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Obscene communication and publication offences

Obscenity was originally an ecclesiastical offence but came to be recognized as a common law misdemeanour in *Curl*.[1] That common law offence of obscene libel, as it became known, was abolished by s 73 of the Coroners and Justice Act 2009.

This chapter focuses on the offences in the Obscene Publications Acts 1959 and 1964, and related offences. The offences raise interesting issues of freedom of speech as well as challenging questions about the appropriate boundaries of criminalization.

30.1 Obscene publications

30.1.1 Offences

It is an offence under s 2(1) of the Obscene Publications Act 1959, as amended,[2] if D either:

(1) publishes an obscene article for gain or not; or

(2) 'has' an obscene article for publication for gain (whether gain to himself or gain to another).[3]

Making an obscene article is not an offence, as such; but those who participate in its manufacture may be liable as secondary parties to the publication, or the 'having', which is a continuing offence.[4] If the article created[5] involves an image or pseudo-image of a child, liability for making it will lie under the Protection of Children Act 1978. If it depicts extreme pornography or extreme images of children, the specific statutory offences discussed later may apply.

30.1.2 Defining obscenity

The ordinary meaning of obscene is 'filthy, lewd, or disgusting'. In law, the meaning is in some respects, narrower and, in other respects, possibly wider.

Section 1(1) of the 1959 Act provides the test of obscenity:

For the purposes of this Act an article[6] shall be deemed to be obscene if its effect or (where the article comprises two or more distinct items) the effect of any one of its items is, if taken as a whole,

[1] (1727) 2 Stra 788; following *Sidley* (1663) 1 Sid 168, sub nom *Sydlyes' Case* 1 Keb 620, a case of an indecent exhibition.

[2] The Criminal Justice and Immigration Act 2008, s 71 increased the maximum sentence to five years' imprisonment. See also A Antoniou, 'Possession of Prohibited Images of Children: Three Years On' (2013) 77 J Crim L 337.

[3] Obscene Publications Act 1959, s 2(1) as amended by the 1964 Act, s 1(1). D Feldman, *Civil Liberties* (2nd edn, 2002) Ch 16. For historical accounts, see N St John Stevas, 'Obscenity and the Law' [1954] Crim LR 817; CH Rolph, *The Trial of Lady Chatterley* (1961); G Robertson, *Freedom, the Individual and the Law* (7th edn, 1993) Ch 5; DGT Williams, 'The Control of Obscenity' [1965] Crim LR 471 at 522; C Manchester, 'A History of the Crime of Obscene Libel' (1991) 12 J of Legal History 36.

[4] *Barton* [1976] Crim LR 514.

[5] This includes images merely downloaded from the internet: *Bowden* [2001] 1 QB 88.

[6] For the definition of 'article', see the discussion later in this chapter.

such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it.

This substantially reproduces the common law test laid down by Cockburn CJ, in *Hicklin*:[7]

I think the test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall.

The element of a tendency to corrupt and deprave is important. It has been said that historically the test was largely ignored at common law and that, if material was found to be 'obscene' in the ordinary meaning of the word, the tendency to deprave and corrupt was presumed. If that was true, the effect of the statutory enactment of the definition in 1959 was to tighten the definition by requiring proof of an actual tendency to deprave and corrupt.[8]

Under the 1959 Act, in *Anderson*[9] (a famous case involving a publication called the 'Oz School Kids' Issue'), the conviction was quashed because the judge left the jury with the impression that 'obscene' meant 'repulsive', 'filthy', 'loathsome' or 'lewd'. An article might be all of these and yet not have a tendency to deprave and corrupt. Obscenity should, it is submitted, be a high threshold. Sexually explicit material is not necessarily obscene.[10]

The CPS advises that:

real caution must be exercised when assessing the tendency to deprave or corrupt of acts which Parliament has not provided should be subject to the criminal law, provided the likely audience is not under 18 or otherwise vulnerable. That is particularly so because whilst they may well be construed to be 'repulsive', 'filthy', 'loathsome' or 'lewd', and so fall under ordinary language to be classified as obscene, that will not suffice for obscenity under the Act.[11]

30.1.2.1 Aversion argument

It has been argued that if the article is so revolting that it would put anyone off the kind of depraved activity depicted then it would have no tendency to deprave.[12] The very 'obscenity' (in the popular sense) of a publication may, paradoxically, prevent it from being 'obscene' (in the legal sense). This is the so-called 'aversion' argument. Whether this defence is available seems to depend on the nature of the article *and* the manner of publication. In *Calder v Boyars*, the article in question was *Last Exit to Brooklyn*, 'a most powerfully written book, and, in some eyes . . . regarded as repulsive and nauseating', which was on general sale. In contrast, the defence could hardly be 'effectively run' in *Elliott*,[13] a video club case, where the material was being advertised as attractive to members of that private club.

Under the 1959 Act, it appears that the requirement that the article be 'obscene' in the ordinary meaning of the word may have disappeared and have been replaced with a technical meaning. An article may be obscene within the statute if it has a tendency to deprave

7 (1868) LR 3 QB 360 at 371. This was an appeal from a decision of a recorder quashing an order of the justices for the destruction of certain pamphlets under the Obscenity Publications Act 1857.

8 *DPP v Whyte* [1972] 3 All ER 12 at 18 per Lord Wilberforce.

9 [1972] 1 QB 304. See T Palmer, *The Trials of Oz* (1971).

10 *Darbo v DPP* [1992] Crim LR 56.

11 www.cps.gov.uk/legal-guidance/obscene-publications.

12 *Calder and Boyars Ltd* [1969] 1 QB 151; *Anderson*, n 9.

13 [1996] 1 Cr App R 432 at 436.

and corrupt (even though it is not filthy, lewd or disgusting), but it may be found not to be obscene because it is so filthy, lewd and disgusting that it would put anyone off. That defence will rarely succeed.

30.1.2.2 Subject matter capable of being obscene

Until 1965, the law of obscenity was only invoked in relation to sexually explicit material. The words 'deprave and corrupt' are clearly capable of bearing a wider meaning than this; and can be applied to material depicting conduct such as drug-taking. In *John Calder (Publications) Ltd v Powell*,[14] the court held that a book's description of the favourable effects of drug-taking could be obscene because there was a real danger that readers might be tempted to experiment with drugs.[15]

The difficulty about extending the notion of obscenity beyond sexual morality is that it is not apparent where the law should stop. It seems obvious that an article with a tendency to induce violence may be obscene;[16] and, if taking drugs is depravity, why not drinking alcohol, or, since evidence of its harmful effects is beyond doubt, smoking? Whether the conduct to which the article relates amounts to depravity would seem to depend on how violently the judge (in deciding whether there was evidence of obscenity) and the jury (in deciding whether the article was obscene) disapproved of the conduct in question. This is an unsatisfactory state of affairs. The offence is arguably ill-defined and fails to respect the principles of certainty and fair warning. However, challenges to the offence on the basis of its incompatibility with the ECHR requirement that restrictions on freedom of expression be prescribed by law have been rejected in the English courts. In *Perrin*,[17] the Court of Appeal held that the offence was prescribed with sufficient clarity within the broad scope of the concept as described by the ECtHR in *Sunday Times v UK (No 1)*:[18]

> Firstly, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able—if need be with appropriate advice—to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.

Indeed, one of the leading cases in Strasbourg jurisprudence on certainty is the obscenity case of *Handyside v UK*, in which the Court stated:

> Freedom of expression constitutes one of the essential foundations of . . . a [democratic] society, one of the basic conditions for its progress and for the development of every man. Subject to Article 10(2), it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'.[19]

Although the Court of Appeal did not consider the issue, one of the controversies raised in *Smith*[20] is whether an online conversation between two people about their private fantasies, which neither party has any proved intention of carrying out, ought to be a criminal offence. The evidence in that case was that D and the unidentified recipient of his communications had fantasized online about incestuous, sadistic sexual acts being performed on young children. There was no evidence to suggest that there was an

[14] [1965] 1 QB 509. [15] ibid, per Lord Parker CJ.
[16] cf *DPP v A and BC Chewing Gum Ltd* [1968] 1 QB 159; *Calder and Boyars Ltd* [1969] 1 QB 151 at 172.
[17] [2002] EWCA Crim 747. [18] (1979–80) 2 EHRR 245, para 49.
[19] (1979–80) 1 EHRR 737, para 49. [20] [2012] EWCA Crim 398.

intention that these acts should ever be carried out. The court accepted that the conversation fell within the statutory definition of obscene (and that there had been publication). This case can, however, be contrasted with the Canadian case of *Sharpe*[21] in which the Supreme Court of Canada held that self-produced works of the imagination were a protected form of speech because of their 'intensely private, expressive nature'. As in *Smith*, the material in *Sharpe* concerned material describing acts that would constitute a criminal offence if carried out. The Supreme Court of Canada nevertheless held that it was a violation of the Canadian Charter for the State to criminalize the possession of such material in the absence of any nexus to harm. While it is unlikely that a similar argument would find favour in this jurisdiction, the Canadian Supreme Court's judgment is interesting in highlighting the different approaches to this issue. The divergence can be explained on the basis that what is a matter of private expression and thus beyond the scope of the criminal law will fall within its ambit when that expression is disseminated to another. It was the publication of D's fantasy in *Smith* that led to criminalization although, as discussed later, some argue that the decision expands the scope of the offence beyond what was ever intended.

30.1.2.3 Depravity defined

The core of the offence is the tendency to deprave and corrupt. It is clear that the tendency to 'deprave' may be satisfied if there is a tendency to affect a reader or viewer's mental state, without causing him to engage in conduct of any kind. Indeed, the protection of the minds of the people is the law's primary object. In *DPP v Whyte*,[22] it was found that articles which would enable readers to engage in private fantasies of their own, not involving overt sexual activity of any kind, were obscene. That case also concluded that an article may be obscene although it is directed only to persons who are already depraved. 'The Act is not merely concerned with the once for all corruption of the wholly innocent; it equally protects the less innocent from further corruption, the addict from feeding or increasing his addiction.'[23] In *Smith*,[24] the Court of Appeal, relying upon the decision in *Whyte*, confirmed that publication to only one individual is capable of meeting the test of obscenity. Although s 2(6) refers to 'persons', it was held that the plural includes the singular. In cases where there has been publication to an individual but other persons are likely to read the article, then the effect on those other persons must also be considered. This will only be necessary if it could reasonably have been expected that onward publication would follow from the initial publication.[25]

30.1.2.4 Proving obscenity

Expert evidence is admissible, and this most commonly occurs in the context of the 'public good' defence (discussed later). Expert evidence also has a part to play in some cases in proving the tendency to deprave, but this must be approached with caution. Expert opinion is admissible, for example, on the medical effects of cocaine and the various ways of taking it because this is a matter which is outside the experience of the ordinary jury member.[26] But whether those effects constitute depravity and corruption—that is, whether the

[21] [2001] 1 SCR 45. [22] [1972] 3 All ER 12. [23] ibid, at 19 per Lord Wilberforce.

[24] [2012] EWCA Crim 398.

[25] For critical comment see A Gillespie, 'Obscene Conversations, the Internet and the Criminal Law' [2014] Crim LR 350.

[26] *Skirving* [1985] QB 819, criticized by RTH Stone, 'Obscene Publications: The Problems Persist' [1986] Crim LR 139 at 142. See LC 325, *Expert Evidence in Criminal Proceedings* (2011) and Criminal Practice Direction 19A.

article, whatever it is, is obscene—is exclusively a question for the jury. Expert evidence is not admissible on that issue.[27]

There is one case that holds that exceptionally, in the case of material directed at very young children, experts in child psychiatry may be asked what the effect of certain material on the minds of children would be.[28] But that decision is to be regarded as 'highly exceptional and confined to its own circumstances'.[29] The theory seems to be that a jury is as able as an expert to judge the effect on an adult but not on a child. This does not mean that the jury should be left without guidance on the question. It would seem right that they should be reminded that 'deprave and corrupt' are very strong words; that material which might lead one morally astray is not necessarily corrupting;[30] and they should bear in mind the current standards of ordinary decent people.[31] In the end, they have to make a judgement of what they believe to be the prevailing moral standard. On one view, this represents the deficiency of the offence in terms of the lack of certainty and fair warning, while on another view this at least preserves the flexibility of the offence and ensures the opportunity for it to evolve with contemporary moral standards.[32]

In *Reiter*,[33] the jury were asked to look at a large number of other books in order to decide whether the books which were the subject of the charge were obscene. The Court of Criminal Appeal held that this was the wrong approach. It is still not permissible, under the Act, to prove that *other* books, which are just as obscene as the one in issue, are freely circulating:[34] 'What is permitted elsewhere in the world is neither here nor there.'[35] But note the more recent case of *Neal*,[36] in which convictions for possession of indecent photographs of children were quashed where the photographs were all available in books of photographs by established photographers and readily available from reputable outlets.

The CPS recognizes that:

> When assessing the evidence of obscenity, . . . [t]he clearest and most common question will be whether there exists a likelihood that children would access the material. Likelihood means more than a mere possibility but does not require that it is inevitable that children would access the material.[37]

30.1.2.5 Jury directions

Where so much power to define the scope of the wrongdoing lies with the jury, much will depend not only on an article's content, but also the content and tone of the judge's direction. In the case of *Martin Secker Warburg*,[38] concerning the publication of *The Philanderer*, Stable J gave a direction to a jury which was acclaimed in the press for its enlightened attitude

[27] *Calder and Boyars Ltd* [1969] 1 QB 151; *Anderson* [1972] 1 QB 304; *DPP v Jordan* [1977] AC 699. For an argument that the limited availability of the expert evidence may contravene Art 6 and Arts 10 and 14 of the ECHR, see C Nowlin, 'Expert Evidence in English Obscenity Law: Implications of the Human Rights Act 1998' (2001) 30 Common L World Rev 94. See generally on expert evidence in obscenity trials, F Bates, 'Pornography and the Expert Witness' (1978) 20 Crim LQ 135.

[28] *DPP v A and BC Chewing Gum Ltd* [1968] 1 QB 159. [29] *Anderson* [1972] 1 QB 304 at 313.

[30] *Knuller (Publishing, Printing and Promotions) Ltd v DPP* [1972] 2 All ER 898 at 932, 936.

[31] ibid, 904.

[32] cf *Muller v Switzerland* (1991) 13 EHRR 212. In other contexts expert evidence has been permitted on the 'ultimate issue' provided the jury is left in no doubt that the final determination is for them and not for the experts.

[33] [1954] 2 QB 16. [34] *Penguin Books* [1961] Crim LR 176; Rolph, *Trial of Lady Chatterley*, 127.

[35] The judge was held to have correctly so directed the jury in *Elliott* [1996] 1 Cr App R 432 at 435, applying *Reiter*.

[36] [2011] EWCA Crim 461. [37] www.cps.gov.uk/legal-guidance/obscene-publications.

[38] [1954] 2 All ER 683.

and was thought to be reassuring to those who fear that the criminal law as applied by the judges was, even then, out of touch with public opinion.[39] The learned judge told the jury:[40]

[T]he charge is a charge that the tendency of the book is to corrupt and deprave. The charge is not that the tendency of the book is either to shock or to disgust. That is not a criminal offence. The charge is that the tendency of the book is to corrupt and deprave. Then you say: 'Well, corrupt and deprave whom?' to which the answer is: those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall. What, exactly, does that mean? Are we to take our literary standards as being the level of something that is suitable for the decently brought up young female aged fourteen? Or do we go even further back than that and are we to be reduced to the sort of books that one reads as a child in the nursery? The answer to that is: Of course not. A mass of literature, great literature, from many angles, is wholly unsuitable for reading by the adolescent, but that does not mean that a publisher is guilty of a criminal offence for making those works available to the general public.

