a) if the individual unintentionally copies a photograph.[4] In *R.* v. *Smith, R* v. *Jayson*,[5] the Court of Appeal provided further clarification of when the *mens rea* element of the s. 1(1)(a) offence is made out in the context of indecent images of children accessed from the internet. It was held that, provided the individual is aware that an e-mail attachment contains or is likely to contain indecent images of children, he makes an indecent image of a child when he opens it and it is saved in his computer's temporary cache.[6] The Court of Appeal also held that if an individual views an image on the internet, then, as soon as it appears on his computer screen, he has made an indecent image

[1] As noted in the previous chapter, such material could be caught under other obscenity and indecency laws. I will discuss the recent Home Office proposals on criminalizing obscene drawings and non-photographic computer-generated images in the concluding chapter.

[2] See PCA, s. 1(1)(4).

[3] *Atkins* v. *Director of Public Prosecutions* [2000] 1 WLR 1427, 1437 (Brown LJ quoting the Oxford English Dictionary).

[4] Ibid.: 1438. [5] [2002] EWCA Crim. 683.

[6] Ormerod argues that in circumstances where an individual does not realize the image she or he clicks on or downloads is an indecent image of child, the possession offence may be committed, but a defence will be available if the e-mail is unsolicited and the individual does not realize the image is an indecent image of a child. (Ormerod 2002). However, this is dependent upon the individual deleting the image promptly from the cache and the obvious potential difficulty is that she or he may not know how to do this.

of the child regardless of whether he intended to save the images. In this scenario, the individual must again have knowledge of the content of the image by, for example, having seen a thumbnail miniature of the image before he views and/or downloads it.[7] Thus, it is apparent that although the actual statutory provisions under s. 1 of the PCA do not include a *mens rea* requirement of knowledge, the judiciary has been required to interpret the offences in light of the methods by which indecent images can be created today. In the late 1970s, legislators were unlikely to have anticipated that the advent of modern technology would lead to the possibility that an individual could potentially 'make' an indecent image of a child by downloading it from the internet, with no knowledge of its contents.[8] Yet it remains questionable whether the act of downloading an image from the internet with knowledge of the image's contents would have been intended to be categorized as making an indecent image of a child by the legislature.[9] This is especially the case given the differentiation made between the acts of making and possession (the latter of which, as will shortly be discussed, is an offence criminalized by the CJA). Sentencing guidelines have been produced highlighting the much more severe nature of making an original indecent image and advising judges to equate making through downloading with the possession offence in terms of the sentence passed.[10] However, the merging of the making and possession offences through judicial interpretation of statutory law should, I submit, still be a matter for concern with regard to fair labelling and the importance of drawing distinctions between different levels of wrongdoing.[11]

Explication of the meaning of the word 'indecent' was provided in the Court of Appeal case of *R.* v. *Graham–Kerr*,[12] where it was stated that photographs of children are considered indecent under the PCA if ordinary people would view them as such, by applying recognized standards of propriety. Whilst we do not have a legal definition of 'indecent', what is clear is that in deciding whether the material in question is indecent, the jury focuses on the content of the image rather than the maker's intention or the context in which it was taken.[13] The seemingly

[7] See also *R.* v. *Beaney* [2004] 2 Cr. App. R. (S) 82.
[8] See also on this point, Gillespie 2005.
[9] See also Akdeniz 2008: 50–1 and 55–7.
[10] Sentencing Advisory Panel 2002: para. 23. See also *R.* v. *Saunders* [2004] EWCA Crim. 777, para. 8.
[11] On the matter of fair labelling, see Chalmers and Leverick 2008, and Chapter 5, at 221–2.
[12] [1988] 1 WLR 1098.
[13] See *R.* v. *Smethurst* [2002] 1 Cr. App. R. 6, para. 16; and *R.* v. *Nicklass* [2006] EWCA Crim. 2613. See also Gillespie 2005.

objective, jury-based test of indecency has been subject to criticism in the context of indecency laws generally. Authors such as Childs have claimed that the test is in fact largely subjective to the particular jury, and this makes it difficult for an individual to know if he has committed an indecency offence.[14] Indeed, a reasonable argument can be made that offences which rely on this indecency test may breach Art. 10 of the European Convention on Human Rights (ECHR),[15] which states that any limitation to the right to freedom of expression must be prescribed by law. The argument could proceed along the lines that the indecency test is not certain or precise enough for citizens to foresee when they are acting criminally. However, when such an argument was raised specifically in the context of the PCA offences, the Court of Appeal confirmed that these offences are sufficiently certain to avoid a breach of the Human Rights Act 1998.[16] Moreover, the jury-based test of indecency has been confirmed by the European Court of Human Rights' decision in *O'Carroll v. UK*.[17] Here, the defendant argued that leaving the jury to decide upon the matter of indecency breached Art. 7 of the ECHR,[18] as it did not sufficiently enable an individual to know in advance whether his conduct is criminal. The court held that such an approach was in fact 'perfectly compatible' with the Convention, provided that the judge indicates to the jury 'with sufficient clarity' the scope of its discretion.[19]

Whilst I would argue that in most cases what amounts to an indecent photograph of a child will be fairly clear cut, a jury's view as to whether a photograph of a child is indecent may be less predictable where the image in question is at the lower end of the child pornography scale, featuring, for example, a naked child and no sexual activity. The question of whether a photograph of a naked child without any sexual activity or posing can and should be capable of being defined as legally indecent is a crucial one. As I will discuss in Chapter 4, perceiving such images as indecent, as sexualized, raises serious questions about the way in which society and law view children's naked bodies.

[14] Childs 1991: 25.

[15] The Article's protection of individuals' freedom of expression includes the freedom to 'receive and impart information and ideas without interference by public authority'.

[16] *R. v. Smethurst*. [17] (2005) 41 EHRR SE1.

[18] Which reads: 'No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed.'

[19] At 5.

The Sentencing Advisory Panel's league table, which describes different levels of child pornography, offers an indication of whether material that features a naked child with no sexual content could potentially be defined as indecent.[20] The table was adapted from the Copine typology scale[21] and was created in order to assist the judiciary when passing sentence for offences relating to indecent photographs of children. It lists: (1) images depicting nudity or 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; and (5) sadism or bestiality. It was adopted by the Court of Appeal when providing sentencing guidelines in *R.* v. *Oliver*,[22] with one alteration. The Court of Appeal judged that an image of a naked or semi-naked child in a legitimate setting, or an erotic or surreptitious image showing underwear[23] would not, of itself, amount to 'a pornographic image'.[24] Thus, applying this ruling, the depiction of deliberate posing suggesting sexual content[25] would be the minimum level at which images could be defined as indecent and, consequently, images of naked children with no actual or suggested sexual content would not seem to be capable of being legally indecent. However, this may not be the case. Gillespie argues that the subsequent Court of Appeal judgment in *R.* v. *Carr*[26] has brought the decision in *Oliver* into question. Some of the images taken by and possessed by the appellant amounted to material that would fall under levels two and three of the Copine scale; yet, whilst the court quashed the sentences relating to these images, it did not address the defendant's convictions in respect of them.[27] Moreover, the court's explanation that it was quashing the sentences 'to demonstrate the necessity for the activity depicted in the photograph … to pass the custody threshold, set out in the Copine guidelines relied on in *Oliver*'[28] is somewhat ambiguous. Is the court referring to the minimum level in the Copine guidelines, or the Copine level that the Court of Appeal in *Oliver* felt appropriate to apply as the minimum legal threshold of indecency? In *R.* v. *O'Carroll*,[29]

[20] Sentencing Advisory Panel 2002: para. 21. [21] See Taylor *et al.* 2001: 101.
[22] [2003] 1 Cr. App. R. 28. [23] Levels two and three of the Copine typology scale.
[24] At para. 10.
[25] Level four of the Copine typology scale. Such as, for instance, the photograph that formed the basis of the appellant's conviction for taking an indecent image of a child in *R.* v. *Gosling* [2005] EWCA Crim. 3300 (an image of a child sitting naked on a bed, with her back to the camera, wearing stockings).
[26] [2003] EWCA Crim. 2416. [27] Gillespie 2005: 33. [28] At para. 27.
[29] [2003] EWCA Crim. 2338.

the images in question (photographs of naked young boys playing outdoors) would also appear to fall under level two of the Copine scale.[30] Whilst the Court of Appeal quashed the sentence passed by the trial judge, finding it to be 'manifestly excessive', the Court of Appeal later dismissed O'Carroll's application for leave to appeal against his conviction.[31] As I will argue in Chapter 3, there are alternative approaches that could be taken to images of naked children without suggested or explicit sexual content, which would avoid the problems encountered when the law remains focused on whether the image is indecent.

The PCA's definition of a photograph includes: 'an indecent film, a copy of an indecent photograph or film, and an indecent photograph comprised in a film'.[32] In order to address the exploitation of an expanding loophole in the law by producers of computer child pornography in the 1990s, the Criminal Justice and Public Order Act 1994 (CJPOA) amended s. 7 of the PCA. Thus, the definition of a photograph was extended to include 'the negative as well as the positive version and data stored on a computer disc or by other electronic means which is capable of conversion into a photograph'.[33] Furthermore, the CJPOA ensured that pseudo-images, whether computerized or created through other means, also come within the scope of the offences under the PCA.[34] Provided that the predominant impression conveyed by the pseudo-photograph is that the person depicted is a child, then it will be construed to be an indecent photograph of a child 'notwithstanding that some of the physical characteristics shown are those of an adult'.[35] The inclusion of pseudo-photographs in the legislation is largely targeted at sophisticated, computer-generated images which convincingly appear to be real images. In the case of *Goodland* v. *DPP*,[36] Brown LJ held that a pseudo-photograph could not be said to be created as a result of taping together two different photographs in a crude fashion, although a photocopy of these two photographs could amount to a pseudo-photograph.

[30] See Gillespie and Bettinson 2006.

[31] See *O'Carroll* v. *UK* (2005) 41 EHRR SE1, 2. See also *R.* v. *McKain* [2007] EWCA Crim. 1145. Again, this was an appeal against sentence. The images in question featured 'no suggestion of sexual behaviour' (para. 9). Although the Court of Appeal quashed the original sentence of six months imprisonment, it was replaced with a three months prison sentence.

[32] S. 7(2). [33] S. 7(4). [34] S. 7(7).

[35] PCA, s. 7(8). For judicial interpretation of what can amount to a pseudo-photograph, see *Goodland* v. *DPP* [2000] 1 WLR 1427.

[36] Ibid.

Finally, an individual convicted on indictment of an offence under the PCA can face a prison sentence of up to ten years.[37] Previously, until January 2001, the maximum sentence that could be imposed on an individual who was convicted of one of the PCA offences was three years.[38] In the case of *R.* v. *Toomer*,[39] the Court of Appeal held that following the principles which had emerged from previous cases, factors such as any evidence of commercial exploitation, the nature of the material, the character of the defendant and whether a plea of guilty had been lodged should be taken into account when considering the length of sentence which should be imposed.

The offence of possessing child pornography

The PCA does not criminalize the act of possessing indecent photographs of a child *unless* such possession is with a view to showing or distributing the photographs. That the possession of indecent photographs of children is only one possible element of these offences indicates that, when the PCA was enacted, simple possession was not considered to represent a significant enough threat to warrant its legal prohibition when carried out in isolation from producing and distributing child pornography.[40]

In 1988, however, further legislation criminalized the mere possession of child pornography. Section 160 of the CJA states that: 'It is an offence for a person to have any indecent photograph of a child in his possession', and this mere possession offence was extended by the CJPOA to cover pseudo-photographs.[41] Furthermore, the maximum sentence for a person convicted of the possession offence on indictment has been increased from six months to five years.[42] Identical defences exist for an individual charged with the possession offence as under s. 1(1)(b) and (c) of the PCA.[43] A further defence for the possession offence exists if

[37] PCA, s. 6(2).

[38] Parliament increased this maximum sentence through an amendment made to the PCA by the Criminal Justice and Court Services Act 2000 (CJCSA).

[39] See *R.* v. *Toomer, R.* v. *Powell and R.* v. *Mould,* The Times, 21 November 2000.

[40] In fact, Cyril Townsend, the Tory MP who introduced the Private Member's Bill that became the PCA, initially sought to include a clause prohibiting possession within the Bill. This clause was later dropped. The Home Secretary advised that: 'Possession alone as an offence may not be easy to justify, both because of circumstances in which possession alone would not be blameworthy and because of inroads into private behaviour.' Letter from Brynmor John to Cyril Townsend, 30 January 1978. Held in NVALA Archives, Box 19.

[41] See the CJPOA, s. 84(4)(a).

[42] See the CJA, s. 160(2A), as inserted by the CJCSA 2000, art. 2(a).

