Fantasy Crime: The Criminalisation of Fantasy Material Under Australia's Child Abuse Material Legislation

Author:
Al-Alosi, Hadeel

Publication Date:
2017

DOI:
https://doi.org/10.26190/unsworks/2074

Fantasy Crime: The Criminalisation of Fantasy Material Under Australia's Child Abuse Material Legislation

Hadeel Al-Alosi

A thesis in fulfilment of the requirements for the degree of Doctor of Philosophy

UNSW
AUSTRALIA

School of Law
Faculty of Law

March 2017

PLEASE TYPE

THE UNIVERSITY OF NEW SOUTH WALES
Thesis/Dissertation Sheet

Surname or Family name: Al-Alosi

First name: Hadeel Other name/s:

Abbreviation for degree as given in the University calendar: PhD

School: Law Faculty: Law

Title: Fantasy Crime: The Criminalisation of Fantasy Material Under Australia's Child Abuse Material Legislation

Abstract 350 words maximum: (PLEASE TYPE)

This dissertation is about the criminalisation of sexually explicit material that depicts or describes fictitious characters who *appear to be* minors. It is the first of its kind to specifically examine the expansion of Australia's child abuse material legislation to include fictional material. The focus is particularly on the potential criminalisation of comics and subgenres of *manga* that frequently depict apparently underage characters in a sexual context. The need to protect children from harm outweighs freedom of expression and the right to privacy. Yet the harm argument is said to be problematic when the material is purely fictional, which raises the question of whether prohibiting fictional representations of minors unduly interferes with individual freedoms.

The study is socio-legal, in that it involves a detailed analysis of primary sources of law and an extensive review of the literature within disciplines such as criminology, sociology, and psychology. It also involves a cross-jurisdictional analysis of comparable legislation in Canada, the United States, and the United Kingdom. To assist in ascertaining the purpose of the law, the study draws upon pertinent theories of criminalisation - the Harm Principle, Offense Principle, and Legal Moralism. Given the uncertainty about the purpose of criminalising sexually explicit fictional representations of minors, and the limitations of the literature, judicial officers and law enforcement officers were interviewed. Their views were then compared and contrasted with the responses of over 200 fans of sexually explicit comics who completed an online survey as part of this study. The findings revealed conflicting opinions as to whether the prohibition is justified. After analysing the literature, theories of criminalisation, and empirical research, this dissertation concludes by providing recommendations for a way forward for Australia and directions for future research.

FOR OFFICE USE ONLY Date of completion of requirements for Award:

ORIGINALITY STATEMENT

'I hereby declare that this submission is my own work and to the best of my knowledge it contains no materials previously published or written by another person, or substantial proportions of material which have been accepted for the award of any other degree or diploma at UNSW or any other educational institution, except where due acknowledgement is made in the thesis. Any contribution made to the research by others, with whom I have worked at UNSW or elsewhere, is explicitly acknowledged in the thesis. I also declare that the intellectual content of this thesis is the product of my own work, except to the extent that assistance from others in the project's design and conception or in style, presentation and linguistic expression is acknowledged.'

Signed …….....

Date …….....

COPYRIGHT STATEMENT

Signed …….....

Date …….....

AUTHENTICITY STATEMENT

'I certify that the Library deposit digital copy is a direct equivalent of the final officially approved version of my thesis. No emendation of content has occurred and if there are any minor variations in formatting, they are the result of the conversion to digital format.'

Signed …….....

Date …….....

Abstract

This dissertation is about the criminalisation of sexually explicit material that depicts or describes fictitious characters who *appear to be* minors. It is the first of its kind to specifically examine the expansion of Australia's child abuse material legislation to include fictional material. The focus is particularly on the potential criminalisation of comics and subgenres of *manga* that frequently depict apparently underage characters in a sexual context. The need to protect children from harm outweighs freedom of expression and the right to privacy. Yet the harm argument is said to be problematic when the material is purely fictional, which raises the question of whether prohibiting fictional representations of minors unduly interferes with individual freedoms.

The study is socio-legal, in that it involves a detailed analysis of primary sources of law and an extensive review of the literature within disciplines such as criminology, sociology, and psychology. It also involves a cross-jurisdictional analysis of comparable legislation in Canada, the United States, and the United Kingdom. To assist in ascertaining the purpose of the law, the study draws upon pertinent theories of criminalisation − the Harm Principle, Offense Principle, and Legal Moralism. Given the uncertainty about the purpose of criminalising sexually explicit fictional representations of minors, and the limitations of the literature, judicial officers and law enforcement officers were interviewed. Their views were then compared with the responses of over 200 fans of sexually explicit comics who completed an online survey as part of this study. The findings revealed conflicting opinions as to whether the prohibition is justified. After analysing the literature, theories of criminalisation, and empirical research, this dissertation concludes by providing recommendations for a way forward for Australia and directions for future research.

The law in this dissertation is at 23 November 2016.

Acknowledgements

Firstly, I must thank my two supervisors, Alana Maurushat and Alex Steel. You both gave me exceptional guidance and encouragement. Alex, our discussions on theory have been stimulating, inspiring and you have consistently challenged me to take a step further in my analysis. Alana, not only have you been an amazing supervisor, you have been a kind friend who never lost faith in me. What I have achieved in my academic career thus far is a testament to your exceptional supervision and I would not be where I am today without you.

I am indebted to the University of New South Wales and, in particular, the Law Faculty for providing me with funding support throughout my candidature. This has enabled me to undertake this study and travel around the world to various conferences. I especially want to thank Jenny Jarrett, the Higher Degree Research Officer, for her outstanding assistance.

I would like to thank all the academics, artists, professionals, survey participants, and friends, both within and outside Australia, who gave me their time to share their valuable views. Mark McLelland, I appreciate your initial guidance and sparking my interest in the subject matter of this dissertation. While writing my dissertation, I made a kind friend from Monash University, Iris Rad, to whom I am grateful for reading various chapters; I wish you all the best in your studies and look forward to seeing you excel in whatever career you pursue. I would also like to acknowledge Matthew Sidebotham for kindly proofreading the whole dissertation. Outside Australia, I must thank Patrick W. Galbraith for his amazing insights into comic culture in Akihabara and Takashi Yamaguchi for sharing his legal knowledge about the legal status of sexually explicit *manga* in Japan. I would also like to thank the Executive Director of the Comic Book Legal Defense Fund, Charles Brownstein, for sharing with me his expert knowledge on the legal status of obscene comics in the United States. I must emphasise, however, the arguments made in this dissertation do not necessarily reflect the opinions of these individuals.

Last, but not least, I would like to thank my family. Father, you have inspired me throughout my journey. Mother, you have made finishing my PhD less stressful by providing me the resources I needed. Sisters, I cannot express how much I appreciate you taking away some of the loneliness that comes with being a PhD candidate. My baby sister, Acyel, you made checking footnotes (almost) fun. My two twin cousins, thank you for providing me with the perfect balance of encouragement and distraction. Grandmother, I started my PhD when you were still here with us and it saddens me that you are no longer here to celebrate the end of the journey, so my dissertation is dedicated to you.

Thank you.

Presentations Arising From This Dissertation

1. Al-Alosi, H, *Fantasy Material and the Law in Australia,* paper presented at the IP and Media Law Conference, 23–24 November 2015, Melbourne Law School, Melbourne.

2. Al-Alosi, H, *User-Generated Content, Fantasy, and the Law,* paper presented at the 14th International Conference on Humanities and Social Science, 22–23 February 2016, Dubai.

3. Al-Alosi, H, *Self-Produced Media and Fantasy Crime,* paper presented at the 29th Annual Australian and New Zealand Society of Criminology Conference, 29 November–2 December 2016, Hobart.

Tables and Figures

Contents

Chapter 1: Introduction — Setting the Scene

Chapter Contents

1.0 Introduction

Child abuse material is a problem of national and international concern. Countries all around the world have criminalised a range of conduct relating to such material, including its production, dissemination, and possession. As well as criminalising material directly related to the abuse of real children, there has been a trend in Australia, as well other Western countries, of expanding child abuse material legislation to include purely fictional representations of children in a sexual context.[1] The implication of the current law is that it potentially prohibits different types of sexually explicit fantasy material, such as comics (including Japanese-style comics

[1]See Chapter 4 for a discussion of the relevant legislation.

known as "*manga*"), and fictional stories, which are consumed by a variety of audiences.[2] Japan, which only criminalised possession of child abuse material in 2014, has received a substantial amount of pressure from international organisations and negative media attention for failing to criminalise sexually explicit comics and animations depicting children.[3] This has sparked debates about whether fictional child pornography should be prohibited, or whether this would unduly interfere with freedom of expression. However, the popularity of sexually explicit comics depicting underage characters is not unique to Japan. Importantly, the debates about the legality of fictional child pornography in Japan indicate it is timely to examine the prohibition of such material in Australia. This an issue that has been largely unaddressed, perhaps unsurprisingly given the extremely sensitive topic, which makes discussing fictional child pornography challenging.

Thus, this study is significant in that it provides a detailed socio-legal analysis of the phenomenon of fictional child pornography. Its main objective is to examine the possible theoretical justifications for criminalising purely and obviously fictional material that depicts or describes minors in a sexual context. The study does so by extensively reviewing the literature in disciplines such as law, criminology, sociology, and psychology; analysing primary sources of law; and obtaining valuable qualitative data from those responsible for enforcing the law, as well as those potentially criminalised by it. As it will be seen, while the societal and legal condemnation of material that involves the sexual abuse of real children is universal, the criminalisation of purely fictional material is problematic due to the inconclusive link between viewing such material and child sexual abuse.

---

[2]See Chapter 2 for a discussion of the different types of fantasy material that may potentially fall foul of the child abuse material legislation.

[3]For example see McCurry, J (2015), "Japan Urged to Ban Manga Child Abuse Images", *The Guardian,* 27 October, available online, <https://www.theguardian.com/world/2015/oct/27/japan-urged-to-ban-manga-child-abuse-images>; Williams, M (2015), "UN Envoy Recommends Japanese Ban on Some Manga and Anime", *CBLDF,* 30 October, available online, <http://cbldf.org/2015/10/un-envoy-recommends-japanese-ban-on-some-manga-and-anime/>; Schroeder, L.P (2015), "Around the World: Protecting Victims of Child Pornography in Japan", *Children's Rights Law Journal,* vol. 35, no. 2, pp. 197–199.

1.1 Terminology

It is pertinent to define at the outset six main terms used throughout this dissertation: "pornography", "sexually explicit material", "child pornography", "virtual child pornography", "child", and "paedophile".

Although the term "pornography" is commonly used in everyday language, it is difficult to define. The lack of certainty as to what is pornographic is reflected in the often-cited quote by Justice Stewart who remarked that he could not necessarily define pornography but that "I know it when I see it".[4] This dissertation adopts the more accurate and accepted definition of pornography, which encompasses material, both visual and written, that is sexually explicit. The term "sexually explicit" is a term that carries different meanings throughout different time periods and cultures. However, there seems to be a consensus in contemporary Western cultures that sexually explicit material represents certain sexual acts (such as sexual intercourse and oral sex) and exposed private body parts.

A particularly difficult term to define is "child pornography". There is currently no universal definition of child pornography, largely because what constitutes such material is highly complex.[5] It has been used to refer to a wide range of depictions of minors. This includes images depicting serious assaults through to material that would seem innocuous in another context, such as nude pictures of babies in a family photo album or children in swimsuits in a clothing catalogue.[6] Although the latter are generally not illegal, the essential link between these images is that they in some way serve a sexual purpose for some viewers with a sexual interest in children.[7] As this dissertation is only concerned with sexually explicit images that are illegal, the definition of child pornography adopted does not include innocuous material that may nevertheless sexually arouse some viewers.

---

[4] *Jacobeellis v Ohio*, 378 U.S 184 (1964), at [197].
[5] Quayle, E, and Taylor, M (2003), *Child Pornography: An Internet Crime*, Routledge, London, p. 2; Healy, M.A (2004), "Child Pornography: An International Perspective", Computer Crime and Research Centre, p. 2, available online, <http://www.oijj.org/en/docs/general/child-pornography-an-international-perspective>.
[6] Quayle and Taylor, above n 5, 5; Gillespie, A (2011), *Child Pornography: Law and Policy*, Routledge, New York, p. 208.
[7] Ibid.

It should be noted that the term "child pornography" has been used reluctantly throughout this dissertation. This reluctance arises from the recognition that this term trivialises the abusive nature of the material.[8] Thus, the terms "child abuse material" and "child exploitation material" are preferred. However, it was found impossible not to use the term "child pornography", as it is currently the most widely understood term and universally used in legal instruments. Accordingly, "child abuse material", "child exploitation material" and "child pornography" are used interchangeably throughout this dissertation.

Another important term to define is "virtual child pornography", which refers to wholly computer-generated images.[9] Despite some confusion in the literature,[10] this term does not encompass pseudo-images, which involve manipulating innocent images of a minor, usually by computer, to place the child in a sexual context.[11] Consistent with its proper definition, reference to virtual child pornography in this dissertation refers exclusively to wholly computer-generated images that do not involve a real child in the production process. It should be noted that this dissertation also considers fictional material not created with the assistance of technology or for commercial purposes, including hand-drawn images and hand-written stories depicting or describing minors in a sexual context. Thus, rather than use the term "virtual child pornography", this dissertation uses the term "fantasy material" or "fictional child pornography" to specifically refer to purely imaginative sexualised representations of minors. This excludes caricatures of real people and stories that are

[8]Ost, S (2009), *Child Pornography and Sexual Grooming: Legal and Societal Responses*, Cambridge University Press, Cambridge, p. 31; Child Exploitation and Online Protection (2013), "New Trends in Child Sexual Abuse Offending Reported by CEOP", *CEOP Command*, available online, <https://ceop.police.uk/Media-Centre/Press-releases/2013/New-trends-in-child-sexual-abuse-offending-reported-by-CEOP/>; Australian Federal Police (2014), "Media Release: Melbourne Man Charged with Child Exploitation Material Offences", *AFP*, 14 March, available online, <http://www.afp.gov.au/media-centre/news/afp/2014/march/media-release-melbourne-man-charged-with-child-exploitation-material-offences.aspx>.

[9]Gillespie, above n 6, 21-22; Clough, J (2015), *Principles of Cybercrime*, 2nd edn., Cambridge University Press, Cambridge, p. 313-314.

[10]The literature on virtual child pornography is reviewed in this chapter, at [1.2.2].

[11]Pseudo-child pornography is sometimes referred to as "morphed" child pornography in the literature. See Krone, T (2004), "A Typology of Online Child Pornography Offending", *Trends & Issues in Criminal Justice*, Australian Institute of Criminology, Canberra, Report No. 279, p. 2; Laroy, A (2008), "Discovering Child Pornography: The Death of the Presumption of Innocence", *Ave Maria Law Review*, vol. 6, no. 2, p. 572; Houtepen, J, Sijtsema, J, and Bogaerts, S (2014), "From Child Pornography Offending to Child Sexual Abuse: A Review of Child Pornography Offender Characteristics and Risks of Cross-Over", *Aggression and Violent Behavior*, vol. 19, no. 5, p. 467.

based on real events. As it will be elaborated on in Chapter 2, this is usually made evident by fantastical elements. For example, some characters may be depicted as having both human and animal features. Another technique emphasising that material is wholly imaginative, is depicting or describing characters engaging in acts that would be physically impossible to replicate in real life. However, it is acknowledged that in some cases, the creators may have based their stories on past experiences of child sexual abuse.

An equally contentious term is "child". Although the notion of childhood differs from one jurisdiction to another, there is a tendency, especially under legal instruments, to define a child as anyone under 18 years-of-age. This is problematic since it fails to recognise that there are significant differences between very young children and those in mid-to-late adolescence.[12] For consistency, the terms "child" and "minor" are used in this dissertation to refer to anyone under the age of 18. When referring specifically to those in mid-to-late adolescence, that is people aged 15 to 18, this dissertation uses the term "young people".

Lastly, it is essential to set out what is meant by the term "paedophile". Properly defined, paedophilia is a mental disorder that refers to adults who are sexually attracted to pre-pubescent children under the age of 13.[13] Nevertheless, it is common in popular culture to describe any adult who is sexually attracted to a child of any age up to 18 as a paedophile.[14] The problem with this broad definition is that it deems a much larger proportion of individuals within the community as paedophiles. It is also misleading to categorise those who have an attraction for sexually mature adolescents with those who have a sexual attraction to pre-pubescent children, as only the latter constitutes

[12]Jenkins, P (2001), *Beyond Tolerance: Child Pornography on the Internet*, New York University Press, New York, p. 220; Garfield, A (2005), "Protecting Children from Speech", *Florida Law Review*, vol. 57, no. 3, p. 603; Green, L (2012), "Censoring, Censuring or Empowering?", in M Strano, H Hrachovec, F Sudweeks and C Ess (eds.), *Proceedings Cultural Attitudes Towards Technology and Communication*, Murdoch University, Western Australia, p. 515.
[13]American Psychiatric Association (2013), *Diagnostic and Statistical Manual of Mental Disorders—DSM-5*, 5th edn., APA, Arlington, Virginia.
[14]Jewkes, Y (2010), "Much Ado About Nothing? Representations and Realities of Online Soliciting of Children", *Journal of Sexual Aggression*, vol. 16, no. 1, p. 6.

paedophilia in the medical sense.[15] Hence, this dissertation uses the term paedophile in its proper psychiatric definition.

Having defined the key terms, it is now appropriate to review the relevant literature.

1.2 Introductory Literature Review

Below is an introductory review of the literature discussing both real and virtual child abuse material, which assists in setting the scene. This is followed by a review of the limited Australian literature dealing with fantasy material. However, because the topic of fictional child pornography raised several issues, it required a review of the broader literature pertaining to the topic. Accordingly, a thorough review was conducted of the relevant literature, across multiple disciplines, dealing with the relationship between sexual fantasies and sex offending; the harm of viewing adult pornography; the harm of viewing child abuse material; and media effects studies.

1.2.1 Child Abuse Material

Traditionally, child pornography was dealt with under obscenity legislation in many Western countries, including Australia.[16] It was only in the 1970s that child pornography became a growing concern in the West, leading to the enactment of separate offences dealing with production, distribution and, later, simple possession.[17] Before this period, such images were generally not considered as playing any significant role in activities relating to the sexual abuse of children.[18] However, in the mid-1990s this perception changed and combating child pornography became a major focus for law enforcement agencies. This was largely due to the advent of the internet, which significantly facilitated its availability.[19]

---

[15]Flanagan, T (2014), *Persona Non Grata: The Death of Free Speech in the Internet Age*, Signal, Toronto, p. 178.
[16]Clough, J (2012), "Lawful Acts, Unlawful Images: The Problematic Definition of 'Child' Pornography", *Monash University Law Review*, vol. 38, no. 3, p. 215.
[17]Ibid. Attorney General's Commission on Pornography (1986), *Final Report*, U.S Government Printing Office, Washington, p. 408; Australian Commonwealth, Joint Committee on the National Crime Authority (1995), *Organised Criminal Paedophile Activity*, Australian Commonwealth Printing Office, Canberra, at [3.55].
[18]Quayle and Taylor, above n 5, 9.
[19]Ibid. Griffith, G, and Simon, K (2008), Child Pornography Law , NSW Parliamentary Library Research Service, Briefing Paper No 9/08, p. 1; Prichard, J, and Spiranovic, C (2014), Child

Since then, the literature discussing child abuse material has grown immensely.[20] The harm caused to victims depicted in such material is well documented,[21] which includes physical, psychological, and emotional harm.[22] The child depicted may also be re-victimised every time the image is viewed.[23] There is widespread agreement that advancements in technology have increased the range, volume, and accessibility of such material. The internet has also facilitated global trade in child pornography,[24] creating an issue of international concern.[25] Although it is difficult to assess how much

---

Exploitation Material in the Context of Institutional Child Sexual Abuse , Report Commissioned by the Royal Commission into the Institutional Responses to Child Sexual Abuse, University of Tasmania, p. 5; Calder, M.C (2004), "The Internet: Potential, Problems and Pathways to Hands-on Offending", in M.C Calder (ed.), *Child Sexual Abuse and the Internet: Tackling the New Frontier*, Russell House Publishing, Lyme Regis, p. 6-7; Seigfried, K.C, Lovely, R.W, and Rogers, M. K (2008), "Self-Reported Online Child Pornography Behavior: A Psychological Analysis", *International Journal of Cyber Criminology*, vol. 2, no. 1, p. 286; Niveau, G (2010), Cyber-Pedocriminality: Characteristics of a Sample of Internet Child Pornography Offenders", *Child Abuse & Neglect*, vol. 34, no. 8, p. 570; Akdeniz, Y (2008), *Internet Child Pornography and the Law: National and International Responses*, Ashgate, Hampshire, 1.

[20]For example see Quayle and Taylor, above n 5; Jenkins, above n 12; Ost, above n 8; Akdeniz, above n 19; Stewart, J (1997), "If this is the Global Community, We must be on the Bad Side of Town: International Policing of Child Pornography on the Internet", *Houston Journal of International Law*, vol. 20, no. 1, pp. 205-246; Krone, T (2004) "A Typology of Online Child Pornography Offending", *Trends & Issues in Criminal Justice*, Australian Institute of Criminology, Canberra, Report No. 279.

[21]For example see Finkelhor, D (1984), *Child Sexual Abuse: New Theory and Research*, Free Press, New York, chapter 12; Klain, E.J, Davies, H.J, and Hicks, M.A (2001), *Child Pornography: The Criminal-Justice-System Response*, American Bar Association Center on Children and the Law for the National Center for Missing & Exploited Children, available online, <http://www.popcenter.org/problems/child_pornography/PDFs/Klain_etal_2001.pdf>; Arata, C.M (2002), "Child Sexual Abuse and Sexual Revictimization", *Clinical Psychology: Science and Practice* vol. 9, no. 2, pp. 135-164; Phillips, A, and Daniluk, J.C (2004), "Beyond 'Survivor': How Childhood Sexual Abuse Informs the Identity of Adult Women at the End of the Therapeutic Process", *Journal of Counseling & Development*, vol. 82, no. 2, pp. 177-184; Quayle, E, Erooga, M, Wright, L, Taylor, M, and Harbinson, D (2006), *Only Pictures?: Therapeutic Work with Internet Sex Offenders*, Russell House Publishing, Lyme Regis; Maniglio, R (2009), "The Impact of Child Sexual Abuse on Health: A Systematic Review of Reviews", *Clinical Psychology Review*, vol. 29, no. 7, pp. 647-657; Salter, M (2012), *Organised Sexual Abuse*, Routledge, Oxon.

[22]Quayle et al, above n 21, 48; Linz, D, and Imrich, D (2001), "Child Pornography", in S White (ed.), *Handbook of Youth and Justice*, Kluwer Academic/Plenum Publishers, New York, p. 87; Choo, K.R (2009), *Online Child Grooming: A Literature Review on the Misuse of Social Networking Sites for Grooming Children for Sexual Offences*, Australian Institute of Criminology, Research and Public Policy Series 103, p. 39.

[23]Ibid. Breckenbridge, J, James, K, and Salter, M (2014), "Child Sexual Abuse—The Contribution of Social Work to the Legal Process", in S Rice and A Day (eds.), *Social Work in the Shadows of the Law*, The Federation Press, Sydney, p. 64; Slane, A (2015), "Legal Conceptions of Harm Related to Sexual Images Online in the United States and Canada", *Child & Youth Services*, vol. 36, no. 4, p. 296. In *R v Beaney* [2004] EWCA Crim 449, at [8] the Court noted that the child depicted might suffer psychological harm by the knowledge that "people out there [were] getting a perverted thrill from watching them forced to pose and behave this way". Also see *R v Booth* [2009] NSWCCA 89, at [40]-[44].

[24]Clough, above n 9, 298.

[25]Largely due to international concerns surrounding the spread of child abuse material, the United Nations adopted the *Optional Protocol on the Sale of Children*, *Child Prostitution and Child Pornography*, New York, 25 May 2000, in force 18 January 2002, 2171 UNTS 227.

child pornography actually exists, estimates of the number of websites carrying pornographic images of children have invariably been in the millions.[26] Accordingly, there have been increased calls for countries around the world to co-operate to prosecute perpetrators who often send this material outside their home country.[27] However, because there is no universally accepted definition of child pornography, what may be legal in one country may be illegal in another.[28]

Despite this, there seems to be a general consensus under international law, which Western countries adhere to, that child pornography is sexually explicit material that visually depicts:[29]

(a) a minor engaged in sexually explicit conduct;
(b) a person appearing to be a minor engaged in sexually explicit conduct;
(c) realistic images representing a minor engaged in sexually explicit conduct.

Some international instruments have adopted a broader definition of child pornography. For example, the *Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography* defines such material as "any representation, by whatever means, of a child engaged in real or simulated explicit sexual activities or any representations of the sexual parts of a child for primarily sexual purposes".[30] It has been said that the expression "by whatever means" was intended to capture not

[26]Calder, above n 19, 4-5; McCabe, K (2000), "Child Pornography and the Internet", *Social Science Computer Review*, vol. 18, no. 1, p. 73; Stanley, J (2001), *Child Abuse and the Internet*, Australian Institute of Family Studies, NCPC Issue No. 15, available online, <http://www.aifs.gov.au/nch/pubs/issues/issues15/issues15.html>; End Child Prostitution, Child Pornography and the Trafficking of Children for Sexual Purposes (2005), *Violence against Children in Cyberspace*, Contribution to the United Nations Study on Violence against Children, Bangkok, p. 30; Sheldon, K, and Howitt, D (2007), *Sex Offenders and the Internet*, John Wiley & Sons, West Sussex, p. 23; Jung, S, Ennis, L, Stein, S, Choy, A, and Hook, T (2013) "Child Pornography Possessors: Comparisons and Contrasts with Contact- and Non-Contact Sex Offenders", *Journal of Sexual Aggression*, vol. 19, no. 3, p. 295; Elliott, I.A. and Beech, A.R. (2009), "Understanding Online Child Pornography Use: Applying Sexual Offense Theory to Internet Offenders", *Aggression & Violent Behavior*, vol. 14, no. 3, pp. 181.
[27]Akdeniz, above n 19, 2.
[28]Clough, above n 9, 298; Quayle, E, and Taylor, M (2002), "Paedophiles, Pornography and the Internet: Assessment Issues", *British Journal of Social Work*, vol. 32, no. 7, p. 865.
[29]This is the definition adopted under Article 9(2) of the *Cybercrime Convention*, Budapest, 23 November 2001, in force 1 July 2004, ETS No. 185.
[30]Article 2(c) of the *Optional Protocol on the Sale of Children*, *Child Prostitution and Child Pornography*, New York, 25 May 2000, in force 18 January 2002, 2171 UNTS 227.

only real images of children, but also fictional images.[31] While the *Cybercrime Convention* expressly defines child pornography as including images of persons "appearing to be a minor",[32] it gives signatories the right not to criminalise these images.[33]

There has been scant research investigating public support for criminalising child abuse material and a major limitation of the existing studies is their small-sample size. In one of the few studies, McCabe surveyed 261 residents and law enforcement officers living in two cities in the United States.[34] It was reported that one-third believed it was "okay"[35] to download child pornography. In a more recent American study, Mears et al conducted a national telephone survey on 425 residents.[36] They sought to investigate whether the public supported "get tough"[37] responses to crimes against children. It was found that 89 per cent supported the incarceration of offenders convicted of distributing such material, but only 68 per cent supported incarcerating individuals convicted of accessing child abuse material.[38] A major limitation of Mears et al's study is that the questions asked assumed that the participants already agreed that such material should be illegal. This is also a limitation of a study by Nicholls et al examining public attitudes to sentencing sex offences in the United Kingdom.[39] In their study on a sample of 82 participants, it was found most supported significant custodial sentences for viewing child abuse material, but a minority preferred shorter custodial sentences for simple possession of such material. Quoting one participant, this was because "there's a big difference between looking at an image and actually abusing a child".[40]

---

[31]End Child Prostitution, Child Pornography and the Trafficking of Children for Sexual Purposes (2008), *Strengthening Laws Addressing Child Sex Exploitation: A Practical Guide*, ECPAT International, Bangkok; Astinova, M (2013), *The Crime of Child Pornography: European Legislative and Police Cooperation Initiatives*, Masters Thesis, Tilburg University, p. 18.
[32]Article 9(2)(b)-(c) of the *Cybercrime Convention*, Budapest, 23 November 2001, in force 1 July 2004, ETS No. 185.
[33]Ibid, Article 9(4).
[34]McCabe, above n 26.
[35]Ibid, 75.
[36]Mears, D, Mancini, C, Gertz, M, and Bratton, J (2008), "Sex Crimes, Children, and Pornography: Public Views and Public Policy", *Crime & Delinquency*, vol. 54, no. 4, pp. 532-559.
[37]Ibid, 532.
[38]For a Canadian study see Lam, A, Mitchell, J, and Seto, M.C (2010), "Lay Perceptions of Child Pornography Offenders", *Canadian Journal of Criminology & Criminal Justice*, vol. 52, no. 2, 173-201.
[39]Nicholls, C, Mitchell, M, Simpson, I, Webster, S, and Hester, M (2012), *Attitudes to Sentencing Sexual Offences*, Sentencing Council Research Series, London.
[40]Ibid, 41.

To date, it seems Prichard et al are the only researchers investigating public perceptions of the harmfulness of child abuse material in Australia.[41] They conducted an online survey of 431 university students in Tasmania. It was reported that one in ten participants did not think viewing child exploitation material depicting real children is harmful since the possessor was not involved in the production. Seven per cent did not believe viewing child abuse material should be illegal. It was also found that one in fifteen participants believed that distributing such material is "harmless".[42] As will be discussed below, Prichard et al's study is particularly useful for the purposes of this dissertation since it also obtained the participants' perceptions on the legality of images produced without a real child.

1.2.2 Virtual Child Pornography

As noted above, "virtual child pornography" refers to sexualised images of minors that do not involve the sexual abuse of a child in production.[43] The expansion of the law to include virtual child pornography has been said to be necessary given rapid technological advances that make it possible to create computer-generated images indistinguishable from real images.[44]

There is now a growing body of literature discussing virtual child pornography, most of which derives from the United States where the protection of such material has been strongly debated in light of the First Amendment guarantee of freedom of speech.[45]

---

[41]Prichard, J, Spiranovic, C, Gelb, K, Watters, P.A, and Krone, T (2016), "Tertiary Education Students' Attitudes to the Harmfulness of Viewing and Distributing Child Pornography", *Psychiatry, Psychology and Law*, vol. 23, no. 2, pp. 224-239.
[42]Ibid, 229.
[43]Gillespie, above n 6, 21-22, Clough, above n 9, 313-314.
[44]Akdeniz, above n 19, 12; Attorney General Transcript (2002), *Response to Supreme Court Decision in Free Speech Coalition v. Ashcroft*, 16 April, DOJ Centre, available online, <http://www.justice.gov/archive/ag/speeches/2002/041602newsconferenceresponse.htm>; New South Wales, *Parliamentary Debates*, Legislative Council, 26 November 2008, 11705.
[45]It would be impossible to list all the relevant literature reviewed on virtual child pornography, but for example see Burke, D (1997), "The Criminalization of Virtual Child Pornography: A Constitutional Question", *Harvard Journal of Legislation*, vol. 34, no. 2, pp. 439-472; Friel, S.M (1997), "Porn by Any Other Name? A Constitutional Alternative to Regulating 'Victimless' Computer-Generated Child Pornography", *Valparaiso University Law Review*, vol. 32, no. 1, pp. 207-267; Pursel, W.L (1998), "Computer-Generated Child Pornography: A Legal Alternative", *Seattle University Law Review*, vol. 22, no. 2, pp. 643-665; Calvert, C (2000), "The 'Enticing Images' Doctrine: An Emerging Principle in First Amendment Jurisprudence?", *Fordham Intellectual Property, Media & Entertainment Law Journal*, vol. 10, no. 3, pp. 595-617; Guglielmi, K (2001), "Virtual Child Pornography as a New Category of Unprotected Speech", *CommLaw Conspectus*, vol.

The First Amendment has been broadly interpreted to include not only spoken words, but also expressive material such as pornography.[46] As will be discussed further in Chapter 4, in 2002 the Supreme Court of the United States classified virtual child pornography as expression worthy of protection,[47] a decision that has been extensively debated in the literature.[48] To a lesser extent, there is literature debating the prohibition

9, no. 2, pp. 207-223; Armagh, D.S (2002), "Virtual Child Pornography Criminal Conduct or Protected Speech?", *Cardozo Law Review*, vol. 23, no. 6, pp. 1993-2010; Hamoy, A.G (2002), "The Constitutionality of Virtual Child Pornography: Why Reality and Fantasy are Still Different Under the First Amendment", *Seton Hall Constitutional Law Journal*, vol. 12, no. 2-3, pp. 471-518; Leach, J (2002), "Reacting to Ashcroft v. Free Speech Coalition and the Burial of the CPPA: An Argument to Regulate Child Pornography because it Incites Imminent Lawless Action", *Vanderbilt Journal of Entertainment Law & Practice*, vol. 5, no. 1, pp. 114-132; Bergelt, K (2003), "Stimulation by Simulation: Is there really any difference between Actual and Virtual Child Pornography? The Supreme Court gives Child Pornographers a New Vehicle for Satisfaction", *Capital University Law Review*, vol. 31, no. 3, pp. 565-595; Loewy, A (2003), "Taking Free Speech Seriously: The United States Supreme Court and Virtual Child Pornography", *First Amendment Law Review*, vol. 1, no. 3, pp. 1-12; Kennedy, R (2004), "Ashcroft v. Free Speech Coalition: Can We Roast the Pig Without Burning Down the House in Regulating Virtual Child Pornography?", *Akron Law Review*, vol. 37, no. 2, pp. 379-415; Kreston, S (2004), "Defeating the Virtual Defense in Child Pornography Prosecutions", *Journal of High Technology Law*, vol. 4, no. 1, pp. 49-84; Slocum, B.G (2004), "Virtual Child Pornography: Does It Mean the End of the Child Pornography Exception to the First Amendment", *Albany Law Journal of Science & Technology*, vol. 14, no. 3, pp. 637-698; Verber, M (2004), "Virtual Child Pornography", *Public Affairs Quarterly*, vol. 18, no. 1, pp. 75-90; Woo, J (2004), "The Concept of 'Harm' in Computer-Generated Images of Child Pornography", *The John Marshall Journal of Computer & Information Law*, vol. 22, no. 4, pp. 717-730; Lui, S (2007), "*Ashcroft*, Virtual Child Pornography and First Amendment Jurisprudence", *UC Davis Journal of Juvenile Law & Policy*, vol. 11, no. 1, pp. 1-54; Malamuth, N, and Huppin, M (2007), "Drawing the Line on Virtual Child Pornography: Bringing the Law in Line with Research Evidence", *NY University of Law & Social Change*, vol. 31, no. 4, pp. 773-828; Mateo, G (2008), "The New Face of Child Pornography: Digital Imaging Technology and the Law", *Journal of Law, Technology & Policy*, vol. 2008, no. 1, pp. 175-203; Russell, G (2008), "Pedophiles in Wonderland: Censoring the Sinful in Cyberspace", *Journal of Criminal Law & Criminology*, vol. 98, no. 4, pp. 1467-1500; Bird, P (2011), "Virtual Child Pornography Laws and the Constraints Imposed by the First Amendment", *Barry Law Review*, vol. 16, no. 1, pp. 161-177; April, K (2012), "Cartoons Aren't Real People, Too: Does The Regulation of Virtual Child Pornography Violate the First Amendment and Criminalize Subversive Thought?", *Cardozo Journal of Law & Gender*, vol. 19, no. 1, pp. 241-272; Byberg, J (2012), "Childless Child Porn—A 'Victimless' Crime?", *Social Science Research Network*, available online, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2114564>; Goldblatt, B (2012), "Virtual Pornography: The Children Aren't Real, But the Dangers Are; Why the Ashcroft Court Got it Wrong", *Law School Student Scholarship*, Paper 41, available online, <http://erepository.law.shu.edu/cgi/viewcontent.cgi?article=1040&context=student_scholarship>; Milstead, V (2012), "Ashcroft v. Free Speech Coalition: How Can Virtual Child Pornography Be Banned Under the First Amendment?", *Pepperdine Law Review*, vol. 31, no. 3, pp. 825-874.

[46] *American Booksellers Association v Hudnut*, 598 F.Supp 1316 (1984).

[47] See especially *Ashcroft v Free Speech Coalition*, 535 U.S. 234 (2002). This case is discussed in Chapter 4, at [4.2].

[48] See footnote 45 above for some of the relevant literature.

of virtual child pornography in Canada[49] and the United Kingdom,[50] but there has been little discourse in Australia.[51]

In summary, the main arguments in favour of criminalising virtual child pornography put forward in the literature are that such material may: [52]

- reinforce negative views and feelings towards children;
- desensitise viewers to the seriousness of child sexual abuse;
- be used to groom children;
- place a heavy burden on prosecutors to determine if the person depicted is real; and
- incite child sexual abuse.

Conversely, those against prohibition often argue that:[53]

- virtual child pornography may discourage child sexual abuse by making it possible for potential molesters to gratify their desires without harming real children;
- material cannot be prohibited simply because child molesters might use it to groom children; and

[49]For example see Akdeniz, above n 19; Ross, J (2000), "*R v. Sharpe* and Private Possession of Child Pornography", *Constitutional Forum*, vol. 11, no. 2, pp. 50-59; Ryder, B (2003), "The Harms of Child Pornography Law", *University of British Columbia Law Review*, vol. 36, no. 1, pp. 101-135; Smyth, S (2009), "A 'Reasoned Apprehension' of Overbreadth: An Alternative Approach to the Problems Presented by Section 163.1 of the Criminal Code", *University of British Columbia Law Review*, vol. 42, no. 1, pp. 69-123.

[50]For example see Gillespie, above n 6; Ost, above n 8; Ost, S (2010) "Criminalising Fabricated Images of Child Pornography: A Matter of Harm or Morality?", *Legal Studies*, vol. 30, no. 2, pp. 230-256; Johnson, M.C (2010), "Freedom of Expression in Cyberspace and the Coroner's and Justice Act 2009", *Procs 3rd International Seminar on Information Law*, Corfu, Greece, 25-26 June; Antoniou, A (2013), "Possession of Prohibited Images of Children: Three Years On", *Journal of Criminal Law*, vol. 77, no. 4, pp. 337-353.

[51]The relevant Australian literature is discussed in this chapter, at [1.2.3].

[52]For example see Bergelt, above n 45; Guglielmi, above n 45; Goldblatt, above n 45; Leach, above n 45; Lui, above n 45; Mateo, above n 45; Pursel, above n 45; Shackel, R (1999), "Regulation of Child Pornography in the Electronic Age: The Role of International Law", *Macarthur Law Review*, vol. 3, p. 159; Report of the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography, (Juan Miguel Petit), United Nations Commission on Human Rights, E/CN.4/2005/78, 23 December 2004, at [22].

[53]For example see April, above n 45; Byberg, above n 45; Calvert, above n 45; Hamoy, above n 45; Kennedy, above n 45; Loewy, above n 45; Russell, above n 45; Ryder, above n 49; Smyth, above n 49.

- governments in liberal countries should not criminalise speech or conduct without empirical proof that it causes direct harm.

These arguments will be addressed individually in Chapter 7 when considering the potential harms of fantasy material.

There are several significant gaps in the literature on virtual child pornography that limit its usefulness for the purposes of this dissertation. This is because, as highlighted above, the term "virtual child pornography" has been used to refer to images that are not entirely fictional. Much of the literature refers to virtual child pornography without distinguishing between wholly computer-generated images and pseudo-child pornography. This fails to acknowledge that pseudo-images infringe the rights of real children not to have their images manipulated and their right to privacy.[54]

Another potential problem is that most of the literature does not demarcate between virtual images that are indistinguishable from real images and images that are obviously fictional, such as cartoons. Where the image is virtually indistinguishable from a real image of a child, there are legitimate concerns that such images may place a heavy burden on prosecutors to prove beyond reasonable doubt that the person depicted exists.[55] Conversely, this argument is weak where the image is obviously fictional; cartoons would not place a heavy burden on prosecutors to determine whether the person depicted is a real child. The distinction between the different types of fictional images is discussed further in Chapter 2.

There have been very few studies measuring public perceptions on whether virtual child pornography should be prohibited. The aforementioned study by McCabe of 261 people in the United States found that 92.3 per cent of participants believed viewing computer-generated images of children is acceptable.[56] A major limitation of this study is that participants were not given a definition of virtual child pornography and, since the study was conducted during 1998–1999, the findings are dated. Conversely,

[54]Ost, above n 8, 128; Shackel, above n 52.
[55]Lui, above n 45, 51; Mateo, above n 45, 179-181; Bergelt, above n 45, 586; Shackel, above n 52; Sandin, P (2004), "Virtual Child Pornography and Utilitarianism", *Information, Communication & Ethics in Society*, vol. 2, no. 1, p. 221.
[56]McCabe, above n 26.

in a more recent study surveying 125 participants residing in the United States, a definition of such material was defined.[57] Participants were told virtual child pornography referred to "virtual images that do not involve real people".[58] It was reported that the majority supported the criminalisation of virtual child pornography. However, the researcher noted several limitations of their study, including that "the description of computer-generated child pornography may have been too ambiguous for participants to provide an informed decision".[59]

As mentioned above, Prichard et al seem to be the only researchers in Australia examining perceptions of the harmfulness of accessing and distributing child abuse material.[60] Importantly, they asked participants whether "pseudo-images"[61] of children should be illegal. It was found that 21.3 per cent did not agree such images should be prohibited.[62] It is not clear whether this survey defined "pseudo-images" and, as noted above, pseudo-child pornography usually refers to images that involve the manipulation of an image of a real child by placing him or her in a sexual context. Therefore, pseudo-images are not truly fictional since they depict real child.[63]

The following section reviews the Australian literature not based on empirical data that discusses the criminalisation of fictional child pornography.

1.2.3 Australian Literature

There is scant Australian literature discussing the criminalisation of fictional child pornography created by computer or otherwise. The main exception is the work of three academics: Mark McLelland, Aleardo Zanghellini, and Brian Simpson. McLelland has written extensively on the potential criminalisation of Japanese-style

[57]Kliethermes, B.C (2015), *Perceptions of Computer-Generated Child Pornography*, Masters Thesis, University of North Dakota.
[58]Ibid, 22.
[59]Ibid, 44.
[60]Prichard et al, above n 41.
[61]Ibid.
[62]Ibid, 232.
[63]See Terminology above, at [1.1]. Also see Gillespie, A (2015), *Cybercrime: Key Issues and Debates*, Routledge, Oxon, p. 246.

comic (*manga*) fans.[64] His analysis is limited in that it concentrates on "young"[65] female fans of a subgenre of sexually explicit *manga* known as Boys Love and YAOI.[66] Essentially, he has argued that: "the law should respect people's right to privacy and should not investigate or hold to account persons who imagine, consume, depict or share any clearly *fictitious* image irrespective of the content of that image".[67]

Given the youthful target audience of Boys Love and YAOI, it seems straightforward to argue that its fans should not be criminalised by legislation that was designed to protect young people. This is similar to the arguments raised against prosecuting youths who send provocative images of themselves via technological devices, a phenomenon known as "sexting", [68] under child pornography legislation. These arguments are often grounded on the need to respect the right of young people to express themselves sexually.[69] However, other observers have argued this ignores the potential harmful consequences if these images were to go viral, and that the focus should be on exploitation, not expression.[70]

---

[64]McLelland, M (2010), "Australia's Proposed Internet Filtering System: Its Implications for Animation, Comic and Gaming (ACG) and Slash Fan Communities", *Media International Australia*, no. 134, pp. 7-19; McLelland, M (2011), "Australia's 'Child Abuse Material' Legislation, Internet Regulation and the Juridification of the Imagination", *International Journal of Cultural Studies*, vol. 15, no. 5, pp. 467-483; McLelland, M (2016), "'Not in Front of the Parents!' Young People, Sexual Literacies and Intimate Citizenship in the Internet Age", *Sexualities*, in press, pp. 1-21.

[65]It is unclear how young the female fans McLelland is referring to in his publications are.

[66]Boys Love and YAOI are discussed in Chapter 2.

[67]McLelland, M (2010), "Australia's Proposed Internet Filtering System: Its Implications for Animation, Comic and Gaming (ACG) and Slash Fan Communities", *Media International Australia*, no. 134, p. 18 (emphasis in the original).

[68]The term "sexting" has been defined as "the creating, sharing, sending or posting of sexually explicit messages via the internet, mobile phones or other electronic devices by people, especially young people". See Law Reform Committee, Parliament of Victoria (2013), *Inquiry into Sexting*, Victorian Government Printer, Parliamentary Paper No. 230, p. 19.

[69]For example see Calvert, C, and Richards, R.D (2009), "When Sex and Cell Phones Collide: Inside the Prosecution of a Teen Sexting Case", *Hastings Communication & Entertainment Law Journal*, vol. 32, no. 1, pp. 1-39; Hasinoff, A.A (2012), "Sexting as media production: Rethinking Social Media and Sexuality", *New Media & Society*, vol. 15, no. 4, pp. 449-465; Albury, K, Crawford, K, and Byron, P (2013), *Young People and Sexting in Australia: Ethics, Representation and the Law*, Final Report, ARC Centre of Excellence in Creative Industries and Innovation at the University of New South Wales, Australia; Crofts, T and Lee, M (2013), "'Sexting, Children and Child Pornography", *Sydney Law Review*, vol. 35, no. 1, pp. 85-106; Gillespie, A (2013), "Adolescents, Sexting and Human Rights", *Human Rights Law Review*, vol. 13, no. 4, pp. 632-643; Simpson, B (2013), "Challenging Childhood, Challenging Children: Children's Rights and Sexting", *Sexualities*, vol. 16, no. 5/6, pp. 690-709; Sweeney, J (2013) "Sexting and Freedom of Expression: A Comparative Approach", *Kentucky Law Journal*, vol. 102, no. 1, pp. 103-146.

[70]See especially Leary, M.G (2007), "Self-Produced Child Pornography: The Appropriate Societal Response to Juvenile Self-Sexual Exploitation", *Virginia Journal of Social Policy & the Law*, vol. 15, no. 1, pp. 1-50; Leary, M.G (2010), "Sexting or Self-Produced Child-Pornography—The Dialog Continues—Structured Prosecutorial Discretion with a Multidisciplinary Response", *Virginia Journal*

Zanghellini has similarly limited his analysis to Boys Love and YAOI.[71] However, rather than focus on the rights of young people to express themselves sexually, Zanghellini has primarily cited the lack of proof of direct physical harm to children to argue against the potential criminalisation of fans.[72] He has maintained that Boys Love and YAOI should not be a concern, believing that "material does not harm or endanger children by involving them in its production, or advocat[e] their abuse".[73]

Conversely, Simpson has not restricted his analysis to young people or fans of Japanese *manga*.[74] Rather, he has broadly discussed the way in which governments are attempting to control fantasy in cyberspace by prohibiting the sharing of sexually explicit fictional material on the internet. Simpson argues that the aim of the current law prohibiting fictional child pornography was not to protect children from harm but to enforce morality by preventing individuals from engaging in inappropriate fantasies.[75] Whether the law is based on harm or morality is considered in depth in chapters 7, 8, and 9.

There are a number of limitations to McLelland, Zanghellini, and Simpson's analyses. As will be discussed further in Chapter 7, they overlook the possibility that fictional child pornography may be harmful when viewed by some audiences, such as those outside the Boys Love fantasy fandom. These academics also seem to assume that the law is not justified because such material does not involve a real child in its production. However, as will be discussed in Chapter 3, there are several theories of criminal law that may justify criminalisation but do not necessarily require proof of direct physical harm to another person.

---

of Social Police & the Law, vol. 17, no. 3, pp. 486-566; Law Council of Australia (2013), *Inquiry into Options for Addressing the Issue of Sexting by Minors*, Senate Select Committee on Cyber-Safety, Canberra.

[71]Zanghellini, A (2009), "Underage Sex and Romance in Japanese Homoerotic Manga and Anime", *Social and Legal Studies*, vol. 18, no. 2, pp. 159-177.

[72]Ibid, 175.

[73]Ibid, 173.

[74]Simpson, B (2009), "Controlling Fantasy in Cyberspace: Cartoons, Imagination and Child Pornography", *Information & Communications Technology Law*, vol. 18, no. 3, pp. 255-271.

[75]Ibid, 261.

1.2.4 Sexual Fantasy and Sex Offending

As indicated by the title of this dissertation, the relationship between fantasy and subsequent behaviour is central to the topic of fantasy material and child sexual abuse. This is because, as will be seen in the case law outlined in Chapter 4 and the data findings in Chapter 6, there is an underlying assumption that fantasy incites action. It was therefore pertinent to review the research investigating the link between sexual fantasy and sex offending. However, it should be noted that a limitation of the existing studies is that they tend to use a small sample size and are often dated.

Sexual fantasies are broadly defined in the literature as "almost any mental imagery that is sexually arousing or erotic to the individual".[76] The critical question the existing studies generally seek to answer is whether there is a link between "deviant"[77] sexual fantasies and criminal behaviour. Much of the literature suggests that a criminogenic link between fantasy and child abuse exists for a significant amount of sex offenders.[78] Sexual fantasy is said to "provide important insights into the internal world of the

[76]Leitenberg, H and Henning, K (1995), "Sexual Fantasy", *Psychological Bulletin*, vol. 117, no. 3, p. 471.
[77]Although "deviance" has historically held different meanings, there is consensus among clinicians that fantasies including themes such as paedophilia, bestiality, coercion, sadism, and intentional infliction of harm are deviant and pathological. See Gee, D.G, Devilly, G.J, and Ward, T (2004), "The Content of Sexual Fantasies for Sexual Offenders", *Sexual Abuse: A Journal of Research and Treatment*, vol. 16, no. 4, p. 316; Quinn, J, and Forsyth, C (2005), "Describing Sexual Behavior in the Era of the Internet: A Typology for Empirical Research", *Deviant Behavior*, vol. 26, no. 3, p. 194; Durkin, K, Forsyth, C, and Quinn, J (2006), "Pathological Internet Communities: A New Direction for Sexual Deviance Research in a Post Modern Era", *Sociological Spectrum*, vol. 26, no. 6, p. 596; Gee, D, and Belofastov, A (2007), "Profiling Sexual Fantasy: Fantasy in Sexual Offending and the Implications for Criminal Profiling", in R.N Kocsis (ed.) *Criminal Profiling: International Theory, Research, and Practice*, Humana Press, New Jersey, p. 50-51; Joyal, C, Cossette, A, and Lapierre V (2015), "What Exactly is an Unusual Sexual Fantasy?", *Journal of Sexual Medicine*, vol. 12, no. 2, p. 332.
[78]Leitenberg and Henning, above n 76, 487; Marshall, W.L, Barbaree, H.E, and Eccles, A (1991), "Early Onset and Deviant Sexuality in Child Molesters", *Journal of Interpersonal Violence*, vol. 6, no. 3, pp. 323-336; Ward, T, and Hudson, S.M (2000), "Relapse Prevention: Assessment and Treatment Implications", in D.R Laws, S.M Hudson, and T Ward (eds.), *Remaking Relapse Prevention with Sex Offenders: A Sourcebook*, Sage Publications, London, p. 116; Baumgartner, J, Scalora, M, and Huss, M (2002), "Assessment of the Wilson Sex Fantasy Questionnaire Among Child Molesters and Nonsexual Forensic Offenders", *Sexual Abuse*, vol. 14, no. 1, pp. 19-30; Zurbriggen, E.L, and Yost, M.R (2004), "Power, Desire, and Pleasure in Sexual Fantasies", *The Journal of Sex Research*, vol. 41, no. 3, p. 288; Jones, T, and Wilson, D (2008), "'In My Own World': A Case Study of a Paedophile's Thinking and Doing and His Use of the Internet", *Howard Journal of Criminal Justice*, vol. 47, no. 2, p. 117; Lambert, S, and O'Halloran, E (2008), "Deductive Thematic Analysis of a Female Paedophilia Website", *Psychiatry, Psychology and Law*, vol. 15, no. 2, p. 298; Hershfield, J (2009), "The Ethics of Sexual Fantasy", *International Journal of Applied Philosophy*, vol. 23, no. 1, p. 33-34; Palmer, J (2010), "Sexual Fantasy and Sex Offending", in J.M Brown and E.A Campbell (eds.), *The Cambridge Handbook of Forensic Psychology*, Cambridge University Press, Cambridge, p. 554.

offender"[79] and modifying the sexual fantasies of sex offenders is often a component of their treatment plan while being incarcerated.[80] Wyre has also contributed to the understanding of the relationship between fantasy and sex offending from his extensive experience in working with sex offenders. He has observed that:

> "Fantasy and behaviour are directly connected … all of the men I have ever worked with have put into practice their fantasies of sexual abuse [and] what I … know is that the more they masturbate to pornography, the more likely they will be to put their fantasy into practice".[81]

Similarly, others have warned that deviant sexual fantasies that are repeatedly paired with masturbatory stimulation will eventually create a strong desire to engage in those fantasised behaviours, which is referred to as "masturbatory conditioning".[82] These claims are supported by empirical research showing the reoccurrence of deviant sexual fantasies may motivate some offenders to enact the imagery they have mentally simulated.[83]

Conversely, others have questioned whether deviant sexual fantasies are a reliable predictor of future offending for sex offenders.[84] Some studies have indicated that not

---

[79]Gee and Belofastov, above n 77, 49.
[80]Abel, G.G, and Blanchard, E.B (1974), "The Role of Fantasy in the Treatment of Sexual Deviation", *Archives of General Psychiatry*, vol. 30, no. 4, p. 467; Quinsey, V.L, and Earls, C.M (1990), "Modification of Sexual Preferences", in W.L Marshall, D.R Laws, and H.E Barbaree (eds.), *Handbook of Sexual Assault*, Plenum Press, New York, p. 287; Laws, D.R, and Marshall, W.L (1990), "A Conditioning Theory of the Etiology and Maintenance of Deviant Sexual Preference in Behavior", in W.L Marshal, D.R Laws, and H.E Barbaree (eds.), *Handbook of Sexual Assault: Issues, Theories, and Treatment of the Offender*, Plenum, New York, p. 226; Laws, D.R, and Marshall, W.L (1991), "Masturbatory Reconditioning with Sexual Deviates: An Evaluative Review", *Advances in Behaviour Research and Therapy*, vol. 13, no. 1, p. 13; Carabellese, F, Maniglio, R, Greco, O, and Catanesi, R (2011), "The Role of Fantasy in a Serial Sexual Offender: A Brief Review of the Literature and a Case Report", *Journal of Forensic Sciences*, vol. 56, no. 1, p. 257.
[81]Wyre, R (1992), "Pornography and Sexual Violence: Working with Sex Offenders", in C Itzin (ed.), *Pornography: Women, Violence and Civil Liberties*, Oxford University Press, Oxford, p. 243.
[82]Thus, one treatment for sexual offenders is requiring them to masturbate to orgasm while imagining (or viewing) what is regarded as socially acceptable sexual fantasies, a technique known as "masturbatory reconditioning". See especially Laws and Marshall, above n 80; Johnston, P, Hudson, S, Marshall, W.L (1992), "The Effects of Masturbatory Reconditioning with Nonfamilial Child Molesters", *Behaviour Research and Therapy*, vol.30, no. 5, pp. 559-561.
[83]See Leitenberg and Henning, above n 76, 487; Jones and Wilson, above n 78; Blundell, B, Sherry, M, Burke, A, and Sowerbutts, S (2002), "Child Pornography and the Internet: Accessibility and Policing", *Australian Police Journal*, vol. 56, no. 1, pp. 59-65.
[84]Looman, J (1995), "Sexual Fantasies of Child Molesters", *Canadian Journal of Behavioural Science*, vol. 27, no. 3, pp. 321-332; Daleiden, E, Kaufman, K, Hilliker, D, and O'Neil, J (1998), "The

all offenders who molest children experience sexual fantasies involving minors prior to their offence.[85] Also, some suggest deviant fantasies may allow paedophiles to release sexual tension, which reduces the chances of paedophiles engaging in sex offending in real life.[86] Given the inconsistencies in the research, the relationship between fantasy and child sex offending remains ambiguous.[87]

While there is much less research investigating the influence of sexual fantasises on non-offenders, this research has also been inconsistent. Some studies have found no significant link between fantasy and criminal behaviour for non-sex offenders.[88] It has therefore been claimed that non-sex offenders "see fantasy as separate from reality and the two can successfully coexist".[89] However, it should be noted that a number of studies have found that non-sex offenders had similar, if not higher, levels of deviant sexual fantasies to sex offenders. [90]

Sexual Histories and Fantasies of Youthful Males: A Comparison of Sexual Offending, Nonsexual Offending, and Nonoffending Groups", *Sexual Abuse*, vol. 10, no. 3, p. 205; Sheldon, K, and Howitt, D (2008), "Sexual Fantasy in Paedophile Offenders: Can Any Model Explain Satisfactorily New Findings from a Study of Internet and Contact Sexual Offenders?", *Legal & Criminological Psychology*, vol. 13, no. 1, pp. 137-158.

[85]For example see Looman, above n 84.

[86]Langevin, R, Lang, R, and Curnoe, S (1998), "The Prevalence of Sex Offenders with Deviant Fantasies", *Journal of Interpersonal Violence*, vol. 13, no. 3, pp. 315-327; Neu, J (2002), "An Ethics of Fantasy?", *Journal of Theoretical and Philosophical Psychology*, vol. 22, no. 2, pp. 133-157; Dandescu, A, and Wolfe, R (2003), "Considerations on Fantasy Use by Child Molesters and Exhibitionists", *Sexual Abuse of Research and Treatment*, vol. 15, no. 4, pp. 297-305.

[87]Quayle and Taylor, above n 5, 11.

[88]Briere, J, and Runtz, M (1989), "University Males' Sexual Interest in Children: Predicting Potential Indices of 'Pedophilia' in a Nonforensic Sample", *Child Abuse & Neglect*, vol. 13, no. 1, pp. 65-75; Becker-Blease, K, Friend, D, and Freyd, J (2006), *Child Sex Abuse Perpetrators Among Male University Students*, poster presented at the 22nd Annual Meeting of the International Society for Traumatic Stress Studies, California.

[89]Howitt, D (2004), "What is the Role of Fantasy in Sex Offending?", *Criminal Behaviour and Mental Health*, vol. 14, no. 3, p. 184. Also see Bader, M.J (2002), *Arousal: The Secret Logic of Sexual Fantasies*, Thomas Dunne Books, New York.

[90]Daleiden et al, above n 84; Langevin et al, above n 86; Baumgartner et al, above n 78; Freund, K (1981), "Assessment of Pedophilia", in M Cook and K Howells (eds.), *Adult Sexual Interest in Children*, Academic Press, New York, pp. 137-180; Rokach, A, Nutbrown, V, and Nexhipi, G (1988), "Content Analysis of Erotic Imagery: Sex Offenders and Non-Sex Offenders", *International Journal of Offender Therapy and Comparative Criminology*, vol. 32, no. 2, pp. 107-122; Bartels, R.M. and Gannon, T.A. (2009), "Rape Supportive Cognition, Sexual Fantasies and Implicit Offence-scripts: A Comparison between High and Low Rape Prone Men", *Sexual Abuse in Australia and New Zealand*, vol. 2, no. 1, pp. 14-20

Several studies have also revealed that a significant number of non-sex offenders commonly experience sexual fantasies indicative of paedophilia.[91] For example, in Briere and Runtz's study on 193 "normal"[92] undergraduate male students, 21 per cent admitted sexual attraction to "small children";[93] nine per cent reported to have had sexual fantasies involving children; five per cent masturbated to such fantasises; and seven per cent suggested some likelihood of committing child sexual abuse if they could avoid detection and punishment.[94] In Briere et al's study on 318 university students, 4.4 per cent of participants "reported some hypothetical likelihood of having sex with a child were no one to know and given an absence of punishment".[95] In another study on 103 male undergraduate students, 95 per cent admitted to having experienced at least one deviant sexual fantasy, 13 per cent of which were indicative of paedophilia.[96]

A major flaw in these studies is that the researchers did not provide a definition of "child", which means participants may have interpreted the questions as referring to a person up to the age of 18. As noted above, the age of a child is pertinent in determining whether an individual is a paedophile in accordance to its clinical definition.[97] Thus,

---

[91]Briere and Runtz, above n 88; Quinsey, V.L, Steinman, C.M, Bergersen, S.G, and Holmes, T.F (1975), "Penile Circumference, Skin Conductance, and Ranking Responses of Child Molesters and 'Normals' to Sexual and Nonsexual Visual Stimuli", *Behaviour Therapy*, vol. 6, no. 2, pp. 213- 219; Templeman, T, and Stinnett, R (1991), "Patterns of Sexual Arousal and History in a 'Normal' Sample of Young Men", *Archives of Sexual Behavior*, vol. 20, no. 2, pp. 137-150; Hall, G, Hirschman, R, and Oliver, L (1995), "Sexual Arousal and Arousability to Pedophilic Stimuli in a Community Sample of Normal Men", *Behavior Therapy*, vol. 26, no. 4, pp. 681-694; Briere, J, and Smiljanich, K (1996), "Self-Reported Sexual Interest in Children: Sex Differences and Psychosocial Correlates in a University Sample", *Violence and Victims*, vol. 11, no. 1, pp. 39-50; Williams, K.M, Cooper, B.S, Howell, T.M, Yuille, J.C, and Paulhus, D.L (2008), "Inferring Sexually Deviant Behavior From Corresponding Fantasies", *Criminal Justice and Behavior*, vol. 36, no. 2, pp. 198-222; Svedin, C, Akerman, I, and Priebe, G (2011), "Frequent Users of Pornography. A Population Based Epidemiological Study of Swedish Male Adolescents", *Journal of Adolescence*, vol. 34, no. 4, pp. 779-788; Dombert, B, Schmidt, A, Banse, R, Briken, P, Hoyer, J, Neutze, J, and Osterheider, M (2015), "How Common is Males' Self-Reported Sexual Interest in Prepubescent Children", *The Journal of Sex Research*, available online, <https://www.academia.edu/Documents/in/Sexual_Fantasy>.

[92]Briere and Runtz, above n 88, 71. The researchers defined "normal" as "non-incarcerated and nonclinical males".

[93]Ibid. Unfortunately, no definition of the term "child" was provided.

[94]Ibid. Also see McConaghy, N, Zamir, R, and Manicavasagar, V (1993), "Nonsexist Sexual Experiences Survey and Scale of Attraction to Sexual Aggression", *Australian and New Zealand Journal of Psychiatry*, vol. 27, no. 4, pp. 686-693.

[95]Briere, J, Henschel, D, and Smiljanich, K (1992), "Attitudes Toward Sexual Abuse: Sex Differences and Construct Validity", *Journal of Research in Personality*, vol. 26, no. 4, p. 401.

[96]Williams et al, above n 91.

[97]See Terminology above, at [1.1].

it is questionable whether some of the fantasies were in fact indicative of paedophilia in the clinical sense. In any event, the findings must be interpreted with caution. This is particularly the case because many individuals may be reluctant to admit experiencing sexual fantasies involving minors.[98] Another limitation is that most of the studies were conducted on a subset of offenders, many of whom have been described as offenders at the extreme end of the spectrum, such as sexual murderers.[99] Mindful of these limitations, the research investigating the relationship between sexual fantasies and child sexual abuse was nevertheless useful, particularly in Chapter 7, when considering the potential harms in viewing fantasy material.

1.2.5 The Harm of Viewing Pornography (Generally)

There is no research that has specifically investigated the impact of viewing fictional child pornography. It was therefore necessary to review the literature investigating the impact of viewing adult pornography in general.

According to anti-pornography feminists, most notably Catherine MacKinnon and Andrea Dworkin, adult pornography causes harm not only to the female participants depicted but to all women.[100] This is generally because such material allegedly desensitises viewers, objectifies women, and reinforces inequality.[101] These claims can be supported by studies investigating the impact of viewing adult pornography.[102]

---

[98]Leitenberg and Henning, above n 76, 488; Carter, M.N (2007), *Ain't Nothin' Like the Real Thing: Sexual Fantasy and Modus Operandi in Adult and Juvenile Sexual Offenders*, PhD Thesis, Pacific University, pp. 86-87.

[99]See Howitt, above n 89.

[100]Dworkin, A (1992), "Against the Male Flood: Censorship, Pornography and Equality", in C Itzin (ed.), *Pornography: Women, Violence and Civil Liberties*, Oxford University Press, Oxford, pp. 515-535; MacKinnon, C (1992), "Pornography, Civil Rights and Speech", in C Itzin (ed.), *Pornography: Women, Violence and Civil Liberties*, Oxford University Press, Oxford, pp. 456-511; Dworkin, A, and MacKinnon, C (1997), *In Harm's Way: The Pornography Civil Rights Hearings*, Harvard University Press, Cambridge. Also see Voon, T (2001), "Online Pornography in Australia: Lessons from the First Amendment", *UNSW Law Journal*, vol. 24, no. 1, pp. 142-170; Levy, N (2002), "Virtual Pornography: The Eroticization of Inequality", *Ethics and Information Technology*, vol. 4, no. 1, pp. 319-324; Maitra, I, and McGowan, M.K (2012), "Introduction and Overview", in I Maitra and M.K McGowan (eds.), *Speech and Harm: Controversies Over Free Speech*, Oxford University Press, Oxford, pp. 1-23.

[101]Ibid.

[102]Linz, D, Donnerstein, E, and Penrod, S (1988), "Effects of Long-Term Exposure to Violent and Sexually Degrading Depictions of Women", *Journal of Personality and Social Psychology*, vol. 55, no. 5, pp. 758-768; Linz, D, and Adams, S.M (1989), "Physiological Desensitization and Judgments about Female Victims of Violence", *Human Communication Research*, vol. 15, no. 4, pp. 509-522; Harris, R (1994), "The Impact of Sexually Explicit Media", in J Bryant and D Zillman (eds.), *Media*

For example, in a meta-analysis conducted between 1962 and 1995, it was found that exposure to pornography "puts one at an increased risk for developing sexually deviant tendencies, committing sexual offences, experiencing difficulties in one's intimate relations, and accepting the rape myth".[103] Laboratory studies have confirmed a correlation between the consumption of pornography and aggression towards women.[104] This association was found to be strongest for violent pornography, with a finding that men who viewed such material are significantly more likely than others to state that they would rape or sexually harass a woman if they could get away with it.[105]

It should be noted that some research has found similar negative effects to be associated with *non-violent* pornography.[106] For example, studies carried out by Zillmann and Bryant suggested that repeated exposure to non-violent and legally available pornography negatively affected consumer's attitudes, leading to "sexual callousness" towards women and "the trivialisation of rape".[107] Malamuth and Check's study of male students found a correlation between reading pornographic

---

Effects: Advances in Theory and Research, Lawrence Erlbaum Associates, New Jersey, pp. 247-272; Mulac, A, Jansma, L, and Linz, D (2002), "Men's Behavior toward Women after Viewing Sexually-Explicit Films: Degradation Makes a Difference", *Communication Monographs*, vol. 69, no. 4, pp. 311-28; Flood, M, and Hamilton, C (2003), *Youth and Pornography in Australia: Evidence on the Extent of Exposure and Likely Effects*, The Australia Institute, Discussion Paper 52, Canberra; Emmers-Sommer, T.M. and Burns, R.J. (2005),"The Relationship between Exposure to Internet Pornography and Sexual Attitudes toward Women", *Journal of Online Behavior*, vol. 1, no. 4, available online, <http://www.behavior.net/JOB/v1n4/emmers-sommer.html>; Vega, V, and Malamuth, N.M. (2007), "Predicting Sexual Aggression: The Role of Pornography in the Context of General and Specific Risk Factors", *Aggressive Behavior*, vol. 33, no. 22, pp. 104-117.

[103]Oddone-Paolucci, E, Genuis, M, and Violato, C (2000), "A Meta-Analysis of Published Research on the Effects of Pornography", National Foundation for Family Research and Education, University of Calgary, available online, <http://ccoso.org/library%20articles/Meta-analysis.pdf>.

[104]Ibid. Also see Itzin, C (2002), "Pornography and the Construction of Misogyny", *Journal of Sexual Aggression*, vol. 8, no. 3, p. 11; Donnerstein, E (1980), "Pornography and Violence Against Women: Experimental Studies", *Annals of the New York Academy of Sciences*, vol. 347, no. 1, pp. 277-288; Huston, A, Wartell, E, and Donnerstein, E (1998), *Measuring the Effects of Sexual Content in the Media*, A Report to the Kaiser Family Foundation, California.

[105]See Malamuth, N, and Check, J.V.P (1980), "Penile Tumescence and Perceptual Responses to Rape as a Function of Victim's Perceived Reactions", *Journal of Applied Social Psychology*, vol. 10, no. 6, pp. 528-547; Briere, J, and Malamuth, N (1983), "Self-Reported Likelihood of Sexually Aggressive Behaviour: Attitudinal versus Sexual Explanations", *Journal of Research in Personality*, vol. 17, no. 3, pp. 315-323; Donnerstein, E (1984), "Pornography: Its Effect on Violence against Women", in N Malamuth and E Donnerstein (eds.), *Pornography and Sexual Aggression*, Academic Press, Florida, pp. 53-81.

[106]For a useful review of these studies see Itzin, above n 104.

[107]Zillmann, D, and Bryant, J (1982), "Pornography, Sexual Callousness and the Trivialisation of Rape", *Journal of Communication*, vol. 32, no. 4, pp. 10-21. Also see Zillmann, D, and Bryant, J (1988), "Pornography's Impact on Sexual Satisfaction", *Journal of Applied Social Psychology*, vol. 15, no. 5, pp. 438-453.

magazines, such as *Playboy* and *Penthouse,* and the positive belief that women enjoy being raped.[108] Similarly, after reviewing existing studies of the effects of viewing pornography, Marshall concluded "it is adult consenting sexual images (i.e. those that are readily available) that appear to be used excessively by sexual offenders and that serve as instigators to their crimes".[109] Marshall had also conducted a study comparing the responses of rapists and non-sex offenders who consumed pornography and found that there was an insignificant difference between the two groups.[110] This finding is consistent with other studies that suggest pornography has similar negative effects on both sex offenders and non-offenders.[111] However, it should be noted that there are several studies that have reported that exposure to adult pornography had no negative effects on the participants' attitudes towards women.[112]

Nevertheless, there are several shortcomings in the research examining the harm in viewing adult pornography. In particular, many of these studies have been conducted in a laboratory, which has led some commentators to question the reliability and generalisability of the findings.[113] It has been claimed that the increased negative attitudes found in these studies do not necessarily predict aggressive behaviour in real life settings and that the studies only show immediate increase in aggressive behaviour

[108]Malamuth, N, and Check, J.V.P (1985), "The Effects of Aggressive Pornography on Beliefs in Rape Myths", *Journal of Research in Personality*, vol. 19, no. 3, pp. 299-320.
[109]Marshall, W.L (2000), "Revisiting the Use of Pornography by Sexual Offenders: Implications for Theory and Practice", *Journal of Sexual Aggression*, vol. 6, no. 1-2, p. 74. Also see Kingston, D.A, Federoff, P, Firestone, P, Curry, S, and Bradford, J.M. (2008), "Pornography Use and Sexual Aggression: The Impact of Frequency and Type of Pornography Use on Recidivism amongst Sexual Offenders", *Aggressive Behavior*, vol. 34, no. 4, pp. 341-351.
[110]Marshall, W.L (1988), "The Use of Sexually Explicit Stimuli by Rapists, Child Molesters, and Nonoffenders", *Journal of Sex Research*, vol. 25, no. 2, p. 277.
[111]Malamuth and Check, above n 108. Also see Itzin, above n 104, 10-13.
[112]Fisher, W, and Grenier, G (1994), "Violent pornography, Antiwoman Thoughts and Antiwoman Acts: In Search of Reliable Effects", *Journal of Sex Research*, vol. 31, no. 1, pp. 23−38; McKee, A (2007), "The Relationship Between Attitudes Towards Women, Consumption of Pornography, and Other Demographic Variables in a Survey of 1,023 Consumers of Pornography", *International Journal of Sexual Health*, vol. 19, no. 1, pp. 31-45. Also see Hamilton, M (2011), "The Efficacy of Severe Child Pornography Sentencing: Empirical Validity or Political Rhetoric?", *Stanford Law & Policy Review*, vol. 22, no. 2, p. 579.
[113]Hamilton, above n 112, 579; Koppelman, A (2005), "Does Obscenity Cause Moral Harm?", *Columbia Law Review*, vol. 105, no. 5, p. 1664; Einsiedel, E.F (1992), "The Experimental Research Evidence: Effects of Pornography on the 'Average Individual'", in C Itzin (ed.), *Pornography: Women, Violence and Civil Liberties*, Oxford University Press, Oxford, p. 267; Harris, B (2005), "Censorship: A Comparative Approach Offering a New Theoretical Basis for Classification in Australia", *Canberra Law Review*, vol. 8, p. 39; Ferguson, C.J, and Hartley, R.D (2009), "The Pleasure is Momentary…The Expense Damnable?: The Influence of Pornography on Rape and Sexual Assault", *Aggression and Violent Behavior*, vol. 14, no. 5, p. 326.

after exposure to pornography and not any long-term effects.[114] Another criticism is that the studies are usually unrepresentative of the population because the researchers often used a convenience sample comprising only of undergraduate students.[115]

Conversely, a number of academics, including many pro-pornography feminists, have rejected the argument that pornography is harmful.[116] Those against censoring such material often rely on research indicating that adult pornography may have a cathartic effect on viewers that allows them to relieve pent-up sexual tension and reduce sexual aggression, and is therefore psychologically beneficial.[117] A frequently cited study is that conducted by Diamond and Uchiyama, which found that the incidence of sex crimes in Japan substantially decreased during the period of increased availability of pornography.[118] Another oft-cited study is that of Kutchinsky, who reported a decrease in overall sex crimes in countries after the repeal of laws restricting the sale of pornography.[119] However, there is empirical evidence undermining the catharsis

[114]Koppelman, above n 113; Ferguson and Hartley, above n 113; Carter, D.L, Prentky, R.Z, Knight, R.A, Vanderveer, P, and Boucher, R (1987), "Use of Pornography in the Criminal and Developmental Histories of Sexual Offenders", *Journal of Interpersonal Violence*, vol. 2, no. 2, p. 197; Knudsen, D (1988), "Child Sexual Abuse and Pornography: Is there a Relationship?", *Journal of Family Violence*, vol. 3, no. 4, p. 258; Downs, D (1989), *The New Politics of Pornography*, University of Chicago Press, Chicago, p. 168.