Dealing with the particular book, he said:[41]

[T]he book does deal with candour or, if you prefer it, crudity with the realities of human love and of human intercourse. There is no getting away from that, and the Crown say: 'Well, that is sheer filth.' Is it? Is the act of sexual passion sheer filth? It may be an error of taste to write about it. It may be a matter in which, perhaps, old-fashioned people would mourn the reticence that was observed in these matters yesterday, but is it sheer filth? That is a matter which you have to consider and ultimately to decide.

Perhaps surprisingly, other directions to juries in more recent times have been a good deal less liberal and it has been suggested that Stable J's is not the typical judicial attitude.[42]

It is now made perfectly clear by the Act that an 'item' alleged to be obscene must be 'taken as a whole' so that where an article consists of a single item,[43] like a novel, the article must be judged in its entirety. Where an article, like a magazine, comprises a number of distinct items, each item must be tested individually; and if one item is found to be obscene, the whole article is obscene.[44] In *Goring*,[45] this approach was extended to films. There is a danger with this approach that juries will be more likely to focus on individual 'purple passages', which will be given an unwarranted significance in the assessment of the overall work. The normal practice is for no more than six articles to form the basis of the indictment—that being sufficient to highlight the different types of activities portrayed or described.

30.1.2.6 Who must be at risk of being depraved?

What pool of likely readers is the jury to consider? In the lauded jury direction in *Warburg*,[46] reference was made to the decently brought up young female aged 14. Such a reader served as a convenient benchmark of the people the Act serves to protect and the judge was inviting the jury to apply that standard. It is unclear whether judges ought to encourage juries to assess obscenity by reference to such a narrow pool of likely readers or viewers.

An article is obscene if it has a tendency to deprave 'persons who are likely . . . to read, see or hear the matter contained or embodied in it'. It is certainly obscene if it has a tendency to deprave 'a significant proportion' of those likely to read it.[47] Only if the number of readers likely to be

[39] See S Prevezer, Note (1954) 17 MLR 571.

[40] [1954] 2 All ER 683 at 686. [41] ibid, 687, 688.

[42] H Street, *Freedom, the Individual and the Law* (7th edn, 1983) 223. For rather extreme arguments that the offence is too liberal, see S Edwards, 'A Plea for Censorship' (1991) 141 NLJ 1478.

[43] This is a question of law for the judge: *Goring* [1999] Crim LR 670.

[44] *Anderson* [1972] 1 QB 304 at 312. [45] [1999] Crim LR 670 and commentary.

[46] [1954] 2 All ER 683. [47] *Calder and Boyars Ltd* [1969] 1 QB 151 at 168.

corrupted is 'so small as to be negligible' is the article not obscene.[48] It would not be obscene simply on the ground that it might tend to deprave 'a minute lunatic fringe of readers'.[49] If, however, a significant, though comparatively small, number of the likely readers were decently brought up 14-year-old children, then whether the book was obscene would turn on whether it was likely to deprave them. A direction to the jury on the number of viewers/readers is not a prerequisite in all cases since there is a danger that it will confuse the jury where, for example, the publication is a novel on general sale. This is also a significant issue since in ECHR terms it may assist in the determination of whether the prosecution was proportionate within Art 10(2).

It has been suggested that this ambiguity over who is being protected renders the law ineffective since it offers an opportunity for many cases to be diverted away from the criminal courts.[50] In cases that do go to trial, the questions for the jury are of a highly speculative nature. How, for example, is the jury to say whether a significant proportion of the readers will be 14-year-olds? The answer seems to depend on all kinds of matters of which the jury can, at best, have imperfect knowledge. The same article may or may not be obscene depending on the manner of publication. If it has a tendency to deprave 14-year-olds, a bookseller who sells a copy to a youth club for 14-year-olds is obviously publishing an obscene article; but if he sells the same book to the local working men's club, this may not be so.

Since any file on the internet is theoretically available to any person of computer-literate age almost anywhere, the likelihood of material being read or viewed by a particular group in terms of age, religion, culture, etc is impossible to predict.[51] In one case, blogger Darryn Walker was charged in a prosecution based on descriptions he gave in his blog of kidnap and sexual torture of members of Girls Aloud (a popular music group).[52] The BBC reported David Perry QC, prosecuting, as saying that a crucial aspect of the reasoning that led to the instigation of these proceedings was that the article in question, which was posted on the internet, was accessible to people who were particularly vulnerable—young people who were interested in a particular pop music group. 'It was this that distinguished this case from other material available on the internet.' However, a defence expert reported that the article could only have been found by internet users who were looking for such specific material. The prosecution offered no evidence.

30.1.2.7 No requirement of an intention to corrupt

The actual intention of the author is irrelevant. If the article has a tendency to deprave a significant proportion of the readership, it does not matter how pure and noble the author's intent may have been,[53] the article is obscene. In *Martin Secker Warburg*, Stable J told the jury:[54]

> You will have to consider whether . . . the author was pursuing an honest purpose and an honest thread of thought or whether that was all just a bit of camouflage. . . .

This was, strictly speaking, too favourable to the defence. The jury could take account of the author's intention, as it appeared in the book itself, as a factor which would have a bearing on whether people would be depraved.

[48] *DPP v Whyte* [1972] 3 All ER 12 at 21 and 25 per Lords Pearson and Cross. See also *O'Sullivan* [1995] 1 Cr App R 455. Cf the obligations of the BBFC when classifying videos under s 4A of the Video Recordings Act 1984 (as now re-enacted following recognition of the failure of the 1984 Act: Video Recordings Act 2010), discussed in *R v Video Appeals Committee of the BBFC, ex p BBFC* [2000] EMLR 850. See C Munro, 'Sex, Laws and Videotape' [2006] Crim LR 957.

[49] ibid, 169.

[50] S Edwards, 'On the Contemporary Application of the Obscene Publications Act 1959' [1998] Crim LR 843, arguing that it renders official statistics valueless.

[51] See on the impact the internet has had J Rowbottom, 'Obscenity Laws and the Internet: Targeting Supply and Demand' [2006] Crim LR 97.

[52] See www.guardian.co.uk/uk/2009/jun/29/girls-aloud-blog. See BBC News reports 29 June 2009.

[53] *Calder and Boyars Ltd* [1969] 1 QB 151 at 168–9. Cf *Lemon*, see 30.9.2.

[54] [1954] 2 All ER 683 at 688.

30.1.2.8 Freedom of expression

A prosecution will engage the right to freedom of expression under Art 10 of the ECHR, but will be justified for the prevention of crime or the protection of morals within Art 10(2) provided it is necessary and proportionate. In *Perrin*,[55] the Court of Appeal accepted that the Obscene Publications Act offence was necessary and proportionate within the meaning in Art 10(2). A potential difficulty arises over how proportionality is to be fairly assessed in any prosecution given that the likely audience may well be unknown. For example, in *Hoare v UK*[56] it was held that prosecution was proportionate when videotapes were sent to the intended purchaser by post because there were insufficient safeguards to ensure that only the intended purchasers would gain access to the material. Prosecution would be disproportionate otherwise where the publication is to a group voluntarily assembled with restricted access as in *Scherer v Switzerland*,[57] which involved showing a pornographic film in a private room in a sex shop.[58]

30.1.3 What is an article?

The 1959 Act provides by s 1(2):

> In this Act 'article' means any description of article containing or embodying matter to be read or looked at or both, any sound record, and any film or other record of a picture or pictures.

This includes a video cassette,[59] a DVD,[60] a computer disk[61] and a statement transmitted electronically in the course of an internet relay chat (a form of instant communication via the internet either between a group of people or in a one-to-one context).[62]

The prosecution's case in *Smith* was that what constituted an 'article' was the individual messages transmitted by D to the recipient rather than the chat-log that recorded the entire exchange. This decision has been criticized on the basis that although s 1(2) defines an article as 'any description of article', this must be read in conjunction with s 1(3)(b) which provides that a person publishes an article 'where the matter is data stored electronically [when he] transmits that data'. Gillespie[63] argues that, depending upon the online instant messaging service that is being used, there may be no data that is being stored and so the section will not bite. The crucial distinction is between those instant messaging services that store data physically, in which case reliance upon s 1(3)(b) will be uncontroversial, and those that use dynamic storage in which the data is not actually stored at all but kept in a transitional state whilst it performs its functions before dissipating entirely. In the case of the latter, it is cogently argued that there is no data being stored and therefore that the section is inapplicable.

In *Straker v DPP*,[64] it was held that while a film negative *might* be within the definition of article,[65] it was not kept for 'publication' as described in s 3(1) since it was not to be shown,

55 [2002] EWCA Crim 747. 56 [1997] EHRLR 678.

57 (1994) 18 EHRR 276; see also *X and Y v Switzerland* (App no 16564/90) 1991.

58 cf *Muller v Switzerland* (1991) 13 EHRR 212 which involved displays of sexually explicit paintings in a public gallery without warnings.

59 *A-G's Reference (No 5 of 1980)* [1981] 1 WLR 88. 60 See eg *Snowden* [2010] 1 Cr App R (S) 39.

61 *Fellows and Arnold* [1997] 1 Cr App R 244, [1997] Crim LR 524 and commentary.

62 *Smith* [2012] EWCA Crim 398.

63 See A Gillespie, 'Obscene Conversations, the Internet and the Criminal Law' [2014] Crim LR 350.

64 [1963] 1 QB 926.

65 Widgery LCJ had little doubt that this was so: *Derrick v Customs and Excise Comrs* [1972] 2 WLR 359 at 361.

played or projected,[66] but to be used for making prints. It could not, therefore, be forfeited under s 3. The gap left by that case is closed by s 2 of the 1964 Act which provides:

(1) The Obscene Publications Act 1959 (as amended by this Act) shall apply in relation to anything which is intended to be used, either alone or as one of a set, for the reproduction or manufacture therefrom of articles containing or embodying matter to be read, looked at or listened to, as if it were an article containing or embodying that matter so far as that matter is to be derived from it or from the set.

By s 2(2) of the 1964 Act, an article is had or kept for publication 'if it is had or kept for the reproduction or manufacture therefrom of articles for publication'. The negatives in *Straker* clearly fall within this provision.

In *Conegate Ltd v Customs and Excise Comrs*,[67] it was conceded that inflatable life-size sex dolls, though obscene, were not 'articles'. It has been suggested that the concession was wrong because the dolls, having faces painted on them, were to be 'looked at'. However, the gist of the obscenity seems to lie in the use to which the dolls were intended to be put rather than in their appearance.[68]

30.1.4 The offence of 'publication'

Section 1 of the Obscene Publications Act 1959[69] provides:

(1) For the purposes of this Act a person publishes an article who—

(a) distributes, circulates, sells, lets on hire, gives, or lends it, or who offers it for sale or for letting on hire; or

(b) in the case of an article containing or embodying matter to be looked at or a record, shows, plays or projects it or, where the matter is data stored electronically, transmits that data.

(2) For the purpose of this Act a person also publishes an article to the extent that any matter recorded on it is included by him in a programme included in a programme service.

(3) Where the inclusion of any matter in a programme so included would, if that matter were recorded matter, constitute the publication of an obscene article for the purposes of this Act by virtue of subsection (4) above, this Act shall have effect in relation to the inclusion of that matter in that programme as if it were recorded matter.

(4) In this section 'programme' and 'programme service' have the same meaning as in the Broadcasting Act 1990.

If the charge alleges publication to a named person, it must be proved that the article had a tendency to deprave and corrupt that person.[70] If the article does not have a tendency to deprave the person to whom it is published, it will be obscene only if either:

(1) (a) there are 'persons who are likely, having regard to all the relevant circumstances, to read, see or hear matter contained or embodied in it' (whether they have done so or not) *and*

(b) it will have a tendency to deprave and corrupt those persons;[71] or

[66] Section 1(3)(b). [67] [1987] QB 254.

[68] Note the prosecution under an offence of importing obscene articles for importing a life-like child sex doll, www.independent.co.uk/news/uk/crime/simon-glerum-child-sex-doll-guilty-sentence-jail-latest-court-trial-essex-hong-kong-indecent-obscene-a7973876.html.

[69] As amended by the Broadcasting Act 1990, s 162(1) and by the Criminal Justice and Public Order Act 1994, s 168(1) and Sch 9.

[70] *DPP v Whyte* [1972] 3 All ER 12 at 29 per Lord Salmon. [71] Obscene Publications Act 1959, s 1(1).

(2) D's initial publication was to a person for whom it would not have a tendency to corrupt, but subsequently it has in fact been published to a person whom it is likely to deprave and corrupt, and that publication could reasonably have been expected to follow from publication by D.[72]

If D is appropriately charged, he may then be convicted of publishing an obscene article to those persons.

In *Barker*,[73] where D published photographs to V, and the judge told the jury that the fact that V kept them under lock and key was unimportant, the conviction was quashed. If the jury had been told that they were to consider the tendency of the article to deprave and corrupt only V, the direction would have been unobjectionable. If, however, they were directed or left to suppose that they should consider its tendency to deprave and corrupt other people, then the direction was clearly wrong. The fact that V kept the articles under lock and key was not *conclusive* since V might have intended to produce them at some future time; but it was certainly *relevant* to the answer to proposition 1(a) above.

30.1.4.1 Internet publications

It is clear that 'transmitting data electronically' constitutes a publication. Uploading and downloading material to and from webpages is sufficient.[74] Thus, if D makes articles of an obscene nature available via a website there is a publication. D will also be held to have 'shown' obscene material by providing others with a password to access such material.[75]

The publication of material on the internet raises a difficult jurisdictional question which was, it is submitted, not adequately addressed in *Perrin*.[76] In that case, D had published material on a website in the United States which depicted coprophilia and coprophagia. X, a police officer, had accessed the site in England and viewed a 'preview page' offering a sample of the material available on subscription. His viewing (ie downloading) in England was held, without any detailed consideration, to constitute a publication by D in England. Reliance was placed on the decision in *Waddon*,[77] but the matter appears to have been conceded by counsel in that case.[78] The result is that D can be convicted of publishing obscene material in England by uploading it to a website in another jurisdiction in which such publication is legal.

The courts reconsidered this issue in *Sheppard and Whittle*,[79] a prosecution under the Public Order Act for inciting racial hatred by 'publishing' anti-Semitic material on the internet. The material was written and edited in England, uploaded from England to a server in the United States and downloaded in England by a police officer. The Court of Appeal held that the English courts had jurisdiction to try the case because there was a 'substantial measure of the activity' performed in England even though the last act of 'hosting' the material was performed in the United States (and protected there by the Constitutional right to free speech).[80] The court declined to choose between various theories of jurisdiction over internet publication: that prosecution is possible (a) in the jurisdiction where the web server upon

72 ibid, s 2(6). 73 [1962] 1 WLR 349.

74 *Perrin* [2002] EWCA Crim 747.

75 See *Fellows and Arnold* [1997] 2 All ER 548, drawing an analogy with the individual who offers the key to his library containing obscene works.

76 See generally M Hirst, *Jurisdiction and the Ambit of the Criminal Law* (2003) 188–90.

77 [2000] All ER (D) 502. See also *Harrison* [2007] EWCA Crim 2976 on possession of indecent child images via 'pop ups' on screen.

78 The court in *Waddon* declined to rule upon what the position might be in relation to 'jurisdiction if a person storing material on a website outside England intended that no transmission of that material should take place back to this country'.