[43] That is, that the individual had a legitimate reason for having the photograph in his possession, or that he had not seen the photograph and had no reason to suspect it was indecent. S. 160 (2)(a) and (b).

the individual can prove that the photograph was sent to him without any request, and that he did not keep it for an unreasonable time.[44] An unsuccessful attempt to rely on the 'legitimate reason' defence in response to a charge of the possession offence was made in the case of *Atkins* v. *DPP*. Atkins, a university lecturer, was discovered to have indecent photographs of children which he had viewed on the internet at work and inadvertently stored in his computer's cache. In his defence, he argued that he had a legitimate reason for being in possession of the photographs, as he was conducting research into the sexuality of children. The High Court held that possessing indecent photographs of children for the purposes of academic research in this case did not constitute a legitimate reason for being in possession of such material. On the issue of the applicability of the defence, Brown LJ commented:

> The central question where the defence is legitimate research will be whether the defendant is essentially a person of unhealthy interests in possession of indecent photographs in the pretence of undertaking research, or by contrast a genuine researcher with no alternative but to have this sort of unpleasant material in his possession.[45]

Atkins was unable to rely on the legitimate reason defence, as it could not be proven that his academic research was legitimate. However, his appeal against his conviction for the offence of possession was allowed. Atkins had no knowledge that the photographs had been stored in his computer's cache and Brown LJ reached the conclusion that Parliament did not intend to criminalize the unknowing possession of indecent photographs, as indicated by the existence of the defence available to individuals who reasonably do not know that photographs in their possession are indecent.[46] This requisite *mens rea* element of knowledge was affirmed in *R.* v. *Collier*.[47]

I explore judicial attitudes towards the possession of child pornography in the following chapter. What it is important to emphasize here

[44] CJA, s. 160(2)(c). [45] At 1435. [46] At 1440.

[47] [2004] EWCA Crim. 1411. The presence of deleted files containing indecent images of children on computer hard drives has posed other important questions regarding *mens rea* and the possession offence. In *R.* v. *Porter* [2006] 2 Cr. App. R. 25, the Court of Appeal was required to decide whether an individual has committed the possession offence when deleted indecent images are still present on his computer, but can only be accessed through the use of special techniques unavailable to him. The court favoured the interpretation of possession applied in cases involving the possession of drugs; the defendant possesses whatever he knows to be in his custody or control (at para. 20). If an individual cannot access or retrieve images stored upon his computer's hard drive, as in the case before them, the Court of Appeal held that he no longer has control or custody of them.

is that the criminalization of possessing child pornography reveals that, in the space of ten years, the legislature's perception of the level of threat caused by possession substantially altered. I will explore the reasons for this modification in stance later in this chapter.

Extending legal constructions of the 'child'

Until the coming into force of the SOA, the PCA defined a 'child' as an individual under the age of sixteen. However, the SOA revised the PCA, re-defining a child as being under the age of eighteen.[48] This re-definition of a child brought English law in this area in line with the UN Convention on the Rights of the Child and the European Council Framework Decision on Combating the Sexual Exploitation of Children and Child Pornography, which both define a child as a person who is less than eighteen years old.[49] There are, however, negative repercussions that result from increasing the age of a child from under sixteen to under eighteen. Particularly, this expansion of the definition of a child raises a significant issue regarding the sexual liberty rights of sixteen- and seventeen-year-old adolescents, a matter to which I will turn shortly. Also, whilst the extension of a 'child' from under sixteen to under eighteen is consistent with the general approach under the SOA, it creates something of a discrepancy and illogicality within the law, given that sixteen-year-old adolescents can give lawful consent to sexual intercourse, but are now unable to give consent to the creation of a pornographic photograph or video of any such act in which they partake. The law thus presents a state of affairs in which an act is lawful, but the representation and recording of that act is not.[50] As Gillespie notes, 'two 17-year-olds can give their consent to have sexual intercourse with as many people as they want, in whatever style they want, but cannot give consent to take an intimate photograph of each other'.[51] It is also not outside the realms of possibility that the seventeen-year-old's consent to have sexual intercourse could be for unprotected sexual intercourse on each occasion. Thus, an adolescent of this age can freely give valid consent to

[48] SOA, S.45, revising s. 7(6) of the PCA. The SOA shifted the age boundary from under-sixteens to under-eighteens in the context of a number of other offences, such as abuse of trust offences (ss. 16–19) and familial child sex offences (ss. 25–9). See further Waites 2005: ch. 8; Ashworth 2006: 355–7; and Home Office 2000: para. 7.6.2.

[49] Art. 1 of the UN Convention on the Rights of the Child; Council Framework Decision 2004/68/JHA, Art. 1(a), [2004] OJ L13.

[50] For a parallel observation regarding Canadian law, see Ryder 2003: 105.

[51] Gillespie 2004: 364.

any number of acts that potentially could be very harmful indeed, yet is prevented from consenting to, and perhaps requesting, her partner to take a pornographic photograph of her which she intends to keep in her own possession.

There is an exception to the offences under the PCA in a case where the child is aged over sixteen and either married to or living together as partners with the defendant in an 'enduring relationship'.[52] However, this does not encompass all situations where a sixteen- or seventeen-year-old might see the making of a pornographic image of herself as an expression of her sexual liberty. It also appears to make the law less clear regarding the question of whether the child who is the subject of the photograph behaves in a criminal manner. Gillespie identifies a situation where two seventeen-year-olds have been engaged for two years, but do not live together.[53] Say that in this situation, the girlfriend takes a pornographic photograph of her boyfriend, to which he consents. She has, on the face of it, committed the offence of taking an indecent photograph of a child. As the couple do not live together, she would not appear to be able to rely on the new exception under the PCA. Moreover, there is also the matter of whether her boyfriend, by permitting her to take the photograph, has also committed an offence.[54] If he has, then the *victim* of the crime, the person whom the legislation was designed to protect, can also be guilty as co-principal to the offence.[55] In the context of the example above, it is thus to be hoped that if the fact that the photograph has been made becomes known to the authorities, as a matter of policy, the prosecution of neither individuals would be brought. In *Setting the Boundaries* and *Protecting the Public*,[56] the government emphasized that the SOA's extension of prohibitions from under-sixteens to under-eighteens would be accompanied by discretionary enforcement and implementation of the law. Notwithstanding this, the appropriateness

[52] See s. 1A of PCA, inserted by the SOA. The exception applies to the offences under s. 1(1)(a), (b) and (c). It also applies to the possession of an indecent photograph of a child offence under s. 160 of the CJA (see s. 160A). The exception does not apply when an individual in the photograph is someone other than the child or the individual who takes the photograph. See s. 1A(3) of the PCA and s. 160A(3) of the CJA.

[53] Gillespie 2004: 364.

[54] Again, under s. 1(1)(a) of the PCA – it is an offence to '*permit to be taken* … any indecent photograph … of a child' (my emphasis). Whilst the assumption would be that the legislature was looking to target an adult who permits another to take an indecent image of the child, this is not made clear in the legislation itself.

[55] Interestingly, according to the principle in *R.* v. *Tyrrell* [1894] 1 QB 710, the victim of a crime whom the law was intended to protect cannot be guilty as *accessory* to the offence in question.

[56] Home Office 2000; and Home Office 2002.

of a blanket approach to criminalization concerned a wide range of Parliamentary Members.[57]

In the House of Commons debates on the Sexual Offences Bill, a major concern of the proposed legislation was highlighted as being to target 'predatory behaviour' and this was a reason why the legislature wished to avoid criminalizing 'effectively consensual', 'minimal sexual activity' between children aged thirteen to sixteen.[58] If 'predatory behaviour' was the main mischief targeted by the legislature, and bearing in mind that the original purpose of the PCA was to prevent the exploitation of children,[59] the currently defined exception that applies to sixteen- and seventeen-year-olds is unnecessarily limited by the need for marriage or an 'enduring relationship'. An alternative approach to that discussed above which would also better recognize the sexual liberty rights of sixteen- and seventeen-year-olds, and at the same time reflect the purpose of the PCA, would be to have allowed a defence where an individual could establish that the image had not been created in an exploitative situation and had not caused harm.[60]

Because the exception is so limited it may be that, by increasing the age of a child, the PCA is incompatible with the UN Convention on the Rights of the Child, the Human Rights Act 1998 (HRA) and the ECHR. According to Art. 12 of the Convention on the Rights of the Child: 'States parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.' The failure to take into account autonomy and sexual liberty rights of sixteen- and seventeen-year-olds could breach Art. 12, particularly as there is no evidence to suggest that the views of such older children were sufficiently taken into account when the child pornography offences were extended to their age group.[61]

[57] See Waites 2005: 199 and 202; and Ashworth 2006: 354 and 359. In an earlier draft of the particular clause relating to this exception in the Sexual Offences Bill, no offence would have been committed if the child depicted in the photograph was aged sixteen or over, provided the photograph was made with the child's consent. There was no need for the child to be married to the defendant, or for an enduring relationship to exist between them. See cl. 52, at www.publications.parliament.uk/pa/ld200203/ldbills/026/03026.24–30.html#j413. Interestingly, the aforementioned European Council Framework Decision provides that Member States may exclude from criminal liability the production and possession of images of children who have reached the age of sexual consent when the image is taken with the child's consent and is solely for private use (see above, n. 49, Art. 3.2(b)).

[58] Hansard HC Deb. 15 July 2003: column 202 (Simon Hughes).

[59] See the later discussion at 83–4 and 99.

[60] See Ryder 2003: 105.

[61] See generally, Spencer 2004: 360; and Home Office 2000: para. 3.3.9.

Gillespie observes that the right to a sexual life is protected under the umbrella of the Art. 8 right to privacy and family life under the ECHR, as confirmed by *Dudgeon* v. *UK*.[62] He also notes, however, that there are a number of circumstances under which Art. 8 can legitimately be breached.[63] These include where the breach is necessary for the protection of the rights or freedoms of others or to protect morals. The need to protect children from exploitation has already been highlighted as a legitimate reason for infringing Art. 8 and 10 of the ECHR.[64] However, if the seventeen-year-old who takes a pornographic image of her boyfriend, to which he consents, simply keeps this image in her possession, can it really be argued that criminalization of this act is necessary in order to protect other children from exploitation? I acknowledge that some might perceive the situation as being different if she intends to show and distribute this photograph to others. It may be contended that the autonomy of the sixteen-or seventeen-year-old who wishes an indecent photo of her boyfriend or herself to be distributed to others can *legitimately* be restricted by the law, if allowing such an exercise of autonomy could potentially threaten other children.[65] Certainly, in our courts of law, infringing autonomy in order to protect other vulnerable individuals in society is likely to be deemed a justifiable violation of Art. 8 of the ECHR.[66]

Undoubtedly, it is the protectionist stance fostered by a society that is anxious to cover all children with the same shield against potential and perceived harm which has served to extend the child pornography offences to older adolescents.[67] Couple this with the fact that the subject in question relates to children's involvement in sexual acts, and it is apparent why it so difficult for society and law to recognize the autonomy rights of older children in this respect.[68] It seems that in this context, a discourse of morality prevails. Society and law may have been able to move away from conservative moral attitudes concerning youth sexuality sufficiently to allow the homosexual age of consent to be reduced to sixteen. However, Parliament has chosen to allow morality and an

[62] (1982) 4 EHRR 149. Article 8 reads: 'Everyone has the right to respect for his private and family life, his home and his correspondence.'

[63] Gillespie 2004: 364. See Art. 8(2) of the ECHR.

[64] See *R.* v. *Smethurst*, para. 24.

[65] By, e.g. encouraging the market – commercial or otherwise – in indecent images of children. See Chapter 3, at 113–18.

[66] See, for instance, the reasoning behind the decision in *DPP* v. *Pretty* [2001] 1 All ER 1, 18, *per* Lord Bingham.

[67] See Home Office 2000: para. 7.6.3.

[68] See Stainton Rogers and Stainton Rogers 1999: 182, 193 and 195.

'adults know best' philosophy to re-shape the definition of a child under the child pornography law. In other areas, in contrast, the law does allow concerns about older children's autonomy to take precedence over concerns for their protection. The consent of a child who is aged sixteen or above to medical treatment is legally effective under the Family Law Reform Act 1969, s. 8(1). The mature minor aged under sixteen can also consent to treatment provided she demonstrates sufficient maturity to be able to reach an intelligent choice.[69] Therefore, framed in its earlier form as discussed above,[70] the provision providing an exception to the inclusion of sixteen- and seventeen-year-olds where the photograph was made with the subject's consent would have reflected existing legislation and case law on older children's consent to medical treatment. When it comes to the child pornography provisions, however, society is dealing with a subject that does not fall within the 'same kind of sanitized domain'[71] as older adolescents consenting to medical treatment. Moreover, statutory and common law's recognition of a more mature minor's autonomy does not extend to a situation where the minor refuses medical treatment. The decision to allow the force-feeding of a sixteen-year-old girl suffering from anorexia nervosa in *Re W. (Minor) (Medical Treatment)*,[72] if necessary, evidences the greater reluctance to respect an older child's autonomy when the decision she reaches is not in accordance with what adults deem to be her best interests. Thus, the extension of the child pornography offences to sixteen- and seventeen-year-olds is a reflection of a broader legal approach in which children's personal autonomy rights can be ignored when adults consider their decisions to be harmful or dangerous to their wellbeing.

In sum here, as Persky and Dixon observe: 'There's something deeply anomalous about a law that criminalizes the representation of a non-criminal act. Since two sixteen-year-olds are legally free to engage in sexual acts, why should it be a crime to represent those acts?'[73] The only convincing answer would seem to be that this aspect of the child pornography law is an example of the criminalization of adolescent behaviour that adults consider to be wrong or inappropriate.