[115]Huston et al, above n 104, 30; Carter et al, above n 114; Einsiedel, above n 113, 268.

[116]For example see Koppelman, above n 113; Strossen, N (1993), "A Feminist Critique of 'the' Feminist Critique of Pornography", *Virginia Law Review*, vol. 79, no. 5, pp. 1099-1190; Wicclair, M.R (1993), "Feminism, Pornography, and Censorship", in J.E White (ed.), *Contemporary Moral Problems*, 4th edn., West Group, Minneapolis, pp. 325-332; Easton, S (1994), *The Problem of Pornography: Regulation and the Right to Free Speech*, Routledge, London; Strossen, N (1995), *Defending Pornography: Free Speech, Sex, and the Fight for Women's Rights*, Scribner, New York; Smith, M, and Cree, V (2014), "Social Work and Pornography: Some Ethical Considerations", *Ethics & Social Welfare*, vol. 8, no. 4, pp. 317-331.

[117]For example see Carter et al, above n 114; Koppelman, above n 113; Wicclair, above n 116; Hamilton, above n 112, 574; Strossen, above n 116, 1182; Harris, above n 113, 41; Zanghellini, above n 71, 162; Fox, R.G (1978), "Censorship Policy and Child Pornography", *Australian Law Journal*, vol. 52, no. 7, p. 362; Bergen, R.K, and Bogle, K.A (2000), "Exploring the Connection Between Pornography and Sexual Violence", *Violence and Victims*, vol. 15, no. 3, p. 228; Heins, M (2001), *Not in Front of the Children: "Indecency", Censorship, and the Innocence of Youth*, Hill and Wang, New York, p. 228; Alexander, J.R (2003), "Obscenity, Pornography, and the Law in Japan: Reconsidering Oshima's 'In the Realm of the Senses'", *Asian-Pacific Law & Policy Journal*, vol. 4, no. 1, p. 153; Maris, C (2013), "Pornography is going on-line: The Harm Principle in Dutch law", *Law, Democracy & Development*, vol. 17, p. 6; Peters, J (2013), "Media and Sexual Development", in D Lemish (ed.), *The Routledge International Handbook of Children, Adolescents and Media*, Routledge, New York, p. 220.

[118]Diamond, M, and Uchiyama, A (1999), "Pornography, Rape and Sex Crimes in Japan", *International Journal of Law and Psychiatry*, vol. 22, no. 1, pp. 1-22.

[119]Kutchinsky, B (1973), "The Effect of Easy Availability of Pornography on the Incidence of Sex Crimes: The Danish Experience", *Journal of Social Issues*, vol. 29, no. 3, pp. 163-181; Kutchinsky, B (1991), "Pornography and Rape: Theory and Practice?", *International Journal of Law & Psychiatry*, vol. 14, no. 1-2, pp. 47-64.

theory, which strongly disapproves the claim that exposure to pornography has beneficial effects.[120]

Others have argued that the relationship between sex offending and pornography is correlative, not causative. For example, Marshall has argued that "pornography exposure may influence (not solely cause) the development of sexual offending in some men but for most its use is simply one of the many manifestations of an already developed appetite for deviant sexuality".[121] Others have also relied upon the research showing that sexual aggression is usually a result of multiple factors, and not just viewing pornography.[122] It has therefore been argued that adult pornography should not be censored because the research does not conclusively establish that viewing such material causes sexual abuse, emphasising that "correlation is not causation".[123] However, Itzin has argued that conclusive scientific proof establishing a direct link between exposure to pornography and harm is not only "impossible to achieve",[124] but unnecessary because:

> "The research consistently produces correlations between pornography and harm. Correlation is itself robust as a standard of evidence in establishing connections between pornography use and negative effects on attitudes, beliefs and behaviour, and should … be reconceptualised as evidence of causal—although not solely causal—relationships". [125]

---

[120]Cline, V.B (1974), "Another View: Pornography Effects, the State of the Art", in V.B Cline (ed.), *Where Do You Draw the Line?*, Brigham Young University Press, Utah, pp. 203-244; Court, J.H (1984), "Sex and Violence: A Ripple Effect", in N Malamuth and E Donnerstein (eds.), *Pornography and Sexual Aggression*, Academic Press, Florida, pp. 143-172; Weaver, J (1992), "The Social Science and Psychological Research Evidence: Perceptual and Behavioural Consequences of Exposure to Pornography", in C Itzin (ed.), *Pornography: Women, Violence and Civil Liberties*, Oxford University Press, Oxford, p. 302; Russell, D, and Purcell, N (2006), "Exposure to Pornography as a Case of Child Sexual Victimization", in N Dowd, D Singer, and R Wilson (eds.), *Handbook of Children, Culture, and Violence*, Sage Publications, California, pp. 59-83.

[121]Marshall, above n 109. Also see Marshall, W.L, and Barbaree, H.E (1990), "An Integrated Theory of Sexual Offending", in W.L Marshall, D.R Laws, and H.E Barbaree (eds.), *Handbook of Sexual Assault*, Plenum Press, New York, pp. 257-275.

[122]For example see Hamilton, above n 112, 578; Koppelman, above n 113; Gruen, L (2008), "Pornography and Censorship", in C Wellman and R.G Frey, *Companion to Applied Ethics*, Blackwell Publishing, Massachusetts, p. 160.

[123]Hamilton, above n 112, 578.

[124]Itzin, above n 104, 20.

[125]Ibid. Also see Weaver, above n 120, 301; Cline, V.B (1976), "The Scientists vs. Pornography: An Untold Story", *Intellect*, vol. 104, no. 2375, p. 575; Itzin, C (1992), "Pornography and Civil Liberties: Freedom, Harm and Human Rights", in C Itzin (ed.), *Pornography: Women, Violence and Civil Liberties*, Oxford University Press, Oxford, pp. 553-585.

The literature concerned with child pornography, both real and virtual, has frequently relied upon many of the arguments raised in the adult pornography debate to advance its claims. For example, some have argued that whether the minor depicted is real or fictional is irrelevant because these depictions reduce children to mere sex objects and may cause desensitisation in the same way that adult pornography degrades women.[126] Conversely, Gillespie has argued that, like the objectification argument made by anti-pornography feminists, the claim that virtual child pornography objectifies children is unconvincing in absence of conclusive evidence of harm.[127] It has therefore been suggested that the only justification for prohibiting virtual child pornography is based on morality.[128] However, as will be discussed in Chapter 7, fictional child pornography may create an unacceptable risk of harm, such as desensitisation and incitement to commit child sexual abuse, which may justify its prohibition. This is especially in light of the research indicating the harm arising from viewing child pornography, as reviewed in the following section.

1.2.6 Harm in Viewing Child Pornography

The focus of this section is on the literature discussing the potential negative effects child pornography may have on viewers' attitudes, beliefs, and actions towards children. There is much less research investigating the harms of viewing child abuse material than the harm of viewing adult pornography. This may be partly due to the ethical barriers in conducting such research and partly because in some jurisdictions accessing child abuse material, even for research purposes, is illegal.[129] These barriers may also explain the lack of studies investigating the impact of viewing virtual child pornography.[130]

---

[126]Bergelt, above n 45, 585; Gural, J (2012), "Kawaii, too Sexy: The Eroticized Portrayal of Children in Manga and Media", *Humble Mumbles*, 21 January, available online, <http://humblemumbles-writes. blogspot.com.au/2012/01/kawaii-too-sexy-eroticized-portrayal-of.html?m=1>;Violence in Cyberspace (2006), *Violence Against Children*, UNCIEF, issue no. 4, p. 7, available online, <http://www.unicef.org/eapro/VAC_newsletter_04Cyber.pdf>.

[127]Gillespie, above n 6, 113.

[128]Ibid. Also see April, above n 45; Ost, above n 50; Ryder, above n 49; Smyth, above n 49; Simpson, above n 74.

[129]Sheldon and Howitt, above n 26, 31; Linz and Imrich, above n 22, 91.

[130]But see Paul, B, and Linz, D (2008), "The Effects of Exposure to Virtual Child Pornography on Viewer Cognitions and Attitudes Toward Deviant Sexual Behavior", *Communication Research*, vol. 35, no. 1, pp. 13-38. In this study, participants were exposed to "barely legal" pornography, that is,

Generally, the studies concerned with pornography depicting real people and attitudes about child sexual abuse indicate that viewing such images may have a negative impact on viewers. For example, Buchman has found that exposure to pornography promoted "callous attitudes about the degree of suffering experienced by child victims of sexual abuse"[131] and led to the "trivialisation of child sexual abuse".[132] It has been suggested that viewing sexualised images of children may cause desensitisation[133] and that viewers are more likely to endorse cognitive distortions, such as the belief that sexual activity with children is normal.[134] This can reduce the viewer's inhibitions; thereby making it more likely that he or she will commit a contact offence on a child.[135]

The use of child pornography in masturbation has been said to be most influential in legitimising distorted thinking and may reinforce the association between the images and sexual gratification.[136] Research shows that such images are commonly used as a stimulus for masturbation by paedophiles.[137] It has been claimed that viewing child

---

pornographic images depicting youthful adults who appear underage. It was found that exposure to sexually explicit images of women who appeared to be underage influenced attitudes about the appropriateness of sex with minors. Participants who viewed barely legal pornography were more likely to make stronger associations between minors and sex when subsequently viewing non-sexualised images of minors. This led the researchers to conclude that viewers may become desensitised by frequent exposure to sexualised images of minors.

[131]Buchman, J.G (1988), *Effects of Repeated Exposure to Nonviolent Erotica on Attitudes about Child Sexual Abuse*, PhD Thesis, Indiana University, p. vii.

[132]Ibid.

[133]Desensitisation is said to occur by repeated viewing of repulsive material. Gradually, the viewer becomes immune to his or her first feelings of repulsion and may believe that such conduct is acceptable. Russell, D (1993), *Against Pornography*, Russell Publications, California, p. 130.

[134]Ibid; Marshall, above n 109, 72; Calder, above n 19, 17; Wyre, above n 81, 239; United States Sentencing Commission (2012), *Report to the Congress: Federal Child Pornography Offenses*, p. 76, available online, <http://www.ussc.gov/news/congressional-testimony-and-reports/sex-offense-topics/report-congress-federal-child-pornography-offenses>. Also see Blundell, B, Sherry, M, Burke, A, and Sowerbutts, S (2002), "Child Pornography and the Internet: Policing and Treatment Issues", *Psychiatry, Psychology and Law*, vol. 9, no. 1, pp. 79-84; Fagan, P, Wise, T, Schmidt, C, and Berlin, F (2002), "Pedophilia", *Journal of the American Medical Association*, vol. 288, no. 19, pp. 2458-2465; Sheldon, K (2011) "What we know about Men who Download Child Abuse Images", *British Journal of Forensic Practice*, vol. 13, no. 4, p. 224.

[135]Ibid.

[136]See Laws and Marshall, above n 80; McGuire, R, Carlisle, J, and Young, B (1964), "Sexual Deviations as Conditions Behaviour: A Hypothesis", *Behaviour Research and Therapy*, vol. 2, no. 2-4, pp. 185-190;Wyre, R (1992), "Pornography and Sexual Violence: Working with Sex Offenders", in C Itzin (ed.), *Pornography: Women, Violence and Civil Liberties*, Oxford University Press, Oxford, p. 243; Sullivan, J and Beech, A (2003), "Are Collectors of Child Abuse Images a Risk to Children?", in A MacVean and P Spindler (eds.), *Policing Paedophiles on the Internet*, The New Police Bookshop, England, pp. 11-20.

[137]Quayle and Taylor, above n 5, 8, 156, 182-183; Sheldon and Howitt, above n 26, 105-106; Malamuth and Huppin, above n 45, 805; Riegel, D (2004), "Effects on Boy-Attracted Pedosexual

pornography for such purposes may heighten sexual awareness to the point that the images are no longer sufficient to meet the viewers' sexual needs.[138] The research also indicates a link between viewing child pornography, masturbation, and contact offending. For example, in a study completed in the 1980s on 51 child molesters, 53 per cent admitted to deliberately viewing child pornography in order to prepare for molestation.[139] A more recent study of 80 convicted child molesters reported that 15 per cent of the participants had used child pornography prior to committing a contact offence against a child.[140]

Additionally, evidence shows that child molesters often have in their possession child pornography depicting real children.[141] While these studies do not establish a clear causal relationship between viewing child pornography and the occurrence of child sex abuse, they do indicate a correlative relationship between the two.[142] This can be supported by studies showing that a considerable number of offenders charged with possessing child pornography also have a previous conviction for sexually abusing a child.[143] In a study by Seto et al, 43 of 100 male child pornography offenders had been

---

Males of Viewing Boy Erotica", *Archives of Sexual Behavior*, vol. 33, no. 4, p. 322. Also see Webb, L, Craissati, J, and Keen, S (2007), "Characteristics of Internet Child Pornography Offenders: A Comparison with Child Molesters", *Sexual Abuse*, vol. 19, no. 4, pp. 449-465.

[138]Quayle and Taylor, above n 5, 25-26. Also see Quayle, E, and Taylor, M (2001), "Child-Seduction and Self-Representation on the Internet", *Cyberpsychology & Behavior*, vol. 4, no. 5, pp. 597-608.

[139]Marshall, above n 109, 280. Also see Elliott, M, Browne, K, and Kilcoyne, J (1995), "Child Sexual Abuse Prevention: What Offenders Tell Us", *Child Abuse and Neglect*, vol. 19, no. 5, pp. 579-594.

[140]Craissati, J, and McClurg, G (1996), "The Challenge Project: Perpetrators of Child Sexual Abuse in South East London", *Child Abuse & Neglect*, vol. 20, no. 11, pp. 1067-1077.

[141]Wolak, J, Finkelhor, D, and Mitchell, K (2005), *Child-Pornography Possessors Arrested in Internet-Related Crimes: Findings from the National Juvenile Online Victimization Study*, National Centre for Missing and Exploited Children, available online, <http://www.unh.edu/ccrc/pdf/jvq/CV81.pdf>; Seto, M.C, Cantor, J.M, and Blanchard R (2006), "Child Pornography Offenses are a Valid Diagnostic Indicator of Pedophilia", *Journal of Abnormal Psychology*, vol. 115, no. 3, pp. 610-615; Wolak, J, Finkelhor, D, Mitchell, K, and Ybarra, M (2008), "Online 'Predators' and Their Victims", *American Psychologist*, vol. 63, no. 2, p. 111-128.

[142]Ost, above n 8, 110.

[143]See Marshall, above n 109; Elliot et al, above n 139; Craissati and McClurg, above n 140; Hernandez, A.E (2006), *Sexual Exploitation of Children Over the Internet: The Face of a Child Predator and Other Issues*, paper presented at the Subcommittee on the Oversight and Investigations Committee on Energy and Commerce, United States House of Representatives; Bourke, M.L and Hernandez, A.E (2009), "The 'Butner Study' Redux: A Report of the Incidence of Hands-on Child Victimization by Child Pornography Offenders", *Journal of Family Violence*, vol. 24, no. 3, pp. 183–191; Long, M, Alison, L, and McManus, M (2013), "Child Pornography and Likelihood of Contact Abuse: A Comparison between Contact Child Sexual Offenders and Noncontact Offenders", *Sexual Abuse*, vol. 25, no. 4, pp. 370-395; Aslan, D and Edelmann, R (2014), "Demographic and Offence Characteristics: A Comparison of Sex Offenders Convicted of Possessing Indecent Images of Children, Committing Contact Sex Offences or both Offences", *Journal of Forensic Psychiatry & Psychology*, vol. 25, no. 2, pp. 121-134. As will be seen in chapters 4 and 5 of this dissertation, many

charged with sexual offence against one or more children.[144] Similarly, Seto and Eke found that in a sample of 201 offenders convicted of child pornography possession, 24 per cent had a history of committing child sexual abuse.[145]

Yet the literature has emphasised that paedophiles who view child pornography are not necessarily child molesters.[146] In several studies, paedophiles who admitted to viewing child pornography claimed to have never molested a child and were found to be at a low risk of becoming contact offenders.[147] According to Sheldon and Howitt, this may be because: "some potential offenders may confine their fantasy to masturbation or even merely daydream about offending".[148] It has also been reported that some molesters never consumed child pornography prior to their offence.[149] However, a major limitation of these studies is that they depend on the willingness of offenders to disclose their criminal history and therefore the findings should be interpreted cautiously.

Like the research on adult pornography, there are studies indicating that child pornography may have a cathartic effect on viewers that prevents them committing child sexual abuse. For example, in an online study involving 290 self-identified "Boy-Attracted Pedosexual Males", 84.5 per cent replied that the consumption of child pornography "rarely" or "never" increased their desire to commit child sexual

---

of the defendants convicted of fantasy material also had a history of committing child sexual abuse.

[144]Seto et al, above n 141.

[145]Seto, M.C, and Eke, A.W (2005), "The Criminal Histories and Later Offending of Child Pornography Offenders", *Sexual Abuse*, vol. 17, no. 2, pp. 201-210.

[146]Quayle and Taylor, above n 5, 12-13; Ost, above n 8, 111; Hamilton, above n 112, 580; Jung et al, above n 26; Malamuth and Huppin, above n 45, 805; Linz and Imrich, above n 22, 82; Fagan et al, above n 134; Rettinger, L.J (2000), *The Relationship between Child Pornography and the Commission of Sexual Offences against Children: A Review of the Literature*, Department of Justice Canada, p. 1-2; Middleton, D (2009), "Linkages between Viewing Indecent Images of Children and Contact Sexual abuse: Issues from Research", Compendium of articles: Research findings on child abuse images and sexual exploitation of children online, ECPAT, pp. 22-26; Lanning, K.V (2010), *Child Molesters - A Behavioral Analysis: For Professionals Investigating the Sexual Exploitation of Children*, National Centre for Missing and Exploited Children, 5th edn, p. 29, available online, <http://www.missingkids.com/en_US/publications/NC70.pdf>; Richards, K (2011), *Misperceptions about Child Sex Offenders*, Trends and Issues in Crime and Criminal Justice, No. 429, Canberra.

[147]Seto and Eke, above n 145; Endrass, J, Urbaniok, F, Hammermeister, L, Benz, C, Elbert, T, Laubacher, A, and Rossegger, A (2009), "The Consumption of Internet Child Pornography and Violent Sex Offending", *BMC Psychiatry*, vol. 9, no. 1, pp. 43-50.

[148]Sheldon and Howitt, above n 26, 190.

[149]See Webb et al, above n 137; Wortley, R, and Smallbone, S (2006), "Applying Situational Principles to Sexual Offenses Against Children", in R Wortley and S Smallbone (eds.), *Situational Prevention of Child Sexual Abuse*, Criminal Justice Press, New York, pp. 7-35.

abuse.[150] Carter et al's study on 38 rapists and 26 child molesters found that pornography might be have been used as a substitute for actual offending.[151] A limitation of their study is that it did not specify whether the type of pornography used by offenders to relieve their impulses depicted adults or children.

Nevertheless, the research suggesting child pornography has a cathartic effect on viewers has been controversial and disproved. As pointed out by Gillespie, it is often offenders who make this claim,[152] and according to Ethel and Quayle, offenders make this claim in order to rationalise their behaviour by maintaining that viewing such images prevented them from acting upon their urges.[153] In particular, Russell and Purcell have strongly dismissed the belief that child pornography is cathartic, arguing that a vast amount of research shows viewing child pornography by no means serves as a "safety valve".[154] Similarly, Seto has argued that "[a] cathartic effect of child pornography would not be consistent with evidence regarding the impact of sexually explicit media".[155]

There are several limitations of the studies investigating the negative influence of viewing child pornography that should be noted. Many of these studies were conducted on a convenience sample of incarcerated offenders and, therefore, the findings cannot be generalised.[156] Other studies have been conducted in an artificial laboratory setting, which does not necessarily predict how a person will act in real life.[157] As mentioned above, the validity of the studies that relied on self-report surveys is also questionable because the sex offender participants may not have been truthful in their reports of child pornography use.[158] The usefulness of the existing studies were particularly limited for the purposes of this dissertation in that they were concerned with the impact

[150]Riegel, above n 137.
[151]Carter et al, above n 114, 207. Also see Quayle and Taylor, above n 5, 90.
[152]Gillespie, above n 6, 41.
[153]Quayle and Taylor, above n 5, 91. Also see Elliott, I.A., Beech, A. R., and Mandeville-Norden, R (2013), "The Psychological Profiles of Internet, Contact, and Mixed Internet/Contact Sex Offenders", *Sexual Abuse,* vol. 25, no. 1, p. 13.
[154]Russell and Purcell, above n 120, 61.
[155]Seto, M.C (2008), *Pedophilia and Sexual Offending Against Children: Theory, Assessment, and Intervention*, American Psychology Association, Washington, p. 68.
[156]Rettinger, above n 146, 11.
[157]For literature criticising laboratory studies see footnote 113 above.
[158]Rettinger, above n 146, 11.

of viewing sexualised images depicting *real* children. They did not investigate whether sexually explicit images of child-like cartoon characters may have any effect on viewers. Despite these limitations, as will be seen in Chapter 7, the existing studies assisted in determining whether it was reasonably open for legislatures to have formed the belief that viewing sexually explicit fictional material depicting children negatively impacts viewers.

1.2.7 Media Effects Studies on Cartoon Violence

There is an enormous volume of research concerned with the role of the media in influencing audiences' attitudes and behaviours.[159] Livingstone has observed that "[s]ince the 1920s thousands of studies of mass media effects have been conducted".[160] It would have been impossible, and unnecessary, to review the vast amount of media effects research. This is partly due to the "severe methodological and theoretical limitations of such research",[161] and because these studies have been mainly concerned with realistic depictions of violence. Therefore, the focus was on reviewing research concerned with the media effects of fictional representations of criminal behaviour.

The studies on cartoon violence form part of the studies generally examining media effects. Given the lack of research examining the effects of cartoon pornography, it was appropriate to review the studies investigating the impact of violent cartoons. This was to determine whether the surrealism of obviously fictional material acts as a cognitive barrier that prevents viewers from developing a desire to imitate the acts depicted.[162]

---

[159]For a useful overview on media effects see Sparks, G (2016), *Media Effects Research: A Basic Overview*, 5th edn., Wadsworth, Boston.

[160]Livingstone, S (1996), "On the Continuing Problems of Media Effects Research", in M Gurevitch and J Curran (eds.), *Mass Media and Society,* 2nd edn., Edward Arnold, London, p. 306.

[161]Greer, C and, Reiner, R (2012), "Mediated Mayhem: Media, Crime, Criminal Justice", in M Maguire, R Morgan, and R Reiner, Robert (eds.), *The Oxford Handbook of Criminology*, 5th edn., Oxford University Press, Oxford, p. 246.

[162]There have been a few researchers who have conducted a content analysis of cartoon pornography in adult magazines, such as *Playboy* and *Hustler.* While it was found that the characters depicted in these magazines often appeared underage, these studies did not assess the effect of viewing such material on viewers. See Palmer, E (1979), "Pornographic Comics: A Content Analysis", *The Journal of Sex Research*, vol. 15, no. 4, pp. 285-298; Reisman, J (1986), "Children in Playboy, Penthouse and Hustler", *Preventing Sexual Abuse*, Summer, p. 6; Matacin, M, and Burger, J (1987), "A Content Analysis of Sexual Themes in Playboy Cartoons", *Sex Roles*, vol. 17, no. 3, pp. 179-186; Scott, J and Cuvelier, S (1987) "Sexual Violence in Playboy Magazine: A Longitudinal Content Analysis", *Journal of Sex Research*, vol. 23, no. 4, pp. 534-539.

The research concerned with cartoon violence usually involves exposing participants to animated characters engaging in violence. It has been found that violence in cartoons is common, especially in cartoons directed at children;[163] therefore, most of the research has been concerned with the effect of cartoon violence on children. This is due in large part to the controversy surrounding the influence of violent comics on children in the 1950s, an issue discussed in Chapter 2. In one of the earliest experiments on cartoon violence, a sample of preschool children randomly viewed either violent or non-violent cartoons and were then observed while playing with other children.[164] The researchers found no difference in levels of aggression between children who viewed violent and non-violent cartoons, which is consistent with other studies examining the effects of cartoon violence on children.[165]

Conversely, Bandura et al found similar aggression scores between children who viewed cartoon violence and violence performed by a real person.[166] The children's level of aggression was measured by observing whether the children would imitate the violence they had been exposed to on an inflated Bobo doll. More recent studies have also reported that cartoon violence has the same negative effects as more realistic violence.[167]

Although there has been little research examining the effects of cartoon violence on adults, it has been found that adult participants generally do not perceive humorous cartoons as violent.[168] This has led some observers to argue that cartoons trivialise

---

[163]Kenyon, B.J (2002), *The Effects of Televised Violence on Students*, Masters Thesis, Grand Valley State University, p. 7; Kirsh, S.J (2006), "Cartoon Violence and Aggression in Youth", *Aggression and Violent Behavior*, vol. 11, no. 6, p. 548; Ferguson, C.J (2013), *Adolescents, Crime, and the Media*, Springer, New York, p. 130.

[164]Siegel, A.E (1956), "Film-Mediated Fantasy Aggression and Strength of Aggressive Drive", *Child Development*, vol. 27, no. 3, pp. 365-378.

[165]For example see Hapkiewicz, W, and Roden, A (1971), "The Effect of Aggressive Cartoons on Children's Interpersonal Play", *Child Development*, vol. 42, no. 5, pp. 1583-1585; Hapkiewicz, W, and Roden, A (1974), "The Effect of Realistic versus Imaginary Aggressive Models on Children's Interpersonal Play", *Child Study Journal*, vol. 4, no. 2, pp. 47-58; Nathanson, A, and Cantor, J (2000), "Reducing the Aggression-Promoting Effect of Violent Cartoons by Increasing Children's Fictional Involvement with the Victim", *Journal of Broadcasting and Electronic Media*, vol. 44, no. 1, pp. 125-142.

[166]Bandura, A, Ross, D, and Ross, S (1963), "Imitation of Film-Mediated Aggressive Models", *Journal of Abnormal and Social Psychology*, vol. 66, no. 1, pp. 3-11.

[167]See Carnagey, N, and Anderson, C (2004), "Violent Video Game Exposure and Aggression: A Literature Review", *Minerva Psichiatrica*, vol. 45, no. 1, pp. 1-18; Anderson, C, Gentile, D, and Buckley, K (2007), *Violent Video Game Effects on Children and Adolescents: Theory, Research, and Public Policy*, Oxford University Press, New York.

[168]Howitt, D, and Cumberbatch, G (1975), *Mass Media Violence and Society*, John Wiley, New York; Gunter, B, and Furnham, A (1984), "Perceptions of Television Violence: Effects of Programme Genre

depictions of criminal behaviour and can desensitise viewers.[169] Cartoons that lack humour have also been perceived to be less violent than realistic depictions of media violence.[170]

It should be noted that research on media effects has been subject to much criticism, on similar grounds as criticism of research examining the effects of adult pornography. This includes unreliable methodologies, the fact that studies are often conducted in an artificial laboratory setting, and the criticism that exposure to violent cartoons in a laboratory is too short to observe any long-term effects.[171] Also, while social learning theorists and researchers have suggested different types of media have considerable power to influence people of all ages,[172] most cartoon violence studies were conducted on very young children. This makes it inappropriate to extrapolate some of the findings to older audiences, as children have been identified as being particularly susceptible to media influence.[173] Accordingly, research examining the effects of cartoon violence was drawn from sparingly in this dissertation.

1.3 Research Questions and Methodology

The research questions guiding this study were shaped by the literature reviewed. Collectively, they sought to investigate the phenomenon of fantasy material. The five main research questions and an explanation of their importance individually are set out below. The research questions were as follows:

---

and Type of Violence on Viewers' Judgements of Violent Portrayals", *British Journal of Social Psychology*, vol. 23, no. 2, pp. 155-64.

[169]See Kirsh, above n 163, 549; Potter, W, and Warren, R (1998), "Humor as Camouflage of Televised Violence", *Journal of Communication*, vol. 48, no. 2, pp. 40-57. Also see Flugel, J.C (1954), "Humor and Laughter", in G Lindzey (ed.), *Handbook of Social Psychology*, Addison-Wesley, Cambridge, p. 716; Harrison, R (1981), *The Cartoon: Communication to the Quick*, Sage Publications, California, p. 114.

[170]Kirsh, above n 163, 550.

[171]See especially Gauntlett, D (1998), "Ten Things Wrong with the Media 'Effects' Model", in R Dickson, R Harindranath, and O Linne (eds.), *Approaches to Audiences: A Reader*, Arnold, London. Also see Livingstone, S (1996), "On the Continuing Problems of Media Effects Research", in M Gurevitch and J Curran (eds.), *Mass Media and Society*, 2nd edn., Edward Arnold, London, pp. 305-324.

[172]See especially Bandura, A (1977), *Social Learning Theory*, Prentice-Hall, New Jersey.

[173]Browne, K, and Hamilton-Giachritsis, C (2005), "The Influence of Violent Media on Children and Adolescents: A Public-Health Approach", *Lancet*, vol. 365, no. 9460, p. 705. Also see Gentile, D.A, Saleem, M, and Anderson, C.A (2007), "Public Policy and the Effects of Media Violence on Children", *Social Issues and Policy Review*, vol. 1, no. 1, pp. 15-61.

1. How have the child abuse material offences restricted the possession and dissemination of fantasy material?

To date, there has not been any comprehensive analysis of the extension of Australia's child abuse material legislation to purely fictional material. Thus, answering this question is essential before discussing the justifications of extending the law to fictional material that does not involve a real child to produce. In particular, addressing this question involved analysing the relevant case law to assess the claims that the prohibition of fictional child pornography unfairly targets otherwise innocent fantasy material fans. Analysis of the relevant legislation and case law is provided in chapters 4 and 5.

2. What are the possible theoretical rationales and justifications for prohibiting, or not prohibiting, sexually explicit fictional representations of minors?

This question is essential because the rationale for criminalising obviously fictional child pornography has not been clearly articulated by legislatures in Australia. Although legal theory may not have strong influence on law-making, theoretical rationales provide useful ways to evaluate the purpose and defensibility of the law. Given the significant influence of the Harm Principle, the Offense Principle, and Legal Moralism in liberal democracies, these theories were drawn upon to assess the possible theoretical justifications for extending Australia's child abuse material to fictional child pornography. These theories are discussed in Chapter 3.

3. Does the empirical evidence support these theoretical justifications?

It is necessary to examine the available empirical evidence to assess whether any of the prevalent theories justify criminalisation. In chapters 7 and 8, the literature reviewed is synthesised with the theoretical justifications to answer this question. However, given the limitations of the existing literature, this study also conducted surveys and interviews with relevant individuals, seeking their views as to whether the prohibition is justified. Therefore, the theories of criminalisation are used as a tool for

interpreting the evidence.

4. What do those enforcing the offence and fantasy material fans, potentially criminalised under the child abuse material legislation, consider to be the justification for these laws?

This research question lies at heart of the dissertation. It is the first study to seek and obtain the views of three pertinent stakeholders–fantasy material fans, law enforcement officers, and judicial officers. It facilitated dialogue between these stakeholders; dialogue that, until this study, had not been created. By surveying fantasy material fans, the methodology used to answer this research question gave voice to those potentially criminalised by the law−fantasy material fans−something that is missing from the literature. This question also shed light on the views of those responsible for interpreting and enforcing the law, which is important in understanding how their understanding of the law affects its enforcement and whether the application of the law mirrors its possible theoretical justifications. The interview and survey data is provided in Chapter 6.

5. In light of international approaches, can the offences be better targeted?

As will be discussed in chapters 4 and 5, fictional child pornography has been criminalised in countries with similar legal systems – Canada, the United States, and the United Kingdom. Having drawn upon the historical development and rationale behind the law in these jurisdictions throughout this study, this dissertation suggests ways for Australia's legislation to be better targeted in Chapter 9.

The methods used to answer the research questions, and the answers obtained, mark this study as noteworthy. This study is socio-legal, in that it examines the relevant law but also situates it in the societal context.[174] It involved, on the one hand, adopting a strict doctrinal approach that relied predominantly on legislation and case law, as well as interpretive materials.[175] On the other hand, it adopted an analytical approach drawn

[174]British Library, *Socio-Legal Studies: An Introduction to Collections*, available online, <http://www.bl.uk/reshelp/findhelpsubject/busmanlaw/legalstudies/soclegal/sociolegal.html>.
[175]Ibid.

from the social sciences to analyse the law in action.[176] Qualitative data in the form of interviews and surveys was collected. The multi-disciplinary methodology adopted, and its strengths and weaknesses, are explained below.

1.3.1 Legal Research

Consistent with most doctrinal legal research, this dissertation used a traditional black letter methodology.[177] This involved researching and analysing the relevant law found in primary sources, such as legislation and case law. The aim of this method was to obtain, organise, describe, and provide commentary on the authoritative law. Extrinsic material, such as explanatory memoranda, parliamentary debates, and second reading speeches, was also used to assist in interpreting the legislation.

Australian case law was generally accessed via online legal databases, such as AustLII, LexisNexis AU, WestLaw and court websites. To obtain judgements that were not publicly available, the relevant courts were contacted to request access to the specific case, which was generally approved upon payment of a fee. However, some cases were not accessible either online or in hard-copy, either because the case was heard in a local court that only reports selected judgements, or because no transcripts of the proceedings existed. As a result, news articles reporting on the case were drawn upon, meaning information about the case was limited to those aspects the media chose to disclose. Given the potential unreliability of media reports, a warning will be provided where information about a particular case could only be gleaned from the media.

The relevant case law in Canada, the United States, and the United Kingdom was relatively easy to obtain. These cases were identified using appropriate search terms on international legal databases, as well as through the secondary literature. However, some recent United Kingdom case law dealing with fictional child pornography that was identified in the literature was not made publicly available. The relevant courts were contacted requesting a copy of certain judgements, but some courts failed to

[176]Ibid.
[177]See Hutchinson, T (2012), "Defining and Describing What We Do: Doctrinal Legal Research", *Deakin Law Review*, vol. 17, no. 1, pp. 83-119; Zariski, A (2014), *Legal Literacy: An Introduction to Legal Studies*, AU Press, Alberta.

respond despite several requests. Again, this meant that what was known about the case was limited to what was reported in the media.

The reason for choosing to conduct a comparative analysis on the law in Canada and the United States was that there has been much judicial and academic consideration on the status of sexually explicit fictional material depicting minors in these jurisdictions. Originally the United Kingdom was not included in the analysis, because it was only in 2010 that fictional images were criminalised. However, upon further research into the lead-up to the enactment of the laws and the growing literature debating the criminalisation of fictional child pornography, it became evident that it was important to include the United Kingdom in the analysis. These three countries were also selected given the similarity of their legal systems, thus allowing a more accurate cross-jurisdictional comparison with Australia.

1.3.2 Qualitative Methodology

Qualitative data was obtained through interviews and surveys. Ethical clearance was obtained from the Ethics Committee before undertaking fieldwork. The process used to collect the data from two relevant groups (elites and comic fans) is outlined below.

1.3.2.1 Elite Interviewing

The interview method whereby individuals from certain professions are selected is known as "elite interviewing". Although there is no universally accepted definition of "elites", Richards's definition was useful. He defined elites as "a group of individuals, who hold, or have held, a privileged position in a society".[178] Despite initial discomfort with using the term elite, like other researchers who have employed this method, "I have found no other term that is shorthand for the point I want to make, namely that people in important or exposed positions may require VIP interviewing treatment on topics which relate to their importance or exposure".[179]

[178]Richards, D (1996), "Elite Interviewing: Approaches and Pitfalls", *Politics*, vol. 16, no. 3, p. 199.
[179]Reisman, D (1964), *Abundance for What? And Other Essays*, Garden City, New York, p. 528.

The elites interviewed consisted of seven judicial officers and four law enforcement officers. Despite the small sample size, the interviews provided rich sources of qualitative data that assisted in filling the gaps in the literature and providing some much-needed Australian perspectives from those responsible for enforcing the law. Accordingly, the research used purposive sampling, which entailed selecting participants in a strategic way to ensure only those identified as relevant were interviewed.[180]

The interviews were semi-structured, which involved formulating a list of specific questions to be asked. The participants were given a great deal of flexibility in how to reply to a question. The main advantages of using the elite interview method included:[181]

- assisting in interpreting and clarifying the law;
- providing information that could not be obtained through published reports or was not otherwise publicly available; and
- gaining access to potential participants, as many of the elites interviewed recommended other relevant individuals in their profession (the "snowball effect").[182]

The main limitation of elite interviewing, and a reason why many socio-legal researchers have been reluctant to use this method, is the difficulty in accessing individuals in certain professions.[183] In particular, there seems to be a widespread belief that members of the judiciary are extremely reluctant to participate in interviews for research purposes.[184] This belief may partly explain why there have been very few

[180]Bryman, A (2008), *Social Research Methods*, 3rd edn., Oxford University Press, Oxford, p. 415.
[181]See Tansey, O (2007), "Process Tracing and Elite Interviewing: A Case for Non-Probability Sampling", *Political Science & Politics*, vol. 40, no. 4, pp. 765-772; Harvey, W (2011), "Strategies for Conducting Elite Interviews", *Qualitative Research*, vol. 11, no. 4, p. 431-441; Richardson, P (2014), "Engaging the Russian Elite: Approaches, Methods and Ethics", *Politics*, vol. 34, no. 2, pp. 180-190.
[182]Richardson, above n 181, 182.
[183]Richards, above n 178, 200; Halliday, S, and Schmidt, P (2009), *Conducting Law and Society Research: Reflections on Methods and Practice*, Cambridge University Press, New York, p. 72; Mikecz, R (2012), "Interviewing Elites: Addressing Methodological Issues", *Qualitative Inquiry*, vol. 18, no. 6, p. 482.
[184]Pierce, J.L (2002), "Interviewing Australia's Senior Judiciary", *Journal of Political Science*, vol. 37, no. 1, p. 132.

Australian studies that have interviewed judges.[185] While obtaining access to judicial officers for the purposes of this study was by no means easy, it was found that there are strategies that can be implemented by researchers to mitigate barriers to access, some of which are mentioned later.

The researcher transcribed all the interviews, which facilitated immersion in the data.[186] The analytical approach adopted was qualitative content analysis, which is one of the most extensively used analytical tools in a diverse range of disciplines.[187] It has been defined as "a research method for the subjective interpretation of the content of text data through the systematic classification process of coding and identifying themes or patterns".[188] This method "focuses on the characteristics of language as communication with attention to the content or contextual meaning of the text".[189] Qualitative content analysis was therefore highly suitable for analysing the interviews, as well as the qualitative surveys conducted on comic fans, given its flexibility and its aim of providing knowledge and understanding of the issue under investigation.[190]

Interviews with Judicial Officers

A total of 15 judicial officers were contacted requesting an interview. Of this total, seven agreed to participate. Four were magistrates and three judges, one of whom was female. In order to obtain the views of judicial officers from different levels of the court hierarchy, judicial officers presiding in the Local Courts, District Court, and Supreme Court were interviewed. Resource restrictions meant most of the judges interviewed were in New South Wales; however, one was a judge presiding in one of the higher courts in Queensland.

---

[185]Ibid.
[186]Griffin, G (2013), "Interviewing", in G Griffin (ed.), *Research Methods for English Studies*, 2nd edn., Edinburgh University Press, Edinburgh, p. 193.
[187]Hsieh, H.F, and Shannon, S.E (2005), "Three Approaches to Qualitative Content Analysis", *Qualitative Health Research*, vol. 15, no. 9, p. 1277.
[188]Ibid, 1278.
[189]Ibid.
[190]Downe-Wamboldt, B (1992), "Content Analysis: Method, Applications, and Issues", *Health Care for Women International*, vol. 13, no. 3, p. 314.

Very rarely will a judicial officer make his or her direct email address available. Therefore, a request was made via email to their clerks, whose contact details are usually provided on court websites, asking if the judicial officer would be willing to participate in a one-hour interview. Attached to the email was the Participation Information Sheet, which detailed what the interview entailed and other relevant information, such as the purpose of the study, the process for audio recording the interviews, how the data will be stored, and the safeguards in place to protect the anonymity of participants.

Group Interview with Law Enforcement Officers

Another group of elites interviewed was law enforcement officers in Australia who were specifically responsible for tackling child abuse images on the internet. It was much easier obtaining access to the law enforcement officers, but this required filling out forms and strictly adhering to the New South Wales Police Force's ethics guidelines. After it was determined that the study met those guidelines, an interview was organised at their headquarters. A total of four police investigators participated in the group interview, including one male investigator and three female investigators. The interview was semi-structured and recorded on a voice recorder with the permission of all the participants.

A group interview, as opposed to one-on-one interviews, was conducted because the law enforcement officers usually work in a team environment. There were other advantages in conducting a group interview, such as time and resources savings. Researchers have also noted that group interviews increase the accuracy of the information obtained because the group environment is believed to dissuade participants from giving inaccurate or dishonest answers.[191] However, there were limitations associated with conducting a group interview.[192] In particular, it was acknowledged that some of the law enforcement officers might have been reluctant to

[191]Aubel, J (1994), *Guidelines for Studies Using the Group Interview Technique*, International Labour Office, Geneva, p. 8.
[192]For a useful overview of the strengths and limitations of the focus group method see Morgan, D.L (1997), *Focus Group as Qualitative Research*, Sage Publications, California.

express views contrary to their colleagues in front of the group. These limitations will be further discussed in Chapter 6 before setting out the findings.

1.3.2.2 Online Survey of Comic Fans

Initially, the research was designed to obtain only the views of elites who could shed light on the interpretation and enforcement of the law prohibiting fictional child pornography. However, it was soon recognised that, as a socio-legal study, it was equally important to obtain the views of laypersons who are not experts on the law. As it was not practicable to conduct a large-scale study on the general population, it was decided to conduct a large-scale study focusing specifically on fans of sexually explicit comics.

After comparing different methodologies, the most effective and resource efficient way to reach out to comic fans geographically dispersed throughout Australia was determined to be the online survey method. The survey method is commonly used to collect information from or about people to describe, explain and compare their attitudes, behaviours, and knowledge.[193] The survey was created on Google Docs and, in order to invite potential participants, website hosts, comic convention organisers, and Facebook groups dedicated to different subgenres of sexually explicit comics were contacted. They were asked if they could make the link to the survey available on their website and/or Facebook page. An overwhelming number agreed and were highly supportive in encouraging participation.

To be eligible to participate, respondents had to be a fan of sexually explicit comics, aged 18–25, and living in Australia. The reason for selecting fans in this age group was that the survey was initially developed to assess claims in the Australian literature that the law significantly impacts, and inadvertently criminalises, young fans of sexually explicit comics.[194] In hindsight, however, it would have been interesting to also obtain the views of more mature audiences interested in sexually explicit comics. It would have also been ideal to include comic fans younger than 18, but it would have

[193]Fink, A (2003), *The Survey Handbook*, 2nd edn., Sage Publications, California, p. 1.
[194]See above, at [1.2.3].

been extremely difficult to obtain ethical clearance to survey minors on the types of sexualised fictional material they viewed.

The survey was available online for six months during 2014–2015. Although the six-month period was not arbitrary, it was felt appropriate to close off the survey after "saturation" had been reached, as no new themes were emerging.[195] By the end of the six months, a total of 226 participants had answered the same open-ended questions, allowing for comparison of their responses. The advantage of asking open-ended questions was that it allowed freedom of response, unlike quantitative surveys that use closed questions, thereby limiting participants to pre-set options such as true/false or yes/no.[196] The aim of the qualitative questions was to ascertain whether the participants were aware that the law prohibits fictional representations of characters who appear to be minors, whether this had any effect on the types of comics they accessed, and whether they were in favour of or against prohibiting sexually explicit comics depicting minors. They were provided with a large text-box where they could freely type their responses.

Although the survey data collected was primarily qualitative, some quantitative data was obtained to aid the analysis. The purpose of the quantitative questions was to obtain demographic information, such as the participants' age, gender, and jurisdiction of residence. The other quantitative questions asked were:

- how old they were when they first started accessing comics;
- whether they created their own comics;
- how many hours they spent on average per week reading and/or creating comics; and
- how important comics were to them.

[195]See Fusch, P, and Ness, L (2015), "Are We There Yet? Data Saturation in Qualitative Research", *The Qualitative Report*, vol. 20, no. 9, pp. 1408-1416.
[196]Fink, above n 193, 17.

Asking quantitative questions does not in itself make a study quantitative or "mixed methods",[197] but it does involve "quantitizing"[198] the qualitative data. The use of numerical data in qualitative research has been supported by researchers and, as will be seen in Chapter 6, has made the presentation of the data more precise.[199]

There were particular advantages in conducting an online survey of comic fans as opposed to other qualitative methods, such as face-to-face interviews. Although not an exhaustive list, the main advantages were:[200]

- time and cost convenience in conducting the survey on the internet;
- the ability to reach more people by making the survey available online;
- convenience for participants partaking in the survey; and
- the greater likelihood of participants being more open and at ease in sharing their opinions with no interviewer being present.

Nevertheless, several disadvantages in using the online survey method were also identified, including:[201]

- the difficulty in confirming demographic variables, such as age and sex of participants;
- the inability to probe participants;
- a possibility that participants may not have understood some of the questions; and

---

[197]Maxwell, J.A (2010), "Using Numbers in Qualitative Research", *Qualitative Inquiry*, vol. 16, no. 6, p. 475.
[198]See Sandelowski, M, Voils, C, and Knafl, G (2009), "On Quantitizing", *Journal of Mixed Methods Research*, 2009, vol. 3, no. 3, pp. 208-222.
[199]See Sandelowski, M (2001), "Real Qualitative Researchers do not Count: the Use of Numbers in Qualitative Research", *Research in Nursing & Health*, vol. 24, no. 3, pp. 230-240; Maxwell, J.A (2010), "Using Numbers in Qualitative Research", *Qualitative Inquiry*, vol. 16, no. 6, pp. 475-482.
[200]Evans, J.R, and Mathur, A (2005), "The Value of Online Surveys", *Internet Research*, vol. 15, no. 2, pp. 195-219; Fowler, F (2014), *Survey Research Methods*, 5th edn., Sage Publications, California, p. 131.
[201]Ibid. Also see Wallace, D, Hedberg, E, and Cesar, G (2014), *The Effects of Survey Mode on Socially Undesirable Responses to Open-Ended Questions: A Mixed Method Approach*, NORC, University of Chicago, available online, <http://www.norc.org/PDFs/Working%20Paper%20Series/WP-2014-003.pdf>; Prichard, J, Watters, P, Krone, T, Spiranovic, C, and Cockburn, H (2015), "Social Media Sentiment Analysis: A New Empirical Tool for Assessing Public Opinion in Crime?", *Current Issues in Criminal Justice*, vol. 27, no. 2, pp. 217-23.

- social desirability bias, which refers to the tendency of participants to give socially desirable responses instead of providing their honest opinions.

The potential impact of these limitations on the findings is discussed further in Chapter 6.

1.4 Scope, Delimitations, and Limitations of the Study

The scope of this dissertation covers the expansion of Australia's child abuse material legislation to include obviously fictional characters who appear to be minors, such as characters in comics and stories that are not based on real people or events. It does not question the prohibition of wholly computer-generated images that are indistinguishable from images depicting real children because, as will be discussed in Chapter 2, these images raise legitimate law enforcement concerns.

Another delimitation of this dissertation is that it only considers the three main theories of criminalisation - the Harm Principle, the Offense Principle, and Legal Moralism. These theories were selected because, as will be discussed further in Chapter 3, they have been highly influential in Western liberal democracies and have spawned a substantial amount of literature. Other theoretical perspectives on criminalisation were considered but ultimately rejected, given their less clear impact in the criminal law domain. This includes utilitarianism, which contends that the right action is the one that maximises the happiness of society. When applied to the criminal law, this theory may justify criminalisation where it is for the greater good, such as where the criminalisation is believed to deter future criminal behaviour. [202] Utilitarian perspectives on criminal theory have been subject to much criticism and its influence has significantly diminished given its weaknesses and because of the potential injustice created by utilitarian rationales of punishment.[203] Thus, by focusing on the prominent

[202]Husak, D (2007) *Overcriminalisation: The Limits of Criminal Law*, Oxford University Press, New York, p. 188.
[203]Ibid, 188-196. Also see Thorburn, M (2011), "Constitutionalism and the Limits of the Criminal Law", in R.A. Duff, Lindsay Farmer, S.E. Marshall, Massimo Renzo, and Victor Tadros (eds.), *The Structure of the Criminal Law*, Oxford University Press, Oxford, pp. 85-105; Seidman, L.M (1984), "Soldiers, Martyrs, and Criminals: Utilitarian Theory and the Problem of Crime Control", *Yale Law*

theories of criminalisation, this dissertation investigates the strongest theoretical justifications for prohibiting, or not prohibiting, fictional child pornography.

The main limitation of the study was not being able to view some of the fantasy material that may potentially be deemed as child pornography. As it will be discussed in detail in Chapter 4, Australia's legislation deems material child pornography if it depicts or describes a child in a sexual context and is considered "offensive" to the "reasonable person". Given the difficulty in determining in advance what material would be considered sufficiently offensive, no attempt was made to access sexually explicit fictional material representing minors. In order to partly overcome this limitation, a ten-day trip to Japan was undertaken during 2015, given allegations that much of the potentially offending material comes from Japan, which is commonly criticised for its large production and consumption of sexually explicit comics.[204] The purpose of the trip was to gain some insight into the comic culture and the general nature of sexually explicit *manga,* such as Boys Love and YAOI, material that the researcher had been unfamiliar with. However, bearing in mind the extraterritorial application of Australia's child abuse material legislation,[205] none of these comics were downloaded or purchased while overseas. The researcher spent most of the time in Akihabara, which is a major city within Tokyo known to be a haven for *manga* fans. During this trip, the researcher also had the opportunity to speak with lawyers and comic artists on the legal status of sexually explicit *manga* in Japan.[206] As this dissertation is focused on the law in Australia, these interviews have not been included in the analysis, but they nevertheless provided valuable insight into the different perspectives on whether sexually explicit *manga* depicting minors should be prohibited.

Another way to partly overcome the limitation of not being able to access some of the potentially legally problematic fictional material was to attend comic fan conventions

Journal, vol. 94, no. 2, pp. 315-349; Kennedy, K.C (1983), "A Critical Appraisal of Criminal Deterrence Theory", *Dickinson Law Review*, vol. 88, no. 1, pp. 1-13.

[204]Healy, above n 5, 5; Quayle, E, Loof, L, and Palmer, T (2008), *Children Pornography and Sexual Exploitation of Children Online*, A contribution of ECPAT International to the World Congress III against Sexual Exploitation of Children and Adolescents, Rio de Janeiro, p. 19.

[205]See *Criminal Code Act 1995* (Cth), s 273.5.

[206]It should also be noted that the researcher had an opportunity to speak with a lawyer from the Comic Book Legal Defense Fund, located in New York, on the current status of fictional child pornography in the United States.

in Australia. These conventions usually allow comic creators to display self-produced sexually explicit material and, therefore, are generally only accessible to people 18 years of age and over. The researcher attended "Room 801", which is a comic convention held annually in Sydney specifically for YAOI fans.[207] Attending the comic convention allowed the researcher to gain understanding of the comic culture in Sydney and provided an opportunity to identify potential participants to complete an online survey seeking the views of fans about the criminal laws in Australia prohibiting fictional child pornography. The methodology used to collect the survey data, as well as its limitations, is discussed later in this chapter.[208]

The lack of sentencing data in Australia outlining the number of individuals prosecuted specifically for fictional child pornography was also a limitation. It was hoped that sentencing data could shed light on the frequency of such prosecutions and the average sentences imposed on defendants convicted for possessing fictional child pornography. Although sentencing data for offences concerning child abuse material is available in Australia, it does not state the nature of the material for which the offenders were sentenced.[209] This means that what can be reliably ascertained about these prosecutions can only be gleaned from the case law, which is analysed in chapters 4 and 5. Another limitation is that it could not be precisely determined how many individuals who do not meet the clinical definition of a paedophile or who had no history of committing child sexual abuse have been prosecuted *solely* for possessing fictional child pornography. However, as will be discussed in Chapter 4, many offenders prosecuted were found to have in their possession both real and fictional material, indicating they have a genuine sexual interest in children and are not merely fantasy material fans.

[207]See Room 801, available online, <https://room801.com.au>. YAOI is discussed in Chapter 2.
[208]The limitations of the interview and survey data collected are discussed in further detail in Chapter 6.
[209]See Sentencing Advisory Council Victoria (2008), "Sentencing Trends for Knowingly Possess Child Pornography in the Magistrates' Court of Victoria 2004-05 to 2006-07", *Sentencing Snapshot*, Report No. 51; Krone, T (2009), "Child Pornography Sentencing in NSW", Australian Institute of Criminology, High Tech Crime Brief No. 8, Canberra; Mizzi, P, Gotsis, T, and Poletti, P (2010), *Sentencing Offenders Convicted of Child Pornography and Child Abuse Material Offences*, Judicial Commission of NSW, Monograph 34, Sydney; Warner, K (2010), "Sentencing for Child Pornography", *Australian Law Journal*, vol. 84, no. 6, pp. 384-395; Sentencing Advisory Council Tasmania (2015), *Sex Offence Sentencing*, Final Report.

Importantly, this study also obtained information that is not otherwise available by interviewing judges who have presided over cases involving fictional child pornography.

1.5 Dissertation Outline

The remainder of this dissertation is divided into eight chapters.

Chapter 2 provides a typology of child abuse material, outlining the essential difference between real, virtual, and obviously fictional child pornography. It discusses the specific types of fantasy materials, including slash fiction, and subgenres of sexually explicit Japanese *manga.* This includes Boys Love and YAOI, which often depict or describe characters who appear to be underage, thereby potentially falling foul of Australia's child abuse material. These materials are drawn upon throughout this dissertation when assessing the defensibility of prohibiting fantasy material.

Chapter 3 discusses the three theories of criminalisation that were identified as most relevant for the purposes of this study. They are the Harm Principle, the Offense Principle, and Legal Moralism (including its subset, Moral Paternalism). These theories provide the theoretical foundation identifying the rationale behind the criminalisation of fictional child pornography and question whether this criminalisation is justified.

Chapter 4 provides a largely descriptive analysis of the relevant legal prohibitions in Australia and other Western countries under examination. The chapter is structured chronologically, starting with the relevant law in Canada, the United States, Australia, and finally the United Kingdom.

Chapter 5 critically analyses the laws set out in the previous chapter. It discusses the main issues identified in the case law and literature relating to the criminalisation of fictional child pornography. This chapter draws upon the relevant law in Canada, the United States, and the United Kingdom for comparison. It further draws upon the

theories discussed in Chapter 3 to assess the possible theoretical justifications of the law criminalising fictional child pornography.

Chapter 6 presents the interviews and the survey findings. This data filled several gaps in the literature, clarified some contentious points raised in the case law, and provided valuable information that could not be obtained by a purely doctrinal methodology. It also provided much needed insight into the views of comic fans on the current criminalisation of sexually explicit fictional material depicting minors.

The findings of this dissertation are divided into two chapters. Chapter 7 synthesises the interview and survey findings, relevant literature, and the Harm Principle. It focuses on the harm of fictional child pornography and compares the views expressed by the elites interviewed, the comic fans surveyed, and academics in the literature. Chapter 8, the second part of the discussion, analyses the findings in light of the Offense Principle and Legal Moralism.

Chapter 9, the final chapter, consolidates the findings and determines whether the findings answer the research questions. It provides some final thoughts on whether the criminalisation of fictional child pornography is really a matter of harm, offense, or morality. Based on the findings, this chapter provides recommendations on how the law in Australia can be better targeted. The chapter concludes with a summary of the contributions of the study and directions for future research.

Chapter 2: Typology and an Introduction to Fantasy Material

Chapter Contents

2.0 Aims of Chapter

As seen in the previous chapter, the existing literature often fails to distinguish between the different types of child pornography. Therefore, this chapter provides a typology of child pornography, emphasising the significant differences between real, pseudo, and virtual images. Before doing so, a brief overview of Australia's legislative framework is provided in order to introduce the most relevant provisions prohibiting child abuse material. However, it should be noted that an in-depth analysis of the law is provided in Chapter 4.

The aim of this chapter is to introduce different types of fantasy material that may be legally problematic. The focus is on sexually explicit comics produced in Japan that are increasingly being consumed by Western audiences. In particular, it examines and elaborates on the existing literature discussing the potential criminalisation of *manga* in the form of Boys Love and YAOI. However, this chapter also discusses the potential criminalisation of slash fiction fans, which is written erotica that is produced and consumed largely by young females.

2.1 Brief Overview of the Legislative Framework

As noted in Chapter 1, in Australia child abuse material is regulated largely by crimes legislation. Given Australia's federal constitutional system, child pornography is regulated by both the Commonwealth and individual State/Territory criminal laws. Although worded differently, the relevant legislation in each Australian jurisdiction defines child pornography in similar terms.[210] The New South Wales legislation provides a fair example of the law in Australia. It prohibits:[211]

…material that depicts or describes, in a way that reasonable persons would regard as being, in all the circumstances, offensive:

(a) a person who is, appears to be or is implied to be, a child as a victim of torture, cruelty or physical abuse, or
(b) a person who is, appears to be or is implied to be, a child engaged in or apparently engaged in a sexual pose or sexual activity (whether or not in the presence of other persons), or
(c) a person who is, appears to be or is implied to be, a child in the presence of another person who is engaged or apparently engaged in a sexual pose or sexual activity, or
(d) the private parts of a person who is, appears to be or is implied to be, a child.

The elements of this section are analysed in Chapter 4, but for now the following should be noted:

- The legislation prohibits "depictions" and "descriptions" of minors in a sexual context. The inclusion of the word "describes" means that child pornography is not limited to visual images, but may also be in the form of writing.[212]

[210] See Chapter 4.
[211] *Crimes Act 1900* (NSW), s 91FB.
[212] See Chapter 4, at [4.3.2].

- Child pornography is defined broadly to include material that depicts or describes persons who "appear to be" a minor. This means that the person does not have to actually be a child.[213]
- The word "person" has been defined broadly to include completely fictitious persons.[214]
- Although the definition of "child" varies in each Australian jurisdiction, a child is generally defined as any person up to 16 or 18.[215]
- The material must be "offensive" to the "reasonable" person.[216]

Another important point is that Australia's legislation does not distinguish between material that involves a real child in its production and material produced without a child. It deals with real, pseudo, and virtual child pornography under the same offences. Despite this, as will be seen below, these types of materials are significantly distinct.

2.2 Typology: Real, Pseudo, and Virtual

For the purposes of the analysis below, child abuse material has been classified into three main categories: actual, pseudo, and virtual. Actual child abuse images depict a real child who has been exploited in its production. Such images are more than simply a picture; they are evidence of a criminal act and a permanent record of the abuse.[217] Even though mere possessors were not involved in the abuse, criminalising private possession is justified because possessors play a significant role in creating and perpetuating the market for child abuse images.[218] The child depicted is re-victimised

[213]See especially *McEwen v Simmons & Anor* [2008] NSWSC 1292. This case is discussed in Chapter 4, at [4.5]. Also see Krone, T (2004), "A Typology of Online Child Pornography Offending", *Trends & Issues in Criminal Justice*, Australian Institute of Criminology, Canberra, Report No. 279, p. 2.
[214]Ibid.
[215]See Chapter 4, at [4.3.1].
[216]See Chapter 4, at [4.3.4].
[217]Friel, S.M (1997), "Porn by Any Other Name? A Constitutional Alternative to Regulating 'Victimless' Computer-Generated Child Pornography", *Valparaiso University Law Review*, vol. 32, no. 1, p. 234; Slane, A (2015), "Legal Conceptions of Harm Related to Sexual Images Online in the United States and Canada", *Child & Youth Services*, vol. 36, no. 4, p. 288.
[218]Quayle, E, and Taylor, M (2002), "Paedophiles, Pornography and the Internet: Assessment Issues", *British Journal of Social Work*, vol. 32, no. 7, p. 873; Quayle, E, and Taylor, M (2003), *Child Pornography: An Internet Crime*, Routledge, London, p. 24; Rogers, A (2008), "Child Pornography's Forgotten Victims", *Pace Law Review*, vol. 28, no. 4, pp. 847-863; Middleton, D (2009), "Linkages between Viewing Indecent Images of Children and Contact Sexual abuse: Issues from Research", Compendium of articles: Research findings on child abuse images and sexual exploitation of children online, ECPAT, p. 25; Sheldon, K (2011), "What we know about Men who Download Child Abuse Images", *British Journal of Forensic Practice*, vol. 13, no. 4, p. 224.

every time the image is viewed.[219] As seen in Chapter 1, the research shows that viewing such images may have considerable negative effects on viewers' attitudes and behaviours towards children.[220]

Pseudo-child pornography is the manipulation of innocent images of a minor to place him or her in a sexual context.[221] Although the minor whose image has been manipulated has not been physically harmed, these images violate the minor's dignity, reputation and right to privacy.[222] In some cases, the minor whose image has been manipulated never becomes aware of its existence, which makes it difficult to sustain the argument that the minor has suffered any harm. However, individuals have an interest in not having their images misused and distorted in a negative way.[223] There is a risk that the minor and the manipulated image may be linked in future, and so there is potential harm even without any knowledge of the existence of the image.[224] Such images may also have an adverse impact on the attitudes and behaviours of viewers.[225] Therefore, real and pseudo-child pornography should be treated similarly.[226]

Nevertheless, it is important that pseudo-images are not confused with virtual child pornography.[227] The latter refers to entirely computer-generated images depicting a person who appears to be a minor in a sexual context. Despite doubts expressed by some,[228] there is evidence indicating that it is now possible to create virtual images that

---

[219]Choo, K.R (2009), *Online Child Grooming: A Literature Review on the Misuse of Social Networking Sites for Grooming Children for Sexual Offences*, Australian Institute of Criminology, Research and Public Policy Series 103, p. 39.
[220]See Chapter 1, at [1.2.6]. Also see Carr, J (2001), *Theme Paper on Child Pornography for the 2nd World Congress on Commercial Sexual Exploitation of Children*, Children & Technology Unit NCH, London, p. 21.
[221]See Krone, above n 213.
[222]Ost, S (2009), *Child Pornography and Sexual Grooming: Legal and Societal Responses*, Cambridge University Press, Cambridge, p. 128. Also see *Ashcroft v Free Speech Coalition*, 535 U.S. 234 (2002), at [242]; *R v Michael H* [2005] ECWA Crim 3037; *Hampson v R* [2011] QCA 132.
[223]Ibid.
[224]Ibid.
[225]See Chapter 1, at [1.2.6].
[226]In *Ashcroft v Free Speech Coalition*, 535 U.S. 234 (2002), at [242], the Court stated that because pseudo-child pornography "implicate[s] the interests of real children" it is similar to real child abuse material. Also see *United States v Rearden*, 349 F 3d 608 (9th Cir. 2003); *United States v Farrelly*, 389 F 3d 649 (6th Cir. 2004); Carr, above n 220; Guglielmi, K (2001), "Virtual Child Pornography as a New Category of Unprotected Speech", *CommLaw Conspectus*, vol. 9, no. 2, pp. 207-223; Gillespie, A (2015), *Cybercrime: Key Issues and Debates*, Routledge, Oxon, p. 246.
[227]See "Terminology" in Chapter 1, at [1.1].
[228]For example in *United States v Kilmer*, 353 F3d 58 (10th Cir. 2003), at [1142], the Court was of the view that imaging technology had not advanced to the point of allowing individuals to create virtual

are indistinguishable from real images.[229] As noted in Chapter 1, this may hinder law enforcement by placing a heavy burden on prosecutors to prove beyond reasonable doubt that the minor depicted actually exists.[230] Some academics have suggested this problem can be minimised by placing a reverse onus on creators, requiring them to prove the image is wholly-computer generated.[231] However, a reverse onus of proof may be problematic for mere possessors, who may have no way of establishing the means by which the image was produced.[232] Another concern is that virtual child pornography may be not entirely fictional; some creators may use an image of a real minor, but make it appear computer-generated to prevent law enforcement identifying the victim.[233]

The proportion of virtual child pornography that is indistinguishable from real images of children should not be overstated. It has been claimed that significant quantities of such images are distinguishable from real images, including images in many virtual online games, such as *Second Life*.[234] Some users of these games create child-like avatars to engage in virtual age play,[235] which may potentially fall foul of child pornography laws in some jurisdictions.[236] Below are examples of virtual images that highlight the different levels of realism of computer-generated children.

---

children that are indistinguishable from real children. Also see *United States v Kimbrough*, 69 F.3d 723 (5th Cir. 1995).

[229]This can be exemplified by the sting operation conducted in 2013 by an international organisation that created a fictitious virtual child character, "Sweetie", discussed later in this chapter. Also see Bernstein, R (2005), "Must Children Be Sacrificed: The Tension Between Emerging Imaging Technology, Free Speech and Protecting Children", *Rutgers Computer & Technology Law Journal*, vol. 31, no. 2, pp. 409-410.

[230]See especially Wolak, J, Finkelhor, D, and Mitchell, K (2005), *Child-Pornography Possessors Arrested in Internet-Related Crimes: Findings from the National Juvenile Online Victimization Study*, National Centre for Missing and Exploited Children, available online, <http://www.unh.edu/ccrc/pdf/jvq/CV81.pdf>.

[231]Friel, above n 217, 209; Ost, above n 222, 131.

[232]See *Ashcroft v Free Speech Coalition*, 535 U.S. 234 (2002), at [255].

[233]Wolak et al, above n 230; Mateo, G (2008), "The New Face of Child Pornography: Digital Imaging Technology and the Law", *Journal of Law, Technology & Policy*, vol. 2008, no. 1, p. 178.

[234]Gillespie, A (2011), *Child Pornography: Law and Policy*, Routledge, New York, p. 111.

[235]Virtual age play refers to sexual role-play that occurs in a virtual world between two consenting adults. One avatar appears to be a child and the other an adult. See Russell, G (2008), "Pedophiles in Wonderland: Censoring the Sinful in Cyberspace", *Journal of Criminal Law & Criminology*, vol. 98, no. 4, pp. 1467-1500; Adams, A (2010), "Virtual Sex with Child Avatars", in C Wankel and S Malleck (eds.), *Emerging Ethical Issues of Life in Virtual Worlds*, IAP, North Carolina, pp. 55-72; Reeves, C (2013), "Fantasy Depictions of Child Sexual Abuse: The Problems of Ageplay in Second Life", *Journal of Sexual Aggression*, vol. 19, no. 2, pp. 236-246.

[236]See Chapter 4.

Figure 1 is an image of a child avatar from the game *Second Life*, which clearly appears fictitious. Conversely, Figure 2 is an image of the fictitious virtual character, "Sweetie", who appears convincingly real.[237] She was created by an international law

Figure 1: Second Life child avatar[238]

enforcement organisation as part of a sting operation.[239] Sweetie effectively misled thousands of men around the world into believing she was a real child.[240] These men were subsequently exposed after soliciting the apparently ten-year-old virtual child to perform sexual acts in front of webcam.[241]

[237]See Crawford, A (2013), "Computer-Generated 'Sweetie' Catches Online Predators", *BBC News*, 5 November, available online, <http://www.bbc.com/news/uk-24818769>; Lucas, T (2013), "Sweetie: The Legality of Using a Virtual Child to Catch a Webcam Predator", *North Carolina Journal of Law & Technology*, 7 November, available online, <http://ncjolt.org/sweetie-the-legality-of-using-a-virtual-child-to-catch-a-webcam-predator/>; Prynne, M (2013), "Virtual girl 'Sweetie' Catches Thousands of Paedophiles", *The Telegraph (UK)*, 6 November, available online, <http://www.telegraph.co.uk/news/uknews/crime/10429608/ Virtual-girl-Sweetie-catches-thousands-of-paedophiles.html>.

[238]Source/image credit: The Nether, available online, <http://www.thenetherplay.com/post/39876064558/child-avatars-in-second-life>.

[239]This highlights that while advances in technology has created opportunities for criminal activity, it has also given law enforcement advantages in identifying and capturing criminals. See Wolak et al, above n 230; Krone, T (2005), "Queensland Police Stings in Online Chat Rooms", *Trends and Issues in Crime and Criminal Justice*, Australian Institute of Criminology, Canberra, Report No. 301.

[240]Ibid. Also see the literature cited in footnote 237 above.

[241]Ibid.

Figure 2: "Sweetie" virtual child[242]

Although the propriety of sting operations using virtual children to entrap potential offenders is questionable,[243] this dissertation does not question the criminalisation of virtual child pornography that is indistinguishable from images depicting real children. However, it does question the criminalisation of obviously fictional virtual images, such as that in Figure 1. It also questions the prohibition of obviously fictional representations of minors created without the assistance of technology, such as hand-drawn cartoons.

Figure 3: Obviously fictional cartoon character [244]

[242]Source: Terre des Hommes (2013), "Becoming Sweetie: A Novel Approach to Stopping the Global Rise of Webcam Child Sex Tourism", available online, <https://www.terredeshommes.nl/en/publications/webcam-child-sex-tourism>.
[243]See Krone, T (2009), "International Police Operations Against Online Child Pornography", in D.S Wall (ed.), *Crime and Deviance in Cyberspace*, Ashgate, Surrey, pp. 250-263.
[244]Source/image credit: Rachael Lefler, available online, <http://hubpages.com/entertainment/Why-Do-Anime-Characters-Have-Big-Eyes>.

Figure 4: Japanese-style cartoon characters[245]

Figure 5: Japanese-style cartoon characters[246]

Importantly, many of the concerns expressed about virtual child pornography would not apply to obviously fictional material. For example, cartoons would not mislead viewers into believing that it is a depiction of a real person given its cartoonish nature, as demonstrated by Figures 3, 4, and 5.

As categorising child abuse material is a highly subjective process, it can be difficult and resource intensive for law enforcement agencies to do so.[247] To overcome the issue

[245]Source/image credit: DKellis, available online, <http://check.animeblogger.net/2007/05/25/one-plus-one/>.
[246]Source/image credit: DKellis, available online, http://check.animeblogger.net/2007/05/25/one-plus-one/>.
[247]Sentencing Council (2012), *Sexual Offences Guideline: Consultation*, Sentencing Council (UK), p. 79.

of subjectivity and provide the courts with an objective measure to support consistency across sentencing, law enforcement agencies have developed scales to categorise such images.[248] The most commonly used scales are COPINE and the Oliver scale.[249] The Combating Paedophile Information Networks in Europe Project developed COPINE in Ireland in the late 1990s. It is a ten-point scale that categorises the severity of images of child sexual abuse, ranging from indicative material through to images portraying sadism or bestiality.

COPINE SCALE
Level 1: Indicative (non-erotic / sexualised pictures)
Level 2: Nudist (naked or semi-naked in legitimate settings / sources)
Level 3: Erotica (surreptitious photographs showing underwear / nakedness)
Level 4: Posing (deliberate posing suggesting sexual content)
Level 5: Erotic posing (deliberate sexual or provocative poses)
Level 6: Explicit erotic posing (emphasis on genital areas)
Level 7: Explicit sexual activity (explicit activity but not involving an adult)
Level 8: Assault (sexual assault involving adult)
Level 9: Gross assault (penetrative assault involving adult)
Level 10: Sadistic / Bestiality (sexual images involving pain or animal)

Table 1: COPINE Scale

The Oliver scale is more concise than the COPINE scale, classifying material into only five categories. [250]

OLIVER SCALE	
1.	Erotic posing with no sexual activity
2.	Sexual activity between children or solo masturbation by a child
3.	Non-penetrative sexual activity between adults and children
4.	Penetrative sexual activity between children and adults
5.	Sadism and bestiality

[248]Quayle, E (2008), "Online Sex Offending: Psychopathology and Theory", in D Laws and T O'Donohue (eds.), *Sexual Deviance: Theory, Assessment, and Treatment*, 2nd edn., The Guilford Press, New York, p. 449.
[249]See Warner, K (2010), "Sentencing for Child Pornography", *Australian Law Journal*, vol. 84, no. 6, pp. 384-395; Mizzi, P, Gotsis, T, and Poletti, P (2010), *Sentencing Offenders Convicted of Child Pornography and Child Abuse Material Offences*, Judicial Commission of NSW, Monograph 34, Sydney; Merdian, H, Thakker, J, Wilson, N, and Boer, D (2013), "Assessing the Internal Structure of the COPINE Scale", *Psychology*, *Crime & Law*, vol. 19, no. 1, pp. 21-34.
[250]This scale was developed in the English decision *R v Oliver* [2003] 1 Cr. App. R. 28.

Table 2: Oliver Scale

It is notable that neither scale distinguishes between real, pseudo, and virtual images. However, the United Kingdom Court in *R v Oliver* held that it "will usually be desirable" for each count on an indictment to specify whether the image in question is a real or pseudo-image.[251] As well as COPINE and the Oliver scale, law enforcement agencies in Australia frequently use the Child Exploitation Tracking System (CETS) to categorise child abuse material.[252] Although this scale does not distinguish between real and pseudo-images, it does create a separate category for animations, cartoons, comics, and drawings depicting minors engaged in sexual activity.

CETS SCALE
Level 1: Depictions of children with no sexual activity
Level 2: Solo masturbation by a child or sex acts between children
Level 3: Non-penetrative sexual activity between child(ren) and adult(s)
Level 4: Penetrative sexual activity between child(ren) and adult(s)
Level 5: Sadism, bestiality, humiliation or child abuse
Level 6: Anime, cartoons, comics, and drawings depicting child(ren) engaged in sexual poses or activity.
Level 7: Non-illegal child material
Level 8: Adult pornography

Table 3: CETS Scale

As shown in Table 3, obviously fictional material is categorised separately from, and is regarded as less serious than, sexually explicit images depicting real children. However, as will be seen in Chapter 4, the courts do not always treat fictional material less seriously.

Having provided a typology of the main types of child pornography, the rest of this chapter focuses on obviously fictional sexually explicit fantasy material.