79 [2010] EWCA Crim 65. See also *Burns* [2017] EWCA Crim 1466.

80 Following the case of *Smith (Wallace Duncan) (No 4)* [2004] 2 Cr App R 17 on conspiracy to defraud.

which it is hosted is situated—the 'country of origin theory'; (b) in any jurisdiction in which it can be downloaded—the 'country of destination theory'; (c) in the jurisdiction where the web server upon which it is hosted is situated, and in a jurisdiction at which the publication is targeted—the 'directing and targeting theory'.[81] Each would seem to have practical problems in application. The courts will have to revisit this issue because there will clearly be cases where there is no 'substantial measure' of activity in England and Wales as, for example, where D uploads obscene material in Russia to a website hosted in the United States and accessed in England. If the material is targeted at an audience in England, it is arguable that a prosecution is appropriate.

In broader terms, there is a danger that the internet will produce undesirably tight restrictions on obscenity. Since it will be almost impossible for a publisher to comply with the requirements of every jurisdiction, for safety's sake he may have to comply with the most restrictive.

30.1.4.2 Publication to whom?

Two issues have arisen in the context of the relevant recipient: does the publication have to be to a third party? And can there be a tendency to corrupt and deprave a police officer?

The Act does not require publication to a third party. Thus, the Court of Appeal held in *Taylor*[82] that there was a publication where X, a photographic developer, developed and printed obscene photographs which were then returned to the customer, D.[83] In *Sheppard and Whittle* (dealing with the Public Order Act 1986 offence of 'publishing'), the Court of Appeal rejected the argument that a publication requires a third party publishee (or rather sufficient publishees). The fact that an officer downloads material and is a self-publishee does not prevent there being a publication.

As regards publication to police officers, if the article has no tendency to deprave and corrupt the person to whom it is published and neither of the conditions specified earlier is satisfied, then D must be acquitted. So, in *Clayton and Halsey*,[84] where V was an experienced police officer who testified that he was not susceptible to depravity or corruption and there was no evidence of publication, or likelihood of publication, to a third party, the Court of Criminal Appeal held that the case should have been withdrawn from the jury.[85] Lord Parker CJ said:[86]

> [W]hile it is no doubt theoretically possible that a jury could take the view that even a most experienced officer, despite his protestations, was susceptible to the influence of the article yet, bearing in mind the onus and degree of proof in a criminal case, it would, we think, be unsafe and therefore wrong to leave that question to the jury.

In *Perrin*, the Court of Appeal distinguished that case from one involving the publication of a single webpage offering a preview of material on offer from the site for those willing to subscribe. The court held that the trial judge had been correct to direct the jury that it was for them to determine who was likely to see the material, and the fact that the only evidence of anyone having actually seen it was that of the police officer investigating it did not bring the case within the exception acknowledged in *Clayton and Halsey*.[87] Its availability on the internet

[81] See further M Dyson, 'Public Order on the Internet' [2010] 2 Arch Rev 6.

[82] [1995] 1 Cr App R 131.

[83] There is a resonance with the concept of supply in drugs.

[84] [1963] 1 QB 163.

[85] D, of course, did not know that he was dealing with an incorruptible police officer. He had mens rea and might now be guilty of an attempt under the Criminal Attempts Act 1981, see Ch 11. See for similar arguments, *Jones* [2007] EWCA Crim 1118.

[86] [1963] 1 QB at 168.

[87] See also *Sheppard and Whittle* [2010] EWCA Crim 65.

meant that there were persons who, in the circumstances, were likely to read or see the matter *and* the jury concluded that it would have a tendency to deprave and corrupt those persons.

One issue of a similar nature that arose was whether the offence is committed when one individual, in the course of an internet relay chat, transmits comments of an obscene nature to another. In *Smith*,[88] the prosecution appealed against the judge's terminating ruling that publication to one person was not an offence unless that person could reasonably be expected to publish onwards, which had not been demonstrated on the facts of the case. The judge placed reliance on *Baker*, *DPP v Whyte* and *Clayton and Halsey* for the proposition that there is no publication within the meaning of the statute unless the obscene material is transmitted to more than one person. In rejecting the judge's interpretation of the legislation, the Court of Appeal held that by transmitting comments to another person in the course of an internet relay chat, D was publishing them within the meaning of s 1(3)(b) of the Act. It was immaterial that the comments had only been transmitted to one person and that the identity of the recipient was unknown. The Court of Appeal rejected the judge's interpretation of *Baker*, finding instead that it supported the contention that transmission to a single person is sufficient to constitute publication. Therefore, although the recipient was unnamed the same principle applied, namely that the question for the jury was whether the articles that D transmitted had a tendency to deprave and corrupt that recipient. The decision of the Court of Appeal has been criticized on the basis that it extends the Obscene Publications Act 1959 into areas that it was never intended to cover and that the legislation has never before been used to regulate what are in effect private communications.[89]

30.1.5 The offence of 'having' an obscene article 'for publication for gain'

This offence, separate from 'publication', was introduced by amendments made by the 1964 Act and was intended to deal with the difficulties arising from *Clayton and Halsey* where it was held that the officer was incorruptible. In fact, the accused in that case were convicted of *conspiracy*[90] to publish the articles, because the buyers they had in view were not incorruptible police officers. But the implications of the case were serious; because where there was no evidence that D had conspired with another, it made it virtually impossible to get a conviction on the evidence of a police officer that the articles had been sold to him. Under the amended provision it is now possible to charge D with *having* the article for publication for gain; and the incorruptibility of the particular officer who purchases it will be irrelevant. The jury is unlikely to suppose that D kept these articles solely for sale to police officers; and they need only be satisfied that, having regard to all the relevant circumstances, (a) D contemplated publication to such a person as the article would have a tendency to deprave and corrupt, or (b) that he contemplated publication from which a further publication to susceptible persons could reasonably be expected to follow (whether D in fact contemplated that further publication or not).

By s 1(3)(b) of the 1964 Act:

> the question whether the article is obscene shall be determined by reference to such publication for gain of the article as in the circumstances it may reasonably be inferred he had in contemplation and to any further publication that could reasonably be expected to follow from it, but not to any other publication.

[88] [2012] EWCA Crim 398.

[89] A Gillespie, 'Obscene Conversations, the Internet and the Criminal Law' [2014] Crim LR 350.

[90] The Law Officers have given an assurance that conspiracy will not be used as a charge so as to circumvent the public good defence, on which see later.

The prosecution must prove more than mere possession of the articles. The reference to 'such publication' is to that which is for gain, and this must be proved.[91]

30.1.5.1 Ownership, possession or control

The meaning of 'having' an article is elucidated by s 1(2) of the 1964 Act:

> [A] person shall be deemed to have an article for publication for gain if with a view to such publication he has the article in his ownership, possession or control.

The owner of the shop in which the article is stocked may therefore be convicted as the owner of the article, as may his employee who has possession or control of it. The van driver who takes it from wholesaler to retailer may be in possession or control with a view to eventual publication for gain to another. Where articles were alleged to be held for distribution to sex shops and there bought by customers, it was necessary to prove that D contemplated that these steps would be taken. The jury had to be sure that the contemplated publication would tend to deprave and corrupt a significant proportion of the readers or viewers.[92]

30.1.5.2 'Offers' for sale

This extension of the offence overcomes another difficulty which arose under the 1959 Act as originally enacted. It was held that a person who displays an obscene article in a shop window is not guilty of publishing it.[93] Of the various ways of publishing referred to in s 1(3), the only one which could conceivably have been applicable was 'offering for sale'; and it was held that 'offer' must be construed in accordance with the law of contract,[94] under which the display of goods in a shop window is an 'invitation to treat' and not an offer.[95] This decision, of course, remains good law; but now a charge might successfully be brought of having the obscene article for publication for gain, irrespective of whether it had been displayed or not.

30.1.5.3 Film exhibitions

Film exhibitions taking place otherwise than in a private house (eg in private cinemas) used to be excluded from the offence under the terms of s 1(3)(b) of the 1959 Act. Section 53 of the Criminal Law Act 1977 amended that provision so that the exhibition of a film anywhere is a publication for the purposes of the Obscene Publications Act; but no prosecution under s 2 may be brought without the consent of the DPP where: (a) the article is a moving picture film not less than 16 mm wide and (b) publication of it took place or could reasonably be expected to take place only in the course of an exhibition of a film. 'An exhibition of a film' under s 2[96] means any exhibition of moving pictures.[97]

If the film is such as to outrage public decency then its public showing is a common law offence, and a local authority which, in performing its licensing duties, authorized the showing of an outrageously indecent film might have been guilty of aiding and abetting that offence.[98] A local authority has no duty to censor films, except in relation to children; but if it chooses to act, through its licensing powers, as a censor for adults, it must act in

[91] *Levy* [2004] All ER (D) 321 (Apr).
[92] *O'Sullivan* [1995] 1 Cr App R 455 at 460.
[93] *Mella v Monahan* [1961] Crim LR 175, following *Fisher v Bell* [1961] 1 QB 394.
[94] For a criticism of this ruling, see [1961] Crim LR at 181; cf *Partridge v Crittenden* [1968] 1 WLR 1204.
[95] *Pharmaceutical Society of Great Britain v Boots Cash Chemists (Southern) Ltd* [1953] 1 QB 401.
[96] As amended by the Cinemas Act 1985, Sch 2 and now by Sch 7, para 1 of the Licensing Act 2003. An 'exhibition of a film' now has the meaning in Sch 1, para 15 of the Licensing Act 2003.
[97] Section 2(7) of the 1959 Act as substituted by Licensing Act 2003, Sch 6, para 28(3).
[98] *Greater London Council, ex p Blackburn* [1976] 3 All ER 184.

accordance with the law and not expressly permit the commission of an offence. Since the Criminal Law Act 1977, however, no proceedings may be brought for an offence at common law (including conspiracy) in respect of a film exhibition alleged to be obscene, indecent, offensive, disgusting or injurious to morality.[99] An indictment for *statutory* conspiracy, contrary to s 1 of the Criminal Law Act 1977,[100] would lie in appropriate circumstances.

30.1.6 Defences

30.1.6.1 No reasonable cause to believe an article obscene

By s 2(5) of the 1959 Act and s 1(3)(a) of the 1964 Act, it is a defence for D to prove[101] that he:

(1) had not examined the article, and

(2) had no reasonable cause to suspect that it was such that his publication of it, or his having it, as the case may be, would make him liable to be convicted of an offence under s 2.

Both conditions must be satisfied; so if D has examined the article, his failure to appreciate its tendency to deprave and corrupt is no defence under these sections.[102]

30.1.6.2 Public good

Section 4 of the 1959 Act (as amended by the Criminal Law Act 1977) provides a defence of 'public good':

(1) . . . a person shall not be convicted of an offence against section two of this Act. . . if it is proved that publication of the article in question is justified as being for the public good on the ground that it is in the interests of science, literature, art or learning, or of other objects of general concern.

. . .

(2) It is hereby declared that the opinion of experts as to the literary, artistic, scientific or other merits of an article may be admitted in any proceedings under this Act either to establish or negative the said ground.

The defence becomes relevant only when the jury has decided that the article is obscene—that it has a tendency to deprave a significant proportion of those likely to read it. By providing the defence, the Act assumes that this potential harm to a section of the community might nevertheless be outweighed by the other considerations referred to in the section. The jury should be directed to consider first whether an article is obscene within s 1. If not satisfied of that beyond reasonable doubt, they must acquit. If so satisfied, they should go on to consider whether, on a balance of probabilities, the publication of the article, though obscene, is for the public good.[103] The jury's task is then to:

consider, on the one hand, the number of readers they believe would tend to be depraved and corrupted by the book, the strength of the tendency to deprave and corrupt, and the nature of the depravity or corruption; on the other hand, they should assess the strength of the literary,

[99] Obscene Publications Act 1959, s 2(4A). [100] See Ch 11.

[101] On the compatibility of reverse burdens of proof with Art 6(2) of the ECHR, see Ch 1.

[102] In the case of a broadcast or transmission in a programme service under the Broadcasting Act 1990, s 162 and Sch 15, para 5(1), D must show he had no knowledge or grounds to suspect that the programme included obscene content.

[103] *DPP v Jordan* [1976] 3 All ER 775. Cf *Sumner* [1977] Crim LR 362 (Judge Davies).

sociological or ethical merit which they consider the book to possess. They should then weigh up all these factors and decide whether on balance the publication is proved to be justified as being for the public good.[104]

One limb of the public good defence is that the article is an object of general concern. The House of Lords held in *DPP v Jordan*[105] that expert evidence is not admissible to support a defence under s 4 to the effect that pornographic material is psychologically beneficial to persons who are sexually repressed, perverted or deviant, in that it relieves their sexual tensions and may divert them from anti-social activities. The defence applies to 'objects of general concern', but the court held that these 'objects of general concern' must fall within the same area as those specifically mentioned in the subsection; that is, science, literature, etc. The effect on sexual behaviour and attitudes was a totally different area, covered in s 1.

The Court of Appeal[106] had reached the same conclusion on the ground that the same qualities relied on by the Crown to show that the article was obscene were being relied on by the defence to show that it was for the public good. To admit such evidence would be to allow every jury to decide for itself as a matter of public policy whether obscene material should be prohibited. Parliament has decided that it should—unless it possesses certain merits; and whatever doubt there may be as to the range of those merits, they clearly cannot include obscenity itself. 'Merits' must mean qualities which show that the publication of the article is for the public good in that it tends to advance an object of general concern. In the famous *Penguin Books* case, Byrne J said that merits from a sociological, ethical and educational point of view were included.[107] That decision must now be read in the light of *Jordan*.

To constitute the defence, the 'other objects of general concern' must not only be such as to be conducive to the public good but must also be of 'concern' to members of the public in general. The Court of Appeal in *Jordan*[108] appears to have concluded that the public generally are not 'concerned' with, or about, the relief of the sexually repressed. It is not clear whether the term 'concerned' was interpreted to mean 'interest in' or 'activity in'. According to the court, '[t]he disposal of sewage is no doubt for the public good but it is not a matter with which the generality of the public is concerned.' The general public are certainly interested in the disposal of sewage, at least in the sense that if it were not efficiently done, they would have a great deal to say about it. On the other hand, it is difficult to suppose that the general public could ever be active in the disposal of sewage. It is submitted, however, that 'concern' ought to be interpreted to mean 'interest'. The general public are not active in literature, art or science, but the Act assumes, rightly, it is submitted, that these are objects of public concern.

Another of the limbs of the defence was considered in *A-G's Reference (No 3 of 1977)*,[109] where 'learning' was described as a noun, being the product of scholarship, something with inherent excellence gained by the work of a scholar. The judge had wrongly permitted the defence to adduce expert evidence to establish that magazines had value in relation to sex education.

In determining whether the article is in the public good because it is in the 'interests of literature', it is not permissible for D to prove that other books, which are just as obscene, are freely circulating.[110] However, evidence relating to other books may be admitted to establish the 'climate of literature' in order to assess the literary merit of the book.[111] In *Penguin*

[104] *Calder and Boyars Ltd* [1969] 1 QB 151 at 172. [105] [1976] 3 All ER 775.
[106] Sub nom *Staniforth* [1976] 2 WLR 849.
[107] See Rolph, *The Trial of Lady Chatterley*, 234; *Calder and Boyars Ltd* [1969] 1 QB 151 at 172; *John Calder (Publications) Ltd v Powell* [1965] 1 All ER 159 at 161.
[108] [1976] 2 All ER 714 at 719. [109] [1978] 67 Cr App R 393.
[110] *Penguin Books* [1961] Crim LR 176; Rolph, *The Trial of Lady Chatterley*, 127. [111] ibid.