[69] *Gillick* v. *West Norfolk and Wisbech AHA* [1985] 3 All ER 402. Of course, supporting the autonomy rights of the mature child under the age of sixteen is more problematic in the context of the child pornography offences whilst the age of sexual consent remains at sixteen.

[70] See above, n. 57. [71] Stainton Rogers and Stainton Rogers 1999: 194.

[72] [1992] 4 All ER 627. See also *Re R. (A Minor)* [1991] 4 All ER 177; and Brazier and Bridge 1996.

[73] Persky and Dixon 2001: 210 and see also 60–1 (referring to Canadian law).

Widening the net: the creation of further child pornography offences

The SOA brought wide-reaching changes to the current legislation on sexual offences. One of the government's main aims in introducing the legislation was to give children 'the greatest possible protection under the law from sexual abuse'.[74] Consequently, there are a number of specific sexual offences against children that feature within Pt. I of the Act, including the 'meeting a child following sexual grooming' offence which I explore later in this chapter. The offences I examine here relate to encouraging, arranging or causing the involvement of a child in prostitution or pornography. These offences exist alongside the afore-discussed offences relating to child pornography. Under s. 48, it is an offence to intentionally cause or incite a child to become involved in child pornography. Under s. 49, it is an offence to intentionally control a child who is involved in child pornography, and an individual's behaviour is criminalized under s. 50 if he intentionally arranges or facilitates a child's involvement in pornography.[74a]

It is significant that the SOA is the first statute to make direct reference to child pornography, as opposed to indecent photographs of children,[75] although the reference to child pornography sits alongside the pre-existing legal terminology of an indecent photograph of a child. It is stated in the SOA that a child is involved in pornography if an indecent image of the child is recorded.[76] The legislation's reference to child pornography raises two interesting questions. First, why did the legislature prefer the legal terminology 'indecent photographs of children' until this time rather than child pornography? Secondly, why, in 2003, did the legislature decide to adopt different terminology? In considering the first question, the legislature may have avoided utilizing terms such as 'pornography' and 'pornographic' when drafting the PCA to avoid association with the Obscene Publications Act 1959 and the type of material often caught by this Act.[77] The legal test for obscenity requires that the material would have a tendency to deprave and corrupt its audience,[78] often a difficult issue for the jury to decide. Placing

[74] Hansard, HL Deb. 13 February 2003: column 772. See also Home Office 2002.

[74a] The offences are not made out if an individual reasonably believes that a child is eighteen or over, provided that the child is actually over thirteen.

[75] See the titles of the SOA offences. [76] S. 51(1).

[77] 'This Bill is a children's Bill. It is not a Bill directed primarily against obscenity; it is a Bill to safeguard children.' Baroness Faithfull, Hansard, HL Deb. 5 May 1978: column 536.

[78] See s. 1 of the 1959 Act and *R.* v. *Martin Secker & Warburg* [1954] 2 All ER 683, for example.

pornographic photographs of children under the umbrella of indecency rather than obscenity avoided the need to consider the subjective effect on the mind of the images in question in order to establish that they are unlawful. Moreover, the indecency test is an easier test to satisfy than the obscenity test. The answer to the second question posed above may lie in the fact that today's public is much more aware of child pornography than it was when the PCA was enacted, particularly in the light of substantial and persistent media coverage and national and international police investigations into the creation, distribution and possession of such material. The government may, then, have decided to modernize the legal terminology used to label images of children of a sexual nature in 2003 to reflect popular discourses.

No doubt because the pre-existing indecency framework remains, the SOA provides no statutory indication of the type of material that can be deemed to be pornography involving a child. The introduction of these offences did seem to offer the perfect opportunity to provide an indication of the varying content of material which can be deemed to be child pornography. What is more, the government would not have had to start from scratch in providing an indication of what can amount to child pornography. The SOA could have incorporated, for example, the afore-mentioned Sentence Advisory Panel's league table of classes of child pornography to illustrate the varying content of material which could fall under this heading. By explaining what can amount to child pornography in this way, the SOA would have clarified the wide range of material that can fall under the label of child pornography.[79]

The intention behind the creation of the new offences was obviously to extend the law's ability to catch more of the people involved in child pornography, including individuals who do not commit existing offences by actually recording or carrying out the sexual abuse. However, the relationship between these proposed offences and the existing offences relating to indecent images of children is somewhat unclear. Gillespie contends that there is 'significant overlap' between the new and old offences, thereby creating confusion in the law.[80] The confusion could have been avoided had the new offences retained an element that was present in the relevant clauses in earlier drafts of the Sexual Offences Bill. Under the originally worded clauses in the Bill when presented before the House of Lords, it was necessary for an individual to commit one of the acts listed under the clauses for gain. The definition of gain provided was fairly broad,

[79] See also, generally Gillespie 2004. [80] Gillespie 2004: 366–7.

being any kind of financial advantage or the goodwill of any person which it is likely will produce a financial advantage in time. The government chose to focus on a motivation of gain in the originally drafted clauses under the Bill because it was trying to tackle primarily the commercial aspects of the child pornography market.[81] However, the sub-section of the clause that stated the element and definition of gain was removed following concern expressed by Baroness Noakes in the House of Lords that including an element of gain would result in fewer convictions for the offences.[82] Removing the gain element has indeed resulted in offences that have much broader application. Gillespie comments that: 'It is difficult to conceive of a non-commercial situation that could come within ss. 48–50 and would not already be covered by s. 1 [of the PCA] using inchoate or secondary liability.'[83] It may be contended that it is simply easier to charge the individual with the new offences rather than relying on inchoate or secondary liability. The fact remains, however, that since such liability in relation to the PCA and the CJA offences exists, it is harder to argue that making an intention of gain a necessary element of the new offences would have failed to protect children from individuals who cause, control, incite or arrange for them to become involved in pornography for non-financial gain.

One final point is that liability for the SOA child pornography offences extends beyond England, Wales and Northern Ireland. Each offence criminalizes the relevant behaviour 'in any part of the world'. Moreover, the potential reach of all the offences relating to indecent images of children has been extended by s. 72 of the SOA. This provision provides that if a British citizen commits what would constitute a sexual offence in this jurisdiction outside the UK and in the jurisdiction in which the act was committed it constituted an offence, the individual has also committed an offence under the law in this jurisdiction.[84] This should make it easier to prosecute British citizens who, for example,

[81] 'We should extend the law, whether on pornography or prostitution, to make it easier to take decisive action to protect people against exploitation for commercial gain.' Hansard, HC Deb. 15 July 2003: column 186 (Home Secretary). Also note that a maximum sentence of fourteen years' imprisonment can be imposed on conviction for the SOA offences (as noted earlier, the maximum sentence for the PCA offences is currently ten years). See also Gillespie 2004: 367.

[82] The gain element was laid down in cl. 58(3) and can be seen in the Sexual Offences Bill, HL Bill 68, available at www.publications.parliament.uk/pa/ld200203/ldbills/068/03068.25–31.html#j418. For the debates regarding the removal of the sub-section, see Hansard, HL Deb. 13 May 2003: columns 176–81 and HL Deb. 9 June 2003: column 60.

[83] Gillespie 2004: 367.

[84] Sch. 2, para. 1 of the SOA lists the PCA and CJA child pornography offences as constituting sexual offences.

upload indecent images of children elsewhere than in this jurisdiction under our law, and seems to be in line with other case law which suggests that the possibility of bringing a prosecution when an offence is committed elsewhere than in the UK is widening.[85]

CRIMINALIZING BEHAVIOUR RELATED TO SEXUAL GROOMING

The main focus of analysis in this part of the chapter is the offence relating to grooming under s. 15 of the SOA. The introduction of this offence followed calls for such legal reform by both the Taskforce on Child Protection on the Internet and child protection groups,[86] and demonstrates the increased societal awareness of the way in which grooming can occur via the internet. Moreover, in the period prior to the introduction of the SOA, the harms of grooming were being recognized by the judiciary. In *Re Attorney General's Reference (No. 41 of 2000)*,[87] one of the reasons why the Court of Appeal increased the defendant's original sentence for indecent assault and making indecent photographs of a child was because he had groomed a vulnerable child with special needs.[88]

The offence relating to grooming

A question which initially begs consideration is why the creation of a specific offence relating to grooming was thought to be a better step forward than simply utilizing the law of attempt – why not simply arrest an individual who intends to commit a sexual offence against a child and charge him with attempt to commit that particular offence? The answer is that there are commonly known and inherent difficulties when relying on the law of attempt, in terms of ascertaining the stage at which a preparatory act becomes an attempt to commit an actual offence. It is necessary to prove that an individual has gone beyond committing merely preparatory acts in order to satisfy the necessary elements of the offence of attempt under the Criminal Attempts Act 1981.[89] The creation of the offence of meeting a child following sexual grooming enables the police to charge an individual in circumstances where, previously, there

[85] See, e.g. *R.* v. *Perrin* [2002] EWCA Crim. 747.
[86] See the next section, at 90.
[87] [2001] 1 Cr. App. R. (S) 372.
[88] Ibid.: 375. See more recently *R.* v. *Kingsley*, *Attorney General's Reference (no. 64 of 2003)*; *Attorney General's Reference (no. 78 of 2003)* [2004] EWCA Crim. 418; and *Robertson* v. *HM Advocate*.
[89] S. 1(1).

may have been insufficient evidence to establish that the individual had committed more than preparatory acts to the relevant offence under the existing law.[90]

The offence relating to grooming can be found under s. 15(1) of the SOA, which provides that an individual aged eighteen or over (A) commits the offence of 'meeting a child following sexual grooming etc' if:

(1) having met or communicated with another person (B) on at least two earlier occasions, he:
    (i) intentionally meets B, or
    (ii) travels with the intention of meeting B in any part of the world;
(2) at the time, he intends to do anything to or in respect of B, during or after the meeting and in any part of the world, which if done will involve the commission by A of a relevant offence;[91]
(3) B is under 16;[92] and
(4) A does not reasonably believe that B is 16 or over.

The maximum sentence that can be imposed following conviction on indictment is ten years. The courts can also impose sentences for public protection for the s. 15 offence, as is permitted by the Criminal Justice Act 2003.[93]

It initially appears, then, that there is a significant difference between the offence relating to grooming and the child pornography offences. The former is pre-emptive, aimed at tackling preparatory behaviour to the act of child sexual abuse, thereby avoiding the child suffering more serious harm. In contrast, the child pornography offences under the PCA and SOA criminalize a harm that has already occurred to the

[90] For further discussion, see Ost 2004: 150–1.

[91] Any offence under Pt. 1 of the SOA amounts to a 'relevant offence'. A number of other sexual offences are listed under Sch. 3, paras. 61–92.

[92] Given that the s. 15 offence only applies where the child is under sixteen, the appropriateness of revising the definition of a child under the PCA and CJA child pornography offences to encompass sixteen- and seventeen-year-olds is again brought into question. If sixteen- and seventeen-year-olds are thought to be less vulnerable to grooming or more capable of resisting attempts to groom, why should they be considered more vulnerable in the case of child pornography?

[93] See, e.g. *Attorney General's Reference (no. 3 of 2006)*. For the court to impose such a sentence under s. 225(4), which is for an indeterminate time, the offender must have committed a serious offence and there must be 'a significant risk to members of the public of serious harm occasioned by the commission by [the offender] of further specified offences'. S. 225(1)(b). The offender can be considered for release when he is no longer considered to pose a danger to children.

child. However, notwithstanding this, I suggest that there is an interesting and important parallel between the offence related to grooming and the possession of child pornography offence; the latter can also be seen to be, in significant part, aimed at preventing potential harm.[94]

Although no actual definition of grooming is provided in the legislation, the explanatory notes that accompany the SOA provide some indication of the form of behaviour that the government considers can amount to grooming. The notes make reference to conduct which may have:

> an explicitly sexual content, such as A [the adult] entering into conversations with the child about the sexual acts he wants to engage her in when they meet, or sending images of adult pornography. However, the prior meetings or communication need not have an explicitly sexual content and could for example simply be A giving the child swimming lessons or meeting her incidentally through a friend.[95]

The lack of any statutory indication of what can amount to grooming through meeting or communication with the child does beg the question of whether s. 15 was intended to be a 'catch all' offence, covering any contact with the child provided that the individual subsequently sets out to meet her. The breadth of s. 15 has led civil rights campaign group Liberty to express concern that people will be less willing to intervene and talk to a child where they suspect that some form of abuse in the home has occurred. Individuals may fear that their intent in communicating with the child will be misinterpreted as harmful.[96]

It is significant that s. 15 does not criminalize an act of grooming *per se*, despite the government's statement in *Protecting the Public* that the offence would be that of grooming.[97] Are there not grounds to argue that, besides being a necessary element of the offence of meeting the child or travelling with the intention of meeting the child under s. 15, the grooming itself should constitute an offence? It is surely arguable that the same threat is posed by a person who grooms a child, but does not then travel to meet the child because, for example, the child informs him that she has decided not to go. If the individual was unsuccessful the first time, he is likely to develop his grooming technique and try to meet a child again. Thus, if one of the main purposes of the legislation is to protect children *before* abuse occurs, then criminalizing the very act of

[94] See the discussion later in this chapter, at 91.
[95] See the explanatory note to s. 15 in *Sexual Offences Act: Explanatory Notes* 2004: para. 27.
[96] Select Committee on Home Affairs 2003: App. 21, para. 18.
[97] Home Office 2002: para. 54. See also Gillespie 2006: 412.

grooming would further meet this aim. This argument has even greater weight if the act of grooming is viewed as *part of* a pattern of abusive behaviour.[98] However, Gillespie comments that 'the creation of … an offence [criminalizing the specific act of grooming] would be virtually impossible as the grooming process takes such a long time and covers so many areas that, if criminalised, it would lead to innocent conversations and actions being brought within the remit too'.[99] Whilst this is undoubtedly true, the offence of *meeting* a child following sexual grooming also raises challenges for the police in terms of gaining sufficient evidence of the harmful intent required.