2.3 Sexually Explicit Comics (Generally)

It is useful to begin by providing an overview of comics in general before specifically

[251] *R v Oliver* [2003] 1 Cr. App. R. 28, at [15].
[252] Child Pornography Working Party (2010), *Report of the Child Pornography Working Party*, NSW Department of Justice and Attorney-General, p. 31.

analysing the potential criminalisation of certain types of sexually explicit comics. Although there is no precise definition, there seems to be a consensus that comics are sequential pictorial narratives usually accompanied by words.[253] There is no limit to the kinds of acts that can be represented in comics and many creators have taken advantage of this by depicting acts that would be illegal or impossible in real life.[254]

However, in Western countries comics have generally been perceived as a low-value medium suitable only for children and marginalised adults.[255] This perception is said to have been a result of the moral panics surrounding comics in the 1950s in some Western countries, including Australia.[256] During this period, a moralistic coalition of educators, parents, religious leaders, and legislators claimed comics were corrupting young readers, and therefore advocated for censorship.[257] Much of the hysteria has been attributed to the work of psychiatrist Fredric Wertham.[258] In his book *Seduction of the Innocent,* written in 1954, Wertham attacked comics for allegedly transforming

[253]Harrison, R (1981), *The Cartoon: Communication to the Quick*, Sage Publications, California, p. 87; McCloud, S (1994), *Understanding Comics: The Invisible Art*, Harper Perennial, New York, p. 9; Greenberg, M.H (2012), "Comics, Courts and Controversy: A Case Study of the Comic Book Legal Defense Fund", *Loyola of Los Angeles Entertainment Law Review*, vol. 32, no. 2, p. 122; Uidhir, C.M, and Pratt, H.J (2012), "Pornography at the Edge: Depiction, Fiction, and Sexual Predilection", in H Maes and J Levinson (eds.), *Art and Pornography: Philosophical Essays*, Oxford University Press, Oxford, p. 145.

[254]Shamoon, D (2004), "Office Sluts and Rebel Flowers: The Pleasure of Japanese Pornographic Comics for Women", in L Williams (ed.), *Porn Studies*, Duke University Press, Durham, p. 87.

[255]Preper, T, and Cornog, M (2002), "Eroticism for the Masses: Japanese Manga Comics and Their Assimilation into the U.S.", *Sexuality and Culture*, vol. 6, no. 1, p. 13; Pagliassotti, D (2008), "Reading Boys' Love in the West", *Particip@tions*, vol. 5, no. 2, available online, <http://www.participations.org/Volume%205/Issue%202/5_02_pagliassotti.htm>.

[256]See Brannigan, A (1985), "Delinquency, Comics and Legislative Reactions: An Analysis of Obscenity Law Reform in Post-War Canada and Victoria", *Australian-Canadian Studies*, vol. 3, pp. 53-69; Brannigan, A (1986), "Crimes from Comics: Social and Political Determinants of Reform of the Victoria Obscenity Law 1938-1954", *Australian and New Zealand Journal of Criminology*, vol. 19, no. 1, pp. 23-42; Finnane, M (1989), "Censorship and the Child: Explaining the Comics Campaign", *Australian Historical Studies*, vol. 23, no. 92, pp. 220-240; Bruce, J (2014), "Banned Comics—Love Illustrated", *John Oxley Library*, 23 September, available online, <http://blogs.slq.qld.gov.au/jol/2014/09/23/banned-comics-love-illustrated/>; Margolis, E (2014), "The Lost Comics Code of Australia", *CBLDF*, 11 February, available online, <http://cbldf.org/2014/02/the-lost-comics-code-of-australia/>.

[257]Finnane, above n 256, 222; Schodt, F.L (1986), *Manga! Manga! The World of Japanese Comics*, Kodansha International, Tokyo, p. 126.

[258]For example see Heins, M (2005), "Do We Need Censorship to Protect Youth?", *Michigan State Law Review*, vol. 2005, no. 3, pp. 795-808; Tilley, C.L (2012), "Seducing the Innocent: Fredric Wertham and the Falsifications That Helped Condemn Comics", *Information & Culture: A Journal of History*, vol. 47, no. 4, pp. 383-413; Williams, M (2013), "Researcher Proves Wertham Fabricated Evidence Against Comics", *CBLDF*, 13 February, available online, <http://cbldf.org/2013/02/researcher-proves-wertham-fabricated-evidence-against-comics/>.

innocent children into violent and sexualised delinquents.[259]

In the United States, during the same year Wertham's book was published, the fear of government regulation led the Comics Magazine Association to form the *Comics Code Authority*.[260] The Association formulated a self-regulatory code that determined what images, words, and themes were acceptable for inclusion in comics.[261] The *Code* banned all depictions of sex and violence, as well as curse words, thereby making comics suitable only for young children—resulting in a dramatic decline in sales.[262] The 1950s was also a decade of recession in the Australian comic market due to government attempts to eliminate "objectionable literature" under obscenity legislation.[263] Consequently, a black market emerged that sold highly sexually explicit comics, such as *Tijuana Bibles* and *Hustler*, both of which were notorious for featuring rape, incest, and child sex abuse—and this was apparently "just the tip of the iceberg compared to what was being sold under the counter".[264]

Since the 1980s, the perception that comics are only suitable for children has slowly been changing, given the success of some adult-oriented comics.[265] Although this has led to recognition of some comics as more serious works worth analysing,[266] some sexually explicit comics continue to be censored or prohibited altogether.[267] For example, Alan Moore and Melinda Gebbie's graphic novel *Lost Girls* has been restricted to adults or banned in some jurisdictions as child pornography because it

---

[259]Tilley, above n 258; Williams, above n 258; Clor, H.M (1969), *Obscenity and Public Morality: Censorship in a Liberal Society*, University of Chicago Press, Chicago, p. 149; Heins, M (2001), *Not in Front of the Children: 'Indecency', Censorship, and the Innocence of Youth*, Hill and Wang, New York, p. 52.

[260]Parker, D (2010), "The Kefauver Comic Book Hearings as Show Trial: Decency, Authority and the Dominated Expert", *Cultural Studies*, vol. 16, no. 2, p. 277.

[261]Ibid.

[262]Schodt, above n 257, 127.

[263]See literature cited in footnote in 256 above. Also see Williams, M (2013), "The Beginning of the End for Australian Comics Censorship", *CBLDF*, 12 March, available online, <http://cbldf.org/2013/03/the-beginning-of-the-end-for-australian-comics-censorship/>.

[264]Pilcher, T, and Kannenberg, G (2008), *Erotic Comics: A Graphic History of Tijuana Bibles to Underground Comix*, Abrams, New York, pp. 108-122. Some have critcised *Playboy* and *Hustler* magazines for covertly normalising and promoting sexual relationships between adults and children. See Harrison, above n 253, 134; Reisman, J (1986), "Children in Playboy, Penthouse and Hustler", *Preventing Sexual Abuse*, Summer, p. 6; Russell, D, and Purcell, N (2006), "Exposure to Pornography as a Cause of Child Sexual Victimization", in N Dowd, D Singer, and R Wilson (eds.), *Handbook of Children, Culture, and Violence*, Sage Publications, California, p. 75.

[265]See especially Harrison, above n 253.

[266]Fox, A.J (2010), *Girls Coming of Age: Possibilities and Potentials within Young Adult Literature*, Master Thesis, DePaul University, p. 44.

[267]Greenberg, above n 253, 121.

depicts the sexual experience of underage fictional characters.[268] It is notable that other Western animations that depict children in a sexual context are publicly broadcast. This includes *Family Guy, Futurama, The Simpsons,* and *South Park,* which often feature underage sex, nudity, and sexual innuendos involving minors.[269] Despite this, as will be seen below, much of the attention and finger-pointing in the media has been directed at sexually explicit comics produced in Japan.[270]

2.4 Sexually Explicit *Manga*

Generally, *manga* refers to Japanese-style comics. Compared to Western comics, the characters depicted in *manga* are much cuter, reflecting the *kawaii* ("cute") craze in Japanese culture.[271] Such fantasy material is widely read by people of all ages in Japan, where comics are not viewed as merely a children's medium and, unlike American super-hero comics, have not traditionally catered only to young boys.[272] By the early 1990s, it was estimated *manga* constituted approximately 38 per cent of all of Japanese

---

[268]Williams, M (2014), "*Lost Girls* Rated 18+ by New Zealand Government Censors", *CBLDF,* 8 July, available online, <http://cbldf.org/2014/07/lost-girls-rated-18-by-new-zealand-government-censors/>.
[269]Phoenix, D (2006), *Protecting Young Eyes: Censorship and Morals Standards of Decency in Japan and the United States as Reflected in Children's Media*, Bachelor Thesis, Massachusetts Institute of Technology, p. 12; Calvert, C, and Richards, R.D (2008), "A War Over Words: An Inside Analysis and Examination of the Prosecution of the Red Roses Stories & Obscenity Law", *Journal of Law and Policy*, vol. 16, no. 1, p. 204; Madill, A (2015), "*Boys' Love* Manga for Girls: Paedophilic, Satirical, Queer Readings and English Law", in E Renold, J Ringrose, and D Egan (eds.), *Children, Sexuality and Sexualization*, Palgrave MacMillan, Hampshire, p. 280.
[270]For example see Coleman, J (1997), "Pornography Easy to Find in Japan—It's Even in Your Mailbox", *Associated Press*, 31 May, available online, <https://news.google.com/newspapers?nid=1876&dat=19970601&id=qbgeAAAAIBAJ&sjid=iM8EAAAAIBAJ&pg=6895,78947&hl=en>; Jones, S (2003), "Oriental Lolitas", *New Statesman*, 3 February, available online, <http://www.newstatesman.com/node/157046>; McNeil, D (2012), "In One Major Nation, Child Pornography is Legal", *UCA News*, 16 October, available online, <http://www.ucanews.com/news/in-one-major-nation-child-pornography-is-legal/62629>; Adelstein, J, and Kubo, A.E (2014), "Japan's Kiddie Porn Empire: Bye-Bye?", *The Daily Beast*, 3 June, available online, <http://www.thedailybeast.com/articles/2014/06/03/japan-s-kiddie-porn-empire-bye-bye.html>; Jiji (2014), "Japan to Finally Outlaw Possession of Child Porn, but Manga gets Free Pass", *Japan Times*, 4 June, available online, <http://www.japantimes.co.jp/news/2014/06/04/national/crime-legal/japan-finally-moving-to-ban-child-porn-possession/#.U5wSxBZcTzL>; Mullen, J, and Wakatsuki, Y (2014), "After long wait, Japan moves to ban possession of child pornography", *CNN News*, 10 June, available online, <http://edition.cnn.com/2014/06/06/world/asia/japan-child-pornography/>.
[271]See especially Kinsella, S (1995), "Cuties in Japan", in B Moeran and L Skov (eds.), *Women, Media and Consumption in Japan*, Curzon Press, Richmond, pp. 220-254; Peek, C.M (2009), *KAWAII Aesthetics: The Role of Cuteness in Japanese Society*, Honours Thesis, University of Arizona.
[272]Allison, A (2000), *Permitted and Prohibited Desires: Mothers, Comics and Censorship in Japan*, University of California Press, California, p. 56; Napier, S (2005), "The Problem of Existence in Japanese Animation", *Proceedings of the American Philosophical Society*, vol. 49, no. 1, p. 72. Note that McCloud has observed that females are increasingly consuming comics in the West. McCloud, S (2015), "Girls are Taking the Comic Book World by Storm", *Time*, 1 May, available online, <http://time.com/3841761/scott-mccloud-free-comic-book-day/>.

print publications, not including the millions of amateur *manga* publications produced by fans.[273] The popularity of *manga* was said to be partly due to the perception that it is a medium fit for a wide array of topics, including sexuality;[274] thus, the availability and accessibility of sexually explicit comics are much greater in Japan than in Western countries.[275]

It is claimed the Japanese have historically been more accepting of pornography than Western countries.[276] This is be reflected in Japan's relatively lenient censorship laws, which tended only to prohibit material that depicted genitals and pubic hair, while being generally relaxed on material depicting violence, sex, and child nudity.[277] It was this leniency towards child nudity that is said to have encouraged artists to draw characters that appeared underage.[278] The greater tolerance of depictions of minors in a sexual context in *manga* may also be due to the lower age of legal sexual consent in Japan (presently 13 years of age).[279] However, as highlighted above, sexually explicit comics are not unique to Japan and this dissertation does not support orientalist stereotypes,[280] often promoted in the Western media, portraying Japanese culture as sexually perverse and somewhat inferior.[281]

---

[273]Schodt, above n 257, 20; Kinsella, S (1999), "Pro-Establishment Manga: Pop-Culture ad the Balance of Power in Japan", *Media, Culture & Society*, vol. 21, no. 4, p. 568.
[274]Schodt, above n 257, 27; Preper and Cornog, above n 255, 4; Galbraith, P.W (2011), "Lolicon: The Reality of 'Virtual Child Pornography' in Japan", *Image and Narrative: Online Magazine of the Visual Narrative*, vol. 12, no. 1, p. 93.
[275]Saitō, T (2011), *Beautiful Fighting Girl*, translated by J. K Vincent and D Lawson, University of Minnesota Press, Minneapolis, pp. 154-155.
[276]Alexander, J.R (2003), "Obscenity, Pornography, and the Law in Japan: Reconsidering Oshima's 'In the Realm of the Senses'", *Asian-Pacific Law & Policy Journal*, vol. 4, no. 1, p. 162.
[277]Preper and Cornog, above n 255, 5; Galbraith, above n 274, 95; Downs, J.F (1990), "Nudity in Japan Visual Media: A Cross-Cultural Observation", *Archives of Sexual Behavior*, vol. 19, no. 6, p. 585.
[278]Zanghellini, A (2009), "Underage Sex and Romance in Japanese Homoerotic Manga and Anime", *Social and Legal Studies*, vol. 18, no. 2, p. 162.
[279]Frennea, M (2011), *The Prevalence of Rape and Child Pornography in Yaoi*, Proceedings of the National Conference on Undergraduate Research, available online, <http://urpasheville.org/proceedings/ncur2011/papers/NP51669.pdf>.
[280]Content analysis of mainstream comics produced in Western countries has also highlighted that it is not uncommon for such comics to depict child-like characters in a sexual context. See Reisman, above n 264; Palmer, E (1979), "Pornographic Comics: A Content Analysis", *The Journal of Sex Research*, vol. 15, no. 4, pp. 285-298; Matacin, M, and Burger, J (1987), "A Content Analysis of Sexual Themes in Playboy Cartoons", *Sex Roles*, vol. 17, no. 3, pp. 179-186; Dines-Levy, G, and Smith, G (1988), "Representations of Women and Men in *Playboy* Sex Cartoons", in C Powell and G Paton (eds.), *Humour in Society: Resistance and Control*, Macmillan, London, pp. 234-259.
[281]For a discussion on the topic of orientalism in general see Said, E.W (1978) *Orientalism*, Pantheon, New York. For examples of orientalist media reporting of Japan see footnote 270 above.

Some academics have suggested *manga* and sex have become synonymous in the West, which is misleading in that not all *manga* is sexually explicit.[282] Overtly sexually explicit *manga* generally belongs to a subgenre targeted at adult males, and known as "*hentai*" (abnormality or perversion).[283] *Hentai*, sometimes referred to as "Lolita Complex", *"lolicon",* or "*rorikon",* is notorious for depicting young girl and boy cartoon characters engaging in sexual activity.[284] In Japan, deep concerns about sexually explicit *manga*, and the avid fans of such material known as the "*otaku*", was ignited after the Miyazaki Tsutomu case.[285] In 1989 Tsutomu murdered four infant girls and was later found to be a fan of *hentai* featuring sexualised images of cartoon schoolgirls.[286] It was believed this fantasy material incited him to commit the murders.[287] Tsutomu's case, and more recent examples, will be discussed further in Chapter 7 as part of the discussion of the harm in viewing sexually explicit *manga.*

Today, *hentai* and other sexually explicit *manga* continue to have a large fan base in both Japan and the West.[288] The internet has facilitated the global expansion of *hentai,* as well as *manga* in general.[289] It has been said such material can be easily accessed through internet sites such as LiveJournal.com, DeviantArt.com, Amazon.com and eBay.com.[290] However, *hentai* may be problematic when imported or accessed in

---

[282]Downs, above n 277, 591.
[283]Geers, T, and Geers, E (2003), *Making Out in Japanese: Revised Edition*, Turtle Publishing, Tokyo, p. 157.
[284]Schodt, above n 257, 37; Uidhir and Pratt, above n 253, 143; Galbraith, above n 274, 105; Shigematsu, S (1999), "Dimensions of Desire: Sex, Fantasy, and Fetish in Japanese Comics", in J.A Lent (ed.), *Themes and Issues in Asian Cartooning: Cute, Cheap, Mad, and Sexy*, Bowling Green State University Popular Press, Ohio, p. 129; Lucy, G (2015), "Creating Transnational Fandoms Adaptation of Japanese Terminology Among English-Language *Dojinshi* Users", *Nagyoya Repository*, vol. 15, p. 27; Takeuchi, C (2015), "Regulating *Lolicon*: Toward Japanese Compliance with Its International Legal Obligations to Ban Virtual Child Pornography", *Georgia Journal of International and Comparative Law*, vol. 44, no. 1, p. 198.
[285]Schodt, above n 257, 56; Galbraith, above n 274, 105; Kinsella, S (1998), "Japanese Subculture in the 1990s: Otaku and the Amateur Manga Movement", *Journal of Japanese Studies*, vol. 24, no. 2, p. 311.
[286]Schodt, above n 257, 56.
[287]Ibid.
[288]Yar, M (2010), "Cyber-sex Offences: Patterns, Prevention and Protection", in K Harrison (ed.), *Managing High Risk Sex Offenders in the Community: Risk and Management, Treatment and Social Responsibility*, Willan Publishing, Cullompton, p. 233.
[289]Pagliassotti, above n 255; Hall, A (2010), "Gay or Gei?: Reading 'Realness' in Japanese Yaoi Manga", in A Levi, M McHarry, and D Pagliassotti (eds.), *Boys' Love Manga: Essays on the Sexual Ambiguity and Cross-Cultural Fandom of the Genre*, McFarland & Company Inc. Publishers, London, p. 211.
[290]Thorn, M (2004), "Girls and Women Getting Out of Hand: The Pleasure and Politics of Japan's Amateur Comics Community", in W.W Kelly (ed.), *Fanning the Flames: Fans and Consumer Culture in Contemporary Japan*, State University of New York Press, Albany, p. 172; McLelland, M, and Yoo, S (2007), "The International Yaoi Boys' Love Fandom and the Regulation of Virtual Child Pornography:

Western countries that have expanded their child pornography laws to include depictions of persons who "appear to be a minor".[291] As a result, many males in Western countries have been prosecuted for possessing *hentai* that has been deemed as child pornography.[292]

Less clear is the legal status of sexually explicit subgenres of *manga* known as "Boys Love" and "YAOI" in Western countries. These subgenres of *manga* also frequently depict underage characters in a sexual context. However, unlike *hentai,* the main consumers of Boys Love and YAOI are generally females in their teens or young adults.[293] Below is a detailed analysis of the content of Boys Love, YAOI, and why such material may be deemed child pornography.

2.4.1 Boys Love and YAOI

Boys Love and YAOI *manga* share several similarities that make it worth analysing the two together. Essentially, these materials focus on homoerotic male sexual relationships, even though the main consumers are largely a diverse group of heterosexual females.[294] It is different from gay erotica, known as "*bara*", which is created with the intention of appealing to homosexual male audiences.[295] Rather, Boys

---

Current Legislation and its Implications", *Journal of Sexuality Research & Social Policy*, vol. 4, no. 1, p. 97; Zanghellini, A (2009), "'Boys' Love' in *Anime* and *Manga*: Japanese Subcultural Production and its End Users", *Continuum*, vol. 23, no. 3, p. 287; Bauer, C.K (2012), *Naughty Girls and Gay Male Romance/Porn: Slash Fiction, Boys' Love Manga, and Other Works by Female 'Cross-Voyeurs' in the U.S. Academic Discourses*, Anchor Academic Publishing, Hamburg, p. 46. The popularity of *manga* is also reflected in the development of offline fan communities. This includes the establishment of conventions dedicated to these subgenres of *manga*, such as *Yaoi-Con*, one of the largest annual conventions held in San Francisco that attracts fans from all over the world. In Australia, fans have also developed their own annual conventions, such as *Oz Comic-Con, SMASH!,* and *Room 801*.

[291]See Chapter 4.

[292]Ibid.

[293]Pagliassotti, above n 255; Frennea, above n 279; Suzuki, K (1998), "Pornography or Therapy? Japanese Girls Creating the Yaoi Phenomenon", in S.A Inness (ed.), *Millennium Girls: Today's Girls Around the World*, Rowman & Littlefield Publishers, Maryland, p. 245; O'Brien, A (2008), *Boys' Love and Female Friendships: The Subculture of YAOI as a Social Bond Between Women*, Masters Thesis, Georgia State University, p. 2; Feng, J (2009) "'Addicted to Beauty': Consuming and Producing Web-Based Chinese *Danmei* Fiction at Jinjiang", *Modern Chinese Literature and Culture*, vol. 21, no. 2, p. 1; Fermin, T (2010), "Yaoi: Voices from the Margins", *Otaku University Knowledge Archive*, pp. 217-218; Martin, F (2012), "Girls who Love Boys' Love: Japanese Homoerotic Manga as Trans-National Taiwan Culture", *Inter-Asia Cultural Studies*, vol. 13, no. 3, p. 367; Steel, C (2014), *Digital Child Pornography: A Practical Guide for Investigators*, Lily Shiba Press, Virginia, p. 18.

[294]Ibid.

[295]Pagliassotti, above n 255; Feng, above n 293, 2.

Love and YAOI have been described as existing in a "female-gendered space"[296] and a "feminine fantasy world" [297] that does not purport to depict "the masculine real-life world of gay male[s]".[298]

Boys Love appears to have developed in the 1970s in Japan. It is usually commercialised, providing fans with characters, plots, and settings, which they can borrow to create their own fantasy.[299] Such material often has an erotic element that may be overtly depicted by scenes of kissing, touching and sex, but sometimes this erotica is implicit and remains ambiguous.[300]

YAOI appears to have developed in the 1980s. It is a plotless and amateur adaptation of original Boys Love *manga* that is created by fans.[301] YAOI tends to be more sexually graphic than Boys Love,[302] largely because Boys Love is commercially produced while YAOI is created by fans and, therefore, not subject to the same restrictions.[303] Its sexual explicitness is emphasised by the acronym YAOI, which stands for the Japanese expression *yama nashi, ochi nashi, imi nashi* ("no climax, no punch line, no meaning"),[304] emphasising that sexual scenarios are at the heart of this material.

Boys Love and YAOI seem to follow the same pattern of depicting pretty boys (*bishounen*) who are irresistibly cute (*kawaii*).[305] The two participants depicted are usually referred to as the *seme* ("top") and the *uke* ("bottom").[306] The *seme* generally is

[296]Pagliassotti, D (2008), "Boys' Love vs. YAOI: An Essay on Terminology", available online, <http://drupagliassotti.com/2008/07/17/boys-love-vs-yaoi-an-essay-on-terminology/>.
[297]Martin, above n 293, 369.
[298]Ibid.
[299]See especially De Certeau, M (1984), *The Practices of Everyday Life*, University of California Press, California; Jenkins, H (1992), *Textual Poachers: Television Fans and Participatory Culture*, Routledge, London.
[300]Martin, above n 293, 368.
[301]Miyake, T (2015), "Towards Critical Occidentalism Studies Re-inventing the 'West' and 'Japan' in Mangaesque Popular Cultures", in P Calvetti and M Mariotti (eds.), Contemporary *Japan Challenges for a World Economic Power in Transition*, Ca' Foscari Japanese Studies, Venezia, p. 105.
[302]Pagliassotti, D (2008), "Boys' Love vs. YAOI: An Essay on Terminology", available online, <http://drupagliassotti.com/2008/07/17/boys-love-vs-yaoi-an-essay-on-terminology/>; De Zwart, M (2010), "Japanese Lessons: What can Otaku Teach Us about Copyright and Gothic Girls?", *Alternative Law Journal*, vol. 35, no. 1, p. 29.
[303]McLelland and Yoo, above n 290, 96; Gravett, P (2004), *Manga: Sixty Years of Japanese Comics*, Laurence King, London, p. 136.
[304]Suzuki, above n 293, 255.
[305]Zanghellini, above n 278, 172.
[306]See Kamm, B.O (2013), "Rotten Use Patterns: What Entertainment Theories Can Do for the Study of Boys' Love", *Transformative Works and Cultures*, no. 12, available online, <http://journal.transformativeworks.org/ index.php/twc/article/view/427/391>.

the aggressive partner in the relationship, while the *uke* is the passive partner who is usually depicted as innocent and childlike. Often the *seme* forces sex upon the submissive *uke,* portraying rape as "erotic and satisfying, where 'no' means 'yes'".[307] Therefore, it is conceivable that the child-like characteristics of the *uke,* in combination with forced sex being instigated by the powerful *seme,* may trigger child abuse material legislation in some Western jurisdictions. This includes New South Wales which, as highlighted above, prohibits depictions of characters who "appear to be" a minor in a sexual context. [308]

However, despite concerns raised in some of the Australian literature,[309] the potential criminalisation of these materials should not be overstated. Generally, it is a requirement under child abuse material legislation in each Australian jurisdiction that the material be "offensive".[310] The older the depicted person appears to be, the less likely it will be considered offensive. It is arguable whether Boys Love and some YAOI would be considered sufficiently offensive to constitute child pornography given that, as demonstrated in Figures 6 and 7 below, the characters depicted in this material commonly appear to be in late adolescence or older.[311] This can be contrasted with many *hentai* comics, which often depict characters who appear to be very young children [312] and, as will be seen in Chapter 4, have been deemed offensive and successfully prosecuted under child pornography laws in Australian courts.

[307]Frennea, above n 279, 13.
[308]*Crimes Act 1900* (NSW), s 91FB. See Chapter 4.
[309]See Chapter 1, at [1.2.3].
[310]See Chapter 4, at [4.3.4].
[311]Madill has observed that the age of the characters in Boys Love is often inconsistent over the course of the narrative. This means that the "stories may appear populated by characters who look, at times, very young but who are in contexts that make it clear that they are to be understood as adults (e.g. in college, university and the workplace)". Madill, above n 269, 276.
[312]That is, pre-pubescent children. See "Terminology" in Chapter 1, at [1.1].

Figure 6: Boys Love/YAOI image [313]

Figure 7: Boys Love/YAOI image [314]

It should be noted, however, that there is a specific subgenre of YAOI, known as "*shota*" or "*shotacon*", which may be similar to *hentai* in that it depicts very young

[313]Source/image credit: hazy95 on Photo Bucket, available online, <http://media.photobucket.com/user/Akihiro122/media/Yaoi/tumblr_lxi81zlkc41qjb4vmo2_500.jpg.html?filters[term]=yaoi&filters[primary]=images&sort=1&o=97>.
[314]Source/image credit: Raffi-kins on DeviantArt, available online, <http://www.deviantart.com/browse/all/?section=&global=1&q=raffi-kins&offset=9>.

characters. *Shota* refers to material that depicts sexually explicit relationships between prepubescent boys and adult men.[315]

Figure 8 below is the front cover of a *shota* animation known as "*Boku no Piko*". While the literature suggests that many YAOI fans do not consider these works as child pornography, *shota* is said to cause some mainstream YAOI fans discomfort due to the depictions of characters who appear very young in a sexual context.[316]

Figure 8: *Shota* image [317]

Observers unfamiliar with the genre may question why fans continue to consume Boys Love and YAOI despite the risk of running afoul of the law. Some fans could be oblivious to the fact that this material may be deemed as child abuse material.[318] Yet,

[315]Malone, P (2013), "Transplanted Boys' Love Conventions and Anti-Shota Polemics in German Manga: Fahr Sindram's Losing Neverland", *Transformative Works and Cultures*, no. 12, available online, <http://journal.transformativeworks.org/index.php/twc/rt/printerFriendly/434/395>. Also see Goode, S.D (2010), *Understanding and Addressing Adult Sexual Attraction to Children*, Routledge, New York, p. 28.
[316]O'Brien, above n 293, 56. Also see Madill, above n 269.
[317]Source/image credit: cover of a *hentai* series of *manga* known as *Boku no Pico*.
[318]Bauwens-Sugimoto, J (2016), "Negotiating Religious and Fan Identities: 'Boys Love' and Fujoshi Guilt", in M McLelland (ed.), *The End of Cool Japan: Ethical, Legal, and Cultural Challenges to Japanese Popular Culture*, Routledge, Oxon, p. 188.

fans seem to be generally aware that Boys Love and YAOI can be perverse and may be considered paedophiliac material.[319] For example, consider the following comment made by a fan:

> "You discover that Ristuka is in the sixth grade and that Soubi is nineteen. After this realisation, 'Shotacon Shotacon!' ['Paedophile Paedophile!'] kept nagging at the back of my mind. But you quickly forget this in the face of all the cuteness".[320]

Nevertheless, the evidence suggests most fans are not viewing this material to satisfy paedophilic urges.[321] It has been consistently claimed in the literature that the emergence of Boys Love and YAOI in Japan during the 1970s and 1980s was part of the feminist movement's response to patriarchal society and the ubiquitous objectifying depictions of women in male comics, especially *hentai*.[322] Dissatisfied with the formulaic storylines, gender stereotypes, and misogyny in comics, as well as in the media generally, some females began creating their own backlash comics.[323] However, as will be discussed in Chapter 7, such material may also attract a less visible paedophiliac audience.

Some observers may further question why female fans chose to express their sexuality through male homosexuality. The answer to this question has invariably been that male homosexuality provides a way for females to express their discontent with predefined gender expectations and instead indulge in the fantasy of equal relationships that can only truly be achieved in relationships between two males.[324] This is based on the belief

---

[319]In Japan, this has led some zealous fans to self-identify themselves as *fujoshi* ("rotten women"). See especially Galbraith, P.W (2015), "*Moe* Talk: Affective Communication among Female Fans of *Yaoi* in Japan", in M McLelland, K Nagaike, K Suganuma, and J Welker (eds.), *Boys Love Manga and Beyond: History, Culture, and Community in Japan*, University Press of Mississippi, Mississippi, pp. 153-168.

[320]A Boys Love/YAOI fan quoted in Zanghellini, above n 290, 290.

[321]Madill, above n 269, 283; Tribunella, E.L (2008), "From Kiddie Lit to Kiddie Porn: The Sexualization of Children's Literature", *Children's Literature Association Quarterly*, vol. 33, no. 2, pp. 135-155.

[322]Suzuki, above n 293, 246-247; Fermin, above n 293, 220; Tresca, D (2014), "Spellbound: An analysis of Adult-Oriented Harry Potter Fanfiction", in K.M Barton and J.M Lampley (eds.), *Fan Culture: Essays on Participatory Fandom in the 21st Century*, McFarland and Co., North Carolina, p. 38.

[323]Ibid. It is notable that females in the West also started creating their own backlash comics during around about this period. See Pilcher and Kannenberg, above n 264, 162.

[324]See Suzuki, above n 293; Fermin, above n 293; Thorn, above n 290; Tresca, above n 322; Cicioni, M (1998), "Male Pair-Bonds and Female Desire in Fan Slash Writing", in C Harris and A Alexander (eds.), *Theorizing Fandom: Fans, Subcultures, and Identity*, Hampton Press, New Jersey, pp. 153-177;

that being born female is a social disadvantage that prevents true equality in heterosexual relationships.[325] It has been suggested that, even though Boys Love and YAOI frequently depict sexual violence, fans see the absence of females in the genre as a "safety device".[326] According to Fujimoto, as it is men being depicted, female readers "cannot get pregnant, lose their virginity or become 'unsuited for marriage'".[327]

Conversely, some academics have claimed the female empowerment aspect of Boys Love and YAOI has been exaggerated.[328] For example, Suzuki has criticised the literature for focusing on empowerment while downplaying the fact that many fans consume these materials simply for sexual gratification.[329] Research has also revealed that there is sometimes a gap between the academic interpretations of YAOI and fan's feelings towards their fandom. Some fans have admitted they did not consume Boys Love or YAOI because they felt that they were oppressed, but simply for the fun of it.[330] Other academics have interpreted the absence of females in Boys Love and YAOI as evidence of a hatred for females.[331] In Thorn's study, it was reported some female fans admitted to loving YAOI because they despise femininity and some wished they had been born male.[332]

Wilson, B, and Toku, M (2003), "Boys' Love, YAOI, and Art Education: Issues of Power and Pedagogy", *Visual Culture Research in Art and Education*, available online, <https://www.csuchico.edu/~mtoku/vc/Articles/toku/Wil_Toku_BoysLove.html>; Jenkins, H (2006), "'Normal Female Interest in Men Bonking': Selections from the Terra Nostra Underground and Strange Bedfellows", in H Jenkins (ed.), *Fans, Bloggers, and Gamers: Exploring Participatory Culture*, New York University Press, New York, pp. 61-88; Goldstein, L, and Phelan, M (2009), "Are You There God? It's Me, Manga: Manga as an Extension of Young Adult Literature", *Young Adult Library Services*, vol. 7, no. 4, pp. 32-38.

[325]Suzuki, above n 293, 263; Fermin, above n 293, 221.

[326]McLelland, M (2005), "The World of Yaoi: The Internet, Censorship and the Global 'Boys Love' Fandom", *Australian Feminist Law Journal*, vol. 23, no. 1, p. 72.

[327]Fujimoto, Y (2004), "Transgender: Female Hermaphrodites and Male Androgynes", *U.S.–Japan Women's Journal*, vol. 27, no. 1, p. 87. Also see Orsini, L (2013), "The Truth about Boys' Love and Rape Culture", *Otaku Journalist*, 14 October, available online, <http://otakujournalist.com/the-truth-about-boys-love-and-rape-culture/>.

[328]Fermin, above n 293, 225.

[329]Suzuki, K (2014), "Beyond Duality and Heteronormativity: Gender Display and Manipulation in Japanese Yaoi/BL Narratives", paper presented at the XVIII ISA World Congress of Sociology, 13–19 July, Yokohama.

[330]Fermin, above n 293, 225-226.

[331]See Fujimoto, above n 327, 84; Kee, T.B (2010), "Rewriting Gender and Sexuality in English-Language Yaoi Fanfiction", in A Levi, M McHarry, and D Pagliassotti (eds.), *Boys' Love Manga: Essays on the Sexual Ambiguity and Cross-Cultural Fandom of the Genre*, McFarland & Company Inc. Publishers, London, p. 140.

[332]Thorn, M (2004), "Girls and Women Getting Out of Hand: The Pleasure and Politics of Japan's Amateur Comics Community", in W.W Kelly (ed.), *Fanning the Flames: Fans and Consumer Culture in Contemporary Japan*, State University of New York Press, Albany, p. 177.

However, the literature does not clearly explain why the characters depicted often appear to be minors, or address the question of why fans do not depict adult characters. Such depictions would avoid potential criminalisation under child abuse materials legislation, as the characters would not "appear to be" minors. Although the literature does not directly answer this question, the reason for the apparent youthfulness of the characters depicted seems to be due to the *kawaii* ("cute") craze in Japanese culture, largely driven by young females who became fascinated with the consumption of cute goods and faking childish behaviour and innocent looks.[333] Japanese popular culture has also become increasingly popular in Western countries, which is evident in the growing availability and consumption of cute Japanese consumer products and animations, such as *Hello Kitty*, *Pokémon* and *Sailor Moon*.[334]

Nevertheless, the fetishising of youth is not unique to Japan, as is evident in the sexualisation of young people in Western media.[335] According to many observers, Western culture continuously fetishes innocence and youth in commercial arenas.[336] It is feared that this sends out the message to young people, especially girls, that sexual behaviour is appropriate at very early ages.[337] Common examples cited in the literature include sexualised advertising of children's clothing, *Playboy* products being marketed

[333]Kinsella, above n 271, 243.
[334]See McGary, D (2002), "Japan's Gross National Cool", *Foreign Policy*, May/June, pp. 44-54; McNicol, T (2004), "Does Comic Relief Hurt Kids?", *Japanese Times*, 27 April, available online, <http://www.japantimes.co.jp/community/2004/04/27/community/does-comic-relief-hurt-kids/#.UmeW1lOKapA>; Norris, C (2003), *The Cross-Cultural Appropriation of Manga and Anime in Australia*, PhD Thesis, University of Western Sydney; Allison, A (2006), "The Japan Fad in Global Youth Culture and Millennial Capitalism", *Mechademia*, vol. 1, pp. 11-21; Dahlquist, J.P, and Vigilant, L.G (2004), "Way Better than Real: Manga Sex to Tentacle Hentai", in D.D Waskul (ed.), *Net.SeXXX: Readings on Sex, Pornography and the Internet*, Peter Lang Publishing, New York, pp. 91-103.
[335]For example see Rush, E, and La Nauze, A (2006), *Corporate Paedophilia: Sexualisation of Children in Australia*, The Australian Institute, Discussion Paper 93, Canberra; Rush, E, and La Nauze, A (2006), *Letting Children Be Children: Stopping the Sexualisation of Children in Australia*, The Australian Institute, Discussion Paper 93, Canberra; Durham, M.G (2008), *The Lolita Effect: The Media Sexualization of Young Girls and What We Can Do About It*, Overlook Press, New York; Dines, G (2009), "Childified Women: How the Mainstream Porn Industry Sells Child Pornography to Men", in S Olfman (ed.), *The Sexualization of Childhood*, Prager Publishers, Connecticut, pp. 121-142.
[336]Ibid. Also see Kitzinger, J (1988), "Defending Innocence: Ideologies of Childhood", *Feminist Review*, vol. 28, no. 1, pp. 77-87; Kincaid, J.R (1992), *Child-Loving: The Erotic Child and Victorian Culture*, Routledge, New York; Flood, M (2009), "The Harms of Pornography Exposure Among Children and Young People", *Child Abuse Review*, vol. 18, no. 6, p. 385; Lunceford, B (2011), "The New Pornographers: New Media, Sexual Expression, and the Law", in B.E German and B Drushel (eds.), *Ethics of Emerging Media: Information, Social Norms and New Media Technology*, Continuum International Publishing, London, p. 102; Jewkes, Y, and Wykes, M (2012), "Reconstructing the Sexual Abuse of Children: 'Cyber-Paeds', Panic and Power", *Sexualities*, vol. 15, no. 8, p. 940.
[337]Durham, above n 335, 48.

to minors, and toys, such as Bratz Dolls.[338] It is also feared that images glamorising children as sexual objects may lead adults to develop the belief that children are suitable sexual partners.[339] The debate concerning the sexualisation of children will be referred to throughout this dissertation, particularly when considering whether fantasy material, such as Boys Love and YAOI, contributes to the marketplace of sexualised images of minors. However, as will be seen in the following section, it is not just images that may be of concern, but also stories describing minors in sexual contexts.

2.5 Written Fantasy Material: Slash Fiction

Fantasy material, including Boys Love and YAOI, also exists in the form of written material. Such material may be legally problematic because, as mentioned above, Australia's child abuse material legislation extends to written material that describes persons who appear to be a minor in a sexual context.

The focus in this section is on "slash fiction", a sexually explicit subgenre of fan fiction. Generally, fan fiction refers to material written by fans using fictional characters and/or settings from an original work—usually based on an identifiable segment of popular culture, such as a novel or television show—and is not produced as "professional" writing.[340] It is a form of "textual poaching", a term that was developed by Michel de Certeau and later developed by Henry Jenkins to highlight that audiences are not passive viewers, but active interpreters of media content.[341]

Although the act of borrowing characters and settings from pre-existing fictional works is by no means a new activity, attention to fan cultures increased in the 1970s with the advent of the *Star Trek* series.[342] During this period, fans, particularly young females, began writing sexually explicit stories (now known as "slash fiction") that paired

[338]Dines, above n 335, 122; Jewkes, Y (2010), "Much Ado About Nothing? Representations and Realities of Online Soliciting of Children", *Journal of Sexual Aggression*, vol. 16, no. 1, p. 7; Kehily, M.J (2012), "Contextualising the Sexualisation of Girls Debate: Innocence, Experience and Young Female Sexuality", *Gender and Education*, vol. 24, no. 3, p. 258; Mulholland, M (2013), *Young People and Pornography: Negotiating Pornification*, Palgrave MacMillan, New York, pp. 60-61.
[339]King, P (2008), "No Plaything: Ethical Issues Concerning Child Pornography", *Ethical Theory and Moral Practice*, vol. 11, no. 3, p. 336.
[340]Tushnet, R (1997), "Legal Fiction: Copyright, Fan Fiction, and a New Common Law", *Loyola of Los Angeles Entertainment Law Review*, vol. 17, no. 3, p. 655; De Zwart, M (2010), "Angel(us) is My Avatar! An Exploration of Avatar Identity in the Guise of the Vampire", *Media and Arts Law Review*, vol. 15, no. 3, p. 320.
[341]De Certeau, above n 299; Jenkins, above n 299.
[342]Bauer, above n 290, 45.

characters such as Kirk and Spock from *Star Trek*. Slash fiction become increasingly popular and seems to have arisen spontaneously in Australia, Canada, the United Kingdom, and the United States.[343] A Japanese equivalent of slash fiction known as "*dojinshi*" also began to proliferate around the same time in Japan.[344] Originally, slash fiction was usually disseminated via fan magazines known as "fanzines".[345] Today, however, it is primarily located on the internet,[346] which has enabled fans to produce and share their work with greater ease by publishing their stories on highly accessible websites, such as DeviantArt, FanFiction.net, and LiveJournal.[347]

While the potential risk of slash fiction fans breaching copyright laws has received academic attention,[348] little attention has been given to the impact the criminal law could have on slash fiction fans who make adaptions of original texts by creating intimate relationships between characters who appear to be minors. Sometimes fans cannot help but use underage characters since the characters in the original texts are minors. For example, in *Harry Potter,* one of the most popular fandoms, the main characters are 11 years old in the first book and 17 by the end of the series.[349] Notably, however, like Boys Love and YAOI fans, slash fiction fans do not seem to be consuming these materials for paedophiliac purposes.[350]

---

[343]Salmon, C (2015), "The Impact of Prenatal Testosterone on Female Interest in Slash Fiction", *Evolutionary Behavioral Sciences*, vol. 9, no. 3, p. 161.
[344]Pagliassotti, above n 255; Nagaike, K (2003), "Perverse Sexualities, Perversive Desires: Representations of Female Fantasies and 'Yaoi Manga' as Pornography Directed at Women", *U.S.–Japan Women's Journal*, vol. 25, p. 77; Levi, A (2010), "Introduction", in A Levi, M McHarry, and D Pagliassotti (eds.), *Boys' Love Manga: Essays on the Sexual Ambiguity and Cross-Cultural Fandom of the Genre*, McFarland & Company Inc. Publishers, London, p. 2; Meyer, U (2010), "Hidden in Straight Sight: Trans*gressing Gender and Sexuality via BL", in A Levi, M McHarry, and D Pagliassotti (eds.), *Boys' Love Manga: Essays on the Sexual Ambiguity and Cross-Cultural Fandom of the Genre*, McFarland & Company Inc. Publishers, London, p. 233.
[345]Salmon, above n 343.
[346]Ibid. Also see Bauer, above n 290, 85.
[347]Cheung, A (2007), "The Regulation of Chinese Women's Sexuality on the Internet", *Media and Arts Law Review*, vol. 12, no. 1, p. 110; Warburton, J (2010), "Me/Her/Draco Malfoy: Fangirl Communities and Their Fictions", in S.R Mazzarella (ed.), *Girl Wide Web 2.0: Revisiting Girls, the Internet, and the Negotiation of Identity*, Peter Lang, New York, pp. 117-137.
[348]For example see Tushnet, above n 340; De Zwart, above n 302; Roth, J, and Flegel, M (2013), "'I'm not a Lawyer but…': Fan Disclaimers and Claims against Copyright Law", *Journal of Fandom Studies*, vol. 1, no. 2, pp. 201-218.
[349]See Tresca, above n 322; Tosenberger, C (2008), "Homosexuality at the Online Hogwarts: Harry Potter Slash Fiction", *Children's Literature*, vol. 36, no. 1, pp. 185-207.
[350]Salmon, C (2005), "Crossing the Abyss: Erotica and the Intersection of Evolutionary Psychology and Literary Studies", in J Gottschall and D Wilson (eds.), *The Literary Animal: Evolution and the Nature of Narrative*, Northern University Press, Illinois, p. 253.

Also like Boys Love and YAOI, the literature on slash fiction has focused on female empowerment and defying social norms.[351] Slash fiction, which is produced and consumed almost exclusively by females,[352] has been praised for enabling females to explore issues about relationships that are based on mutual respect.[353] Such material has been further commended for allowing females to explore relationships in a way decided by themselves, rather than dictated by the producers of traditional media.[354] As slash fiction is amateur work that is not subject to the same content restrictions as the original media texts, some of the most sexualised content can be found in slash fiction.[355] These stories often contain deviant themes, including paedophilia, bestiality, incest, rape, and sadomasochism.[356] Stories describing young characters engaging in these deviant acts may be considered offensive and it is therefore conceivable some slash fiction may breach child pornography laws.[357] Given the sexual explicitness and deviant themes featured in slash fiction, the anonymity provided by the internet makes it a particularly appealing medium for fans to consume and share this material.[358] However, as it will be demonstrated by some of the case law discussed in chapters 4 and 5, this anonymity is only apparent given the identification and subsequent prosecution of some internet users for sharing their fantasies online.

2.6 Concluding Remarks

The first section of this chapter provided a typology of child pornography, distinguishing real, pseudo, and virtual material. In doing so, it made clear that the

---

[351]Suzuki, above n 293, 246; Fermin, above n 293, 220; Bauer, above n 290, 3; De Zwart, above n 302.
[352]Jenkins, above n 324; Salmon, above n 343; Evans, A (2006), *The Global Playground: Fan Fiction in Cyberspace*, Masters thesis, Roehampton University.
[353]Ibid. f
[354]De Zwart, above n 302, 30; Wolfson, S (2012), "Fan Fiction Allows Teenagers to Explore their Sexuality Freely", *The Guardian*, 8 October, available online, <http://www.theguardian.com/commentisfree/2012/oct/07/fan-fiction-teenagers-explore-sexuality>.
[355]McLelland, M (2015), "Regulation of Manga Content in Japan: What Is the Future for BL?", in M McLelland, K Nagaike, K Suganuma, and J Welker (eds.), *Boys Love Manga and Beyond: History, Culture, and Community in Japan*, University Press of Mississippi, Mississippi, p. 257.
[356]See Tresca, above n 322, 37; Tosenberger, above n 349; Tosenberger, C (2008), "'The Epic Love Story of Sam and Dean': *Supernatural*, Queer Readings, and the Romance of Incestuous Fan Fiction", *Transformative Works and Cultures*, vol. 1, available online, <http://journal.transformativeworks.org/index.php/twc/article/ view/30/36-Subtext>.
[357]As it will be seen in chapters 4 and 5, a number of male defendants have been successfully prosecuted for creating stories that sound strikingly similar to the slash fiction fans. See especially *Whiley v R* [2010] NSWCCA 53.
[358]Tresca, above n 322.Also see Cheung, above n 347; Katyal, S.K (2006), "Performance, Property, and the Slashing of Gender in Fan Fiction", *Journal of Gender, Social Policy & the Law*, vol. 14, no. 3, pp. 461-518.

scope of this dissertation is to investigate the rationale behind prohibiting obviously fictional material that leaves no doubt in the viewer's mind that it is not a depiction of a real child.

The second section introduced the types of fantasy material that may be legally problematic for depicting or describing fictitious characters who appear to be minors in a sexual context. Comics are one of the most popular forms of fantasy material and, with the spread of Japanese culture products, sexually explicit *manga* is increasingly being consumed in the West. As seen in the Australian literature reviewed in Chapter 1, there has been a concern that the largely young female fans of Boys Love and YAOI fans are potentially criminalised as child pornographers. This concern can be extended to slash fiction fans, who create and consume stories that often describe underage characters engaging in sexual activity. The Boys Love, YAOI, and slash fiction examples are drawn upon throughout this dissertation to highlight the different types of potentially criminalised material under the child abuse material laws.

Chapter 3: Theories of Criminal Law

Chapter Contents

3.0 Aims of Chapter

There are various theoretical perspectives on criminalisation. These theories are generally developed to explore what type of conduct should or should not be a matter for the criminal law.[359] The most relevant and pertinent theories are the Harm Principle, the Offense Principle, and Legal Moralism (including its subset, Moral Paternalism). Although these theories have been used to examine why certain types of conduct are regulated in different areas of law, such as tort and contract law, this chapter situates these theories in the context of the criminal law. The aim of this chapter is to describe the scope of the Harm Principle, Offense Principle, and Legal Moralism to determine if these theories provide the theoretical justification for criminalising fictional child

[359]See Duff, R.A, and Green, S (2005), "Introduction: The Special Part and its Problems", in R.A Duff and S Green (eds.), *Defining Crimes: Essays on the Special Part of the Criminal Law*, Oxford University Press, Oxford, pp. 1-20; Simester, A.P, and Sullivan, G.R (2007), *Criminal Law: Theory and Doctrine*, 3rd edn., Hart Publishing, Oxford, pp. 551-604; Hornle, T (2014), "Theories of Criminalization", in M.D Dubber and T Hornle (eds.), *The Oxford Handbook of Criminal Law*, Oxford University Press, Oxford, chapter 30.

pornography. The Harm Principle is discussed first, followed by the Offense Principle and, lastly, Legal Moralism.

Before beginning the discussion, however, three points should be noted. Firstly, despite dealing with each theory separately, it is acknowledged that there is an interrelationship between the Harm Principle, Offense Principle, and Legal Moralism and that they are not wholly distinct. Secondly, it is beyond the scope of this chapter to consider the voluminous literature debating these theories; therefore, the analysis has been limited to aspects of these theories that will aid in understanding the rationale for prohibiting fictional child pornography. Lastly, the analysis does not argue in favour of one theory against another. Indeed, as will be seen in chapters 7 and 8, each theory can play a role in deliberations about whether fictional child pornography should or should not be prohibited.

3.1 The Harm Principle

The Harm Principle is a liberal principle that seeks to protect individual autonomy. It was championed by John Stuart Mill[360] and appears to be the most prevalent principle underlying criminal law in liberal Western countries.[361] Mill explained the Harm Principle in the following passage:

> "The object of this essay is to assert one very simple principle, as entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control … That principle is that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others".[362]

[360]Mill, J.S (1991, orig.1859), *On Liberty and Other Essays*, edited by J Gray, Oxford University Press, Oxford.
[361]Simester, A.P, and von Hirsch, A (2011), *Crimes*, *Harms, and Wrongs: On the Principles of Criminalisation*, Hart Publishing, Oxford, p. 79; Lauterwein, C (2010), *The Limits of Criminal Law: A Comparative Analysis of Approaches to Legal Theorizing*, Ashgate, Surrey, p. 57.
[362]Mill, above n 360, 13-14.

As can be seen from Mill's quote, the Harm Principle has both a negative and a positive aspect.[363] The negative aspect emphasises the Harm Principle's important role in limiting state interference with individual freedoms and preventing over-criminalisation.[364] It is considered a bulwark against the legal enforcement of morality,[365] which is seen by liberals as being "none of the state's proper business".[366] Conversely, the positive aspect involves identifying what conduct is considered sufficiently harmful to justify criminalisation. Taken together, the Harm Principle is "one very simple principle",[367] which asserts that state intervention may be justified to prevent harm to others, but otherwise freedom takes priority. However, as will be seen in the following section, the Harm Principle is not simple at all, due to the difficulty in defining its scope and ascertaining what constitutes "harm".

3.1.1 The Scope of the Harm Principle

The Harm Principle is problematic in that Mill did not adequately clarify what "harm" should encompass, and one of the greatest difficulties for later theorists and academics has been how to define this term.[368] As observed by Holtug:

> "The problem of defining harm seems to be the most important element in defining the scope of the Harm Principle, i.e. in determining the range of issues of which the Harm Principle can be legitimately invoked in order to defend individual liberty".[369]

---

[363]See Duff, R.A, and Marshall, S.E (2015), "'Abstract Endangerment', Two Harm Principles, and Two Routes to Criminalization", *Minnesota Legal Studies Research Paper Series*, Research Paper No. 15-19.
[364]Herring, J (2012), *Great Debates in Criminal Law*, 2nd edn., Palgrave Macmillan, Basingstoke, p. 8.
[365]Ibid; Hall, J (1960), *General Principles of Criminal Law*, Bobbs-Merrill, Indianapolis, p. 3.
[366]Persak, N (2007), *Criminalising Harmful Conduct: The Harm Principle, its Limits and Continental Counterparts*, Springer, New York, p. 17.
[367]Mill, above n 360, 13-14.
[368]Simester and Sullivan, above n 359, 582; Feinberg, J (1984), *Harm to Others: The Moral Limits of the Criminal Law*, Vol. I, Oxford University Press, New York, p. 214; Holtug, N (2002), "The Harm Principle", *Ethical Theory and Moral Practice*, vol. 5, no. 4, p. 364; Smith, S.D (2006), "Is the Harm Principle Illiberal?", *American Journal of Jurisprudence*, vol. 51, no. 1, p. 25; Wallerstein, S (2007), "Criminalising Remote Harm and the Case of Anti-Democratic Activity", *Cardozo Law Review*, vol. 28, no. 6, p. 2703; Steel, A (2008), "The Harms and Wrongs of Stealing: The Harm Principle and Dishonesty in Theft", *University of New South Wales Law Journal*, vol. 31, no. 3, p. 713.
[369]Holtug, above n 368, 364.

Feinberg's analysis of the Harm Principle has been most influential in the literature.[370] He defined harm as something "thwarting, setting back, or defeating of an interest".[371] By "interests", Feinberg was referring to a narrow class of welfare interests, which are mainly concerned with maintaining material resources and economic assets.[372] The test is whether the person has been placed in a worse condition as a result of the conduct, thereby incorporating a "but for" test.[373] This test, which is the prevailing theory of causation in Western countries,[374] asks, "but for the defendant's act would the harm have happened?"[375] If the harm would have occurred despite the defendant's actions, the act might be found to have not caused the harm at law. [376]

Despite some differences in interpretation, there is general agreement on many aspects of the Harm Principle as set out by Feinberg.[377] For example, there seems to be a consensus that not every type of harm warrants the protection of criminalisation. The Harm Principle has generally been interpreted as being concerned with harm arising from physical injury, including death, and financial loss. It does not extend to unpleasant mental states, such as distress, dislike, or annoyance, none of which are regarded as sufficiently harmful.[378]

There is also agreement among commentators that the Harm Principle is only concerned with harm to others and not harm to one's self, as the latter would be a form of paternalism.[379] Generally, paternalism refers to behaviour by governments that limit

---

[370]For example Persak, above n 366; Simester and von Hirsch, above n 361; Hornle, above n 359; Husak, D (2007) *Overcriminalisation: The Limits of Criminal Law*, Oxford University Press, New York; Ost, S (2010) "Criminalising Fabricated Images of Child Pornography: A Matter of Harm or Morality?", *Legal Studies*, vol. 30, no. 2, pp. 230-256; Ashworth, A, and Horder, J (2013), *Principles of Criminal Law*, 7th edn., Oxford University Press, Oxford.
[371]Feinberg, above n 368, 33.
[372]Ibid, 60.
[373]Ibid, 36.
[374]The "but for" test has also been enshrined in Australian civil laws. See Kift, S, Campbell, M, and Butler, D (2010), "Cyberbullying in Social Networking Sites and Blogs: Legal Issues for Young People and Schools", *Journal of Law, Information and Science*, vol. 20, no. 2, pp. 60-97.
[375]Herring, above n 364, 57.
[376]Ibid.
[377]For example see Hornle, above n 359; Simester and von Hirsch, above n 361; Husak, above n 370; Ashworth and Horder, above n 370; Persak, above n 366; Riley, J (2007), "Mill, Liberalism, and Exceptions to Free Speech", in G Newey (ed.), *Freedom of Expression: Counting the Costs*, Cambridge Scholars Publishing, Newcastle, pp. 191-210.
[378]Feinberg, above n 368, 215-216; Holtug, above n 368, 362; Riley, above n 377, 196.
[379]This is based on Mill's formulation of the Harm Principle, where he stated that "the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is

individuals' liberty and autonomy for what is presumed to be their own good.[380] Commonly cited examples of paternalism include anti-drug laws, the compulsory wearing of seatbelts, and the withholding of a patient's information by physicians.[381] Mill specifically argued against paternalism, except in the case of children and the mentally ill,[382] stating that a person's "own good, either physical or moral" [383] does not justify state intervention. This is because he assumed that individuals are in the best position to judge what is in their interests and should have an absolute right "[o]ver himself, over his own body and mind".[384]

Additionally, many commentators agree that the Harm Principle requires the conduct in question to be "wrongful", that is, an indefensible violation of a person's rights.[385] In order for conduct to be wrongful, it must not be attributable to nature, misfortune, or the legally permissible action of another person.[386] For example, a business owner may suffer significant financial loss as a result of a competitor setting up a more successful business. But such harm is considered to be a result of fair competition and therefore not wrongful.[387] Most types of conduct prohibited by the criminal law can easily be classified as wrongful because they involve directly harming someone, as in the case of murder or theft. [388] However, even liberals concede that it is sometimes necessary to criminalise wrongs, independent of the harm they cause.[389] This includes attempted murder, which is wrongful because of the actor's intention rather than the outcome.[390] Despite this, as will be seen in the subsequent section, extending the Harm Principle to indirect harms has been contentious.

---

to prevent harm to others". Mill, above n 360, 13-14. Also see Cavalieri, P (1991), "Principle of Liberty or Harm Principle?", *Between the Species*, vol. 7, no. 3, p. 162.

[380]See Thomas, M, and Buckmaster, L (2010), *Paternalism in Social Policy: When is it Justifiable?*, Research Paper No. 8, Parliament of Australia Department of Parliamentary Services, available online, <http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1011/11rp08>.

[381]Ibid.

[382]Mill defined a child as a person "below the age which the law may fix as that of manhood or womanhood". Mill, above n 360, 14.

[383]Ibid.

[384]Ibid.

[385]Feinberg, above n 368, 34-36; Simester and Sullivan, above n 359, 585; Wallerstein, above n 368.

[386]Hornle, above n 359, 688.

[387]Feinberg, above n 368, 219-220

[388]Simester and von Hirsch, above n 361, 19.

[389]Ibid, 51. Also see Duff, R.A (2005), "Criminalizing Endangerment", *Louisiana Law Review*, vol. 65, no. 3, pp. 941-965; Simester, A.P, and von Hirsch, A (2009), "Remote Harms and Non-Constitutive Crimes", *Criminal Justice Ethics*, vol. 28, no. 1, pp. 89-107.

[390]Simester and von Hirsch, above n 361, 51.

3.1.2 Remote Harm

The theory of remote harm expands the Harm Principle to criminalise conduct that risks the occurrence of harm that might follow indirectly from that conduct. Simester and von Hirsch identify three main types of remote harm offences:[391]

1. Abstract endangerment, which refers to conduct that creates an unreasonable probability of harming someone. Such crimes punish individuals for hypothetical creation of risk. The prime example is drinking over the permitted alcohol level, which holds drivers culpable even if he or she knows the street is empty.
2. Mediating interventions, which proscribe conduct that has no ill consequences of itself, but may cause another person to engage in harmful conduct. The harm is remote because it depends on intervening choice and the conduct is punished regardless of whether or not the intervention occurs. One example is laws prohibiting the sale of guns because of what others might do with them.[392]
3. Conjunctive harm is where the harm occurs only when combined with similar acts of others. For example, a person who dumps garbage in a river may not create a health hazard, but it can become a hazard if numerous people do the same.

Criminalising remote harm is more difficult to justify than criminalising direct harm, as fault cannot be straightforwardly attributed to the offender's act that resulted in the harm.[393] In fact, the person need not even be aware that his or her actions may have deleterious consequences.[394] Accordingly, criminalising remote harms raises the issue of fair imputation.[395] It is essential when imposing fault on a defendant for the criminal law to clearly explain *why* the offender is being held accountable for the harmful consequences. [396] This is usually straightforward when the harm is a direct cause of the

[391]Ibid, 57-59.
[392]See especially Baker, D.J (2011), *The Right not to be Criminalized: Demarcating Criminal Law's Authority*, Ashgate, Surrey.
[393]Simester and von Hirsch, above n 361, 54; Simester and Sullivan, above n 359, 588.
[394]Ibid.
[395]Simester and von Hirsch, above n 361, 59.
[396]Ibid.

conduct in question. However, when conduct is being criminalised because there is a possibility that it may trigger a series of events that may cause harm to others, it may not be clear why the defendant should be held accountable for those consequences that are a result of the intervening choices of an independent agent.[397]

Several academics have opposed state intervention on individual liberties in the absence of direct harm.[398] For example, Simester and von Hirsch have criticised the criminalisation of remote harms "because all sorts of seemingly innocent things we do may ultimately have deleterious consequences".[399] Some academics have also argued that extending the Harm Principle to remote harms has made the principle meaningless[400] and a "hollow concept".[401] In particular, Harcourt has argued the Harm Principle "no longer serves the function of a critical principle because non-trivial harm arguments permeate the debate".[402] This is because advocates have used it to support laws that criminalise whatever conduct they disfavour.[403] Similarly, Herring has argued that extending the Harm Principle to remote harms has enabled advocates to raise harm-based arguments not founded on a genuine assessment of harm, but on mere speculation about what conduct they believe to be remotely harmful.[404]

Nevertheless, Mill argued that the Harm Principle might justify criminalising conduct that will "prevent harm to others".[405] Commentators writing after Mill have also argued that the Harm Principle justifies prohibiting conduct "likely to cause"[406] harm to others, which recognises the important role the Harm Principle can play in harm prevention.[407] Accordingly, the Harm Principle has been used to justify laws making it a crime for people to drink and drive above the proscribed alcohol limit, even though certain

[397]Ibid; Wilson, W (2002), *Central Issues in Criminal Theory*, Hart Publishing, Oxford, p. 29.
[398]See Simester and von Hirsch, above n 361; Wilson, above n 397; Baker, above n 392; Wallerstein, above n 368.
[399]Simester and von Hirsch, above n 361, 54.
[400]Ibid, 36; Harcourt, B.E (1999), "The Collapse of the Harm Principle", *Journal of Criminal Law & Criminology*, vol. 90, no. 1, p. 109.
[401]Steel, above n 368, 717.
[402]Harcourt, above n 400.
[403]Smith, S.D (2004), "The Hollowness of the Harm Principle", *University of San Diego Public Law and Legal Theory Research Paper Series*, Working Paper No 17, p. 8.
[404]Herring, J (2015), *Great Debates in Criminal Law*, 3rd edn., Palgrave Macmillan, London, p. 9.
[405]Mill, above n 360.
[406]Persak, above n 366, 41.
[407]Duff and Marshall, above n 363, 3; Baker, above n 392, 131.

individuals may drive safely above this limit.[408] This is because such conduct gives a reasonable apprehension that an intoxicated driver will cause a car accident that harms other road users.[409] Additionally, some have argued that the Harm Principle justifies criminalising conduct that creates an unacceptable risk of harm because the criminal law should be used to protect people from conduct that threatens harm to individuals' health, property, and resources.[410] The challenge is determining how probable the occurrence, and serious the harm must be to justify criminalisation.

3.1.3 The Probability and Magnitude of Harm

While the Harm Principle may justify prohibiting conduct that creates a risk of harm,[411] it does not tell us how probable the harm must be to justify state interference. This raises the question: "what consequences are 'likely' to occur?".[412] To answer this question, some have suggested invoking the "but for" test.[413] As mentioned above, this test requires asking whether "certain innocuous acts are 'but for' causes of certain criminal harms".[414]

However, the "but for" test may be too onerous when conduct only creates remote harm, since that harm may be due to multiple factors. This can be demonstrated by the ongoing debate as to whether producers of adult pornography should be liable for the subsequent acts of viewers. On the one hand, it can be argued that consuming such material will very rarely be a "but for" cause for subsequent sex crimes, because pornography does not cause "normal, decent chaps, through a single exposure, to metamorphose into rapists".[415] On the other hand, as highlighted in Chapter 1, there is

[408]Ibid, 9.
[409]Simester and von Hirsch, above n 361, 44.
[410]Duff and Marshall, above n 363, 13.
[411]Persak, above n 366, 41.
[412]Ibid.
[413]Ibid, 42; Feinberg, above n 368, 120; Wallerstein, above n 368, 2706; Lucas, K (2014), "Does the Harm Principle Justify Criminal Drug Statutes Against Drug Use?", *Hilltop Review*, vol. 7, no. 1, p. 37.
[414]Baker, D.J (2007), "The Moral Limits of Criminalizing Remote Harms", *New Criminal Law Review,* vol. 10, no. 3, p. 375.
[415]Feinberg, J (1985), *Offense to Others: The Moral Limits of the Criminal Law*, Vol. II, Oxford University Press, New York, p. 153.

research indicating a causal connection between pornography consumption and sex offending. Hence some believe "pornography is the theory, and rape is the practice".[416]

To guide legislatures in determining whether criminalisation of remotely harmful conduct is justified under the Harm Principle, Feinberg suggested considering the likelihood and magnitude of the envisioned harm.[417] He stated:

> "[T]he greater the probability of harm, the less grave the harm need to be to justify coercion; the greater the gravity of the envisioned harm, the less probable it need be".[418]

Thus, using the example of drink driving, even though the likelihood of an accident may be relatively low for some individuals at the proscribed blood alcohol limit, car accidents carry a significant magnitude of harm that justifies restrictions on drink driving.[419] Conversely, such restrictions may not justify placing the same alcohol limit on those who ride a bicycle given the lower magnitude of risk.[420] Chapter 7 considers the likelihood and magnitude of the envisioned harm of fictional child pornography in order to weigh the potential harms and benefits of criminalisation.

It has been argued that, where the envisioned harm is likely to transpire, imputing blame to those who engage in the conduct is justified on the Harm Principle.[421] This is especially the case where the offender is culpably associated with the resulting harm, such as situations where the offender "through his conduct, in some sense affirms or underwrites the subsequent [criminal] choice"[422] of another person. Culpable involvement can be demonstrated by accomplice liability, such as where a person aids or abets murder.[423] For example, if a person sells a person a gun knowing that the buyer

---

[416]Morgan, R (1980), "Theory and Practice: Pornography and Rape", in L Lederer (ed.), *Take Back the Night: Women on Pornography*, William Morrow, New York, p. 131. Also see MacKinnon, C (1993), *Only Words*, Harvard University Press, Cambridge.
[417]Feinberg, above n 368, 187.
[418]Ibid, 191.
[419]Lucas, above n 413, 35.
[420]Wilson, above n 397, 30.
[421]See Baker, above n 392, 120.
[422]Ibid.
[423]Ibid.

will use it to murder another person, it may be fair to impute blame to the seller for the consequences of the subsequent, but independent, actions of the buyer. [424]

In some cases, proof that the offender actually knew that his or her intentional assistance might cause an independent agent to engage in harmful conduct may be difficult to establish. In such cases, it *may* be sufficient if the offender foresaw that there was a substantial risk that the other person would commit an offence.[425] For example, this may apply where a seller sells a gun to a buyer, despite overhearing the buyer telling someone else that he wants a gun for the purpose of murdering his wife.[426] Arguably, given the gravity of harm, which in this example is death, and the seller's extreme recklessness, the seller ought to be assigned blame for the foreseeable and significantly harmful actions of the buyer.[427] This is because offenders who "consciously disregard a substantial and unjustifiable risk" that another person will commit a crime should be punished for their "gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation".[428] As will be seen in the following section, the Harm Principle can also be extended to justify criminalising speech that incites harm to others.

3.1.4 The Harm Principle and Freedom of Expression

At the heart of the Harm Principle is the protection of individual liberties, so this section specifically considers the Harm Principle and freedom of expression. Sexually explicit fantasy material can be considered as a form of speech and, as mentioned in Chapter 1, virtual child pornography is generally regarded as speech in the United States.[429] In recognition that speech is not confined to spoken words, much of the literature uses the word "expression" to emphasise that it also includes various forms of non-verbal manifestation of ideas, regardless of the mode of communication.[430] Consistent with

[424]Dressler, J (2006), *Understanding Criminal Law*, 4th edn., LexisNexis, New Jersey, p. 498.
[425]See Baker, above n 392, 121; Kadish, S.H (1997), "Reckless Complicity", *Journal of Criminal Law and Criminology*, vol. 87, no. 2, pp. 369-394.
[426]Baker, above n 392, 122.
[427]Ibid, 124.
[428]Kadish, above n 425, 385.
[429]See Chapter 1, at [1.2.2].
[430]For example see Schauer, F (1982), *Free Speech: A Philosophical Inquiry*, Cambridge University Press, Cambridge, p. 922; Bakan, J (1985), "Pornography, Law and Moral Theory", *Ottawa Law Review*, vol. 17, no. 1, p. 2; Sunstein, C.R (1993), "Words, Conduct, Caste", *University of Chicago Law Review*, vol. 60, no. 3/4, p. 840; Cole, D (1994), "Playing by Pornography's Rules: The

the literature, this dissertation treats pornography as a form of speech, but uses the terms "expression" and "speech" interchangeably throughout. It is acknowledged that much of this literature derives from the United States that, unlike Australia, explicitly protects freedom of expression under its Constitution. However, it should also be noted that Article 19 of the *International Covenant on Civil and Political Rights*, to which Australia is a signatory, protects "freedom of expression".[431] This is defined broadly as including:

> "… the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice".[432]

In *On Liberty,* Mill strongly advocated for freedom of speech, holding that if speech does not "harm" anyone, it should not be suppressed.[433] Essentially, he premised his argument on the importance of maintaining democracy, the ascertainment of truth, and the advancement of knowledge, which he believed could only be achieved by allowing individuals to think and speak as they please.[434] Thus, much of the literature has been concerned with political speech;[435] much less consideration has been given to the importance of sexual expression.

Although it would be dubious to argue that sexually explicit expression facilitates the voting process,[436] the belief that only political speech merits heightened protection is

---

Regulation of Sexual Expression", *University of Pennsylvania Law Review*, vol. 143, no. 1, p. 125; White, A (2006), *Virtually Obscene: The Case for an Uncensored Internet*, McFarland & Company, North Carolina, p. 53; Adams, A (2010), "Virtual Sex with Child Avatars", in C Wankel and S Malleck (eds.), *Emerging Ethical Issues of Life in Virtual Worlds*, IAP, North Carolina, p. 59.

[431]*International Covenant on Civil and Political Rights*, New York, December 1966, in force 23 March 1976, 999 UNTS 171, Article 19(2).

[432]Ibid.

[433]Mill, above n 360, 16.

[434]See Cohen-Almagor, R (1997), "Why Tolerate? Reflections on the Millian Truth Principle", *Philosophia*, vol. 25, no. 1, pp. 131-152.

[435]For literature discussing the less privileged status of sexual expression compared to political speech, see Cole, above n 430, 111; Greenawalt, K (1989), *Speech, Crime, and the Uses of Language*, Oxford University Press, New York, p. 233; DeCew, J.W (2004), "Free Speech and Offensive Expression", *Social Philosophy & Policy*, vol. 21, no. 2, p. 95; Boyce, B (2008), "Obscenity and Community Standards", *Yale Journal of International Law*, vol. 33, no. 2, p. 323.

[436]This is even though some sexually explicit expression may be politically motivated or contain political content. White, above n 430, 62; Sorial, S (2012), *Sedition and the Advocacy of Violence: Free Speech and Counter-Terrorism*, Routledge, Oxon, p. 51.

"illogical and unconvincing".[437] As argued by several academics, sexual expression serves a valuable purpose in assisting individuals further their autonomy, self-discovery, and self-fulfilment.[438] Additionally, according to Dworkin, it is undesirable for governments to determine which expression warrants protection, arguing governments should be committed to free speech neutrality by not favouring certain types of speech over others.[439] It is also feared that if governments are allowed to restrict certain speech, other types of speech may become increasingly susceptible to prohibition.[440]

Some observers have argued that the Harm Principle does not justify laws that criminalise speech unless they are accompanied by action, because words alone "*cannot cause any harm to others*".[441] Yet theorists have demonstrated how some utterances create situations likely to lead to harmful consequences, which is known as the "speech/act" theory, and the Harm Principle has been used to argue for the suppression of such speech.[442] Mill argued that some "opinions lose their immunity, when the circumstances in which they are expressed are such as to constitute their expression a positive instigation to some mischievous act".[443] For example, an opinion that corn-dealers starve the poor can be expressed and circulated in media such as newspapers without restriction, but if the speaker expressed the same opinion to an excited mob assembled outside the house of a corn-dealer, this speech may justifiably be suppressed for inciting violence.[444] Examples of sexually explicit communications describing fictitious children that the courts have deemed as inciting paedophilia are provided in Chapter 4.

---

[437]Smolla, R.A (1992), *Free Speech in an Open Society*, Alfred A. Knopf, New York, p. 14.
[438]Strossen, N (1993), "A Feminist Critique of 'the' Feminist Critique of Pornography", *Virginia Law Review*, vol. 79, no. 5, p. 1102, quoting Gary Mongiovi; Malloy, S, and Krotoszynski, R (2000), "Recalibrating the Cost of Harm Advocacy: Getting Beyond Brandenburg", *William and Mary Law Review*, vol. 41, no. 4, pp. 1173-1174; Baskin, S (2006), "Deviant Dreams: *Extreme Associates* and the Case for Extreme Porn", *New York City Law Review*, vol. 10, no. 1, p. 191.
[439]Dworkin, R (1994), *Taking Rights Seriously: New Impression with a Reply to Critics*, Duckworth, London.
[440]Ibid. Also see Sorial, above n 436, 52; DeCew, above n 435; Akselrud, G (1999), "Hit Man: The Fourth Circuit's Mistake in Rice v. Paladin Enters., Inc.", *Loyola of Los Angeles Entertainment Law Journal*, vol. 19, no. 2, p. 406.
[441]Wallerstein, above n 368, 2700 (emphasis in the original).
[442]See especially Austin, J.L (1962), *How to Do Things With Words*, Oxford University Press, London.
[443]Mill, above n 360, 62.
[444]Ibid. A more modern example is Sarah Palin's post to her Twitter followers: "Don't Retreat. Instead Reload", which some believed encouraged violence against Democratic members of Congress during the 2011 election year. See Sorial, above n 436, 1.