Books,[112] the prosecutor conceded in argument that the intention of the author in writing the book is relevant to the question of literary merit. If this is right, it must again[113] refer only to the author's intention as it appears in the book itself; identifying the author's private intentions would be entirely speculative.

The onus of establishing the defence is on the accused and the standard of proof required rests on a balance of probabilities.[114] The defence is not available on the common law charge of conspiracy to corrupt public morals which would often be applicable in cases covered by the 1959 Act. Parliament has been assured that prosecutors will not use that common law offence so as to circumvent the statutory defence.[115]

Section 4(1) does not apply where the article is a moving picture film or moving picture soundtrack.[116] In the case of these articles, a similar defence of public good is provided except that the interests which may justify publication are those of drama, opera, ballet or any other art, or of literature or learning.[117]

30.1.7 Mens rea

30.1.7.1 At common law

Historically, at common law, mens rea was required. In *Hicklin*,[118] it was held that it was not necessary to establish that D's motive was to deprave and corrupt; and that, if he knowingly published that which had a tendency to deprave and corrupt, it was no defence that he had an honest and laudable intention in publishing the work in question.[119] The case did not decide, as is sometimes supposed, that no mens rea is required. D's argument was that the publication was in his view justified by his predominant intention of exposing the errors of the Catholic Church. D did not claim that he did not know the nature of the thing published nor even that he did not know that its natural consequence was to tend to deprave and corrupt.[120] A person who knows that a certain result (being depraved and corrupted) will follow from his publication may properly be said to intend[121] it or, at the very least, to be reckless. *Hicklin*[122] decided merely that if D publishes material which he knows will have a tendency to deprave and corrupt, it is no defence that he did so with the best of motives.

No case before the Act of 1959 decided anything to the contrary.[123] In *Barraclough*,[124] it was held unnecessary (but desirable) that the indictment should contain an allegation of intent, because the intent was implicit in the allegation of publishing obscenity.[125] In *De Montalk*,[126] D handed to a printer some poems he had written, intending to circulate

[112] Rolph, *The Trial of Lady Chatterley*, 87 and 123.

[113] As with the question whether the book is obscene. [114] *Calder and Boyars Ltd*, n 107, 171.

[115] 'That should be known by all who are concerned with the operation of the criminal law', *Knuller v DPP* [1972] 2 All ER 898 at 912 per Lord Morris. See Lord Diplock's doubts as to the efficacy of the assurance (at 924) and Lord Reid's opinion that it does not apply to conspiracy to outrage public decency (at 906).

[116] 'Moving picture soundtrack' means 'any sound record designed for playing with a moving picture film, whether incorporated with the film or not', s 4(3).

[117] Section 4(1A). Cf Theatres Act 1968, s 3; Broadcasting Act 1990, Sch 15.

[118] (1868) LR 3 QB 360. [119] ibid, 371, 372.

[120] Cockburn assumed that D *did* know what the effect of the publication would be: it is impossible to suppose that the man who published it must not have known and seen that the effect upon the minds of many of those into whose hands it would come would be of a mischievous and demoralizing character, at 372. If the law requires knowledge, this is now clearly a question for the jury: Criminal Justice Act 1967, s 8.

[121] See Ch 3. [122] See n 118.

[123] See *Thomson* (1900) 64 JP 456 at 457. [124] [1906] 1 KB 201.

[125] '. . . intent . . . is still part of the charge or the publication would not have been lawful': per Darling J, ibid, 212.

[126] (1932) 23 Cr App R 182.

about 100 copies, mostly to young people of both sexes ('literary people'). The printer sent the poems to the police and D was convicted. His appeal on the ground that there was no sufficient direction on intent was dismissed. The headnote is misleading in asserting that the jury should not be directed that they must find an intention to corrupt public morals. Crown counsel (later Byrne J) had submitted merely that intention *was to be inferred* from the act of publication and that no affirmative evidence of intention need be given. The court dismissed the appeal, saying that the law was accurately stated in *Barraclough*.[127] In *Penguin Books*,[128] Byrne J held that if D publishes an article which is obscene, the inference that he intends to deprave and corrupt is irrebuttable. Such an approach today would seem to be inconsistent with s 8 of the Criminal Justice Act 1967;[129] but, though Byrne J used the language of proof, he was probably saying, in substance, that intent to deprave was not a constituent of the offence.[130] He conceded that the judgment in *De Montalk* was not very clear, but stated that he was bound by that decision: there was nothing in the argument that the presumption is rebuttable.

30.1.7.2 Mens rea under the Obscene Publications Act

In *Shaw v DPP*,[131] D was charged with publishing an obscene article in the form of the *Ladies Directory* (a catalogue of sex workers and the services offered). His appeal to the Court of Criminal Appeal[132] on the ground that the judge did not direct the jury to take into account D's 'honesty of purpose' was dismissed. Ashworth J said:[133]

> If these proceedings had been brought before the passing of the Obscene Publications Act 1959, in the form of a prosecution at common law for publishing an obscene libel, *it would no doubt have been necessary to establish an intention to corrupt*. But the Act of 1959 contains no such requirement and the test of obscenity laid down in s 1(1) of the Act is whether the effect of the article is such as to tend to deprave and corrupt persons who are likely to read it. In other words obscenity depends on the article and not upon the author.[134]

This view that there is no mens rea requirement is inconsistent with the view of Byrne J, in *Penguin Books*.[135] In that case, Byrne J at trial thought, in holding that there was no mens rea, that he was applying the common law rule, but according to the Court of Criminal Appeal's view, he was wrong about the common law, but reached the right result by accident, the common law having been revised by the Act.[136]

It was not necessary in *Shaw* to consider the question of mens rea. To rule that 'honesty of purpose' is irrelevant is no more than was done in *Hicklin*. However, to decide that no mens rea is necessary as to depravity and corruption, is a radical departure from the common law position. Shaw's motive may have been to help the sex workers to ply their trade, but if he knew (as he must have done) that the inevitable result of his conduct would be what the law regards[137] as depravity and corruption, he *intended* that result. Moreover, the test laid down in s 1(1) is not decisive, for this merely defines the actus reus and says nothing about mens rea. It is difficult, however, to dispute the conclusion of the Court of Criminal

[127] See n 124. [128] See n 112. [129] See n 107. [130] See the discussion of s 8; Ch 3.

[131] [1962] AC 220. [132] He was refused leave to appeal to the House of Lords on this count.

[133] [1962] AC 220 at 227.

[134] Emphasis added. The reference to the author is puzzling. Presumably 'the publisher' is meant. They were one and the same in *Shaw*.

[135] See earlier.

[136] As a matter of fact, it seems that this was not the intention of Parliament: H Street, *Freedom, the Individual and the Law* (3rd edn, 1972) 141.

[137] Whether he knew the law so regarded it is irrelevant. Cf *Sancoff v Halford* [1973] Qd R 25.

Appeal in the light of the defence provided by s 2(5).[138] If mens rea in the sense described earlier were required, this provision would be quite unnecessary. But the clear implication of s 2(5) is that D would be guilty: (a) although he had examined the article and concluded that it had no tendency to deprave and corrupt if there were reasonable grounds on which he might have suspected that it would; (b) although the jury thought it as likely as not that he did not suspect the article's tendency;[139] and (c) although he had examined the article and failed to appreciate its tendency. Thus it appears likely that the Act, perhaps inadvertently, has restricted the requirement of mens rea.

In *Anderson*,[140] the court thought it quite obvious that the jury had acquitted of the offence of conspiracy to corrupt public morals because they were not satisfied that there was the required intent to corrupt. But the court did not consider this absence of mens rea fatal to the charge under the Obscene Publications Act. In fact, the court considered whether to uphold the conviction under the proviso in s 2 of the Criminal Appeal Act 1968 (as it existed at the time) on the ground that no actual miscarriage of justice had occurred.[141] The court could hardly have been prepared to uphold the conviction if intention was a necessary element of the crime and the jury had found none.

30.1.8 Forfeiture of obscene articles

Section 3 of the Obscene Publications Act 1959 provides a summary procedure for the forfeiture of obscene materials. An information on oath must be laid before a magistrate that there is reasonable ground for suspecting that obscene articles are *kept* in any premises, stall or vehicle in the justice's area *for publication for gain*.[142] The magistrate may then issue a warrant authorizing a constable to search for and seize any articles which he has reason to believe to be obscene and to be kept for publication for gain. Such a warrant authorizes only a single entry and a second entry in reliance on the warrant will be unlawful; but, in the absence of evidence of 'oppression', the court has no discretion to exclude any evidence unlawfully obtained.[143]

Any articles seized must be brought before a magistrate for the same local justice area. If the magistrate, after looking at the articles, decides they are not obscene, then the matter drops and the articles[144] are, no doubt, returned.[145] But if he thinks they may be obscene (and he need not come to a decided opinion at this stage) he may issue a summons to the occupier of the premises to appear before the court and show cause why the articles should not be forfeited. If the court is satisfied[146] that the articles, at the time they were seized, were obscene articles kept for publication for gain, it must order the articles be forfeited. The power does not apply to any article which is returned to the person from whom it was seized.[147] The section applies to material destined for publication abroad.[148] The magistrates may thus be

138 See earlier. 139 The onus of proof on a balance of probabilities is on D.

140 See Ch 11. 141 [1971] 3 All ER 1152 at 1161.

142 *Hicklin*'s case might thus now fall outside the Act. He sold the pamphlets for the price he paid for them and this was evidently considered not to be selling for gain: (1868) LR 3 QB 360 at 368 and 374. But cf n 118.

143 *Adams* [1980] QB 575.

144 It is not necessary for each justice to read all the material, provided the whole is discussed and considered by them: *Olympia Press Ltd v Hollis* [1974] 1 All ER 108. On an appeal to the Crown Court, the judge may take a number of articles at random to sample, showing them to the defence as an indication of the basis on which he has reached his decision: *Crown Court at Snaresbrook, ex p Metropolitan Police Comr* (1984) 79 Cr App R 184. Cf RTH Stone, 'Obscene Publications the Problems Persist' [1986] Crim LR 139.

145 *Thomson v Chain Libraries Ltd* [1954] 1 WLR 999.

146 In *Thomson v Chain Libraries Ltd* [1954] 2 All ER 616 at 618, Hilbery J said that the onus of proof is on the person who appears to show cause. *Sed quaere*: the magistrate must be *satisfied* that the article is obscene.

147 Criminal Law Act 1977, Sch 12, s 65(4) and Criminal Justice and Police Act 2001, Sch 2, para 10.

148 *Gold Star Publications Ltd v DPP* [1981] 2 All ER 257.

required to form an opinion as to the likely effect of the material on foreigners with different attitudes and customs but, in practice, they are likely to rely on their knowledge of human nature and are unlikely to hold an article to be obscene where it is destined for country X and not obscene where it is destined for country Y. As with the discussion of obscenity on the internet, there is a danger that this leads to the most restrictive threshold being applied.

The owner, author or maker of the articles, or any other person through whose hands they had passed before being seized, is entitled to appear and show cause why they should not be forfeited; and any person who appeared or was entitled to appear to show cause against the making of the order has a right of appeal to the Crown Court.

The defence of 'public good' is available in proceedings for forfeiture;[149] but the decision is, of course, now in the hands of the magistrates and not in the hands of a jury. Thus, if proceedings for forfeiture are brought instead of an indictment, the author or publisher of a book can effectively be deprived of a right to jury trial.[150]

There is not necessarily any uniformity of decision-making. One bench may pass a magazine or picture, while another condemns it.[151] In practice, it seems that the advice of the DPP is usually taken by the police before applying for a warrant. The DPP's advice is not *necessary* since it is thought undesirable that she should be in the position of a literary or moral censor.

Where, however, the article is a moving picture film in respect of which a prosecution under s 2 of the 1959 Act could not be instituted without the consent of the DPP,[152] no order for forfeiture may be made unless the warrant under which the article was seized was issued on an information laid by or on behalf of the DPP.[153]

30.1.9 ECHR and European law matters

An argument that forfeiture is incompatible with the ECHR right to peaceful enjoyment of possessions (Art 1, Protocol 1) will be unlikely to succeed.[154] If the forfeiture denied D the opportunity to have the material shown in circumstances in which there was no likelihood of corruption (eg by removing it from general sale and making it available in a private outlet), the argument might have more substance.

As far as the EU and free movement of goods within the EU are concerned, the Divisional Court has held that once goods were within the definition of obscenity in s 1 of the 1959 Act, there was no difficulty in applying (what is now) Art 36 of the Treaty on the Functioning of the European Union to permit restriction on importation and forfeiture.[155]

30.2 Obscenity in the theatre

The Theatres Act 1968 abolished censorship of the theatre generally. Section 2 of the Act makes it an offence to present[156] or direct an obscene performance of a play. The maximum penalty is six months' imprisonment in the magistrates' court, and three years on

[149] Obscene Publications Act 1959, s 4(1).

[150] See the challenge in *Britton v DPP* [1996] CLY 1486, on the law officers' undertakings.

[151] The same thing could, of course, occur in relation to proceedings on indictment. If another publisher were to be prosecuted for publishing *Lady Chatterley*, the decision in *Penguin Books*, n 110, would not be relevant in evidence; and another jury, hearing different expert evidence, might well arrive at a different conclusion.

[152] See earlier. [153] Obscene Publications Act 1959, s 3(3A).

[154] *X Co v UK* (1983) 32 DR 231.

[155] See *Bow Street Metropolitan Stipendiary Magistrates, ex p Noncyp Ltd* [1990] 1 QB 123; *Wright v Customs and Excise Comrs* [1999] 1 Cr App R 69. For detailed discussion see P Craig and G de Búrca, *EU Law: Text, Cases, and Materials* (6th edn, 2015) Ch 19.

[156] cf *Grade v DPP* [1942] 2 All ER 118.

indictment. The definition of obscenity is the same as in s 1(1) of the Obscene Publications Act 1959,[157] except that attention is directed to the effect of the performance on the persons who are likely to *attend* it instead of 'read, see or hear it'. A defence of 'public good' is provided by s 3 which is the same as that under s 4 of the 1959 Act, except that the interests which may justify the performance are, as in the case of films, those of 'drama, opera, ballet or any other art or of literature or learning'. A performance given 'on a domestic occasion in a private dwelling' is exempted by s 7 from the provisions of s 2. If proceedings are to be brought in respect of the alleged obscenity of the performance of a play, they must be brought under the Act and not under common law offences: s 2(4). A prosecution on indictment under s 2 must be commenced within two years of the commission of the offence: s 2(3).

30.3 Extreme pornography

The law relating to obscenity was not reviewed in the Sexual Offences Review in 2000. It was widely regarded as being in a state of incoherence and ambiguity and in desperate need of reform. For some time, suggestions had been made to reform the central test of corrupting and depraving, replacing it with schedules of prohibited material (eg torture, coprophilia, child pornography, etc).[158] The government announced[159] proposals to outlaw the possession of an extreme pornographic image. In August 2005, the Home Office launched a consultation paper on the possession of extreme pornographic material stating that it was considered 'possible that such material may encourage or reinforce interest in violent and aberrant sexual activity to the detriment of society as a whole'.[160] The Home Office published a response in 2006.[161] The resulting legislative proposals were heavily criticized, not merely because they further restrict free expression, but because they were not consistent with the stated policy aim. If the concern is with extreme pornography leading to violent offending, it was strange that the offences are limited to possession of sexual but not violent imagery.[162] It was unsurprising therefore when s 37 of the Criminal Justice and Courts Act 2015 extended the offence to include images of rape and non-consensual sexual penetration.[163]

157 See earlier. 158 See historically on reform, the Williams Committee (1979) Cmnd 7772.

159 In part triggered by the evidence in the prosecution of *Coutts* [2006] UKHL 39, for the manslaughter of a schoolteacher. The evidence at trial revealed that Coutts had been downloading very graphic violent pornography and that this may have been a cause of his actions. See also the rough sex defence in Ch 16.