The crucial question of ulterior intent and the practical utilization of the s. 15 offence

> The act constituting a crime may in some circumstances be objectively innocent, and take its criminal colouring entirely from the intent with which it is done.[100]

In the context of the s. 15 offence, intent is the crucial issue that separates behaviour that is potentially harmful to children from non-harmful behaviour. In order to satisfy the element of an intent to commit an offence against a child, the prosecution must prove beyond all reasonable doubt that an individual arranged the meeting with the child with a harmful purpose in mind. This will depend on the extent to which all of the circumstances surrounding the previous grooming, and perhaps the meeting itself, reveal such a purpose.

Prior to the enactment of the SOA, senior police and probation officers identified difficulties regarding the issue of proving harmful intent and expressed concern that the s. 15 offence might be impossible to use in practice, particularly in cases where the individual has no prior convictions for child sex offences.[101] The practical utilization of s. 15 may reveal that such concerns were well placed. One police officer I interviewed commented that:

> to prove that intent to twelve good men and true in the jury is really difficult. You've really got to have the explicit email before they set off [regarding] what they intend to do in graphic detail … And I think the

[98] See Robins 2000; and Chapter 1, 32–9. [99] Gillespie 2002: 419.
[100] Williams 1961: 22.
[101] 'Grooming law is unworkable, police warn', *The Guardian*, 26 November 2002.

> Crown Prosecution Service sometimes appreciate how difficult it is to prove and as a result of that, become reluctant to refer charges.[102]

In the words of another:

> the Government are very good at [creating] offences, but they can't legislate for how you investigate such offences. We have proved a few, but not very many. There haven't been very many prosecutions actually as I understand it.[103]

It may be easier for the police and Crown Prosecution Service (CPS) to establish harmful intent evidence as a result of the changes brought by the Criminal Justice Act 2003 regarding the admissibility of evidence relating to the defendant's prior convictions.[104] Communications of an explicit, sexual nature also provide strong evidence of intent, even where the individual does not have any past convictions for relevant offences.[105] In *R.* v. *Mohammed*,[106] the defendant had no such convictions, although he did have a number of convictions for other unrelated offences. He had been charged with child abduction and the s. 15 offence and the jury found him guilty on both counts. Mohammed had been introduced to the victim, a thirteen-year-old girl with severe learning difficulties and behavioural problems, by one of her friends and they exchanged telephone numbers. There then followed a number of telephone calls and text messages over a period of several months, which were of a suggestive and intimate nature. The victim visited the defendant at his house and stayed overnight. The defendant was arrested after he had collected the victim from a telephone box in his van, this event having being witnessed by her foster sister who, together with her partner, had followed

[102] Interview RX2. Similar views were expressed by the officer in Interview RX8. Another stated that: 'There are easier offences to prosecute because you have to know that he wants to go there to have sex, which is why it tends to be done over the internet. You tend to have something written down and then you can prove what his intent was.' Interview RX5. In this officer's experience, the easier offence to prove was that of child abduction under the Child Abduction Act 1984, s. 2, since it is not necessary to establish what the individual's intentions are. However, he saw the negative consequences of this offence as being that sentencing powers 'are perhaps less than a grooming offence should be'.

[103] Interview RX3.

[104] See Chapter 5. According to one of the police officers I interviewed, 'we've now got evidence of bad character that we can use, if the offender has previous convictions'. Interview RX4. Another officer also made this point: Interview RX6.

[105] 'We can look at the computer traffic … If we can get our hands on the victim's and perpetrator's computers, we can look at what traffic has gone between them and maybe adduce evidence from there. There may be telephone contact that we could look at.' Interview RX4.

[106] See also *R.* v. *Mansfield*.

the vehicle and alerted the police. Whilst the jury did not have prior convictions for sexual offences from which they could infer that the defendant had a harmful intention when he met his victim, the evidence of the text messages in particular satisfied the majority that the requisite intention to commit an offence was present.[107]

The legislation provides no explicit explanation of *why* the content of communications or the events that take place during a prior meeting with the child may be deemed to amount to grooming, and could thus be indicative of an intention to commit an offence at the subsequently arranged meeting. The Act simply provides a broad definition of an act of prior communication, or a prior meeting with the child, leaving it to the jury to make the decision as to the intention behind the defendant's actions.[108] In some cases, all of the surrounding circumstances could provide evidence of a course of grooming and a harmful ulterior intention. For example, in *R.* v. *Wilson*, the appellant had met a number of girls under the age of sixteen after he had made contact with them on a website. He was charged with various offences alongside the s. 15 offence, relating to sexual intercourse with a girl under sixteen, sexual activity with a child, making indecent photographs of a child, possessing such photographs, and indecent assault on a female. Wilson pleaded guilty to all of the offences. The evidence relating to Wilson's use of the website to meet young teenage girls, his sexual activities with his victims and the indecent photographs of children he had taken could have been convincing evidence of a harmful intention had a jury been required to reach a verdict as to whether he had committed the s. 15 offence.[109]

A well-publicized case in which the conduct in question occurred prior to the SOA coming into force seems to offer another example of the type of evidence which could be enough to demonstrate harmful intent. In August 2003, a man was convicted of attempting to incite another to procure a nine-year-old girl for sex. He had used a website set up by American law enforcement agents to procure a young girl in the UK. When he was arrested on his way to what he thought would be a meeting with a girl, he was found to have in his possession a gun, a teddy bear and a condom.[110] However, such evidence is unlikely to be

[107] Ibid., particularly paras. 6 and 8. [108] See s. 15(2).

[109] See 'Man, 54, jailed for web grooming', BBC News report, 1 March 2007, http://news.bbc.co.uk/1/hi/wales/north_west/6410013.stm for a further recent example of persuasive evidence of an ulterior intent.

[110] See 'Student jailed after child sex sting', BBC News report, 11 August 2003, http://news.bbc.co.uk/1/hi/uk/3141803.stm. In the explanatory note to s. 15, an individual travelling to a

available in all cases since some groomers may take care to ensure that they are not in possession of incriminating evidence. One of the officers I interviewed stated that, in his experience, groomers 'are well versed and practised in the art of deception and they're not going to travel with a … sexual grooming kit that is so obvious and overt that they're going to get themselves charged. They're going to prepare properly and they're going to take [the child] to a hotel or another place or somewhere where that equipment may be.'[111]

The cases discussed above indicate that a harmful ulterior intention can be inferred prior to the individual meeting the child, particularly where explicit communications exist. The broad scope of the offence also means that it can apply in circumstances where sufficient evidence of an intention to commit an offence only materializes when the individual actually meets the child. However, it is highly unlikely that the police would permit such a meeting to occur. Representatives of the Metropolitan Police Service have stated that police officers would never allow a child to physically meet an adult believed to be a danger to her, citing a case where one individual sexually abused three children within fifteen minutes of meeting them.[112] This is further substantiated by the same police officer involved in my study as quoted above:

> You can't … say, 'Well, we'll just let that happen' and then intercept them at the point of contact. Because, what if you get lost? What if they do meet up and you don't make that interception … You're effectively really condoning or allowing an offence. So it's really hard.[113]

Inevitably, there will be cases where the necessary intent cannot be proven without a meeting taking place. For example, an officer working undercover may encounter an individual who, believing the officer is a child, enters into communications with her, the content of which are not overtly sexual. If the individual then arranges to meet the 'child', there is insufficient evidence here to prove an intent to commit a sexual offence. By way of another example, in *Re Attorney General's Reference (No. 41 of 2000)*, the defendant groomed a thirteen-year-old boy prior to committing the offence of making indecent photographs of him by providing

meeting he has arranged with the child with ropes, condoms and lubricants is given as an example of evidence from which the intent to commit an offence could be drawn. See *Sexual Offences Act: Explanatory Notes* 2004: para. 29. One of the officers involved in my study also highlighted this as a way in which intent could be evidenced: Interview RX4.

[111] Interview RX2. [112] Select Committee on Home Affairs 2003: App. 22, para. 7.

[113] Interview RX2.

him with numerous gifts and money. However, the giving of gifts and money is not behaviour which could, in itself, be indicative of an intent to commit a sexual offence against a child at a subsequent meeting.[114] In such cases, it seems that the s. 15 offence would not be made out, given that the police would be unwilling to allow a subsequent meeting with the child to take place because of the danger that this could pose.

A successful prosecution also depends on a cooperative victim. Where grooming is effective, this is problematic since: 'Many victims profess love or close feelings for offenders.'[115] A police officer who participated in my study discussed the problem of uncooperative victims:

> You've got a young, fifteen year old girl who might not appreciate that [she is a] victim … That is very, very difficult to manage … And then … also, because of the effects of grooming, you sometimes get to the situation where they don't want [the offender] to be punished and they feel that they're still in love with this person. Or they don't want the embarrassment of going to court. Or their parents bring influence to bear because they don't want the family embarrassed by the case going through the courts.[116]

Furthermore, the police often only learn about the occurrence of grooming after the child has been sexually abused. According to one police officer, children 'don't realize they're being groomed … so they don't come forward until something goes wrong. The police are very good at investigating after sexual grooming has taken place and somebody's actually been abused in some way, shape or form. But identifying the signs earlier and being able to prevent it, that's where we're trying to be at.'[117] In his experience, the s. 15 offence only tends to be used: 'a) where parents get access to the computer and find something or b) where we get access online and realize that [we can] actually target somebody using the undercover type work'.[118] Another officer explained why there are not many police statistics available for the s. 15 offence: 'Invariably, a

[114] Consider again the variety of grooming methods discussed in the previous chapter.

[115] Wolak *et al.* 2008: 113.

[116] Interview RX2. The difficulty of the victim not realizing she is a victim was highlighted by other officers (Interviews RX3, RX5 and RX6). Other officers emphasized the need for full disclosure from the victim (Interviews RX4 and RX8).

[117] Interview RX3.

[118] Ibid. For examples of recent police undercover work that has caught groomers, see the following links to reports on the BBC News website: http://news.bbc.co.uk/1/hi/england/norfolk/7296552.stm; http://news.bbc.co.uk/1/hi/england/devon/7410599.stm; http://news.bbc.co.uk/1/hi/england/berkshire/7095947.stm; and http://news.bbc.co.uk/1/hi/england/sussex/6402279.stm. See also *R. v. S.* [2008] EWCA Crim. 600.

further substantive criminal offence has been committed … as opposed to the grooming … a physical offence, like indecent assault or underage sex with a child … or a rape … and so that offence gets crimed and not the grooming.'[119]

Whilst the need to prove an ulterior, harmful intent in respect of the s. 15 offence does pose clear difficulties, the cases discussed above demonstrate that convincing evidence of this intention can be obtained from all of the circumstances surrounding the defendant's actions. It seems that especially where evidence of explicit prior communications exists, the police can successfully utilize the s. 15 offence, although I have highlighted limitations in terms of the police being able to uncover acts of grooming before actual abuse occurs. Whether the introduction of this criminal offence is the most effective means of combating grooming in the contexts it most often occurs is another matter. This is a question I address in the final section of this chapter, and also return to in Chapter 3.

The criminalization of grooming under other statutory provisions

I have noted the fact that the act of grooming itself is not specifically criminalized under the SOA. Thus, it is also necessary to examine other provisions under the SOA that criminalize specific acts which could form a part of the grooming process.

The act of causing a child to watch a sexual act, which includes causing a child to look at a photograph or pseudo-photograph of a person engaging in sexual activity, is criminalized under s. 12, which reads:

A person aged 18 or over (A) commits an offence if –

(a) for the purpose of obtaining sexual gratification, he intentionally causes another person (B) to watch a third person engaging in an activity, or to look at an image of any person engaging in an activity,
(b) the activity is sexual, and
(c) either –
(i) B is under 16 and A does not reasonably believe that B is 16 or over, or
(ii) B is under 13.[120]

[119] Interview RX2.

[120] Conviction for the s. 12 offence can lead to a maximum sentence of ten years' imprisonment. Note also the s. 19 offence, which mirrors the s. 12 offence where the individual is in a position of trust in relation to the victim and the victim is under eighteen.