3.2 The Offense Principle

Another useful theory on criminalisation is the Offense Principle. Unlike Mill, who seemed to suggest that harm to others was the only legitimate ground for criminalisation, Feinberg took a more moderate position, arguing that criminalising certain conduct may be justified if it offends the majority.[445] He developed the Offense Principle to supplement the Harm Principle, stating that:

> "It is always a good reason in support of a proposed criminal prohibition that it is necessary to prevent serious offence (as opposed to injury or harm) of persons other than the actor and would be an effective means to that end if enacted".[446]

In contrast to the Harm Principle, the Offense Principle takes into consideration psychological distress.[447] However, Feinberg made a list of mental states that would be insufficient, including "transitory disappointments and disillusionments, wounded pride, hurt feelings, aroused anger, shocked sensibility, alarm, disgust, frustration … and many more".[448] The Offense Principle does not justify criminalising conduct that causes these types of unpleasant mental states since the offense is only "suffered for a time, and then goes, leaving us as whole and undamaged as we were before".[449] Feinberg also made clear that offense would almost always be less serious than the types of harms proscribed by the Harm Principle.[450] This was because "offense is not strictly commensurable with harm … rather offences are a different sort of thing altogether".[451]

The Offense Principle is mainly concerned with public acts that are considered offensive,[452] reflecting the interest of the state and the public in preserving the quality of public settings.[453] There are numerous public acts that have been prohibited by law

---

[445]Feinberg, above n 415, 27-36.
[446]Feinberg, above n 368, 26.
[447]Ibid, 15. Also see Feinberg, above n 415.
[448]Feinberg, above n 368, 45.
[449]Ibid.
[450]Feinberg, above n 415, 2.
[451]Ibid, 3.
[452]Alexander, L (2008), "The Legal Enforcement of Morality", in C Heath and W Frey (eds.), *Companion to Applied Ethics*, Wiley, Hoboken, p. 132.
[453]However, Hornle has argued that offensive conduct could embrace many private incivilities, such as keeping someone waiting or making a inappropriate speech at a wedding about the bride or groom. See

that have been justified on the Offense Principle, including indecent exposure, exhibitionism, and public sexual intercourse.[454] Most of these acts, if conducted in private, would not merit criminalisation. For example, two adults engaging in sexual intercourse in the privacy of their home generally would not fall within the scope of the Offense Principle. However, the same activity would be offensive if it were being performed on a public street corner.[455]

Like the Harm Principle, an important element of the Offense Principle is wrongfulness.[456] This means that the offensive conduct in question must involve an unjustifiable violation of another person's rights.[457] It is this wrongful violation that prevents the Offense Principle from collapsing into Legal Moralism,[458] which will be discussed later in this chapter. Some conduct is not truly wrongful even though it may be considered offensive. For example, wearing dirty clothes or belching in public may go against social convention, but breach of convention does not necessarily demonstrate that the behaviour in question is objectively wrong.[459] This is because "[i]t is not enough that conduct be widely disapproved of or that it infringes traditional taboos".[460]

Therefore, an issue is whether the Offense Principle justifies legal intervention where the offensive conduct occurs in private, which Feinberg refers to as the "bare knowledge problem".[461] Feinberg believed that private conduct would have to be "profoundly offensive" and not just a "mere nuisance" before it could be legitimately

---

Hornle, T (2006), "Legal Regulation of Offence", in A von Hirsch and A.P Simester (eds.), *Incivilities: Regulating Offensive Behaviour*, Hart Publishing, Oregon, pp. 133-148. Arguably, such incivilities may fall within the scope of the Offense Principle but, as Simester and von Hirsch have pointed out, the case for state intervention is strongly diminished in private settings. In such cases, concerns about personal privacy militate against criminalisation and, even where the conduct is disrespectful, such as a distasteful wedding speech, criminalisation would ordinarily be inappropriate. See Simester and von Hirsch, above n 361, 132.

[454]Strikwerda, L (2012*)*, "When Should Virtual Cybercrime be Brought Under the Scope of the Criminal Law?", in *4th International Conference on Digital Forensics & Cyber Crime*, ICDF2C, Lafayette, p. 122.

[455]See Hart, H.L.A (1963), *Law, Liberty, and Morality*, Oxford University Press, Oxford, pp. 45-48.

[456]Feinberg, above n 368, 34; Feinberg, above n 415, 1-2.

[457]Ibid.

[458]Alexander, L (1994), "Harm, Offense, and Morality", *Canadian Journal of Law and Jurisprudence*, vol. 7, no. 2, p. 202; Trebilcock, M.J (1993), *Freedom of Contract*, Harvard University Press, Cambridge, p. 64.

[459]Simester, A.P, and von Hirsch, A (2002), "Rethinking the Offense Principle", *Legal Theory*, vol. 8, no. 3, p. 273.

[460]Ibid, 279.

[461]Feinberg, above n 415, 60.

prohibited under the Offense Principle.[462] Profoundly offensive behaviour refers to serious offense that is occasioned by the "bare thought"[463] that the conduct is being engaged in. Feinberg provided a list of examples of profoundly offensive conduct, such as voyeurism and the mistreatment of corpses.[464] Feinberg placed a higher offense threshold for criminalising private behaviour, believing it should be only in exceptional cases that individual freedoms should be restricted when the conduct does not concern others.[465]

However, accepting bare knowledge as grounds for state intervention is problematic for liberal theory.[466] This is because liberals, to whom Feinberg's theory was primarily directed, have "[t]raditionally … rejected statutes penalising harmless unwitnessed private conduct no matter how profoundly upset *anyone* may become at the bare knowledge that such conduct is or might be occurring".[467] Thus, prohibiting private offensive acts seems to be concerned with matters of private morality, which is in direct conflict with liberal theory.[468] This highlights Feinberg's difficulty in articulating an allegedly liberal principle that does not enforce morality.[469]

Moreover, Feinberg argued that the Offense Principle does not require being offended to be reasonable.[470] He had two reservations about including reasonableness as a criterion. Firstly, Feinberg worried that such a condition would "require agencies of the state to make official judgments of the reasonableness and unreasonableness of emotional states and sensibilities",[471] which he believed would be both dangerous and "contrary to liberal principles".[472] Secondly, Feinberg was of the view that providing reasonable reasons was redundant if there was a consensus that the behaviour in question was offensive.[473] He believed that "the very unreasonableness of the reaction

[462]Ibid, 58-59.
[463]Ibid, 68.
[464]Ibid, 51.
[465]Ibid, 69-70.
[466]See especially Dalton, H.L (1987), "Offense to Others: The Moral Limits of the Criminal", *Yale Law Journal*, vol. 96, no. 4, pp. 881-913.
[467]Feinberg, above n 415, 63 (emphasis in the original).
[468]The public/private distinction is discussed further below in this chapter, at [3.4].
[469]Simester and von Hirsch, above n 361, 111.
[470]Feinberg, above n 415, 36.
[471]Ibid, 36.
[472]Ibid, 37.
[473]Ibid, 36.

will tend to keep it from being sufficiently widespread to warrant preventive coercion".[474] However, history highlights that widespread unreasonable offense has been used to criminalise conduct.[475] This includes laws prohibiting interracial relationships and laws prohibiting affection between two adults of the same sex.[476]

Accordingly, later theorists have reformulated Feinberg's Offense Principle to include a reasonableness requirement, in order to prevent widespread unreasonable offense overruling the liberties of minorities.[477] This is given the belief that it is unjustified to penalise individuals merely because the majority thinks certain conduct is distasteful.[478] As it will be seen in Chapter 4, and elaborated in Chapter 5, Australia's child abuse material legislation is worded as being concerned with "offensive" material. Whether criminalising offensive fictional child pornography, with or without the added the reasonable requirement, can be justified by the Offense Principle is considered in Chapter 8.

3.2.1 Mediating Principles

Although Feinberg did not require the taking of offense to be reasonable, he argued that several conditions must be met before the Offense Principle would support criminalising certain conduct. This requires weighing the interests of the offender and the offended. When considering the offender's interests, Feinberg suggested taking into consideration:[479]

1. the importance of the offending conduct to both the offender and society at large;
2. the possibility that the offending conduct can be engaged in at a time or place that causes no offense;

---

[474]Ibid.
[475]Hornle, above n 453, 138; White, above n 430,124.
[476]Shoemaker, D.W (2000), "'Dirty Words' and the Offense Principle", *Law and Philosophy*, vol. 19, no. 5, p. 554.
[477]Ibid. Simester and von Hirsch, above n 459. Also see Young, J (2005), "Profound Offense and Culture Appropriation", *Journal of Aesthetics and Art Criticism*, vol. 63, no. 2, pp. 143-146; DeBaker, D (2008), *Harmful Offense to Others: A New Liberty-Limiting Principle and the 'New' Child Pornography*, Honours Thesis, College of William and Mary, 43.
[478]Simester and von Hirsch, above n 361, 97.
[479]Feinberg, above n 415, 26.

3. the interest in protecting freedom of expression; and
4. the extent, if any, to which the offense is caused with spiteful motives.

Conversely, the factors Feinberg considered on the part of those being offended are:[480]

1. the magnitude of the offense, such as its intensity, duration, and extent;
2. the ability to avoid being offended;
3. whether the offense was voluntarily incurred; and
4. whether the offense occurs only because of a person's abnormal susceptibility.

While these principles may seem self-explanatory, the appropriate way to apply them is not obvious. For example, Feinberg did not elaborate on how widespread the offense must be in order to warrant criminalisation.[481] Nor did he set out how to measure the importance of the offending behaviour for the offender and society.[482] There was no guidance on how to weigh these principles against each other. Also, there remains a great deal of confusion in the literature about the difference between harm and serious offensive conduct.[483] Despite these limitations, as will be seen in Chapter 8, Feinberg's mediating principles are of assistance when weighing the rights of fans to access sexually explicit fantasy material and the rights of non-fans not to be offended.

3.2.2 The Offense Principle and Freedom of Expression

When formulating his Offense Principle, Feinberg placed much emphasis on protecting freedom of expression. He agreed with Mill that an essential element of democracy is allowing unpopular, unorthodox, and extreme opinions equal protection to other types of speech. [484] Thus, Feinberg asserted that offense would hardly ever outweigh the value of free speech, stating: "[n]o amount of offensiveness in an expressed opinion can counterbalance the vital social value of allowing unfettered expression". [485] Feinberg believed that pornography and obscene material is a form of expression and

[480]Ibid, 35.
[481]Petersen, T (2016) "No Offense! On the Offense Principle and Some New Challenges", *Criminal Law and Philosophy*, vol. 10, no. 2, p. 359.
[482]Ibid.
[483]Shoemaker, above n 476, 545.
[484]Feinberg, above n 415, 38.
[485]Ibid, 39.

was a vocal defender of allowing the free flow of such material.[486] He stressed that the Offense Principle generally would not support the suppression of obscenity because:

> "When an 'obscene' book sits on the shelf, who is there to be offended? Those who want to read it for the sake of erotic stimulation presumably will not be offended (or else they wouldn't read it), and those who choose not to read it will have no experience of it to be offended by. If its covers are too decorous, some unsuspecting readers might browse through it by mistake and then be offended by what they find, but they need only close the book again to escape the offense". [487]

This highlights the emphasis Feinberg placed on "reasonable avoidability" [488] in determining whether certain speech should be prohibited. He argued that if expressive material can be reasonably avoided then the Offense Principle would not justify criminalisation. Feinberg seemed to suggest that offensive material might be legitimately regulated, but not prohibited outright, by enforcing time and place restrictions in order to prevent unwitting viewers from being offended. Therefore, the Offense Principle would support the:

> "… regulation of the places in which pornography is made available via zoning laws, the times at which it is made available through public media and the volume of it present in various social arenas".[489]

As will be seen in Chapter 4, the law in Australia prohibits fictional child pornography outright by making it an offence for individuals even to privately possess such material. This significantly restricts the freedom of expression of individuals who wish to create, access, and/or share offensive fantasy material with willing viewers. Whether this prohibition can be justified under the Offense Principle is discussed in Chapter 8, which

[486]Ibid, 44.
[487]Ibid, 32.
[488]Ibid, 45.
[489]McKinnon, C (2007), "Sex, Speech and Status: New Developments in the Pornography Debate", in G Newey (ed.), *Freedom of Expression: Counting the Costs*, Cambridge Scholars Publishing, Newcastle, pp. 37-38.

also considers Legal Moralism as grounds for criminalisation. The scope of Legal Moralism is outlined in the subsequent section.

3.3 Legal Moralism

Unlike the theories discussed above, Legal Moralism is not focused on concrete harm, a setback of interests, or wrongful offense.[490] Rather, Legal Moralism is concerned with the principles of right and wrong, asserting that the perceived immorality of certain conduct may provide sufficient reason to prohibit it.[491] According to this theory, the law can legitimately be used to prohibit behaviours that conflict with society's shared moral judgements, even if those behaviours do not cause physical or psychological harm to others.

The Western discussion on morality as grounds for criminalisation has been heavily influenced by the discourse between Professor Hart and Lord Devlin, which is now commonly referred to as the "Hart/Devlin debate".[492] The historical context of this debate was the release of the Wolfenden Report,[493] which recommended, amongst other things, a repeal of the criminal prohibitions against homosexual acts between consenting adults in private in the United Kingdom. Shortly after, Devlin delivered a lecture that was later published in his book *The Enforcement of Morals*.[494] In this book, he criticised the Wolfenden Report's claim that law ought not to generally concern itself with private morality, believing that purportedly immoral activities should remain criminal offences. Hart then critiqued and criticised Devlin's arguments in his book *Law, Liberty and Morality*.[495]

---

[490]See especially Devlin, P (1968), *The Enforcement of Morals*, Oxford University Press, London.
[491]When setting out the "definitions of liberty-limiting principles", Feinberg stated: "Legal Moralism (in the usual narrow sense): It can be morally legitimate to prohibit conduct on the ground that it is inherently immoral, even though it causes neither harm nor offense to the actor or to others". Feinberg, above n 368, 27. Also see Feinberg, J (1988), *Harmless Wrongdoing: The Moral Limits of the Criminal Law*, Vol. IV, Oxford University Press, New York.
[492]See Harcourt, above n 400, 188-189; Caron, Y (1969), "The Legal Enforcement of Morals and the So-Called Hart-Devlin Controversy", *McGill Law Journal*, vol. 15, no. 1, pp. 9-47.
[493]Committee on Homosexual Offences and Prostitution (1957), *Report of the Committee on Homosexual Offences and Prostitution*, Her Majesty's Stationery Office, London. This Report is popularly known as the "Wolfenden Report".
[494]Devlin, above n 490.
[495]Hart, above n 455.

Based on an extreme interpretation of Devlin's Legal Moralism, [496] he was arguing that social cohesion *per se* justifies the legal enforcement of morality and that society can legitimately enforce *whatever* moral beliefs held by the majority.[497] Such beliefs do not have to be rational and can be based on feelings, [498] which means that empirical evidence that certain conduct will result in moral harm is not necessary.[499] The morality in question may even be treated differently from society to society. Examples include polygamous marriage, abortion, euthanasia, and homosexuality, all of which are prohibited in some societies, while legal in others.[500]

Devlin's willingness to permit the legal enforcement of whatever conduct is believed immoral by the majority is similar to Feinberg's willingness to extend the Offense Principle to justify criminalising conduct that the majority unreasonably believe is offensive. These concerns have led in part to the "revival of Legal Moralism"[501] by Legal Moralists.[502] In order to constrain what kinds of immoral conduct should be within reach of the criminal law, contemporary Legal Moralists have argued that the legal enforcement of morals is only justified if the morality in question is *objectively* immoral or wrongful.[503] According to Duff:

> "A modest Legal Moralism, by contrast, holds that only certain kinds of moral wrongdoing are even in principle worthy of criminalisation; for many kinds of

[496]Ibid, 48-52; Harcourt, above n 400, 188-189; Raes, K (2001), "Legal Moralism or Paternalism? Tolerance or Indifference? Egalitarian Justice and the Ethics of Equal Concern", in P Alldridge and C Brants (eds.), *Personal Autonomy, the Private Sphere and Criminal Law: A Comparative Study*, Hart Publishing, Oxford, pp. 33-34.
[497]Devlin, above n 490, 11.
[498]Ibid, 15.
[499]George, R.P (1990), "Social Cohesion and the Legal Enforcement of Morals: A Reconsideration of the Hart-Devlin Debate", *American Journal of Jurisprudence*, vol. 35, no. 1, p. 20.
[500]Ibid.
[501]Duff, R.A, Farmer, L, Marshall, S.E, Renzo, M, and Tadros, V (2010), *The Boundaries of Criminal Law*, Oxford University Press, Oxford, p. 19.
[502]See especially George, above n 499; George, R.P (1993), *Making Men Moral: Civil Liberties and Public Morality*, Clarendon Press, Oxford; Moore, M (1997), *Placing Blame: A General Theory of the Criminal Law*, Oxford University Press, New York; Kekes, J (2000), "The Enforcement of Morality", *American Philosophical Quarterly*, vol. 37, no. 1, pp. 23-35; Duff, R.A (2014), "Towards a Modest Legal Moralism", *Criminal Law and Philosophy*, vol. 8, no. 1, pp. 217-235. Also see Petersen, T (2010), "New Legal Moralism: Some Strengths and Challenges", *Criminal Law and Philosophy*, vol. 4, no. 2, pp. 215-232.
[503]Ibid.

wrongdoing, the conduct's wrongness gives us no reason at all to criminalise it".[504]

Duff's modest Legal Moralism requires the immoral conduct to be a "public wrong"[505] before the conduct is apt for criminalisation. He stated that "[w]e should interpret a 'public' wrong, not as a wrong that injures the public, but as one that properly concerns the public, i.e. the polity as a whole".[506] Therefore, Duff's modest Legal Moralism is incompatible with Devlin's permission to society to enforce whatever morality the majority of the population affirms.

Other Legal Moralists have also suggested that only truly immoral acts justify state intervention to preserve the moral fabric of society.[507] These Legal Moralists believed that there "are right answers to moral questions … and that such right answers do not depend on what most people in his society happen to think about these matters".[508] The difficulty lies in ascertaining whether certain conduct is being criminalised because it is objectively immoral or merely because of common opinion.[509] While it seems uncontroversial to hold conduct such as "murder for fun, torture for pleasure, [and] enslavement for profit"[510] objectively immoral,[511] deciding whether behaviour, such as mercy killing, are objectively immoral has been controversial.[512]

Conversely, Hart argued against the criminalisation of immorality.[513] He claimed that in truly liberal societies it would be unfair to criminalise an individual merely because the majority believed that certain conduct is immoral.[514] This is especially if there was no definitive proof that the conduct in question could cause the moral fabric of society to deteriorate.[515] Indeed, it was in part the lack of evidence that homosexual acts

[504]Duff, above n 502, 222.
[505]Ibid, 223.
[506]Duff, R.A (2007), *Answering for Crime: Responsibility and Liability in the Criminal Law*, Oxford University Press, Oxford, p. 141.
[507]See literature cited in footnote 502 above.
[508]Moore, above n 502, 645.
[509]See Alexander, above n 452, 140.
[510]Kekes, above n 502, 24.
[511]Even Hart seemed to accept that some conduct was objectively immoral and the existence of a shared morality "that forbids acts injurious to others such as killing, stealing, and dishonesty". Hart, above n 455, 51.
[512]For example see Huxtable, R (2007), *Euthanasia, Ethics and the Law: From Conflict to Compromise*, Routledge-Cavendish, New York.
[513]Hart, above n 455.
[514]Ibid, 17.
[515]Ibid.

between consenting adults in private would lead to the moral destruction of society that Hart opposed the criminalisation of such conduct.[516] Therefore, Hart rejected bare knowledge that immoral acts are being engaged in private as a ground for criminalisation, stating "to punish people for causing this form of distress would be tantamount to punishing them simply because others object to what they do".[517] As seen above, Feinberg believed the bare knowledge of profoundly offensive conduct engaged in private could fall within the Offense Principle, but he did not provide a convincing argument as to why the Offense Principle is different to Legal Moralism. This further indicates Feinberg's difficulty in showing that the Harm Principle and Offense Principle are the exclusive reasons for legal coercion in liberal societies.[518]

A subclass of Legal Moralism, known as "Moral Paternalism", which specifically focuses on the morality of the individual is discussed in the following section.

3.3.1 Moral Paternalism

Legal Moralism can also be used to justify laws that protect individuals from corrupting themselves, an approach referred to as "Moral Paternalism".[519] Dworkin has defined Moral Paternalism as "interference with a person's liberty of action justified by reasons referring exclusively to the welfare, good, happiness, needs, interests or values of the person being coerced".[520] According to Feinberg, state intervention under Moral Paternalism is based on the rationale that:

> "[I]t is bad (harmful) for a person to have impure thoughts and a depraved character whatever he may think about the matter, and the state has a right to protect him from his own folly by banning the corrupting materials".[521]

[516]Ibid, 50.
[517]Ibid, 47.
[518]See Price, T.L (2006), "Feinberg's Offense Principle and the Danish Cartoons of Muhammad", *APA Newsletters*, vol. 6, no. 1, p. 12; Szerletics, A (2009), "The Theoretical Aspects of Legal Moralism", *Silesian Journal of Legal Studies*, vol. 1, p. 105.
[519]Dworkin, G (2005), "Moral Paternalism", *Law and Philosophy*, vol. 24, no. 3, p. 308.
[520]Dworkin, G (1972), "Paternalism", *The Monist*, vol. 56, no. 1, p. 65.
[521]Feinberg, above n 415, 100.

Thus, Moral Paternalism is in direct conflict with the Harm Principle because, as seen above, Mill opposed state coercion for a person's "own good, either physical or moral".[522]

Unlike Paternalism in general, which is concerned with protecting an individual's physical health, Moral Paternalism is concerned with the individual's moral welfare and aims to make citizens morally better persons.[523] It is this focus on moral well-being that further distinguishes Moral Paternalism from Legal Moralism.[524] Moral Paternalism believes that everyone should achieve and maintain a morally upright character and that this is in their "best interests".[525] Wall has explained the relationship between well-being and having a virtuous character as follows:

> "Well-being refers to a person's good or interests … Character refers to moral dispositions to act and fell in certain ways … Some people think that character is a necessary constituent of well-being. As one's character is corrupted, one's well-being declines, holding other things constant".[526]

It is difficult to give "pure" examples of legislation based on Moral Paternalism because legislation is usually justified on several grounds.[527] However, examples may include laws preventing advertising of cigarettes and gambling, if it is believed that such images are enticing and may exploit the weaknesses of citizens.[528] Chapter 8 considers whether prohibiting private possession of fictional child pornography may also be an example of legislation based on Moral Paternalism.

3.4 The Public/Private Dichotomy

Before concluding, it is essential to note the distinction the theories of criminalisation drawn between public and private conduct. As illustrated in the analysis above, a central

---

[522]Mill, above n 360.
[523]Dworkin, above n 519, 311. Also see Feinberg, above n 491; Ten, C.L (1971), "Paternalism and Morality", *Ratio*, vol. 13, no. 1, pp. 56-66.
[524]Dworkin, above n 519.
[525]Scoccia, D (2000), "Moral Paternalism, Virtue and Autonomy", *Australasian Journal of Philosophy*, vol. 78, no. 1, p. 53.
[526]Wall, S (2013), "Enforcing Morality", *Criminal Law and Philosophy*, vol. 7, no. 3, p. 457.
[527]Dworkin, above n 519.
[528]Feinberg, J (1979), "Pornography and the Criminal Law", *University of Pittsburgh Law Review*, vol. 40, no. 4, p. 597. Also see Sunstein, C.R (1986), "Legal Interference with Private Preferences", *University of Chicago Law Review*, vol. 53, no. 4, p. 1141.

theme in the debates on the legal enforcement of morality is the public/private distinction. Public morality refers to conduct that affects society at large and is generally seen as essential to the maintenance of communal existence; it is therefore concerned with acts such as murder and theft.[529] Conversely, matters of private morality may be condemned, but are not necessarily subject to law,[530] which has traditionally included matters concerning the family, home, and personal tastes.[531]

The separation between public and private is essential for liberal theory.[532] Those who adhere to the Harm Principle usually consider government intrusion in the private sphere as falling outside of the law.[533] The morality of a person's conduct is a private and personal matter for the individual "and that is a responsibility which a mature agent can properly be expected to carry for himself without the threat of punishment from the law".[534] As recalled, from Mill's perspective, immorality should not be a crime because "the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others".[535] He further argued that "with the personal tastes and self-regarding concerns of individuals the public has no business to interfere".[536] Yet, even in liberal countries, it is sometimes legitimate for the law to intrude in matters of private morality,[537] as evidenced by the widespread acceptance of laws prohibiting consensual incest and suicide pacts.[538] As seen above, the Offense Principle also requires a public element because private offensive conduct can be reasonably avoided.[539] The exception is where the conduct in question is considered by the majority to be profoundly offensive.

---

[529]Bunnin, N, and Yu, J (2004), *The Blackwell Dictionary of Western Philosophy*, Blackwell Publishing, Oxford, p. 576.
[530]Ibid, 577.
[531]Ibid.
[532]Ibid.
[533]For example see Mill, above n 360; Hart, above n 455.
[534]Committee on Homosexual Offences and Prostitution, above n 493, at [61].
[535]Mill, above n 360. Also see Hart, above n 455, 4-5.
[536]Mill, above n 360, 95.
[537]Caron, above n 492, 16. Also see Thomas and Buckmaster, above n 380.
[538]Ibid, 23.
[539]Farmer, L (2011), "Disgust, Respect, and the Criminalization of Offence", in R Cruft, M.H Kramer, and M.R Reiff (eds.), *Crime, Punishment, and Responsibility: The Jurisprudence of Anthony Duff*, Oxford University Press, Oxford, p. 278.

In contrast, no public/private distinction is usually made in Legal Moralism or Moral Paternalism. This means these theories can be used to enforce widely accepted morality, even if the conduct takes place in the private sphere.[540] According to Devlin:

> "I do not think that one can talk sensibly of a public and private morality any more than one can of a public or private highway. Morality is a sphere in which there is a public interest and a private interest, often in conflict, and the problem is to reconcile the two".[541]

George has also argued that if the conduct is truly immoral, it is irrelevant to distinguish between acts committed in public and acts committed in private because:

> "[N]o potentially controversial act is in principle 'private', because *any* act committed in violation of widely and strongly held moral opinions is capable of eroding the common morality without which people would 'drift apart'".[542]

Thus, George, and others, argue that prohibiting the private consumption of pornography is justified because it has public consequences.[543] For example, it has been claimed pornography undermines the value of the institution of marriage, and sexually objectifies humans, thereby eroding public standards of morality, which in turn affects all members of the community.[544]

---

[540]Nunan, R (1996), "Legal Moralism: From Hart and Devlin to Feinberg and George", *The American Philosophical Association*, vol. 96, no. 1, p. 64.
[541]Devlin, above n 490, 16.
[542]George, above n 499, 38 (emphasis in original).
[543]George, R.P (2000), "The Concept of Public Morality", *American Journal of Jurisprudence*, vol. 45, p. 17. Also see George, R.P (2011), "Pornography, Public Morality, and Constitutional Rights", *The Witherspoon Institute*, 17 October, available online, <http://www.thepublicdiscourse.com/2011/10/3958/>.
[544]Ibid; Cline, V.B (2001), "Pornography's Effects on Adults and Children", *Morality in Media*, available online, <http://www.scribd.com/doc/20282510/Dr-Victor-Cline-Pornography-s-Effects-on-Adults-and-Children>; Schmitz, M (2016), "Why It's Time to Ban Pornography", *Sydney Morning Herald*, 30 May, available online, <http://www.smh.com.au/comment/the-case-for-banning-pornography-20160529-gp6vg7.html>. Also see Dworkin, R (1985), *A Matter of Principle*, Oxford University Press, Oxford. But note, Dworkin argued individuals nevertheless have a right to pornography.

As it will be seen throughout this dissertation, but particularly in chapters 7 and 8, the private/public distinction is pertinent when considering whether the law is justified in prohibiting the dissemination and possession of fictional child pornography.

3.5 Concluding Remarks

Of the theories discussed, the Harm Principle continues to be the most popular among theorists and academics.[545] This is unsurprising given the deep concern for individual liberty, especially the importance of safeguarding freedom of expression, in contemporary liberal societies. The Harm Principle has been subject to different interpretations based in part around defining harm and scope. Despite this, there seems to be a general consensus that it is concerned with conduct that directly affects another person's physical or financial wellbeing. The conduct in question must be wrongful and the resulting harm must not be trivial. Whether the Harm Principle should extend to conduct that causes remote harms is a more contentious issue. Some liberals have opposed criminalising remote harms, arguing it is too much of a distortion of the Harm Principle; others accept criminalising conduct that may cause remote harm if the probability of harm is grave. The difficulty is determining the likelihood of the harm occurring and then weighing the potential risks and benefits of criminalisation.

Feinberg developed the Offense Principle to coexist with the Harm Principle, to justify criminalising public acts widely considered offensive. It may also justify prohibiting private conduct that causes profound offense to the majority. However, it remains debatable whether bare knowledge of offensive conduct taking place in private warrants intervention because liberals generally see private conduct as falling outside the scope of the law. This highlights Feinberg's failure to separate the Offense Principle, which is supposedly a liberal theory, from Legal Moralism.[546]

Nevertheless, as seen above, both the Harm Principle and the Offense Principle place great importance on freedom of expression. Although Mill and Feinberg seemed to accept that some speech might be harmful, it appears that speech would only fall within

[545]Holtug, above n 368, 357.
[546]Simester and von Hirsch, above n 361, 111.

the scope of the Harm Principle when it was expressed in circumstances where it was likely to incite harm to others. Where the speech in question is merely offensive, as in the case of pornography and obscenity, Feinberg suggested that very rarely would prohibition be justified on the Offense Principle. This was largely because unwilling viewers can reasonably avoid the offensive material.

Conversely, Legal Moralism does not distinguish between private and public acts. It makes clear that immorality itself provides a sufficient basis to criminalise certain conduct, even if engaged in private. This reflects a belief that private acts can have public consequences, which can erode the moral fabric of society. According to Moral Paternalism, legal intervention is also justified to protect the virtue of citizens.

The aim of this chapter was set out the main theories that may support, or not support, criminalisation. Having done so, the next chapter identifies the relevant criminal laws prohibiting fictional child pornography and later considers whether the prohibition can be justified on the Harm Principle, the Offense Principle, and/or Legal Moralism.

Chapter 4: Descriptive and Chronological Analysis of the Law Dealing with Fantasy Material

Chapter Contents

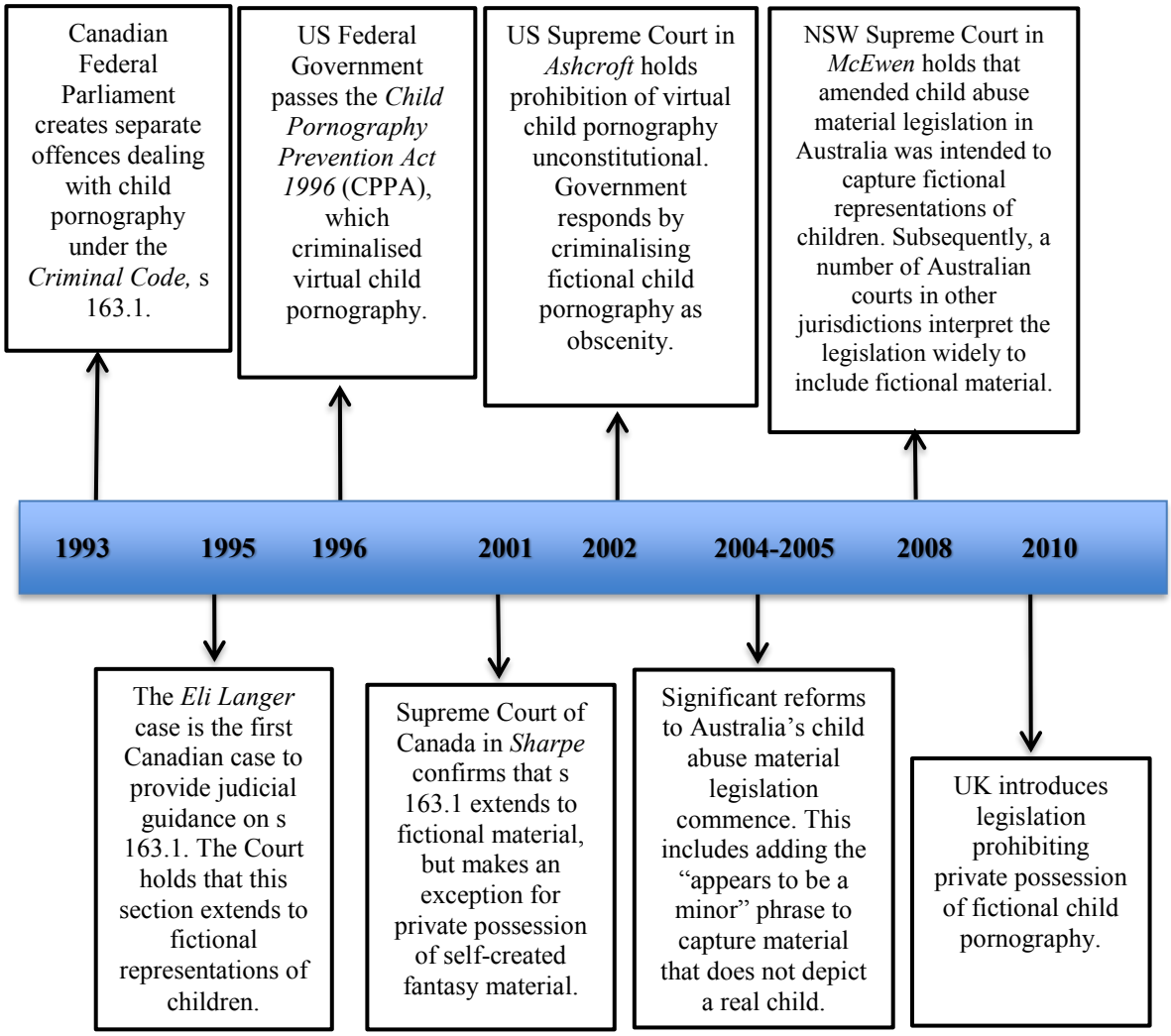
4.0 Aims of Chapter

The aim of this chapter is to analyse, in chronological order, the relevant law prohibiting fictional child pornography in Australia and other Western countries under examination, namely, Canada, the United States, and the United Kingdom. Doing so is essential to understand the legislative context in which Australian legislatures amended their child abuse material legislation and the subsequent interpretation of the legislation by the courts. Thus, this chapter firstly sets out the relevant federal

legislation and case law in Canada, and then the United States.[547] This is followed by an examination of Australia's child abuse material legislation. As this dissertation is focused on Australia, this chapter is largely dedicated to providing an in-depth analysis of the elements of the offences in each Australian jurisdiction. Also important is to consider the legal status of fictional child pornography in the United Kingdom, but because they have only relatively recently criminalised possession of fictional child pornography in 2010, their laws are dealt with last.

The timeline below provides a simplified chronology of the law prohibiting fictional child pornography in Australia, Canada, the United Kingdom, and the United States.

Figure 9: Timeline



[547]Like Australia, the United States and Canada have a dual system of laws given their federal systems. It would be impossible to consider the law in each state within Canada and the United States in a dissertation of this size. Therefore, the focus is on the relevant federal laws.

4.1 Canada

In Canada, child pornography was traditionally dealt with by legislation prohibiting obscene publications. However, during the 1980s many saw obscenity laws as inadequate in dealing with child pornography because these laws only prohibited production and sale, not private possession.[548] Obscenity laws were also seen as inadequate because they focused on the content of the material and not the circumstances of its production, thereby insufficiently recognising the harm involved to the child victims depicted in the images.[549]

In 1993, in response to the perceived inadequacies of the obscenity laws and advances in technology, the Canadian Federal Parliament introduced s 163.1 into the *Criminal Code*.[550] This provision criminalised making, printing, publishing, distributing, possessing, and circulating child pornography. Section 163.1 defined "child pornography" as follows:

> (a) a photographic, film, video or other visual representation, whether or not it was made by electronic or mechanical means:
>
> (i) that shows a person who is or is depicted as being under the age of eighteen years and is engaged in or is depicted as engaged in explicit sexual activity; or
>
> (ii) the dominant characteristic of which is the depiction, for a sexual purpose, of a sexual organ or the anal region of a person under the age of eighteen years; or
>
> (b) any written material or visual representation that advocates or counsels sexual activity with a person under the age of eighteen years that would be an offence under this Act.

---

[548]Canada, Committee on Sexual Offences Against Children and Youths (1984), *Report of the Committee on Sexual Offences Against Children and Youths: Summary Volume*, Department of Supply and Services, Ottawa; Benedet, J (2002), "Children in Pornography after Sharpe", *Les Cahiers de Droit*, vol. 43, no. 2, p. 330; Smyth, S (2009), "A 'Reasoned Apprehension' of Overbreadth: An Alternative Approach to the Problems Presented by Section 163.1 of the Criminal Code", *University of British Columbia Law Review*, vol. 42, no. 1, p. 80.

[549]Ibid.

[550]Ibid. Also see Casavant, L, and Robertson, J.R (2007), *The Evolution of Pornography Law in Canada*, Current Issue Review, Library of Parliament, Canada, available online, <http://www.parl.gc.ca/content/lop/researchpublications/843-e.htm>.

It also provided that the accused must be acquitted if the material in question has artistic merit or an educational, scientific, or medical purpose.[551]

As shown in Figure 9 above, the *Eli Langer* case was the first case to provide judicial guidance on the interpretation of s 163.1.[552] In this case, a Toronto artist, Eli Langer, was charged for producing five paintings and 35 pencil drawings depicting minors engaging in sexual activity with adults. Although the prosecution eventually withdrew the charges of child pornography, it proceeded with a forfeiture application under s 164 of the *Criminal Code* on the grounds that Canada's new child pornography legislation needed judicial interpretation.[553] Justice McCombs interpreted s 163.1 broadly. He stated it prohibited material that involves no real child in its production because in "an age of technical breakthroughs such as computer imaging, child pornography legislation should not be limited to images created through the use of real children".[554] Justice McCombs was of the opinion that all forms of child pornography, whether depicting real children or not, were harmful because such material might fuel the fantasy of paedophiles, reinforce cognitive distortions, and may be used to persuade children that sexual activity between children and adults is acceptable.[555] However, it was held that since Langer's work had artistic merit and did not fall below the community standards of tolerance it should be returned to him.[556]

Following *Langer,* the prohibition of fictional child pornography under Canadian law seemed to receive little judicial consideration until the 2001 landmark case of *Sharpe.*[557] In this case, the constitutionality of Canada's child pornography laws was challenged on the grounds of freedom of expression and privacy. Sharpe was prosecuted for possessing both real and fictional material, namely 400 photographs depicting young boys in sexual poses, as well as computer discs that contained a collection of fictional stories describing minors engaging in sexual activity. As this

[551]See *Criminal Code of Canada* (RSC, 1985, c. C-46) s 163.1(6)(a), which states: "no person shall be convicted" if the act alleged to constitute the offence was for "a legitimate purpose related to the administration of justice or to science, medicine, education or art…".
[552]*Re Paintings, Drawings and Photographic Slides [by Eli Langer]*, [1995] OJ No. 1045.
[553]Ibid, at [3].
[554]Ibid, at [124].
[555]Ibid, at [26]-[29].
[556]Ibid, at [173]-[175].
[557]*R v Sharpe* [2001] 1 SCR 45.

dissertation is only concerned with fictional material, the focus is on the Court's ruling in regard to the stories.

At first instance, Shaw J held that it was unconstitutional for Parliament to prohibit simple possession of self-created fantasy material.[558] He was of the view that prohibiting private possession of such material was an unjustified intrusion on freedom of expression and right to privacy.[559] Subsequently, the prosecution appealed and the decision was ultimately brought before the Supreme Court of Canada.[560]

On appeal to the Supreme Court, a preliminary issue was whether the word "person" under s 163.1 included a fictional character. Chief Justice McLachlin, writing for the majority, stated that the legislation was intended to extend to "drawings from the imagination, cartoons, or computer-generated composite".[561] It was held that interpreting the word "person" broadly to include imaginary characters would be in "accordance with Parliament's purpose of criminalising possession of material that poses a reasoned risk of harm to children".[562] Nevertheless, in a 6:3 majority, the Supreme Court upheld Shaw J's decision. This was because the prohibition of self-created works of the imagination was seen as unduly interfering with "freedom of expression while adding little to the protection the law provides children".[563] The provision was therefore held to be contrary to the Canadian *Charter of Rights*, which explicitly protects freedom of expression.[564]

However, rather than strike out s 163.1 completely, the Supreme Court made two exceptions for:

(a) Any written or visual representations created by the accused alone and

---

[558] *R v Sharpe* (1999) 22 CR (5th) 129.
[559] Ibid at [51]. In coming to this conclusion, Shaw J was persuaded by previous Canadian decisions that expressly excluded "private conversations" when interpreting laws that suppressed expression, in particular *R v Keegstra* (1990) 61 CCC (3d) 1; *Canada (Human Rights Commission) v Taylor* [1990] 3 SRC 892; and *R v Butler* [1992] 1 SCR 452.
[560] *R v Sharpe* [2001] 1 SCR 45.
[561] Ibid, at [38].
[562] Ibid.
[563] Ibid, at [110].
[564] See *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act 1982*, s 2(b).

used exclusively by the accused;[565] and

(b) Any visual recordings created by or depicting the accused that do not depict unlawful sexual activity and are held by the accused exclusively for private use.[566]

These two exceptions were limited in that they only protected private possession. The Supreme Court emphasised that "neither exception affords protection to a person harbouring any other intention than private possession; any intention to distribute, publish, print, share or in any other way disseminate these materials".[567] As Sharpe had possessed the fictional stories privately, he fell within the exceptions and the charges against him were dismissed.[568]

The approach adopted by the Supreme Court of Canada can be contrasted with the approach adopted in the United States, which is discussed in the following section.

4.2 United States

Child pornography laws in the United States originally did not extend to fictional representations of children. During the 1990s, the Federal Government became increasingly concerned with claims that, regardless of whether material depicted real or fictional children, it could be "used to incite paedophiles to molest *real* children, to seduce *real* children into being molested, and to convince *real* children into making more child pornography".[569]

Subsequently, the United States Federal Government passed the *Child Pornography Prevention Act 1996* (CPPA). It was worded broadly, criminalising "any visual depiction, including any photograph, film, video, picture, computer or computer-

[565]*R v Sharpe* [2001] 1 SCR 45, at [75].
[566]Ibid, at [76].
[567]Ibid, at [128].
[568]For cases dealing with fictional child pornography after *Sharpe* see *R v Beattie* (2005) 75 OR (3d) 117; *R v Chin* [2005] AJ No. 1712; *R v Missions* (2005) NSCA 82); *R v Austin* [2006] BCJ No 3430 (QL); *R v Houston* [2008] SKQB 174; *R v Matheson*, Notice of Application, Ontario Court of Justice (2012). It should be noted that in the *Matheson* case, the prosecution ultimately withdrew all charges. Some of these cases are analysed later in this dissertation, especially in Chapter 5.
[569]Senate Report (1996), Child Pornography Prevention Act of 1995, Report No. 104-358 (USA), pp. 19-20 (emphasis in original).

generated image or picture" that "is, or appears to be, of a minor engaging in sexually explicit conduct".[570] The CPPA also prohibited any visual depiction that was advertised, promoted, presented, described, or distributed in a manner that "conveys the impression" that the material depicts a minor engaging in sexually explicit conduct.[571] The legislative intent of adding the terms "appears to be" and "conveys the impression" was to close the perceived loophole in child pornography laws caused by technological advances.[572]

For many years, the CPPA withstood legal attacks.[573] The courts rejected the argument raised by several defendants that term "appears to be" was too vague and claims that the relevant provisions in the CPPA were overbroad.[574] However, in 2002 the Supreme Court in *Ashcroft* reached a different conclusion.[575] This case was instigated by the Free Speech Coalition, a trade association of the adult entertainment industry involved in the production and distribution of adult-orientated materials. The Free Speech Coalition were seeking a declaration that the provisions prohibiting child pornography under the CPPA were invalid because the "appears to be" phrase prohibited images that did not involve children in its production, including virtual child pornography and images of youthful adults who appear to be minors. The majority of the Supreme Court agreed, holding that the CPPA "prohibits speech that records no crime and creates no victims by its production".[576] The phrases "appears to be" and "conveys the impression" were held to be overbroad and in violation of the First Amendment, which guarantees freedom of expression.[577] This was even if the virtual images were indistinguishable from images depicting real children because:[578]

---

[570]*Child Pornography Prevention Act of 1996* (USA), § 2256(8).
[571]Ibid.
[572]Senate Report, above n 569, 28.
[573]See *United States v Hilton*, 167 F.3d 61 (1st Cir. 1999); *R v Acheson*, 195 F.3d 645 (11th Cir. 1999); *United States v Mento*, 231 F.3d 912 (4th Cir. 2000); *United States v Fox*, 248 F.3d 394 (5th Cir. 2001); *Free Speech Coalition v Reno*, 198 F.3d (9th Cir. 1999).
[574]Ibid.
[575]*Ashcroft v Free Speech Coalition*, 535 U.S. 234 (2002).
[576]Ibid, at [250].
[577]Ibid, at [258]. The Court stated: "The First Amendment requires a more precise restriction. For this reason, § 2256(8)(D) is substantially overbroad and in violation of the First Amendment".
[578]The Supreme Court's argument is problematic because, as noted in Chapter 2, there are legitimate concerns about virtual images that are indistinguishable from real images depicting children that do not apply to obviously fictional images such as cartoons. For example, indistinguishable images can make it difficult for prosecutors to determine if the child is a real person. The Supreme Court's reasoning is also problematic since it fails to consider that some paedophiles only take pleasure in images knowing that a child has been abused. See Lui, S (2007), "*Ashcroft*, Virtual Child

> "If virtual images were identical to illegal child pornography, the illegal images would be driven from the market by the indistinguishable substitutes. Few pornographers would risk prosecution by abusing real children if fictional, computerised images would suffice".[579]

Additionally, the majority of the Supreme Court stated that there was insufficient empirical evidence that virtual child pornography incited viewers to commit sexual abuse.[580] They were of the opinion that, even if such images led to such abuse, "the harm does not necessarily follow from the speech, but depends upon some unquantified potential for subsequent criminal acts".[581] Therefore, the provisions in the CPPA criminalising virtual child pornography were held to be unjustified.

In response to the Supreme Court's ruling in *Ashcroft,* the Federal Government passed the *Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003* (PROTECT Act). The term "appears to be" was removed and instead child pornography was defined as imagery "that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct".[582] A new affirmative defence was added, allowing defendants to escape conviction if he or she can show that the images in question were completely computer-generated.[583] The Federal Government made it clear that the revised definition of child pornography excluded images in the form of drawings, cartoons, sculptures, or paintings depicting minors as adults.[584]

However, at the same time, the United States Federal Government enacted 18 USC § 1466A of the PROTECT Act. This provision currently prohibits the production and dissemination of material "of any kind, including a drawing, cartoon, sculpture or painting" that "depicts an image that is, or appears to be, of a minor" engaging in

---

Pornography and the First Amendment Jurisprudence", *UC Davis Journal of Juvenile Law & Policy*, vol. 11, no. 1, pp. 1-54; Goldblatt, B (2012), "Virtual Pornography: The Children Aren't Real, But the Dangers Are; Why the Ashcroft Court Got it Wrong", *Law School Student Scholarship*, Paper 41, available online, <http://erepository.law.shu.edu/cgi/viewcontent.cgi?article=1040&context=student_scholarship>.

[579]*Ashcroft v Free Speech Coalition*, 535 U.S. 234 (2002), at [254].

[580]Ibid, at [253]-[254].

[581]Ibid.

[582]PROTECT Act 18 U.S.C § 2256(8)(b).

[583]Ibid, § 2252A.

[584]Ibid, § 2256(11)).

sexually explicit conduct and is obscene. It does not prohibit private possession unless the person in possession intends to distribute the material.[585] Section 1466A also provides that there is no requirement that the "minor depicted actually exist",[586] but it is a defence if the material is of "serious literary, artistic, political, or scientific value".[587]

Thus, in the United States fictional sexually explicit material of minors is now dealt with as obscenity, rather than child pornography. Obscenity is a well-established exception to freedom of expression[588] and it is has been long recognised that obscenity could manifest itself in both visual and written form.[589] It should be noted that the Supreme Court in *New York v Ferber* made it clear that the concept of obscenity had no place in child pornography laws.[590] This was because obscenity is concerned with the effect the material has on viewers, which "bears no connection to the issue of whether a child has been physically or psychologically harmed in the production of the work".[591] In *Ferber*, the defendant was a bookstore owner who was charged under child pornography legislation for selling two films depicting boys under 16 masturbating to an undercover police officer. The Supreme Court unanimously ruled that the Government had a compelling interest in prohibiting the sale of sexually explicit material depicting minors and that such material could be prohibited, even if it fell short of the legal definition of obscenity.[592] It was also held that artistic merit

---

[585]Ibid, § 1466A(a).

[586]There have since been several defendants convicted for possessing fictional child pornography in the form of comics. Some of these cases will be discussed below and in Chapter 5. For example see *United States v Whorley*, 550 F.3d 326 (4th Cir. 2008); *United States v Ryan*, No. 2:07-CR-35, (2009) U.S. Dist. LEXIS 53644; *United States v Handley*, 564 F. Supp. 2d 996 (S.D. Iowa 2008); *United States v Kutzner*, No. CR-10-0252-SEJL (D.Id 2010); *United States v Koegel*, 777 F Supp 2d 1014 (E.D Va. 2011); *United States v Sluss*, 2014 US Dist LEXIS 8090 (ED Tenn. 2014).

[587]PROTECT Act 18 U.S.C § 1466A(2)(b).

[588]Obscenity is an established exception to freedom of expression. See especially *Roth v United States*, 354 U.S. 476 (1957); *Miller v California*, 413 U.S. 15 (1973).

[589]See *Kaplan v California*, 413 U.S. 115 (1973). In this case, the defendant, a bookstore proprietor, was convicted for selling books with the "most tenuous plot" that repeatedly described sexual and offensive conduct between adults. Also see *Dunlop v United States*, 165 U.S. 486 (1897); *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v Attorney General of Massachusetts*, 383 U.S. 413 (1966); *United States v Fletcher*, No. 06-329 (W.D. Pa. Aug. 7, 2008); *United States v Whorley*, 550 F.3d 326 (4th Cir. 2008); *United States v McCoy*, 678 F. Supp. 2d 1336 (M.D. Ga. 2009).

[590]*New York v Ferber*, 458 U.S 747 (1982). Also see *Osborne v Ohio* 495 U.S 103 (1990); *Ashcroft v Free Speech Coalition*, 535 U.S. 234 (2002).

[591]*New York v Ferber*, 458 U.S 747 (1982), at [761].

[592]The legal definition of obscenity in the United States was established in *Miller v California*, 413 U.S. 15 (1973). See footnote 597 below.

was no defence because "[i]t is irrelevant to the child [who has been abused] whether or no the material … has a literary, artistic, political or social value".[593]

Unlike the provisions in the PROTECT Act targeting sexually explicit images depicting real children, § 1466A is not concerned with direct harm to children but with obscene publications. Yet § 1466A carries the same maximum penalty as that attached to images depicting real children.[594] This section incorporates a community standards test to determine whether the material in question would be widely regarded obscene.[595] Prosecuting individuals for fictional material under obscenity legislation that does not require proof of harm to a real child has evidently made it easier for prosecutors. For example, in *United States v Whorley* the offender was convicted and sent to prison for possessing real child abuse material, receiving *manga* that depicted minors engaging in sexual activity, as well as sending and receiving obscene emails.[596] On appeal, the offender challenged the constitutionality of § 1466A, arguing that it was contrary to the ruling in *Ashcroft* because it criminalised material that did not involve real children in its production. The majority of the Court upheld the offender's convictions on the grounds that he was being convicted for obscenity and not child pornography. [597] The Court stressed that *Ashcroft* was concerned with child pornography laws based on child protection. Conversely, § 1466A was concerned with obscenity and therefore proof of harm to a real child was not required.[598]

Another illustrative case is *United States v Handley,* which involved sexually explicit *manga* depicting fictional minors engaging in sexual activity.[599] The defendant argued

---

[593]*New York v Ferber*, 458 U.S 747 (1982), at [761].
[594]PROTECT Act 18 U.S.C § 1466A(B) states that a person convicted under this section "shall be subject to the penalties provided in § 2252A(b)(1) [18 USCS § 2252A(b)(1)]". Pursuant to § 2252A(b)(1), an offender who violates § 1466A, "shall be fined under this title and imprisoned not less than 5 years and not more than 20 years".
[595]The community standards test used in the United States to determine if material is legally obscene was formulated in *Miller v California*, 413 U.S. 15 (1973). It requires asking: (a) whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.
[596]*United States v Whorley*, 550 F.3d 326 (4th Cir. 2008).
[597]Ibid, at [337].
[598]Ibid.
[599]*United States v Handley*, 564 F. Supp. 2d 996 (S.D. Iowa 2008). Note, unlike many of the defendants prosecuted for fictional child pornography, the defendant in *Handley* did not have in his possession real child abuse material or a history of committing child sexual abuse. See Comic Book

that the phrase "appears to be" a minor in § 1466A was too vague and could not be applied to fictional characters because they do not have an ascertainable age.[600] The Court held that accepting this argument would "imprecisely blend the law of child pornography with the law of obscenity"[601] because unlike the former, age is not a requirement of obscenity.

However, § 1466A does not prohibit private possession of obscene material. This is because of the well-established principle articulated in *Stanley v Georgia* that "[w]hatever the power of the State to control public dissemination of ideas inimical to the public morality, it cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts".[602] More recent cases have interpreted *Stanley* narrowly, holding that it did not create a correlative right to receive obscene material.[603] For example, in *United States v Ryan*, the defendant was prosecuted for receiving obscene material via the internet.[604] The defendant challenged the constitutionally of § 1466A, arguing that a person cannot be convicted for merely possessing obscene material as this would be interfering in matters of private morality, which would be contrary to *Stanley.* It was also argued that it would be contrary to *Lawrence v Texas*,[605] where it was held that morality of itself cannot justify legislation. The Court rejected this argument on the grounds that the legislation was not concerned with simple possession, but with public conduct, such as the distribution of obscene material.[606] As the defendant had accessed the obscene material via the internet, it was held to be a public act that could be prohibited.[607]

Legal Defense Fund (CBLDF) (no date), "CBLDF Case file—U.S v Handley", available online, <http://cbldf.org/about-us/case-files/cbldf-case-files/handley/>.
[600]Ibid, at [1003].
[601]Ibid.
[602]*Stanley v Georgia*, 394 U.S. 557 (1969), at [556].
[603]See *United States v Reidel*, 402 U.S. 351 (1971); *United States v Thirty-Seven Photographs*, 402 U.S. 363 (1971); *United States v Extreme Associates*, 431 F.3d 150 (3d Cir. 2005); *United States v Whorley*, 550 F.3d 326 (4th Cir. 2008); *United States v McCoy*, 678 F. Supp. 2d 1336 (M.D. Ga. 2009); *United States v Mees*, (2009) No. 4:09CR00145 ERW.
[604]*United States v Ryan*, No. 2:07-CR-35, (2009) U.S. Dist. LEXIS 53644.
[605]*Lawrence v Texas*, 539 U.S. 558 (2003).
[606]*United States v Ryan*, No. 2:07-CR-35, (2009) U.S. Dist. LEXIS 53644, at [25].
[607]Ibid, at [25]-[26]. The Court was quoting *Paris Adult Theatre I v Slaton*, 413 U.S. 49 (1973). Also see *United States v Thomas*, 74 F.3d 701 (6th Cir. 1996); *United States v Runyan*, 290 F.3d 223 (5th Cir. 2002).

Having set out the significant developments on the legal status of fictional child pornography in other Canada and the United States, it will now be easier to understand the context in which legislatures amended the child pornography laws in Australia.

4.3 Australia's Child Abuse Material Legislation

As seen in Figure 9 above, significant and continuing amendments to Australia's child abuse material commenced in 2004/2005.[608] The most notable expansion for the purposes of this dissertation was widening the definition of child pornography to include material that depicts or describes a person who "appears to be" a child.

It was noted in Chapter 2 that because Australia operates under a federal constitutional system, there is separate legislation in Commonwealth and State/Territory jurisdictions dealing with child abuse material.[609] Each State and Territory has its own laws dealing with the possession, production, sale, and distribution of child abuse material, while Commonwealth legislation also deals with the import and export of such material, both in hardcopy and digital format. Yet it is not uncommon for offenders to be prosecuted simultaneously under both Commonwealth and State/Territory offences for the same material.[610]

Table 4 below provides a summary of the relevant legislation in each jurisdiction, highlighting the test used to determine if the material in question constitutes child pornography, the prohibited conduct, and the maximum penalty attached to each offence. The elements of the offences are further discussed in the following sections.

---

[608]See Boxall, H, Tomison, A, and Hulme, S (2014), *Historical Review of Sexual Offence and Child Sexual Abuse Legislation in Australia: 1788–2013*, Report Prepared by the Australian Institute of Criminology for the Royal Commission into Institutional Responses to Child Sexual Abuse, Canberra.
[609]Note that in 1991 the Standing Committee of the Attorney-General began developing a Model Criminal Code, capable of being adopted by all Australian jurisdictions. The aim was to remove inconsistencies across jurisdictions. Although all Australian States seem to have endorsed the Model Criminal Code project as of national significance and apparently agreed to adopt the whole Code by 2001, this has not occurred. See Brown, D, Farrier, D, McNamara, L, Steel, A, Grewcock, M, Quilter, J, and Schwartz, M (2015), *Criminal Laws: Materials and Commentary on Criminal Law and Process of New South Wales*, 6th edn., The Federation Press, NSW, pp. 145-146.
[610]Mizzi, P, Gotsis, T, and Poletti, P (2010), *Sentencing Offenders Convicted of Child Pornography and Child Abuse Material Offences*, Judicial Commission of NSW, Monograph 34, Sydney, p. 1.

Table 4: Outline of Australia's Child Abuse Material legislation

Jurisdiction/Legislation	Definition	Statutory Test	Offence	**Maximum Penalty for Basic Offence**
Commonwealth *Criminal Code Act 1995*	"Child pornography" (CP) is material that depicts or describes a person who is or appears to be under 18 years of age engaged in a sexual pose or sexual activity (s 473.1). "Child abuse material" (CAM) is material that depicts or describes a person who is, or appears to be, under 18 years of age and is, or appears to be, a victim of torture, cruelty or physical abuse (s 473.1).	CP and CAM is material that reasonable persons would regard as being, in all the circumstances, offensive.	Use of a telecommunications carriage service to access, transmit, possess, or distribute CP or CAM (ss 471.16–471.20). It is also an offence to engage in any of these activities outside of Australia (ss 273.2–273.7).	**15 years imprisonment.**
Customs Act 1901	Same as above (s 233BAB(3)).	Same as above.	Offence to import or export CP and CAM (s 233BAB(1)(h).	**Fine not exceeding 2500 penalty units, 10 years imprisonment, or both.**
Australian Capital Territory *Crimes Act 1900*, (Part III)	"Child exploitation material" (CEM) is material that represents a person under 18 years of age engaging in sexual activity, someone else engaging in sexual activity in the presence of a child, or the sexual parts of a child (s 64).	CEM must be substantially for the purpose of sexual arousal or gratification of someone other than the child	Producing, publishing, offering, and selling CEM (s 64A). Possessing CEM (s 65).	**Producing etc.—1200 penalty units, 12 years imprisonment, or both.** **Possession—700 penalty units, 7 years imprisonment, or both.**
New South Wales *Crimes Act 1900*, (Part III, Division 15A)	CAM is material that depicts or describes a person is or appears to be under 16 years of age engaging in a sexual pose, sexual activity, or depicts the private parts of a person who is or appears to be a child. It also includes material that depicts or describes a person who is, or appears to be a child, being subject to torture, cruelty or abuse (ss 91FA–91FB).	CAM is material that reasonable persons would regard as being, in all the circumstances, offensive.	Producing, disseminating, and possessing CAM (s 91H(2)).	**10 years imprisonment.**

Jurisdiction/Legislation	Definition	Statutory Test	Offence	Maximum Penalty for Basic Offence
Northern Territory *Criminal Code Act 1983*, (Part V, Division 2, subdivision 1)	CAM is material that depicts, describes, or represents a person who is or appears to be under 18 years of age in engaging in a sexual context, in a sexual context, or being subject to abuse, cruelty or torture (s 125A).	CAM is material that is likely to cause offence to a reasonable adult.	Distributing, producing, selling, offering, or possessing CAM (s 125B).	10 years imprisonment.
Queensland *Criminal Code 1899*, (Chapter XXII)	CEM is material that depicts or describes a person who is or appears to be under 16 years of age in a sexual context, or being subject to abuse, cruelty or torture (s 207A).	CEM is material that is likely to cause offence to a reasonable adult.	Making (s 228B), distributing (s 228C), and possessing CEM (s 228D).	14 years imprisonment.
South Australia *Criminal Law Consolidation Act 1935*, (Part III, Division 11A)	CEM is material that depicts or describes a person who is or appears to be under 17 years of age engaging in sexual activity, or depicts the bodily parts of such a person that is of a pornographic nature (s 62).	CEM must intend to excite or gratify a sexual interest.	Producing and disseminating CEM (s 63). Possessing CEM (s 63A).	Producing and disseminating CEM—10 years imprisonment (basic offence). Possessing CEM—5 years imprisonment (this is if it is a first offence and a basic offence).
Tasmania *Criminal Code Act 1924*	CEM is material that depicts or describes a person who is or appears to be under 18 years of age engaging in sexual activity, in a sexual context, or the subject of torture, cruelty or abuse (s 1A).	CEM is material that reasonable persons would regard as being, in all the circumstances, offensive.	Producing (s 130A), distributing (s 130B), possessing (s 130C), or accessing CEM (s 130D	No statutory max. penalty. Section 389 states that if no maximum penalty is specified, punishment "shall be by imprisonment for 21 years, or by fine, or by both" at the discretion of the judge.
Classification (Publications, Films& Computer Games) Enforcement Act 1995 (Pt VII)	Same as above (s 71).	Same as above.	Making or reproducing (s 72A), distributing (s 73A), and possessing (s 74A) CEM.	For making and distributing, fine not exceeding 300 penalty units, term of imprisonment not exceeding 3 years, or both. For possession, fine not exceeding 200 penalty units, imprisonment not exceeding 2 years, or both.

Jurisdiction/Legislation	Definition	Statutory Test	Offence	Maximum Penalty for Basic Offence
Victoria *Crimes Act 1958*, (Part I)	CP is material that describes or depicts a person who is or appears to be a minor engaging in sexual activity or depicted in an indecent sexual manner or context (s 67A).	—	Producing (s 68), and possessing (s 70) CP.	10 years imprisonment.
Classification (Publications, Films & Computer Games) Enforcement Act 1995 (Pt VI)	Same as above (s 57A).	—	Publication or transmission of CP (s 57A).	10 years imprisonment.
Western Australia *Criminal Code Act Compilation Act 1913*, (Chapter XXV)	CP is material that describes or depicts a person who is or appears to be under 16 years of age engaging in sexual activity or in a sexual context. CEM means child pornography; or material that depicts or describes a person who is or appears to be a child in an offensive or demeaning context, or being subjected to abuse, cruelty or torture (whether or not in a sexual context) (s 217A).	CP and CEM is material that is likely to offend a reasonable person.	Producing (s 218), distributing (s 219), and possessing CEM (s 220).	Producing and distributing CEM—10 years imprisonment. Possession CEM—7 years imprisonment.

4.3.1 Terms Used

As shown in Table 4, the legislation in each jurisdiction uses different terminology when referring to child pornography. In some jurisdictions, such material is referred to as "child abuse material", in others as "child exploitation material". The Commonwealth legislation refers to both "child abuse material" and "child pornography"; this was to make clear that "child abuse material" does necessarily require a sexual element.[611] Western Australia also uses both terms "child pornography" and "child exploitation material". However, most jurisdictions use "child abuse material" and "child exploitation material" to refer to both material that is sexually explicit and non-sexualised material that depicts or describes a person who is, or appears to be, a minor being subject to abuse, cruelty, or torture. Previously, the law throughout Australia had simply referred to such material as "child pornography", but given the increasing view that this term does not reflect the harm caused to the participants, this term is being increasingly abandoned.[612] All three terms—child pornography, child abuse material, and child exploitation material—generally refer to sexually explicit depictions or descriptions of minors engaging in sexual activity or in a sexual context. Therefore, these terms are used interchangeably.

There is also no consistent definition of the term "child" throughout Australia. In some jurisdictions, a child is defined as a person under 18 years of age for the purposes of the child pornography offences;[613] in other jurisdictions the age is 16[614] or 17.[615] This means that what may be deemed child pornography in one jurisdiction may be legitimate in another.[616] It also means that a person may be in violation of the

[611]The New South Wales Child Pornography Working Party has argued that "it may be artificial to split" the terms "child abuse material" and "child pornography". Therefore, it was recommended that New South Wales' legislation should simply adopt the term "child abuse material". See Child Pornography Working Party (2010), *Report of the Child Pornography Working Party*, NSW Department of Justice and Attorney-General, p. 24.
[612]Ibid. Griffith, G, and Simon, K (2008), *Child Pornography Law*, NSW Parliamentary Library Research Service, Briefing Paper No 9/08, p. 9; Australian Federal Police (2014), "Media Release: Melbourne Man Charged with Child Exploitation Material Offences", *AFP*, 14 March, available online, <http://www.afp.gov.au/media-centre/news/afp/2014/march/media-release-melbourne-man-charged-with-child-exploitation-material-offences.aspx>.
[613]*Criminal Code Act 1995* (Cth), s 473.1; *Criminal Code Act 1983* (NT), s 1; *Criminal Code Act 1924* (Tas), s 1A; *Crimes Act 1958* (Vic), s 67A.
[614]*Criminal Code Act 1899* (Qld), s 207A; *Crimes Act 1900* (NSW), s 91FA; *Criminal Code Act Compilation Act 1913* (WA), s 217A.
[615]*Criminal Law Consolidation Act 1935* (SA), s 62.
[616]See Crimes Amendment (Child Pornography and Abuse Material) Bill 2010 (NSW), p. 21572.

Commonwealth legislation, which defines a child as a person up to 18 years of age, but not in violation of the law in jurisdictions that define a child as a person up to 16 or 17.

It is also notable that the age set by the child pornography law is inconsistent with the legal age of sexual consent.[617] In Australia, the age of consent is 16 in each jurisdiction,[618] with the exception of South Australia and Tasmania, which require the person to be at least 17.[619] This means some material may be deemed child pornography even though the act depicted may be legal,[620] including, for example, an image depicting two 17-year-olds (whether real or fictional) engaging in sexual activity.[621]

4.3.2 "Material" that "Depicts or Describes" a Person who "Appears to be" a Child

The term "material" is defined widely in each jurisdiction. For example, under the Commonwealth legislation it includes "material in any form, or combination of forms, capable of constituting a communication".[622] Under Queensland's legislation, "material" is defined as including "anything that contains data from which text, images or sound can be generated".[623] The definition under the New South Wales legislation is even wider, stating that "material" includes "any film, printed matter, data or *any other thing of any kind* (including any computer image or other depiction)".[624]

---

[617]Under Australian criminal law, the age of consent refers to the age at which a person is considered capable of legally giving informed consent to engage in sexual activity with another person. See Child Family Community Australia (2016), "Age of Consent Laws", Australian Institute of Family Studies, available online, <https://aifs.gov.au/cfca/publications/age-consent-laws>.
[618]*Crimes Act 1900* (ACT), s 55; *Criminal Code Act 1899* (Qld), s 215; *Crimes Act 1900* (NSW), s 66C; *Criminal Code Act 1983* (NT), s 127; *Crimes Act 1958* (Vic), s 45; *Criminal Code Act Compilation Act 1913* (WA), s 321.
[619]*Criminal Law Consolidation Act 1935* (SA), s 49; *Criminal Code Act 1924* (Tas), s 124.
[620]Michie, R (2013), "Sexting: Matching Reality and Law", *Civil Liberties Australia*, 29 June, available online, <http://www.cla.asn.au/News/sexting-matching-reality-and-law/>.
[621]It should be noted that Victoria amended its child pornography laws in 2014 to provide an exception for minors who send sexually provocative images of themselves in some circumstances. See *Crimes Amendment (Sexual Offences and Other Matters) Act 2014* (Vic); *Crimes Act 1958* (Vic), s 70AAA.
[622]*Criminal Code Act 1995* (Cth), s 473.1. Also see Law Reform Committee, Parliament of Victoria (2013), *Inquiry into Sexting*, Victorian Government Printer, Parliamentary Paper No. 230.
[623]*Criminal Code 1899* (Qld), s 207A.
[624]*Crimes Act 1900* (NSW), s 91FA (emphasis added).

Each Australian jurisdiction prohibits material that "depicts" or "describes" a person who is, or appears to be, a child in a sexual context.[625] "Depictions" cover visuals such as photographs, videos, and audio;[626] while "describes" refers to written material such as stories and lyrics.[627] There have been several prosecutions for written material describing minors in a sexual context.[628] These cases, which are discussed in this and the following Chapter, involve not only handwritten stories but also text-based conversations expressed via technological devices, such as online chat-room conversations.[629]

Notably, the legislation in each Australian jurisdiction does not require that the "person" depicted or described actually be a child. This is made clear by the phrase "appears to be" a minor. However, the legislation is silent as to whether the "person" includes a purely fictitious child. Despite this, as will be discussed later, Australian courts have interpreted the relevant provisions as including fictitious persons.

---

[625]*Criminal Code Act 1995* (Cth), s 473.1; *Crimes Act 1900* (NSW), s 91FB; *Criminal Code Act 1899* (Qld), s 207A; *Criminal Code Act 1983* (NT), s 125A; *Criminal Law Consolidation Act 1935* (SA), s 62; *Criminal Code Act 1924* (Tas), s 1A; *Criminal Code Act Compilation Act 1913* (WA), s 217A; *Crimes Act 1958* (Vic), s 67A. Note, the Australian Capital Territory only uses the word "represents", which "means depict or otherwise represent on or in a film, photograph, drawing, audiotape, videotape, computer game, the internet or anything else". See *Crimes Act 1900* (ACT), s 64.

[626]Explanatory Memorandum accompanying the Crimes Legislation Amendment (Telecommunications Offences & Other Measures) Bill 2004 (Cth), at [6].

[627]Ibid.

[628]For example see *Dodge v R* [2002] WASCA 286; *Holland v R* [2005] WASCA 140; *R v Carson* [2008] QCA 268; *Bennie v R* (2009) (unreported case heard at Wagga Wagga Local Court); *R v Campbell* [2009] QCA 128; *R v Gibb* [2009] NSWDC 340; *R v XB* [2009] VSCA 51; *Hitchen v R* [2010] NSWCCA 77; *R v Jarrold* [2010] NSWCCA 69; *Minehan v R* (2010) NSWCCA 140; *Stephenson v State of Western Australia* [2010] WADC 160; *Whiley v R* [2010] NSWCCA 53; *Ponniah v R* [2011] WASCA 105; *Traynor v McCullough* [2011] TASSC 4; *Godfrey v R* [2013] WASCA 247; *R v Shelford* [2013] NSWDC 102; *DPP v Ward* [2014] VCC 314; *Martin v R* [2014] NSWCCA 124; *R v McNamara* [2014] NTSC 53; *Attorney-General Queensland v Roles* [2015] QSC 223; *DPP (WA) v Wesley (No 2)* [2015] WASC 168; *R v Feuerstein* [2015] NSWCCA 82.

[629]For example *R v Jarrold* [2010] NSWCCA 69; *R v Shelford* [2013] NSWDC 102; *Burbridge v R* [2016] NSWCCA 128.

4.3.3 The Sexual Explicitness Requirement

The legislation in each jurisdiction requires the material in question to depict or describe a person who is, or appears to be, a minor in a "sexual context". This is generally used to refer to representations of minors engaging in, or in the presence of, certain sexual acts, such as sexual intercourse and oral sex.[630]

In some jurisdictions, the legislation captures material that depicts or describes the "private parts",[631] "sexual parts",[632] or "bodily parts"[633] of a person who is, or appears to be, a minor. Although not all jurisdictions define these terms, the New South Wales legislation states that "private parts" refers to "a person's genital area or anal area; or the breasts of a female person".[634] The Commonwealth legislation also prohibits material that depicts or describes "a sexual organ or the anal region … or the breasts, or a representation of the breasts, of a female person who is, or appears to be, under 18 years of age".[635] Unlike the other Australian jurisdictions, the New South Wales and Commonwealth legislation also encompass representations of minors engaged in a "sexual pose".[636]

Additionally, in some jurisdictions the material in question does not have to be sexually explicit. The Commonwealth legislation, as well as the legislation in most States/Territories, prohibits depictions and descriptions of a person who is, or appears to be, a minor as a victim of torture, cruelty, or abuse, regardless whether or not in a sexual context.[637]

4.3.4 The Offensiveness Requirement

As shown in Table 4, the legislation in most Australian jurisdictions requires the material to be considered "offensive" in order to constitute child pornography.

---

[630]This is consistent with the definition provided adopted of "sexually explicit" by the Council of Europe (2001), *Explanatory Report to the Convention on Cybercrime ETS No. 185*, Budapest, at [100].
[631]*Crimes Act 1900* (NSW), s 91FB(1)(d).
[632]*Crimes Act 1900* (ACT), s 64(5)(a).
[633]*Criminal Law Consolidation Act 1935* (SA), s 62(a)(ii).
[634]*Crimes Act 1900* (NSW), s 91FB(4).
[635]*Criminal Code Act 1995* (Cth), s 473.1(b).
[636]*Crimes Act 1900* (NSW), s 91FB; *Criminal Code Act 1995* (Cth), s 473.1.
[637]See Table 4 above.