160 Para 27. See also J Rowbottom, 'Obscenity Laws and the Internet: Targeting Supply and Demand' [2006] Crim LR 97; S Edwards, 'A Safe Haven for Hardest Core' [1997] Ent LR 137.

161 *Consultation on the Possession of Extreme Pornographic Material: Summary of Responses and Next Steps* (2006). See also the responses at www.gov.scot/Topics/archive/law-order/pornography/ExtremePornograhic Materia.

162 See also J Samiloff, 'Harmful Viewing' (2007) 157 NLJ 170. For reform of this area in Scotland, see www .gov.scot/Topics/archive/law-order/pornography/ExtremePornograhicMateria. For views against the legislation, see www.backlash.org.uk, and against the Home Office, http://news.bbc.co.uk/1/hi/7364475.stm.

163 In *Connectivity, Content and Consumers* the government announced that it planned to amend the Criminal Justice and Immigration Act 2008 so as to criminalize the possession of extreme pornography that depicts rape. The amendment now provides that an image is 'extreme' if it depicts, in an explicit or realistic way, the non-consensual penetration of a person's vagina, anus or mouth by another person's penis, or the non-consensual sexual penetration of a person's vagina or anus by a part of another person's body or by anything else and a reasonable person would think the people were real.

The offences were originally enacted in the Criminal Justice and Immigration Act 2008 and came into force in January 2009[164] and were amended in 2015. They are triable either way. The offence comprises possession of extreme pornographic images. The offences are very controversial.[165] They are distinct from the obscenity offences discussed previously because these outlaw possession of categories of adult pornography per se. It is likely that the offences will be further reformed.[166]

30.3.1 Pornographic

Under s 63 of the Act, an image is 'pornographic' if it must reasonably be assumed to have been produced solely or principally for the purpose of sexual arousal (s 63(3)). Where the image appears as part of a series its potential pornographic nature is to be considered in the context of the whole (s 63(4)).[167] It is not relevant to consider D's intentions nor whether he was sexually aroused. The test is objective.

30.3.2 Extreme image

'Image' is defined to include a moving or still image (produced by any means); or data (stored by any means) which is capable of conversion into a moving or still image (s 63(8)). There is no requirement that D made or created the image. Crucially, the Act goes on to define an 'extreme image' as one which is 'grossly offensive, disgusting, or otherwise of an obscene character' and falls within s 63(7). As enacted, s 63(7) provided that the images caught were those depicting:

(a) an act which threatens a person's life,[168]

(b) an act which results, or is likely to result in serious injury to a person's anus, breasts or genitals,[169]

(c) an act which involves sexual interference with a human corpse,

(d) a person performing an act of intercourse or oral sex with an animal (whether dead or alive),

and a reasonable person looking at the image would think that any such person or animal was real.

Section 37 of the Criminal Justice and Courts Act 2015 extends the offence to include images of rape and non-consensual sexual penetration.

Classified films are excluded from the scope of the offence.[170]

[164] SI 2008/2993. See generally on the offences, C McGlynn and E Rackley, 'Criminalising Extreme Pornography: A Lost Opportunity' [2009] Crim LR 245; AD Murray, 'The Reclassification of Extreme Pornographic Images' (2009) 72 MLR 73.

[165] See the discussion on the consultation responses in Murray, ibid, 78.

[166] See for recent critical comment, C McGlynn and H Bows, 'Possessing Extreme Pornography: Policing, Prosecutions and the Need for Reform' (2019) 83 JCL 473.

[167] By s 63(5), further explanation is offered: 'where—(a) an image forms an integral part of a narrative constituted by a series of images, and (b) having regard to those images as a whole, they are not of such a nature that they must reasonably be assumed to have been produced solely or principally for the purpose of sexual arousal, the image may, by virtue of being part of that narrative, be found not to be pornographic, even though it might have been found to be pornographic if taken by itself'.

[168] eg depictions of hanging. The clause was originally much broader and included images that appeared to threaten life.

[169] Including surgically reconstructed ones: s 63(9). Examples might include penetration with sharp objects.

[170] Section 64 of the 2008 Act.

The Ministry of Justice describes[171] having chosen the words 'grossly offensive and disgusting' as ordinary words, intending them to be understood in a non-technical way. The core terms—life-threatening, serious injury, etc—are all undefined. The Ministry of Justice notes that it was not intended that serious injury relate to any class of injury under the OAPA 1861.[172]

Section 63(6) defines an extreme image as one which shows an act which threatens a person's life/results in injury, etc *and* is 'grossly offensive, disgusting or otherwise of an obscene character'. The government's focus was primarily on the harm to those participating in the activities being depicted.[173]

Commentators suggested that it was not clear what specific harm the provisions as originally enacted sought to prevent.[174] It was further suggested that the offence should only be invoked to target those acts that are themselves unlawful, such as depictions of rape.[175] Unlike indecent images of children which necessarily involve depictions of child sex offences, there is not necessarily a similar *direct* harm in the depiction of all forms of extreme pornography. The offence does, however, have its defenders. It has been argued that it is an expression of benign perfectionism, making a statement about the type of society in which individuals wish to live, rather than one motivated by repressive paternalism.[176] Challenges under Art 10 and Art 8 seem likely, although there have been none so far. The question will be whether the offence is necessary and proportionate. Although the Obscene Publications Act offences have been found compatible, this is a different offence focused on mere possession by an adult, and not the publication of material which might corrupt others.

30.3.3 Possession

In the first reported case under the 2008 Act, *Ping Chen Cheung*,[177] D was found with a laptop bag containing hundreds of DVDs bundled together by elastic bands in packs. Many were counterfeit films.[178] In the bottom of the bag was a bundle of DVDs depicting acts of bestiality. He denied having knowing possession of the bestiality DVDs. The DVD covers displayed images of oral sex with animals, but these were not visible simply by opening the bag and the DVDs did not bear his fingerprints. The issue at trial was whether D had possession of them if, as he claimed, he lacked knowledge of the type of images they depicted and whether he had proved the defence under s 65 that he had not seen the image and did not know, nor had any cause to suspect, it to be an extreme pornographic image. D admitted he knew the bag contained DVDs and that it was his intention to sell them. The trial judge directed the jury in such a confused manner as to conflate several requirements and the Court of Appeal quashed the conviction.

171 Circular 2009/01, para 12. 172 ibid, para 16.

173 See C Itzin, A Taket and L Kelly, 'The Evidence of Harm to Adults relating to Exposure and Extreme Pornographic Material' published on the government website: www.justice.gov.uk. See also S Edwards, 'The Failure of British Obscenity Laws in the Regulation of Pornography' in C Itzin and P Cox (eds), *Pornography and Sexual Aggression* (2000).

174 See S Forster, 'Possession of Extreme Pornographic Images, Public Perceptions and Human Rights' (2010) 15 Cov LJ 21, 25.

175 E Rackley and C McGlynn, 'Prosecuting the Possession of Extreme Pornography: A Misunderstood and Mis-Used Law' [2013] Crim LR 400.

176 S Easton, 'Criminalising the Possession of Extreme Pornography: Sword or Shield?' (2011) 75 J Crim L 391.

177 [2009] EWCA Crim 2965; see also *Wakeling* [2010] EWCA Crim 2210.

178 D pleaded guilty to a Trade Marks Act 1994 offence in relation to these.

From the Court of Appeal's judgment it is clear that the prosecution must prove (a) that D had physical possession of the DVDs (that is necessary but not sufficient for conviction) and (b) that D knew of the existence of the thing in his custody or control.[179] It is not necessary as part of the mens rea for the prosecution to prove that D knew that the DVDs contained extreme pornographic images.

> It is only if there is a real doubt as to whether the defendant believed that that which he knew he had, was of a wholly different nature from that which in fact it was, that possession would not be made out. A mere mistake as to quality of the thing which the defendant knows is in his possession or control is not enough to prevent him being in possession for the purposes of the offence under section 63. What amounts to something of a wholly different nature will be a question of fact and degree for the jury in a given case where this issue arises. A belief, for example, that something which is in fact a collection of DVDs is a collection of, say, floor tiles might well qualify. . . . In the case of a package or a box, . . . the defendant's possession of it will lead to a strong inference that the defendant was in possession of its contents within the meaning of the statutory provision.[180]

Things will be more complex where the images are on a computer. Issues may arise as to whether D knew that he had *data* on his computer. See the decisions in the next section.

30.3.4 Defences

There is no defence of the image being for the public good. There are two statutory defences: one of a legitimate reason for possession (s 65) and one of participating in the consensual acts depicted (s 66).

Section 65 provides in effect three defences for D to prove: (a) that he had a legitimate reason for being in possession of the image concerned;[181] or (b) that he had not seen the image concerned and did not know, nor had any cause to suspect, it to be an extreme pornographic image; or (c) that he (i) was sent the image concerned without any prior request having been made by or on behalf of him, and (ii) did not keep it for an unreasonable time.[182]

In *Baddiel*,[183] D was convicted of possessing images depicting a person performing an act of intercourse or oral sex with an animal. They had been sent to a WhatsApp group including D. A vast number of images had been sent to members of that group over a nine-month period (over 19,400 pages of download). D denied possession of the images and relied on the fact that the default setting for the WhatsApp app meant that images were automatically stored on the phone's camera roll when the messages were opened. Every WhatsApp opens immediately without the user scrolling down to view each one. D argued that the fact that

[179] Compare cases under s 160 of the Criminal Justice Act 1988: *Collier* [2004] Crim LR 1039, and *Atkins v DPP* [2000] 2 Cr App R 248. In *Atkins*, the court held that the offence of possession under s 160 of the Criminal Justice Act 1988 is not committed unless the defendant knows that he has photographs in his possession. In *Collier*, it was noted that the defences in s 160(2)(a) and (c) of the 1988 Act proceed on the assumption that the defendant is aware that the photograph is an *indecent* photograph *of a child*.

[180] At [15].

[181] This is similar to s 1(4)(a) of the Protection of Children Act 1978 and s 160(2)(a) of the Criminal Justice Act 1988. Whether D has a legitimate reason for being in possession of the image concerned is a question of fact: *Atkins v DPP* [2000] 2 Cr App R 248.

[182] See *Sharples* [2012] EWCA Crim 3144 where D claimed he thought he had deleted the image from his phone that had been sent to him unsolicited. The defence is similar to s 160(2)(c) of the Criminal Justice Act 1988. See *Bowden* [2000] Crim LR 381; *Collier* [2004] EWCA Crim 1411, [2004] Crim LR 1039 and commentary; see also A Gillespie, 'Tinkering with Child Pornography' [2004] Crim LR 361.

[183] *Baddiel* [2016] EWCA Crim 474.

the messages had been opened did not necessarily mean that the images had even been seen let alone continued to be possessed.

D had not requested the messages, or responded to them, or forwarded them. He had deleted them, but it was unclear when they had been opened or deleted. There was no evidence from D's computer of any user-related actions in relation to extreme pornography, and the presence of the images was not in character with what D or any other user of the computer appeared to be interested in.

On appeal, D argued that under s 63(3), the relevant purpose for creating the images had to be that of the person who sent the images to him rather than that of the person who took the original images. The Court of Appeal upheld the conviction. Under s 63(3), what mattered was whether the image was produced for the purposes of sexual arousal of anyone who came to have it, whether that was the producer of the image, a distributor or the ultimate recipient. The section was designed to prevent the possession of such images by whoever came to have them.

The court held that the section did not draw subtle distinctions between photographer, sender and any ultimate recipient of images. The circumstances in which the images were received were immaterial, as was who produced the image.

D had never solicited the images, possibly had not even viewed them, had deleted them, had never attempted to re-access them and yet the Act applied to his conduct. It is difficult to see what an innocent-minded person should do if in receipt of unsolicited extreme pornography.

Given the prevalence of social media apps which allow for images to be attached, it is unsurprising that the issue arose again. In *Okoro*,[184] D was convicted of being in possession of an indecent image of a child and also of extreme pornographic images. D claimed that he had been sent the images, unsolicited, via WhatsApp, had not known what they contained until he downloaded or opened them, had accessed them only once and believed that he had deleted them but had saved them by mistake. The central issues for the jury were whether D had seen the videos, whether he had cause to suspect that they were indecent and whether he had kept them for an unreasonable length of time. In his route to verdict, the judge directed the jury that the appellant had admitted being in possession of the images since they were on his phone. The court observed that neither the Criminal Justice Act 1988 (in relation to images of children) nor the Criminal Justice and Immigration Act 2008 (in relation to extreme pornography) defined 'possession', but that the meaning of the term had been considered by the Court of Appeal on a number of occasions in the context of images stored on a computer. The issue for the court in the instant case was different as it concerned a file that was sent uninvited.

The court rejected an interpretation of the law that a defendant must be shown to be aware of all the relevant content of a digital file on his device. If that were necessary, then the statutory defences would be redundant. The question is whether it is enough that D should know that digital files had been sent to him, for example as an attachment to an email or as an encrypted file by one of the apps by which digital content may be transmitted. The court stated that the statute requires proof by the Crown of possession of the pornography or images of child abuse as a preliminary step before the burden of proof shifts to the accused, to establish the statutory defences.

It cannot be the law that a defendant must be shown to be aware of all the relevant content of a digital file on his device. If that were necessary, then the statutory defences in s.160(2) CJA

184 [2018] EWCA Crim 1929.

1988 would be redundant. The question is whether it is enough that the accused should know that digital files had been sent to him, say, as an attachment to an email, or perhaps more likely as an encrypted file by one of the many apps by which digital content may be transmitted. Can possession be established by demonstrating that material is contained in an attachment to an unopened email in an inbox? Or, as claimed here, where the information was transmitted through WhatsApp without any invitation from the accused, and without him viewing any or all of the material.

There is such a volume of information in the memory of modern devices that proof of knowledge of all transmitted content would be impossible.[185]

An accused cannot be convicted in relation to material of which he was genuinely totally unaware. Nor could a defendant be said to be in possession of a digital file if it was in practical terms impossible for him to access that file. However, for these statutory purposes the court was clear that possession is established if D can be shown to have been aware of a relevant digital file or package of files which he has the capacity to access, even if he cannot be shown to have opened or scrutinized the material.

The court concluded that two elements had to be established: (a) the images must have been within D's custody or control, ie so that he was capable of accessing them; and (b) he must have known that he possessed an image or a group of images. It is clear that knowledge of the content of those images is not required to make out the basic ingredients of the offence; instead, that issue is dealt with by the statutory defences. Where unsolicited images are sent on WhatsApp, and automatically downloaded to the phone's memory, it was held that it is highly likely that the first element will be fulfilled. The court stated that the second element will depend on whether the defendant knew that he received an image or images.

The impact of this judgment is likely to increase at time goes on, given the prevalence of messaging apps and the reliance placed upon them to send and receive images. The court's analysis of the relationship between mens rea and the statutory defences is useful and must surely be correct. Knowledge of the content of the message is unnecessary, but is relevant to the statutory defences. The two issues should not be conflated. The court's analysis demonstrates the strict nature of these offences and serves to emphasize the importance of the statutory defences.