Crucially, then, it must be proven that this act is carried out for the purpose of sexual gratification in order for the offence to be committed. It would seem that the government felt it necessary to include a specific *mens rea* element within the s. 12 offence in order to exclude from its ambit acts of, for example, showing children material of a sexual content for the purposes of sexual education. One particular method of grooming can be to show a child photographs of other children taking part in sexual activities, in order to convince her that what the individual is asking her to do is the norm. In a study conducted by Elliott *et al.*, 14 per cent of the child sex abusers interviewed by the authors stated that they used pornography to develop strategies to approach children.[121] Prior to judicial interpretation of s. 12, I made the case that if an individual showed a child photographs of other children taking part in sexual activities for the purpose of grooming rather than sexual gratification, he would not have committed an offence under s. 12.[122] However, in *R.* v. *Abdullahi*,[123] it was held that sexual gratification does not need to occur immediately for the s. 12 offence to be made out. The courts have thus extended the sexual gratification element of the offence to a distant, future-intended purpose. This interpretation of the requirement of sexual gratification to include gratification obtained at some later point encompasses a situation where, for instance, the individual continues to successfully groom the child and receives gratification from some subsequent behaviour.[124]

The s. 12 offence follows offences under ss. 9, 10 and 11, which relate to sexual activity with a child, inciting a child to engage in sexual activity and engaging in sexual activity in the presence of a child.[125] Another of the offences under Pt. 1 of the SOA could also be interpreted to apply to a situation in which an individual grooms a child. Under s. 14, it is an offence for an individual to intentionally arrange or facilitate any action which he intends to do or intends another person to do or believes that another person will do, in any part of the

[121] Elliott *et al.* 1995: 585. See also O'Connell 2003: 11; and Taylor and Quayle 2003: 23.

[122] Ost 2004: 154. The individual would not be guilty of an offence under s. 15 in these circumstances, provided that he does not subsequently meet the child and there is insufficient evidence to charge him with attempt. Whilst the individual would commit the offence of showing indecent images of children under the PCA, charging him with this offence would fail to address the fact that he committed this act with a specific, harmful purpose.

[123] [2007] 1 WLR 225. [124] See also Gillespie 2006: 414; and Ormerod 2007.

[125] For an argument that the s. 10 offence may catch behaviour that involves showing a child pornography, see Gillespie 2006: 415–6. See Ost 2004: 155–156, for a discussion of the way in which the offences under ss. 9–11 cast a wider net than that cast by the now repealed Indecency with Children Act 1960.

world, if this action will involve the commission of an offence under ss. 9 to 13. In *R.* v. *Harrison*,[126] the appellant groomed a child with the intention of causing or inciting her to engage in sexual activity (masturbation of herself whilst she was on the telephone to him), the s. 10 offence. He was charged and pleaded guilty to the offence of arranging or facilitating the commission of a child sex offence under s. 14. The application of s. 14 to behaviour that amounts to grooming in this case is significant because, in a situation such as that in *Harrison*, no meeting between the individual and the child actually took place, nor did the appellant set out with the intention of meeting the child. Thus, the s. 15 offence would not be made out. However, provided that the intended action that the individual arranges or facilitates amounts to or will amount to an offence under the relevant sections, then he commits the s. 14 offence. The s. 14 offence could also apply where, for example, the individual arranges to cause the child to watch a sexual act he will perform through the use of a webcam, for the purpose of grooming (the intention being to commit the s. 12 offence). Again, the s. 14 offence is made out before the behaviour criminalized under s. 12 occurs, and without any meeting between the individual and the child being planned or taking place. That the s. 14 offence criminalizes behaviour which can amount to grooming without the need for a meeting to occur or even to have been intended by the individual, could provide wider protection to children from sexual groomers and abusers.

It is of interest that in giving judgment as to the appropriateness of the sentence passed in *Harrison*, the Court of Appeal actually referred to the s. 14 offence as an 'offence of grooming',[127] although there is nothing within the Explanatory Note to s. 14 to suggest that the legislature was targeting grooming behaviour. The effective utilization of the s. 14 offence in the context of grooming is dependent, however, on the child disclosing the groomer's behaviour. As already discussed, children may be reluctant to come forward with this information. Child sex offenders might use threats or violence to control children when preparing to abuse them and other methods to prevent the child from disclosing after the abuse.[128] Whether the s. 14 offence can be used to criminalize grooming behaviour is also dependent on the existence of evidence that the action which the groomer intended amounted to an offence. Offenders involved in Elliott *et al.*'s study revealed that their grooming

[126] [2005] EWCA Crim. 3458. [127] Ibid.: para. 13. [128] Elliot *et al.* 1995: 585–6.

strategies included telling stories, teaching the child a sport or how to play a musical instrument and playing games.[129] None of these activities in themselves could provide evidence that the groomer was intentionally arranging or facilitating a relevant offence.

Finally, here, there is a further provision under the SOA that could potentially apply to acts of grooming. Steps can be taken to prohibit an individual from carrying out certain acts against children that may be undertaken for the purpose of grooming by virtue of s. 123 of the SOA. This provision enables the police to apply to a magistrates' court for a Risk of Sexual Harm Order (RSHO) to be brought against an individual who has committed certain specified acts on at least two occasions. These acts include communicating with a child where the content of such communication is sexual and causing a child to look at a moving or still image that is sexual.[130] Such an order prohibits the individual from doing anything described in it, with the proviso that any prohibitions imposed must be necessary for the purpose of protecting children generally or any child from harm from the defendant. The harm can be physical or psychological.[131] The individual will commit an offence if he does anything he is prohibited from doing under the order.[132] Therefore, if such an order is made against an individual who, for example, sends e-mails with a sexual content to a child and the order prohibits him from entering into any further communication with children, any subsequent communication will amount to an offence.[133]

The RSHO could effectively criminalize acts which may be carried out for the purposes of grooming, but only *after* an individual has been identified as posing a threat to children. Thus, it is the individual's prior conduct which causes such acts to constitute an offence, rather than these acts being offences in themselves. However, the introduction of the RSHO has certainly extended the reach of the law. Previously, the police could apply to a magistrates' court for a Sex Offender Order if they had reasonable cause to believe that a convicted sex offender was acting in a way that posed serious harm to members of the public.[134] The offender was then prohibited from carrying out the acts named in the order for a minimum of five years. The new order is available at a

[129] Ibid. [130] S. 123(3). [131] Ss.123(6) and 124(2). [132] S. 128.

[133] Note also the Sexual Offence Prevention Orders that can be imposed upon an individual convicted of any of the offences relating to child pornography, meeting a child following sexual grooming and the ss. 9–12 offences under the SOA, where there is evidence of a risk of him causing serious sexual harm. See s. 104 of the SOA.

[134] Under the Crime and Disorder Act 1998, s. 2, repealed by the SOA.

much earlier stage and can be brought against *any* individual, not only convicted sex offenders.[135]

THE LAW'S FRAMING AND CONSTRUCTION OF CHILD PORNOGRAPHY AND SEXUAL GROOMING

Having analysed the relevant offences, in order now to uncover the law's ideological framing of child pornography and grooming, it is necessary to engage in a theoretical analysis of the way in which the law 'thinks' about and constructs the dangers represented by these phenomena. This final section provides the beginnings of my moral panic analysis of the legal and social response to child pornography and grooming, which will be developed in Chapter 4, and offers an introduction to the crucial question of harm to be addressed in the next chapter. It examines the impulsion that steered Parliament towards legislation and assesses what the increased criminalization of behaviour reveals about the law's construction of the harms of child pornography and grooming. It also considers the effects of increased criminalization. It concludes by drawing attention to the problematical legal construct and framework of indecency that surrounds the child pornography laws, and the potential dangers of a generalized legal construction of grooming as stranger grooming through the use of modern technologies.

The impetus behind the introduction of the laws relating to child pornography and grooming and the law's construction of harm

Persak has recently reminded us that the state's power to render behaviour criminal, with all the consequences this brings for the individual concerned, is a vast and dangerous power for a liberal society.[136] Arguably, the main check that can be placed upon this power is to ensure that the behaviour in question has first been socially categorized as seriously harmful. Further, as Ashworth remarks, the 'chief concern of the criminal law is to prohibit behaviour that represents a serious wrong against an individual or against some fundamental social value or institution'.[137] To simply see the criminal law as reflecting a social understanding that certain behaviour is both harmful and wrongful, however, would be

[135] See further Shute 2004: 417–40.

[136] Persak 2007: 12. See also Husak 2008: vii; and Schonsheck 1994: 1.

[137] Ashworth 2006: 1. See also Simester and Smith 1996: 4–6. Duff highlights the criminal law's concern with moral wrongs. Duff 2007: 80.

to take a narrow view. Legislation criminalizing behaviour must pass through the filter of politics in order to become a recognized source of law: 'Criminalisation is, first and foremost, a political process; a process, through which the world of politics *via* criminal policy penetrates into the world of law.'[138] With this in mind, the discussion here focuses on the political impetuses that compelled the legislature to take action against child pornography and grooming, and influenced legal constructions of harm.

The Protection of Children Bill (PCB) began its rapid journey through Parliament during a time when a less tolerant, more restrictive approach was being adopted towards 'corruptive' behaviour, such as the publication of obscene material and behaviour that offended public decency. As McCarthy and Moodie observe, in the wake of more liberal statutes in the 1960s,[139] 'the trend of legislation had swung against "permissive social behaviour"' in the 1970s.[140] The government's concern about the legal regulation of obscene and indecent material was evidenced by the Home Secretary's appointment of a committee chaired by Bernard Williams to review obscenity and indecency laws in 1977.[141]

Much of the propulsion behind the criminalization of behaviour related to child pornography and grooming is revealed by the debates that preceded the enactment of the legislation. My starting point is the background to and introduction of the Private Member's Bill that became the PCA into the House of Commons in 1978. Cyril Townsend, the Conservative MP who introduced the PCB, emphasized the need to eradicate the harm of exploitation caused by child pornography from the start.[142] In MP Michael Alison's view, the PCB was solely concerned 'with the children used in the production of pornography' and the 'appalling damage' they suffer due to their involvement.[143] A number of other

[138] Persak 2007: 5.

[139] Such as the Abortion Act 1967, the Suicide Act 1961 and the Sexual Offences Act 1967. The latter decriminalized homosexual conduct occurring in private where individuals were over the age of twenty-one in light of the conclusions of the Wolfenden Committee. See Committee on Homosexual Offences and Prostitution 1957.

[140] McCarthy and Moodie 1981: 48.

[141] See Committee on Obscenity and Film Censorship 1979 and Hansard, HC Deb. 10 February 1978: column 1851.

[142] Hansard, HC Deb. 10 February 1978: column 1827. See also Townsend 1979, in which Townsend states that his Bill was designed 'to strengthen the law against the exploitation of children for pornographic purposes', at 2.

[143] Ibid.: columns 1854 and 1856.

MPs also highlighted the exploitation of children as the primary harm of child pornography during the 1978 Parliamentary debates.[144]

In the year prior to the debates, the problem of child pornography had increasingly been a matter of media attention and calls for legal action had been made by prominent moral campaigner Mary Whitehouse and the National Viewers' and Listeners' Association (NVALA). Their ABUSE (Action to Ban Sexual Exploitation of Children) campaign was backed by a one-and-a-half-million signature petition.[145] The strong public support for the ABUSE campaign was ensured by Whitehouse writing to editors of 270 regional and religious newspapers to publicize the cause and urging readers to lobby their MPs for their support for the PCB. When the Labour Government failed to support the ABUSE campaign, Whitehouse targeted the Conservative Party, a party that was keen to further its political interests by backing a cause that would cast the government as being soft on behaviour that threatened societal values.[146] Whitehouse also enlisted the help of American child pornography expert, lawyer and psychiatrist Judianne Densen-Gerber. Just before the PCB was due to be read for the second time, Densen-Gerber spoke at press conferences and to MPs, and gave televized interviews about her perception of the enormity of the problem of child pornography in America and internationally.[147]

In introducing the PCB, Cyril Townsend took great pains to emphasize the public pressure and support for a bill of its kind. His justification for a new law targeting child pornography involved reference to expert opinion, newspaper and television coverage, religious opinion, statements from child welfare organizations, and letters from a General of the Salvation Army and the Chief Constable of the Greater Manchester Police.[148] The latter was particularly significant, given the Chief Constable's statement that: 'There is clear evidence from several

[144] Ibid.: columns 1857, 1876–8, 1883, 1885–6, 1889, 1897, 1905, 1909 and 1918. Hansard, HL Deb. 5 May 1978: column 536.

[145] See the NVALA Archives, Boxes 114 and 115; Hansard, HL Deb. 5 May 1978: column 565; and Jenkins 1992: 73.

[146] McCarthy and Moodie 1981: 50 and 54–5.

[147] Ibid.: 50 and 58. See also NVALA Archives, Box 115. For a critical discussion of Densen-Gerber's claims and the evidence relied upon by Mary Whitehouse, see Chapter 4, at 158–60.