Generally, the material must depict or describe minors in a sexual context "in a way that reasonable persons would regard as being, in all the circumstances, offensive…".[638] The term "offensive" is not defined in the legislation and only the Commonwealth and New South Wales legislation provide guidance as to what factors to take into consideration when determining offensiveness. This includes "the standards of morality, decency and propriety generally accepted by reasonable adults … the literary, artistic or educational merit …the journalistic merit … and the general character of the material".[639]

The only exceptions are the Australian Capital Territory and South Australia, which do not require the material to be offensive to the reasonable person. In the Australian Capital Territory, the material needs to be "substantially for the sexual arousal or sexual gratification of someone other than the child".[640] Similarly, the legislation in South Australia does not necessitate determining whether the material is offensive, but it does require the material to be "intended or apparently intended to excite or gratify a sexual interest".[641]

Nevertheless, a commonality of Australia's child pornography legislation is its focus on the effect of the material on potential viewers, rather than how the material was produced. This can be contrasted with the United States, where the Supreme Court held in the aforementioned case of *Ferber* that offensiveness and "whether a work, taken as a whole, appeals to prurient interest of the average person" [642] is irrelevant when the depiction is of a real child.

---

[638] *Criminal Code Act 1995* (Cth), s 473.1. It should be noted that Victoria's legislation does not expressly incorporate the test of offensiveness. It defines "child pornography" as a material that "describes or depicts a person who is, or appears to be, a minor engaging in sexual activity or depicted in an indecent sexual manner or context". *Crimes Act 1958* (Vic), s 67A. However, in *Harkin v R* (1989) 38 A Crim R 296, it was held that indecency is defined by asking whether the "right-minded person" would consider the conduct indecent. This suggests that Victoria's legislation also requires an assessment of whether the material would offend the reasonable person. See Crofts, T and Lee, M (2013), "'Sexting', Children and Child Pornography", *Sydney Law Review,* vol. 35, no. 1, p. 91.
[639] *Crimes Act 1900* (NSW), s 91FB(2); *Criminal Code Act 1995* (Cth), s 473.4.
[640] *Crimes Act 1900* (ACT), s 64(5).
[641] *Criminal Law Consolidation Act 1935* (SA), s 62.
[642] *New York v Ferber*, 458 U.S 747 (1982), at [761]. This case is discussed above, at [4.2].

4.3.5 Production, Dissemination, and Possession

It is illegal to produce, disseminate, or possess child pornography. However, as seen in Table 4, production and distribution are treated more severely than simple possession in some jurisdictions.

Producing child abuse material generally means engaging in any of the following activities:[643]

(a) filming, photographing, printing, or otherwise making child abuse material; or
(b) altering or manipulating any image for the purpose of making child abuse material; or
(c) entering into any agreement or arrangement to do so.

The act of dissemination includes:[644]

(a) sending, supplying, exhibiting, transmitting, or communicating it to another person; or
(b) making it available for access by another person; or
(c) entering into any agreement or arrangement to do so.

The concept of possession is similar in each Australian jurisdiction. It generally requires the person having:[645]

(a) physical possession of the material;
(b) knowledge of possession;
(c) intent to exercise physical possession of the item; and
(d) knowledge of the nature of the material being possessed.

[643]See *Crimes Act 1900* (NSW), s 91H.
[644]Ibid.
[645]The most important case on possession and awareness is *He Kaw Teh v R* (1985) 157 CLR 523. Although the High Court in this case was not dealing with child abuse material, it has been applied in cases concerned with such material. For example see *Holland v R* [2005] WASCA 140; *R v Gelding* [2007] SADC 124; *Clark v R* [2008] NSWCCA 122.

The legislation in most Australian jurisdictions explicitly states that the person must have "knowingly" or "intentionally" possessed the material in question.[646] In other jurisdictions, the legislation is silent on the fault element.[647] However, following the principles set out by the High Court in *He Kaw Teh v R*,[648] it appears that the prosecution will have to prove, beyond reasonable doubt, that the accused actually knew, or should have been aware, that material in his or her possession was child abuse material.

4.3.6 Defences

The law recognises that there are some circumstances where there may be legitimate reasons for dealing with child abuse material. Thus, each jurisdiction provides varying defences to such charges. Generally, it is a defence that:

(a) the person engaged in the offending conduct for a genuine artistic purpose; or
(b) the conduct engaged in was for a public benefit; or
(c) the offending material was classified under the *Classification (Publications, Films and Computer Games) Act 1995*, other than as refused classification; or
(d) the offending material came into the accused's possession unsolicited, and the accused, as soon as he or she became aware that it was child pornography, took reasonable steps to delete it from their possession.

[646] *Crimes Act 1900* (ACT), s 65; *Criminal Code 1899* (Qld), s 228D; *Criminal Law Consolidation Act 1935* (SA), s 63A; *Criminal Code Act 1924* (Tas), s 130C; *Crimes Act 1958* (Vic), s 70.
[647] This includes New South Wales, Northern Territory, and Commonwealth legislation. However, under Commonwealth law, if no mental element is specified the *Criminal Code Act 1995* (Cth) sets out the default mental elements. Under s 5.6, it states: "If the law creating the offence does not specify a fault element for a physical element that consists only of conduct, intention is the fault element for that physical element". This section adds that: "If the law creating the offence does not specify a fault element for a physical element that consists of a circumstance or a result, recklessness is the fault element for that physical element". For a discussion of the fault element in child pornography offences see *R v Clarke* [2008] SASC 100.
[648] *He Kaw Teh v R* (1985) 157 CLR 523.

Artistic Purpose

A genuine artistic purpose makes it legal to produce and possess sexually explicit material representing minors if it is objectively perceived as having the quality or value of art. This is referred to as the "artistic merit" defence, which is provided under the child abuse material legislation in some Australian jurisdictions.[649] It is not available as a defence under the Commonwealth, New South Wales, or Northern Territory legislation. However, under the Commonwealth and New South Wales legislation, artistic merit may be a relevant factor when determining if the material would offend the reasonable person.[650]

Public Benefit

Although the artistic merit defence is not provided under Commonwealth or New South Wales legislation, both jurisdictions provide a "public benefit" defence. Other Australian jurisdictions provide both an artistic merit defence and a public benefit defence.[651] Generally, conduct is considered a "public benefit if, and only if" it is necessary for or of assistance in:[652]

> (a) enforcing or administering a law of the State, or of another State, a Territory or the Commonwealth; or
> (b) monitoring compliance with, or investigating a contravention of, a law of the State, or of another State, a Territory or the Commonwealth; or
> (c) the administration of justice.

---

[649] *Criminal Code Act 1899* (Qld), s 228E(2)(a); *Criminal Law Consolidation Act 1935* (SA), s 63C(3); *Criminal Code Act 1924* (Tas), s 130E(1)(b); *Criminal Code Act Compilation Act 1913* (WA), s 221A(c)(i); *Crimes Act 1958* (Vic), s 70(2)(b). Note, in Victoria the artistic merit defence cannot be relied on in a case where the prosecution proves that the minor is actually under the age of 18 years (see section 70(3)).
[650] See *Criminal Code Act 1995* (Cth), s 473.4; *Crimes Act 1900* (NSW), s 91FB(2).
[651] *Criminal Code Act 1899* (Qld), s 228E(2)(a); *Criminal Code Act 1924* (Tas), s 130E(1)(b).
[652] *Crimes Act 1900* (NSW), s 91HA(4). The Commonwealth provision is similar, but also adds conduct that is necessary for "conducting scientific, medical or educational research". See *Criminal Code Act 1995* (Cth), s 474.21(2).

The New South Wales and Commonwealth legislation specifically states that whether a person's conduct is of public benefit is a question of fact and a person's motives for engaging in the conduct are irrelevant.[653]

Classification other than Refused Classification

The third defence of classification demonstrates the relevance of Australia's censorship laws in relation to charges involving child pornography. The legislation in each jurisdiction contains a provision providing that it is a defence if the material in question has been, or would be, classified other than Refused Classification by the Classification Board under the *Classification (Publications, Films and Computer Games) Act 1995* (Cth). Refused classification refers to material that is "banned", that is material that cannot be sold, hired, advertised, or legally imported into Australia.[654] This is because it is considered to contain content that is very high impact and contravenes widely accepted community standards.[655] While it is not illegal to privately possess banned material, only publications, films, and computer games are eligible for classification.[656]

Unawareness

As mentioned above, knowledge of possession is an essential element of the offences. Accordingly, the legislation in each jurisdiction makes it a complete defence if the accused can prove on the balance of probabilities that he or she did not know, or could not reasonably be expected to have known, that the material was child pornography.[657] In some cases, the accused may be able to argue inadvertent possession,[658] which is particularly important given the risks the internet creates for unwitting receipt and

[653]*Crimes Act 1900* (NSW), s 91HA(5); *Criminal Code Act 1995* (Cth), s 474.21(1).
[654]Australian Classification Board, *Classification Categories Explained*, Australian Government, available online, <http://www.classification.gov.au/Guidelines/Pages/Guidelines.aspx>.
[655]Ibid.
[656]Ibid. *Classification (Publications, Films and Computer Games) Act 1995* (Cth), s 9.
[657]For example see *Crimes Act 1900* (NSW), s 91HA(1).
[658]For example see *R v Liddington* (1997) 18 WAR 394; *R v W (A Child)* (2000) 27 SR (WA); *Isherwood v Tasmania* (2010) 20 Tas R 375.

possession of child pornography.[659] However, in order to successfully raise this defence, the accused must show that the he or she took "reasonable steps to get rid of"[660] the material as soon as becoming aware of its nature.

4.3.7 Penalties and Consequences of Conviction

As shown in Table 4, the maximum penalty for producing, disseminating, or possessing child pornography is a term of imprisonment. The length of imprisonment is significant and has been continuously increasing. For example, in New South Wales the penalty for possessing child abuse material doubled from five years to ten years imprisonment in 2009.[661] The relevant Commonwealth offences were increased in 2010 from ten years to 15 years imprisonment.[662] More recently, Victoria has increased the maximum penalty for possession of child pornography from five years to ten years imprisonment in 2015.[663]

Additionally, a conviction under the child abuse material legislation leads to inclusion on the sex offender register, which has been established in every Australian jurisdiction.[664] A "registrable person" generally refers to a person convicted for any sexual offence against a child, including offences relating to child abuse material.[665]

---

[659]Clough, J (2015), *Principles of Cybercrime*, 2nd edn., Cambridge University Press, Cambridge, p. 372. For a discussion on the concept of "possession" of child pornography in the digital context see Clough, J (2009), "Now You See It, Now You Don't: Digital Images and the Meaning of 'Possession'", in D.S Wall (ed.), *Crime and Deviance in Cyberspace*, Ashgate, Surrey, pp. 273-307; Clough, J (2012), "'Just looking': When Does Viewing Online Constitute Possession?", *Criminal Law Journal*, vol. 36, vol. 4, pp. 233-248.

[660]For example see *Crimes Act 1900* (NSW), s 91HA(2).

[661]*Crimes Amendment (Sexual Offences) Act 2008* (NSW), Sch 1, which commenced on 1 January 2009 and applies to offences committed from that date.

[662]*Crimes Legislation Amendment (Sexual Offences Against Children) Act 2010* (Cth), which commenced on 14 April 2010.

[663]Explanatory Memorandum, Crimes Amendment (Child Pornography and Other Matters) Bill 2015 (Vic).

[664]*Child Protection (Offenders Registration) Act 2000* (NSW); *Sex Offenders Registration Act 2004* (Vic); *Child Protection (Offender Reporting) Act 2004* (Qld); *Child Sex Offenders Registration Act 2006* (SA); *Community Protection (Offenders Reporting) Act 2004* (WA); *Child Protection (Offender Reporting and Registration) Act 2004* (NT); *Community Protection (Offender Reporting) Act 2005* (Tas); *Crimes (Child Sex Offenders) Act 2005* (ACT). Generally, as part of the registration a person must provide their personal details, including details about their employment, car, any children they normally live with, as well as many other onerous requirements. For an overview of the sex-offender legislation see Australian Institute of Family Studies (2013), *Offender Registration Legislation in Each Australian State and Territory*, Australian Government, available online, <http://aifs.gov.au/institute/pubs/carc/3b.html>.

[665]For example see *Child Protection (Offenders Registration) Act 2000* (NSW), s 3A.

With the exception of Tasmania, registration is mandatory following conviction, which means the court does not have the discretion to waive the sex offender registration requirement.[666]

The following section discusses the underlying rationale behind the amendments.

4.4 Insight into the Legislative Intent

Australian legislatures have made it clear that the primary purpose of prohibiting child pornography is to prevent the abuse and exploitation of children.[667] However, the legislative purpose of prohibiting obviously fictional sexualised representations of persons who appear to be a child has not been easy to ascertain.

In 2004, the Commonwealth Government stated in explanatory memoranda that amendments to its child abuse material legislation extended to fictional representations of minors.[668] It was explained that: "'depictions' … are intended to cover all visual images, both still and motion, including representations of children, such as cartoons and animations".[669] This was because the availability of such material may "fuel further demand for similar material" and allegedly "[t]his can lead to greater abuse of children in the production of material to meet this demand."[670] Although no empirical evidence was put forward to support this claim, the Commonwealth Government believed fictional child pornography created an unacceptable risk to children, which justified prohibiting such material.[671]

[666]At the time of writing, Tasmania is the only jurisdiction that provides for judicial discretion in relation to the registration of sex offenders. Under section 6 of the *Community Protection (Offender Reporting) Act 2005* (Tas), a person convicted of a registrable offence must be placed on the register "unless the court is satisfied that the person does not pose a risk of committing a reportable offence in the future".
[667]For example see Explanatory Memorandum, Crimes Amendment (Child Pornography) Bill 2004 (NSW); Explanatory Memorandum, Criminal Law (Child Exploitation and Dangerous Drugs) Amendment Bill 2012 (Qld).
[668]Explanatory Memorandum accompanying the Crimes Legislation Amendment (Telecommunications Offences & Other Measures) Bill 2004 (Cth).
[669]Ibid.
[670]Ibid.
[671]Ibid.

Similarly, the Attorney-General stated in the Second Reading Speech accompanying the amendments to the Northern Territory's child abuse material legislation that the amendments cover "material that represents children in cartoons and computer-generated representations of children".[672] While the Northern Territory Government explicitly stated that the definition captures cartoons, there was no explanation as to why.

Conversely, when amending its child abuse material legislation, the New South Wales legislature explained that it was necessary to prohibit material that does not involve a child in its production.[673] The reason provided was that current technologies made it easier for pornographers to manipulate images of real children into a sexual context.[674] The Attorney-General at the time, John Hatzistergos, explained:

> "Some may argue that such images do not include a 'real victim' and therefore should not be captured by this legislation. However, the Government makes no apologies in ensuring that all child pornographic images whether 'real' or 'pseudo' are covered by this legislation. These tough child pornography laws serve not only to protect children from abuse, but also act as a denunciation and a general deterrent. Furthermore, it is important to reduce the amount of this abhorrent material available to anyone with access to a computer. The community expects the Government to do everything within its power to prevent proliferation of these images, and that is what this Bill serves to do".[675]

Notably, this passage shows that the legislative intent was to target "pseudo" images. As discussed in chapters 1 and 2, pseudo-images usually refer to images of real children that have been manipulated into a sexual context.[676] Although no child is physically harmed in the production process, these images infringe the right of children not have their images distorted and their right to privacy and, therefore, such images

[672]Northern Territory, Criminal Code Amendment (Child Abuse Material Bill), Presentation and Second Reading Speech, 10 June 2004.
[673]New South Wales, *Parliamentary Debates*, Legislative Council, 26 November 2008, p. 11705.
[674]Ibid.
[675]Ibid.
[676]See especially "Terminology" in Chapter 1, at [1.1].

are rightly prohibited.[677] Perhaps the Attorney-General's reference to pseudo-child pornography was being used widely to also include wholly computer-generated images. However, it is still not clear whether there was an intention to capture obviously fictional representations of minors, such as cartoons, created by computer or otherwise.

In 2012, the Queensland Government stated that the amendment to its child exploitation material legislation "extends to animated, virtual or fictitious images".[678] The reason was that such images may "create real evidentiary problems for prosecutors in child exploitation material cases. The accused person may claim that the images are virtual and do not involve real children".[679] This suggests that the law extended only to virtual images that are indistinguishable from images depicting real children, because prosecutors would surely be able to distinguish depictions of cartoon characters from real children. It therefore also remains unclear whether the Queensland legislation was intended to prohibit obviously fictional representations of children.

The legislatures in other Australian jurisdictions do not seem to have provided any guidance as to whether the child pornography laws in their jurisdiction extend to fictional material. While the Commonwealth and Northern Territory explicitly stated that their child abuse material legislation extends to cartoons, no explanation was offered as to why. The New South Wales and Queensland legislatures mentioned criminalising material that does not involve a real child in its production, but it remains unclear whether it was intended to capture cartoons and images that can be distinguished from real images of children. Despite this, as will be seen in the following section, courts throughout Australia have interpreted the relevant provisions in the child abuse material legislation as including depictions of obviously fictitious children.

4.5 Australian Case Law Analysis

[677]Ost, S (2009), *Child Pornography and Sexual Grooming: Legal and Societal Responses*, Cambridge University Press, Cambridge, p. 140; Gillespie, A (2011), *Child Pornography: Law and Policy*, Routledge, New York, p. 28.
[678]Explanatory Memorandum, Criminal Law (Child Exploitation and Dangerous Drugs) Amendment Bill 2012 (Qld), p. 9.
[679]Queensland, Criminal Law (Child Exploitation and Dangerous Drugs) Amendment Bill 2012, Second Reading Speech, 21 March 2013, p. 887.

At the outset, it should be noted that it is unnecessary to discuss each decided case dealing with fictional child pornography. This is because in most cases the defendants plead guilty and so the judgement noted only in passing that the material in question was fictional, without providing any useful commentary. Therefore, the cases discussed in this section are those that shed light on the content of the material,[680] provide judicial guidance on the scope of the legislation, and/or have considered the broader question of legislative intent.[681]

It is also important to note that in virtually all of the cases identified, the defendants were male and were being prosecuted for having in their possession child abuse material depicting real children and/or had a history of committing child sexual abuse.[682] This is a concerning issue that is discussed further in Chapter 7 when considering the harm in viewing fictional child pornography. As this dissertation is concerned with fantasy, analysis of the case law discussed in this dissertation focuses only on the courts' rulings in relation to the fictional material.

Prior to the reforms commencing in 2004–2005, there were two main decisions, both from Western Australia, suggesting that fictional characters could be "persons" for the purposes of legislation prohibiting child abuse material.[683] In *Dodge v R*, the Court of Criminal Appeal upheld convictions for 17 stories describing children under the age

[680]Some of the pertinent cases are also discussed in Chapter 5 as part of a critical analysis of Australia's child abuse material legislation.
[681]For a full list of the case law retrieved and considered for the purposes of this dissertation see the Bibliography (noting that not all the cases listed there dealt with fictional child pornography).
[682]For example *Dodge v R* [2002] WASCA 286; *Puhakka v R* [2009] NSWCCA 290; *Colbourn v R* [2009] TASSC 108; *R v Ross* [2009] NSWDC 104; *R v Carlton* (2009) 197 A Crim R 220; *R v Cargnello* [2009] NSWDC 132; *R v XB* [2009] VSCA 51; *Grehan v R* (2010) 199 A Crim R 408; *R v MBM* (2011) 210 A Crim R 317; *R v Carget-Bennett* [2010] QCA 231; *R v Cowell* [2011] NSWDC 249; *R v Hancock* [2011] NTCCA 14; *Hardwick v Western Australia* [2011] WASCA 164; *R v Hickey* [2011] QCA 385; *R v Pederson* [2011] QDC 69; *DPP v Davies* [2013] VCC 1671; *R v Gridley* [2013] SASCFC 29; *Larkins v R* [2013] NSWDC 159; *Bayliss v R* [2013] VSCA 70; *Pettersen v R* [2013] VSCA 185; *Anderson v The State of Western Australia* [2014] WASCA 137; *BGX v Children's Guardian* [2014] NSWCATAD 173; *R v Tahiraj* [2014] QCA 353; *DPP v Waters* [2014] VCC 875; *R v Falzon* [2015] ACTSC 104; *R v Pol* (Unreported, District Court of Adelaide, 12 August 2015); *DPP v Gunawardena* [2015] VCC 477; *DPP (WA) v Wesley (No 2)* [2015] WASC 168; *O'Sullivan v R* [2015] NSWCCA 329; *R v Feuerstein* [2015] NSWCCA 82; *Taylor v R* [2015] TASCCA 7; *Burbridge v R* [2016] NSWCCA 128; *R v Lewsam* [2016] WASCA 60; *R v Walshe* [2016] ACTSC 267. The only Australian case where the defendant was convicted despite having no history of child sex offences or being in possession of child abuse material depicting real children seems to be *Traynor v McCullough* [2011] TASSC 41. This case is discussed below in this chapter.
[683]*Dodge v R* [2002] WASCA 286; *Holland v R* [2005] WASCA 140.

of 10 engaging in sexual activity that were deemed child pornography.[684] The offender in this case, Martin Dodge, was serving a prison sentence for committing child sexual abuse offences at the time of being apprehended. The prison officers had found the stories while conducting a random search of a cell belonging to another prisoner and Dodge later admitted that he had supplied the prisoner the stories in question. However, in his defence it was argued that "being in possession of fictitious material where there were no victims was materially different to offending against individuals who have feelings and suffer consequences".[685] The Court rejected this argument, stating that the material still fell within the definition of child pornography, expressing a concern that the fictional stories "could have stimulated the recipient or other people with depraved tendencies towards children".[686] Despite this, the Court reduced Dodge's sentence from three years to 12 months imprisonment since no real child was involved in the production of the material.

The second important case is *Holland v R*,[687] where the defendant was prosecuted under the *Customs Act 1901* (Cth)[688] for importing from the Netherlands fictional books that described adults engaging in sexual acts with adolescent boys. On appeal, the Western Australian Supreme Court held that the word "person" for the purposes of the *Customs Act* extended to imaginary persons.[689] Chief Justice Malcolm stated:

> "In my opinion, it is a notorious fact of which judicial notice could be taken that the word 'person', as it is commonly used in every day speech and language, extends to both real and fictitious persons. As the *New Shorter Oxford Dictionary* itself makes clear, the word 'person' includes a person who plays a

[684] *Dodge v R* [2002] WASCA 286, at [8].
[685] Ibid, at [13].
[686] Ibid, at [25].
[687] *Holland v R* [2005] WASCA 140. The offender in this case was being prosecuted solely for fictional material and it is unclear whether he had a history of committing child sexual abuse. However, it has been reported in the media that Harry Holland "is a self-described paedophile". Bell, D (2014), "Nugent Loses Child Sex Mag Appeal", *Perth Voice Interactive,* 21 November, available online <https://perthvoiceinteractive.com/2014/11/21/nugent-loses-child-sex-mag-appeal/>. Also see *Colin Nugent (formerly Harry Holland) v The State of Western Australia* [2014] WASCA 213.
[688] As shown in Table 4, s 233BAB of the *Customs Act 1901* (Cth) also prohibits the importation and exportation of child pornography.
[689] *Holland v R* [2005] WASCA 140, at [17].

part in a drama or a character in a play or story. It is clear that the word extends to real, imaginary and fictitious persons".[690]

Chief Justice Malcolm's reasoning was influential on the New South Wales Supreme Court decision of Adams J in *McEwen v Simmons & Anor*.[691] This case is now considered the landmark case dealing with fictional child pornography in New South Wales following the initial 2004–2005 reforms. In the 2008 case of *McEwen,* the defendant was charged under New South Wale child abuse material legislation for possession,[692] and simultaneously under the Commonwealth legislation for using his computer to access such material.[693] The material in question comprised a series of cartoons depicting the child characters from the television program *The Simpsons* engaging in sexual acts.[694] Relying on *Holland* and the Canadian cases of *Eli Langer* and *Sharpe,*[695] as well as extrinsic material, Adams J concluded that the word "person" was intended to include fictional characters.[696] He believed that interpreting the word "person" broadly would be consistent with the legislative intent. This was because material that does involve a real child "can fuel demand for material that does involve the abuse of children".[697] Justice Adams was also influenced by the majority of the Supreme Court's view expressed in *Sharpe* that the "available evidence suggests that explicit sexual materials can be harmful whether or not they depict actual children".[698]Accordingly, the defendant was convicted, fined $3000, and placed on a two-year good behaviour bond.

Since *McEwen,* there have been several defendants convicted for possessing fictional material that depicts or describes fictitious characters who appear to be children in a

[690]Ibid.
[691]*McEwen v Simmons & Anor* [2008] NSWSC 1292.
[692]*Crimes Act* 1900 (NSW), s 91H(3).
[693]*Criminal Code Act* 1995 (Cth), s 474.19(1)(a)(i).
[694]It is not clear from the judgment whether the defendant was also being prosecuted for real child abuse material and/or had a history of committing child sexual abuse.
[695]*Re Paintings, Drawings and Photographic Slides [by Eli Langer]*, [1995] OJ No. 1045 and *R v Sharpe* [2001] 1 SCR 45. As seen above, the courts in both cases made clear that Canada's child pornography laws extend to purely fictional characters.
[696]*McEwen v Simmons & Anor* [2008] NSWSC 1292, at [29].
[697]Ibid, at [26].
[698]Ibid, at [23]. His Honour was quoting McLachlin CJC in *R v Sharpe* [2001] SRC 45.

sexual context.[699] For example, the defendant in *Larkins v R* was also convicted for possessing cartoons depicting the child characters from *The Simpsons* engaging in sexual acts, as well as child abuse material depicting real children, some of which showed "penetrative sex between boys of between the ages of ten to fourteen".[700]Although the District Court expressed "some doubt as to whether such material even qualified as child pornography",[701] the Court was bound by the decision in *McEwen.* Therefore, it was held that, given the apparent ages of Bart and Lisa Simpson, the material showing the characters engaging in sexual activity constituted child pornography.[702] However, on appeal, the Court reduced the offender's custodial sentence, stating that the offender should not have received the same sentence for possessing sexually explicit cartoon images of Bart and Lisa Simpson as he did for the videos depicting real children in a sexual context.[703]

Whiley v R is another case where the penalties "imposed by the sentencing judge were manifestly excessive".[704] In this case, the offender was in prison for non-child abuse related offences. While searching his cell, Corrective Services officers found 18 sheets of drawings created by the offender depicting children apparently under 16 years of age in a sexual context. They also found 24 self-produced handwritten stories describing sexual encounters between the adult and child characters from the television program *The Brady Bunch.* He was subsequently charged with producing and possessing child pornography, even though the drawings and stories were created "from his imagination"[705] and were not shared with anyone. When discussing the harm of fictional pornography, the New South Wales Court of Criminal Appeal specifically referred to the passage by McCombs J in the Canadian case of *Eli Langer*, where he stated: [706]

---

[699]Some of these cases will be discussed in this dissertation, but also see "Australian case law" in the Bibliography.
[700]*Larkins v R* [2013] NSWDC 159, at [12].
[701]Ibid, at [8].
[702]Ibid.
[703]Ibid, at [19].
[704]*Whiley v R* [2010] NSWCCA 53, at [72].
[705]Ibid, at [63].
[706]Ibid, at [68]. The Court was quoting McCombs J in *Re Paintings, Drawings and Photographic Slides [by Eli Langer]*, [1995] OJ No. 1045. This passage was also quoted in *R v Lanham* [2014] ACTSC 128, at [66].

> "The evil of child pornography lies not only in the fact that actual children are often used in its production, but also in the use to which it is put. Although behavioural scientists disagree about the reliability of scientific studies, there is general agreement among clinicians that some paedophiles use child pornography in ways that put children at risk. It is used to 'reinforce cognitive distortions' (by rationalising paedophilia as a normal sexual preference); to fuel their sexual fantasies (for example, through masturbation); and to 'groom' children by showing it to them in order to promote discussion of sexual matters and thereby persuade them that such activity is normal."[707]

While at first glance the decision to prosecute in *Whiley* may seem arbitrary, it is essential to note that the defendant had a history of committing child sexual abuse and his sexual fantasies about children were seen as interfering with his prospects of rehabilitation.[708] When sentencing the offender, the trial judge seemed to have taken into account that:

> "In 1998 the [offender] was imprisoned for four offences of sexual intercourse with a child under 10. In 2001 he was dealt with under s 10 of the *Crimes (Sentencing Procedure) Act* for possession of child pornography".[709]

Nevertheless, the New South Wales Court of Criminal Appeal concluded that the original sentence "imposed by the sentencing judge [was] manifestly excessive",[710] considering that "actual children were not used in the production of the child pornography".[711] Accordingly, the offender's sentence was reduced from four years imprisonment to 12 months.[712]

Conversely, in *R v Jarrold*, the New South Wales Court of Criminal Appeal rejected the argument that the offences should be treated less severely because the material

[707] *Re Paintings, Drawings and Photographic Slides [by Eli Langer]*, [1995] OJ No. 1045, at [28].
[708] *Whiley v R* [2010] NSWCCA 53, at [20].
[709] Ibid, at [23].
[710] Ibid, at [72].
[711] Ibid, at [69].
[712] Ibid, at [72].

involved no real child in its production.[713] In this case, the offender was prosecuted for several offences relating to the physical sexual abuse of a child as well as for possessing thousands of sexually explicit images of real children. Some of these images depicted "boys between the age of 8 and 15 years who were either in a sexual position or engaging in sexual activity with other boys or men".[714] However, three of the charges arose from the offender's internet conversations in which he engaged in sexual fantasies describing fictitious children. In trying to reconcile *Whiley* and *Jarrold*, it has been suggested that the latter should be distinguished because the material was not created solely for personal use.[715]

The offender in *Keith v R* was prosecuted for possessing child abuse material depicting real children, as well as text messages sent via the offender's mobile phone.[716] These messages were described by the New South Wales Court of Criminal Appeal as a "fantasy involving the participation of a thirteen-year-old boy ... in sex acts with the accused".[717] The sentencing judge accepted that the "communications were not as serious as those which involved the depiction of actual children",[718] but was nevertheless of the view that "even fantasies produce a distorted view of reality, in which sex with children is somehow seen as appropriate".[719]

Similarly, in *R v Shelford,* which also involved both real and fictional child pornography, the offender had engaged in online chat-room conversations under the username "Perverted Dad".[720] The Australian Federal Police identified the offender after receiving information from police in The Netherlands about online conversations describing child sexual abuse between Perverted Dad and other paedophiles.[721] The Court stated that:

[713]*R v Jarrold* [2010] NSWCCA 69.
[714]Ibid, [58].
[715]See *Minehan v R* (2010) NSWCCA 140, at [90]. Also see *Martin v R* [2014] NSWCCA 124, at [54]-[56].
[716]*Keith v R* [2014] NSWCCA 124.
[717]Ibid at [16].
[718]Ibid, [23].
[719]Ibid.
[720]*R v Shelford* [2013] NSWDC 102, at [2].
[721]Ibid.

> "It is important to bear in mind that there is, in objective gravity terms, a significant difference between chatting and fantasising about sexually abusing children and possessing images and videos showing children being abused".[722]

Nevertheless, the Court concluded that imprisoning the offender was necessary because:

> "Even the fantasy stories contained within the chat logs are sufficiently serious, involving interactions with other perverted people throughout the world, that a custodial sentence of some kind is required for them".[723]

This can be compared with the comments of the Court in the Northern Territory case of *R v Hancock,* which involved multiple charges of both real and fictional child pornography.[724] The fictional material was in the form of stories describing "sexual activity between adult males and male children".[725] The trial judge stated, "I appreciate that what you have written may well be no more than sexual fantasy writing and not based on personal experience",[726] but held that the offender's stories were potentially harmful because:

> "[T]his writing rationalises paedophilia as a normal sexual preference and in that way it could well create or reinforce cognitive distortions in the minds of those who read it, possibly enabling those persons to justify and rationalise their own abusive behaviour".[727]

It should be noted that the courts initially interpreted Queensland's child exploitation material legislation differently. This was mainly because s 207A of the *Criminal Code 1899* (Qld) formerly defined child exploitation material as "[m]aterial that, in a way likely to cause offence to a reasonable adult, describes or depicts *someone* who is or

[722]Ibid, at [4].
[723]Ibid, at [22].
[724]*R v Hancock* [2011] NTCCA 14.
[725]Ibid, at [28].
[726]Ibid, at [35].
[727]Ibid.

apparently is a child".[728] The courts have held that reference to "someone" required a depiction of a flesh and blood person.[729] Thus, in *R v Williams*, Devereaux J stated that even though "Homer Simpson might represent certain faults and triumphs exhibited by many men … the character is not a depiction of someone".[730] Accordingly, he held that the Japanese *manga* in the defendant's possession depicting characters appearing to be minors in a sexual context did not fall within the definition of child exploitation material.[731] However, as can be seen in Table 4, s 207A has been amended and is now consistent with legislation in other Australian jurisdictions in that it uses the word "person".[732] The Queensland Government stated that this amendment was to clarify that Queensland's child exploitation material legislation extends to completely fictitious persons.[733] It is therefore likely that *Williams* would have been decided differently had the offence been committed after the amendment to s 207A.[734]

Although not discussed in any detail, Devereaux J in *R v Williams* also considered the rationale behind prohibiting fictional representations of minors. He commented that the legislative purpose of prohibiting fictional child pornography was "wider than to protect real children who are actually exploited in the making of the material"[735] and observed that the offences dealing with child exploitation under *Criminal Code* "are not offences conveying the idea of child exploitation".[736] This can be supported by the fact that the relevant provisions are found under Chapter 22 of Queensland's *Criminal Code 1899*, titled "Offences Against Morality", which deal with a range of offences that are primarily designed to protect morality.[737] Whether the purpose of the law was to protect morality, and whether this is justified, is discussed in Chapter 8.

---

[728]Emphasis added.
[729]See *R v Campbell* [2009] QCA 128; *R v MBM* [2011] QCA 100; *R v Williams* [2014] QDC 62.
[730]*R v Williams* [2014] QDC 62, at [40].
[731]Ibid, at [10].
[732]*Criminal Law (Child Exploitation and Dangerous Drugs) Amendment Act 2013* (QLD), No. 14, s 13.
[733]Explanatory Memorandum, Criminal Law (Child Exploitation and Dangerous Drugs) Amendment Bill 2012 (Qld), p. 9.
[734]It should be noted that the offence took place before s 207A was amended. The offender was originally charged under the old s 207A, which used the word "someone". This meant that the District Court had to determine his appeal in light of the old s 207A.
[735]*R v Williams* [2014] QDC 62, at [45].
[736]Ibid.
[737]See Schloenhardt, A (2013), *Queensland Criminal Law*, 3rd edn., Oxford University Press, Melbourne, at [1.1.1].

Similarly, when determining the legislative intent in *R v Campbell,* the Queensland Court of Appeal held that it was "the legislature's intent that the definition [of child exploitation material] should extend to the literary description of fictional characters". The Court was particularly persuaded by *Holland* and the Canadian decision of *Sharpe,* believing these decisions lent considerable support to the finding that Queensland's legislation was also intended to proscribe fictional representations of minors in a sexual context. The Court in *Campbell* also seemed to suggest that the purpose of prohibiting fictional child pornography was to protect potential viewers from offensive material, stating:

> "It is more than tolerably clear, at least from the authorities to which I have already referred, that the vice at which legislation of this nature is directed is not limited to the actual exploitation of real people in the production of offending material, but also to a perceived need to 'shield the community' from offensive fictional material which describes the sexual or social abuse of children".[738]

In *R v MBM*, the Supreme Court of Queensland followed the decision of *Campbell.*[739] The defendant in *MBM* was found guilty of possessing child abuse material depicting real children, as well as 139 "images involving childlike cartoon characters involved in incestuous sexual activities with other cartoon characters or with animated humans".[740] The Court stated that because there was no dispute as to whether such images fell within the definition of child exploitation, it was not necessary to re-consider *Campbell.* However, the Supreme Court did comment on what the legislative purpose of prohibiting fictional child pornography may have been, stating that "[f]rom a policy perspective the possession of [fictional] images, it might be thought, would lead to toleration of actual child exploitation".[741] Whether the prohibition can be justified on the Offense Principle is examined in Chapter 8.

Nevertheless, analysis of the Australian case law highlighted that there have been very few cases that involved prosecuting an individual who had no previous convictions

[738] *R v Campbell* [2009] QCA 128, at [46].
[739] *R v MBM* [2011] QCA 100.
[740] Ibid, at [9].
[741] Ibid, at [22].

related to child sexual abuse or who were not also found to have in their possession child abuse material depicting real children. One of those few cases is *Traynor v McCullough,*[742] where the defendant was prosecuted for possessing an English erotic classic publication, *The Pearl*, which described sexual acts between adults and girls as young as 12. At the time *The Pearl* was written, the age of consent in England was in fact 12. The trial judge found the defendant guilty, ordering him to register as a sex offender and placing him on a two-year good behaviour bond. On appeal, the Court took into account several factors to conclude that the defendant should not have been registered as a sex offender. The Court noted that "[t]he offender's antecedents were excellent. At the age of 54 he had no record and he had a history of public service and employment. There is no suggestion that he is a paedophile".[743] Accordingly, on appeal it was ordered that the defendant be removed from the sex-offender registry, stating that "no magistrate could reasonably have failed to find that the applicant did not pose a risk"[744] of committing a sexual offence against a child. The defendant's conviction was quashed, but the two-year good behaviour bond remained in place.[745]

More recently, the United Kingdom has criminalised simple possession of fictional child pornography, which is discussed in the following section.

4.6 United Kingdom

In the United Kingdom, child abuse images depicting real children are dealt with under the *Protection of Children Act 1978.* This Act was introduced as a result of the perception that child pornography was a growing problem, and aimed to protect

[742] *Traynor v McCullough* [2011] TASSC 41. Other cases may include *Johnson v Yore* [2014] (Magistrates Court of Victoria) (1 October 2014). However, as discussed in Chapter 5 at [5.6], Yore's case involved manipulating the images of real children and were therefore not purely fictional. Another case is *Holland v R* [2005] WASCA 140, which involved only fictional stories, but as noted in footnote 687 above, the offender in that case has been reported to be a self-admitted paedophile. It remains unclear from the judgement of *McEwen v Simmons & Anor* [2008] NSWSC 1292 whether the defendant was also being prosecuted for real child abuse material and/or had a history of committing child sexual abuse. Nevertheless, it is important to note that, as not all cases are reported, it could not be determined precisely how many individuals who do not have a history of committing child sexual abuse or were not also found in possession of child abuse material depicting real children have been prosecuted solely for fictional child pornography. This was a limitation of the study mentioned in Chapter 1, at [1.4].

[743] Ibid, at [49].

[744] Ibid, at [54].

[745] Ibid, at [55].

children from sexual abuse and exploitation.[746] Prior to this, child abuse material was dealt with under obscenity legislation. In 1994, the Act was amended to prohibit wholly computer-generated photographs that were indistinguishable from images depicting real children.[747]

In 2007, the Home Office published the *Consultation Paper on the Possession of Non-Photographic Visual Depictions of Child Sexual Abuse*, suggesting that there might be a gap in the law since it did not extend to fictional child pornography.[748] The Home Office admitted:

> "We are not aware of any specific research carried out to ascertain whether there is a direct link between possession of these images and an increased risk of sexual offending against children. However, in discussion with the police and others involved in the protection of children, there is concern that these images fuel the abuse of real children by reinforcing potential abusers' inappropriate feelings towards children. Against this background, the interest in websites featuring animated images of child sexual abuse appears to be growing. These images, particularly as some are in a cartoon format, could easily be obtained for use to help groom victims".[749]

A consultation was undertaken, inviting submissions from individuals and organisations on which of the following options was preferred to deal with fictional child pornography:[750]

(a) extend the existing child pornography laws to include "any visual representation", in order to capture cartoons, drawings, and computer-generated images;

---

[746]Akdeniz, Y (2008), *Internet Child Pornography and the Law: National and International Responses*, Ashgate, Hampshire, p. 19.
[747]*Protection of Children Act 1978* (UK), s 7(8)).
[748]Home Office, Scottish Executive and Northern Ireland Office (2007), *Consultation on Possession of Non-Photographic Visual Depictions of Child Sexual Abuse*, Home Office, London.
[749]Ibid, 6.
[750]Ibid.

(b) introduce a new offence specially criminalising possession of any non-photographic representation of child sexual abuse; or
(c) do nothing.

The Home Office recommended option (b), that is, possession of fictional child pornography should be dealt with under a separate offence.[751] This was to signal that fictional material should not be conflated with real images, since fictional material is not produced as a result of abuse and exploitation of real children.[752] Given the lack of direct harm to children, it was recommended that the new offence should carry considerably lower penalties than the legislation dealing with real images of children.[753]

The Home Office's recommendations were acted upon and in 2010 images of imaginary children in a sexual context were officially prohibited for the first time in the United Kingdom under the *Coroners and Justice Act 2009*.[754] In order to be a prohibited image, it must be grossly offensive, disgusting or otherwise of an obscene character.[755] It must also focus "solely or principally on a child's genital or anal region"[756] or portray any of the sexual activities listed in s 62(7), which generally prohibits material depicting children participating in sexual activities or present while sexual activity takes place. 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".[757] The legislation also prohibits the possession of images of an "imaginary child"[758] or "imaginary person"[759] if it conveys the impression that the person depicted is a person under 18 years of age, or if the dominant impression

[751]Ibid, 7.
[752]Ibid. Also see Internet Watch Foundation (2007), "IWF response to the Government consultation on the Possession of Non-Photographic Visual Depictions", available online, <https://www.iwf.org.uk/accountability/ consultations/non-photographic-visual-depictions>.
[753]Ibid, 9. The maximum penalty for possession of prohibited images of fictitious children is currently three years imprisonment on indictment. However, as these offences are usually dealt with summarily, the maximum term of imprisonment is significantly lower (12 months in England and Wales, but six months in Northern Ireland). See *Coroners and Justice Act 2009* (UK), s 66.
[754]*Coroners and Justice Act 2009* (UK), ss 62-68.
[755]Ibid, s 62(2).
[756]Ibid, s 62(6).
[757]Ibid, s 62(3).
[758]Ibid, s 65(8).
[759]Ibid, 65(7).

conveyed is that the person shown is a child,[760] even if "some of the physical characteristics shown are not those of a child".[761]The maximum penalty for breaching s 62 is lower than child pornography laws, carrying a maximum of three years imprisonment.

There have since been several reported cases where individuals have been prosecuted for possessing obscene comics depicting underage characters. An example of a reported decision is *R v Milsom*, where the defendant was prosecuted for possessing 5,142 "sickening" [762] self-created drawings. [763] The Court made clear that s 62 was not concerned with child protection, but with morality, therefore, it was held that "the court has no power to impose a sentence of imprisonment for public protection for offences under s 62".[764]

However, because s 62 is a summary offence, many decisions are not reported.[765] This means it was not possible analyse these decisions. Also, as noted in Chapter 1, a limitation of this study was being unable to access full judgements of some cases dealing with s 62, despite making several requests to relevant courts in the United

[760]Ibid, s 65(6)(a)-(b)).
[761]Ibid, s 65(6)(b).
[762]*R v Milsom* [2011] EWCA Crim 2325, at [18].
[763]Ibid, at [14].
[764]Ibid, at [14].
[765]Some of the reported case law includes *R v Cutler et al.* [2011] EWCA Crim 2781; *R v Milsom* [2011] EWCA Crim 2325; *R v Palmer* [2011] EWCA Crim 1286; and *R v Streeter* [2012] EWCA Crim 2103. As noted in Chapter 1 at [1.3.1], a limitation was not being able to obtain several British cases that have been reported in the media. Bearing in mind the reliability of media reports, a case that has attracted considerable media attention is that of Robul Hoque. In 2014, Hoque received a suspended sentence of nine months imprisonment for possessing on his computer hundreds of prohibited images in the form of sexually explicit *manga* depicting underage characters. See Edmunds, D.R (2014), "Child Pornography on basis of Manga Cartoon", *Breitbart*, 21 October, available online, <http://www.breitbart.com/london/2014/10/21/british-court-convicts-man-of-possessing-child-pornography-on-basis-of-stash-of-manga-cartoons/>; Kravets, D (2014), "UK Convicts Man Over Manga Sex Images of Children", *Ars Technica*, 21 October, available online, <http://arstechnica.com/tech-policy/2014/10/uk-convicts-man-over-manga-sex-images-of-children/>; Romano, A (2014), "A Man's Manga Collection got him Convicted on Child Porn Charges", *Daily Dot*, 20 October, available online, <http://www.dailydot.com/geek/uk-manga-fan-convicted-for-loli-possession/>. More recent is the prosecution of 20-year-old female, Amy Hickson, who was allegedly charged under the *Coroners and Justice Act 2009* (UK) for possessing fictional child pornography. See BBC News (2015), "Alresford Woman Amy Hickson Admits Animal Porn Charges", *BBC News*, 2 February, available online, <http://www.bbc.com/news/uk-england-hampshire-31092432>; Crone, J (2015), "Woman, 20, Spared Prison Despite Being Caught with More than 600 Indecent Images of Babies, Children and Animals", *Daily Mail*, 7 March, available online, <http://www.dailymail.co.uk/news/article-2983306/Woman-20-spared-prison-despite-caught-600-indecent-images-babies-children-animals.html>.

Kingdom. Nevertheless, sentencing data shows that prosecutions under this section have been increasing significantly per annum.[766]

Unlike the Australian and Canadian legislation, the *Coroners and Justice Act* only prohibits images, not written material.[767] Despite this, written obscene fictional child pornography can be prosecuted under the *Obscene Publications Act,* but only if it is published.[768] The courts in the United Kingdom have interpreted the term "publish" broadly to include private communications. Thus, in *R v Smith (Gavin*), the defendant was convicted under the *Obscene Publications Act* for describing sexually explicit fantasies involving minors with one other person in an online chat room.[769]

It should be noted that, like Canada and the United States, the United Kingdom explicitly protects the right to privacy and freedom of expression. The United Kingdom has done so by incorporating the *European Convention on Human Rights* into domestic legislation.[770] Articles 8 and 10 of the *Convention* provide:

> Article 8: Everyone has the right to respect for his private and family life, his home and his correspondence.

---

[766]It has been reported that in 2011 there were 21 charged, in 2012 there were 179, and in 2013 there were 394 charges. See McGuire, M and Dowling, S (2013), "Chapter 3: Cyber-Enabled Crimes—Sexual Offending Against Children", *Cyber Crime: A Review of the Evidence*, Research Report No. 75, Home Office (UK).

[767]But note that there have been discussions about extending s 62 of the *Coroners and Justice Act 2009* (UK) to written material. This is based on the assumption that written material may also "fuel the fantasies" of offenders and that "the written word is more powerful than the pictures" in inciting actual child abuse. Sir Paul Beresford quoted in BBC News (2012), "Outlaw possession of written accounts of child abuse says MP", *BBC News* (UK), 12 September, available online, <http://www.bbc.co.uk/news/uk-politics-19574487>. The issue of fantasy material and incitement is discussed in Chapter 7.

[768]Section 2(1) of the *Obscene Publications Act 1959* (UK) states that commercial gain is an irrelevant factor in the publication of obscenity.

[769]*R v Smith (Gavin*) [2012] EWCA Crim 398. Another example is the prosecution of Darryn Walker who was charged in 2009 with obscenity after posting stories describing the kidnap, sexual torture, and murder of a pop group, *Girls Aloud*. However, this case is beyond the scope of this dissertation because the offender referred to real people who may suffer psychological harm and be frightened or intimidated if they were to find out about the stories referring to them. See Crown Prosecution Service (2009), "CPS Statement on Darryn Walker", *CPS*, 29 June, available online, <http://www.cps.gov.uk/news/latest_news/cps_statement_on_darryn_walker/>.

[770]*Convention for the Protection of Human Rights and Fundamental Freedoms*, Rome, 4 November 1950, in force 3 September 1953, 213 UNTS 221, Articles 8 and 10. Also see the *Human Rights Act 1998* (UK).

> Article 10: Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

In *Handyside v United Kingdom,* the European Court on Human Rights held that Article 10 "is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also those that offend, shock or disturb the State or any sector of the population".[771] However, as the Court also pointed out, the *European Convention on Human Rights* allows governments to interfere with freedom of expression and privacy for the "protection of … morals".[772] Obscenity is a well-established exception to these freedoms because it is assumed to erode morality.[773] It will nevertheless be interesting to see if the United Kingdom courts will take the same approach as courts in Canada and the United States by ruling that prohibiting self-created fantasy material unduly interferes with individual freedoms.

4.7 Concluding Remarks

This chapter provided a descriptive analysis of the relevant law prohibiting fictional child pornography. It set out the law in Canada and then the United States, highlighting that even though both constitutionally protect freedom of expression, there are exceptions. In Canada, sexually explicit fictional material representing minors is prohibited under child pornography laws. Images depicting a real child are prohibited outright, but there is an exception for private possession of self-created fantasy material. Conversely, the United States does not prohibit sexually explicit fictional material as child pornography, but rather as obscene material, which is a well-established exception to freedom of expression. While private possession of obscene material is protected in the United States, there is no correlative right to access such materials.

---

[771] *Handyside v United Kingdom* (1976) 1 EHRR 737, at [49].
[772] *Convention for the Protection of Human Rights and Fundamental Freedoms*, Rome, 4 November 1950, in force 3 September 1953, 213 UNTS 221, Articles 8(2) and 10(2).
[773] See *R v Hicklin* (1868) LR 3 QB 360; *R v Calder and Boyars Ltd* [1969] 1 QB 151; *Handyside v United Kingdom* (1976) 1EHRR 737); *Knuller (Publishing, Printing and Promotions) Ltd v DPP* [1973] AC 435; *R v Perrin* [2002] EWCA Crim 747.

The main focus of this chapter was on the prohibition of sexually explicit material representing minors in Australia. Such material is dealt with under Australia's child abuse material legislation, which criminalises depictions and descriptions of persons who "appear to be" a minor. The elements of the main offences were provided, followed by an analysis of the legislative intent, and relevant case law. It was hoped analysis of primary sources of law and extrinsic material would shed light on the purpose of prohibiting fictional child pornography in Australia, but this purpose remains ambiguous. Some Members of Parliament seemed to suggest that amendments to child pornography laws were only intended to capture virtual images that appear to depict a real child, or pseudo-images that manipulate the image of a real child, with no mention of obviously fictional material such as cartoons. Despite this, several judges, relying particularly on Canadian case law, have reached the conclusion that Australian legislatures intended to capture obviously fictional representations of minors.

As the United Kingdom is the most recent jurisdiction to introduce legislation criminalising fictional child pornography out of the Western countries concerned, its law was discussed last. Like Australia, the United Kingdom now prohibits private possession of fantasy material. However, an important distinction is that the United Kingdom deals with such material under separate legislation with lower penalties, signalling a lower level of culpability than offences dealing with images produced using real children. The appropriateness of this approach is discussed further in the following chapter, which also provides a critical analysis of the relevant law.

Chapter 5: Critical and Comparative Analysis of the Law Dealing with Fantasy Material

Chapter Contents

5.0 Aims of Chapter

Having provided a descriptive outline of the law in Australia criminalising fictional child pornography in the previous chapter, the aim of this chapter is to critically analyse the law. The analysis draws upon the relevant law in Canada, the United States, and the United Kingdom for comparison, as well as the theories discussed in Chapter 3. The main issues identified in the Australian case law and literature discussed in this chapter are the phrase "appears to be"; the judicial interpretation of a fictional character as a "person"; criticism of the community standards test; the relevance of the artistic merit defence; the criminalisation of private possession; the judicial consideration of individual freedoms; and, lastly, the consequences of being convicted under the child abuse material legislation. The final section of this chapter provides concluding remarks.

5.1 "Appears to be" a Child

As seen in the previous chapter, Australia's child abuse material legislation does not require the "person" depicted or described to actually be a child. It is sufficient if the person "appears to be" a child. Where the image is a depiction of a real person, the reason for taking into consideration the apparent age of the person depicted is

necessary because "[i]t will often be impossible to identify the person [who is the] the subject of pornography, and so impossible to prove the person's age".[774] The inability of prosecutors to locate and prove the age of the person depicted should not permit defendants to evade prosecution.[775]

As noted in Chapter 4, the United States legislation also criminalises sexually explicit depictions of apparently underage characters. In response to the *Ashcroft* decision,[776] the Federal Government enacted § 1466A into the PROTECT ACT of 2003 to specifically target obscene visual images "of any kind, including a drawing, cartoon, sculpture or painting … that depicts an image that is or *appears to be* engaging in sexually explicit conduct and is obscene".[777] There have since been several failed challenges to the constitutionality of § 1466A on the grounds that the phrase "appears to be" is too vague.[778] For example, in *United States v Handley,* which involved sexually explicit *manga* depicting minors, the defendant argued that "because cartoons are a product of one's imagination, the characters portrayed have no age, and any indicators of age may be perceived very differently by different observers and could result in vastly different estimates by different individuals".[779] The Court rejected this argument, stating that the phrase "appears to be" was neither vague nor wholly subjective, stating that:

> "The term 'minor' has a statutory definition contained within the PROTECT Act and has a commonly understood meaning of being an individual under the age of eighteen. The phrase 'appears to be' is not subject to differing interpretations, and the plain meaning of the phrase is clear".[780]

---

[774]*R v Clarke* [2008] SASC 100, at [19].
[775]This was the same rationale for extending the law in the United States to virtual child pornography that is indistinguishable from images depicting real children. The United States Federal Government argued that the inability of prosecutors to prove that the person is real should not allow defendants to evade prosecution. See *Ashcroft v Free Speech Coalition*, 535 U.S. 234 (2002).
[776]*Ashcroft v Free Speech Coalition*, 535 U.S. 234 (2002). See Chapter 4 for discussion of this case.
[777]*Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003* (PROTECT Act), 18 U.S.C § 1466A (emphasis added).
[778]For example see *United States v Whorley*, 550 F.3d 326 (4th Cir. 2008); *United States v Williams*, 553 U.S. 285 (2008); *United States v Handley*, 564 F. Supp. 2d 996 (S.D. Iowa 2008); *United States v Ryan*, No. 2:07-CR-35, (2009) U.S. Dist. LEXIS 53644.
[779]*United States v Handley*, 564 F. Supp. 2d 996 (S.D. Iowa 2008), at [1003].
[780]Ibid, at [1004].

Nevertheless, observers continue to criticise the phrase "appears to be" as overly vague.[781] For example, Greenberg has asked "[h]ow can anyone tell if a character is seventeen years, eleven months and twenty days old, and thereby a minor, or two days older, and therefore no longer a minor and a lawful subject of illustration?".[782] Similarly, Eiland has argued that "there would likely be no discernible difference between a depiction of a 16-year-old child and a 19-year-old adult".[783]

It was noted in Chapter 1 that a few academics have criticised the expansion of Australia's child abuse material legislation to include depictions of characters who appear to be minors on the grounds that it potentially criminalises otherwise innocent Boys Love and YAOI fans.[784] It has therefore been recommended that Australia's legislation abolish the "appears to be" phrase and that instead "the stated age of the character in the narrative itself [should be] accepted".[785] This is problematic in that it would allow creators to avoid liability by merely claiming that a character is an adult, regardless of how child-like it may appear. Indeed, as it will be seen in Chapter 6, comic fans have admitted that creators often claim in the narrative that the character is an adult, but the accompanying depiction of the character unequivocally appears to be a child.

Despite concerns about the "appears to be" phrase, analysis of the case law of the Western countries under review highlighted that ascertaining the apparent age of a fictitious person has not been a major issue in practice.[786] In most cases, the courts were of the view that the characters depicted were undoubtedly young children, such

[781]Eiland, M.L (2009), "From Cartoon Art to Child Pornography", *International Journal of Comic Art*, vol. 11, no. 2, p. 402; Hudson, L (2011), "Why Comics Get Confiscated at the Canadian Border (and How to Protect Yours)", *Comics Alliance*, available online, <http://comicsalliance.com/comic-books-canada-customs/>; Greenberg, M.H (2012), "Comics, Courts and Controversy: A Case Study of the Comic Book Legal Defense Fund", *Loyola of Los Angeles Entertainment Law Review*, vol. 32, no. 2, p. 122. Also see Hornle, J (2011), "Countering the Dangers of Online Pornography: Shrewd Regulation of Lewd Content", *European Journal of Law and Technology*, vol. 2, no. 1, p. 11.
[782]Greenberg, above n 781.
[783]Eiland, above n 781.
[784]Chapter 1, at [1.2.3].
[785]McLelland, M (2010), "Australia's Proposed Internet Filtering System: Its Implications for Animation, Comic and Gaming (ACG) and Slash Fan Communities", *Media International Australia*, no. 134, p. 18.
[786]However, determining the apparent age of a fictional person seems to have been difficult in the Canadian case of *M.K v R* (2010) NBCA 71 where not all the characters depicted in the drawings were clearly minors. The sentencing judge estimated the characters to be anywhere between 15 and 19 years of age. This was despite a disclaimer on the material stating that the person depicted was over the age of 18.

as toddlers or primary school children.[787] In other cases, the author explicitly stated that the characters were children.[788] Additionally, as the apparent age of the person depicted or described is an essential element of the offence, the prosecution must convince the magistrate, judge, or jury beyond reasonable doubt that the person is apparently a minor. [789] If the prosecution fails to meet this standard, an essential element of the offence would not have been proved.

5.2 A Fictional Character is (Not) a "Person"

While the term "person" in its ordinary meaning is generally unproblematic, the case law raises doubt as to whether the law was intended to capture fictitious persons. As seen in the previous chapter, Australia's legislation does not actually state that a fictional character can be regarded as a "person". In contrast, the law in the United States explicitly captures "cartoons"[790] and the United Kingdom's legislation also explicitly states that reference to a "child" includes an "imaginary child".[791]

Given the silence in Australia's legislation and the lack of legislative guidance, it could be argued that Australian legislatures did not intend to capture obviously fictitious characters at all. This has led several observers to criticise the decision of Adams J in *McEwen* to interpret the word "person" broadly as including fictitious persons.[792] Arguably, Adams J could have interpreted the New South Wales child abuse material legislation as only applying to depictions and descriptions of real

---

[787] For example *McEwen v Simmons & Anor* [2008] NSWSC 1292; *R v Carlton* (2009) 197 A Crim R 220; *R v Cowell* [2011] NSWDC 249; *Larkins v R* [2013] NSWDC 159.
[788] For example *R v Carson* [2008] QCA 268; *Stephenson v State of Western Australia* [2010] WADC 160; *Bayliss v R* [2013] VSCA 70; *R v Shelford* [2013] NSWDC 102; *DPP v Gunawardena* [2015] VCC 477; *Taylor v R* [2015] TASCCA 7.
[789] *McEwen v Simmons & Anor* [2008] NSWSC 1292, at [40].
[790] PROTECT Act, 18 U.S.C § 1466A.
[791] *Coroners and Justice Act 2009* (UK), s 65(8).
[792] Anderson, N (2008), "Cowabunga! Simpsons Porn on the PC Equals Child Pornography", *Ars Technica*, 9 December, available online, <http://arstechnica.com/uncategorized/2008/12/cowabunga-simpsons-porn-on-the-pc-equals-child-pornography/>; Kontominas, B (2008), "Simpsons Cartoon Rip-Off is Child Porn: Judge", *Sydney Morning Herald*, 8 December, available online, <http://www.smh.com.au/news/technology/simpsons-cartoon-ripoff-is-child-porn-judge/2008/12/08/1228584707575.html>; Oates, J (2010), "Aussie Man Convicted for *Simpsons* Smut", *The Register*, 28 January, available online, <http://www.theregister.co.uk/2010/01/28/australia_simpsons/>; Pringle, H (2013), "Cartoon Wars: The Interpretation of Drawn Images", in R Frances and D Bandyopadhyay (eds.), *Remapping the Future: History, Culture and Environment in Australia and India*, Cambridge Scholars Publishing, Newcastle, pp. 114-127; New Matilda (2008), "Helen Lovejoy Gets Her Way", *New Matilda*, 12 December, available online, <https://newmatilda.com/2008/12/12/helen-lovejoy-gets-her-way/>.

children. This is because, as he acknowledged, statutory interpretation legislation defines a person as an "individual" who is a "natural person".[793] A fictitious character is a figment of an illustrator's imagination and therefore clearly not a natural person.[794] It can further be argued that:

> "[I]n an illustration of a fictional character, a drawing is not a 'person'; it is a drawing. As the famous Magritte painting of a pipe notes … 'This is not a pipe'; it is a drawing of a pipe. The picture (of the thing) is not the thing it represents".[795]

However, finding that a "person" included fictional characters was also open to the Australian courts. This is because even though the statutory interpretation legislation defines a person as a "natural person", the definition is inclusive and not exclusive.[796]

As emphasised in the previous chapter, the decision of the Australian courts must be viewed in light of the development of the law in other jurisdictions. The Canadian Supreme Court in *Sharpe* held that interpreting the word "person" to include imaginary characters was "in accordance with Parliament's purpose of criminalising possession of material that poses a reasoned risk of harm to children".[797] Evidently, *Sharpe* was highly persuasive on the courts when interpreting the intended scope of Australia's legislation and was explicitly referred to by a number of judges when interpreting Australia's legislation.[798]

The Canadian case law was also influential in highlighting the potential harms created by fictional child pornography. In both *Eli Langer* and *Sharpe,* the courts believed that fictional child pornography was harmful because such material may incite

---

[793]See *Acts Interpretation Act 1901* (Cth), s 2C; *Interpretation Act 1987* (NSW), s 21.
[794]Although in dissent, Gregory J made a similar argument in *United States v Whorley*, 550 F.3d 326 (4th Cir. 2008), which concerned Japanese *manga* depicting minors in a sexual context. He doubted whether fictional characters could be considered persons, arguing that a person is a "living human being … with legal rights and duties" and, because a fictitious character is a figment of an illustrator's imagination, it is not a human being with legal rights that should fall within the scope of the law (at [351]).
[795]Greenberg, above n 781, 168.
[796]See *Acts Interpretation Act 1901* (Cth), s 2C; *Interpretation Act 1987* (NSW), s 21.
[797]*R v Sharpe* [2001] 1 SCR 45, at [38].
[798]See Chapter 4, at [4.5].

paedophiles, reinforce cognitive distortions, and may be used to groom children.[799] These claims are evaluated in Chapter 7, but it seems that Australian courts have accepted that fictional child pornography causes remote harms, such as:

> "… the tendency to 'normalise' exploitative sexual activity involving children and may stimulate a susceptible recipient to engage in sexual activity involving real children".[800]

Thus, in *McEwen,* Adams J stated that interpreting the word "person" to include fictional characters is consistent with the aim of Australian legislatures in preventing harm to real children. This was because it would reduce the amount of material sexualising children "that, as the explanatory memorandum puts it, can fuel demand for material that does involve the abuse of children".[801] Some have defended the decision of Adams J*,* arguing that fictional child pornography can indirectly cause harm to children because:

> "… if material depicting sexual activity with minors, such as that in [the *McEwen*] case, does not fall within the ambit of the [legislation], the behaviour may be normalised and cognitive distortions reinforced. The use of humour and satire arguably makes this even more likely".[802]

Yet, it remains uncertain whether stick figures and characters depicted with some non-human characteristics would be regarded as having sufficient human characteristics for the purposes of the legislation.[803] This includes cartoon characters such as Mickey

---

[799]*Re Paintings, Drawings and Photographic Slides [by Eli Langer]*, [1995] OJ No. 1045; *R v Sharpe* [2001] 1 SCR 45. See Chapter 4 for a discussion of these cases.
[800]*Ponniah v R* [2011] WASCA 105, at [38]. Also see *Holland v R* [2005] WASCA 140; *McEwen v Simmons & Anor* [2008] NSWSC 1292; *Whiley v R* [2010] NSWCCA 53; *R v Hancock* [2011] NTCCA 14; *R v Lanham* [2014] ACTSC 128.
[801]*McEwen v Simmons & Anor* [2008] NSWSC 1292, at [26]. Also see *R v Davis* [2012] QCA 324, at [17].
[802]Public Defender, Paul Winch, quoted in Child Pornography Working Party (2010), *Report of the Child Pornography Working Party*, NSW Department of Justice and Attorney-General, p. 42.
[803]Depicting characters with both human and non-human characteristics is a technique employed by many comic creators. See Eiland, above n 781, 399; Uidhir, C.M, and Pratt, H.J (2012), "Pornography at the Edge: Depiction, Fiction, and Sexual Predilection", in H Maes and J Levinson (eds.), *Art and Pornography: Philosophical Essays*, Oxford University Press, Oxford, pp. 137-157.

Mouse, Donald Duck,[804] or "elves, pixies, and other fantasy creatures".[805] For example, it is questionable whether the following illustrations, which depict characters with human arms and legs, but also with tails and claws, would be considered sufficiently human for the purposes of the legislation.

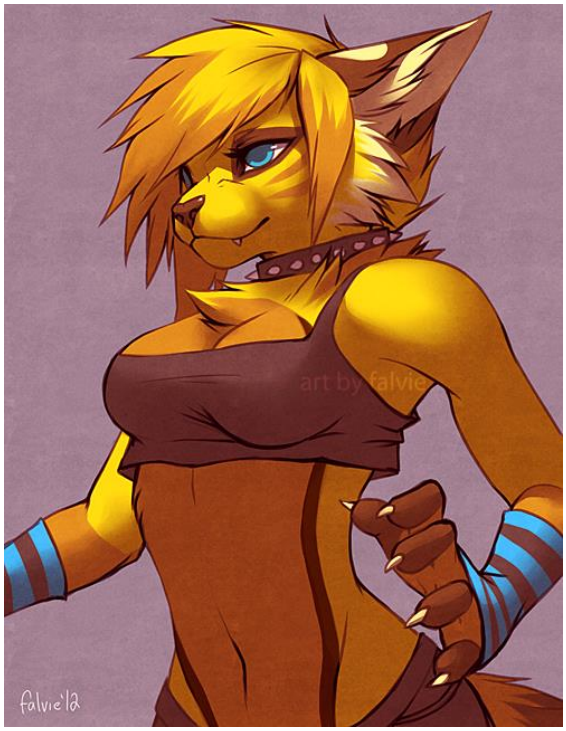


Figure 10: Partly human cartoon[806]

[804]These questions have been raised in some of the literature. For example see New Matilda, above n 792; Healy, J (2008), "Bart Simpson, Child Pornography and Free Speech", *The Lede*, 8 December, available online, <http://thelede.blogs.nytimes.com/2008/12/08/bart-simpson-child-pornography-and-free-speech/?_r=0>; Johnson, M.C (2010), "Freedom of Expression in Cyberspace and the Coroner's and Justice Act 2009", *Procs 3rd International Seminar on Information Law*, Corfu, Greece, 25-26 June, p. 13; Gillespie, A (2015), *Cybercrime: Key Issues and Debates*, Routledge, Oxon, p. 250.
[805]It has been reported in the media that a man in New Zealand was convicted for downloading cartoon videos depicting "elves, pixies, and other fantasy creatures having sex". However, it was also reported that the offender had "previous convictions for indecently assaulting a teenage boy". Steward, I (2013), "Man Sent to Jail for Watching 'Pixie Sex'", *Stuff (NZ)*, 21 April, available online, <http://www.stuff.co.nz/national/crime/8577037/ Man-sent-to-jail-for-watching-pixie-sex>.
[806]Source/image credit: Falvie on DeviantArt, available online, <http://falvie.deviantart.com/art/Storm-of-Roses-341798292>.

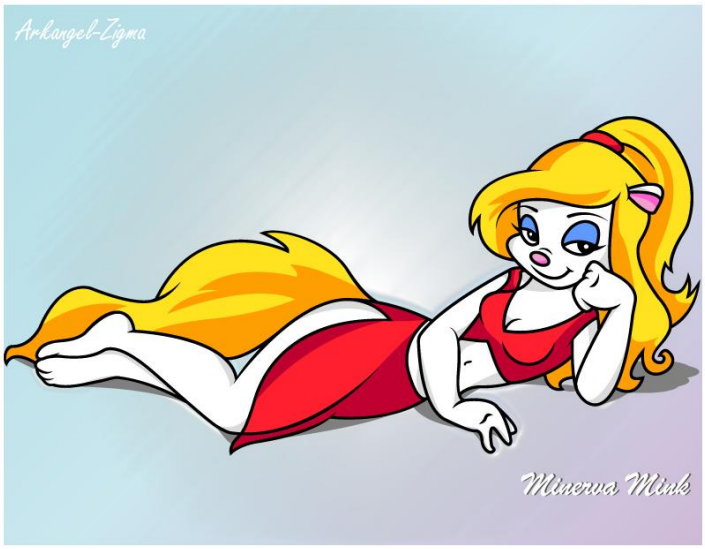


Figure 11: Partly human cartoon[807]

As seen in the previous chapter, the United Kingdom's legislation explicitly states that an image may be prohibited even if "some of the physical characteristics shown are not those of a child".[808] Conversely, Australia's legislation provides no guidance as to whether it captures fictional characters and, if it does, the degree to which characters must appear human. Although Adams J attempted to provide some judicial guidance, it is ambiguous. He stated that merely giving "human characteristics to, say, a rabbit, a duck or a flower … would not suffice if it were fair to say that the subject of the depiction remained a rabbit, a duck or a flower".[809] However, Adams J then stated that "even one which departs from recognisable human forms in some significant respects, may nevertheless be the depiction of a person".[810] Justice Adams also believed that a stick figure could depict a person, but immediately retracted this by saying, that "it might well be a representation of a person. No bright line of inclusion or exclusion can be sensibly described". [811]

Nevertheless, it should be noted that Adams J did point out that since the depiction of a person is an essential element of the offence, the prosecution must prove this beyond

[807]Source:/image credit: Todd18 on DeviantArt, available online, <http://todd18.deviantart.com/art/Minerva-Mink-73470273>.
[808]*Coroners and Justice Act 2009* (UK), s 65(6)(b).
[809]*McEwen v Simmons & Anor* [2008] NSWSC 1292, at [40].
[810]Ibid.
[811]Ibid.

reasonable doubt. This means that "if it were reasonably possible that the depiction is not that of a person, the offence is not proved".[812]

5.3 Criticisms of the Community Standards Test

As discussed in Chapter 4, the relevant provisions in the child abuse material legislation in most Australian jurisdictions require material to be "offensive" to constitute child pornography. The term "offensive" is not defined in the legislation but is synonymous with the term "obscenity", which has been defined by the Australian High Court in *Crowe v Graham*.[813] In this case, the High Court rejected adopting the test of obscenity developed in the English decision of *R v Hicklin*, which defined obscenity as "material that has a tendency to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall".[814] Instead, the High Court held that what is offensive should be understood contextually and judged in terms of the likely degree of offense to the reasonable adult.[815] This is now referred to as the "community standards test", which is used to determine whether certain material is "offensive".[816]

A number of observers have supported the rejection of the *Hicklin* test.[817] The "deprave and corrupt" test was considered elusive, highly subjective, and having the effect of imposing standards of decency from an earlier Victorian society upon contemporary societies.[818] Initially, the community standards test was seen as allowing objectivity in the judicial process.[819] It has been argued that judges particularly welcomed this test because it allowed them to shield themselves from criticism that

[812]Ibid.
[813]*Crowe v Graham* (1968) 121 CLR 375. Also see *Harkin v R* (1989) 38 A Crim R 296.
[814]*R v Hicklin* (1868) LR 3 QB 360, at [371].
[815]*Crowe v Graham* (1968) 121 CLR 375, at [395]-[399].
[816]Australian Law Reform Commission (2011), *National Classification Scheme Review*, Discussion Paper 77, p. 32; Flew, T (2012), "Globalisation, Media Policy and Regulatory Design: Rethinking the Australian Media Classification Scheme", *Australian Journal of Communication*, vol. 39, no. 2, pp. 6-7.
[817]For example see Greenberg, above n 781; Fox, R.G (1981), "Depravity, Corruption and Community Standards", *Adelaide Law Review*, vol. 7, no. 1, pp. 66-78; LaSelva, S.V (1987), "Controlling Obscenity: What Difference Does the Charter of Rights Make?", *Journal of Canadian Studies*, vol. 22, no. 3, pp. 20-34; Boyce, B (2008), "Obscenity and Community Standards", *Yale Journal of International Law*, vol. 33, no. 2, p. 314.
[818]Fox, above n 817, 68; LaSelva, above n 817, 24; Boyce, above n 817, 368.
[819]LaSelva, above n 817, 24.

what they deemed to be offensive was based on personal opinion. [820] This was because judges could claim that they were simply enforcing the standards the contemporary community had set for itself. [821]

The legislation in each Australian jurisdiction requires ascertaining community standards by reference to the "reasonable person", but this term is also undefined. Devlin tells us the reasonable person is "not to be confused with the rational man. He is not expected to reason about anything and his judgement may be largely a matter of feeling".[822] The reasonable person is, therefore, the "man in the street [or] … in the Clapham omnibus … [or] in the jury box".[823] Australian courts seem to have adopted Devlin's definition, but have preferred to define the hypothetical reasonable person as one who rides the "Bondi tram".[824] In *Ball v McIntyre*, Kerr J provided further judicial guidance, stating:

> "I recognise that different minds may well come to different conclusions as to the reaction of the reasonable man in situations involving attitudes and beliefs and values in the community, but for my part I believe that the so-called reasonable man is reasonably tolerant and understanding and reasonably contemporary in his reactions". [825]

Similarly, in *Phillips v Police,* Debelle J described the reasonable person as "ordinary, decent-minded, but not unduly sensitive".[826] This indicates that the courts take into consideration an essential condition suggested by Feinberg, that is, whether the offense occurs only because of a person's "abnormal susceptibility".[827]

---

[820]Ibid.
[821]Ibid.
[822]Devlin, P (1968), *The Enforcement of Morals*, Oxford University Press, London, p. 15.
[823]Ibid.
[824]*Nomikos Papatonakis v Australian Telecommunications Commission* (1985) 156 CLR 7, at [36].
[825]*Ball v McIntyre* (1966) 9 FLR 237, at [245].
[826]*Phillips v Police* (1994) 75 A Crim R 480, at [486]. Also see *Connolly v Willis* [1984] 1 NSWLR 373; *Police v Butler* [2003] NSWLC 2; *Beck v NSW* [2012] NSWSC 1483.
[827]Feinberg, J (1985), *Offense to Others: The Moral Limits of the Criminal Law*, Vol. II, Oxford University Press, New York, p. 35. See Chapter 3, at [3.2.1].