Under s 66 it is a defence for D to prove that the images were portrayals of acts in which D directly participated and that the acts did not involve any infliction of non-consensual harm. If D can lawfully participate in the activities it would be nonsensical to criminalize his possession of the images of his doing so.[186] This defence is not available if the images involve animals (s 63(7)(d)), or in cases in which the image portrays an act with a real corpse. Under s 66(3), 'non-consensual harm' extends to harm to which a person cannot in law consent under the decision in *Brown* (see Ch 16) as well as cases where there is no consent in fact.

30.3.5 Procedure

The consent of the DPP will be required for a prosecution (s 63(10)).[187] Conviction on indictment will result in a maximum sentence of three years' imprisonment where the image depicts acts in s 63(7)(a) or (b) (life threats or serious genital injury), and a maximum of two years in other cases: s 67.

[185] At [43]–[44]. [186] Hansard, HL, 30 Apr 2008, col 275 (Lord Hunt).
[187] See Ministry of Justice Circular 2009/01.

30.4 Possession of prohibited images of children

An offence of possession of prohibited images of children[188] was introduced in ss 62 to 67 of the Coroners and Justice Act 2009.[189] Detailed discussion of this offence and those of making, etc and possession of indecent images of children lies beyond the scope of this work.[190]

It is, however, worth noting one unusual feature of the offence. It deals with images depicting children but, significantly, it is restricted to images which are not already caught by the indecent child image offences. For the purpose of this offence, by s 65(3) 'image' does *not* include an indecent photograph, or indecent pseudo-photograph, of a child. What, therefore, is being criminalized is the possession of images of imaginary children, unlike the indecent image offences in which the image depicts a real child (or part of a child). Whereas the offences under the Protection of Children Act 1978 and the Criminal Justice Act 1988 involve direct harm to children as the images depict child sex offences, in this offence there is no child who is directly harmed; there is no child involved in the creation of the images.[191] Ost examines in detail the possible moral bases for the offence, distinguishing (a) those cases in which the image was one of a real child which has been manipulated to disguise that and (b) images of fantasy children. In relation to the latter, debate has arisen as to the sufficiency of the basis for criminalization. Possible justifications are that the images will be used to groom children and that the images encourage the objectification of children as sex objects.[192] The parliamentary debates gave rise to some interesting discussions of whether it ought to be an offence for an adult to possess for private use images of imaginary children.

The offence under s 62 comprises: (a) possession[193] (b) of an image[194] (c) which is a prohibited one[195] (d) which is a pornographic[196] image (e) of a child.[197]

The maximum sentence on indictment is three years' imprisonment: s 66. The offence has a number of qualifications and safeguards: the definition in s 62 is designed to exclude

[188] See in particular the analysis in A Antoniou, 'Possession of Prohibited Images of Children: Three Years On' (2013) 77 J Crim L 337 and S Ost, 'Criminalising Fabricated Images of Child Pornography: A Matter of Harm or Morality?' (2010) 30 LS 230.

[189] For the background to the offence, see the Home Office, *Consultation on the Possession of Non-Photographic Visual Depictions of Child Sexual Abuse* (2007) in which it is acknowledged that there is no evidence that these images lead to child sex abuse of real children. See on this the comments of the Joint Committee on Human Rights, Eighth Report, 20 Mar 2009, para 1.178.

[190] See generally A Gillespie, *Child Pornography: Law and Policy* (2012); S Ost, *Child Pornography and Sexual Grooming: Legal and Societal Responses* (2009); M Taylor and E Quayle, *Child Pornography: An Internet Crime* (2003).

[191] The offence is about 'protecting children from abuse and to protect children and vulnerable adults from coming into contact with the material . . . [that] can desensitise people to child abuse and reinforce people's inappropriate and potentially dangerous feelings towards children': Joint Committee on Human Rights, Eighth Report, 20 Mar 2009, para 1.175.

[192] Ost proposes an alternative form of offence focusing on creation and publication of such images.

[193] Possession will no doubt be construed as in the extreme pornographic cases (eg *Ping*, discussed earlier) and follow closely the case law on drug possession.

[194] An image includes a moving or still image, produced by any means, and therefore sketches or computer-generated images are within the reach of the offence (s 65(2)(a)).

[195] The image must be 'grossly offensive, disgusting or otherwise of an obscene character' (s 62(2)(c)). The language of s 62(2)(a) is identical to that in s 63(6)(b) of the 2008 Act discussed earlier. The image must be one that either (a) focuses solely or principally on a child's genitals or anal region (s 62(6)(a) and s 62(2)(a)), or (b) portrays any of the specified acts in s 62(7) (penetration, oral sex, masturbation, bestiality, etc: see s 62(6) and s 62(7)(a)).

[196] An image is 'pornographic' if it is of such a nature that it must reasonably be assumed to have been *produced* solely or principally for the purpose of sexual arousal: s 62(3).

[197] A 'child' means a person under the age of 18 years: s 65(5).

genuine works of art; by s 63 the offence does not apply to classified films; the consent of the DPP is required for prosecution: s 62(9). Moreover, there is a defence in s 64 for the defendant to prove: (a) that he had a legitimate reason for being in possession of the image concerned; (b) that he had not seen the image concerned and did not know, nor had any cause to suspect, it to be a prohibited image of a child; (c) that he (i) was sent the image concerned without any prior request having been made by or on behalf of him, and (ii) did not keep it for an unreasonable time.[198]

30.5 Posting indecent or obscene matter

Section 85 of the Postal Services Act 2000 provides:

(3) A person commits an offence if he sends by post a postal packet which encloses—

(a) any indecent or obscene print, painting, photograph, lithograph, engraving, cinematograph film or other record of a picture or pictures, book, card or written communication, or

(b) any other indecent or obscene article (whether or not of a similar kind to those mentioned in paragraph (a)).

(4) A person commits an offence if he sends by post a postal packet which has on the packet, or on the cover of the packet, any words, marks or designs which are of an indecent or obscene character.

(5) A person who commits an offence under this section shall be liable—

(a) on summary conviction, to a fine not exceeding the statutory maximum,

(b) on conviction on indictment, to a fine or to imprisonment for a term not exceeding twelve months or to both.

The offence follows closely that under the Post Office Act 1953 which it replaces, and the authorities on that section retain significance.

30.5.1 Meaning of indecent or obscene

Under the 1953 Act, the Court of Appeal made clear in the infamous Oz Trial[199] that in the postal context, 'obscene' takes its dictionary definition and not that adopted for the offences under the 1959 Act.[200] The Court of Appeal confirmed in *Kirk*[201] that the words 'indecent' and 'obscene' used in the 2000 Act are ordinary words. They are readily understood by members of the jury and it is unnecessary, and might be misleading, for the jury to be given any interpretation of the words which might either narrow or enlarge their meaning. The defendant was an anti-vivisectionist who had sent articles to companies whom he considered to be connected with animal experimentation. The envelopes and contents of some of the packets showed graphic images of animal experiments in laboratories and the results of such experiments. The trial judge's direction followed the leading case under the previous legislation (s 11 of the 1953 Act) where it was held in *Stanley*[202] that: '[t]he words "indecent or obscene" convey one idea, namely offending against the recognised standards

198 This follows that in relation to adult extreme images in the Criminal Justice and Immigration Act 2008, s 65.

199 *Anderson* [1972] 1 QB 304.

200 Lord Widgery CJ stated expressly that obscene 'includes things that are shocking and lewd and indecent', at 311.

201 [2006] EWCA Crim 725.

202 [1965] 2 QB 327.

of propriety, indecent being at the lower end of the scale and obscene at the upper end of the scale . . . an indecent article is not necessarily obscene, whereas an obscene article almost certainly must be indecent'.[203] In *Stanley*, the verdict of a jury holding that certain cinematograph films were not obscene (for the purposes of the Obscene Publications Act) but were indecent (for the purposes of the Post Office Act) was upheld.

Kirk confirms that in the 2000 Act, as under the 1953 Act, 'obscene' bears its ordinary meaning[204] and so may not extend to material simply because it advocates drug-taking or violence which would not ordinarily be described as 'indecent'.[205] On the other hand, such articles might well be said to offend against 'recognised standards of propriety'; and, for the purposes of other legislation, abusive language and shouts in church alleging hypocrisy against the reader of the lesson[206] have been held to be 'indecent'. 'Indecent' is not confined to sexual indecency, but extends to other improper matters.

The test of indecency is objective and the character of the addressee is immaterial.[207] Indeed, the object of the section seems to be the protection of Post Office employees against dangerous, deleterious or indecent articles.[208] It is evidently not limited to employees, however, since it is only in rare cases that they will have access to matter 'enclosed' as required by para (b). Evidence is not admissible by any person to say what the effect of the article was on him. The jury do not need assistance. They are themselves 'the custodians of the standards for the time being'.[209] The court in *Kirk* rejected a challenge to s 85 under Art 10 of the ECHR. The offence is not incompatible with Art 10 on the basis that it lacks certainty—even though the element of obscenity remains to be defined by the jury on a case-by-case basis.[210] The court's rejection of Art 10 challenges must be read with caution since it is submitted that the question whether the Article is engaged and whether the prosecution and/or punishment is necessary and proportionate will require a factual assessment in every case.

30.6 Other offensive communications offences

30.6.1 Malicious communications

The Malicious Communications Act 1988[211] created an offence of sending a letter, electronic communication[212] or article which is indecent or grossly offensive, threatening or containing information which is known or believed to be false. In *Connolly v DPP*,[213] the court held that the words 'indecent' and 'grossly offensive' are ordinary English words. The court upheld a conviction for sending images of aborted foetuses to pharmacists selling the morning-after pill. The offence does not depend on the recipient's actual reaction,

[203] ibid, 333–4.

[204] *Anderson* [1971] 3 All ER 1152 at 1162. The judge's direction was thus correct so far as the 'Post Office count' was concerned. *Stamford* [1972] 2 QB 391.

[205] *Lees v Parr* [1967] 3 All ER 181n (by-law).

[206] *Abrahams v Cavey* [1968] 1 QB 479 (Ecclesiastical Courts Jurisdiction Act 1860, s 2); *Farrant* [1973] Crim LR 240.

[207] *Straker* [1965] Crim LR 239; *Kosmos Publications Ltd v DPP* [1975] Crim LR 345.

[208] *Stamford* [1972] 2 All ER 427 at 429. [209] ibid, 432.

[210] *Perrin* [2002] EWCA Crim 747. See the Australian High Court discussion of an equivalent offence in *Monis and another v R* [2013] HCA 4.

[211] See historically Law Com Working Paper No 84, *Criminal Libel* (1982) and LC 147, *Poison Pen Letters* (1985). For comprehensive discussion, see the Law Comm Report No 381, *Abusive and Offensive Online Communications: A Scoping Report* (2018).

[212] As inserted by the Criminal Justice and Police Act 2001, s 43. [213] [2007] EWHC 237 (Admin).

but on the intention of the sender. The court also rejected the argument that on the facts of that case the prosecution infringed Arts 9 and 10 of the ECHR, concluding that the right to freedom of expression does not include a right to cause distress or anxiety. Section 32 of the Criminal Justice and Courts Act 2015 makes this offence triable either way and substitutes a maximum sentence of two years on indictment.

30.6.2 Offensive communications

Under s 127(1) of the Communications Act 2003, a person is guilty of an offence if he (a) sends by means of a public electronic communications network a message or other matter that is grossly offensive or of an indecent, obscene or menacing character; or (b) causes any such message or matter to be so sent. On summary conviction, an offender is liable to six months' imprisonment or an unlimited fine, or to both. Section 51 of the Criminal Justice and Courts Act 2015 amended the offence so that it can be tried provided an information is laid before the end of the period of three years beginning with the day on which the offence was committed.

The provision was considered by the House of Lords in *DPP v Collins*.[214] D telephoned the office of his MP and in the course of complaining about various issues he spoke of 'wogs', 'Pakis' and 'black bastards' during his conversations with the office members. Of those who heard the messages, one had found the language upsetting, one had not done so and one had found it depressing. None of those people happened to be a member of an ethnic minority. The justices acquitted D on the basis that, while offensive, a reasonable person would not consider these messages 'grossly' offensive. The Divisional Court agreed. The House of Lords allowed the prosecutor's appeal, holding that the offence was complete when the message was sent, provided D is shown to have intended or. been aware of the proscribed nature of his communication.

The purpose of this offence is not to protect against unsolicited offensive communication,[215] but to proscribe the use of public communications systems for sending messages offending against 'basic standards of society'. D's guilt did not depend on whether the message was received by a person who was deeply offended, or by a person who was not. Since there is no need for any receipt of the message to be proved, liability arises irrespective of whether the recipient was grossly offended/menaced/found it to be indecent or obscene. Indeed, logically the characteristics of the likely recipient cannot be taken into account in determining whether the actus reus is performed, although the expected reaction of the likely recipient (such as they are known to the sender at the time the message is sent) is *relevant* to the issue of the sender's state of mind. In terms of whether the words used were 'grossly offensive', the House held that this was for the justices to determine as a question of fact applying the standards of an open and just multi-racial society, and the words must be judged in context. The House of Lords found that C's messages were grossly offensive and would be found by a reasonable person to be so.[216]

The House of Lords also rejected a challenge based on Art 10 of the ECHR: s 127(1)(a) interferes with a person's right to freedom of expression, but is a restriction directed to a legitimate objective,[217] preventing the use of a public electronic communications network for attacking the reputations and rights of others. The offence is necessary in a democratic

[214] [2006] UKHL 40. [215] cf Sedley LJ in the Divisional Court at [9].

[216] The likelihood that the words would cause offence to those to whom they relate (not necessarily the recipients) may be relevant in evaluating their offensiveness: see Lord Bingham at [10]; Lord Carswell at [22]; Lord Brown at [26]–[27].

[217] The House placed emphasis on Art 17, which prevents a person relying on Convention rights to undermine the rights of others. For arguments that Art 17 is overused and therefore reduces the protection of Art 10, see S Turenne, 'The Compatibility of Criminal Liability with Freedom of Expression' [2007] Crim LR 866.

society to achieve that end.[218] The court must ascertain on the facts of each case whether the Article is engaged and whether the prosecution is necessary and proportionate on the facts.

The result is a far-reaching offence, extending to even solicited communications where D1 is happy to receive D2's indecent communication. This is a controversial interpretation, described by one commentator as 'fundamentally flawed' and 'a complete fallacy' because of the potential impact it will have on telephone and internet adult-chat/sex industries.[219]

The offence has proved to be particularly controversial when invoked in the context of social media.[220] In *Chambers v DPP*,[221] the applicant was convicted of committing an offence contrary to s 127 when he expressed his frustration at the closure of the airport from which he was intending to travel by posting the following message on Twitter: 'Crap! Robin Hood Airport is closed. You've got a week and a bit to get your shit together otherwise I am blowing the airport sky high!' The appellant was convicted in the magistrates' court and his appeal to the Crown Court was dismissed on the basis that the message was menacing per se, as an ordinary person seeing the tweet would have been alarmed and the appellant appreciated that it was of a menacing character. In its analysis of the actus reus of the offence, the Divisional Court made clear that it was not contradicting anything that had been said in *Collins* but noted that the House of Lords confined itself to considering the meaning of 'grossly offensive'. It was held that whether a message is menacing must be determined having regard to the circumstances and the context in which the message was sent.[222] Although there does not need to be an immediate threat, the court nevertheless held that the fear or anxiety must be real and 'if the person, or persons who receive or read it, or may reasonably be expected to receive, or read it, would brush it aside as a silly joke, or a joke in bad taste, or empty bombastic or ridiculous banter, then it would be a contradiction in terms to describe it as a message of a menacing character'. In the absence of any evidence that suggested the applicant's tweet caused anyone fear or apprehension, his conviction was quashed.