[148] Hansard, HC Deb. 10 February 1978: columns 1827–31 and 1840–1. Townsend later commented: 'if there had not been massive public opinion and, in particular, some one and a half million signatures on a petition collected by the ABUSE campaign, I do not believe we would have the Bill on the Statute Book'. Quoted in McCarthy and Moodie 1981: 57. See also Townsend 1979: 3.

of my police divisions that more and more pornographic material seized by my officers depicts young children.'[149] He also noted that, according to Vice Squad officers' estimations, about 5 per cent of all of the material seized from hard pornography bookshops in Greater Manchester was child pornography.[150] Armed with this and other evidence obtained through his nationwide investigation into child pornography, Townsend informed the House of Commons that:

> It is impossible to prove beyond a shadow of a doubt that the photographing of children for pornographic purposes is on the increase in Britain, although the majority of those whom I have consulted believe that that is so … But there can be no doubt that the photographing of children for such purposes is widespread in this country …[151]

Other MPs seemed uncertain about how long the problem of child pornography had been developing, with one believing that it had been around for 'the last ten years', another for 'these past two years' and another for even longer than ten years.[152] Townsend's evidence that there had been a recent increase in the prevalence of child pornography was challenged by the Home Secretary, Brynmor John. His consultation with the same Chief Constable revealed that there were no hard figures to back up the 5 per cent figure quoted. Research conducted by the Home Office indicated that contrary to press coverage, the majority of hard pornography was not home-produced, but imported from foreign jurisdictions. The Home Office's research, which involved consultations with many police forces throughout the country, also brought into question newspaper reports that the amount of hard pornography being brought into the country was increasing. According to Customs authorities and police forces, the amount of such material 'is not great and does not show a rapid increase in recent times'.[153] Consequently, the Home Office concluded that existing legislation was sufficient to deal with child pornography.[154] In contrast, those strongly in favour of the PCB presented a construction of the harms caused by child pornography that challenged the ability of the existing law to deal with the problem. MP Michael Alison argued that the law failed to catch the evil of child pornography following a Court of Appeal judgment in 1977 that it

[149] Hansard, ibid.: column 1831. [150] Ibid.

[151] Ibid.: column 1829. Note also Robert Hicks's statement that 'the police believe that child pornography is a problem that may be increasing'. Ibid.: column 1889.

[152] Ibid.: column 1862. [153] Ibid.: columns 1845–6. [154] Ibid.

did not amount to an indecent assault to photograph naked children.[155] Further, in his view, the Obscene Publications Act 1959 was not aimed at the main evil of child pornography, which was again presented as the damage suffered by the child in the image. Townsend highlighted the fact that the Indecency with Children Act 1960 only extended to children under the age of fourteen.[156]

Despite the government's cautious reaction to the PCB,[157] they chose not to oppose it given the nature of the public reaction in light of the ABUSE campaign.[158] In the words of Lord Houghton: 'the Government have connived for political reasons in foisting this Bill onto Parliament, because I believe they are afraid of the Campaign that would be waged against them if the Bill were not passed and they could be accused of having failed to protect the nation's children'.[159] Lord Houghton offered what appears to have been very much the minority view in Parliament, expressing concern that the Bill was being rushed through with little debate and as a consequence of aggressive public pressure.[160]

Moving forward to the criminalization of possessing child pornography in 1988, a large part of the impetus for this extension of the law came from the police and the pressure they placed on the government. Beginning in 1986, Scotland Yard had chosen to make child pornography a 'number one target' and police officers called for the criminalization of possession in order to enable prosecutions to be brought where material was found, but evidence of intended distribution was lacking.[161] This supports Dubber's view that: 'Possession is the ideal fallback, or charge-down option in today's criminal process. If nothing else sticks, possession will.'[162] The rationalization for making possession an offence was accompanied by the construction of possession as harmful in itself, and this construction is the one that has become cemented in the law thereafter.

One way in which possession was constructed as a harmful act was to blur the distinction between the production and possession of child pornography. For example, the Home Secretary was quick to challenge any

[155] Ibid.: columns 1853–6. [156] Ibid.: column 1834.
[157] Ibid.: columns 1841, 1843, 1848 and 1849–52. [158] See McCarthy and Moodie 1981.
[159] Hansard, HL Deb. 28 June 1978: column 346. See also Gibbons 1995: 87.
[160] Hansard, HL Deb. 5 May 1978: columns 553 and 556. See further Chapter 4, at 161–2 and 164; and McCarthy and Moodie 1981: 60.
[161] See 'Yard officers seek more help to fight child pornography', *The Times*, 4 April 1988; 'Labour backs Hurd on child pornography', *The Times*, 17 October 1987; and 'Obscenity call', *The Times*, 8 October 1987. See also Williams 2004: 256.
[162] Dubber 2005: 96.

argument against criminalization of the possession of child pornography on the basis of infringing individual freedoms when no harm was caused by the behaviour in the following way: 'I am not persuaded in the case of material which exploits children this position stands close scrutiny. Such material can only be produced through exploiting and violating children and sometimes subjecting them to appalling degradation.'[163] His main justification for removing the individual freedom to possess child pornography – that this behaviour was harmful – was presented as and merged with the harm that the production of such material causes children. To use Best's terminology, the possession of child pornography was presented within the domain of the existing problem.[164] Arguing that the creation of child pornography involves the exploitation of a child and that the possession of the image exacerbates and encourages this exploitation can lend further legitimation to such a fusion of harm construct. In a newspaper article, the Minister of State (David Maclean) explained that it was appropriate to criminalize possession 'because it contributed to the exploitation of children' and stated that the only way to bring an end to this exploitation was to 'act against those without whom it would not exist – the people who actually buy child pornography'.[165] As a second validating factor behind criminalization, both the Home Secretary and the Minister of State stated that possession 'fed the instincts which gave rise to sexual abuse'.[166] Such a claim, which appears to be predicated upon the existence of a causal link between possessing child pornography and committing child sexual abuse, is still far from proven today, some twenty years after the government confidently relied on this construction of harm.[167]

Moving forward again to 1994, the objective behind the criminalization of pseudo-images was to expand the law to address what was perceived as another, newer threat.[168] The justification given for broadening the criminal law to catch pseudo-images was that such images were a further part of the larger problem of child pornography as a consequence of new technologies, and the law had to be expanded in

[163] 'Labour backs Hurd on child pornography', above, n. 161. [164] Best 1990: 65–6.

[165] 'New penalty to curb child porn', *The Guardian*, 1 March 1988; and see the Home Secretary's similar statement in the House of Commons debates: Hansard, HC Deb. 18 January 1988: column 689.

[166] Ibid. [167] See Chapter 3, at 108–13.

[168] According to Lady Maitland, 'computer technology has become a tremendous curse in the hands of the pornography industry, and when it is used to exploit children it is of great concern to us all'. Hansard, HC Standing Committee B: Criminal Justice and Public Order Bill, 15 February 1994: column 740. See also Home Affairs Committee 1994: para. 1.

order to keep up.[169] According to the Minister of State, the government was 'trying to ensure that anyone who uses a pseudo-photograph cannot use the excuse that somehow it is not an image'.[170] However, the government provided Parliament with few arguments as to *why* children were at risk of harm from the creation, distribution and possession of such images and, therefore, why the fact that the image was fabricated should not be an 'excuse'. How, then, did Parliament construe pseudo-images as harmful? When the CJPO Bill was at Committee stage, Labour MP Mike O'Brien stated that, although taking a pseudo-photograph of a child could amount to a 'victimless crime', if a photograph of a child's face from a magazine was used to create the pseudo-image, the child could be perceived to be a victim as the photograph was being used without consent, and that 'he or she is abused in another sense'.[171] He also referred to research by Catherine Itzin, which suggested that using 'such material' incited paedophiles to seek stronger stimuli and might lead them closer to committing indecent acts.[172] Both of these arguments are based upon assumptions. In the case of the former, for the child to suffer some form of actual harm, she or others she knows would need to be aware of the existence of the pseudo-image and, in the latter case, there is a supposition that viewing pseudo-images provokes an individual to behave in a certain way.

The 'abuse in another sense' of the child in the original image did not appear to be a construction of harm that impacted on the government. Rather, the Minister of State preferred to offer up another possible threat that pseudo-images represent: 'the problem is that certain people might use the photograph to lure children or to convince them that what is happening is all right … We are concerned that such material will be used to persuade children that something which we all know is wrong is, in fact, correct.'[173] This risk of harm was not substantiated with any evidence or research.[174] As had occurred when the criminalization of

[169] See Chapter 4, at 166–7; and 'Crackdown on computer porn', *The Guardian*, 26 November 1993.

[170] Hansard, HC Standing Committee B: Criminal Justice and Public Order Bill, 15 February 1994: column 733.

[171] Ibid.: column 742.

[172] Ibid. Additionally, O'Brien highlighted a practical difficulty: prosecutions could not be brought in cases where the police were unable to establish that the image was real rather than fabricated, an argument that will be addressed in the next chapter, at 131.

[173] Ibid.: column 745.

[174] The 'compelling' arguments accepted by the Home Affairs Committee in support of the criminalization of pseudo-images were also uncorroborated. See Home Affairs Committee 1994: para. 13.

possession was legitimized, an important distinction was again obscured; this time, the distinction between the production of real and virtual child pornography. Home Secretary Michael Howard, for instance, stated that he would not hesitate to act when individuals who degraded children found new methods to sell their material.[175] The obvious difference between the harm caused when a real child is forced to be involved in child pornography and the non-involvement of a child in the creation of a pseudo-image was left unaddressed. Instead, real and virtual images were placed into the same category and presented as giving rise to the same harm of degrading children.

Just as real child pornography and pseudo-images were given the same classification in the 1990s, so were all children presented as being at the same risk of harm from sexual predators in the early 2000s. By downplaying the maturity, sexual awareness and knowledge possessed by older children, the government was able to legitimate the further expansion of the child pornography laws to sixteen- and seventeen-year-olds brought into being by the SOA.[176] Moreover, the gradual amplification of both law and the construction of harm meant that an increase in the penalties that can be imposed upon conviction for child pornography offences was almost inevitably on the cards.

So, where has all this criminalization taken us? Contemporary child pornography law is not limiting itself towards the main harm of visual depictions that exploit real children, but is now directed towards exploitation of the non-existent child, possible future harm that could be caused to other children, and non-exploitative relationships involving sixteen- and seventeen-year-olds. It would seem that the original legislative purpose of preventing the exploitation of real children has gradually metamorphosed into a more all-encompassing construction of harm. Any behaviour related to child pornography, whether real, potential, remote or virtual, is thought to give rise to a risk of 'harm'.[177] This gradual but major shift in the legal discourses surrounding child pornography has been able to occur because the desire to protect the subject at risk has become so compelling. That there is no overwhelming evidence to suggest that children are at definite risk of harm from pseudo-images, or that there was a lack of considered Parliamentary debate as to whether the taking of a pornographic image of a sixteen- or seventeen-year-old is

[175] See 'Crackdown on computer porn', above, n. 169. [176] See Home Office 2000: para. 7.6.3.

[177] For a compelling critique of American law that is based in part upon a move away from its original purpose of preventing child sexual abuse to broader purposes that are not constitutionally defensible, see Adler 2001a.

always exploitative, has not mattered. Furthermore, the huge expansion of the legal construct of harm has been made practically possible because of the fluid concept of indecency which frames child pornography law, as I will discuss later.[178]

As with the more recent child pornography offences, in choosing to tackle the problem of grooming, the legislature was not directing itself towards criminalizing behaviour that causes primary harm in itself. Rather, it took a pre-emptive strike, rendering behaviour that could lead to harm unlawful. The harm of grooming was constructed as potential, anticipated harm.[179] This was the notion of harm promulgated by Childnet International, a children's internet charity, which provided much of the impetus and pressure for the introduction of a specific offence relating to online grooming. According to Childnet's Research and Policy Manager, the 'grooming offence' enables 'the law to step in before the physical harm and damage at the end of the grooming process has been wreaked on the child'.[180]

By and large, when the government and Parliament turned their attention to grooming, the main focus was on online, stranger grooming.[181] In the explanatory note to s. 15, it is stated that the offence is 'intended to cover situations where an adult establishes contact with a child through, for example, meetings, telephone conversations or communications on the Internet, and gains the child's trust and confidence so that he can arrange to meet the child for the purpose of committing a "relevant offence" against the child'.[182] Although the offence can cover offline grooming, it was designed to specifically target internet grooming due to Childnet's concentration on 'online sexual predators' and the fact that the offence was also largely brought about with the assistance and recommendations of the Task Force on Child Protection on the Internet.[183]

Thus far, I have examined the legislature's framing of child pornography and grooming, but the judiciary's role in extending criminalization should also be noted. Ashworth comments that judges 'retain a central place in the development of the criminal law. They seem to bear the major responsibility for developing the conditions and the scope of criminal liability, and also exert considerable influence on the shape of

[178] See the final section in this chapter, at 98–101. [179] See, e.g. Home Office 2002: para. 54.
[180] See Gardner 2003: 6. [181] See also McAlinden 2006: 342.
[182] *Sexual Offences Act: Explanatory Notes* 2004: 27.
[183] See Hansard, HL Deb. 19 November 2002: column 286; and Childnet's memorandum to the Select Committee on Home Affairs 2003: App. 7.

criminal law through their interpretation of statutory offences.'[184] This is clearly evidenced by the judiciary's merger of the making and possession of child pornography offences in the context of downloading material from the internet. Consider also the judicial extension of the sexual gratification element of the s. 12 offence under the SOA to a more remote future intended purpose, and the judicial interpretation of the s. 14 offence as an offence of grooming in *Harrison*. These latter developments indicate that the judiciary is following the government's lead, enabling the prevention of potential harm to children before it occurs by interpreting the law in a broad way.