However, several observers have questioned whether an identifiable community standard exists, especially in a pluralistic society like Australia.[828] A recent example is illustrated by the case of Australian artist, Bill Henson.[829] In 2008, there was an explosive reaction to photographs he had taken that depicted a nude 13-year-old girl[830] after they had been displayed at an art exhibition in Sydney.[831] On one hand, some observers, including some members of parliament, denounced Henson's photographs as child pornography and accused him of being a paedophile masquerading as an artist.[832] On the other hand, Henson's defenders claimed his photographs were tasteful art exposing the vulnerable emotional states of childhood and adolescence.[833] Thus, it is unclear whether Henson's photographs are offensive to the "reasonable" person and whether the images should be classified as child pornography. Nevertheless, the prosecution eventually decided to drop the charges against Henson[834] after the Classification Board rated his photographs "PG".[835] Criticisms of the community

[828]For example see Harris, B (2005), "Censorship: A Comparative Approach Offering a New Theoretical Basis for Classification in Australia", *Canberra Law Review*, vol. 8, pp. 25-58; Libertus (2010), "Australia's Classification (Censorship) System", *Libertus.net*, 11 April, available online, <http://libertus.net/censor/clscensor.html>; Bravehearts (2011), *Submission to the Select Legal and Constitutional Legal and Constitutional Committees: Inquiry into the Australian Film and Literature Classification Scheme*, Prepared by Bravehearts Inc., p. 6; Chalmers, M (2013), "Who Defines Community Standards?", *New Matilda*, 27 August, available online, <https://newmatilda.com/2013/08/27/who-defines-community-standards/>.

[829]For an extended account of the Bill Henson controversy see Marr, D (2008), *The Henson Case*, Text Publishing, Melbourne.

[830]There have been inconsistencies in the literature, with some reporting that the model depicted was 12-years-old at the time of being photographed.

[831]It should be noted that the police were acting in response to complaints from some members of the public who questioned the legality of Henson's photographs. However, it was ultimately in the discretion of the police to lay charges.

[832]It has been reported that former Australian Prime Minister, Kevin Rudd, described Henson's photographs as "absolutely revolting". Kennedy, L, and Narushima, Y (2008), "Henson Refuses to Name Model", *Sydney Morning Herald*, 29 May, available online, <http://www.smh.com.au/news/arts/henson-refuses-to-name-model/2008/05/28/1211654124098.html>. Also see Bravehearts, above n 828; Western Australia, Child Pornography and Exploitation Material and Classification Legislation Amendment Bill 2009, Second Reading Speech, 24 June 2010.

[833]For example see Danielsen, S (2008), "These Photographs aren't Sexual: They're Just Human", *The Guardian*, 27 May, available online, <https://www.theguardian.com/artanddesign/artblog/2008/may/27/thesephotographsarentsexual>; Faulkner, J (2011), "Vulnerability and the Passing of Childhood in Bill Henson: Innocence in the Age of Mechanical Reproduction", *Parrhesia*, vol. 11, pp. 44-55.

[834]This led to criticism of the police officers involved in Henson's case for not consulting the Classification Board before deciding to lay charges. See Meagher, D (2009), "Investigating 'Indecent, Obscene or Pornographic' Art: Lessons from the Bill Henson Controversy", *Media and Arts Law Review*, vol. 14, no. 3, pp. 292-307.

[835]"PG" stands for "Parental Guidance". The content of material rated PG is considered to be of mild impact. Such material can be openly sold in Australia, but the Australian Classification Board recommends that it should not be viewed by persons under 15 years of age without guidance from parents or guardians. See Australian Classification Board, *Classification Categories Explained*,

standards test and the Henson case are further discussed in Chapter 8 when investigating whether prohibiting fictional child pornography can be justified on the theory of Legal Moralism.

As will be discussed in the next section, the Henson case also raises the question of whether artistic merit should be a relevant consideration when determining whether certain material should be deemed child pornography.

5.4 Relevance of Artistic Merit

In response to the Bill Henson controversy, the New South Wales Government removed the artistic merit defence, believing that it was anomalous in legislation designed to protect children from harm. [836] It was argued that an image that involved the abuse and exploitation of a child should not be protected, regardless of artistic merit.[837] Yet, as mentioned in Chapter 4, this defence has been retained in several Australian jurisdictions.[838] This raises the question of why artistic merit continues to be a consideration in these jurisdictions when the image is a product of child sexual abuse and exploitation.[839]

Conversely, when the material is obviously fictional, taking its artistic merit into consideration seems highly appropriate, particularly because many fictional works are produced and consumed for genuine artistic purposes.[840] Notably, the United States Supreme Court in *Ashcroft* suggested that artistic merit should be considered when the material is fictional.[841] This was because failure to do so may lead to the prohibition of many valuable works describing minors in a sexual context, such as Shakespeare's

---

Australian Government, available online, <http://www.classification.gov.au/Guidelines/Pages/Guidelines.aspx>.

[836]Child Pornography Working Party (2010), *Report of the Child Pornography Working Party*, NSW Department of Justice and Attorney-General, pp. 23-24. The artistic merit factor is now only taken into account when deciding whether a reasonable person would regard the material in question as being, in all the circumstances, offensive. See *Crimes Act 1900* (NSW), s 91FB(2).

[837]Ibid. Also see Bravehearts, above n 828.

[838]See Chapter 4, at [4.3.6].

[839]As noted in Chapter 4, the United States Supreme Court, in *New York v Ferber*, 458 U.S 747 (1982), stated at [761] that "[i]t is irrelevant to the child [who has been abused] whether or not the material . . . has a literary, artistic, political or social value".

[840]Gillespie has claimed that "it can be argued that *hentai* is entertainment rather than sexual gratification". Gillespie, above n 804, 251.

[841]*Ashcroft v Free Speech Coalition*, 535 U.S. 234 (2002).

Romeo and Juliet, Alice Walker's *The Color Purple,* and Vladimir Nabokov's *Lolita*.[842] Similar concerns were expressed by Daubney J in the Australian case of *R v Campbell*, stating:

> "I presently see no reason why a piece of literature that describes someone, being a fictional character, who is a child under 16 years in a sexual context might not fall within the definition of 'child exploitation material'. True it is that, in the wider context of the definition, such an approach would render literary works which portray children in offensive or demeaning contexts, or being subject to abuse, cruelty or torture (such as Charles Dickens' 'Oliver Twist'), or in a sexual context (such as Nabokov's 'Lolita'), prima facie susceptible to being characterised as 'child exploitation material' if the description in each case is likely to cause offence to a reasonable adult".[843]

However, the potential criminalisation of classic literary works in Australia should not be overstated. Unlike the United States' federal child pornography laws, Australia's legislation requires the material to be "offensive" to the "reasonable person". Presumably, classic literature, such as *Romeo and Juliet,* that describes minors in a sexual context would not offend a person who is "reasonably contemporary in his [or her] reactions".[844] Therefore, it is unlikely such material would be deemed as child pornography under Australian law.

Nevertheless, the problem is that the law may disadvantage contemporary creators of unconventional literature and drawings. This is because, when a person is prosecuted for self-produced fictional material depicting or describing minors in a sexual context, the material is being scrutinised by police and other officials who are trained in determining child pornography and "are not known for having a background in literature, let alone in a perverse literary aesthetic".[845] Additionally, it often takes years for works to reach the status of a classic and sometimes the social value of such work is not realised until well after the creator has passed away. It is for this reason that

[842]Ibid, at [247]-[248]. Also see *United States v Whorley*, 550 F.3d 326 (4th Cir. 2008), at [348]-[349].
[843]*R v Campbell* [2009] QCA 128, at [46].
[844]*Ball v McIntyre* (1966) 9 FLR 237, at [245].
[845]Bell, S (2001), "Sharpe's Perverse Aesthetic", *Constitutional Forum*, vol. 12, no. 1, p. 31.

Gregory J in *Whorley* questioned whether writers of iconic books, such as Nabokov, the author of *Lolita,* would have been prosecuted in modern times if they had "e-mailed the sections of their work that described the sexual relationship between the minor and the adult to a willing recipient".[846]

The importance of fantasy material for fans for artistic reasons is considered further in Chapter 8.

5.5 Criminalising "Private Possession"

Australia's legislation criminalises private possession of child pornography. This includes material accessed online and material stored on digital communication devices, such as mobile phones.[847] Where the image depicts a real child, this is highly appropriate because, as noted in Chapter 2, mere possessors play a significant role in creating and perpetuating the market for child abuse images.[848] Australian legislatures and the courts have recognised that possession of real child abuse material is not a "victimless crime" [849] since the images "cannot come into existence without exploitation and abuse of children somewhere in the world".[850] In contrast, simple possession of purely fictional child pornography can be seen as a victimless crime,[851] which has led the New South Wales Council for Civil Liberties to argue:

---

[846] *United States v Whorley*, 550 F.3d 326 (4th Cir. 2008), at [349] (Gregory J dissenting).
[847] For a discussion highlighting the complexity of determining what constitutes "possession" of child pornography in the digital context see Clough, J (2009), "Now You See It, Now You Don't: Digital Images and the Meaning of 'Possession'", in D.S Wall (ed.), *Crime and Deviance in Cyberspace*, Ashgate, Surrey, pp. 273-307.
[848] Quayle, E, and Taylor, M (2002), "Paedophiles, Pornography and the Internet: Assessment Issues", *British Journal of Social Work*, vol. 32, no. 7, p. 873; Quayle, E, and Taylor, M (2003), *Child Pornography: An Internet Crime*, Routledge, London, p. 24; Rogers, A (2008), "Child Pornography's Forgotten Victims", *Pace Law Review*, vol. 28, no. 4, pp. 847-863.
[849] *R v Jones* [1999] WASCA 24, at [9]; *Ponniah v R* [2011] WASCA 105, at [36].
[850] *R v Booth* [2009] NSWCCA 89, at [42].
[851] Cisneros, D (2002), "Virtual Child Pornography on the Internet: A 'Virtual' Victim?", *Duke Law & Technology Review*, available online, <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1060&context=dltr>; Strikwerda, L (2011), "Virtual Child Pornography: Why Images do Harm from a Moral Perspective", in C Ess and M Thorseth (eds.), *Trust and Virtual Worlds: Contemporary Perspectives*, Peter Lang, New York, p. 140.

> "Australian child pornography legislation also enacts 'thought crimes' by criminalising the expression of child pornography created from an individual's own imagination and kept exclusively for his or her own personal use".[852]

As seen in Chapter 4, the courts in Canada and the United States have held that the state cannot prohibit private possession of fictional child pornography, as this unduly interferes with freedom of expression and privacy. Thus, the Supreme Court in *Sharpe* made an exception to the child pornography laws that protected the right of individuals to privately possess self-created sexually explicit fantasy material of minors, "such as personal journals and drawings, intended solely for the eyes of their creator".[853] However, the courts have stressed that the private possession exception does not extend to a person with "any intention to distribute, publish, print, share or in any other way disseminate these materials".[854] It has also been emphasised that the right of possession does not create a correlative right to receive obscene material.[855] Accordingly, a number of individuals have been prosecuted for accessing or receiving sexually explicit *manga* by downloading it online, or importing it into the country.[856]

For instance, in the Canadian case of *R v Chin*, the 26-year-old offender pleaded guilty to importing *manga* from Japan that was deemed child pornography.[857] These comics could be openly purchased in Japan and the United States, which led the defendant to mistakenly believe they were legal in Canada.[858] The Court noted several factors indicating that the defendant did not pose a genuine risk of harm to children, including that this was his first offence and that there was nothing secretive about his behaviour

---

[852]New South Wales Council for Civil Liberties, Submission to Committee Secretary, *Australia's Ratification of the Optional Protocol to the Convention on the Rights of the Child*, 2 November 2005, p. 2.
[853]*R v Sharpe* [2001] 1 SCR 45, at [128].
[854]Ibid.
[855]See Chapter 4. In particular see *United States v Mees*, (2009) No. 4:09CR00145 ERW; *United States v Reidel*, 402 U.S. 351 (1971); *United States v Thirty-Seven Photographs*, 402 U.S. 363 (1971); *United States v Extreme Associates*, 431 F.3d 150 (3d Cir. 2005); *United States v Whorley*, 550 F.3d 326 (4th Cir. 2008); *United States v McCoy*, 678 F. Supp. 2d 1336 (M.D. Ga. 2009).
[856]For example *R v Chin* [2005] AJ No. 1712; *United States v Whorley*, 550 F.3d 326 (4th Cir. 2008); *United States v Handley*, 564 F. Supp. 2d 996 (S.D. Iowa 2008); *R v Matheson*, Notice of Application, Ontario Court of Justice (2012); *R v Mahannah* [2013] OJ No. 6330.
[857]*R v Chin* [2005] AJ No. 1712.
[858]Ibid, at [39].

in obtaining the comics.[859] However, the Court seemed to have been persuaded by the prosecutors argument that:

> "Some of the people, and I'm not saying necessarily Mr. Chin, but some of the people who see this material start to think that this is normal, they normalize it, they get worked up by it and then it progresses from there. Maybe to the point where they're looking at pictures of real children or maybe or maybe to the point where they're acting out on it".[860]

The offender was therefore sentenced to 12 months imprisonment, which was allowed to be served in the community subject to conditions.[861] This included the condition that "he will not possess or use any personal computer, modem or other device capable of accessing the internet. He will in fact not access the internet".[862]

The effect of an outright ban of possession in Australia and the limited right of possession in the United States can be illustrated by *Whiley*[863] and the United States case of *Platz*.[864] The facts of these cases are strikingly similar in that both involved a prisoner who was charged with creating obscene, sexually explicit fictional material of minors.[865] The only difference is that the offender in *Platz* had shared his drawings with another inmate, which gave rise to the charge of "knowingly producing and distributing a visual depiction of a minor engaged in sexually explicit conduct that was obscene", in violation of § 1466A.[866] At first instance, the offender was sentenced to

---

[859]Ibid. The defendant had used his own name, his own credit card, and had the material shipped to his home address.
[860]Ibid, at [30].
[861]Ibid, at [75].
[862]Ibid, at [79].
[863]*Whiley v R* [2010] NSWCCA 53. See Chapter 4, at [4.5] for a discussion of this case.
[864]*United States v Platz*, 2015 U.S. Dist. LEXIS 80789.
[865]*Whiley v R* [2010] NSWCCA 53.
[866]*United States v Platz*, 2015 U.S. Dist. LEXIS 80789, at [2]. A similar case in the United States has been reported in the media, involving two men serving time in prison for child pornography. One had produced a comic book depicting fictitious children in a sexual context and shared it with another inmate, giving rise to a charge of distributing obscenity. The defendant who produced the drawings was allegedly "sentenced to an additional 10 years in prison for possession of the drawings, twice as much time as the 5-year sentence he was already serving for a New York conviction for the possession and distribution of child pornography". See Gomez, B (2015), "Two Federal Prisoners Face Additional Time for Possession of Comics", *CBLDF*, 20 November, available online, <http://cbldf.org/2015/11/two-federal-prisoners-face-additional-time-for-possession-of-comics/>; Krause, K (2015), "Two Imprisoned for Child Porn Face more Time for Obscene Comics", *Dallas*

three months imprisonment and a lifetime term of supervised release, but the supervised release was reduced to three years on appeal.[867] Conversely, the offender in the Australian case of *Whiley* had not shared his stories with anyone else, which resulted in his sentence being reduced on appeal from four years imprisonment to 12 months.[868] Although it was not stated in *Platz* whether the offender had a history relating to child abuse material, it was emphasised in the previous chapter that the offender in *Whiley* had committed sexual abuse on real children. Therefore, the decision to prosecute *Whiley*, and his subsequent conviction, must be viewed in context.

Another issue is the criminalisation of apparently private communications engaged in through electronic devices between consenting adults under child pornography laws.[869] This privacy is only apparent because law enforcement agencies can now monitor communications expressed via digital technology, which has led to the identification and subsequent prosecution of some individuals who have expressed sexually explicit fantasises describing minors.[870] The courts in Australia, Canada, the United States, and the United Kingdom have interpreted these conversations as "publications" and as constituting dissemination, even if the audience was only one other person.[871] For example, in the Australian case of *Jarrold* the offender was convicted for engaging in online conversations that were purely from "fantasies from the offender's mind, rather than actual acts that ever happened to any actual child".[872] Nevertheless, there was a concern that the offender's:

> "… perverted thoughts … could have been saved by the receivers onto a computer hard disk of their own and perhaps been further disseminated to others interested in this perverted material, or even worse, published generally on the

---

Morning News, 17 November, available online, <http://www.dallasnews.com/news/crime/headlines/20151117-two-imprisoned-for-child-porn-face-more-time-for-obscene-comics.ece>.

[867] *United States v Platz*, 2015 U.S. Dist. LEXIS 80789, at [9].

[868] *Whiley v R* [2010] NSWCCA 53, at [72].

[869] See especially Gillespie, A (2014), "Obscene Conversations, the Internet and the Criminal Law", *Criminal Law Review*, no. 5, pp. 350-363.

[870] For example see *United States v Whorley*, 550 F.3d 326 (4th Cir. 2008); *R v Jarrold* [2010] NSWCCA 69; *R v Smith (Gavin)* [2012] EWCA Crim 398; *R v Hancock* [2011] NTCCA 14; *Keith v R* [2014] NSWCCA 124; *United States v Valle*, 301 FRD 53 (SDNY 2014); *Martin v R* [2014] NSWCCA 124.

[871] Ibid.

[872] *R v Jarrold* [2010] NSWCCA 69, at [49]. However, since the offender had committed child sexual abuse on a real child previously, it is questionable whether the conversations were purely fantasy.

internet available to anyone who sought it out. For those reasons in my view, there must be some custodial sentence".[873]

It has been claimed, somewhat exaggeratedly, that the criminalisation of fictional child pornography unduly interferes with the right to fantasise in cyberspace.[874] Simpson has argued that as "private thoughts can now be scrutinised in cyberspace that permits the state to now assess whether the thoughts and ideas possessed by citizens are appropriate".[875] Seto has observed that:

> "Pre-internet, mental health evaluators had to infer the contents of someone's sexual fantasies because our understanding was constrained by a simple fact: Only the perpetrator really knew what was in his mind, and he might not tell us the truth, for very understandable reasons given the legal consequences. (Who would choose to admit to atypical sexual fantasies when facing years in prison?) The internet has changed this, so that we can now gain valuable insight into someone's sexual fantasies and desires by examining the pornography he views online, the websites he visits, and the content of his emails, instant messages, and message board posts".[876]

Nevertheless, the likelihood of individuals being prosecuted for private communications describing sexually explicit fantasies of minors should not be overstated. Krone has highlighted the specific ways in which individuals may be apprehended for fantasy material kept privately on a computer, including:

> "… by tip-off from someone else with access to the computer or data storage device; in the course of searching a computer for evidence of other offences; when a computer is being serviced; when a computer is stolen; or even when a computer has been accessed remotely by a third party".[877]

---

[873]*R v Jarrold* [2010] NSWCCA 69, at [50].
[874]Simpson, B (2009), "Controlling Fantasy in Cyberspace: Cartoons, Imagination and Child Pornography", *Information & Communications Technology Law*, vol. 18, no. 3, pp. 255-271.
[875]Ibid, 263-264.
[876]Seto, M.C (2015), "Crossing the Line: Distinguishing Fantasy and Intent in Sexual Crimes", *Medium*, 15 May, available online, <https://medium.com/@MCSeto/crossing-the-line-distinguishing-fantasy-and-intent-in-sexual-crimes-dfe5daf4631b>.
[877]Krone, T (2004), "A Typology of Online Child Pornography Offending", *Trends & Issues in Criminal Justice*, Australian Institute of Criminology, Canberra, Report No. 279, p. 4.

Thus, the prosecution of individuals for private fantasy material may be seen as exceptional. It is also important to note that most of the offenders prosecuted in Australia for sharing sexually explicit fantasises describing minors admittedly had a sexual interest in children and were not merely engaging in "innocent" fantasy role-play.[878] However, since these materials do not involve a real child, it is questionable whether the law should intervene. The defensibility of criminalising the dissemination and private possession of fantasy material is discussed further in chapters 7 and 8.

5.6 The (Ir)Relevance of Individual Freedoms

The cross-jurisdictional analysis of the relevant case law made it obvious that individual freedoms have not been a central theme in Australian cases dealing with fictional child pornography. This can be contrasted with the case law from Canada and the United States, which has given considerable weight to freedom of expression and privacy. The reason for this may be the lack any explicit guarantee of freedom of expression and privacy in the Australian Constitution.[879] It was this absence that led Adams J in *McEwen* to comment that the applicability of the Canadian case law is limited in "the interpretation of Australian legislation, given our rather different legal context".[880]

Nevertheless, the position in Victoria *may* be different where the material is self-created and kept privately in light of Redlich J's judgement in *R v Quick.*[881] In this case, a primary school teacher was prosecuted under Victoria's child pornography laws for producing and possessing written stories that described engaging in sexual acts with some of his former students. The stories were discovered after a tradesman, who had attended the defendant's home, informed the police that he had seen a large volume of handwritten material where the defendant had "recorded his intimate thoughts and feelings about individual female pupils whom he had taught… much of

[878]For example *R v Jarrold* [2010] NSWCCA 69; *R v Hancock* [2011] NTCCA 14; *R v Shelford* [2013] NSWDC 102; *Keith v R* [2014] NSWCCA 124.
[879]Note, however, the Australian High Court has recognised an implied freedom of political communication from the text of the Australian Constitution. See *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.
[880]*McEwen v Simmons & Anor* [2008] NSWSC 1292, at [24].
[881]*R v Quick* [2004] VSC 270. Also see *R v XB* [2009] VSCA 51.

the descriptions being of a very explicit sexual nature".[882] Justice Redlich, who relied heavily on the Canadian Supreme Court's decision in *Sharpe*, refused to extend the law to private possession.[883] In dismissing the charges against the defendant, Redlich J stated that "clear and unmistakable language is required before I should impute an intention to the legislature to interfere with the citizen's freedom to privately record his or her thoughts for their private use".[884] Justice Redlich believed that criminalising private possession of one's self-created works of the imagination "would fall outside Parliament's purpose, producing unintended consequences. It would involve a curtailment of the freedom of each individual to record their thoughts".[885]

It should be noted that *Quick* is not directly relevant to this discussion as the stories referred to real children and, therefore, were not the type of purely fictional material of concern in this dissertation. However, there was no evidence the defendant had committed child sexual abuse and none of the students were harmed psychologically, as they were unaware of the defendant's stories.[886]

Since *Quick,* the Victorian Parliament has enacted legislation protecting individual freedoms—the *Charter of Human Rights and Responsibilities Act 2006.* With the exception of the Australian Capital Territory,[887] no other Australian jurisdiction has enacted legislation guaranteeing individual freedoms. Section 15(2) of the Victorian *Charter* provides that:

Every person has the right to freedom of expression which includes the freedom to seek, receive and impart information and ideas of all kinds, whether within or outside Victoria and whether:

[882]Ibid, at [5].
[883]Ibid, at [83]-[88].
[884]Ibid, at [95].
[885]Ibid.
[886]Ibid, at [11].
[887]See *Human Rights Act 2004* (ACT).

(a) orally; or
(b) in writing; or
(c) in print; or
(d) by way of art; or
(e) in another medium chosen by him or her.

The *Charter* also protects the right to privacy, stating that a "person has a right not to have his or her privacy, family, home or correspondence unlawfully or arbitrarily interfered with".[888]

A legislative charter of rights does not offer the same protection as constitutionally entrenched rights because its provisions can be easily overridden by Parliament.[889] Despite this, the *Charter* may allow Victorian courts to give greater weight to freedom of expression and privacy in cases dealing with fictional child pornography. Yet, in more recent cases, such as *DPP v Gunawardena,* which was heard in the County Court of Victoria in 2015, it seems that the Victorian *Charter* had no influence at all.[890] This may have been because the *Charter* was not raised to defend the charges relating to the offender's possession of ten images in the form of "anime, cartoons, or comics et cetera depicting children engaged in sexual poses or activity".[891] It would have also been futile to raise the *Charter* to defend the thousands of videos and images of real children being sexually abused and exploited that were found in the offender's possession.

In contrast, the *Charter* was influential in the 2014 case of artist Paul Yore, where the presiding Magistrate held that Victoria's child pornography provisions should, as far as possible, be interpreted in a way that is compatible with human rights.[892] The magistrate held that Yore was "entitled to the right enshrined in the *Charter* to impart views and opinions through his art form, even where the imagery he uses will be confronting or

[888] *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 13(a).
[889] See especially Williams, G (2004), *The Case for An Australian Bill of Rights: Freedom in the War on Terror*, UNSW Press, Sydney.
[890] *DPP v Gunawardena* [2015] VCC 477. It also seems that the *Charter* was not given any consideration in the following cases that involved some material which was fictional: *R v XB* [2009] VSCA 51; *DPP v Ward* [2014] VCC 314; *DPP v Cabo* [2016] VCC 579.
[891] *DPP v Gunawardena* [2015] VCC 477, at [10].
[892] *Johnson v Yore* [2014] (Magistrates Court of Victoria) (1 October 2014), at [20].

offensive to some members of the public".[893] Although it did not involve a real child in its production, Yore's work was not purely fictional. It was a collage incorporating:

> "… a large number of collage images, phallic and pornographic, toys, balloons, electric lights, images of fertility, numerous dildos; all interspersed with images from popular culture, including multiple depictions of Justin Bieber".[894]

To produce the collage, Yore manipulated images of real children by superimposing their faces on images of male bodies performing sex acts, thereby meeting the definition of pseudo-child pornography.[895] It is therefore questionable why freedom of artistic expression was given greater weight than the rights of the children whose image had been manipulated.[896] This is particularly because s 17(2) of the Victorian *Charter* states that "[e]very child has the right, without discrimination, to such protection as is in his or her best interests and is needed by him or her by reason of being a child". It will nevertheless be interesting to see whether the *Charter* influences future cases dealing with purely fictional child pornography in Victoria and whether this will be persuasive on the courts in other Australian jurisdictions.

5.7 Consequences of Conviction

As seen in Chapter 4, Australia's legislation does not distinguish between real and fictional material. Accordingly, offenders convicted for fictional child pornography are subject to the same penalties as offenders convicted for child abuse material depicting real children. This seems to be contrary to the general principle that the greater degree of wrongdoing justifies greater punishment, and fails to recognise the harm inflicted on the child victims.[897] In a number of cases the appeal courts were

[893]Ibid, at [26].
[894]Ibid, at [20].
[895]See "Terminology" in Chapter 1, at [1.1].
[896]In Canada, the United States, and the United Kingdom, all of which constitutionally protect freedom of expression, pseudo-child pornography, which involves manipulating the image of a real child, is generally treated as an exception to freedom of expression.
[897]See Greenawalt, K (1983), "Punishment", *Journal of Criminal Law & Criminology*, vol. 74, no. 2, pp. 347-348; Ashworth, A (2008), "Conceptions of Overcriminalization", *Ohio State Journal of Criminal Law*, vol. 5, no. 2, p. 410; New South Wales Law Reform Commission (2013), *Sentencing*, Report 129, Sydney.

rectifying "manifestly excessive"[898] sentences that did not take into account the reduced level of criminality when the material is purely fictional. For example, in *Larkins v R,* the New South Wales District Court held that it was inappropriate for the sentencing judge to have imposed on the offender the same sentence for possessing on his mobile phone "cartoons showing Bart and Lisa having sex as he did for possessing on that thumb drive videos showing a number of real children having sex".[899]

The label attached to an offence also plays a significant symbolic function in the criminal law; the label symbolises the degree of blame that should be attributed to the offender, which affects the way the community treats the offender.[900] A label that inaccurately represents the degree or nature of the offender's wrongdoing may result in the offender being unfairly stigmatised.[901] As noted in Chapter 4, many jurisdictions have abandoned the term "child pornography" and instead are labelling such offences as "child abuse material" and "child exploitation material". This is highly appropriate when the image involves the abuse and exploitation of a real child. However, it seems anomalous to label offences involving purely fictional material as such, since no child was abused or exploited in its production. In the United Kingdom, it has been argued:

> "[I]n order to reflect the degree of wrongdoing, there should be a clear demarcation between the labels attached to producers of material which causes children to suffer harm, and those who create completely computer-generated material that does not exploit real children".[902]

Indeed, as seen in Chapter 4, the United Kingdom has recognised the importance of dealing with fictional child pornography under a separate offence that carries lower penalties than those offences involving images of real children to better reflect the level of wrongdoing of offenders. Australia should also consider dealing with fictional

[898] *Whiley v R* [2010] NSWCCA 53, at [72].
[899] *Larkins v R* [2013] NSWDC 159, at [19].
[900] Hence why there the there is distinction between murder and manslaughter; while both involve homicide, murder carries greater stigma and to merge the two together would signal that law did not consider murder as a specifically serious offence. See Chalmers, J and Leverick, F (2008), "Fair Labelling in Criminal Law", *Modern Law Review,* vol. 71, no. 2, p. 227.
[901] Ibid, 226.
[902] Ost, S (2009), *Child Pornography and Sexual Grooming: Legal and Societal Responses*, Cambridge University Press, Cambridge, p. 221.

child pornography under a separate offence; this recommendation is further elaborated in the final chapter of this dissertation.

5.8 Concluding Remarks

This chapter provided a cross-jurisdictional and critical analysis of the legislation prohibiting fictional child pornography in Australia. It identified and discussed several issues concerning Australia's criminal laws prohibiting fictional child pornography. The first issue addressed was the "appears to be" phrase. As discussed, defendants in the United States have repeatedly challenged this phrase and it has been subject to much criticism in the literature for being too vague. However, upon analysing the relevant case law, it was found that determining the apparent age of a fictional character has generally been unproblematic. Further, as age is an essential element of the offence, it is unlikely defendants will be convicted if there is doubt as to whether the character is apparently a child or not. More contentious is the judicial interpretation of the word "person" to include fictional characters. This is complicated by the lack of legislative guidance as to the degree of human resemblance the character must have in order to be considered a "person" for the purposes of the legislation.

The community standards test may prevent some material depicting or describing youth sexuality from being deemed child pornography, as such material may not be regarded as offensive to the reasonable person. Yet, as demonstrated by the Bill Henson case, determining whether certain material flouts community standards can be problematic. The artistic merit defence may save some works from being deemed as child pornography, but this defence is not available in every Australian jurisdiction. It was also questioned why the artistic merit defence is available in cases where the material in question is the product of child sexual abuse and exploitation.

In Canada and the United States, the courts have upheld the right of individuals to privately possess self-created fantasy material, regardless of its content. Conversely, in Australia, and now the United Kingdom, there is no such exception. Nevertheless, the case law from Canada and the United States highlighted that the right to privately possess obscene material is significantly undermined if there is no correlative right to

access it. This issue will be discussed further in chapters 7 and 8 when weighing the benefits and costs of criminalisation to determine whether the law is justified.

The analysis of the primary sources of law raised several questions that could not be answered by a purely doctrinal approach or by the literature. Accordingly, this dissertation obtained the views of several judicial officers, law enforcement officers, and comic fans regarding the prohibition of fictional child pornography. Their responses are provided in the following chapter.

Chapter 6: Interview and Survey Findings

Chapter Contents

6.0 Aims of Chapter

The methodology used to obtain the data was provided in Chapter 1. The aim of this chapter is to set out the findings; however, it does provide a summary of the methodology and highlight the limitations that may have affected the findings. As discussed in Chapter 1, one-on-one interviews were conducted with judicial officers and a group interview was conducted with law enforcement officers. Individuals from these professions were selected given their expertise in interpreting and enforcing the law. They provided exclusive insight into the views of those frequently exposed to

child abuse material as part of their professions. As a socio-legal study, it was also desirable to obtain the views of laypersons within the community who may be potentially criminalised by the law. Accordingly, this study conducted an online survey that specifically sought the views of fans of sexually explicit comics. Importantly, the surveys gave voice to those potentially criminalised by the law, which is something clearly missing from the literature. The participants' responses were then coded into themes relating to the possible theoretical justifications for prohibiting fictional child pornography.

Although the judicial officers, law enforcement officers, and comic fans were asked different questions,[903] the primary purpose of selecting these groups of individuals was to answer the research question:[904]

> What do those enforcing the offences, and fantasy material fans potentially criminalised under the child abuse material legislation, consider to be the justification for these laws?

The following sections set out the responses of the judicial officers, law enforcement officers, and comic fans respectively.

6.1 Interviews with Judicial Officers

A total of seven judicial officers were individually interviewed during 2014–2015. Two presided in the Supreme Court, one in the District Court, and the remaining four in local courts. Six were judicial officers in New South Wales and one was from Queensland. Judges from the higher courts were purposely selected because they had sat on a case involving fictional child pornography. Judicial officers from local courts were selected because most cases dealing with possession of child abuse material are heard summarily;[905] therefore, it was appropriate to obtain their views. There were six

[903]The interview and survey questions can be found in the appendices.
[904]See Chapter 1, at [1.3] for the list of the five main research questions guiding this study.
[905]See Sentencing Advisory Council Victoria (2008), "Sentencing Trends for Knowingly Possess Child Pornography in the Magistrates' Court of Victoria 2004-05 to 2006-07", *Sentencing Snapshot*, Report No. 51; Krone, T (2009), "Child Pornography Sentencing in NSW", Australian Institute of Criminology, High Tech Crime Brief No. 8, Canberra; Mizzi, P, Gotsis, T, and Poletti, P (2010), *Sentencing Offenders Convicted of Child Pornography and Child Abuse Material Offences*, Judicial

males and one female. They were questioned about the relevant law prohibiting fictional child pornography in their jurisdiction, as well as the relevant Commonwealth legislation.[906] Each interview averaged about one hour and was recorded using a digital voice recorder.

A limitation of elite interviewing is the reluctance of some participants to candidly express their views.[907] This is because they may be conscious to uphold a certain public image and adjust their responses to avoid being seen in a negative light.[908] Pierce, who is amongst the few researchers to have interviewed judges for research purposes, has suggested that promising complete anonymity significantly assists in encouraging judges to speak openly.[909] To protect their anonymity, the judicial officers interviewed are referred to as J1, J2, J3, and so on. However, while anonymity may have encouraged some of the judicial officers to share their views, some of the participants did not want to offer personal opinions or make statements that may be seen as inappropriate in their capacity as a judicial officer. Other researchers who have interviewed judges have made similar observations.[910]

Another limitation is the sample size. Only seven judges were interviewed, mostly from New South Wales, which means that the findings are not representative of all members of the judiciary. Ideally, it would have been desirable to obtain the views of judicial officers from each Australian jurisdiction. Several invitations were sent out to judges in other jurisdictions, but these invitations were declined. Other researchers have also indicated difficulty in obtaining access to members of the judiciary for the purposes of research.[911] However, sample size is less relevant in qualitative research since its aim is to obtain in-depth information and, therefore, it is less concerned with

---

Commission of NSW, Monograph 34, Sydney; Warner, K (2010), "Sentencing for Child Pornography", *Australian Law Journal*, vol. 84, no. 6, pp. 384-395.

[906]For a detailed overview of the relevant law see Chapter 4.

[907]The general limitations of elite interviewing were also noted in Chapter 1, at [1.3.2.1].

[908]Richards, D (1996), "Elite Interviewing: Approaches and Pitfalls", *Politics*, vol. 16, no. 3, p. 201; Baum, L (1997), *The Puzzle of Judicial Behavior*, University of Michigan Press, Michigan, p. 19.

[909]Pierce, J.L (2002), "Interviewing Australia's Senior Judiciary", *Journal of Political Science*, vol. 37, no. 1, p. 133.

[910]Ibid. Also see Baum, above n 908.

[911]Ibid.

numbers.[912] Due to the small sample size, it was neither possible nor desirable to conduct any statistical analysis on the judicial officers' responses. Their responses, which have been placed into pre-defined categories, are provided in the following section.

6.1.1 The Underlying Rationale

Central to the discussion in each interview was what the judges believed *might* have been the purpose of prohibiting obviously fictional representations of minors. This was because, as seen in Chapter 4, the legislative purpose in prohibiting obviously fictional child pornography remains elusive. J3 stated, "I have no idea". When commenting on the possible rationale of criminalising fictional child pornography in New South Wales, J2 stated that "the explanatory memorandum did not clarify anything", particularly because "there was no mention of cartoons". Thus, J2 believed that the Supreme Court in *McEwen,*[913] where it was held that the legislation was intended to capture fictional representations of children, might have been based on "something the legislatures had not thought about at all".

When commenting on the possible purpose of prohibiting fictional child pornography in Queensland, J7 stated:

> "I think what is at the heart of this discussion is what is the purpose of the law and then clarifying the language so as to achieve that purpose. The traditional prohibiting child exploitation material is what judges say regularly in cases when sentencing people is that it protects real victims who are abused in the making of the material. When judges sentence, they usually say 'you realise that this is not a victimless crime. There are children here from whatever country who have been oppressed and exploited in the making it.' If that is the only purpose of the legislation than it should not catch all this fictional stuff. But we can only interpret legislation on its language and the language of the current legislation

[912]For example see Mays, N, and Pope, C (1995), "Qualitative Research: Rigour and Qualitative Research", *BMJ Journals*, vol. 311, no. 6697, pp. 109-112; Patton, M.Q (2002), *Qualitative Research and Evaluation Methods*, 3rd edn., Sage Publications, California, p. 3; Bryman, A (2008), *Social Research Methods*, 3rd edn., Oxford University Press, Oxford, p. 384.
[913]*McEwen v Simmons & Anor* [2008] NSWSC 1292. See Chapter 4 for a discussion of this case.

> suggests that its purpose is wider than just protecting the children who are the subject of the images or descriptions".

However, four judges were of the view that the purpose of prohibiting fictional child pornography was to prevent remote harms. J4 said that the legislation was "based on a vague belief that fictional child pornography incites actual child abuse". Similarly, J7 suggested that the legislation might have been based on an assumption that "people's fantasies might turn into a reality". J6 said that prohibiting fictional child pornography might protect real children "not directly, but indirectly … because it might make sexual acts with young children seem acceptable".

All seven of the judicial officers admitted that they were not aware of any "evidence whatsoever"[914] showing that fictional child pornography causes harm. Despite this, all stated that the lack of definitive proof of harm was not of itself a barrier to criminalisation. This was because it was open to legislatures to assume that fictional child pornography creates an "unacceptable risk"[915] that it might lead to child sexual abuse. J2 stated "since when have politicians needed evidence?". J6 also said that it would be "surprising" if it could be shown that viewing fictional child pornography:

> "… has no consequence at all … let me tell you why. We are getting a lot of evidence that children who are abused become themselves an abuser. So you sexualise the child and that child will then have an abhorrent sexual response, not in every case, but in many cases. If you make sexual acts depicting children acceptable, even to children, I think that psychologists will say that there is a significant risk that you will create in that child an expectation of unacceptable sexual behaviour".

In Chapter 1, it was noted that there is no specific research examining the impact of viewing fictional child pornography. Aware of the lack of the research, J7 said "if you are looking for evidence of whether fictional material sparks action you might not find it. But you may find evidence that depictions of real people sparks action". J1 also

[914] J2.
[915] J1.

commented that there is unlikely to be much evidence that fictional child pornography is harmful, which meant that those wanting to prohibit such material need "to make an argument that there is unacceptable risk that children would be sexually abused. If they can make that case, then I think you can act. But if you can't make that case then I think there would be no basis to move forward on it".

Some of the judicial officers specifically distinguished between private possession and dissemination. J1 doubted that the prohibition of private possession was based on harm, stating it was "hard to imagine how fictional child pornography is going to cause anyone any great deal of harm". However, J1 said there could be harm "once that kind of material is published" because "once it is published and control is lost as to where it goes then a potential for a broader evil is created".

Three of the judicial officers suggested the law is also concerned with shielding people from offensive material and protecting morality. According to J2, the prohibition on dissemination of fictional child pornography was "basically the old laws on obscenity". J2 was of the view that it is "reasonable to prevent the circulation of fictional child pornography … because it is capable of being destructive and contrary to our notions of what is appropriate in a civilised community". J6 suggested that the rationale behind prohibiting simple possession might be that such material is seen as "crossing the moral boundary, which society at the moment is saying should not be crossed in relation to children". Referring specifically to Queensland's legislation, J7 stated:

> "The language of the current legislation suggests that its purpose is wider than just protecting the children who are the subject of the images or descriptions. Presumably it is based on some kind of vague idea that if you distribute fictional child pornography it will somehow encourage people to actually offend against children. I suppose that is the idea or the possible purpose of the legislation".

It should be noted the judicial officers emphasised that they were only speculating on that the purpose of the law might have been. Most declined to comment on whether they believed prohibiting fictional child pornography is justified. J2 said "I will not answer

a political question", adding "I do have an opinion about it as an individual, but you are asking me as a judge. As a judge I have no opinion about it". Similarly, J4 said:

> "I am deliberately not telling you my personal views because that has nothing to do with the way I must do my job … We are not policy-makers and we are not supposed to have an opinion whether or not a law is good or bad. We are judicial officers so we swear an oath to administer the law as it stands. It is the politicians and policy-makers who decide if a law is good. Even in the higher courts, the only decision the higher courts are making on an appeal is whether or not the decision made in the lower court is within law and not whether the law is good morally or in the public interest … So we do not turn our minds to whether or not the law is good or bad because that is not our role."

Despite this, some judges did express views on whether prohibiting fictional child pornography is appropriate. In relation to prohibiting dissemination of such material, J1 said "I do not see it much as an issue to outlaw such material because it could lead to other more direct abuse of living children". However, as noted above, J1 was critical of prohibiting private possession. J2 said that prohibiting fictional child pornography might be justified "if it were used for the purpose of grooming, because then it would protect children". This provided an opportunity to ask J2 whether it may be more appropriate to criminalise the act of grooming rather than the material used to groom. The response was "I am not going to say what the law should be, but that seems a sensible limitation". J7 was unsure whether prohibiting fictional child pornography is justified, stating:

> "I think the answer depends on what we were talking about before. I do not see any justification for it unless there is evidence demonstrating that the depiction or description of fictional characters could give rise to harm to children and I do not know if there is any evidence base for that. I think it is more likely that all the law does is limit people's expression".

The judicial officers' responses highlight differing views of the rationale for prohibiting fictional child pornography. A distinction was drawn between the possible

purpose of prohibiting private possession and dissemination. The judicial officers were unsure why private possession was targeted, but were of the opinion that prohibiting dissemination might be seen as necessary in order to prevent harm to children. It was suggested that the purpose might also have been to protect morality and shield people from offensive material. The possible theoretical justifications for prohibiting both possession and dissemination of child pornography are discussed further in chapters 7 and 8.

6.1.2 Criticisms of the Community Standards Test

As discussed in chapters 4 and 5, Australia's child abuse material legislation incorporates the community standards test to determine if the reasonable person would find the material in question offensive. J2 and J6 were critical of the inclusion of the community standards test in the legislation, but for different reasons. J2 stated that the community standards test and the concept of the "reasonable man" were "a legal fiction" because both tests were:

> "… just a way of attempting to make something objective a subjective standard, which is the standard of the decision-maker. But you don't have a choice. That is what the law requires and [judges] just have to do the best [they] can. Of course it makes it problematic but that is why you have independent people deciding it and not judges, not politicians who are going to be elected, and not policemen who might get promotion by the cases they prosecute."

The "decision-maker" J2 was referring to are the members of the jury. Juries are only used in indictable matters in higher courts and not in the local courts. Thus, J2 was asked to consider the fact that many child abuse material possession offences are heard in local courts, meaning a single magistrate decided whether the material is considered widely offensive.[916] J2 admitted that, as a result of the expansion of the summary jurisdiction, "not having a jury is unavoidable", but still believed the community standards test remains a "useful test and sometimes it is the only test you can use".

[916]Krone, T (2005), "Does Thinking Make It So? Defining Online Child Pornography Possession Offences", *Trends and Issues in Crime and Criminal Justice*, Australian Institute of Criminology, Canberra, Report No. 299, p. 2.

However, J6 was not convinced that "12 people dragged off the street" have explicit knowledge of what standard of offensiveness their community holds. The reasons for this belief were not elaborated, with J6 stating "we can have a whole other conversation about juries and how valid that it is". Despite this, J6 later commented that applying the community standards test to determine whether certain material would be widely considered offensive can be difficult at times, partly because of the "change in culture norms". J6 explained:

> "When I was a university student, D.H Lawrence's *Lady Chatterley's Lover* was banned. I do not know if you have read it or not but today it would be considered to be pretty innocuous today because the cultural norm has changed. There are movies [today] that depict sexual acts that would have been banned back when I was a university student, close to fifty years ago, which today no one would turn a hair about".

J7 also said that it was sometimes difficult to determine whether some fictional material brought before the court would fall below contemporary community standards. The example provided was a case J7 had presided over, which involved a charge for possessing child pornography in the form of cartoons. The trial judge had deemed all five cartoons in question offensive, but J7 "excluded all of them but one". This was because J7 believed that only one of the cartoon images could "potentially be seen as offensive in the eyes of a jury".

The judicial officers' criticisms of the community standards echo many of the criticisms in the literature discussed in Chapter 5.[917] Yet, most of the judges accepted that the community standards test was a useful when determining whether the dissemination of certain material should be prohibited.

6.1.3 Is the Net Cast too Wide?

[917] See Chapter 5, at [5.3].

Review of the literature in Chapter 1 highlighted a concern that the law potentially criminalises otherwise innocent fantasy material fans, in particular Boys Love and YAOI female fans. Although none of the judicial officers were questioned about whether they believed the law inadvertently targets specific fantasy material fans, they were asked who were the intended targets of the legislation prohibiting fictional child pornography.

All the judicial officers believed that criminalising fictional child pornography targeted adults with a sexual interest in children, such as paedophiles, potential child molesters, and pornographers. However, all expressed a concern that the law may unduly interfere with the rights of those who may have not been the original targets of the legislation. For example, J2 said the law potentially incriminates everyone who has access to pen and paper because "you can draw [fictional child pornography] yourself". J1 believed that the law particularly targets people who had "artistic skill" because to create such material "would require someone [to] have artistic abilities. I guess, with the computer programs that are being developed, that sort of thing may become easier".

J1 added that "in this day and age, the internet has created limitless opportunities to access" fictional child pornography, which meant that the criminalisation of fictional child pornography may capture a range of people. Similarly, J2 said that such material is probably easy to access because it "must be available online. Everything is available online". J3 commented that "the internet opens up all sorts of possibilities". J4 also noted that the internet makes it easy to access some problematic comics. When asked what was the likelihood of young people interested in sexually explicit comics being potentially criminalised under child pornography laws, J4 responded:

> "I would imagine the likelihood to be fairly high. It would be just as likely as an adult being caught with such material and perhaps possibly even more so if they are kids who are internet savvy and interested in those kinds of comics that are available overseas. If the material came within the definition as set out in the legislation then there is no reason why a young person would not be caught by it".

J5 also stated that young people might be criminalised by the legislation because "cartoons are particularly appealing to young people". However, J5 further added: "that is not to say that cartoons are just for young people …even Disney films cater for both young and adult audiences".

Yet J4 said that there does not appear to be a need for legislative reform because there has not been a "floodgate" of young people being prosecuted for fantasy material. J4 added "if all a sudden young people were falling foul of [child pornography] laws for cartoons, I might be in a position to form an opinion that the law needs to be amended, but I have not seen any evidence of that".

Nevertheless, all the judicial officers doubted whether the average person would know that the production, possession, and dissemination of sexually explicit fictional material of minors could be a crime. J1 stated "I would be surprised if there was a general awareness that possessing such material would be an offence". J2 commented that "as a layperson, I would have thought that creating this kind of material could well be entirely harmless". J4 was also of the view that it was it was unlikely people would be aware that fictional child pornography was prohibited, but added "I think a lot of people are unaware of most of the laws". According to J7, "I do not think the public would be aware of the law and I think the public would be really surprised. I actually think that the public might think it was ridiculous. Therefore, I do not think the law is serving its purpose very well".

Thus, the judicial officers believed that the law was primarily targeting paedophiles and child molesters. Given the perception that fictional child pornography could be accessed easily online, some of the judicial officers stated that the law might potentially criminalise people who were not the original targets. However, one judicial officer stated that there does not appear to be over-criminalisation of young people that necessitates law reform.

6.1.4 A Justified Interference with Individual Freedoms?

Analysis of the Australian case law dealing with fictional child pornography in the previous chapter highlighted that individual freedoms have been given little consideration. Accordingly, the judicial officers were asked to comment about the relevance of individual freedoms in relation to prohibiting both private possession and dissemination of fictional child pornography.[918]

All the judges believed that legislatures "should be careful not to interfere with freedom of expression and privacy",[919] but also made clear that freedoms are not absolute. J2 said that there are "accepted exceptions" to freedom of expression, noting "defamation is one of them, I think hate speech is another, so there are accepted exceptions. Conspiring to commit a crime is another". Similar comments were made by J4, who said "we have a lot of laws that put limits on expression that are accepted by the community, such as racial vilification laws". J5 also remarked that "society says there are boundaries to freedom of expression".

However, J2 suggested that the New South Wales case of *McEwen*[920], where it was held that fictional representations of children can constitute child pornography, would likely have been decided differently if Australia's Constitution explicitly guaranteed freedom of expression and privacy. J2 highlighted that the Canadian Supreme Court decision in *Sharpe*[921] "in a legal sense did not really help because Canada has a *Charter of Rights.* We do not have that here". When asked whether it is of any significance that Australia is a signatory to international law protecting freedom of expression and the right to privacy, J2 stated that international law "just does not have the same effect".

Conversely, J6 did not believe that fictional child pornography would be permitted if Australia constitutionally guaranteed freedom of expression and privacy, stating:

> "I do not think that lack of constitutional rights really makes a difference because there will always be provision for the government to limit those rights. For

[918]For a discussion about the (ir)relevance of individual freedoms in the Australian case law dealing with fictional child pornography see Chapter 5, at [5.6].
[919]J1.
[920]*McEwen v Simmons & Anor* [2008] NSWSC 1292.
[921]*R v Sharpe* [2001] 1 SCR 45. See Chapter 4 for a discussion of this case.

example, in America they would still have laws prohibiting fictional child pornography, even though they have constitutional rights".

Nevertheless, all the judges were critical of prohibiting private possession of fantasy material because, unlike publications, "it is altogether a different thing if the material does not go anywhere".[922] J2 questioned "why make it criminal for someone to create fictional material for their own purposes?". Both J1 and J2 described the law as "thought policing" and J2 elaborated, stating prohibiting private possession was "a way of controlling a person's private thoughts" because the law makes it a crime even if "you write a story and put it in your attic".

Despite this, J2 found it "hard to imagine a situation where the law would get involved in a case involving private possession". After informing J2 of the *Whiley* case,[923] where the defendant was convicted for having in his possession self-created fantasy material, J2 responded, "Are you kidding me?!". At the time of being apprehended, the defendant in *Whiley* was an inmate in prison and the material was found in his cell. J6 stated "you would have thought the Correctional Officers would have just ripped up the stories and said 'do not do it again'". J6 added:

> "It is plain that in the hands of an over-zealous prosecutor that some people may be prosecuted who possibly should not have been, but generally a prosecutor is not going to prosecute someone unless there is a lot in the circumstances to justify their prosecution".

It was emphasised by J4 that it is "the decision of the prosecuting authorities who decide whether or not they lay the charge. They have a discretion". J4 said that, as a judicial officer, "I must simply apply the law and I must apply the precedent by the higher jurisdictions. If a higher court says XYZ is against the law, I must follow it". Similarly, J3 commented that "just this morning, a young man stood up in court and said 'the law is wrong'. I said that is your opinion. My job is only to enforce law, to employ the penalties that apply".

---

[922] J1.
[923] *Whiley v R* [2010] NSWCCA 53. See Chapter 4 for a discussion of this case.

Therefore, there was a consensus that individual freedoms are not absolute and there are accepted exceptions, even in countries that constitutionally protect freedom of expression and privacy. Although prohibiting dissemination was largely seen unproblematic, the judicial officers questioned whether criminalising private possession was a justified intrusion on individual freedoms. There was a belief that it would only be in exceptional cases that a person would be prosecuted for private possession, but it was also emphasised that this is ultimately a decision for prosecutors and not judicial officers.

6.1.5 Real versus Fictional

All the judicial officers stated that it is necessary to distinguish between images produced using a real child and completely fictitious material when sentencing an offender. J2 said "the crucial point is whether or not an actual child was abused". J1 explained:

> "In sentencing, you would have to distinguish between fictional and real material … material depicting real children involves physical abuse and is an evil of itself. If it is fictional, then you are sentencing the offender merely because there is a potential for others to abuse children. So I think you have to regard it as a lower level of seriousness than actually possessing real material".

J1 added that sentencing is complicated when the charge relates to both fictional and real child pornography because "if it is all lumped in together in the one charge as child abuse material then it makes the sentencing exercise that much harder". J7 also commented that whether the material is fictional "would have to be relevant because when sentencing for child pornography an important factor is whether there are any victims. When the material is fictional, one of the reasons why the offence is serious does not apply and this would have to affect the sentence".

J6 believed that whether the material is fictional is relevant, but added "there are all sorts of things that go into the sentencing mix", including the offender's criminal

history. According to J6, a particularly important factor is whether the offender had "a previous history of child pornography and committing child sexual assault".

Thus, a common theme in the judicial officers' responses was the need to differentiate between images depicting real children and purely fictional material. The importance of maintaining this distinction is considered further in Chapter 9.

6.1.6 Summary of the Interviews with the Judicial Officers

The judicial officers had similar views as to what the purpose of prohibiting fictional child pornography might have been. Their responses can be classified as being harm, offensiveness, and/or morality. The emphasis was on potential remote harms if fictional child pornography were to be disseminated. Although the judicial officers were not aware of any evidence that such material caused indirect harm to children, it was generally believed that fictional child pornography created an unacceptable risk of harm. Accordingly, prohibiting the dissemination of such material was seen to be reasonable, but prohibiting private possession of fictional child pornography was seen as unduly interfering with individual freedoms. This is despite the belief that the law may have been based on the need to protect morality.

In the following section, the views of the law enforcement officers are provided.

6.2 Group Interview with Law Enforcement Officers

A group interview was conducted in February 2015 with four law enforcement officers based in Australia, one male and four female. They are specialist officers specifically trained in identifying and investigating individuals who use the internet and telecommunication systems to produce, possess, and/or disseminate both real and fictional child abuse material. The interview was approximately 60 minutes and was recorded using a digital voice recorder. Since the role of the police is to enforce the law and not interpret it, the questions focused on the law enforcement officers' opinions about the harm of fictional child pornography, rather than the legislative purpose of prohibiting such material. To preserve their anonymity, they are referred to as Law Enforcement Officer ("LEO") 1, LEO 2, LEO 3, and LEO 4.

It is pertinent to set out the limitations in more depth before furnishing the law enforcement officers' responses. It is acknowledged that some of the law enforcement officers may have been reluctant to convey views contrary to their colleagues in front of the group.[924] Several researchers have also claimed participants may express more extreme views in a group interview than in private.[925]Another limitation is that, given the small number of participants, the findings should not be generalised or be interpreted as representing the views of all law enforcement officers.

Despite this, the advantages of conducting a group interview outweighed the limitations. The purpose of conducting a group interview was to address questions that could not be answered by analysing only primary sources of law. It provided an opportunity to obtain "high quality data in a social context where people can consider their own views in the context of the views of others".[926]Another advantage is that the group environment may deter participants from giving inaccurate answers, thereby enhancing data quality.[927] This is because the "participants tend to provide checks and balances on each other, which weeds out false or extreme views".[928] Researchers have also suggested group settings encourage participants to discuss their opinions and experiences, which fosters fluid and flexible communication.[929] These advantages were all evident in the group interview with the law enforcement officers. Their responses are provided below.

6.2.1 The Harm

From the outset, all the law enforcement officers said that both dissemination and private possession of fictional pornography should be prohibited. They were adamant that such material caused an unacceptable risk of harm to children. To better understand why they strongly opposed sexually explicit fictional material representing

[924]This is a general limitation of group interviewing identified by researchers. For example see Patton, above n 926, 387; Morgan, D.L (1997), *Focus Group as Qualitative Research*, Sage Publications, California, p. 15.
[925]Ibid.
[926]Patton, M.Q (1980), *Qualitative Evaluation and Research Methods*, 3rd edn., Sage Publications, California, p. 335.
[927]Patton, above n 926, 386; Aubel, J (1994), *Guidelines for Studies Using the Group Interview Technique*, International Labour Office, Geneva, p. 8.
[928]Patton, above n 926, 386.
[929]Aubel, above n 927.

minors, it is essential to provide some context. The law enforcement officers are exposed to some of the most heinous images of child sexual abuse and deal with serious child sex offenders. This can be illustrated by the comment made by LEO 1 early in the interview: "I can take you to our [workstation] now. You can spend the next three weeks there and you still would not be able to touch the tip of the iceberg of how much is available".[930] LEO 2 added "you sit there and you cannot even do everything that is in front of you because there is so much". LEO 4 also commented that "possession of child abuse material is very prevalent, we see it in here a lot, we charge a lot, it is being charged all the time".

As well as material depicting real children, LEO 1 said that they "had to deal with a plethora of fictional material as well", including cartoons and stories. LEO 3 added: "it is part of our training" to tackle both real and fictional material. However, both LEO 1 and LEO 2 stated that they dealt with fewer cases involving fictional material. LEO 1 said "if you are doing it percentage wise, it is probably 98 per cent real stuff and two per cent fictional".

According to LEO 1, fictional child pornography was harmful:

> "… because a lot of the research says that people progress from just writing or talking about sexually abusing children [which then] becomes insufficient to fulfil their sexual desires and so they then progress to contact offending".

This was a concern for LEO 1 because "a lot of the fictional stuff we deal with is generally self-produced". LEO 2 agreed, saying "the people we charge usually have produced it themselves". LEO 2 believed that, even though the stories are fictional, the creators were usually "talking about things they are planning to do to children" and said, "if you have those kinds of thoughts and you are prepared to write down and share them with other people … you would be happy for someone to play out that fantasy". Agreeing, LEO 1 described those who "get those thoughts and then put them

[930]The views expressed by the law enforcement officers are consistent with those expressed by sociologist Philip Jenkins. He has debunked the claims made by some academics that child abuse material is an exaggerated issue after being confronted with the widespread availability of such material while conducting research in the late 1990s. See Jenkins, P (2001), *Beyond Tolerance: Child Pornography on the Internet*, New York University Press, New York.

on paper" as "opportunist". LEO 3 added that "if the opportunity arose for them to go out and play out their fantasies, having written it down, they know exactly what they want to do and they will do it" and "sometimes the character in a story is an actual person". This was followed by an example by LEO 1:

> "A recent case we dealt with involved a bus driver who drove around young children. He wrote several stories that were horrendous in nature about meeting one of the girls that rides on the bus, taking her to his place on a number of occasions, and then sexually abusing her in horrendous ways".

It was then emphasised to the law enforcement officers that the interview was concerned with purely fictional material that does not refer to either real people or events. Therefore, LEO 4 stated that the example given by LEO 1 was perhaps not relevant in that it "relates more to a real child as opposed to a fictional child". However, LEO 1 believed distinguishing real material from fictional material was artificial, commenting:

> "I find it difficult that you are trying to separate the two because when you break it down both equally are talking about the sexual exploitation of children. It does not really matter whether it is real or fictional".

LEO 1 also believed that "fictional stories are just as bad as images depicting real children", stating:

> "I find reviewing stories and that fantasy stuff worse from work, health, and safety aspect because you then have to create that imagine in your mind rather than it just being there and I find that more disturbing … the producers of that material would have created it in their mind first before they put it down on paper. To have thoughts of that nature, of sexually abusing children … a lot of those stories are far worse than the images".

Additionally, LEO 3 suggested that fictional material is harmful because it can be traded for images depicting real children, remarking:

> "Offenders will often try and share their stories with other people and want something back for it. They would be asking for images or access to material about real children".

The law enforcement officers therefore made it clear that they believed prohibiting fictional child pornography is necessary to prevent harm to real children. Unlike the judicial officers, they did not suggest the law might have been based on the need to protect individuals from offensive material or to protect morality.

6.2.2 Who are the Likely Offenders?

When asked who they believed were likely to be creating, collecting, and circulating fictional child pornography, LEO 1 responded "child sexual predators" and "paedophiles". The reason for this belief may be explained by the claim by LEO 1 that:

> "It is only occasionally that I have come across a person who has only fictional material. There have been occasions, but it is rare … and often those that we have come across who only have the fictional stuff are often the authors or the producers of that material".

This is consistent with the observation made in Chapter 4 that, in most of the cases dealing with fictional child pornography, the offenders also had in their possession real child abuse material.[931]

Nevertheless, none of the law enforcement officers stated that the law might inadvertently capture individuals who were not paedophiles or child molesters. Therefore, they were prompted to consider whether the law might potentially capture individuals who do not fall within these categories:

[931] See Chapter 4, at [4.5].

Interviewer: What are the chances of a minor, so someone under 18, creating and sharing fictional material that depicts or describes minors in a sexual context with their friends online?

LEO 2: We have had a run of juveniles lately.

LEO 1: Yes, we have had a fair bit of that …

LEO 4: But they are minors who are writing about people of the same age.

LEO 1: If they are talking about people their own age—for example a 15-year-old writing about having sex with another 15-year-old—we are never going to prosecute that.

The law enforcement officers were then prompted to specifically consider whether the law potentially criminalises otherwise innocent individuals who may be interested in sexually explicit comics that depict underage characters:

Interviewer: Do you deal with a lot of sexually explicit comics, such as *manga*?

LEO 1: Like *hentai*?

Interviewer: Yes.

LEO 1: A little bit. Not as much as you would imagine. It is more prevalent amongst boys, definitely.

Interviewer: What about fan fiction stories that describe the underage Harry Potter characters in a sexual context. Do you come across that stuff?

LEO 1: Not on a wide scale. We do not look down to that level. The people we are dealing with probably are not interested in *One Direction* or *The Simpsons*. They are more interested in stories about adults and children.

Later, LEO 3 commented "we come across those Japanese cartoons when we are reviewing this stuff. But it is only now and then". LEO 1 added "a lot of it is from Australia".

The law enforcement officers were also asked to consider the potential criminalisation of those who may produce fictional material depicting minors for artistic purposes. LEO 1 said:

> "There might be a small percentage that are creating this stuff that do not have a genuine interest in children and are just are doing it for an arty purpose, but I do not think that would be the majority".

According to LEO 1, the police would probably not pursue cases where the person has produced the material for genuine "arty purposes" because it is unlikely the court will find the material "offensive". LEO 1 explained this was why stories describing minors in a sexual context, such as Shakespeare's *Romeo and Juliet,* would not be deemed child pornography. LEO 3 added that the potential criminalisation of some individuals who may be creating fictional child pornography for artistic purposes was "not enough to get rid of the legislation".

Moreover, LEO 4 believed that police officers would use their "common sense" when exercising their discretion whether to charge someone. LEO 4 said it is unlikely police would charge someone who has an "image of Bart Simpson doing something naughty". In hindsight, it would have been appropriate to prompt LEO 4 to consider the *McEwen* case,[932] where the defendant was prosecuted for sexually explicit images of the children from *The Simpsons* cartoon show, but unfortunately this opportunity was missed. LEO 3 also said that the police would "never prosecute 15-year-olds who write a story about having sex with people their own age", but "would prosecute a 15-year-old who writes a story about how they are going to rape and torture and do all

[932] *McEwen v Simmons & Anor* [2008] NSWSC 1292. See Chapter 4.

this terrible stuff to another 15-year-old". LEO 2 further stated that "we are not going to use the legislation for purposes it was not designed for".

As seen in Chapter 4, the purpose of prohibiting fictional child pornography remains ambiguous. Nevertheless, the law enforcement officers were of the opinion that the purpose was to prevent harm to children and that it was specifically targeting those who have a sexual interest in children.

6.2.3 Individual Freedoms

Individual freedoms were not given much consideration in the group interview. LEO 1 mentioned freedom of expression in passing, stating:

> "I am all for free speech and that but when you are talking sexually abusing children in horrendous ways and often [the creators] end up killing children in a lot of this material we have read, no one should be able to think that way. That is just not healthy for a society".

Nevertheless, like the judges, the law enforcement officers believed it is unlikely the average person would know it is an offence to deal with fictional child pornography. Despite this, LEO 1 stated it was common for offenders to claim: "I did not know that was an offence". The question whether there is a general awareness amongst comic fans that fictional sexually explicit of minors is prohibited is addressed later in this chapter.

6.2.4 Summary of the Group Interview with the Law Enforcement Officers

At the conclusion of the interview, the law enforcement officers were asked "who wants to just briefly sum up their views about fictional child pornography?". The following responses were provided:

> *LEO 1*: We are of the view, and anyone else please contribute …
>
> *LEO 2*: Our view, as I said before, is that fictional stuff is exactly the same to us when we are dealing with it as child abuse material involving real children. The difference is, well there is no difference. It is the same …
>
> *LEO 1*: It should be treated the same.

Noticing that LEO 3 and LEO 4 had not provided a final summary of their views, they were asked "what about you two? Do you agree with [LEO 1] and [LEO 2]?". They responded:

> *LEO 4*: I personally think it just comes down to common-sense …
>
> *LEO 3*: I agree with all of that has been said. But, like we said, if it were two 16-year-olds who writing about each other in a sexual way, then discretion would need to be exercised. If an 18-year-old was writing about a 12-year-old, that is a different story. But in each case we use our discretion. In situations like that, it is not a blanket law. Every case is taken differently.

Thus, the four law enforcement officers seemed to believe that fictional child pornography causes indirect harm to real children and, therefore, such material is rightly prohibited. Little consideration was given to freedom of expression or privacy because the need to protect real children was seen to outweigh individual liberties. There was a belief that possession of fictional child pornography material indicated an intention to commit actual child sexual abuse and that the fantasy might turn into a reality. When prompted to consider other audiences who may be consuming sexually

explicit fantasy material of minors for non-paedophilic reasons, it was accepted that "there might be a small percentage that are creating this stuff that do not have a genuine interest in children",[933] but this was "not enough to get rid of the legislation".[934] As it will be seen in the following section, some of the comic fans surveyed shared different views.

6.3 The Views of Comics Fans

This section sets out the responses of the comic fans surveyed. As mentioned in Chapter 1, eligible participants were invited to complete an online survey that sought their views on the law prohibiting fictional representations of minors in a sexual context. To be eligible to participate, respondents were required to be:

- living in Australia;
- aged between 18 and 25; and
- a fan of sexually explicit comics/*manga*.

The survey was available for six months and was closed when it became obvious "saturation" had been reached, meaning no new themes were emerging.[935] By the end of this period there were 226 eligible participants whose responses were coded and analysed.

The Participant Information Sheet advised that participation was voluntary and could be withdrawn at any time. Due to the risk of participants disclosing potentially criminal behaviour, they were not asked for their names and were advised not to provide any information that might identify them or any other individual. None of the participants provided any identifying information pertaining to themselves or anyone else. Permission was obtained to include their quotes in any research outputs. When quoted, the gender and age of participant is indicated at the end of each quote.[936]

---

[933]LEO 1.
[934]LEO 3.
[935]See Fusch, P, and Ness, L (2015), "Are We There Yet? Data Saturation in Qualitative Research", *The Qualitative Report*, vol. 20, no. 9, pp. 1408-1416.
[936]This is denoted by the letter "M" or "F", which stands for male or female, followed by the participant's age. For example: "M: 21".

Although this study was predominately qualitative, the much larger sample size makes it appropriate to quantify some of the responses.[937] Accordingly, descriptors such as "some", "most", and "many" are avoided where possible. As will be seen below, this made the findings more precise and avoided misrepresenting the actual basis for the conclusions.

The general limitations of conducting an online survey were discussed in Chapter 1, but it is essential to review how some of these limitations may have specifically affected the findings outlined below. First, while the sample size was reasonably large it included only individuals who self-identified themselves as fans of sexually explicit comics and as aged 18 to 25. Therefore, the findings are not representative of the views of all fans or the Australian population as a whole. However, because the sample strategy was purposive, it was not intended to be representative of the population or used to make generalisations.

Second, given the sensitive topic, social desirability—which refers to a tendency to answer in a socially acceptable way[938]—may have affected the participants' responses. Research suggests social desirability is quite common in surveys.[939] The reason why participants may lie in surveys is said to be "pretty much the same reasons they lie in everyday life—to avoid embarrassment or possible repercussions from disclosing sensitive information".[940] Thus, it is acknowledged that some of the fans surveyed might have not answered some of the questions honestly in order to conform to socially acceptable beliefs.[941]However, since the survey was conducted anonymously via the internet, the participants may have felt less inclined to provide socially desirable responses.[942]

---

[937]See Chapter 1, at [1.3.2.2].
[938]See Crowne, D.P, and Marlowe, D (1960), "A New Scale of Social Desirability Independent of Psychopathology", *Journal of Consulting Psychology*, vol. 24, no. 4, pp. 349-354; Tourangeau, R, and Yan, T (2007), "Sensitive Questions in Surveys", *Psychological Bulletin*, vol. 133, no. 5, pp. 859-883.
[939]Tourangeau and Yan, above n 938, 863.
[940]Ibid, 878.
[941]Van de Mortel, T.F (2008), "Faking It: Social Desirability Response Bias in Self-Report Research", *Australian Journal of Advanced Nursing*, vol. 25, no. 4, p. 41.
[942]See Prichard, J, Watters, P, Krone, T, Spiranovic, C, and Cockburn, H (2015), "Social Media Sentiment Analysis: A New Empirical Tool for Assessing Public Opinion in Crime?", *Current Issues in Criminal Justice*, vol. 27, no. 2, p. 227.

Third, due to the anonymous nature of the internet, it was not possible to verify demographic variables, such as age and sex of participants. It is possible that some responses purportedly from females were actually provided by males and vice versa. Some participants may have also misstated their age in order to qualify to participate in the study.

Fourth, a limitation of surveys is the inability to probe participants for more information. It is also acknowledged that participants may have wanted further clarification about some of the questions and it is impossible for researchers to ensure that all the questions in the survey were understood. However, a draft of the survey was sent out to peers and academics for comment to identify and remove any unclear questions.

Despite the above, the advantages of conducting an online survey far outweighed the limitations.[943] It was found to be the most suitable and practicable method of collecting data from a large number of participants in different geographical areas. Given the sensitive topic, the anonymity provided by the internet may have encouraged participants to disclose their personal views and answer more honestly.[944] Having all the data available online also made it easier to store, code, and analyse.

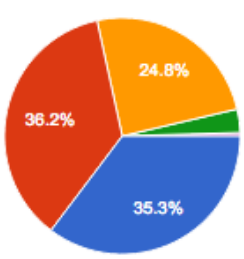
Below is a demographic overview of the comic fans who participated in the study.

[943]For an outline of the main advantages of online survey methods see Bryman, above n 912, 653; Mikulsky, J (2005), "Use of Web-Based Surveys in Social Science and Education Research: Practical and Methodological Considerations", *Change: Transformations in Education*, vol. 8, no. 1, pp. 71-90.
[944]Ibid, 74. Mikulsky has observed that: "computerised surveys create a sense of social distance which can contribute to a greater likelihood of respondents disclosing sensitive personal information and/or stigmaised behaviours in which they are engaged".

6.3.1 Demographics and interests in comics

The majority of participants said they resided in New South Wales (62%), followed by Victoria (17.2%), Western Australia (9.5%), Queensland (6.2%), and South Australia (4.1%). There was only one participant residing in Tasmania (0.5%) and one in the Northern Territory (0.5%). There were no participants from the Australian Capital Territory. The number of female (112) and male (114) participants was almost equal.

To ascertain their interest in comics, the participants were asked to indicate how important being able to access such material was for them.

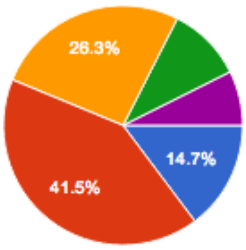


Extremely important	77	35.3%
Important	79	36.2%
Somewhat important	54	24.8%
Unimportant	7	3.2%
Extremely unimportant	1	0.5%

Figure 12: Importance of accessing comics for fans

As can be seen from the pie chart above, an overwhelming majority indicated that such material was “extremely important” or “important”.

The participants’ interest in comics was further reflected by their response to the question: “How many hours do you spend reading or creating comics per week?”.



0-1 hour	32	14.7%
1-4 hours	90	41.5%
4-8 hours	57	26.3%
8-12 hours	22	10.1%
Over 12 hours	16	7.4%

Figure 13: Hours per week spent reading/creating comics

A total of 134 (59%) participants said that they created their own comics, mostly out of enjoyment and not for financial gain. Several participants described themselves as "amateurs" who shared their works on "fanart" communities online.

The surveys provided a rich array of data but, for the purposes of the dissertation, three questions gathered the most relevant information. These questions were as follows:[945]

1. Are you aware that comics depicting characters who appear to be under 18 in a sexual context are prohibited under Australia's child pornography laws?
2. Has your awareness of the law prevented you from accessing certain comics?
3. Do you think that sexually explicit comics depicting characters under 18 should be prohibited?

The participants' responses to each of these questions are set out below.

6.3.2 Awareness of the law

A total of 121 participants (53%) stated that they were aware that sexually explicit fictional material depicting minors is prohibited in Australia. Seventy-nine participants (35%) said that there were not aware, while the remaining participants were unsure. Most responded simply "yes", "no", or "unsure" to this question, but those who elaborated made comments including:

> Yes. I believe that a judge has deemed illustrations of human figures as having human rights in a certain sense. That is insanity! (M: 21).

> Yes, but there does not appear to be any infrastructure to enforce the law on the internet (M: 18).

> Yes, and I don't want to access those comics (M: 18).

> Yes, but who cares? (M: 18).

[945]For a full list of the survey questions see Appendix C.

No, but it makes sense! (F: 19).

I am now (F: 18).

I thought this was the case, but I didn't know for sure (F: 24).

Thus, the responses showed that there was a significant degree of uncertainty as to whether the law prohibited fictional sexually explicit representations of minors.