Although it was not required to do so, the court went on to consider the mens rea of the offence. It was observed that the House of Lords did consider this issue in *Collins* and given that there was no principled basis for distinguishing between the two forms of the offence in this regard, that decision was binding precedent. The Lord Chief Justice suggested, *obiter*, that the mens rea of the offence is that D intends the message to be menacing or appreciates that others may find it menacing.[223] His lordship then observed:

> We would merely emphasise that even expressed in these terms, the mental element of the offence is directed exclusively to the state of the offender, and that if he may have intended the message as a

[218] The prosecution of informed consenting-adult sex line or internet chat room users engaged in an indecent conversation seems unlikely in practice, but is now theoretically possible. Whether such a prosecution would withstand challenge under Art 8 of the ECHR is another matter. Could it be a proportionate response to prosecute where the individuals are adults communicating only with each other?

[219] A Gillespie [2006] Ent LR 236. Lord Brown acknowledged the problem for 'chat lines', but left this matter unresolved.

[220] For discussion, see www.theguardian.com/law/2012/jul/31/tom-daley-twitter-abuse-law.

[221] [2012] EWHC 2157 (Admin).

[222] The court also accepted that a tweet was a message sent by a 'public electronic communications network' for the purposes of s 127(1) of the 2003 Act even if it was found by means of a search of published content.

[223] *Chambers* was relied upon by the Administrative Court in *Karsten v Wood Green Crown Court* [2014] EWHC 2900 (Admin). D was convicted of sending a menacing message by a telecommunications network contrary to s 127(1)(a) of the 2003 Act. The message comprised the words, 'Ask if he is Jewish. As him if he's eating kosher.' One of the questions contained in the stated case was whether the court was correct to find that this was menacing within the meaning of s 127(1)(a). After citing *Chambers*, Cranston J stated that the statute imposes a relatively high threshold and that the words, whilst nasty and anti-Semitic, could not be regarded as menacing. In his brief concurrence, Laws LJ stated: 'The courts need to be very careful not to criminalise speech which, however contemptible, is no more than offensive. It is not the task of the criminal law to censor offensive utterances.' At [21].

joke, even if a poor joke in bad taste, it is unlikely that the mens rea required before conviction for the offence of sending a message of a menacing character will be established.

This *dictum* has been criticized on the basis that it may render the s 127 offence less useful in cases of cyberbullying where D often claims that he was 'only joking'.[224] Although the presumption of mens rea being held applicable to both forms of the offence is welcome, care must be taken with the approach to messages that are intended as jokes. It will not necessarily follow that D will be able to avoid liability by simply stating that he intended the message as a joke, given that it will be open to the justices to find that although D intended it as joke, he was nevertheless aware that his message could be construed as menacing.

In response to the controversy surrounding this case, the DPP published guidelines on prosecuting cases involving communications sent via social media.[225]

In *R (on the application of Chabloz) v CPS*,[226] C performed antisemitic songs at a right-wing organization's meeting at a London hotel. They were recorded and uploaded onto YouTube. She had an internet blog onto which she posted links or uploaded the videos. She posted hyperlinks to the performances and was convicted in the magistrates' court of two counts under s 127(1)(b) of the Communications Act 2003 of causing to be sent by means of a public electronic communications network a message or other matter that was grossly offensive. She was also convicted under s 127(1)(a) of one count of sending such a message by uploading a YouTube video of one of the performances. C did not challenge the conclusion that the performance of the songs was grossly offensive. It was submitted on her behalf that: (a) posting a hyperlink was a neutral act which did not cause an offensive message to be sent; and (b) in uploading a YouTube video, she had sent it to a server in California which was an inanimate object with which communication was not possible. The Divisional Court held that the case fell to be considered by reference to *DPP v Collins* and *Chambers v CPS*. These cases confirmed that the purpose of s 127(1) was to prohibit the use of a public electronic communications network to contravene basic standards of public decency. The actus reus was the sending of a message with an intention to insult. The offence did not depend on the message being received, but was complete when it was sent. The potential recipients of a message posted on the internet were members of the public. The court held that it was immaterial that an accused might have intended only that a message should be read by a limited class of people. When the message was posted, it became a message sent by an electronic communication service for the purposes of s 127(1). In terms of whether posting a hyperlink was a neutral act, the court made reference to the Canadian Supreme Court's judgment in *Crookes v Newton*[227] in which the majority concluded that the mere creation of a hyperlink in a website did not lead to a presumption that somebody actually used the hyperlink to access the impugned words. The court held that the correct approach was to consider all factors in answering the question of whether posting a hyperlink amounted to endorsing content. C had told an audience that she had performed the songs and she facilitated access to the performances by posting the hyperlink. That was not a neutral or passive act and it widened the distribution of the material. The claimant had used the internet to create a link to where the material was stored with the purpose of causing the material to be seen. She had complete knowledge of the content of the material. She had caused a message to be sent in that she plainly told people that videos of her songs existed and provided a means to access them. She clearly endorsed the content. The legislation aimed to protect the

224 A Gillespie, 'Twitter, Jokes and the Law' (2012) 76 J Crim L 364.

225 www.cps.gov.uk/legal-guidance/social-media-guidelines-prosecuting-cases-involving-communications-sent-social-media.

226 [2019] EWHC 3094 (Admin). For criticism, see M O'Floinn [2020] Crim LR 548.

227 [2011] 3 SCR 269.

integrity of a public service and prevent its misuse. It was wrong to place undue emphasis on the technology used to achieve an aim of disseminating material. In terms of when the offence was completed, it was completed as soon as the video was uploaded. It was irrelevant that the server was in California.

30.6.3 Sending unsolicited material

Sending unsolicited matter describing human sexual techniques, or unsolicited advertisement of such matter, is an offence[228] under s 4 of the Unsolicited Goods and Services Act 1971.

30.6.4 Reform

The Law Commission published a scoping report which considers reform of this area.[229] The Commission found that there were some positive aspects of the offence in s 127(1) of the Communications Act 2003. For example, because the offence does not require evidence of actual harm caused to victims, it can be prosecuted more easily than if it were a result crime. The Commission also stated that the broad terms used in the offence meant that it was generally flexible enough to cover a huge variety of offensive and abusive online communications, thereby providing scope to adapt to future developments. However, the Law Commission did make a number of criticisms of the offence, for example the fact that it does not include communications sent over a 'private' network, such as Bluetooth. More fundamentally, the Law Commission observed that the communications offences overlap and would benefit from consolidation and rationalization. Perhaps the Law Commission's most significant criticism of the offence was the reliance it places on the concept of 'gross offensiveness'. The Law Commission noted that only minimal progress has been made by the courts in defining and clarifying its meaning. This lack of clarity risks overcriminalization and controversy regarding charging and prosecuting decisions. This is particularly problematic, given that the concept of 'offence' raises particular challenges for freedom of expression. This led the Commission to recommend that the term be considered as part of a broader review of communication offences. More recently,[230] The Law Commission has published reform proposals to the Malicious Communications Act 1988 and the Communications Act 2003 'to criminalise behaviour where a communication would likely cause harm'. More specifically, the offence would criminalise D who, without lawful excuse, sends a message and D foresees a risk that anyone 'likely' to see the message might suffer 'serious emotional distress'. The offence does not require proof that anyone was actually harmed. The element of 'without reasonable excuse' is an element of the offence that must be proved by the prosecution. 'Reasonable excuse' should be defined to include where the communication either was or was meant as a contribution to a matter of public interest. This is an extremely wide offence and has been subjected to critical comment.[231]

The Commission also proposes an offence for D to send or post a communication that he 'knows to be false', he intends 'to cause non-trivial emotional, psychological, or physical harm to a likely audience', and he sends it without reasonable excuse. The proposals would not cover communications that D believes to be true—no matter how dangerous those communications may be. On other areas the Commission makes no proposals beyond what was recognised in the 2018 Report.

228 *DPP v Beate Uhse (UK) Ltd* [1974] QB 158.

229 Law Commission Report No 381, *Offensive Online Communications: A Scoping Report* (2018).

230 *Harmful Online Communications: The Criminal Offences* (2020) LCCP 248.

231 see L. Higson-Bliss [2021] Crim LR (forthcoming) who concludes that there is a risk in relying on 'a catch-all reasonableness element to mitigate the wide nature of the proposed reform to protect freedom of expression, without creating clear and distinct rules as to when the criminal law should intervene with online communications'.

30.7 Indecent displays

The Indecent Displays (Control) Act 1981 makes it an offence to make, cause or permit the public display of any indecent matter. Matter displayed in, or so as to be visible from, any public place is publicly displayed. A public place is one to which the public have or are permitted to have access, whether on payment or otherwise, except (a) where the payment is or includes payment for the display, or (b) the place is a shop or part of a shop to which the public can gain access only by passing an adequate warning notice, as specified in the Act (s 1(6)). The Act is aimed at displays that people cannot avoid seeing as they go about their business—bookshop and sex shop window displays, cinema club posters, and so on. It does not apply to television broadcasts as defined in the Broadcasting Act 1990, displays visible only from within an art gallery or museum, the performance of a play within the Theatres Act 1968 or a film exhibition as defined in the Licensing Act 2003. 'Matter' is anything capable of being displayed except an actual human body or part of it. Thus 'lap dancing' or 'stripping' is not caught.[232] 'Indecent' is not defined. Whether matter is indecent will no doubt be considered a matter of fact to be determined by applying the ordinary meaning of the word.[233]

30.8 Sharing private sexual imagery

Section 33 of the Criminal Justice and Courts Act 2015 creates an offence to tackle 'revenge porn'.[234] The offence is committed where D discloses a private sexual photograph or film if the disclosure is made: (a) without the consent of an individual who appears in the photograph or film, and (b) with the intention of causing that individual distress. Disclosure to the subject of the image is not an offence.

Defences exist for journalistic material which D believes is in the public interest to publish (s 33(4)); where D reasonably believed that the disclosure was necessary for the purposes of preventing, detecting or investigating crime (s 33(3)); or (in s 33(5)) where there is a reasonable belief that the photograph or film had previously been disclosed for reward and no reason to believe that the previous disclosure for reward was made without the consent of the individual who appears in the photograph or film and to whom the current disclosure is intended to cause distress.

The maximum sentence on indictment is two years' imprisonment.

Note that s 33 does not require any actual distress to have resulted but merely requires an intention to cause distress. By s 33(8), a person 'is not to be taken to have disclosed a photograph or film with the intention of causing distress merely because that was a natural and probable consequence of the disclosure'. The provision provides an equivalent approach to s 8 of the Criminal Justice Act 1967 but in this situation no result is actually necessary—it is an ulterior intent.

By the Domestic Abuse Act 2021, s 69 the offence is extended to threats to share such an image.

232 See the regulation of venues providing such services under the Policing and Crime Act 2009.

233 See *Brutus v Cozens* [1973] AC 854.

234 For discussion, see A Gillespie, '"Trust Me, It's Only for Me": "Revenge Porn" and the Criminal Law' [2015] Crim LR 866; C McGlynn and E Rackley, 'Image-Based Sexual Abuse' (2017) 37 OJLS 534; S Pegg, 'A Matter of Privacy or Abuse? Revenge Porn and the Law' [2018] Crim LR 512; J Ledward and J Agate, '"Revenge Porn" and s.33: The Story So Far' [2017] Ent LR 40. See LC 381, p 249.

30.8.1 Reform

Further reform is proposed by the Law Commission in its consultation paper. The Law Commission plans new offences.[235] 'A 'base' offence which prohibits the taking or sharing of an intimate image of a depicted person where they do not consent and there is no reasonable belief in consent by the perpetrator. An additional more serious offence of taking or sharing an intimate image without the consent of the depicted person, with the intention to humiliate, alarm or distress the victim. A further additional serious offence of taking or sharing an intimate image, without the consent of the depicted person and the perpetrator having no reasonable belief in consent, for the purpose of either their own or someone else's sexual gratification.' These offences would not require proof of an intent to cause distress. A defence of reasonable excuse would apply where D takes or shares an image if: D reasonably believed it was necessary for the purposes of preventing, detecting, investigating or prosecuting crime, for legal proceedings or for the administration of justice; or the images were taken or shared for a genuine medical, scientific, or educational purpose; or taking or sharing the image was in the public interest.

These will include criminalising 'downblousing'—taking an image, usually from above, down a female's top in order to capture their bra, cleavage, and/or breasts.' There is also a proposal to criminalise sharing of altered images—including sexualised photoshopping and deepfakes. It will also be an offence to share an intimate image of the depicted person with the depicted person (ie the person who originally consented to the photo being taken). This will prevent D who sends V an image of herself for the purpose of causing the victim distress, either as means to exert control and power or leading to a further threat.

30.9 Outraging public decency

The common law offence of outraging public decency[236] is still relied upon to prosecute some displays despite the number of statutory offences available.[237]

The offence involves doing an act of a lewd, obscene or disgusting nature which outrages public decency. The offence is triable either way.[238] An article which is sufficient for the offence of outraging public decency is not necessarily obscene. It may well outrage and disgust without having any tendency to deprave and corrupt. In such a case, a prosecution for the common law offence is not barred by s 2(4) of the Obscene Publications Act.[239] This was the conclusion of the court in *Gibson*[240] where in a commercial art gallery D exhibited 'Human Earrings', earrings made out of freeze-dried human foetuses. It was not suggested that anyone was likely to be corrupted by the exhibition but, as the jury had found, the public would be outraged by it.

[235] Intimate Image Abuse LCCP 253 (2021).

[236] See P Rook and R Ward, *Rook and Ward on Sexual Offences: Law and Practice* (5th edn, 2016) Ch 15 xxx. There is a brief examination of the offence in LCCP 193, *Simplification of Criminal Law: Public Nuisance and Outraging Public Decency* (2009) Part 3 and LC No 358, *Simplification of the Criminal Law: Public Nuisance and Outraging Public Decency* (2015).

[237] There are reported to be 300–400 prosecutions per year: see LCCP No 193, para 4.36. The offence also overlaps with a number of sexual offences in the Sexual Offences Act 2003: see Ch 17. It covers diverse conduct: eg *Anderson* [2008] EWCA Crim 12—urinating on a dying woman in the street.

[238] Criminal Justice Act 2003 (Commencement No 2 and Saving Provisions) Order 2004, SI 2004/81.

[239] See earlier.

[240] [1991] 1 All ER 439. See also M Childs, 'Outraging Public Decency: The Offence of Offensiveness' [1991] PL 20.

The defence of 'public good' under s 4(1) of the 1959 Act does not apply to the common law offence. An article may have a tendency both to corrupt and to cause outrage. It seems to follow that in such a case the protection of the 1959 Act can be avoided by charging the common law offence. It can hardly be said that the 'essence of the offence' charged is that the article is obscene because the prosecution do not have to prove obscenity in order to establish it; and, if obscenity is not the essence of the offence charged, the prosecution is not barred by s 2(4). The less grave conduct of outraging public decency therefore attracts no defence when the more serious one of corrupting and depraving does.