The legislative measures and judicial interpretation discussed in this chapter clearly demonstrate that, in tackling child pornography and grooming, the law is responding to the wider societal desire to protect the group in society considered to be most vulnerable to sexual harm. Once the legislature chose to react to this societal pressure by going down the path of criminalizing the creation and dissemination of child pornography, it became very difficult to stop the trajectory towards criminalization of other behaviour. Thus, successive governments have been keen to enable more prosecutions of individuals who could not be successfully prosecuted under existing law, and to criminalize behaviour that might *potentially* cause harm; expansions of the criminal law which may be harder to legitimate.

Whilst, then, on the face of it, the offences relating to child pornography and grooming might appear to be designed to tackle different mischiefs, this is not necessarily the case. They are all framed around avoiding a risk of harm. Although it is true that a child may already have been harmed through the creation of child pornography, the PCB was introduced to avoid a predicted increase in the child pornography problem, and thus a future increase in the number of children harmed.[185] Criminalizing possession was considered to be a way of reducing the market for child pornography and, consequently, reducing the potential risk of other children being sexually abused through future involvement. As such, even if the mischiefs behind the offences relating to child pornography and grooming can initially be conceived to be different, they all serve to further a broader political, protectionist agenda of safeguarding children from potential, future harm.

The effects of the steady increase in criminalization

As more law has appeared on the statute book, is it also the case that prosecutions for offences regarding child pornography and grooming

[184] Ashworth 2006: 7. See also Husak 2008: 10–11. [185] See Chapter 4, at 156 and 162–3.

have increased? Does the increase in criminalization reflect an increase in the prevalence of the phenomena? Table 1 provides the official figures for those individuals cautioned, prosecuted and found guilty for the offences of taking an indecent image of a child, possessing such an image and meeting a child after sexual grooming between 1996 and 2006.

What these figures indicate is that there has been an increase in the number of individuals cautioned, prosecuted and convicted in relation to making child pornography during this ten-year period. For instance, over four times as many people were convicted for this offence in 2001 than in 1996 and, in comparison with 2002, the number of people convicted in 2006 rose by over 65 per cent. The significant increase in cautions, prosecutions and offenders found guilty in 2003 for the two child pornography offences is the consequence of Operation Ore.[186] The peak in 2003 for the making offence has descended in more recent years, although the figures remain much higher in 2006 than they were in 2002. As Akdeniz notes, a further reason for this marked increase may be that prosecutors have preferred to bring charges for the making offence rather than the possession offence in light of the judicial categorization of downloading child pornography from the internet as 'making' indecent images of children.[187]

Turning to the possession offence, there was actually a decrease in the number of people found guilty between 1996 (seventy-nine) and 2001 (fifty-one). Since 2004, the figures for those cautioned and convicted for possession have not changed greatly; in fact, there was a decrease in these figures in 2006 compared with 2004. Certainly in the case of possession, none of these figures is staggering, suggesting a 'tide' of child pornography.[188] Turning to the s. 15 offence, although there has been an increase in prosecutions between 2004 and 2006, the figures are notably low. As would be expected, these figures are lower than the total amount of crime measured relating to the s. 15 offence in the same period. The *Crime in England and Wales 2006/7* Home Office Statistical Bulletin records 186 instances of crime in 2004/5, 237 in 2005/6 and 322 in 2006/7.[189] The difference in these figures may support the views of

[186] See Chapter 1, at 53 and Chapter 5, at 215. [187] Akdeniz 2008: 55.

[188] Caution should be taken when discussing official statistics as a guide to the prevalence of behaviour in question as of course, these statistics only reveal the behaviour that has been discovered and the cases where law enforcement action has been taken to at least the stage of issuing a caution. What should also be borne in mind is the difficulty of ascertaining the true prevalence of crimes related to child pornography and grooming. See Quayle *et al.* 2006: 2.

[189] Nicholas *et al.* 2007: Table 2.04. The figures in this bulletin are a combination of statistics from both the British Crime Survey and the police. The crimes recorded by the British Crime

TABLE 1. Number of defendants cautioned, prosecuted and found guilty at all courts for offences relating to child pornography and sexual grooming, 1996-2006

Offence description	Disposal[1]	1996	1997	1998	1999	2000	2001
Take/make indecent photographs of children	Cautioned	15	14	26	31	35	38
	Prosecuted	80	111	116	175	284	398
	Convicted	69	103	82	139	218	289
Possession of an indecent photograph of a child	Cautioned	16	17	19	34	25	25
	Prosecuted	125	124	167	163	129	88
	Convicted	79	81	105	99	77	51

Offence description	Disposal	2002	2003	2004	2005	2006
Take/make indecent photographs of children	Cautioned	63	239	201	195	168
	Prosecuted	582	1,464	1,097	1,101	937
	Convicted	434	1,048	978	958	768
Possession of an indecent photograph of a child	Cautioned	53	205	162	151	147
	Prosecuted	156	326	200	184	171
	Convicted	97	239	184	196	166
Meeting a child after sexual grooming	Cautioned	*	*	2	5	10
	Prosecuted	*	*	9	28	43
	Convicted	*	*	3	25	36

[1] The convicted column may sometimes exceed the number prosecuted in cases where a defendant has been prosecuted in earlier years or for a different offence.

* Not applicable.

Source: RDS – Offending and Criminal Justice Group, Home Office, Ref: IOS 503-03 (for 1996-2001), RDS – Office for Criminal Justice Reform, Ref: IOS 078-08 (for 2002-6).

police officers I interviewed regarding the difficulty of proving the s. 15 offence, emphasized by one officer's statement that when sexual activity has already occurred, the individual tends to be charged with a contact offence rather than the s. 15 offence.

Survey include crimes not reported to the police and crimes that have not been recorded by the police.

A consideration of these statistics produces more questions than answers. Can the criminal law really be having a deterrent effect if the occurrence of crimes regarding child pornography and grooming is on the increase? Are these crimes really, in fact, on the increase? Could it not be that the police are getting better at uncovering the occurrence of crime, as four of the officers I interviewed suggested,[190] or are these increasing figures simply the result of the ever-widening scope of behaviour that is criminalized?[191] What the statistics certainly do not and cannot prove is that increased criminalization has deterred individuals from committing crime related to child pornography and grooming.

If the legislature's aim is to offer better protection to children, is increasing criminalization to enable more prosecutions and escalating penal consequences the most effective approach? The supposition at work here is that the criminal law deters; would-be child pornographers and groomers will be discouraged from acting in a way that violates the criminal law for fear of the consequences if caught.[192] However, in Ashworth's view: 'The evidence … does not support the belief that there is a hydraulic relationship between behaviour on the one hand and criminal laws and sentencing, on the other hand.'[193] Robinson and Darley's behavioural science assessment of whether criminal law deters leads them to conclude that assumptions that the existence of criminal law rules influences behaviour are 'disturbing' and 'dangerous'.[194] The research relied upon by Robinson and Darley reveals that many potential offenders are unaware of the criminal rules assumed to influence their behaviour.[195] What they do know about the rules may be inaccurate information acquired through 'indirect communication', 'experience and gossip'.[196] A major source of information about the criminal law rules

[190] Interviews RX1, RX3, RX4 and RX8. For example, one officer commented that since the introduction of two police operations in Lancashire focused upon child sexual exploitation, more instances of grooming are being found because they are now being looked for (Interview RX4).

[191] See also Adler 2001a: 231.

[192] For an analysis of the role that deterrence plays in justifying the criminal law, see Ashworth 2006: 16–17.

[193] Ibid.: 16.

[194] Robinson and Darley 2004: 173. The authors are 'profoundly sceptical that the formulation of criminal law rules or even sentencing policies or practices can have the deterrent effect that common wisdom assumes it has': 197.

[195] This is significant in light of research which reveals that there are five preconditions in order for criminal deterrence to be successfully achieved, all of which require the potential offender's subjective awareness of the criminal law penalties that can be imposed. See von Hirsch *et al.* 2000: 7.

[196] Robinson and Darley 2004: 178.

pertaining to child pornography and behaviour related to grooming for potential offenders is the media. It may be particularly important, then, that media news reports are littered with misleading references to the s. 15 offence as the 'grooming offence' and tend to focus on cases involving online grooming.[197] The knowledge that potential offenders derive from these reports is likely to be incomplete and inaccurate.

When prospective offenders do have accurate information about the criminal law rules, Robinson and Darley argue that their cost-benefit analysis directs them towards violation rather than compliance.[198] There will, however, be cases where their cost-benefit analysis does incentivize potential offenders to comply with the criminal law. This may be because their analysis takes into account not only the detriment they will suffer by the imposition of a sanction, but broader negative consequences, such as stigma, loss of reputation, social disapproval and the effects of 'naming and shaming'.[199] The latter is particularly relevant in the case of offences relating to child pornography and grooming. This is reflected by Earl Ferrers's observation that criminalizing the possession of child pornography should reduce the market for such material because individuals would not wish to experience the public shame that could follow conviction.[200] As von Hirsch *et al.* observe: 'The stigmatising and

[197] The following are just some of the many examples: 'Man charged with grooming offence', BBC News report, 4 June 2006, http://news.bbc.co.uk/1/hi/england/coventry_warwickshire/5046164.stm; 'Man is convicted of internet grooming', *Bristol Evening Post*, 15 February 2007; 'Online grooming', *The Times*, 26 January 2007: 'A Flying Squad officer pleaded guilty at Southwark Crown Court to online child grooming offences.' 'Law lets paedophiles slip through net', *Scotland on Sunday*, 23 May 2004, in which it is stated that: 'The new legislation makes grooming a child an offence'; 'Radical reform of sex laws to protect children', *Coventry Evening Telegraph*, 3 May 2004, in which it is stated that: 'A new grooming offence means that anyone convicted of contacting a child – including on the Internet – with the intention of committing a sex offence will face up to 10 years in jail.' Almost identical wording to this appears in 'New get-tough move against sex abusers', *Liverpool Daily Echo*, 3 May 2004; 'Tough sex laws protect children', *Evening Gazette*, 1 May 2004; and 'Tougher rape laws come into force', *The Times*, 1 May 2004. Also, misleadingly, during the Second Reading of the Sexual Offences Bill in the House of Commons, the Home Sectretary stated that: 'We are criminalising grooming' when referring to the proposed offence. Hansard, HC Deb. 15 July 2003: column 181.

[198] Applying an economic model to crime and the impact of criminalization, potential offenders are only likely to be deterred from breaking the law if, according to their calculations, the benefit they would receive from committing the offence is outweighed by the costs of being convicted, taking into account the probability that their crime will be detected. Ogus argues that, although not all potential offenders will make a subjective cost-benefit assessment in this way, many will do so instinctively. See Ogus 2006: 15. See also Becker 1976; and von Hirsch *et al.* 2000: 6.

[199] Ogus 2006: 104 and 106. See also von Hirsch *et al.* 2000: 8.

[200] Hansard, HL Deb. 22 July 1988: column 1669.

shaming effects of penal censure operate most readily when the legal prohibition bears a reasonable relation to widely held moral norms in the population.'[201]

However, even when potential offenders are directed to act in accordance with the law by their cost-benefit assessment, Robinson and Darley argue that they may still be unable to shape their conduct accordingly due to situational, social and/or chemical factors. One particular factor highlighted by the authors as an impediment to compliance is that prospective offenders often have personalities that involve a lack of self-control and acting on impulse.[202] Applying control theory to sexual offending, Simon and Zgoba argue that: 'Offenders molest children and rape women because they derive immediate sexual gratification from the acts, failing to consider the long-term consequences of their acts such as legal sanctions.'[203] I have already discussed Wortley and Smallbone's research in this area, which suggests that many child sex offenders abuse children because of an inability to exercise restraint.[204] Whilst this research may not be directly relevant to offences involving child pornography where the offender has not sexually abused a child, it could have real relevance to offenders who sexually abuse a child following a course of grooming. Ogus notes that the potential offender's subjective calculation of the likelihood of apprehension is in part influenced by whether the particular individual is risk adverse.[205] However, if it is indeed true that child sex offenders are governed by a lack of self-control, then even if the particular individual is risk adverse, this may not prevent him from creating child pornography involving the abuse of a child, or meeting a child he has groomed and committing a sexual offence.[206] He may perhaps only refrain from offending if he considers that there is a strong probability of apprehension.[207]

Besides increasing the amount of behaviour that is criminalized, another deterrence strategy is to increase the severity and certainty of punishment in order to achieve marginal deterrence. Thus, the idea is

[201] Von Hirsch *et al.* 2000: 40. [202] Robinson and Darley 2004: 179–80.