6.3.3 The Law's Preventative Effect

Those participants who said they were aware of the law were then asked whether this prevented them from accessing sexually explicit comics depicting minors. Eighty-one participants (67%) admitted that the law did not deter them, the main reason being that such material can be easily accessed online. One participant stated that "as a viewer of comics on the internet, the law has done nothing to prevent me viewing comics" (M: 18). Another participant said that the law "has not stopped me from accessing certain kinds of comics and I will continue to do so. If I am arrested I will try to fight the courts to my full ability" (M: 21). Three female participants also said that the law was no deterrent because it was easy to buy sexually explicit comics depicting minors in Japan and bring them back to Australia. Another participant commented:

> "I know friends of friends who have visited Japan and bought comics that depict young girls in sexual contexts. They were concerned about bringing the comics back through Australian customs, but nothing happened" (F: 19).

Four participants admitted they were fans of *shota* that, as discussed in Chapter 2, is a subgenre of YAOI that depicts sexually explicit relationships between prepubescent boys and adult men. Those fans highlighted that the law had not prevented them from accessing *shota.* Although the literature claims that such material is created largely by and for females,[946] one of the fans of *shota* surveyed was a male who said:

> "I prefer looking at illustrations of males from the ages of 12–17 usually, which means sometimes I am associated with the *shota* community and I am also seen as something hideous by Australian society. I don't exactly think that is fair …

[946]See Chapter 2, at [2.4.1].

> I don't ever plan on having a relationship with such an individual. I just find them the most attractive" (M: 21).

Another participant commented that she was currently part of a female online fandom that "likes to pair a 15-year-old character and a 29-year-old, both males, … and post them on fanart websites" (F: 18).

Ten participants were unsure whether the material they viewed would be legally problematic, but this uncertainty had not prevented them from accessing certain comics. The reason they were unsure whether the material would be deemed as child pornography was because "age is rarely stated" (F: 25) or because the characters "depicted appear to be of a young age, but the author says they are over 18" (F: 19). Another participant said she was currently reading "a series that had a character that was drawn to look 10 or so, but [the comic creator] stated the character is 22" (F: 22). The uncertainty as to whether the material falls foul of the child abuse material legislation is also reflected by the following responses:

> It does get really confusing. Sometimes in *manga* you have kids that look 15, but the author says they are 30+ (M: 24).

> I am not sure. It's blurry because the characters are 16–17, so I guess it's okay seeing that the age of consent in Australia is 16 (M: 20).

> It's hard to know … 'cause the characters sometimes are wearing school uniforms (F: 23).

Three participants, two male and one female, said that the characters in the comics they viewed depicted appeared 16 or 17. Therefore, they assumed that these comics are legal "seeing that the age of consent in Australia is 16" (M: 20).

Thirty-six participants highlighted that it was not the law that deterred them from accessing sexually explicit comics depicting minors, but other factors. Six participants said it was moral reasons, illustrated by the responses below:

> The law has had no influence on my decision, I simply abide by my own morals and can see that this content is wrong (M: 19).

> Morally, I don't like looking at under 18s in any sexual context. I never read/watch anything that shows under 18s in immoral acts, including drinking/smoking etc. (M: 19).

> I just don't access those comics out of morals sake, so I didn't think much about the law (F: 18).

> I don't access sexually explicit content showing minors due to my morality rather than abiding the law (F: 19).

> The law does not determine my aversion of images sexualising youth, my morals do (F: 18).

> I tend to avoid sexual depictions minors for moral reasons, regardless of my ignorance of the law and I would hope most people do (M: 20).

Thirty participants said that they did not access sexually explicit comics depicting minors for other reasons not related to morality. This included "not hav[ing] an interest in those kind of comics" (F: 24), or because the participant did not find "[child-like] characters sexually appealing" (M: 25).

Four participants commented that it was a lack of interest in comics that prevented them from accessing comics depicting minors, but admitted that "sometimes it's unavoidable" (F: 23). Others claimed:

> I do not seek depictions of underage characters, but they are very common and difficult to avoid (F: 19).

> I have accidentally run into that kind of material a few times (F: 18).

> I don't set out to read/find sexually explicit comics/*manga*, but it's so easy to come across it accidently (F: 23).

Only twenty-five participants (30%) said that the law prevented them from accessing such material, 18 of whom expressed discontent with the restrictions it imposed on them. Two participants stated it only "prevented me from physically possessing certain

comics" (M: 19), but did "not stop me from getting them online" (M: 18). Another male participant commented the law only prevented him "to some extent because it has made me more nervous about the legal implications of accessing such material" (M: 21). One female participant said that the law prevented her from accessing sexually explicit comics depicting minors and added that "as an artist, I have made sure if I draw or create sexually explicit scenes that I state that the characters are over the age of 18" (F: 18).

Conversely, seven participants said that the law did prevent them from accessing sexually explicit material depicting minors, but they were not burdened by the prohibition. This was illustrated by responses such as:

> Yes, it has prevented me, but I would not buy a comic that has an underage minor [engaging] in a sexual act (F: 20).

> Yes, but I would rather read something about consenting adults (F: 22).

Another participant said: "yes, but it is mainly *shota* that depicts children. I've never had much interest in it specifically because their characters so closely resemble children" (F: 18).

These divergent responses show that the law has largely not deterred fantasy material fans from accessing sexually explicit comics depicting minors. Those who stated that they avoided accessing such comics highlighted that it was due either to their morality or lack of interest in comics sexualising children, regardless of whether such material is legal or not.

6.3.4 Arguments For and Against Prohibition

A total of 123 participants (54%) believed sexually explicit comics depicting minors should not be prohibited. However, of those who argued against prohibition, 34 believed such material should be regulated to prevent unwilling viewers from being exposed to comics that might be considered offensive. Seventy-one participants (31%) believed such material should be prohibited outright, while the remainder said they were "unsure" or did not respond to this question. Arguments against prohibition, in favour of regulation, and in favour of prohibition are outlined below.

Arguments Against Prohibition

A common theme in the responses of those against prohibiting sexually explicit fictional comics depicting minors was the importance of freedom of expression. For example, one participant stated: "I value freedom of expression very highly and as such I do not think there are any comics that should be completely prohibited" (M: 21). Similarly, one female argued:

> "Characters depicted in a comic or *manga* are fictional and so what happens to them does not directly harm anyone. Fiction should be allowed as an expression of freedom in any manner, and it is the responsibility of the reader or guardian of a reader to control what they will or won't read" (F: 18).

The importance of individual freedoms was also reflected in the following comments:

> Comics, or fictional works of any sort, should not be prohibited. Reason: freedom of expression is of utmost importance to society, particularly in the creative arts (M: 19).
>
> Drawings are drawings. To prohibit them is to prohibit free speech (M: 23).
>
> I believe in freedom of creativity. Do you think *Lolita* by Vladimir Nabokov should be banned? Neither do I (F: 19).
>
> Freedom of speech—it's not anyone's business what other people love (F: 18).

In arguing against prohibition, there was an emphasis on the lack of direct harm to a real person in works of fiction, highlighted in comments such as:

> The original role of child pornography laws was to prevent child abuse. To consider a fictional depiction of children engaging in sexual acts illegal, especially when the 'children' do not resemble real humans, is simply ridiculous as it implies that these fictional children possess human rights. To prohibit fictitious depictions and to punish those in possession of these materials because

> of fears that they could spawn demand for material involving real children is irrational and an act of injustice. It is no different from punishing people for their thoughts (M: 18).
>
> If the comics are drawn, no children were harmed in the process (M: 21).
>
> They're just comics/*manga*. They're fictional and don't hurt anybody at all by containing this content. I'd have a problem if the images were of actual minors, however they aren't so there shouldn't be a problem (F: 19).
>
> Even though there are comics that depict underage characters in sexual contexts, I don't see any harm in that. They aren't real children. I don't see the point in charging someone for possessing a cartoon drawing of a young fictional character. Why not charge people for shooting fictional characters in video games? (F: 19).
>
> People should be able to read whatever they want. Reading a book isn't going to harm anyone (M: 19).
>
> I think people can like what they want so long as they aren't hurting anyone (M: 25).

A common theme of the arguments against prohibition was that comics allow individuals to engage in harmless fantasy:

> Comics shouldn't be prohibited because they provide a certain level of freedom that can never be achieved in real life (M: 19).
>
> I don't think any types of comics/*manga* should be prohibited. I believe people can make the distinction between reality and fantasy, and that reading a comic will not lead to acting out the same actions depicted (M: 18).

> No comic should be prohibited because it is a figment of someone's imagination. It portrays scenarios that will never be possible in real life and it is for fun only. It is like reading Harry Potter or Game of Thrones (F: 19).

Another common argument was that sexually explicit comics do not incite crime:

> I truly believe a work of fiction shouldn't be the medium to blame for offensive sex acts. It is the sole responsibility of the person reading it and then committing the crime. Similar to video game violence (M: 21).

> Comic characters are just comic characters. There is no reason why the child pornography laws should extend to comics because it is not enacted in real life and it does not necessarily encourage people to engage in such acts in real life either (M: 18).

Four participants who argued against prohibition noted that they might support laws banning sexually explicit comics depicting minors if there was evidence of harm. It was said:

> No comics should not be prohibited, unless it can be proven that it has a statistically significant negative effect on society (M: 20).

> While I enjoy access to comics, I would be open minded to give that choice up if there was evidence or statistics released which showed that certain comics have negative effects (M: 19).

One participant even relied upon John Stuart Mill, stating:

> "I don't know enough on the subject to have a strict opinion, but I am concerned that there may be a correlation between reading sexually violent/likewise material and committing sexually violent/likewise acts in real life. I like to think that people would be able to consume media—even violent media—without being influenced to recreate it in real life, but I just don't know if that's true or

not. I feel that John Stuart Mill's 'harm principle' is relevant in these cases: if the media-consumers and media-makers aren't hurting anyone with their creations, then there's no reason to stop them creating and consuming those works. However, if there is evidence that those works are causing actual harm to others, then those works should be prohibited" (M: 21).

Another participant suggested fictional material might prevent harm to real children, commenting:

> "If the character is fictional, wouldn't it be better that a paedophile take pleasure from that, rather than a real child? That way a paedophile, who can't help the fact that they hold this particular sexual attraction, is able to 'get off' without harming anyone" (F: 21).

There was a widespread consensus that fans of sexually explicit comics were reading these materials "out of interest of the story/plot, not because they are a sadist or paedophile" (M: 20). Therefore, it was argued that willing viewers should not have their freedoms restricted, particularly as unwilling viewers could easily avoid certain comics. This is highlighted by the following comments:

> Just because you find some material offensive, it's not your right to prohibit what you think is wrong (M: 18).

> Comics are made up and the characters are not real, so I feel that I should be allowed to read them if I want to since it doesn't offend me. I'm sure there is somebody out there who is offended by it, but they don't have to read it or ruin it for the rest of us (F: 24).
> Specific genres have their own niche market and it isn't my business to tell people to read or not to read something (F: 18).

> If you don't like it don't buy it (F: 18).
> I think everyone has a right to access and create what they wish (F: 19).

However, ten participants who opposed prohibition stated that although they valued freedom of expression "there should be limits as to what people are allowed to say, including what they say in *manga*" (M: 18). These participants were generally of the view that comics should be prohibited if they "promote violence" (M: 20), "promote or condone harmful practices" (F: 25), or "promote illegal acts" (F: 21). One participant commented:

> "If a comic explicitly promotes or incites violence, discrimination, or other harmful crimes, then it should be prohibited. But I have been using the internet for social and sexual purposes for 10 years and I have never once seen a comic I feel should be prohibited" (M: 24).

Similarly, another male expressed the view that a comic should only be prohibited "if it specifically targets individuals and groups because it is like hate speech" (M: 18).

Restriction versus Prohibition

As highlighted above, of the 123 participants who stated comics should not be prohibited, 34 believed such material should nevertheless be regulated to prevent unwilling exposure. They were of the view that "pornographic comics should adhere to the same laws as other pornographic material" (F: 18). Some of these participants stated:

> Just have a restricted section that is only available to 18+ customers and have those comics sealed in bags so that you have to purchase them to read them (F: 19).

> As long as the rating is there, I don't see why they should be banned (M: 22).

> Comics shouldn't be banned because they entirely fictional and so no harm has been caused. But some should be restricted to an appropriate audience (M: 21).

Particular emphasis was placed on the need to prevent minors from accessing sexually explicit comics depicting minors, as highlighted by the following comments:

> I don't believe that they should be prohibited entirely. However, there needs to be strict laws in place to ensure that children are not able to see them (F: 18).

> I believe that there are comic books that should be restricted from younger audiences, but not prohibited (M: 21).

> There are comics out there that should only be sold to an 18+ audience, much the same as erotic novels or films, however, I don't feel that any should be explicitly banned (F: 20).

> For children, regulation of content is fine. However, prohibition would be excessive as adults should be able to decide what they read (M: 18).

> As long as a person is an adult, they should be able to view what they wish (M: 19).

> *Hentai* can be brutal and I am all for this [material] being restricted for under 18s (M: 25).

None of the participants stated whether a "child" includes those in mid-to-late adolescence, or just very young children. As stated above, a disadvantage of surveys is the inability to probe participants for more detailed information.

It should be noted that five participants expressed concern about regulating certain comics, stating:

> The more regulation, the less freedom authors have to create a true masterpiece (F: 23).

> Censorship is a dangerous path. Freedom of art comes before anything else (M: 19).

> I do not believe censorship is the way to go. Instead of restricting content, I believe that more should be created so that everyone can find what they like and ignore what they do not (M: 19).

One participant more elaborately commented:

> "I don't think certain comics should be censored. People should be free to read what they want to read, and if you start censoring comics then you're going down a slippery slope. It's like in the 1950s, when they wanted to censor horror comics, but ended up censoring almost all comics. And people are offended by different things—what I might find problematic might be no big deal to somebody else, and vice versa. I'm in favour of artistic freedom and the right to read what one wants. Another problem with censorship is that if you start banning certain stuff [then] it will go underground and it's near impossible to ban material in the digital era information anyway. Just have it out in the open and exercise your own judgement as to whether you want to read it or not" (F: 25).

Another participant also believed that regulation "only gives [the material] publicity and makes people more eager to seek it out. And frankly, I don't need the ratings board, government, or whoever telling me what I can see" (F: 18).

Arguments in Favour of Prohibition

Seventy-one participants (31%) believed sexually explicit comics depicting minors should be prohibited outright, for varying reasons. Nine participants based their argument on moral grounds and/or their belief such material is offensive, as pointed out by comments such as:

> Some comics just seem morally wrong (M: 18).
> I believe that comics that depict children and rape in any form should be prohibited mostly because I find it morally/ethically wrong (F: 20).

> There are so many sexually explicit depictions of extremely young children in comics that I think should be prohibited because it is immoral (F: 19).

> If the characters are under 18 characters in a comic doing sexual acts it is disturbing (F: 22).

> Yes, those comics should be prohibited to avoid the distribution and consumption of inappropriate material (F: 21).

> I think that there are certain comics that should be prohibited because they [are] absolutely disgusting (M: 18).

Nine participants based their arguments in favour of prohibition on remote harm, stating:

> Sexually explicit comics depicting children should be prohibited because they may encourage real life sexual exploitation of minors (M: 21).

> Those comics should be prohibited because [they] desensitise the general public to the seriousness of these actions … it also makes offenders think they have a right to engage in the act and that [the act] is not wrong (F: 19).

> They depict certain acts that are not ok, such as acts of paedophilia, and are presented in a way that makes it seem normal (F: 21).

One participant said that although she was not sure whether sexually explicit fictional comics are harmful, it is "safer to ban such material even if it's illustrated…especially if links are found between paedophilia offences and the enjoyment of illustrated child porn" (F: 24).

Five participants specifically expressed concern about some subgenres of sexually explicit *manga* discussed in Chapter 2. These participants commented:

> *Manga* with *shota* and *loli* themes should be banned because the characters are drawn to look like children under the age of 10 (F: 18).
>
> *Shota* and *lolicon* are repulsive and should be stopped (F: 21).
>
> *Hentai* that that explicitly depicts under age children in sexual situations should be prohibited (M: 20).

The analysis above shows that fantasy material fans are divided as to whether the law should criminalise sexually explicit comics depicting minors. The majority are against prohibition; some supported restricting such material to appropriate audiences; while others were in favour of prohibition for moral reasons or because sexually explicit fictional depictions of minors were seen as creating a risk of harm.

6.3.5 Summary of the Survey Findings

It was hypothesised that most participants would not be aware that sexually explicit fictional comics depicting minors are potentially captured by Australia's child abuse material legislation. The findings reveal that 53 per cent of comic fans were in fact not aware. However, out of the participants who said they were aware of the law, 67 per cent admitted the law did not deter them from seeking out certain sexually explicit comics depicting minors. In contrast, 36 participants said they did not access such material for moral reasons or lack of interest, regardless of whether it is prohibited or not.

The majority of participants (54%) believed sexually explicit comics depicting minors should not be prohibited. The main reasons given were that such material did not directly harm children, the lack of empirical evidence of harm, the importance of freedom of expression, and the ability of unwilling viewers to avoid offensive comics. Despite this, some participants said there should be limits on freedom of expression, stating that material that incites or promotes certain harmful acts should be prohibited.

Of the 123 participants who argued against prohibition, 34 believed sexually explicit comics should be regulated to prevent unwilling viewers from being offended. There

was particular concern that children would otherwise be able to easily access such material.

A minority (31%) believed sexually explicit comics depicting minors should be prohibited outright. Some said this was because such material is offensive or immoral. Others, however, believed sexually explicit comics depicting minors might indirectly cause harm to children by causing desensitisation and encouraging child sexual abuse.

6.4 Concluding Remarks

Notwithstanding the limitations, the findings provided valuable data. The interviews of seven members of the judiciary provided insight into the issues faced when interpreting and applying the law dealing with fictional material, insight that could not be obtained by a purely doctrinal approach. This was particularly valuable given the ambiguity of the legislative intent in criminalising fictional child pornography, as seen in Chapter 4. Despite the small sample size, the four law enforcement officers also provided unique insight into the views of those who regularly deal with child abuse material offenders and responsible for enforcing the law. In doing so, they provided expert views on what they believed are the potential harms of fictional child pornography.

There was a greater divergence of opinions expressed in the responses of the 226 comic fans surveyed. As discussed, the majority were against prohibition, but others supported prohibition on the grounds of morality, offensiveness, and potential harms. It is emphasised, however, that findings should not be taken to be representative of all fans of sexually explicit comics or the Australian population.

In the upcoming chapters, the responses of all the participants are analysed in light of the literature and theories of criminal law.

Chapter 7: Discussion Part I—A Matter of Harm

Chapter Contents

7.0 Aims of Chapter

Chapters 7 and 8 synthesise the data findings, the literature, and the theories explored throughout this dissertation. The focus of this chapter is on the Harm Principle and fictional child pornography; the next chapter focuses on the Offense Principle and Legal Moralism. The aim is to provide a socio-legal discussion of the issue of fantasy crime. This was made possible after analysing the pertinent theories of criminalisation, and the primary sources of law, and then obtaining valuable qualitative data through interviews with, and surveys of, relevant individuals.

The first section of this chapter sets out the definition of "harm". This is followed by a discussion of the main types of alleged remote harms created by fictional child pornography, namely, grooming, incitement to commit child sexual abuse, and desensitisation. As will be seen, the Harm Principle may provide a strong basis to justify prohibiting dissemination of fictional child pornography, but a weak basis for banning private possession.

7.1 Defining "Harm"

Before discussing the potential harm of viewing fictional child pornography, it is essential to define "harm" in this context. Mill formulated the Harm Principle, which has been a "powerful weapon in debate"[947] and is said to be the most influential principle underlying the criminal law in liberal democracies.[948] The Harm Principle's appeal lies in its apparent simplicity; harmful conduct is within governments' coercive jurisdiction, whereas harmless conduct is not.[949]

However, as seen in Chapter 3, one of the difficulties with the Harm Principle is that Mill did not precisely set out its scope. While it seems largely undisputed that the Harm Principle is only concerned with harm to others, there is debate as to whether the Harm Principle should be extended to include remote harms.[950] Remote harms broadly refers to conduct that may have no "ill consequences in itself, but which is thought to induce or lead to further acts (by the defendant or a third person) that create or risk harm".[951] The main criticism is that criminalising remote harms imputes blame to individuals for the potential acts others over whom they have no control and "because all sorts of seemingly innocent things we do may ultimately have deleterious consequences".[952] Yet, because Mill stated that one of the primary aims of the Harm Principle is to "*prevent* harm to others",[953] the principle can justify criminalising conduct that creates a risk of causing harm.[954] Hence, not taking into account remote harms is also problematic, as it fails to recognise that one of the important aims of the Harm Principle is harm prevention.[955]

---

[947]Smith, S.D (2006), "Is the Harm Principle Illiberal?", *American Journal of Jurisprudence*, vol. 51, no. 1, p. 6.
[948]Simester, A.P, and von Hirsch, A (2011), *Crimes, Harms, and Wrongs: On the Principles of Criminalisation*, Hart Publishing, Oxford, p. 79; Lauterwein, C (2010), *The Limits of Criminal Law: A Comparative Analysis of Approaches to Legal Theorizing*, Ashgate, Surrey, p. 57.
[949]Smith, above n 947, 6.
[950]See Chapter 3, at [3.1.2].
[951]von Hirsch, A (1996), "Extending the Harm Principle: 'Remote' Harms and Fair Imputation", in A Simester and A Smith (eds.), *Harm and Culpability*, Clarendon Press, Oxford, p. 264.
[952]Simester and von Hirsch, above n 948, 54.
[953]Mill, J.S (1991, org. 1859), *On Liberty and Other Essays*, edited by J Gray, Oxford University Press, Oxford, pp. 13-14 (emphasis added).
[954]Persak, N (2007), *Criminalising Harmful Conduct: The Harm Principle, its Limits and Continental Counterparts*, Springer, New York, p. 41.
[955]Ibid. Wallerstein, S (2007), "Criminalising Remote Harm and the Case of Anti-Democratic Activity", *Cardozo Law Review*, vol. 28, no. 6, p. 2699; Duff, R.A and Marshall, S.E (2015)

For the purposes of the following discussion, this dissertation adopts Mill's formulation of the Harm Principle, but relies on Feinberg's interpretation and refinement of the principle to fill the gaps left by Mill. As Feinberg's definition of harm has been widely endorsed by subsequent theorists, relying on Feinberg is generally consistent with the literature. Feinberg defined the Harm Principle as follows:

> "It is always a good reason in support of penal legislation that it would probably be effective in preventing (eliminating, reducing) harm to persons other than the actor (the one prohibited from acting) *and* there is probably no other means that is equally effective at no greater cost to other values".[956]

More specifically, Feinberg defined "harm" as something "thwarting, setting back, or defeating of an interest".[957] He emphasised that offense is less serious than harm[958] and excluded unpleasant mental states, such as distress, dislike, or annoyance, from the scope of the Harm Principle.[959] Feinberg recognised that harm prevention is good reason for criminalisation, but noted two important factors when assessing whether conduct that creates a risk of harm should be prohibited. These two factors, discussed further below,[960] are the *magnitude* of harm and the *likelihood* that the action will result in harm.[961] Accordingly, Feinberg's interpretation of the Harm Principle permits criminalising conduct that may lead to remote harms,[962] even where the harmful consequence is due to the actions of another autonomous individual.[963]

Adopting a Feinbergian version of the Harm Principle is particularly appropriate when considering the issue of fictional child pornography. This is because it is undesirable

---

"'Abstract Endangerment', Two Harm Principles, and Two Routes to Criminalization", *Minnesota Legal Studies Research Paper Series*, Research Paper No. 15-19, p. 3.

[956]Feinberg, J (1984), *Harm to Others: The Moral Limits of the Criminal Law*, Vol. I, Oxford University Press, New York, p. 26 (emphasis in the original).

[957]Ibid, 3.

[958]Feinberg, J (1985), *Offense to Others: The Moral Limits of the Criminal Law*, Vol. II, Oxford University Press, New York, p. 2.

[959]Feinberg, above n 956, 45.

[960]See below at [7.3].

[961]Feinberg, above n 956, 187.

[962]See Feinberg, above 958, 232-243.

[963]See von Hirsch, A (2014), "Harm and Wrongdoing in Criminalisation Theory", *Criminal Law and Philosophy*, vol. 8, no. 1, p. 246.

to expect governments not to act until there is "definitive proof"[964] of harm in some circumstances, especially where the envisioned harm is significant, as in the case of child sexual abuse. [965] It is also because ethical and legal barriers make researching the potential harm of viewing fictional child pornography extremely difficult, meaning it is unlikely that definitive proof of harm is possible; as stated by J7, "if you are looking for evidence of whether fictional material sparks action you might not find it". However, as will be argued later, this should not prevent legislatures from criminalising fictional child pornography if it creates a reasonable apprehension of an unacceptable risk of harm.

Having set out the scope of the Harm Principle, the following section discusses the potential remote harms created by fictional child pornography that may justify prohibition.

7.2 Remote Harms

A common theme in the findings was the belief that fictional child pornography may cause indirect harm. It was suggested such material "could lead to the abuse of living children"[966] or that it "may encourage real life sexual exploitation of minors".[967] These constitute remote harms because the material may create a risk of contact offending.

---

[964]In relation to sexually explicit cartoons depicting minors, Greenberg has argued that "the absence of any definitive proof of that harm leads to the recommendation that at the very least, penalties for the creation, distribution, and ownership of comics and cartoons with sexual content must be de-criminalised". Greenberg, M.H (2012), "Comics, Courts and Controversy: A Case Study of the Comic Book Legal Defense Fund", *Loyola of Los Angeles Entertainment Law Review*, vol. 32, no. 2, p. 122. Also see Levy, N (2002), "Virtual Pornography: The Eroticization of Inequality", *Ethics and Information Technology*, vol. 4, no. 1, pp. 319-323; Russell, G (2008), "Pedophiles in Wonderland: Censoring the Sinful in Cyberspace", *Journal of Criminal Law & Criminology*, vol. 98, no. 4, pp. 1467-1500; Cochran, A.L (2009), "Punishment For Virtual Child Pornography … It's Just A Fantasy", *ExpressO*, available online, <http://works.bepress.com/allison_cochran/1/>; Ost, S (2009), *Child Pornography and Sexual Grooming: Legal and Societal Responses*, Cambridge University Press, Cambridge, pp. 130-131; Ost, S (2010) "Criminalising Fabricated Images of Child Pornography: A Matter of Harm or Morality?", *Legal Studies*, vol. 30, no. 2, pp. 230-256; April, K (2012), "Cartoons Aren't Real People, Too: Does The Regulation of Virtual Child Pornography Violate the First Amendment and Criminalize Subversive Thought?", *Cardozo Journal of Law & Gender*, vol. 19, no. 1, pp. 241-272; Byberg, J (2012), "Childless Child Porn—A 'Victimless' Crime?", *Social Science Research Network*, available online, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2114564>.

[965]See Akagawa, M (2015), "Regulating Pornocomic Sales to Juveniles in Japan: Cycles and Path-Dependence of a Social Problem", *Qualitative Sociology Review*, vol. 11, no. 2, p. 69.

[966]J1.

[967]M: 21.

The predominant types of remote harms identified in the findings were similar to those expressed in the literature dealing with virtual child pornography,[968] namely that fantasy material might:

- be used to groom children;
- incite viewers to commit child sexual abuse; and
- desensitise viewers.

Each of these remote harms is critically analysed below as grounds for prohibiting fictional child pornography.

7.2.1 Grooming

Child grooming is the process whereby potential child molesters build trust with a child for the purpose of facilitating sexual abuse.[969] The literature suggests pornographic material is sometimes used as a tool to assist this process.[970] It has been suggested that virtual child pornography may be particularly effective for the purpose of grooming because such images can be manipulated to show children enjoying sexual activity.[971] As seen in the previous chapter, J2 believed prohibiting fictional child pornography might be justified if the material was "used for the purpose of grooming, because then [the prohibition] would protect children".[972]

While there is extensive literature on child grooming, there are no studies investigating the use of fictional child pornography to sexually groom children.[973] However, the

[968]See Chapter 1, at [1.2.2].
[969]Kim, C (2004), "From Fantasy to Reality: The Link Between Viewing Child Pornography and Molesting Children", *American Prosecutors Research Institute*, vol. 1, no. 3, available online, <http://www.ndaa.org/ pdf/Update_gr_vol1_no3.pdf>.
[970]McCabe, K (2000), "Child Pornography and the Internet", *Social Science Computer Review*, vol. 18, no. 1, p. 76; Quayle, E, and Taylor, M (2001), "Child-Seduction and Self-Representation on the Internet", *Cyberpsychology & Behavior*, vol. 4, no. 5, p. 599.
[971]Guglielmi, K (2001), "Virtual Child Pornography as a New Category of Unprotected Speech", *CommLaw Conspectus*, vol. 9, no. 2, p. 217; Gillespie, A (2011), *Child Pornography: Law and Policy*, Routledge, New York, p. 108.
[972]J2.
[973]For example see Ost, above n 964; Choo, K.R (2009), *Online Child Grooming: A Literature Review on the Misuse of Social Networking Sites for Grooming Children for Sexual Offences*, Australian Institute of Criminology, Research and Public Policy Series 103; O'Connell, R (2003), *A Typology of Child Cybersexploitation and Online Grooming Practices,* Cyberspace Research Unit University of

Feinbergian version of the Harm Principle, which takes into consideration remote harms, would not demand conclusive empirical evidence that such material is being used as a grooming tool. This is provided that the risk is not trivial, which Feinberg refers to as the "de *minimis* maxim".[974] It seems plausible that child molesters may use cartoons, such as "Japanese *manga* … to induce children into sexual activity".[975]

Yet, prohibiting fictional child pornography solely because it may be used to groom children is problematic, given that it is not feasible to criminalise *any* item that may conceivably be misused by child molesters. This was recognised by the United States Supreme Court in *Ashcroft,* where the majority held that criminalising certain items that may be used to groom would lead to the criminalisation of all sorts of things, such as candy, video games and toys, "yet we would not expect those to be prohibited because they can be misused".[976] It can be argued that, unlike fictional child pornography, innocuous items such as candy are morally neutral and therefore not truly comparable.[977] However, it has been reported that molesters use adult pornography to lower the inhibitions of children,[978] but adult pornography remains generally legal in Western countries and is certainly not prohibited because it can be used to groom. If the main concern is grooming, it would be more appropriate to criminalise the act of grooming rather than material that may potentially be used to

---

Central Lancashire, available online, < http://image.guardian.co.uk/sys-files/Society/documents/2003/07/17/Groomingreport.pdf>; Craven, S, Brown, S, Gilchrist, E (2006), "Sexual Grooming of Children: Review of Literature and Theoretical Considerations", *Journal of Sexual Aggression*, vol. 12, no. 3, pp. 287-299; McAlinden, A.M (2012), *'Grooming' and the Sexual Abuse of Children: Institutional, Internet, and Familial Dimensions,* Oxford University Press, Oxford.

[974]See Feinberg, above n 956, 189.

[975]Schroeder, L.P (2015), "Around the World: Protecting Victims of Child Pornography in Japan", *Children's Rights Law Journal*, vol. 35, no. 2, p. 198. Also see Takeuchi, C (2015), "Regulating *Lolicon*: Toward Japanese Compliance with Its International Legal Obligations to Ban Virtual Child Pornography", *Georgia Journal of International and Comparative Law*, vol. 44, no. 1, p. 223.

[976]*Ashcroft v Free Speech Coalition*, 535 U.S. 234 (2002), at [251].

[977]April, above n 964, 263; Eneman, M, Gillespie, A, and Stahl, B.S (2009), "Criminalising Fantasies: The Regulation of Virtual Child Pornography", *Proceedings of the 17th European Conference on Information Systems*, at [4.1], available online, <http://www.cse.dmu.ac.uk/~bstahl/publications/2009_Criminalising_ Fantasies_ECIS.pdf>.

[978]See Kim, above n 969; Rettinger, L.J (2000), *The Relationship between Child Pornography and the Commission of Sexual Offences against Children: A Review of the Literature*, Department of Justice Canada, p. 11; Mitchell, K, Finkelhor, D, and Wolak, J (2005), "The Internet and Family and Acquaintance Sexual Abuse", *Child Maltreatment*, vol. 10, no. 1, p. 55; Powell, A (2007), *Paedophiles, Child Abuse and the Internet: A Practical Guide to Identification, Action and Prevention*, Radcliffe Publishing, Oxon, p. 29.

groom.[979] Indeed, Australia has enacted legislation specifically dealing with grooming.[980] For example, s 66EB of the *Crimes Act 1900* (NSW) makes it an offence for an adult to expose a child up to the age of 16 to indecent material with the intention of making it easier to procure the child for unlawful sexual activity.

Thus, it seems that grooming itself does not provide a strong basis for prohibiting fictional child pornography. Nonetheless, as will be seen in the following sections, there are other concerns that may support prohibition.

7.2.2 Fantasy and Incitement

As the title of this dissertation indicates, the relationship between fantasy and crime is a key issue. The concern that fantasy material incites crime or other anti-social behaviour is not new. This was exemplified in Chapter 2, which discussed the panic surrounding comics in Western countries in the 1950s, leading to the censorship of comics depicting sex and violence.[981] It was feared that comics stimulated violence by showing it "in a way that makes it seem more amusing, more permissible, and less serious than it really is".[982] These claims are supported by some studies concerned with cartoon violence.[983]

Since the 1950s, comics have sporadically come under scrutiny due to occasional instances where a person commits a crime and is later revealed to be a comic fan. This includes the 1989 case of Miyazaki Tsutomu, who murdered four children in Japan and was later found to be an avid fan of *hentai* depicting young girls.[984] The media's reporting of this case implied that his interest in such material was a significant factor

[979]See Calvert, C (2000), "The 'Enticing Images' Doctrine: An Emerging Principle in First Amendment Jurisprudence?", *Fordham Intellectual Property, Media & Entertainment Law Journal*, vol. 10, no. 3, pp. 595-617.
[980]For a summary of the grooming offences in each Australian jurisdiction see Australian Institute of Criminology (2008), "Online Child Grooming Laws", *High Tech Crime Brief*, Report No. 17, Canberra. But note, there have been some amendments to the law since this report was published.
[981]Chapter 2, at [2.3].
[982]Harrison, R (1981), *The Cartoon: Communication to the Quick*, Sage Publications, California, p. 114.
[983]See Chapter 1, at [1.2.7].
[984]Miyazaki Tsutomu was discussed in Chapter 2, at [2.4].

leading to his crimes, with one media report asserting "the little girls he killed were no more than characters from his comic book life".[985]

Sexually explicit comics have also attracted negative attention in the West, including Australia. For example, in 2015, the media reported that 22-year-old Australian Daniel Kelsall, who had previously been convicted of murder, was "an avid fan of cartoons and Japanese anime".[986] Some of these comics allegedly "depicted children under 16 engaged in sex acts and poses with older males".[987] There was no apparent link between the murder and the possession of the comics, with the two offences being substantially different from each other. Yet, implicit in these reports was that fantasy material incites viewers to harm real people. What was not acknowledged was that these examples are extreme and exceptional. Therefore, the actions of individuals such as Tsutomu or Kelsall should not be generalised to a whole generation of fans of sexually explicit *manga*.[988] However, Schodt, a renowned expert on *manga,* has warned that:

---

[985]Charles Whippie quoted in Kinsella, S (1998), "Japanese Subculture in the 1990s: Otaku and the Amateur Manga Movement", *Journal of Japanese Studies*, vol. 24, no. 2, p. 309.

[986]Gardner, S (2015), "Morgan Huxley's Killer, Daniel Kelsall, Sentenced for Possessing Child Porn", *Sydney Morning Herald*, 17 August, available online, < http://www.smh.com.au/nsw/morgan-huxleys-killer-daniel-kelsall-sentenced-for-possessing-child-porn-20150817-gj0ogv.html>. Another Australian example is the media's reporting of a 52-year-old man from Adelaide who received a suspended sentence for possessing over 300 cartoon images deemed child pornography. See Marcus, C (2015), "Anime Images not a Big Leap to Viewing Child Pornography: SA Judge", *ABC News*, 12 August, available online, <http://www.abc.net.au/news/ 2015-08-12/anime-not-a-big-leap-to-child-pornography-sa-judge-says/6691372>. In the United States, concern has also been expressed about fantasy material following media reports in 2014 that two 12-year-old girls repeatedly stabbed their friend after being influenced by the "Slender Man" digital fantasy. See Keneally, M, and Robinson, K (2014), "Girl Accused in 'Slender Man' Stabbing Says She Talks to Unicorns and Voldemort", *ABC News*, 1 August, available online, <http://abcnews.go.com/US/girl-12-accused-slender-man-stabbing-ruled incompetent/story?id=24796126>; Williams, M (2014), "Florida Sheriff Says Soul Eater and Slender Man Directed Teen to Kill", *CBLDF*, 11 September, available online, <http://cbldf.org/2014/09/florida-sheriff-says-soul-eater-and-slender-man-directed-teen-to-kill/>. For an example from Belgium see AFP (2010), "'Manga Murderers' Accused of Slicing Up Victim", *Sydney Morning Herald*, 21 September, available online, <http://www.smh.com.au/world/manga-murderers-accused-of-slicing-up-victim-20100920-15k4r.html>.

[987]Gardner, above n 986.

[988]See especially Kam, T.H (2013), "The Anxieties that Make the 'Otaku': Capital and the Common Sense of Consumption in Contemporary Japan", *Japanese Studies*, vol. 33, no. 1, pp. 39-61. Also see Kinsella, above n 985, 311; Suzuki, T (2001), "Frame Diffusion from the U.S. to Japan: Japanese Arguments Against Pornocomics, 1989–1992", in J Best (ed.), *How Claims Spread: Cross-National Diffusion of Social Problems*, Aldine De Gruyter, New York, pp. 142-143; Hashimoto, M (2007), "Visual Kei Otaku Identity—An Intercultural Analysis", *Intercultural Communication Studies*, vol. 16, no. 1, p. 88.

> "[I]t is hard to escape the conclusion that some of the less healthy minds on the fringe of English *manga*/anime fandom have paedophiliac tendencies that are stimulated, and in their minds even legitimised, by the Japanese 'Lolita' erotic ideal. Inevitably, as anime and *manga* become more and more mainstream, this dark side of the phenomenon will invite more and more criticism".[989]

According to some of the judicial officers interviewed, prohibiting fictional child pornography might have been based on an assumption that "people's fantasies might turn into a reality".[990] Yet, it was apparent that the judicial officers were hesitant in concluding that this was the rationale, commenting that whether the law extended to obviously fictional representations of children might have been "something the legislatures had not thought about at all".[991]

Conversely, the law enforcement officers interviewed were adamant that the legislation was focused on preventing harm, believing that there is a significant risk viewers will imitate what they see in fantasy material in real life. This was highlighted by comments describing individuals who "get those thoughts and then put them on paper"[992] as "opportunists"[993]. It was claimed that "if the opportunity arose for them to go out and play out their fantasies, having written it down, they know exactly what they want to do and they will do it".[994] An interest in sexually explicit fantasy material representing children may also be, as implied by the law enforcement officers, indicative of paedophilia and may intensify those interests. As mentioned in Chapter 1, from his experience with working with sex offenders, Wyre has made similar observations, stating that:

> "Fantasy and behaviour are directly connected … all of the men I have ever worked with have put into practice their fantasies of sexual abuse [and] what I …

[989]Schodt, F.L (1996), *Dreamland Japan: Writings on Modern Manga*, Stone Bridge Press, California, p. 501.
[990]J7.
[991]J2.
[992]LEO 1.
[993]LEO 1.
[994]LEO 3.

know is that the more they masturbate to pornography, the more likely they will be to put their fantasy into practice".[995]

According to two Australian clinical psychologists and one senior child abuse investigator who have dealt with offenders:

> "[W]hile can't be said with certainty, that any or all individuals who access child pornography will progress towards hands-on offences … the longer the fantasy is maintained and elaborated on, the greater the chance that the behaviour will be acted out in real life. Fantasy functions not only as a motivator and an opportunity to rehearse activities, but also a way of overcoming inhibitions to enacting the target behaviour. Therefore, the more individuals engage in fantasy, the more motivating and more detailed the rehearsal may become, and the more able the individuals are to convince themselves to act out the behaviour in real life".[996]

Other experts who have worked with sex offenders have also highlighted the significant role sexual fantasy plays in the progression towards abuse. As seen in the literature review in Chapter 1,[997] research suggests "sexual fantasy plays an integral role in the development and maintenance of sexually aberrant behaviour"[998] and provides "fuel for offending".[999] The literature also emphasised the relationship between sexual fantasies, masturbation, and sex offending.[1000] Wolf has argued that:

> "[E]ven if sexual behaviour is believed to be forbidden to the individual, when [the sex offender] fantasises about it and begins to experience the sexual stimulation

---

[995]Wyre, R (1992), "Pornography and Sexual Violence: Working with Sex Offenders", in C Itzin (ed.), *Pornography: Women, Violence and Civil Liberties*, Oxford University Press, Oxford, p. 243. But note that Wyre's views have been subject to criticism in Hewson, B (2009), "Fetishising Images", in D.S Wall (ed.), *Crime and Deviance in Cyberspace*, Ashgate, Surrey, p. 268.

[996]Blundell, B, Sherry, M, Burke, A, and Sowerbutts, S (2002), "Child Pornography and the Internet: Accessibility and Policing", *Australian Police Journal*, vol. 56, no. 1, pp. 63-64.

[997]See Chapter 1, at [1.2.4].

[998]Gee, D, and Belofastov, A (2007), "Profiling Sexual Fantasy: Fantasy in Sexual Offending and the Implications for Criminal Profiling", in R.N Kocsis (ed.) *Criminal Profiling: International Theory, Research, and Practice*, Humana Press, New Jersey, p. 49.

[999]Sullivan, J, and Beech, A (2003), "Are Collectors of Child Abuse Images a Risk to Children?", in A MacVean and P Spindler (eds.), *Policing Paedophiles on the Internet*, The New Police Bookshop, London, p. 17.

[1000]See Chapter 1, at [1.2.4].

> and gratification, this will in time, with enough repetitions, desensitise [the offender] to the sense of taboo that the behaviour brings with it".[1001]

Similarly, Sullivan and Beech have maintained that masturbating to deviant fantasies reinforces an association between the images in the person's mind and sexual gratification, which creates an urge to play out the fantasy.[1002] They have dismissed the claims made by some child sex offenders that masturbating over fantasies involving children was a way for offenders to control urges, instead arguing that:

> "[T]his process of linking fantasy with a reinforcer like masturbation develops the urge, and this combination becomes the engine room of the desire to sexually offend".[1003]

The literature on fantasy material indicates that sexually explicit comics are used during masturbation.[1004] It has been claimed that the point of adult *manga "*is to arouse, stimulate, and likely aid in masturbation";[1005] YAOI has specifically been referred to as "masturbation fantasy".[1006] Accordingly, it can be argued that repeated masturbation paired with sexually explicit fantasy material depicting underage characters may create a strong desire to engage in the fantasised behaviours.

[1001]Wolf, S.C (1988), "A Model of Sexual Aggression/Addiction", *Journal of Social Work & Human Sexuality*, vol. 7, no. 1, p. 137.
[1002]Sullivan and Beech, above n 999, 17-18.
[1003]Ibid, 18.
[1004]For example see Kam, above n 988; Dahlquist, J.P, and Vigilant, L.G (2004), "Way Better than Real: Manga Sex to Tentacle Hentai", in D.D Waskul (ed.), *Net.SeXXX: Readings on Sex, Pornography and the Internet*, Peter Lang Publishing, New York, p. 96; Saitō, T (2011), *Beautiful Fighting Girl*, translated by J. K Vincent and D Lawson, University of Minnesota Press, Minneapolis, pp. 154-155; Nagaike, K (2012), *Fantasies of Cross-Dressing: Japanese Women Write Male-Male Erotica*, Brill, Leiden, p. 111; Brown, L (2013), "Pornographic Space-Time and the Potential of Fantasy in Comics and Fan Art", *Transformative Works and Cultures*, vol. 13, available online, <http://journal.transformativeworks.org/index.php/twc/article/view/465/396 >; Fermin, T (2013), "Appropriating Yaoi and Boys Love in the Philippines: Conflict, Resistance and Imaginations Through and Beyond Japan", *EJCJ*, vol. 13, no. 1, available online, <http://japanesestudies.org.uk/ejcjs/vol13/iss3/ fermin.html>.
[1005]See Galbraith, P.W (2014), "The *Misshitsu* Trial: Thinking Obscenity with Japanese Comics", *International Journal of Comic Art*, vol. 16, no. 1, p. 133.
[1006]Sugiura Yumiko quoted in Galbraith, P.W (2015), "*Moe* Talk: Affective Communication among Female Fans of *Yaoi* in Japan", in M McLelland, K Nagaike, K Suganuma, and J Welker (eds.), *Boys Love Manga and Beyond: History, Culture, and Community in Japan*, University Press of Mississippi, p. 157. Also see McLelland, M (2000), "No Climax, No Point, No Meaning? Japanese Women's Boy-Love Sites on the Internet", *Journal of Communication Inquiry*, vol. 24, no. 3, pp. 274-291.

However, as noted in Chapter 1, the problem with much of the existing research is that it was conducted on a subset of serious child sex offenders. As well as being inconclusive and at times contradictory, these studies may not provide a sufficient basis to conclude that fantasy material incites child sexual abuse. This is particularly if it is accepted that the vast majority of people are capable of "see[ing] fantasy as separate from reality and [so] the two can successfully coexist".[1007] It was for this reason that several comic fans surveyed argued that it is not justified to prohibit sexually explicit comics depicting children because "people can make the distinction between reality and fantasy, and that reading a comic will not lead to acting out the same actions depicted".[1008] This again raises the question of whether the rights of the majority should be restricted because of a minority of individuals who may be incited by fantasy materials.

Yet, as will be seen in the following section, material that sexualises children has the potential to desensitise both sex offenders and non-offenders alike, which may provide support for criminalising fictional child pornography.

7.2.3 Desensitisation

Desensitisation refers to the concern that repeated exposure to abhorrent material will cause viewers to gradually become immune to their first feelings of repulsion and believe that the conduct viewed is acceptable.[1009] It has been argued that

> "[W]hen children are sexualised within mainstream media or where images of abuse remain legal, as in the case of *manga* (violent and sometimes pornographically violent) cartoons in Japan, both children and adults are less shocked by virtual violence and exploitation and may even begin to see it as normal".[1010]

[1007]Howitt, D (2004), "What is the Role of Fantasy in Sex Offending?", *Criminal Behaviour and Mental Health*, vol. 14, no. 3, p. 184. Also see Leitenberg, H, and Henning, K (1995), "Sexual Fantasy", *Psychological Bulletin*, vol. 117, no. 3, pp. 469-496; Bader, M.J (2002), *Arousal: The Secret Logic of Sexual Fantasies*, Thomas Dunne Books, New York.
[1008]M: 18.
[1009]Russell, D (1993), *Against Pornography*, Russell Publications, California, p. 130.
[1010]Violence in Cyberspace (2006), *Violence Against Children*, UNCIEF, no. 4, p. 7, available online, <http://www.unicef.org/eapro/VAC_newsletter_04Cyber.pdf>. Also see Takeuchi, C (2015), "Regulating *Lolicon*: Toward Japanese Compliance with Its International Legal Obligations to Ban

In this sense, the dissemination of such material may lead to what Simester and von Hirsch describe as a remote "conjunctive harm".[1011] If many people are exposed to fictional child pornography, it may silently desensitise society to the immorality of child sexual abuse.[1012] As seen in the previous chapter, some participants were also concerned that such comics "might make sexual acts with young children seem acceptable"[1013] and "depict certain acts that are not ok, such as acts of paedophilia, and are presented in a way that makes it seem normal".[1014] An example of desensitisation can be reflected by the response of one male surveyed as part of this study, who admitted that:

> "I prefer looking at illustrations of males from the ages of 12–17 usually, which means sometimes I am associated with the *shota* community and I am also seen as something hideous by Australian society. I don't exactly think that is fair".[1015]

Nevertheless, some academics, as well as many of the comic fans surveyed, have questioned whether cartoon depictions of minors in a sexual context can actually desensitise viewers.[1016] This is because they believed that the surreal and cartoonish nature of fantasy material might act as a buffer between the acts depicted and their execution in real life.[1017] It has been argued that "[i]t is precisely because of the non-

---

Virtual Child Pornography", *Georgia Journal of International and Comparative Law*, vol. 44, no. 1, pp. 195-236.

[1011]That is, harm that occurs when combined with similar acts of others. Simester and von Hirsch, above n 948, 59. See Chapter 3, at [3.1.2].

[1012]This is one of the main concerns about virtual child pornography expressed in the literature. See Chapter 1, at [1.2.2]. See especially Pursel, W.L (1998), "Computer-Generated Child Pornography: A Legal Alternative", *Seattle University Law Review*, vol. 22, no. 2, p. 659.

[1013]J6.

[1014]F: 21.

[1015]M: 21.

[1016]See especially Jones, T, and Wilson, D (2009), "When Thinking Leads to Doing: The Relationship Between Fantasy and Reality in Sexual Offending", in J.L Ireland, C.A Ireland, and P Birch (eds.), *Violent and Sexual Offenders: Assessment, Treatment and Management*, Willan Publishing, Oregon, pp. 235-256. Also see Dahlquist and Vigilant, above n 1004, 98-100; Blitz, M.J (2008), "The Freedom of 3D Thought: The First Amendment in Virtual Reality", *Cardozo Law Review*, vol. 30, no. 3, p. 1230; Brenner, S.W (2008), "Fantasy Crime: The Role of Criminal Law in Virtual Worlds", *Vanderbilt Journal of Entertainment and Technology Law*, vol. 11, no. 1, pp. 89-90; Adams, A (2010), "Virtual Sex with Child Avatars", in C Wankel and S Malleck (eds.), *Emerging Ethical Issues of Life in Virtual Worlds*, IAP, North Carolina, p. 67; Reeves, C (2013), "Fantasy Depictions of Child Sexual Abuse: The Problems of Ageplay in Second Life", *Journal of Sexual Aggression*, vol. 19, no. 2, p. 243.

[1017]Ibid.

reality of animation that producers are free to express opinions and ideas that would otherwise be considered taboo".[1018] The characters represented only exist in the realm of fantasy and such material may only be enjoyable to viewers because they know that no real child was used to produce it.[1019] These claims are consistent with those of Sigmund Freud:

> "The unreality of the writer's imaginative world, however, has very important consequences for the technique of his art; for many things which, if they were real, could give no enjoyment, can do so in the play of fantasy, and many excitements which, in themselves, are actually distressing, can become a source of pleasure for the hearers and spectators at the performance of a writer's work".[1020]

This sense of distance has been said to be particularly important for fans of sexually explicit comics, such as *hentai,* Boys Love, and YAOI.[1021] It has been argued that the characters in *hentai* were never supposed to stand for real people; rather "their appeal is their very fictionality".[1022] Peek's thesis on *kawaii* (cute)[1023] aesthetics in Japanese

---

[1018]Peek, C.M (2009), *KAWAII Aesthetics: The Role of Cuteness in Japanese Society*, Honours Thesis, University of Arizona, p. 15. Also see Galbraith, above n 1006.
[1019]Blitz, above n 1016; Brenner, above n 1016; Adams, above n 1016; Reeves, above n 1016; McLelland, M, and Yoo, S (2007), "The International Yaoi Boys' Love Fandom and the Regulation of Virtual Child Pornography: Current Legislation and its Implications", *Journal of Sexuality Research & Social Policy*, vol. 4, no. 1, p. 98.
[1020]Freud, S (1908), "Creative Writers and Day-Dreaming", in *Standard Edition* 9, p. 143.
[1021]For example see Peek, above n 1018; Galbraith, above n 1006; Suzuki, K (1998), "Pornography or Therapy? Japanese Girls Creating the Yaoi Phenomenon", in S.A Inness (ed.), *Millennium Girls: Today's Girls Around the World*, Rowman & Littlefield Publishers, Maryland, pp. 243-268; Nagaike, K (2003), "Perverse Sexualities, Perversive Desires: Representations of Female Fantasies and 'Yaoi Manga' as Pornography Directed at Women", *U.S.–Japan Women's Journal*, vol. 25, pp. 76-103; Shamoon, D (2004), "Office Sluts and Rebel Flowers: The Pleasure of Japanese Pornographic Comics for Women", in L Williams (ed.), *Porn Studies*, Duke University Press, Durham, pp. 77-103; Thorn, M (2004), "Girls and Women Getting Out of Hand: The Pleasure and Politics of Japan's Amateur Comics Community", in W.W Kelly (ed.), *Fanning the Flames: Fans and Consumer Culture in Contemporary Japan*, State University of New York Press, Albany, pp. 169-186; Welker, J (2006), "Beautiful, Borrowed, and Bent: 'Boys' Love' as Girls' Love in *Shojo Manga*", *Chicago Journals*, vol. 31, no. 3, pp. 841-870; Feng, J (2009) "'Addicted to Beauty': Consuming and Producing Web-Based Chinese *Danmei* Fiction at Jinjiang", *Modern Chinese Literature and Culture*, vol. 21, no. 2, pp. 1-41; Ortega-Brena, M (2009), "Peek-a-Boo, I see You: Watching Japanese Hard-Core Animation", *Sexuality & Culture*, vol. 13, no. 1, pp. 17-31; Zanghellini, A (2009), "'Boys' Love' in *Anime* and *Manga*: Japanese Subcultural Production and its End Users", *Continuum*, vol. 23, no. 3, pp. 279-294; Kee, T.B (2010), "Rewriting Gender and Sexuality in English-Language Yaoi Fanfiction", in A Levi, M McHarry, and D Pagliassotti (eds.), *Boys' Love Manga: Essays on the Sexual Ambiguity and Cross-Cultural Fandom of the Genre*, McFarland & Company Inc. Publishers, London, pp. 126-156.
[1022]Hemmann, K (2014), "Short Skirts and Superpowers: The Evolution of the Beautiful Fighting Girl", *U.S.–Japan Women's Journal*, vol. 47, no. 1, pp. 52-53. Also see Saitō, above n 1004.
[1023]See Chapter 2, at [2.4] for a discussion of the cute craze in Japan.

animations also emphasised that the cuteness of the characters in *manga* allows "viewers [to] distance themselves from the reality of situations".[1024] This is supported by Galbraith's study on avid male fans of sexually explicit *manga* where most, if not all, of the respondents admitted that they were sexually gratified by cute two-dimensional characters and not pornography depicting three-dimensional people.[1025] Similar claims were made by several comic fans surveyed for the purposes of this dissertation who argued that comics are "fiction and, thus, not representing the real world",[1026] and that "comics shouldn't be prohibited because they provide a certain level of freedom that can never be achieved in real life".[1027] Viewing such material was compared to "reading Harry Potter or Game of Thrones",[1028] which allow fans to fantasise about acts that "will never be possible in real life and it is for fun only".[1029]

However, some of the research on cartoon violence reviewed in Chapter 1 suggests it is the unrealism of fantasy materials that is most troubling.[1030] According to Harrison, the concern surrounding comics in the 1950s "was not that the cartoon violence was too realistic, but rather it was unrealistic, that it gave a distorted view of the real danger or permissibility of violence".[1031] It has been observed that, since comics are usually perceived as humorous entertainment, "we find laughter evoked by a series of intensely 'cruel' and sadistic happenings that would in ordinary circumstances evoke horror and sympathy, but which become tolerable by the cartoon technique adopted".[1032] Therefore, cartoon representations of children engaging in sexual activity may trivialise and give a distorted view of the seriousness of child sexual abuse. This was the view of a New South Wales Public Defender who, when commenting on *The Simpsons* cartoon pornography in question in the *McEwen* case,[1033] warned that such material might desensitise viewers and that "the use of

[1024]Peek, above n 1018, 14.
[1025]Galbraith, P.W (2014), *The Moe Manifesto: An Insider's Look at the Worlds of Manga, Anime, and Gaming*, Tuttle Publishing, Tokyo.
[1026]M: 21.
[1027]M: 19.
[1028]F: 19.
[1029]Ibid.
[1030]See Chapter 1, at [1.2.7].
[1031]Harrison, above n 982, 127.
[1032]Flugel, J.C (1954), "Humor and Laughter", in G Lindzey (ed.), *Handbook of Social Psychology*, Addison-Wesley, Cambridge, p. 716.
[1033]*McEwen v Simmons & Anor* [2008] NSWSC 1292. See Chapter 4 for a discussion of this case.

humour and satire arguably makes this even more likely".[1034] Some of the judicial officers interviewed also reasoned that:

> "This law, which extends to cartoons, is all about trying to remove from society the impact of sexual activity with children. So what society is saying is that in no way is the activity acceptable".[1035]

In response, it is common for those who oppose prohibiting sexually explicit fictional material of minors to argue that there is no conclusive evidence proving such material causes harm, claiming that the purpose of the law was indefensibly to protect morality.[1036] This includes some of the comic fans surveyed, who responded that sexually explicit comics "should not be prohibited, unless it can be proven that it has a statistically significant negative effect on society".[1037] As noted in Chapter 1, there has been little, if any, research investigating the harm in viewing fictional child pornography, which may be largely due to the ethical and legal barriers in conducting such research.

However, even in the absence of empirical research it may be reasonable to believe that viewing fictional child pornography is harmful in that it may desensitise viewers. To determine whether this belief is based on reasonable grounds, J7 suggested relying upon the research exploring the effects of viewing pornography containing "depictions of real people". This research was reviewed in Chapter 1 and, as demonstrated by several studies, repeated exposure to pornography depicting adults may lead to

---

[1034]Public Defender Paul Winch quoted in Child Pornography Working Party (2010), *Report of the Child Pornography Working Party*, NSW Department of Justice and Attorney General, p. 42.
[1035]J6.
[1036]For example Greenberg, above n 964; April, above n 964; Russell, above n 964; Ost, above n 964; Brenner, above n 1016; Ryder, B (2003), "The Harms of Child Pornography Law", *University of British Columbia Law Review*, vol. 36, no. 1, pp. 101-135; Simpson, B (2009), "Controlling Fantasy in Cyberspace: Cartoons, Imagination and Child Pornography", *Information & Communications Technology Law*, vol. 18, no. 3, pp. 255-271; Zanghellini, A (2009), "Underage Sex and Romance in Japanese Homoerotic Manga and Anime", *Social and Legal Studies*, vol. 18, no. 2, pp. 159-177; McLelland, M (2013), "Ethical and Legal Issues in Teaching about Japanese Popular Culture to Undergraduate Students in Australia", *Electronic Journal of Contemporary Japanese Studies*, vol. 13, no. 2, available online, <http://ro.uow.edu.au/cgi/viewcontent.cgi?article=1895& context=lhapapers>; Williams, M (2014), "CNN Spectacularly Fails to Understand Manga and Anime", *CBLDF*, 19 June, available online, <http://cbldf.org/2014/06/cnn-spectacularly-fails-to-understand-manga-and-anime/>.
[1037]M: 20.

negative attitudes towards women and acceptance of the rape myth.[1038] More specifically, a considerable amount of studies have indicated that viewing child pornography depicting real children has significant negative effects on viewers.[1039] This includes a potential to cause "callous attitudes about the degree of suffering experienced by child victims of sexual abuse"[1040] and the "trivialisation of child sexual abuse".[1041] A number of these studies further found that viewing sexualised images of real children can desensitise viewers by rendering them insensitive or less sensitive to the sexualisation of children.[1042] Importantly, unlike the studies concerned with the link between fantasy and crime, many of these studies were conducted on non-sex offenders. Therefore, their findings are more reliable when assessing the potential effects of viewing fictional child pornography more broadly.

Additionally, as noted in Chapter 1, social learning theorists and researchers have suggested the media can, and does, influence people of all ages.[1043] It been argued that:

> "[G]eneral theories of social learning do suggest that at least for some, viewing any material which associates children and sex, whether real or created child abuse images, art (still or animated), textual descriptions or virtual sex with child avatars, will increase their propensity to engage in child molestation".[1044]

In light of the existing research it seems unreasonable to believe that, as stated by J6, fictional child pornography "has no consequences at all". Yet, it should be noted that individuals tend to believe that the media affects everyone except themselves, which is referred to as the "third person effect".[1045] There was a general observation of the

[1038]For a review of the literature discussing the harm in viewing adult pornography see Chapter 1, at [1.2.5].
[1039]For a review of the literature discussing the harm in viewing child pornography see Chapter 1, at [1.2.6].
[1040]Buchman, J.G (1988), *Effects of Repeated Exposure to Nonviolent Erotica on Attitudes about Child Sexual Abuse*, PhD Thesis, Indiana University, p. vii.
[1041]Ibid.
[1042]See Chapter 1, at [1.2.6].
[1043]Chapter 1, at [1.2.7]. See especially Bandura, A (1977), *Social Learning Theory*, Prentice-Hall, New Jersey; Greer, C and, Reiner, R (2012), "Mediated Mayhem: Media, Crime, Criminal Justice", in M Maguire, R Morgan, and R Reiner, Robert (eds.), *The Oxford Handbook of Criminology*, 5th edn., Oxford University Press, Oxford, p. 245-278.
[1044]Adams, above n 1016, 67. Also see Quayle, E, and Taylor, M (2003), *Child Pornography: An Internet Crime*, Routledge, London, p. 71.
[1045]See especially Strasburger, V.C (2004), "Children, Adolescents, and the Media", *Current Problems in Pediatric and Adolescent Health Care*, vol. 34, no. 2, pp. 54-113; Andsager, J, and

"third person effect" in the survey data, with several participants recognising that viewing sexually explicit comics might be harmful for other people, but believing it did not affect them personally. This is consistent with the findings of other researchers who have conducted studies on adolescents and young adults' views on pornography consumption.[1046]

Desensitisation becomes a greater a concern when taking into account the potential effects of viewing fictional child pornography on those with a sexual interest in children. Like child abuse material depicting real children, fictional sexually explicit representations of minors may mislead some viewers to believe that:[1047]

- there is nothing wrong with adult-child sex;
- sexual activity between adults and children is harmless; and
- children enjoy sexual stimulation and so it is fine for adults to provide them with this enjoyment.

According to experts who have worked extensively with paedophiles and sex offenders, whether the child depicted appears real or fictional "is irrelevant because

White, A (2007), *Self Versus Others: Media*, *Messages, and the Third-Person Effect*, Lawrence Erlbaum Associates, New Jersey.

[1046]For example Gunther, A (1995), "Overrating the X-Rating: The Third- Person Perception and Support for Censorship of Pornography", *Journal of Communication*, vol. 45, no. 1, pp. 27-38; Häggström-Nordin, E, Hanson, U, and Tydén, T (2005), "Associations between Pornography Consumption and Sexual Practices among Adolescents in Sweden", *International Journal of STD & AIDS*, vol. 16, no. 2, pp. 102-107; Paradise, A, and Sullivan, M (2012), "(In)Visible Threats? The Third-Person Effect in Perceptions of the Influence of Facebook", *Cyberpsychology, Behavior and Social Networking*, vol. 15, no. 1, pp. 55-60; Watson, M, and Smith, R (2012), "Positive Porn: Educational, Medical, and Clinical Uses", *American Journal of Sexuality Education*, vol. 7, no. 2, pp. 122-145.

[1047]For example see Wyre, above n 995, 239; Blundell et al, above n 996, 79-84; Linz, D, and Imrich, D (2001), "Child Pornography", in S White (ed.), *Handbook of Youth and Justice*, Kluwer Academic/Plenum Publishers, New York, pp. 79-111; Fagan, P, Wise, T, Schmidt, C, and Berlin, F (2002), "Pedophilia", *Journal of the American Medical Association*, vol. 288, no. 19, pp. 2458-2465; Calder, M.C (2004), "The Internet: Potential, Problems and Pathways to Hands-on Offending", in M.C Calder (ed.), *Child Sexual Abuse and the Internet: Tackling the New Frontier*, Russell House Publishing, Lyme Regis, p. 17; Russell, D, and Purcell, N (2006), "Exposure to Pornography as a Cause of Child Sexual Victimization", in N Dowd, D Singer, and R Wilson (eds.), *Handbook of Children, Culture, and Violence*, Sage Publications, California, pp. 59-83; Paul, B, and Linz, D (2008), "The Effects of Exposure to Virtual Child Pornography on Viewer Cognitions and Attitudes Toward Deviant Sexual Behavior", *Communication Research*, vol. 35, no. 1, pp. 13-38.

they are *perceived* as minors to the psyche".[1048] Thus, Seto has recommended that both real and fictional material depicting children should be treated the same when diagnosing paedophilia, because:

> "[T]he content matters more than whether the child is real … anime or *manga* (cartoons) depicting adult-prepubescent child sex is relevant to the diagnosis even though no real children are depicted, and stories describing adult-prepubescent child sex ... are also relevant indicators of paedophilic interests".[1049]

As seen in the previous chapter, this view is consistent with that of the law enforcement officers interviewed, who argued that it is irrelevant if the child depicted is real or fictional since both "equally are talking about the sexual exploitation of children".[1050]

Another harmful consequence of desensitisation is that it can cause viewers to seek out more extreme material. Research[1051] has reported that offenders who repeatedly view child pornography often seek out more extreme images to meet their sexual needs.[1052] According to Cline, a clinical psychologist who has treated hundreds of sex offenders and individuals with "sexual illness",[1053] fictional material is particularly harmful because "the man always escalates to more deviant material".[1054] This can be

---

[1048]Dr Victor Cline quoted in Senate Report (1996), *Child Pornography Prevention Act of 1995, Report No. 104-358* (USA), p. 17. Cline's research has also been influential in Australian parliamentary debates. For example see Western Australia, Child Pornography and Exploitation Material and Classification Legislation Amendment Bill 2009, Second Reading Speech, 24 June 2010.
[1049]Seto, M.C (2010), "Child Pornography Use and Internet Solicitation in the Diagnosis of Pedophilia", *Archives of Sexual Behavior*, vol. 39, no. 2, p. 592. Also see Blanchard, R (2009), "The DSM Diagnostic Criteria for Pedophilia", *Archives of Sexual Behavior*, vol. 39, no. 2, pp. 304-316.
[1050]LEO 1. Also see Shackel, R (1999), "Regulation of Child Pornography in the Electronic Age: The Role of International Law", *Macarthur Law Review*, vol. 3, p. 159; End Child Prostitution, Child Pornography and the Trafficking of Children for Sexual Purposes (2008), *Strengthening Laws Addressing Child Sex Exploitation: A Practical Guide*, ECPAT International, Bangkok, p. 78.
[1051]See Chapter 1, at [1.2.6].
[1052]See especially Quayle and Taylor, above n 970; Quayle and Taylor, above n 1044, 84.
[1053]Cline has stated that this included "many types of unwanted compulsive sexual acting out plus such things as child molestation, exhibitionism, voyeurism, sadomasochism, fetish, rape, and so forth". Cline, V.B (1994), "Pornography Effects: Empirical and Clinical Evidence", in D Zillmann, J Bryant, and A.C Huston (eds.), *Media, Children and the Family: Social Scientific, Psychodynamic and Clinical Perspectives*, Erlbaum, New Jersey, p. 233.
[1054]Cline quoted in Senate Report, above n 1048, 13. Also see Brenner, above n 1016, 92; Sternberg, S (2001), "The Child Pornography Prevention Act of 1996 and the First Amendment: Virtual Antitheses", *Fordham Law Review*, vol. 69, no. 6, p. 2787; Bergelt, K (2003), "Stimulation by Simulation: Is there really any difference between Actual and Virtual Child Pornography? The

supported by the law enforcement officers' claims made during the group interview that, in the vast majority of cases they dealt with, offenders usually had in their possession both real and fictional child pornography.[1055] The literature has also reported similar claims made by police and,[1056] as noted in Chapter 4, the vast majority of offenders were being prosecuted for having in their possession both types of material.[1057] Nevertheless, it is unknown which type of material offenders had sought out first. Arguably, some individuals may have accessed or created their own fictional material as a substitute for images depicting real children. If so, it can be argued that fictional child pornography may decrease the demand for images depicting real children.[1058] Such material may therefore prevent harm to real children by suppressing the urges of paedophiles. In the words of one comic fan surveyed:

> "If the character is fictional, wouldn't it be better that a paedophile take pleasure from that, rather than a real child? That way a paedophile, who can't help the fact that they hold this particular sexual attraction, is able to 'get off' without harming anyone".[1059]

Supreme Court gives Child Pornographers a New Vehicle for Satisfaction", *Capital University Law Review*, vol. 31, no. 3, p. 584; Coleman, S (2009), "You Only Live Twice: How the First Amendment Impacts Child Pornography in Second Life", *Loyola of Los Angeles Entertainment Law Review*, vol. 29, no. 2, p. 221.

[1055]See Chapter 6, at [6.2.2].

[1056]See Baartz, D (2008), *Australians*, *the Internet and Technology-Enabled Child Abuse: A Statistical Profile*, Australian Federal Police, Canberra; Quayle, E, Loof, L, and Palmer, T (2008), *Children*, *Pornography and Sexual Exploitation of Children Online*, A contribution of ECPAT International to the World Congress III against Sexual Exploitation of Children and Adolescents, Rio de Janeiro. In the United Kingdom, the Home Office has claimed that "from discussions with the police, it has become clear that cartoons, computer generated images, or drawings which graphically depict children in a sexually abusive way are generally found alongside indecent photographs of children". Home Office, Scottish Executive and Northern Ireland Office (2007), *Consultation on Possession of Non-Photographic Visual Depictions of Child Sexual Abuse*, Home Office, London, p. 4.

[1057]See Chapter 4, at [4.5].

[1058]In *Ashcroft v Free Speech Coalition*, 535 U.S. 234 (2002), at [254], the Supreme Court of the United States claimed that "few pornographers would risk prosecution by abusing real children if fictional, computerised images would suffice". Also see Loewy, A (2003), "Taking Free Speech Seriously: The United States Supreme Court and Virtual Child Pornography", *First Amendment Law Review*, vol. 1, no. 3, pp. 1-12.

[1059]F: 21.

Some observers, including academics,[1060] and therapists,[1061] have expressed a similar view in the literature.

However, as noted in Chapter 1, there is substantial research debunking the assertion that viewing child pornography has a cathartic effect on viewers.[1062] Researchers have noted that it is often the offenders themselves who claim viewing such material is beneficial and "just pictures" in order to excuse their behaviour.[1063] Accepting that viewing fictional child pornography suppresses the urges of paedophiles is inconsistent with the large body of research demonstrating the negative effects of viewing sexually explicit representations of children.[1064]

It therefore seems prohibiting fictional child pornography may be an effective way to prevent desensitisation, but the cost of prohibition also needs to be taken into account. In light of the remote harms discussed above, the next section considers whether the Harm Principle justifies criminalising fictional child pornography.

7.3 Does the Harm Principle Justify Criminalising Fantasy Material?

[1060]For example Ost, above n 964, 237; Cochran, above n 964; Neu, J (2002), "An Ethics of Fantasy?", *Journal of Theoretical and Philosophical Psychology*, vol. 22, no. 2, p. 151; Burke, D (1997), "The Criminalization of Virtual Child Pornography: A Constitutional Question", *Harvard Journal of Legislation*, vol. 34, no. 2, pp. 464-465; Williams, K.S (2004), "Child Pornography Law: Does It Protect Children?", *Journal of Social Welfare & Family Law*, vol. 26, no. 3, p. 253; Diamond, M, Jozifkova, E, and Weiss, P (2011), "Pornography and Sex Crimes in the Czech Republic", *Archives of Sexual Behavior*, vol. 40, no. 5, p. 1042; Byberg, J (2012), "Childless Child Porn—A 'Victimless' Crime?", *Social Science Research Network*, available online, <http://papers.ssrn.com/sol3/ papers.cfm?abstract_id=2114564>; Moosa, T (2012), "Virtual Child Porn and Paedophilia", *Big Think*, 25 November, available online, <http://bigthink.com/against-the-new-taboo/virtual-child-porn-and-paedophilia>; Dray, K (2013), "Should the Government Provide 'Virtual Child Pornography' to Stop Paedophiles coming into Contact with Real Children?", *Closer Online*, 27 November, available online, <http://www.closeronline.co.uk/2013/11/should-the-government-provide-virtual-child-pornography-to-stop-paedophiles-coming-into-contact-with-real-children>.

[1061]See Thornhill, T (2012), "'Virtual' Child Pornography 'Could Quell Paedophiles' Sexual Urges', Claim Dutch Sex Therapists", *Huffington Post*, 20 November, available online, <http://www.huffingtonpost.co.uk/2012/11/20/virtual-child-pornography-paedophiles_n_2163908.html>. Also see Russell, above n 964, 1498-1499 (citing psychologist Bader, M.J (2002), *Arousal: The Secret Logic of Sexual Fantasies*, Thomas Dunne Books, New York).

[1062]Chapter 1, at [1.2.6].

[1063]Bourke, M.L and Hernandez, A.E (2009), "The 'Butner Study' Redux: A Report of the Incidence of Hands-on Child Victimization by Child Pornography Offenders", *Journal of Family Violence*, vol. 24, no. 3, p. 188. Also see Quayle and Taylor, above n 1044, 91; Elliott, I.A., Beech, A. R., and Mandeville-Norden, R (2013), "The Psychological Profiles of Internet, Contact, and Mixed Internet/Contact Sex Offenders", *Sexual Abuse,* vol. 25, no. 1, p. 13.

[1064]Seto, M.C (2008), *Pedophilia and Sexual Offending Against Children: Theory, Assessment, and Intervention*, American Psychology Association, Washington, p. 68.