30.9.1 Actus reus

In the leading case of *Hamilton*,[241] D used a hidden camera in his bag to film up young girls' skirts while they stood in supermarket checkout queues. The Court of Appeal conducted an extensive review of the authorities. The elements of the offence were identified as being twofold:

i) The act was of such a lewd character as to outrage public decency; this element constituted the nature of the act which had to be proved before the offence could be established.

ii) It took place in a public place and must have been capable of being seen by two or more persons who were actually present, even if they had not actually seen it. This constituted the public element of the offence which had to be proved.[242]

The first element is whether the act is of such a lewd, obscene or disgusting character that it outrages public decency.[243] An obscene act is one which offends against recognized standards of propriety and which is at a higher level of impropriety than indecency; and a disgusting act is one which fills the onlooker with loathing or extreme distaste or causes annoyance.[244] 'It is not enough that the act is lewd, obscene or disgusting and that it might shock people; it must, . . . be of such a character that it outrages minimum standards of public decency as judged by the jury in contemporary society.'[245] The court observed that 'outrages' is a strong word. If no such act is done, the offence is not committed, however outrageous D's intentions or fantasies, as revealed, for example, in his private diaries.[246] It might be different where the observers of ambiguous conduct are aware of the actor's purpose. They might then be outraged by acts which, if not known to be done with that purpose, would not be outrageously indecent.

Proof of the element of outrage is often by inference. In *Lunderbech*,[247] D, masturbating in a children's playground, was seen only by two police officers who did not testify that they were outraged. The court said that where the act is plainly indecent and likely to disgust and annoy, 'the jury are entitled to infer such disgust and annoyance without affirmative evidence that anyone was disgusted and annoyed'. The so-called 'inference' is plainly fictitious. In *May*[248] (a schoolmaster 'behaving in an indecent manner with a desk' in the presence of two boys), it was held to be irrelevant that the two boys may have enjoyed the performance.[249] The effect seems to be that the offence is committed if the jury think the conduct outrageously indecent because it would disgust and annoy them, and therefore the ordinary

[241] [2007] EWCA Crim 2062. The court conducted an extensive historical survey of the offence and its elements.

[242] At [21]. [243] *Hamilton* [2007] EWCA Crim 2062, [31]. [244] ibid, [30]. [245] ibid, [30].

[246] *Rowley* [1991] 4 All ER 649. [247] [1991] Crim LR 784.

[248] (1989) 91 Cr App R 157.

[249] See also *Choi* [1999] EWCA Crim 1279 (filming in ladies' lavatory in supermarket).

members of the public whom they represent, if they witnessed it.[250] 'Disgusting' is that which is capable of filling the onlooker with loathing or extreme distaste or of causing the onlooker extreme annoyance.[251]

Secondly, the court in *Hamilton* concluded that the act must be done in a place to which the public has access or in a place where what is done is capable of public view and where at least two members of the public who are actually present *might* see it,[252] or hear it.[253] In *Hamilton*, the girls in the queue did not see the conduct (D secretly filming) nor did others in the vicinity, but there were more than two people present who *could* have seen it. Controversially, the court declined to restrict the offence so as to require *actual* sight or sound of the nature of the act:

> The public element in the offence is satisfied if the act is done where persons are present and the nature of what is being done is *capable of being seen*; the principle is that the public are to be protected from acts of a lewd, obscene or disgusting acts which are of a nature that outrages public decency and which are capable of being seen in public.[254]

The Court of Appeal accepted that all the reported cases had involved one person *actually being present* seeing the act, but observed that the requirement was a matter of evidence rather than one of substantive law. This was technically *obiter.* The court's interpretation in *Hamilton* is surprising in that it demonstrates a willingness to extend the common law to tackle new mischief which is a practice the House of Lords had deprecated in *Rimmington*[255] in the context of public nuisance.[256]

In *F*,[257] the judge ruled that the two-person rule must be satisfied and the Court of Appeal upheld that ruling. F sat in his car masturbating while watching children play on a nearby sports ground. Whenever passers-by approached the car, he covered himself. He was watched by W alone from an upstairs window in her house overlooking the road. There were not two people present who *might* have seen his acts.

The Divisional Court in *Rose*[258] held that the two individuals present who might see the conduct must be two other than those knowingly participating in the outrageous conduct. In that case, D and his girlfriend engaged in oral sex at 1 am in a bank foyer accessible for those wishing to use ATM machines therein. Their activity was recorded on CCTV. The foyer was deserted, though well lit and passers-by could have peered in.[259] The court held that it is probably not sufficient that the only individuals who might see the conduct are able

250 See also *Hamilton* at [31].

251 *Choi* [1999] EWCA Crim 1279; see also *Cuthbertson* [2003] EWCA Crim 3915 (filming under cubicles in changing rooms with a mobile phone camera).

252 *Vaiculevicius* [2013] EWCA Crim 185 (sex in public park); *Curran* (1998) 29 Oct, unreported, CA (copulation and oral sex on bonnet of car in short-stay car park at Heathrow sufficient); having sex with a stranger's dog in public: *Daily Telegraph*, 21 July 2010.

253 *Hamilton* expressly accepts that this is sufficient, drawing on the statements in parliamentary debates on the Sexual Offences Bill 2003, cited by Rook and Ward, *Rook and Ward on Sexual Offences: Law and Practice*, para 15.58 xxx.

254 *Hamilton*, [39] (emphasis added). 255 [2006] 1 AC 459.

256 For criticism see A Gillespie, '"Up-Skirts" and "Down Blouses": Voyeurism and the Law' [2008] Crim LR 370, examining whether voyeurism under s 67 of the Sexual Offences Act 2003, see Ch 17, might apply and whether England ought to adopt a new offence based on the New Zealand model to tackle 'upskirting'. See now the offence outlined later.

257 [2010] EWCA Crim 2243. See Rook and Ward, para 15.55 xxx for criticism of the Court of Appeal's apparent preparedness for such a case to be left to the jury.

258 [2006] EWHC 852 (Admin).

259 On that basis it is reconcilable with *Hamilton*.

to view it via CCTV. A private recording of an act which had not previously been seen is probably insufficient to constitute the offence.[260]

It is insufficient that the act in a private dwelling is witnessed by two people,[261] or in public where only one person could see the conduct.[262] Interestingly, in *HKSAR v Chan Yau Hei*[263] the Hong Kong Court of Final Appeal considered whether the offence could be committed in circumstances where D posted an offensive message on an internet discussion forum. The prosecution argued that the public element of the offence could be satisfied 'virtually'. After conducting a review of the English authorities, the court held that it was a fiction to describe the internet as a place in any physical or actual sense. For that reason, Fok J stated:

> Therefore, in my opinion, the first part of the public element of the offence does require that the *actus reus* (whether it be something said, done or exhibited) be committed in a physical, tangible place and not virtually in cyberspace by way of the internet. To hold that the internet is a public place for the purposes of the offence would involve either dispensing with the first part of the public element of the offence or substantially extending its meaning and would therefore amount, impermissibly, to judicially extending the boundaries of criminal liability.[264]

His lordship observed that the judgment did not preclude the offence from being committed via the internet in every instance, as it remains possible for someone to post a message online that will be seen in a physical place to which the public has access. The example given was a large public computer display, such as a flight information display at an airport. This is a cogent judgment and, should the issue ever arise in this jurisdiction, it is submitted that the approach taken by the Hong Kong court is one that commends itself.

30.9.2 Mens rea

To the extent that the House of Lords in *Lemon* declared blasphemy to be an offence of strict liability,[265] *Gibson* does the same for outraging public decency. D must presumably be aware of the nature of the act he is doing. If Gibson had not known that the earrings were made from human foetuses he would presumably not have been guilty. But the case decides that it was not necessary to prove that he intended or foresaw that the effect of the exhibition would be to outrage public decency.[266] As the court said, the practical effect of this ruling is not great. It is difficult to imagine a jury not being satisfied that D knew very well what the effect of his act would be. But this does not justify dispensing with mens rea. Rather, it demonstrates that there is not that necessity which is sometimes urged as a justification for strict liability—that is, that no one would be convicted if mens rea were required.

[260] *Rose*, cf *Birch* [2007] EWCA Crim 1008, masturbating in public and witnessed on CCTV by operator who alerted police as D pursued a woman who did not see the acts. See also the possible use of s 67 of the Sexual Offences Act 2003 which criminalizes voyeurism, and see *Henderson* [2006] EWCA Crim 3264 (upskirting and filming with phone in ladies' toilets) and *Richards* [2020] EWCA Crim 95, on which see Ch 17.

[261] *W* (1995) 159 JP 509 (D masturbating in front of his daughter and her ten-year-old friend).

[262] See eg *Davies* (1999) No 98/5489/Y4 (D masturbating in car in remote country lane in presence of only his driving pupil). Cf *Ammouchi* [2007] EWCA Crim 842, where D pleaded guilty to the offence when he masturbated outside a woman's window witnessed by her alone in the early hours of the morning.

[263] FACC 3/2013, 7 Mar 2014. [264] At [50].

[265] Described by the Law Commission as being as though the defendant is treated as if he had intended or been reckless. LCCP 193, para 5.45 and LC No 358, para 2.51. The offence is simply one of strict liability.

[266] See eg *Tinley* [2004] EWCA Crim 3032, D looking up women's skirts surreptitiously using video camera.

The court remarked that one reason why the early authorities are of little assistance is the existence before the enactment of s 8 of the Criminal Justice Act 1967 of the presumption that a person intends the natural and probable consequences of his actions. The court failed to draw the inevitable conclusion from this premise. Before 1967, intention need not be proved only because it was conclusively presumed, but since 1967 it is no longer presumed and must be proved.

30.9.3 ECHR

The European Commission dismissed as inadmissible an application challenging the offence in *S and G v UK*.[267] Despite the efforts of the courts to clarify the actus reus elements in *Hamilton, F* and *Rose*, it remains doubtful whether the offence is sufficiently certain to be prescribed by law within Art 10, or necessary and proportionate within Art 10(2).[268]

30.9.4 Reform

The Law Commission provisionally proposed in LCCP 193[269] that 'there is no *obvious* case for abolishing the offence or radically altering its conduct element, within the limits of a simplification project. It may be that a more wide-ranging and fundamental review would lead to a different view of where the offence should fit in among the wider spectrum of indecency-related offences: for example, a different rationale could be provided for penalising voyeuristic acts like those in *Hamilton*.' Rather, the proposal was that the law should be retained as it is stated in *Hamilton* with the modification that the offence be defined to require that D intentionally generates or realizes that he might generate outrage, shock or disgust in ordinary people. In the subsequent report, the Commission concluded that there is a need for an offence of outraging public decency and recommended that the existing common law offence should be replaced by a statutory offence.[270] The Commission recommended that a new offence of outraging public decency should require an act or display that is either obscene or disgusting to an extant sufficient to outrage minimum standards of public decency as judged by the jury in a contemporary society. The replacement offence would include a fault element.

30.10 Upskirting

The constraints of the common law offence of outraging public decency, and the limits on the offence of voyeurism under the Sexual Offences Act 2003, meant that the law lacked a ready-made solution to tackle the emerging behaviour commonly referred to as 'upskirting'. This occurs where someone operates film-recording equipment beneath the victim's clothing, with the intention of viewing the victim's genitals or buttocks—whether exposed or covered with underwear—for the purpose of obtaining sexual gratification or humiliating, distressing or alarming the victim.

The outraging public decency offence was able to provide some protection as in (*Ching Choi*[271]), but the gap in the law was exposed in *Henderson*,[272] discussed previously.

[267] App no 17634/91 (the *Gibson* case).
[268] The Law Commission rejects the argument that the offence is potentially incompatible with the ECHR.
[269] See LCCP 193.
[270] LC No 358, *Simplification of the Criminal Law: Public Nuisance and Outraging Public Decency* (2015).
[271] *Ching Choi* [1999] EWCA Crim 1279.
[272] *Henderson* [2006] EWCA Crim 3264.

The voyeurism offence was also unable to provide adequate protection. Where the conduct of taking an intimate recording occurs in an ordinary public context, such as where a person is riding on public transport, the 'private act' element of the voyeurism offence under s 67 of the Sexual Offences Act 2003 cannot be established. Further, as Gillespie notes, where a photograph is taken up a person's skirt in a public place, such as a shopping centre, the person is not engaged in a 'private act' because they are not exposing their genitals or buttocks (with underwear or otherwise) in that place; they are covered by clothing. There is also a difficulty in using s 67 of the Act because the fault element of sexual gratification may also not be satisfied, where such images are taken and disseminated to humiliate, or to be humorous, for example.[273]

The government responded with the Voyeurism (Offences) Act 2019. The Act creates a new offence—s 67A of the Sexual Offences Act 2003. It applies where:

> D, for the purpose of either obtaining sexual gratification or humiliating, alarming or distressing another person (V), and without that person's consent, (a) operates equipment beneath V's clothing with the intention of enabling himself or another person (X) to observe V's genitals, buttocks or underwear; or (b) he records an image beneath the clothing of V of V's genitals, buttocks or underwear with the intention that D or another person (X) will look at the image.

The Act does not cover another form of voyeurism—that of 'down-blousing', where a person takes photographs or records another from above, focusing on the other person's cleavage, bra and breasts.[274] This could also potentially be done through the use of online equipment, and is another example of the law playing catch-up with the way advancements in technology increase the opportunities to commit different types of privacy-related offences.

D is liable on conviction on indictment to imprisonment for a term not exceeding two years, or on summary conviction to imprisonment for a term not exceeding six months, to a fine not exceeding the statutory maximum, or to both.

30.11 Common law offences of blasphemy, libel and sedition

The common law recognized four forms of criminal libel—blasphemy, defamation, obscenity and sedition.[275] Lord Scarman regarded them as part of a group of criminal offences designed to safeguard the internal tranquillity of the kingdom.[276]

30.11.1 Blasphemy

At common law it was a misdemeanour to publish blasphemous matter.[277] Section 79 of the Criminal Justice and Immigration Act 2008 abolished the offence of blasphemy and blasphemous libel.[278] For discussion of the offence, see the 12th edition of this work.

[273] A Gillespie, '"Up-Skirts" and "Down-Blouses": Voyeurism and the Law' [2008] Crim LR 370.

[274] ibid.

[275] See M Head, *Crimes Against the State From Treason to Terrorism* (2011).

[276] *Whitehouse v Gay News Ltd* (1979) 68 Cr App R 381 at 404 and 409.

[277] For a comprehensive general discussion, see Appendix 3 and for a comparative analysis, see Appendix 5 of the House of Lords Select Committee, *Religious Offences in England and Wales First Report* (2003) vol I (HL Paper 95-I). For historical accounts, see generally: GD Nokes, *History of the Crime of Blasphemy* (1928); CS Kenny, 'The Evolution of the Law of Blasphemy' (1922) 1 CLJ 127; Stephen, II HCL, 469–76; L Blom-Cooper and G Drewry, *Law and Morality* (1976) 254–60; N Walter, *Blasphemy Ancient and Modern* (1990); R Webster, *A Brief History of Blasphemy* (1990); R Buxton, 'The Case of Blasphemous Libel' [1978] Crim LR 673.

[278] On which see R Sandberg and N Doe, 'The Strange Death of Blasphemy' (2008) 71 MLR 971.

30.11.2 Defamatory libel

By s 73 of the Coroners and Justice Act 2009, the common law crimes of libel[279] were abolished. For discussion of these offences, see the 12th edition of this work.

Further reading

CH Rolph, *The Trial of Lady Chatterley*

G Robertson, *Freedom, the Individual and the Law*

[279] See R Parkes and A Mullis (eds), *Gatley on Libel and Slander* (12th edn, 2013) Ch 20.