[203] Simon and Zgoba 2006: 69 and 88. I refer to the control model in Chapter 1, at 41. For a challenge to this, see Beauregard and Leclerc 2007: 117 and 126–7.

[204] Wortley and Smallbone 2006. See also Summit and Kryso 1978. [205] Ogus 2006: 103–4.

[206] To suggest that acts of grooming themselves occur due to a potential offender's lack of control is more problematic, since, as Craven *et al.* observe, 'sexual grooming is not an impulsive act' (2006: 290).

[207] According to Beauregard and Leclerc's research, in assessing the risk of apprehension, sex offenders consider factors such as the presence or absence of a capable guardian, whether the environment is risky or favourable and whether the target is an easy one (2007: 127).

that introducing stricter penalties will make individuals less likely to offend because there is a link between making sanctions more severe and increasing deterrent effects. The government's expressed intention in increasing the sentences for the child pornography offences in 2000 was to make the punishment fit the crime.[208] Might such a legislative move also be likely to deter individuals from abusing and exploiting children for the purposes of child pornography? Whilst von Hirsch *et al.* consider that the criminal law does have deterrent effects, they are much more sceptical about marginal deterrent effects. What they do suggest is that large increases in punishment '*might* have some impact', although this is dependent on 'little-understood questions of potential offenders' thresholds'.[209] We should not assume, therefore, that the increase in the maximum sentences for the child pornography offences has, in and of itself, deterred would-be offenders or re-offending rates.[210]

There are thus reasons to challenge the view that the effect of increased criminalization is a positive one of deterrence. There are also strong reasons to argue that the consequences of this increased criminalization are negative, catching behaviour which is not harmful and unjustifiably restricting liberty. As I have noted, the introduction of the SOA has given rise to a blanket criminalization approach in terms of child pornography that potentially criminalizes 'normal' behaviour, an argument Spencer has raised regarding all of the child sex offences under the SOA.[211] The legislature has paid insufficient regard to the sexual liberties rights of sixteen- and seventeen-year-old teenagers, and the very limited marriage or enduring relationship exception does not adequately address this matter. There is a distinct possibility that this could give rise to a challenge to the current law under the Human Rights Act 1998, brought by a young couple where one or both partners is aged sixteen or seventeen. The strength of the desire to protect children to the greatest degree possible has, therefore, cost teenagers who have already reached the age of sexual consent their sexual liberty rights.[212] Waites is correct to argue that the SOA reforms have exacerbated 'unresolved

[208] See Chapter 4, at 169.

[209] The authors state that potential offenders have their own threshold levels, so that above and below a particular level of severity, changes to punishments imposed do not have an effect upon their behaviour. von Hirsch *et al.* 2000: 7–8 and 47.

[210] According to Beech *et al.*, social science evidence does not suggest that varying the severity of criminal penalties deters re-offending. Beech *et al.* 2008: 226. See also Jenkins 2001: 218.

[211] Spencer 2004: 353.

[212] See also Jenkins 2001: 220 (upon the same matter with respect to American law).

tensions and disputes over the correct relationship between "rights" and "protection"'.[213]

The extent to which child pornography offences impinge upon the sexual liberty rights of older teenagers depends greatly upon an appropriate exercise of prosecutorial discretion by the CPS. This, however, offers no guarantee that older teenagers will not be prosecuted. In respect of the offences against children under the SOA, Ashworth argues that reliance upon prosecutorial discretion to avoid the criminalization of older children's consensual sexual behaviour 'is unsatisfactory in general' and in Spencer's view, such an approach does not comply with the rule of law.[214]

In light of my concerns about ever-increasing criminalization, it seems apt here to reflect on what should be required before intended criminalization can be morally justified. According to Schonsheck:

> an essential task in justifying *any* criminal statute is an inquiry into the actual consequences of the enactment and enforcement of that statute … What 'side-effects' will result from criminalization – and will the 'costs' of these side-effects be so high that they exceed the expected 'benefits' of criminalization? … And as regards the behavior which constitutes a violation of the statute – does it pose so serious a threat to the social order that imprisonment – at the cost of the individual's liberty, and significant resources of the state – is warranted? Could the incidence of the behavior be reduced to an acceptable level by means less coercive and costly than a criminal statute? And the list goes on. In sum: No argument for morally justified criminalization is sound unless it takes full consideration of the realities of law enforcement.[215]

I would add a further requirement to Schonsheck's list in the context of the laws I have examined: an inquiry into establishing the consequences of criminalizing behaviour to avoid potential risks of harm. This has been the overarching justification for extending the criminal law on child pornography and creating the offence relating to grooming, but little attention has been paid to the effects of enacting and extending law on this basis.

Problematic legal constructs

The law surrounding child pornography is framed around the notion of indecency. I have already alluded to more general criticisms of the legal application of this construct, and similar concern was expressed

[213] Waites 2005: 207. [214] Ashworth 2006: 354 and 359; Spencer 2004: 354; and Husak 2008: 27.
[215] Schonsheck 1994: 11. See also Husak 2008: ch. 2.

about the uncertainty of the term by several MPs whilst the Protection of Children Bill was being debated in 1978.[216] Criminalization was the greatest priority for Whitehouse, the NVALA and the ABUSE campaign in the late 1970s. The legal presentation of child pornography as a matter of indecency is explicable, given that the PCB was introduced at a time when the legislative focus was centred on repressing written and visual depictions of obscenity and indecency. Those campaigning for the Bill were motivated in this, as in other endeavours, by what they perceived to be declining moral standards and moral corruption and the social and legal climates were conducive to their crusades to outlaw child pornography. Writing in 1981, McCarthy and Moodie commented:

> We have seen stricter enforcement of the laws governing obscenity, the Oz Trial being the most publicised example … There have been strong municipal incentives in the clean up of 'porn shops'; the use of conspiracy charges in sex cases, attempted Private Members' legislation on 'indecent display' and revival of the archaic blasphemy laws through Mary Whitehouse's successful prosecution of the editor of Gay News.[217]

Campaigners were no doubt assisted in promulgating the broader argument that the emergence of the growing problem of child pornography was just one effect of a decline in society's moral standards because of a failure on the part of the police to enforce obscenity laws. What Jenkins describes as 'pervasive police corruption' led to a number of officers from the Obscene Publications Squad going on trial in the 1970s.[218]

However, morality was not the only or primary concern of members of the legislature who supported a new law. Clearly, they were concerned about combating the exploitation of children through child pornography. The PCA is introduced as an Act 'to prevent the exploitation of children by making indecent photographs of them' and I have already discussed the significance attached to the way in which child pornography sexually exploits children by MPs in the 1978 Parliamentary debates. Notwithstanding this, since the main harm of child pornography was presented as the making, distribution or possession of an *indecent* photograph by the legislation, whether or not the person has committed an offence depends on reasonable people considering the image to be indecent. However, the question of whether, according to adult perceptions, the photograph is 'offending

[216] Hansard, HC Deb. 10 February 1978: columns 1850, 1859 and 1970.
[217] McCarthy and Moodie 1981: 49. [218] Jenkins 1992: 77.

against decency'[219] is not getting to the substantive harm, or wrong, of child pornography.[220] To centre upon indecency is to draw attention away from the harm that the child has suffered in order for an image to be created, harm by way of exploitation and, in some cases, sexual abuse. From the start, Parliament enacted legislation that was not directed to the very harm it was designed to target.

It could be contended that the harm of indecency in the context of indecent photographs of children is not the effect on the public, but the harm experienced by the child because of the nature of the material. However, indecency is primarily a moral concept of offence, as evidenced by the definition of indecency under the common law which refers to outrage and disgust.[221] In presenting the harm of child pornography within an adult discourse of morality, the law is failing to place the child's experience at the crux of the matter. Whilst Edwards argues that, once it has been decided that the image is indecent, the child's exploitation is a self-evident truth,[222] whether adults see the image as failing to meet common standards of propriety and offensive is irrelevant to the question of whether the child in the image has been exploited. This is, and should be, the only real issue. At least one member of the House of Lords appears to have had somewhat similar concerns during the PCB debates:

> We are attempting to use a court definition of 'indecency' to stop damage, psychological and otherwise, to children … However … there are pictures taken of children which undoubtedly may have done psychological harm and damage to them but which are in no sense of the word indecent … There are also pictures which may be thought to be indecent which probably do no psychological harm to the child at all.[223]

[219] The definition of indecent provided in *The Oxford Compact Dictionary and Thesaurus* 1997. Oxford University Press.

[220] See also Akdeniz 1996: 247–8; and Schalken 1988. 'Pornografiediscussie gaat over grenzen van staatsmacht' ('Pornography debate is about the limits of state power'), NRC Handelsblad – quoted and translated by Schuijer and Rossen 1992; and Williams 2003: 109.

[221] In *Knuller* v. *DPP* [1973] AC 435, Lord Reid outlined the test for indecency as being whether ordinary decent-minded people would be 'outraged or utterly disgusted' by the material (at 457). Gibbons comments that as a legal basis for regulation, indecency operates 'not because of the harm it tends to cause but on the basis of moral disapproval by the community at large'. Gibbons 1995: 87.

[222] Edwards 1996: 129.

[223] Hansard, HL Deb. 18 May 1978: column 560 (Lord Parker). Lord Parker sought to introduce an amendment which would have criminalized images that caused harm to the child. See also Hansard, HL Deb. 22 July 1988: column 1670 (Lord Houghton).

Perhaps the view Lord Parker and I share over-problematizes the indecency scaffolding that the PCB was secured by; child pornography was then, and is now, construed as being more than just an offence against morality, since the victims of the crime are children. In addition, it could be argued that in the late 1970s, an indecency law was the most apposite vehicle for criminalizing child pornography. Although feminist concerns regarding the harmful effects of pornography were emerging at this time, it was only in the early 1980s that real attention began to be paid to the exploitation of children through child pornography by feminist authors and activists.[224] However, now, in the wake of the gradual expansion of the law, the consequences of presenting the harms of child pornography within a framework of indecency are clearly apparent. For instance, because of the malleable nature of the social and legal construct of indecency, it has been possible for the law's grip to be extended to pseudo-images of child pornography that do not feature real children or the manipulation of a real child's image. A further problem is the possibility that images of naked children can potentially be construed as indecent simply on the basis of their content, a possibility that I have noted may not have been ruled out by the courts. As I will discuss in the next chapter, this gives rise to a dangerous presentation of children's naked bodies as sexualized.

The time is now overdue to move away from this moralistic, irrelevant presentation of harm, in order to ensure that the law is framed around what is really harmful about child pornography. As I have already intimated, this harm is that which is reflected in the introduction to the PCA: the exploitation of children. The legal framework of indecency should thus be cast aside and replaced with one of exploitation, as evidenced by the content of the photograph and, in some cases, the context in which the image was taken, and not adults' reactions to the photograph's content. To assist the jury in clarifying the nature of material that amounts to exploitative images of child pornography, the Sentencing Advisory Panel's league table, as adopted by the Court of Appeal in *Oliver*, could be a part of the statutory law. This should also prevent an over-broadening of the law. Much more needs to be addressed about the concept of exploitation and the matters of harm and appropriate criminalization,[225] however, and I develop my argument in this regard in the next chapter.

[224] See Jenkins 1992: 107–9; and Jenkins 1998: 126.

[225] e.g. as should become clear in the next chapter, applying the harm principle, I only advocate the criminalization of *harmful* exploitation.

A problematic legal construct also exists regarding grooming. Here, it is not so much the framework within which the s. 15 offence exists, but the legal presentation of the problem. The offence of meeting a child following a course of sexual grooming is directed at individuals who embark upon a particular course of action to groom a child for sexual abuse. I recognize that there are practical reasons as to why the offence is thus focused, namely that evidence is much easier to obtain when records of communications exist in e-mail messages or instant messages, for example.[226] However, the legislature needed to make it much more transparent that they were only tackling one smaller part of grooming, to ensure that society and law comprehend the range of grooming behaviour and methods that groomers employ. Instead, they have created a problematic generalized legal construct of stranger grooming through the use of modern technologies. The creation of the s. 15 offence could also have given groomers a sense of security, provided that they perfect their grooming technique so that evidence of any communications they have with the child is harder to come by. Grooming a child in an environment where the child feels comfortable and already knows the groomer is more conducive to the groomer's intention of avoiding apprehension. It avoids the need to utilize internet chat rooms, mobile phone text messages and other methods of communication that could leave an electronic trail of evidence. The existing research reveals that sexual abuse is already most likely to occur where the child knows the abuser. Thus, the potential danger of criminalizing behaviour related to grooming in situations that better reflect stranger grooming is that individuals intent upon sexually abusing a child simply ensure their grooming behaviour takes place in 'safer' situational contexts.[227]

As the argument in this chapter should have made abundantly clear, the matter of harm permeates the legal discourses surrounding child pornography and grooming. Harm and dominant constructions of harm thus form the framework for my analysis in the next chapter.

[226] See Select Committee on Home Affairs 2003: App. 7, para. 5 (Childnet International's memorandum).

[227] Research indicates, e.g. that child sex offenders will adapt their grooming strategies to avoid disclosure. See Conte *et al.* 1989. I will further explore the reasons why the legal construction of grooming is a cause for concern in the following chapter.