Even if it is determined that certain conduct leads to harm, the Harm Principle does not automatically justify criminalisation.[1065] This was emphasised by Feinberg, who stated that the Harm Principle supports criminalisation only if it would be "probably be effective in preventing … harm to other persons other than the actor … *and* there is probably no other means that is equally effective at no greater cost to other values".[1066] Thus, the benefits and costs of criminalisation must be weighed against each other. To determine whether conduct that does not directly lead to harm should be criminalised, Feinberg suggested taking into account the likelihood and magnitude of the envisioned harm, stating that:

> "[T]he greater the probability of harm, the less grave the harm need to be to justify coercion; the greater the gravity of the envisioned harm, the less probable it need be".[1067]

Given the seriousness of the envisioned harm—that is, child sexual abuse—legislatures should be given greater leeway to enact legislation based on risk prevention. This was recognised by the judicial officers interviewed, who all seemed to suggest that the lack of definitive proof of harm was not a barrier to governments prohibiting conduct that created a reasonable apprehension that it would lead to harm. In other comparable jurisdictions, judges have expressed a similar view. For example, the Supreme Court of Canada in *Butler v R* stated:

> "It might be suggested that proof of actual harm should be required … [however] it is sufficient … for Parliament to have a reasonable basis for concluding that harm will result and this requirement does not demand actual proof of harm."[1068]

In *R v Sharpe,*[1069] which dealt with possession of child pornography, the Supreme Court followed the decision in *Butler,* stating that "a 'reasoned apprehension'

[1065]Feinberg, above n 956, 12.
[1066]Ibid, 26.
[1067]Ibid, 191.
[1068]*R v Butler* [1992] 1 SCR 452, at [117].
[1069]*R v Sharpe* [2001] 1 SCR 45. See Chapter 4, at [4.1] for details about this case.

sufficed".[1070] The Court held that requiring "scientific proof based on concrete evidence"[1071] that simple possession of child pornography causes harm "set the bar too high".[1072]

Similarly, the Supreme Court of the United States in *Paris Adult Theatre I v Slaton* held that:

> "Although there is no conclusive proof of a connection between antisocial behaviour and obscene material, the legislature ... could quite reasonably determine that such a connection does or might exist".[1073]

Thus, the pertinent question is whether fictional child pornography creates an "unacceptable risk"[1074] that viewing such material may lead to significant harm and whether this harm necessitates prohibition. The discussion above highlighted that it is reasonably plausible that fictional child pornography can cause significant indirect harms, thereby refuting the simplistic arguments raised by some that fictional child pornography "isn't going to harm anyone".[1075] However, since the Harm Principle advocates minimal state interference, it is important to consider whether the principle supports criminalising the dissemination of fictional child pornography, and then considering whether this support extends to criminalising simple possession.

7.3.1 Criminalising Dissemination

Given legitimate concern over desensitisation and incitement, the Harm Principle would justify criminalising the widespread dissemination of fictional child pornography. However, as seen in chapters 4 and 5, the courts in Australia and other Western countries have interpreted dissemination and publications broadly to include situations where material is shared with even one other person.

[1070]Ibid, at [85].
[1071]Ibid.
[1072]Ibid.
[1073]*Paris Adult Theatre I v Slaton*, 413 U.S. 49 (1973), at [60]-[61].
[1074]J1.
[1075]M: 19. Also see references cited in footnote 964 above.

Accordingly, it would still be potentially criminal for a fantasy material fan to, for example, share sexually explicit comics on websites that they believed are frequented by like-minded individuals and not "sadist or paedophiles".[1076] This would include young fans who are part of an online fandom that "likes to pair a 15-year-old character and a 29-year-old, both males … and post them on fanart websites".[1077] Preventing fictional child pornography from being uploaded on the internet is particularly important because, as emphasised by the judicial officers interviewed, "once [the material] is published … control is lost as to where it goes [and] then a potential for a broader evil is created".[1078] As seen in Chapter 5, this was also a concern expressed by some of the judges in the case law that once "published generally on the internet [the material would be] available to anyone who sought it out"[1079] and then "further disseminated to others interested in this perverted material".[1080] Thus, given the risk created by the internet of widespread circulation of material to unintended audiences, prohibiting the dissemination of fictional child pornography to prevent the risk of harm can be justified on the Harm Principle.

Nevertheless, the likelihood of otherwise innocent individuals being prosecuted for sharing sexually explicit fantasy material with their peers should not be exaggerated. To date, there seem to have been no prosecutions under the child pornography laws in Australia of Boys Love, YAOI, or slash fiction fans. On the contrary, as seen in chapters 4 and 5, all the defendants in the case law dealing with fictional child pornography have been adult males who met the clinical definition of a paedophile. They often had in their possession images depicting real children and/or a history of committing child sexual abuse.

Another concern is that the offenders sharing sexually explicit fantasy material of minors commonly did so for the purpose of inciting child sexual abuse, such as defendants who posted fictional child pornography on "a paedophile website dedicated

[1076]M: 20.
[1077]F: 18.
[1078]J1.
[1079]*R v Jarrold* [2010] NSWCCA 69, at [50].
[1080]Ibid.

to man-girl relationships".[1081] For example, the offender in *Keith v R* was convicted for sending text messages describing minors engaging with adults:

> "…to a known paedophile and it had the obvious purpose of stimulating the sender and recipient's sexual interest in boys … The potential harm that can be caused from the dissemination of such material to known paedophiles is manifest".[1082]

In these circumstances, the Harm Principle would strongly support criminalisation. This is because, as noted in Chapter 3, Mill argued that "opinions lose their immunity, when the circumstances in which they are expressed are such as to constitute their expression a positive instigation to some mischievous act".[1083] It is also notable that ten comic fans surveyed who were against prohibition nevertheless supported banning comics if they "promote violence",[1084] "promote or condone harmful practices",[1085] or "promote illegal acts".[1086]

The evidence suggests law enforcement officers are using their "common-sense",[1087] targeting not naïve fantasy material fans but rather those who pose a real risk to children. Indeed, as seen in chapters 4 and 5, to date there does not seem to be any prosecution of young female Boys Love, YAOI, or slash fiction fans and, as discussed in Chapter 2, young females have been creating such material since the 1970s. This undermines the concerns expressed in the literature that Australia's child abuse material legislation "criminalises a large, predominantly female fandom of *manga* fans who use the internet to participate in online fan clubs dedicated to a Japanese *manga*".[1088] However, as stated by J4, if there is suddenly a "floodgate" of otherwise innocent individuals being prosecuted for fantasy material, the risk of harm and the benefits of criminalising dissemination would need to be reconsidered.

[1081]*R v Houston* [2008] SKQB 174, at [2].
[1082]*Keith v R* [2014] NSWCCA 124, at [56]. Also see *R v Shelford* [2013] NSWDC 102. Both these cases are discussed in Chapter 4, at [4.5].
[1083]Mill, above n 953, 62.
[1084]M: 20.
[1085]F: 25.
[1086]F: 21.
[1087]LEO 4.
[1088]McLelland and Yoo, above n 1019, 93.

7.3.2 Criminalising Possession

While the Harm Principle can support prohibiting the dissemination of fictional child pornography, prohibiting private possession is controversial.[1089] As seen in chapters 4 and 5, the courts in Canada and the United States have held that it is legitimate to prohibit dissemination of fictional child pornography, but drew the line at private possession. The right to possess fictional child pornography in these two jurisdictions is extremely limited, in that it does not create a right to knowingly access such material. Nor does the right to private possession extend protection to anyone who has an "intention to distribute, publish, print, share or in any other way disseminate these materials".[1090] In Canada, the Supreme Court in *Sharpe* held that criminalising private possession of self-created works "trenches heavily on freedom of expression while adding little to the protection the law provides children".[1091] Similarly, in the United States it has been held that "[w]hatever the power of the State to control public dissemination of ideas inimical to the public morality, it cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts".[1092]

It has been argued "if one is entitled to possess obscene material in the privacy of one's own home, but may not receive such materials … how is such content supposed to get into one's home?". [1093] It seems that without a correlative right to access, the law only protects self-produced fantasy material that is not shared with anyone else, such as the person who writes a "salacious books in [their] attic, prints them in [their] basement, and reads them in [their] living room".[1094] Interpreting the right of private possession

[1089] Of course, this did not extend to the possession of child abuse material depicting real children, since such images are unquestionably a matter of harm: "The very existence of child pornography … is inherently harmful to children and to society. This harm exists independently of dissemination or any risk of dissemination and flows directly from the existence of the pornographic representations, which on their own violate the dignity and equality rights of children". *R v Sharpe* [2001] 1 SCR 45, at [158].
[1090] *R v Sharpe* [2001] 1 SCR 45, at [128]).
[1091] Ibid, at [110].
[1092] *Stanley v Georgia*, 394 U.S. 557 (1969), at [556].
[1093] Greenberg, above n 964, 170. Also see Bird, P (2011), "Virtual Child Pornography Laws and the Constraints Imposed by the First Amendment", *Barry Law Review*, vol. 16, no. 1, p. 177; Ryder, B (2003), "The Harms of Child Pornography Law", *University of British Columbia Law Review*, vol. 36, no. 1, p. 105; Loewy, A (2005), "Obscenity: An Outdated Concept for the Twenty-First Century", *NEXUS*, vol. 10, p. 26.
[1094] *United States v Thirty-Seven Photographs*, 402 U.S. 363 (1971), at [382] (Black J dissenting).

is important in preventing the circulation of material that creates a risk of desensitisation and incitement to commit child sexual abuse.

Conversely, Australia's legislation makes no exceptions and, as stated by J2, the law makes it a crime even if "you write a story and put it in your attic". This raises the question, "why make it criminal for someone to create fictional material for their own purposes?".[1095] Arguably, it is unnecessary to amend Australia's legislation to allow private possession, as it is unlikely that law enforcement will discover privately kept material. Nevertheless, even though the likelihood of detection may be low, the prohibition may still have a chilling effect on expression; people may be deterred from writing down their thoughts for fear of being prosecuted. It is also important for the law to recognise, as stated by Shaw J in *Sharpe,* that an "individual's personal belongings are an expression of that person's essential self"[1096] and not a matter for the law. Even though it could be argued that creating fantasy material for private purposes may corrupt one's morals, the Harm Principle rejects Moral Paternalism and state interference in the private lives of citizens for what is presumed to be for their own good.[1097]

Another problem with prohibiting simple possession of fictional child pornography is the wrongdoing requirement. As seen in Chapter 3, the Harm Principle requires an element of wrongdoing to justify criminalisation.[1098] Creating fantasy material solely for private purposes is not wrongful, as it does not violate another person's rights. There is, however, an element of wrongdoing where the person disseminates the material, as demonstrated in the case law discussed previously where the offenders shared fantasy material for the purpose of stimulating a sexual interest in children. [1099]

[1095]J2.
[1096]*R v Sharpe* (1999) 22 CR (5th) 129, at [51].
[1097]This is because Mill made it clear that "the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others". Mill, above n 953.
[1098]Wrongdoing means an indefensible violation of a person's rights. Feinberg, J (1984), *Harm to Others: The Moral Limits of the Criminal Law*, Vol. I, Oxford University Press, New York, p. 34. See Chapter 3.
[1099]For example *Keith v R* [2014] NSWCCA 124; *DPP v Latham* [2009] TASSC 101.

The Harm Principle limits how far the state can interfere with individual freedoms to prevent harm. Prohibiting private possession of self-created fantasy material goes well beyond the limits of the Harm Principle, particularly given the importance the Harm Principle places on freedom of thought.[1100] As seen in Chapter 6, the judicial officers interviewed described the criminalisation of private possession as "thought policing"[1101] and it was perceived by several comic fans surveyed as "no different from punishing people for their thoughts".[1102] It was noted in Chapter 5 that the New South Wales Council for Civil Liberties has similarly argued that "Australia's child pornography legislation enacts 'thought crimes' by criminalising [material] created from an individual's own imagination and kept exclusively for his or her own personal use".[1103] Accordingly, Australian legislatures need to look elsewhere to justify banning private possession. Whether the Offense Principle and/or Legal Moralism provide this support is discussed in the following chapter.

7.4 Concluding Remarks

The aim of this chapter was to assess the potential harms created by fictional child pornography and determine whether the Harm Principle can justify criminalisation. It was found that, even though there is no conclusive empirical evidence such material causes harm, it is reasonable to believe that fictional child pornography can negatively affect viewers. The central role of fantasy in the aetiology of sex offending has been well documented, highlighting that there is a significant risk that fantasy incites child sexual abuse. While the existing research is limited by its focus on serious child sex offenders, it is clear fictional child pornography, like other types of media, has the potential to desensitise viewers of all ages and backgrounds. When desensitisation is taken into account, the harm of fictional child pornography is sufficient to justify preventing its dissemination. The Harm Principle, however, has its limits and cannot support criminalising private possession of self-created works of the imagination.

[1100]Mill believed freedom of expression was of "almost as much importance as the liberty of thought itself and … is practically inseparable from it". Mill, above n 953, 16-17. Also see Wallerstein, above n 955, 2700.
[1101]J1 and J2.
[1102]M: 18.
[1103]New South Wales Council for Civil Liberties, Submission to Committee Secretary, *Australia's Ratification of the Optional Protocol to the Convention on the Rights of the Child*, 2 November 2005, p. 2.

Chapter 8: Discussion Part II — A Matter of Offensiveness and Morality

Chapter Contents

8.0 Aims of Chapter

As highlighted in the previous chapter, the Harm Principle provides a strong basis for criminalising dissemination of fictional child pornography, but not for criminalising private possession. Accordingly, this chapter draws upon the Offense Principle and Legal Moralism to determine whether either theory can justify outlawing simple possession. Given the emphasis placed by the Offense Principle against state intervention where the offensive material can be reasonably avoided, this chapter will also consider whether it is justifiable to prohibit individuals from accessing and sharing such material with willing viewers. The second section of this chapter examines whether Legal Moralism, and its subset Moral Paternalism, support criminalising fictional child pornography. The discussion is aided by the research findings and the relevant literature.

8.1 Offensiveness and Fantasy Material

The Offense Principle, as developed by Feinberg, holds that criminalising certain conduct may be justified if it offends the majority of the population.[1104] Unlike the Harm Principle, the Offense Principle does not demand empirical proof of physical harm to others and takes into consideration psychological distress.[1105] The criticisms of the Offense Principle were noted in Chapter 3. While some of these criticisms are valid, it is beyond the scope of this dissertation to engage in this theoretical debate. As will be seen below, the Offense Principle remains useful in determining whether it is justifiable to criminalise fictional child pornography since "many, probably most, liberals agree that actions may sometimes be prohibited on the grounds of their offensiveness".[1106]

Chapter 4 indicated that Australia's child abuse material legislation might have been based on the Offense Principle. This is because the legislation is concerned with whether the "reasonable" person would regard the material as "offensive",[1107] which is referred to as the "community standards test".[1108] Given the pornographic and obscene content of some sexually explicit fantasy material, it is likely to fall below community standards. The literature on sexually explicit fantasy material highlights that fans are not oblivious to the fact that some of these materials may be considered highly offensive.[1109] For example, YAOI and slash fiction are said to often depict or describe acts of paedophilia in combination with other offensive themes, such as incest and bestiality.[1110] The survey findings of the present study also showed that fans

[1104]Feinberg, J (1985), *Offense to Others: The Moral Limits of the Criminal Law*, Vol. II, Oxford University Press, New York, 36. For a discussion of the Offense Principle see Chapter 3, at [3.2].
[1105]Feinberg, J (1984), *Harm to Others: The Moral Limits of the Criminal Law*, Vol. I, Oxford University Press, New York, p. 15.
[1106]Simester, A.P, and Sullivan, G.R (2007), *Criminal Law: Theory and Doctrine*, 3rd edn., Hart Publishing, Oxford, p. 589.
[1107]See Table 4 in Chapter 4 for a brief summary of the relevant law in each Australian jurisdiction.
[1108]*Crowe v Graham* (1968) 121 CLR 375; Australian Law Reform Commission (2011), *National Classification Scheme Review*, Discussion Paper 77, p. 32; Flew, T (2012), "Globalisation, Media Policy and Regulatory Design: Re-Thinking the Australian Media Classification Scheme", *Australian Journal of Communication*, vol. 39, no. 2, pp. 6-7. For a discussion about the community standards test see Chapter 5, at [5.3].
[1109]See Chapter 2.
[1110]For example see O'Brien, A (2008), *Boys' Love and Female Friendships: The Subculture of YAOI as a Social Bond Between Women*, Masters Thesis, Georgia State University; Zanghellini, A (2009), "'Boys' Love' in *Anime* and *Manga*: Japanese Subcultural Production and its End Users", *Continuum*, vol. 23, no. 3, pp. 279-294; Kee, T.B (2010), "Rewriting Gender and Sexuality in English-Language

acknowledged that some of the material they viewed would be widely considered "offensive", "shocking", and "disturbing", because it often depicts "rape", "extreme fetishes", "sadism", "torture", "cannibalism", "bestiality", "incest", and "sexual violence". [1111]

It therefore seems reasonable to prohibit the widespread dissemination of such material to reduce the likelihood of unwilling viewers being offended. Feinberg would further argue that the public display of fictional child pornography would interfere with peoples' right to enjoy public space, especially where individuals have no reasonable means to avoid being offended.[1112] As Feinberg developed the Offense Principle prior to the introduction of the internet, it is questionable whether material posted on websites, personal blogs and so on, would be regarded as a public display.[1113] However, as elaborated below, Feinberg is likely to have argued that this is irrelevant so long as unwilling viewers can reasonably avoid the offensive material.

The survey findings revealed that the participants acknowledged that people are likely to be offended by some of the content in sexually explicit comics. However, there was a strong emphasis that "as long as a person is an adult, they should be able to view what they wish".[1114] It was argued:

Yaoi Fanfiction", in A Levi, M McHarry, and D Pagliassotti (eds.), *Boys' Love Manga: Essays on the Sexual Ambiguity and Cross-Cultural Fandom of the Genre*, McFarland & Company Inc. Publishers, London, pp. 126-156; Frennea, M (2011), *The Prevalence of Rape and Child Pornography in Yaoi*, Proceedings of the National Conference on Undergraduate Research, available online, <http://urpasheville.org/proceedings/ncur2011/papers/NP51669.pdf>; Galbraith, P.W (2015), "*Moe* Talk: Affective Communication among Female Fans of *Yaoi* in Japan", in M McLelland, K Nagaike, K Suganuma, and J Welker (eds.), *Boys Love Manga and Beyond: History*, *Culture*, *and Community in Japan*, University Press of Mississippi, Mississippi, pp. 153-168.

[1111]Several female and male survey participants made these comments. See Chapter 6.

[1112]See Feinberg, above n 1104, 32.

[1113]MacVean has argued that "the internet has created a virtual place or 'space' that has not been available before. Traditionally, 'space' has been conceptualised as either public or private domains. Most child abuse takes place in private domains; behind closed doors and public of public gaze. Yet, ironically the internet has provided a space that falls between the traditional private and public domains, even if the space is 'virtual'". MacVean, A (2003), "Understanding Sexual Predators on the Internet: Towards a Greater Knowledge", in A MacVean and P Spindler (eds.), *Policing Paedophiles on the Internet*, The New Police Bookshop, London, p. 6. Also see Wall, D.S, and Williams, M (2007), "Policing Diversity in the Digital Age: Maintaining Order in Virtual Communities", *Criminology and Criminal Justice*, vol. 7, no. 4, pp. 391-415; Prichard, J, Watters, P, Krone, T, Spiranovic, C, and Cockburn, H (2015), "Social Media Sentiment Analysis: A New Empirical Tool for Assessing Public Opinion in Crime?", *Current Issues in Criminal Justice*, vol. 27, no. 2, pp. 217-23.

[1114]M: 19.

> "I should be allowed to read [offensive comics] if I want to since it doesn't offend me. I'm sure there is somebody out there who is offended by it, but they don't have to read it or ruin it for the rest of us".[1115]

Accordingly, some of the comic fans surveyed distinguished between regulation and prohibition of offensive comics, generally supporting the former but not the latter.[1116] Regulation involves enforcing time and place restrictions on when, by whom, and where certain material can be accessed, whereas prohibition involves an outright ban.[1117] Thirty-four of the survey participants believed sexually explicit comics depicting minors should not be prohibited but regulated, mainly to protect children from being able to access such material. It was argued that such comics are "inappropriate for minors"[1118] because they "can affect the development of young people".[1119]A limitation of the online survey method was that the participants could not be asked to clarify what they meant by "minor", "child", and "young people". It is therefore unclear whether they believed anyone under 18 should be prevented from accessing sexually explicit comics or only very young children.

The participants' arguments echoed concerns voiced in the ongoing debate about the availability of sexually explicit *manga* in Japan. Currently, sexually explicit *manga* depicting underage characters remains legal for adults but cannot be sold to minors under the age of 18 on the presumption that it is "harmful" to youth development.[1120] Such comics are usually required to be sealed and marked "adults only" when sold

---

[1115]F: 24.
[1116]See Chapter 6, at [6.3.4].
[1117]See McKinnon C (2007), "Sex, Speech and Status: New Developments in the Pornography Debate", in G Newey (ed.), *Freedom of Expression: Counting the Costs*, Cambridge Scholars Publishing, Newcastle, pp. 37-38.
[1118]F: 19.
[1119]M: 18.
[1120]Article 175 of the Japanese *Penal Code* (Act No. 45 of 1907) prohibits the distribution, sale, or display in public of obscene material. It has been claimed that authorities in Japan have traditionally used Article 175 to proactively review and seize objectionable material that they considered harmful to minors. See Kinsella, S (2000), *Adult Manga: Culture & Power in Contemporary Japanese Society*, Curzon, Surrey, p. 140; Leavitt, A, and Horbinski, A (2012), "Even a Monkey Can Understand Fan Activism: Political Speech, Artistic Expression, and a Public for the Japanese Dojin Community", *Transformative Works & Culture*, vol. 10, available online, <http://journal.transformativeworks.org /index.php/twc/rt/printerFriendly/321/311>.

outside of adult bookstores.[1121] It seems that Feinberg would support Japan's regulatory approach as it seeks to protect unwitting exposure and makes fictional child pornography reasonably avoidable. However, Feinberg made an exception to the reasonable avoidability condition where the conduct is considered "profoundly offensive". This is examined in the following section.

8.1.1 Profound Offense

As discussed in Chapter 3, Feinberg believed criminalising private conduct could be justified under the Offense Principle if the conduct was considered profoundly offensive. This is where the majority are offended by the "'bare thought' or by 'bare knowledge' of the occurrence of the loathsome behaviour".[1122] Examples given by Feinberg include racial insults and the desecration of scared symbols.[1123] Such acts are offensive "even when one does not perceive the offending conduct directly [because] one can be offended 'at the very idea' of that sort of thing happening even in private".[1124]

In order for the Offense Principle to support prohibiting individuals from creating or accessing fictional child pornography in private, such conduct would have to be "deep, profound, shattering, [and] serious".[1125] Given the sample size and purposive selection of specific individuals, the survey and interview findings did not reveal whether the majority of Australians are profoundly offended by the "bare thought" that some people are viewing fictional child pornography. At best, the findings only reveal that some individuals, such as law enforcement officers who are responsible for tackling child abuse material, may find possession of such material offensive and harmful.

[1121]This is based on the researcher's own observations while in Japan. Others have made similar observations. For example see Berndt, J (2006), "'Adult' Manga: Maruo Suehiro's Historically Ambiguous Comics", in J Berndt and S Richter (eds.), *Reading Manga: Local and Global Perceptions of Japanese Comics*, Leipziger Universitatsverlag, Leipzig, p. 110; Tabuachi, H (2011), "In Tokyo, a Crackdown on Sexual Images of Minors", *New York Times*, 9 February, available online, <http://www.nytimes.com/2011/02/10/business/global/10manga.html?_r=0>; Takeuchi, C (2015), "Regulating *Lolicon*: Toward Japanese Compliance with Its International Legal Obligations to Ban Virtual Child Pornography", *Georgia Journal of International and Comparative Law*, vol. 44, no. 1, p. 197.
[1122]Feinberg, above n 1104, 68.
[1123]This includes the desecration of flags and crucifixes. Feinberg, above n 1104, 53.
[1124]Ibid, 58.
[1125]Ibid.

Despite the absence of research on the views of the public, [1126] it has been suggested that fictional child pornography can cause serious offense to the majority.[1127] This is "[g]iven the strength of moral sensibilities towards child sexual abuse and images of such abuse".[1128] It has also been claimed that "[a]nything that even shows any sign of paedophilia is a cause of offense to a significant proportion of society".[1129] As seen in the previous chapters, fantasy material, in particular *hentai,* has been associated with paedophilia in the literature and case law.

It should be noted that some of the comic fans surveyed claimed that being offended by such material is unreasonable because "comics are made up and the characters are not real".[1130] However, provided that the majority were in consensus that the conduct in question is offensive, Feinberg argued that offense does not need to be reasonable.[1131] As seen in Chapter 3, some academics have insisted on adding a reasonableness requirement to the Offense Principle to prevent widespread unreasonable offense overruling the liberty of minorities.[1132] Even if such a requirement was added as a condition to the Offense Principle, it may be objectively reasonable for individuals to be offended by the "bare thought" of individuals viewing material portraying child sexual abuse as erotic or desirable.

Nevertheless, criminalisation based on bare knowledge remains controversial.[1133] This is particularly because the Offense Principle was developed as a liberal theory that was

---

[1126]As noted in Chapter 1, Prichard et al have recently conducted a study on perceptions of viewing and distributing real and "pseudo" images. Their study involved a surveying a convenience sample of university students. Therefore, like the present study, their findings cannot be used to make generalisations. Prichard, J, Spiranovic, C, Gelb, K, Watters, P.A, and Krone, T (2016), "Tertiary Education Students' Attitudes to the Harmfulness of Viewing and Distributing Child Pornography", *Psychiatry*, *Psychology and Law*, vol. 23, no. 2, pp. 224-239. Nevertheless, Prichard et al's study provides valuable data and will be discussed further in this chapter below, at [8.2].

[1127]Ost, S (2010) "Criminalising Fabricated Images of Child Pornography: A Matter of Harm or Morality?", *Legal Studies*, vol. 30, no. 2, p. 236. Also see Carr, J (2001), *Theme Paper on Child Pornography for the 2nd World Congress on Commercial Sexual Exploitation of Children*, Children & Technology Unit NCH, London, p. 21.

[1128]Ibid. However, Ost ultimately argued against criminalising possession of fictional child pornography.

[1129]Adams, A (2010), "Virtual Sex with Child Avatars", in C Wankel and S Malleck (eds.), *Emerging Ethical Issues of Life in Virtual Worlds*, IAP, North Carolina, p. 67.

[1130]F: 24.

[1131]Feinberg, above n 1104, 36.

[1132]See Chapter 3, at [3.2]. See especially Shoemaker, D.W (2000), "'Dirty Words' and the Offense Principle", *Law and Philosophy*, vol. 19, no. 5, pp. 545-584.

[1133]See especially Dalton, H.L (1987), "Offense to Others: The Moral Limits of the Criminal", *Yale Law Journal*, vol. 96, no. 4, pp. 881-913.

intended to place limits on criminalisation and emphasised the importance of individual freedoms.[1134] Accordingly, it seems difficult to justify criminalisation on the Offense Principle, even if privately consuming fictional child pornography is considered profoundly offensive.[1135] In difficult cases where there are conflicting interests, Feinberg developed mediating principles to guide legislatures in determining whether certain offensive conduct should be criminalised.[1136] In the following section, these principles are applied to the issue of fictional child pornography.

8.1.2 Applying Feinberg's Mediating Principles

Applying Feinberg's mediating principles involves weighing the interests of the offending parties and the offended parties. When considering the offending parties' interests, Feinberg suggested taking into account:[1137]

i. the importance of the offending conduct to both the offender and society at large;
ii. the possibility that the offending conduct can be engaged in at a time or place that causes no offense;
iii. the interest in protecting freedom of expression; and
iv. the extent, if any, to which the offense is caused with spiteful motives.

Conversely, the factors Feinberg considered on the part of those offended are:[1138]

i. the magnitude of the offence, such as its intensity, duration, and extent;
ii. the ability to avoid being offended;
iii. whether the offense was voluntarily incurred; and
iv. whether the offense occurs only because of a person's abnormal susceptibility.

[1134]Ibid, 894.
[1135]Ost, above n 1127, 237.
[1136]See Chapter 3, at [3.2.1].
[1137]Feinberg, above n 1104, 26.
[1138]Ibid.

Below, these principles are used to weigh the interests of fans of sexually explicit fantasy material and those who might be offended by the bare thought that individuals are consuming such material.

Importance of the Material

Whether sexually explicit fictional material depicting minors has social value is irrelevant. This is because Feinberg noted that "if the only observers are willing observers, then it is wholly pointless to consider whether a film or book with explicitly sexual themes has social value or not".[1139]

Thus, the focus must be on the importance of fantasy material for willing viewers. The importance of the right to express one's fantasy was reinforced by the Supreme Court of Canada in *Sharpe*, where it was stated that "[p]ersonal journals and writings, drawings and other forms of visual expression may well be of importance to self-fulfilment".[1140] The Supreme Court stressed that only private possession of self-created fantasy material was protected, not dissemination.[1141]As seen in Chapter 5, the right to possession is significantly undermined without a correlated right to access fantasy material.[1142] For some individuals, being able to access such material is as, if not more, important, especially as many consumers are not creators. This is supported by the survey findings, which showed that the vast majority of participants indicated that being able to access comics was extremely important (35.3%) or important (36.2%).[1143] A limitation of this question is that it did not specifically ask participants how important it was for them to access sexually explicit comics. This means participants may have been indicating the importance of both pornographic and non-pornographic comics.

Although the subjective importance of fantasy material will vary between individuals, some general observations can be made from the literature. As discussed in Chapter 2, Boys Love, YAOI, and slash fiction have been praised for allowing females to defy

[1139]Ibid, 138.
[1140]*R v Sharpe* [2001] 1 SCR 45, at [107].
[1141]Ibid, at [128].
[1142]Chapter 5, at [5.5].
[1143]See Chapter 6, at [6.3.1].

social norms and explore their sexual fantasies. It has been claimed this material provides a way for females to express their discontent with predefined gender expectations and indulge in the fantasy of equal relationships that can only be achieved in relationships between two males.[1144] While Boys Love, YAOI, and slash fiction frequently depict and describe sexual violence, the absence of female characters in these works is said to act as a "safety device"[1145] because:

> "No matter how much those rape or gang-rape scenes (and there are truly a lot of them!) resemble male-on-female assaults, if it is men depicted then [the female readers] cannot get pregnant, lose their virginity, or become 'unsuited for marriage'".[1146]

In Chapter 2, it was asked why fans choose to depict characters that appear underage when increasing the apparent age of the characters would avoid the potential criminalisation of such material, as the characters would not "appear to be"[1147] minors. However, it seems that using apparently underage characters is an important element in allowing females to feel comfortable when exploring their sexuality through fantasy material. This is because *kawaii* (cute) and androgynous characters are less intimidating than characters that appear to be adult and masculine.[1148]

[1144]For example see Suzuki, K (1998), "Pornography or Therapy? Japanese Girls Creating the Yaoi Phenomenon", in S.A Inness (ed.), *Millennium Girls: Today's Girls Around the World*, Rowman & Littlefield Publishers, Maryland, pp. 243-268; Jenkins, H (2006), "'Normal Female Interest in Men Bonking': Selections from the Terra Nostra Underground and Strange Bedfellows", in H Jenkins (ed.), *Fans*, *Bloggers*, *and Gamers: Exploring Participatory Culture*, New York University Press, New York, pp. 61-88; Fermin, T (2010), "Yaoi: Voices from the Margins", *Otaku University Knowledge Archive*, pp. 215-227.

[1145]McLelland, M (2005), "The World of Yaoi: The Internet, Censorship and the Global 'Boys Love' Fandom", *Australian Feminist Law Journal*, vol. 23, no. 1, p. 72.

[1146]Fujimoto, Y (2004), "Transgender: Female Hermaphrodites and Male Androgynes", *U.S.–Japan Women's Journal*, vol. 27, no. 1, p. 87. Also see Pagliassotti, D (2010), "Better than Roman? Japanese BL Manga and the Subgenre of Male/Male Romantic Fiction", in A Levi, M McHarry, and D Pagliassotti (eds.), *Boys' Love Manga: Essays on the Sexual Ambiguity and Cross-Cultural Fandom of the Genre*, McFarland & Company Inc. Publishers, London, p. 77; Orsini, L (2013), "The Truth about Boys' Love and Rape Culture", *Otaku Journalist*, 14 October, available online, <http://otakujournalist.com/the-truth-about-boys-love-and-rape-culture/>.

[1147]This is the phrase used in Australia's child abuse material legislation. See Table 4 in Chapter 4.

[1148]Stanley, M (2010), "101 Uses for Boys: Communing with the Reader in Yaoi and Slash", in A Levi, M McHarry, and D Pagliassotti (eds.), *Boys' Love Manga: Essays on the Sexual Ambiguity and Cross-Cultural Fandom of the Genre*, McFarland & Company Inc. Publishers, London, p. 100.

It was also mentioned in Chapter 2 that some academics have differed in their interpretations of Boys Love, YAOI, and slash fiction, claiming that this material is not about female empowerment. For some observers, the absence of female characters in such material has been interpreted as hatred of females.[1149] Others have suggested the empowerment element has been exaggerated and that this material is largely for sexual pleasure.[1150] It has been found that there is often a gap between some academic interpretations of YAOI and how fans interpret this material, with several fans stating they did not feel oppressed and enjoyed YAOI simply for the fun of it.[1151] Similar comments were made by some of the female fans surveyed in the present study, stating that they viewed sexually explicit comics "for fun only".[1152]

However, mere enjoyment is still a factor that weighs against criminalisation because experiencing pleasant sensations is important. As argued by Koppelman:

> "[S]exual pleasure is good. If pleasure is good, then fantasy is good if it is an avenue to pleasure. It is in the nature of sexual fantasy that it is an avenue to pleasure. It follows that sexual fantasy is per se good".[1153]

There is also literature suggesting sexually explicit fictional comics depicting underage girls are important for their predominantly male consumers.[1154] In Galbraith's study on zealous male comic fans in Japan,[1155] the participants stressed

---

[1149]See Kee, above n 1110, 140; Fujimoto, above n 1146, 84; Thorn, M (2004), "Girls and Women Getting Out of Hand: The Pleasure and Politics of Japan's Amateur Comics Community", in W.W Kelly (ed.), *Fanning the Flames: Fans and Consumer Culture in Contemporary Japan*, State University of New York Press, Albany, pp. 169-186.

[1150]Suzuki, K (2014), "Beyond Duality and Heteronormativity: Gender Display and Manipulation in Japanese Yaoi/BL Narratives", paper presented at the XVIII ISA World Congress of Sociology, 13-19 July, Yokohama.

[1151]Fermin, above n 1144, 225-226.

[1152]F: 19.

[1153]Koppelman, A (2005), "Does Obscenity Cause Moral Harm?", *Columbia Law Review*, vol. 105, no. 5, p. 1660.

[1154]For example see Shigematsu, S (1999), "Dimensions of Desire: Sex, Fantasy, and Fetish in Japanese Comics", in J.A Lent (ed.), *Themes and Issues in Asian Cartooning: Cute*, *Cheap*, *Mad*, *and Sexy*, Bowling Green State University Popular Press, Ohio, p. 130; Galbraith, P.W (2014), *The Moe Manifesto: An Insider's Look at the Worlds of Manga*, *Anime*, *and Gaming*, Tuttle Publishing, Tokyo; Lucy, G (2015), "Creating Transnational Fandoms—Adaptation of Japanese Terminology Among English-Language *Dojinshi* Users", *Nagyoya Repository*, vol. 15, pp. 27-43.

[1155]These fans are referred to as "otaku". See especially Kinsella, S (1998), "Japanese Subculture in the 1990s: Otaku and the Amateur Manga Movement", *Journal of Japanese Studies*, vol. 24, no. 2,

that "cute girl characters"[1156] are central to their interest in such material and that they only felt "satisfaction with fictional characters". [1157] Although this study was conducted solely on men in Japan, Schodt has provided reasons why *hentai* has become important to its male readership in the West, stating that:

> "To shy, retiring, and still maturing young males, the erotic women characters idealised in American mainstream comics and films may sometimes seem too adult, too threatening. The modern Japanese fantasy idea—younger, slightly softer, rarely possessing an in-your-face aggressive feminism—may be a type of refuge".[1158]

In light of these claims, it seems that the subjective importance to consumers of fictional sexually explicit material depicting minors may outweigh the interests of those who might be offended by the "bare thought" that fans are viewing such material.

However, this finding should be interpreted cautiously. It is not being suggested that paedophiles should be permitted to view child abuse images depicting real children, despite claims that such material may be important in preventing them from committing a contact offence.[1159] As argued in the previous chapter, this assertion has largely been discredited and,[1160] regardless of how important such material may be for some paedophiles in suppressing their urges, the fact that a real child has been harmed in the production process cannot be ignored. Thus, the above analysis applies only to fictional material.

pp. 289-316; Kam, T.H (2013), "The Anxieties that Make the 'Otaku': Capital and the Common Sense of Consumption in Contemporary Japan", *Japanese Studies*, vol. 33, no. 1, pp. 39-61.
[1156]Galbraith, above n 1154, 101, 113, 130, and 245.
[1157]Ibid, 179.
[1158]Schodt, F.L (1996), *Dreamland Japan: Writings on Modern Manga*, Stone Bridge, California, p. 501.
[1159] See Chapter 1, at [1.2.6].
[1160]See Chapter 7, at [7.2.3].

Reasonable Avoidability and Voluntariness

Feinberg stressed that the Offense Principle does not support the suppression of obscene materials if the viewer voluntarily sought out the material. As stated in Chapter 3, Feinberg argued that:

> "When an 'obscene' book sits on the shelf, who is there to be offended? Those who want to read it for the sake of erotic stimulation presumably will not be offended (or else they wouldn't read it), and those who choose not to read it will have no experience which to be offended. If its covers are to decorous, some unsuspecting readers might browse through it by mistake and then be offended by what they find, but they need only close the book again to escape the offense".[1161]

In the digital era, the person at risk of being offended would simply have to exit the screen to escape the offensive content.[1162] Thus, accidentally stumbling upon offensive material would not in itself justify prohibition.

The ability of individuals to avoid offensive sexually explicit comics was a common argument raised against prohibition in the survey findings. This is demonstrated by comments such as "if you don't like it don't buy it"[1163] and claims that people can simply "ignore what they do not [like]".[1164] A number of comic fans surveyed emphasised that websites dedicated to sexually explicit comics often had disclaimers warning potential viewers of the nature of the content, thereby reducing the risk of involuntary exposure to offensive content.[1165] The literature on Boys Love, YAOI, and

[1161]Feinberg, above n 1104, 32.
[1162]White, A (2006), *Virtually Obscene: The Case for an Uncensored Internet*, McFarland & Company, North Carolina, p. 126; Strikwerda, L (2014), "Should Virtual Cybercrime be Regulated by means of Criminal Law? A Philosophical, Legal-Economic, Pragmatic and Constitutional Dimension", *Information & Communication Technology Law*, vol. 23, no. 1, p. 42.
[1163]F: 18.
[1164]M: 19.
[1165]It is notable that in *United States v McCoy*, which involved stories describing minors in a sexual context, the defendant's warning message that his stories were likely to offend and disturb some people was used by the Court to infer that the defendant knew his stories were offensive. Therefore, the disclaimer was used as evidence against him. It was held that: "[e]ven if the Court were unsatisfied that these topics and their subject matter depict sexual conduct in a patently offensive way, which it is not, the Court notes that Defendant's stories are littered with disclaimers and apologies

slash fiction has also highlighted that websites dedicated to this genre use disclaimers warning viewers of the content.[1166]

Magnitude of the Offense and Abnormal Susceptibility

Determining the magnitude of the offense requires considering its intensity, duration, and extent.[1167] Feinberg made it clear that mere unpleasant mental states, such as "hurt feelings, aroused anger, shocked sensibility, alarm, disgust, frustration … and many more", [1168] do not justify prohibition under the Offense Principle. Such affronts are compared to "a single mosquito bite. It comes; we wince; it goes; that is all".[1169]
Without research specifically investigating the views of the Australian public about the perceived offensive impact of fictional child pornography, it is difficult to ascertain whether the bare thought that some people are viewing such material would cause serious offence to the majority of reasonable adults. It is also difficult to ascertain the magnitude of the offense that may be caused by the content of some fantasy material because, as noted in Chapter 1, the author of this dissertation did not want to risk potentially breaching the law by accessing such material.

Nevertheless, as seen in Chapter 4, Australia's child abuse material legislation generally requires the material to be "offensive" to the "reasonable" person. It is therefore unlikely that material occasioning fleeting discomfort would be considered sufficiently offensive to constitute child pornography. A reasonable person test also precludes taking into account the perspective of a person who is abnormally susceptible to being offended. As emphasised in the Australian case law, the reason for precluding those who are highly sensitive is that such persons would not be

about the offensive and disturbing nature of the content of his work". *United States v McCoy*, 937 F. Supp. 2d 1374 (M.D Ga. 2013), at [1379]-[1380].
[1166]Noxon, C (2003), "When Harry Met Smutty", *Metroactive*, 26 June–2 July issue, available online, <http://www.metroactive.com/papers/metro/06.26.03/potter-0326.html>; Madill, A (2015), "*Boys' Love* Manga for Girls: Paedophilic, Satirical, Queer Readings and English Law", in E Renold, J Ringrose, and D Egan (eds.), *Children*, *Sexuality and Sexualization*, Palgrave MacMillan, Hampshire, p. 276.
[1167]Feinberg, above n 1104, 26.
[1168]Feinberg, above n 1105, 45.
[1169]Feinberg, above n 1104, 274.

"reasonably tolerant and understanding and reasonably contemporary in [their] reactions".[1170]

Arguably, since adolescent sexuality has been a prevalent theme in art and literature for centuries, reasonable persons would tolerate some material depicting or describing minors in a sexual context.[1171] It is for this reason, as explained by J2 and LEO 1, that Shakespeare's *Romeo and Juliet,* which places two minors in a sexual context, is not deemed child pornography. More contentious is Nabokov's novel *Lolita,*[1172] which tells a tale of a middle-aged man who becomes sexually involved with a 12-year-old girl. It seems that, because this novel has not been deemed child pornography in Australia, the majority may agree with one female comic fan surveyed who said, "do you think *Lolita* by Vladimir Nabokov should be banned? Neither do I".[1173] It is likely that the older the characters appear, the less likely the material will be found offensive. This is because depictions of characters who appear to be in late adolescence would be a depiction of lawful sexual activity since, as some of the comic fans surveyed noted, "the age of consent in Australia is 16".[1174] However, this comment is only partly accurate, as the age of sexual consent in Tasmania and South Australia is 17.[1175]

The inconsistent age of consent in different jurisdictions can create difficulties for law enforcement and confusion amongst those who access and share fantasy material online from other jurisdictions. Since the age of sexual consent varies between countries, and sometimes between jurisdictions within the same country, what may be considered offensive in one jurisdiction may be legitimate in another. For example, the age of consent in Japan is 13,[1176] which may explain why comics depicting what

[1170]*Ball v McIntyre* (1966) 9 FLR 237, at [245].
[1171]See *Ashcroft v Free Speech Coalition*, 535 U.S. 234 (2002), at [247].
[1172]*Lolita*, which was written by Vladimir Nabokov, was originally published in English in 1955. It has since been translated into many other languages and is now considered a modern classic. For a recent commentary on this book see Ambrosiani, P (2016), "Vladimir Nabokov's *Lolita*: Text, Paratext and Translation", *Translation and Interpreting Studies*, vol. 11, no. 1, pp. 81-99.
[1173]F: 19.
[1174]M: 20.
[1175]For an overview of Australia's age of consent laws see Child Family Community Australia (2016), "Age of Consent Laws", Australian Institute of Family Studies, available online, <https://aifs.gov.au/cfca/publications/age-consent-laws>.
[1176]Frennea, above n 1110, 21.

is lawful sexual activity in Japan may be deemed child pornography when accessed in, or imported into, the West.

The survey data indicated that comic creators attempt to evade child pornography laws by depicting characters who appear underage, but stating in the accompanying narrative that the characters are older. For example, one female participant said she was reading a comic where the character "was drawn to look 10 or so, but [the comic creator] stated the character is 22".[1177] Others also admitted it becomes "confusing" [1178] and "blurry"[1179] when the character "look[s] 15, but the author says they are 30+".[1180] Yet, unbeknownst to some fans, the age specified in the narrative is not determinative of whether the reasonable person might find the material offensive because, as highlighted in chapters 4 and 5, Australia's legislation is only concerned with the *apparent* age of the person.[1181]

Hence, the magnitude of the offense is an issue that would have to be determined on a case-by-case basis. This determination can only be made after a judge or jury is given the opportunity to view the material in the eyes of a hypothetical reasonable person.

Spiteful Motives

A factor weighing in favour of criminalisation under the Offense Principle is whether the conduct was undertaken with "spiteful motives". [1182] Feinberg stated that: "[w]holly spiteful conduct, done with the intention of offending and for no other reason, is wholly unreasonable".[1183]Although he did not provide specific examples, presumably Feinberg was referring to persons who engage in offensive conduct with the intention of wrongfully offending others.

[1177]F: 22.
[1178]M: 24.
[1179]M: 20.
[1180]M: 24.
[1181]Also see Krone, T (2005), "Combating Online Child Pornography in Australia", in E Quayle and M Taylor (eds.), *Viewing Child Pornography on the Internet: Understanding the Offence*, *Managing the Offender*, *Helping the Victims*, Russell House Publishing, Dorset, p. 18.
[1182]Feinberg, above n 1104, 26.
[1183]Ibid, 44.

As discussed in Chapter 2, Boys Love, YAOI, and slash fiction originally emerged "as a form of revenge against the male-dominated society".[1184] This indicates spiteful motives against men, which may cause some males to be offended, in particular homosexuals who feel they are being ridiculed.[1185] Yet, even if such material is produced for spiteful reasons against males, it would be clearly unjustified to criminalise such material under laws concerned with child protection.

Nevertheless, whether a person had spiteful motives would also vary on a case-by-case basis.

Freedom of Expression and Offensiveness

Like Mill, Feinberg stressed the importance of protecting freedom of expression. He believed that "no amount of offensiveness in an expressed opinion can counterbalance the vital social value of allowing unfettered personal expression".[1186] Feinberg referred not only to political communication, but also to the importance of allowing the free flow of non-political offensive speech. Thus, he generally opposed prohibiting offensive material such as obscenity and pornography.[1187] Notably, the need to protect offensive speech was a common theme in the survey findings, evidenced by comments such as, "just because you find some material offensive, it's not your right to prohibit what you think is wrong".[1188] It was also claimed that "the more regulation, the less freedom authors have to create a true masterpiece"[1189] and "freedom of art comes before anything else".[1190]

[1184]Suzuki, above n 1144, 263.
[1185]This is because, as discussed in Chapter 2, Boys Love, YAOI, and slash fiction portray homosexual relationships and literature highlights that these materials have offended some homosexual males. See Fermin, above n 1144, 224; Thorn, above n 1149, 117; Zanghellini, A (2009), "Underage Sex and Romance in Japanese Homoerotic Manga and Anime", *Social and Legal Studies*, vol. 18, no. 2, p. 160.
[1186]Feinberg, above n 1104, 39.
[1187]See especially Feinberg, J (1979), "Pornography and the Criminal Law", *University of Pittsburgh Law Review*, vol. 40, no. 4, pp. 567-604; Feinberg, J (1983), "Obscene Words and the Law", *Law & Philosophy*, vol. 2, no. 2, pp. 139-161.
[1188]M: 18.
[1189]F: 23.
[1190]M: 19.

The Offense Principle may support prohibiting some types of offensive speech if they are motivated by spite. If a person creates material with the motive of maliciously offending others, Feinberg argued that the speech:

> "… deserves no respect at all. Offending the senses or sensibilities of others simply for the sake of doing so is hardly less unreasonable than harming the interests of others simply for the sake of doing so. Conduct cannot be reasonable in the eyes of the law (or on the scales of the legislator) if its entire motive is malice or spite".[1191]

However, even if some fictional child pornography may have been created with spiteful motives, the Offense Principle would only support criminalising the actions of the person who created the material. It would not justifiably criminalise consumers of the material who have no malicious intention of offending others by possessing such material.

8.1.3 Does the Offense Principle Justify Criminalising Offensive Fantasy Material?

Given Feinberg's emphasis that material should generally not be prohibited if it can be reasonably avoided, the Offense Principle would support regulating sexually explicit fantasy material, but not outright prohibition.[1192] This approach would involve regulating sexually explicit comics depicting minors in the same manner "as other pornographic material", [1193] by restricting its availability to avoid unwitting exposure.[1194] Although this regulation may inconvenience some fans, it strikes a defensible balance between their rights and the rights of others not to be offended.[1195] However, preventing individuals from possessing, accessing, and sharing with other willing viewers fictional child pornography may be problematic for the Offense Principle. Criminalisation in these circumstances may be justified if the Offense Principle is extended to conduct that causes profound offense to the majority by the

[1191]Feinberg, above n 1104, 41.
[1192]See Feinberg, above n 1187.
[1193]F: 18.
[1194]See McKinnon, above n 1117.
[1195]See West, C (2012), "Pornography and Censorship", *Stanford Encyclopedia of Philosophy*, available online < http://plato.stanford.edu/entries/pornography-censorship/>.

"bare thought" of some individuals viewing such material. Nevertheless, it should be emphasised that the Offense Principle was developed as a liberal theory that sought to limit criminalisation. Feinberg, like others, warned that criminalising offensive conduct should only occur in exceptional cases.[1196] Whether fictional child pornography is one of those exceptional cases is debatable, but after applying the mediating principles, it seems the scales tipped against prohibition. This is given the reasonable avoidability of fantasy material by unwilling viewers and the high value the Offense Principle places on "unfettered expression".[1197]

Additionally, prohibiting conduct just because the majority is offended by the "bare thought" that it is occurring highlights the difficulty in distinguishing the Offense Principle from Legal Moralism.[1198]As will be discussed in the following section, Legal Moralism may provide a stronger and less contentious basis for prohibiting fictional child pornography.

8.2 Legal Moralism and Fantasy Material

Legal Moralism is concerned with the principles of right or wrong. According to this theory, the immorality of certain conduct may provide a legitimate basis for the state to criminalise the behaviour in question.[1199] Unlike the Harm Principle and the Offense Principle, Legal Moralism states that it is legitimate to prohibit behaviours that conflict with society's collective moral judgements.[1200] This is even if those behaviours do not result in physical or psychological harm to others.[1201] Legal Moralism also does not require empirical evidence that conduct will result in moral harm in order to justify criminalisation.[1202]

[1196]Feinberg, above n 1104, 69-70; Simester and Sullivan, above n 1106, 590-591; Ost, above n 1127, 237.
[1197]Feinberg, above n 1104, 38.
[1198]Simester, A.P, and von Hirsch, A (2011), *Crimes*, *Harms*, *and Wrongs: On the Principles of Criminalisation*, Hart Publishing, Oxford, p. 111.
[1199]Feinberg, above n 1105, 27. Also see Feinberg, J (1988), *Harmless Wrongdoing: The Moral Limits of the Criminal Law*, Vol. IV, Oxford University Press, New York.
[1200]See especially Devlin, P (1968), *The Enforcement of Morals*, Oxford University Press, London.
[1201]Bailey, D.S (1961), "Public Morality and the Criminal Law", *Eugenics Review*, vol. 52, no. 4, p. 202.
[1202]George, R.P (1990), "Social Cohesion and the Legal Enforcement of Morals: A Reconsideration of the Hart-Devlin Debate", *American Journal of Jurisprudence*, vol. 35, no. 1, p. 29; Peterson, J (2015), "Legal Moralism, Interests and Preferences: Alexander on Aesthetic Regulation", *Philosophia*, vol. 43, no. 2, p. 486.

As noted in Chapter 3, Legal Moralism generally does not distinguish between private and public acts because "[m]orality is a sphere in which there is a public interest and a private interest, often in conflict, and the problem is to reconcile the two".[1203] Accordingly, from a Legal Moralist perspective, it is unnecessary to distinguish between dissemination and private possession of fantasy material. An often-cited example by those who oppose the legal enforcement of morality in the private sphere is *R v Brown.*[1204] In this case, the House of Lords upheld the convictions of a group of adult men for engaging in private homosexual sadomasochistic activities. Extreme Legal Moralists would endorse this decision since it sanctioned conduct that was viewed at the time as being inherently immoral.[1205] This is even though "all who are involved in the deed are consenting parties, [because] the injury is done to morals, [and] the public interest in moral order can be balanced against the claims of privacy".[1206] Conversely, Modest Legal Moralists,[1207] and especially those who adhere to the Harm Principle,[1208] may see the decision in *Brown* as problematic, since the conduct occurred in private and involved only consenting adults.

In Chapter 3, the Devlin/Hart debate was used to illustrate the conflict between liberal theory and the legal enforcement of morality.[1209] Based on the extreme interpretation of Devlin's writings, Legal Moralism supports prohibiting any conduct that conflicts with whatever moral beliefs are held by the majority, even if those beliefs are not rational and are merely based on feelings.[1210] Devlin contended that there is a common morality in every society and that:

> "If men and women try to create a society in which there is no fundamental agreement about good and evil they will fail; if, having based it on common

[1203]Devlin, above n 1200, 16.
[1204]*R v Brown* [1994] 1 AC 212.
[1205]For example, Kekes has argued that "murder for fun, *torture for pleasure*, enslavement for profit, to mention some examples, are clear cases in which required conventions are unjustifiably violated. People are deprived of a primary value they need to live a good life and the reason for it is morally unacceptable". Kekes, J (2000), "The Enforcement of Morality", *American Philosophical Quarterly*, vol. 37, no. 1, p. 24 (emphasis added).
[1206]Devlin, above n 1200, 19.
[1207]For example Duff, R.A (2014), "Towards a Modest Legal Moralism", *Criminal Law and Philosophy*, vol. 8, no. 1, p. 232.
[1208]For example Simester and von Hirsch, above n 1198, 82.
[1209]Chapter 3, at [3.3].
[1210]Devlin, above n 1200, 15.

> agreement, the agreement goes, the society will disintegrate. For society is not something that is kept together physically; it is held by the invisible bonds of common thought. If the bonds were too far relaxed the members would drift apart. A common morality is part of the bondage. The bondage is part of the price of society; and mankind, which needs society, must pay its price".[1211]

However, Devlin argued that "[n]othing should be punished by law that does not lie beyond the limits of tolerance".[1212] He emphasised that there must be a "genuine feeling" [1213] of "intolerance, indignation, and revulsion"[1214] before legal sanctions are appropriate. The test advocated by Devlin is whether the "ordinary man, the man in the jury box", [1215] would find the conduct in question beyond the limits of tolerance. The verdict of the jury must be unanimous so that "a moral principle, if it is to be given the force of law, should be one which 12 men and women drawn at random from the community can be expected not only to approve but to take so seriously that they regard a breach of it as fit for punishment".[1216] It is interesting to note that some of the judicial officers interviewed expressed doubt as to whether "12 people dragged off the street" [1217] would have explicit knowledge of the standards of morality their community holds.[1218] In response to criticisms on Devlin's reliance on the jury to determine the common morality of society, some Legal Moralists have argued that:

> "In most cases … deep disgust, especially if it is the unanimous reaction of randomly selected people in a diverse society, is a reliable sign of moral commitment, even if it is neither a necessary nor sufficient sign. It is a good indication that, at least in the respect in which deep disgust is felt, the society is morally healthy".[1219]

[1211]Ibid, 10.
[1212]Ibid, 16-17.
[1213]Ibid, 17.
[1214]Ibid.
[1215]Ibid, 90.
[1216]Ibid.
[1217]J6.
[1218]See Chapter 6, at [6.1.2].
[1219]Kekes, above n 1205, 33.

However, as most child pornography offences are dealt with summarily in Australia and "not having a jury is unavoidable",[1220] which means that it would be a single magistrate making the decision.[1221] This may be problematic for Legal Moralists such as Devlin since the decision may not be reflective of society's shared morality, but based on the personal tastes of the presiding magistrate, who may not be sufficiently in touch with community standards.[1222]

Nevertheless, pornography has traditionally been opposed on moral grounds in Western countries and seen as beyond the limits of tolerance by some individuals and groups.[1223] Conservatives feared such material "is morally corrupting and that it reduces people's sexual inhibitions" [1224] and believed that consumption of pornography is evidence of moral decline.[1225] Pornography has also been condemned for religious reasons due to the belief that viewing such materials is sinful.[1226]Although attitudes towards pornography have significantly relaxed in contemporary societies, some Legal Moralists still maintain that viewing pornography erodes morality because such material, including "pornographic art … degrade and even corrupt".[1227]

[1220]J2. Also see Sentencing Advisory Council Victoria (2008), "Sentencing Trends for Knowingly Possess Child Pornography in the Magistrates' Court of Victoria 2004–05 to 2006–07", *Sentencing Snapshot*, Report No. 51; Krone, T (2009), "Child Pornography Sentencing in NSW", Australian Institute of Criminology, High Tech Crime Brief No. 8, Canberra; Mizzi, P, Gotsis, T, and Poletti, P (2010), *Sentencing Offenders Convicted of Child Pornography and Child Abuse Material Offences*, Judicial Commission of NSW, Monograph 34, Sydney; Warner, K (2010), "Sentencing for Child Pornography", *Australian Law Journal*, vol. 84, no. 6, pp. 384-395.

[1221]See Krone, T (2005), "Does Thinking Make It So? Defining Online Child Pornography Possession Offences", *Trends and Issues in Crime and Criminal Justice*, Australian Institute of Criminology, Canberra, Report No. 299, p. 2.

[1222]For literature discussing the judiciary and contemporary community standards, see Gleeson, M (2004), *Out of Touch or Out of Reach*, paper presented at the Judicial Conference of Australia Colloquium, Adelaide, available online, <http://www.hcourt.gov.au/assets/publications/speeches/ former-justices/gleesoncj/ cj_02oct04.html>; Malleson, K (2012), "White, Male and Middle Class—Is a Diverse Judiciary a Pipe Dream", paper presented at Mansfield College, Oxford, available online, <http://www.law.qmul.ac.uk/eji/ docs/78402.pdf>; Chalmers, M (2013), "Who Defines Community Standards?", *New Matilda*, 27 August, available online, <https://newmatilda.com/2013/08/27/who-defines-community-standards/>.

[1223]Suzuki, T (2001), "Frame Diffusion from the U.S. to Japan: Japanese Arguments Against Pornocomics, 1989–1992", in J Best (ed.), *How Claims Spread: Cross-National Diffusion of Social Problems*, Aldine De Gruyter, New York, p. 131; Cusak, C (2015), *Pornography and the Criminal Justice System*, CRC Press, Florida, p. 2.

[1224]Berger, R, Searles, P, and Cottle, C (1990), "Ideological Contours of the Contemporary Pornography Debate: Divisions and Alliances", *Frontiers*, vol. 11, no. 2/3, p. 31.

[1225]Suzuki, above n 1223.

[1226]Berger et al, above n 1224.

[1227]George, R.P (2011), "Pornography, Public Morality, and Constitutional Rights", *The Witherspoon Institute*, 17 October, available online, <http://www.thepublicdiscourse.com/2011/10/3958/>. Also see Dworkin, R (1985), *A Matter of Principle*, Oxford University Press, Oxford; Cline, V.B (2001),

It is therefore highly likely that, given the pornographic nature of fantasy materials such as Boys Love, YAOI, slash fiction and *hentai,* Legal Moralism would support banning such materials outright.[1228] From an extreme Legal Moralist's perspective, the fact that no child has been harmed in the production of fictional child pornography is irrelevant because such material is "disgusting",[1229] "depraved",[1230] "perverted",[1231] "the content of [such] cartoon material [is] deviant from 'normality'",[1232] and "no one should be able to think that way. That is just not healthy for a society".[1233] Fictional child pornography may be seen as contrary to the consensus that representations of children in pornographic material are morally wrong. It was for this reason that J6 suggested the rationale behind prohibition was that such material "crosses the moral boundary, which society at the moment is saying should not be crossed in relation to children".

Nevertheless, whether Legal Moralism would support criminalising private possession can be questioned in light of Devlin's claim that "as far as possible privacy should be respected".[1234] He emphasised that even though the public and private distinction is artificial, there should be:

> "… a strong reluctance on the part of judges and legislators to sanction invasions of privacy in the detection of crime. The police have no more right to trespass than the ordinary citizen has; there is no general right of search; to this extent an

---

"Pornography's Effects on Adults and Children", *Morality in Media*, available online, <http://www.scribd.com/doc/20282510/Dr-Victor-Cline-Pornography-s-Effects-on-Adults-and-Children>; United Families International (2008), *Guide to Family Issues: The Harms of Pornography*, available online, <http://unitedfamilies.org/issues-and-answers/guides-to-family-issues/the-harms-of-pornography/>; McLatchie, J (2014), "Why Pornography Harms", *Cross Examined*, 20 August, available online, <http://crossexamined.org/pornography-harms/>; Yamoah, E, and Dei, D (2015), "Effects of Pornography on Christian Marriage: An Empirical Review", *Global Journal of Arts Humanities and Social Sciences*, vol. 13, no. 1, pp. 1-13; Schmitz, M (2016), "Why It's Time to Ban Pornography", *Sydney Morning Herald*, 30 May, available online, <http://www.smh.com.au/comment/ the-case-for-banning-pornography-20160529-gp6vg7.html>.

[1228]See Bakan, J (1985), "Pornography, Law and Moral Theory", *Ottawa Law Review*, vol. 17, no. 1, p. 1.

[1229]M: 18; F: 19; *Dodge v R* [2002] WASCA 286, at [16]; *R v Shelford* [2013] NSWDC 102, at [5].

[1230]*Dodge v R* [2002] WASCA 286, at [16]; *Bayliss v R* [2013] VSCA 70, at [31]; *DPP v Butterfield* [2014] VCC 1663, at [2]; *Taylor v R* [2015] TASCCA 7, at [8].

[1231]*R v Jarrold* [2010] NSWCCA 69, at [50]; *R v Ross* [2009] NSWDC 104, at [9].

[1232]*CFJ v Children's Guardian* [2016] NSW CATAD 62, at [68].

[1233]LEO 1.

[1234]Devlin, above n 1200, 18.

> Englishman's home is still his castle. Telephone tapping and interference with mails afford a good illustration of this".[1235]

As Devlin was writing prior to the internet, it can be argued that he would extend the right to privacy to include the protection of personal emails and private instantaneous communications involving sexually explicit fantasies. However, Devlin did not place much importance on the right to privacy, stating that if the conduct in question is so abhorrent that the majority cannot tolerate it, "I do not see how society can be denied the right to eradicate it".[1236]

It was also noted in Chapter 3 that there has been a revival of Legal Moralism by modern theorists, who have criticised Devlin's extremism.[1237] Modest Legal Moralists have argued that only objectively immoral conduct—that is, conduct that transgresses reasoned-based morality—is apt for criminalisation.[1238] Duff would further argue that the conduct must be a "public wrong". According to Duff, "[w]e should interpret a 'public' wrong, not as a wrong that injures the public, but as one that properly concerns the public, i.e. the polity as a whole".[1239] Although Duff has not provided any general criteria for determining the wrongfulness of certain behaviour,[1240] he stated:

> "If we are to criminalise a type of conduct, we must show that it falls within the public realm, the civic enterprise, and that it is therefore of proper interest to all citizens in virtue of their participation in that enterprise; that it constitutes a public wrong within that realm; that it is a wrong that requires the particular kind of response that the criminal law provides—one that condemns the conduct and call its perpetrator to public account for it. The question of which kinds of

[1235]Ibid.
[1236]Ibid, 17.
[1237]Chapter 3, at [3.3].
[1238]See especially George, above n 1202; Kekes, above n 1205; Duff, above n 1207; George, R.P (1993), *Making Men Moral: Civil Liberties and Public Morality*, Clarendon Press, Oxford; Moore, M (1997), *Placing Blame: A General Theory of the Criminal Law*, Oxford University Press, New York. Also see Petersen, T (2010), "New Legal Moralism: Some Strengths and Challenges", *Criminal Law and Philosophy*, vol. 4, no. 2, pp. 215-232.
[1239]Duff, R.A (2007), *Answering for Crime: Responsibility and Liability in the Criminal Law*, Oxford University Press, Oxford, p. 141.
[1240]See von Hirsch, A (2014), "Harm and Wrongdoing in Criminalisation Theory", *Criminal Law and Philosophy*, vol. 8, no. 1, p. 253.

> conduct constitute public wrongs is then a matter for public political deliberation, which might focus on whether the conduct in question is a public matter, or on whether and how it is wrong".[1241]

To justify prohibiting the possession of fictional child pornography under modest Legal Moralism requires ascertaining whether such conduct is objectively immoral, but this is assuming that an objective morality even exists.[1242] Nevertheless, possessing fictional child pornography may be seen as a public wrong if there is a risk that individuals viewing such material may become desensitised and no longer feel deep disgust for analogous abhorrent acts on real children. For example, Kekes has argued that disgust can be a harm-based moral fear, stating that "[t]he danger that is reasonably feared in deep disgust is not immediate harm, but the more remote and more devastating collapse of civilised life".[1243] Although some of the survey participants suggested it was not reasonable to feel offended by fictional depictions of child cartoon characters engaging in sexual activity since "no children were harmed in the process",[1244] feeling of deep disgust may be a reasonable reaction. According to Kekes, it is reasonable to feel revulsion when witnessing a "disgusting thing happening to someone else, real or fictional"[1245] even if when "challenged to justify their reaction, they may not be able to do so. But that does not mean that their reaction is not justifiable".[1246] Given the seriousness of child sexual abuse, it can be argued that people who do not feel disgusted by fictional child pornography have been "desensitised, brutalised, hardened in a way that society sets them apart from the rest of their society".[1247] Therefore, even privately viewing material that portrays children engaging in sexual activity may be a matter of public concern, thereby justifying the criminalisation of private possession by both an extreme and modest forms of Legal Moralism.

[1241]Duff, above n 1207, 233.
[1242]See Strong, S.I (1997), "Romer v. Evans and the Permissibility of Morality Legislation", *Arizona Law Review*, vol. 39, no. 4, pp. 1259-1314.
[1243]Kekes, above n 1205, 32.
[1244]M: 21.
[1245]Kekes, above n 1205, 32.
[1246]Ibid, 33.
[1247]Ibid, 30.

Nevertheless, considering the value placed on individual freedoms in liberal societies, which may be seen as a countervailing moral in itself, it may well be that Australians are willing to tolerate individuals privately consuming fictional child pornography. This is especially in light of Prichard et al's study of 431 university students in Tasmania, which found that one in 10 participants did not think viewing child exploitation depicting *real* children is harmful.[1248] It was also found that one in 15 participants believed that distributing such material is "harmless".[1249] Only seven per cent did not think viewing images depicting real children should be criminalised, but this figure increased to 21.3 per cent when asked whether viewing "pseudo" child pornography should be prohibited.[1250] However, as noted by the researchers, these findings should not be generalised as the study was conducted on a convenience sample of university students and recommended further research into public attitudes towards child abuse material legislation.[1251]

In Chapter 1 it was also noted that McCabe had conducted a study on 261 people living in the United States, seeking their perceptions of viewing virtual child pornography.[1252] It was found that 92.3 per cent of participants believed that viewing computer-generated images of children is acceptable. This led McCabe to conclude that "[p]erhaps the fact that computer-generated children are not really children provides citizens with the rationale for accepting these media".[1253] However, Devlin could well argue that as McCabe's study was conducted during 1998–1999, the findings may be out-dated because "the limits of tolerance shift"[1254] from generation to generation. This seems to be supported by a more recent study on 125 participants in the United States, which found that the majority supported criminalisation of virtual child pornography.[1255] Nevertheless, as both of these studies were conducted in the

[1248]Prichard et al, above n 1126.
[1249]Ibid, 229. As noted in Chapter 1, pseudo-child pornography usually refers to digitally manipulated images of real children. However, it seems Prichard et al were using the term to refer to images "not involving real children".
[1250]Ibid, 234.
[1251]Ibid, 236.
[1252]McCabe, K (2000), "Child Pornography and the Internet", *Social Science Computer Review*, vol. 18, no. 1, pp. 73-76.
[1253]Ibid, 76.
[1254]Devlin, above n 1200, 18.
[1255]Kliethermes, B.C (2015), *Perceptions of Computer-Generated Child Pornography*, Masters Thesis, University of North Dakota.

United States, the findings are of limited use since morality may be treated differently in various societies.[1256] It is for this reason some conduct, such as polygamous marriages, is condemned in some societies while accepted in others.[1257]

Overall, the analysis above indicated that both extreme and modest Legal Moralism would support criminalising fictional child pornography. The following part considers whether Moral Paternalism would also support the prohibition.

8.2.1 Moral Paternalism

The main difference between Legal Moralism and Moral Paternalism is that the latter focuses on making individuals morally better.[1258] As discussed in Chapter 3, Moral Paternalism is:

> "… the claim that we are entitled to interfere with persons on the grounds that they will be (1) in a morally improved state and (2) that such a state will be better for the individual in question". [1259]

Moral Paternalism is based on the assumption that "[i]t is always a good reason in support of a proposed prohibition that it is probably necessary to prevent *moral* harm (as opposed to physical, psychological, or economic harm) to the actor himself".[1260] According to Wall, "some people think that character is a necessary constituent of well-being … [as] one's character is corrupted, one's well-being declines".[1261] In this sense, the criminal law is seen as playing an important role in sustaining or achieving a virtuous character.[1262]

[1256]Devlin, above n 1200, 18.
[1257]George, above n 1202, 20.
[1258]Dworkin, G (2005), "Moral Paternalism", *Law and Philosophy*, vol. 24, no. 3, p. 308. An example of Moral Paternalism given by Dworkin is legislation prohibiting prostitution on the grounds that engaging in that occupation undermines the person's well-being.
[1259]Ibid.
[1260]Feinberg, above n 1105, 27.
[1261]Wall, S (2013), "Enforcing Morality", *Criminal Law and Philosophy*, vol. 7, no. 3, p. 457.
[1262]Ibid, 459.

Feinberg specifically explained the rationale of prohibiting obscene materials on Moral Paternalistic on the basis that:

> "[I]t is bad (harmful) for a person to have impure thoughts and a depraved character whatever he may think about the matter, and the state has a right to protect him from his own folly by banning the corrupting materials."[1263]

Prohibiting obscene material on Moral Paternalistic grounds is justified by those who support this theory because it is assumed that the ban is in the "best interests" [1264]of individuals who are not being deprived of anything of significant value.[1265] The use of sexually explicit comics as a sexual aid has been seen as unproductive, anti-social, morally corrupting, and therefore contrary to individuals' best interests.[1266]

8.2.2 Is the Legal Enforcement of Morality Justified?

Since Legal Moralism does not require empirical proof of harm and permits criminalisation based on common morality, it provides the easiest theoretical basis for prohibiting fictional child pornography. However, as reinforced by the literature discussed below, legal enforcement of morality is controversial and seems to be widely rejected as a sole ground for criminalisation in liberal societies.[1267]

In the United Kingdom, Ost has argued that, in relation to the criminalisation of fictional child pornography, "moral harm-based arguments ultimately fail to convince, since Legal Moralism or Moral Paternalism should not be acceptable grounds for criminalisation".[1268] Similarly, in the United States, it has been argued that:

[1263]Feinberg, above n 1104, 100.
[1264]Scoccia, D (2000), "Moral Paternalism, Virtue and Autonomy", *Australasian Journal of Philosophy*, vol. 78, no. 1, p. 53.
[1265]Ibid.
[1266]See Galbraith, P.W (2014), "The *Misshitsu* Trial: Thinking Obscenity with Japanese Comics", *International Journal of Comic Art*, vol. 16, no. 1, pp. 125-146.
[1267]For example see Ost, above n 1127; Strikwerda, above n 1162; Strong, above n 1242; Ten, C.L (1971), "Paternalism and Morality", *Ratio*, vol. 13, no. 1, p. 64; Ryder, B (2003), "The Harms of Child Pornography Law", *University of British Columbia Law Review*, vol. 36, no. 1, p. 135; Bassham, G (2012), "Legislating Morality: Scoring the Hart- Devlin Debate after Fifty Years", *Ratio Juris*, vol. 25, no. 2, pp. 117-132.
[1268]Ost, above n 1127, 230. Also see Johnson, M.C (2010), "Freedom of Expression in Cyberspace and the Coroner's and Justice Act 2009", *Procs 3rd International Seminar on Information Law*, Corfu, Greece, 25–26 June.

> "Since it is apparent the government has no convincing scientific basis for their prohibition of the creation, possession, or distribution of virtual child pornography, it appears that the true motivations behind the anti-virtual child pornography law are akin to a moral crusade. Proscribing the expression of thought on purely moral grounds raises a multitude of concerns".[1269]

In Canada, it has also been claimed that:

> "[E]xpressive material that did not involve harm in its production … should be no concern of the criminal law. Moral corruption arguments do not provide a compelling basis for the imposition of criminal sanctions on the creation, dissemination and use of expressive material. To justify criminal prohibitions, we need a reason other than our dislike of the ideas expressed".[1270]

Although there is sparse literature from Australia on the prohibition of fictional child pornography,[1271] the few academics who have written about Australia's legislation have argued that:

> "… the harm the prosecution of such material seeks to prevent is not so much that done to children, but the harm done to the moral character of the community by making such images viewable to individuals. It is therefore not a justification based on harm to others but rather it is based on an ambiguous notion of moral harm connected with the inappropriateness of having certain thoughts, constructing particular fantasies and imagining specific scenarios".[1272]

[1269]April, K (2012), "Cartoons Aren't Real People, Too: Does The Regulation of Virtual Child Pornography Violate the First Amendment and Criminalize Subversive Thought?", *Cardozo Journal of Law & Gender*, vol. 19, no, 1, p. 263. Also see Byberg, J (2012), "Childless Child Porn—A 'Victimless' Crime?", *Social Science Research Network*, available online, <http://papers.ssrn.com/sol3/papers.cfm? abstract_id=2114564>.

[1270]Ryder, above n 1267. Also see Smyth, S (2009), "A 'Reasoned Apprehension' of Overbreadth: An Alternative Approach to the Problems Presented by Section 163.1 of the Criminal Code", *University of British Columbia Law Review*, vol. 42, no. 1, pp. 69-123.

[1271]See Chapter 1, at [1.2.3].

[1272]Simpson, B (2009), "Controlling Fantasy in Cyberspace: Cartoons, Imagination and Child Pornography", *Information & Communications Technology Law*, vol. 18, no. 3, p. 256. Also see Zanghellini, A (2009), "Underage Sex and Romance in Japanese Homoerotic Manga and Anime", *Social and Legal Studies*, vol. 18, no. 2, pp. 159-177; McLelland, M (2013), "Ethical and Legal Issues in Teaching about Japanese Popular Culture to Undergraduate Students in Australia", *Electronic*

Rejection of Legal Moralism and Moral Paternalism was also echoed in the majority of the comic fans' responses who argued that outright prohibition was an "excessive"[1273] interference in the private lives of adults who "should be able to view what they wish".[1274] Their responses suggested the state may intervene to protect public morality by preventing widespread dissemination, but should not prevent willing viewers from accessing comics depicting minors because it is not anyone's "business to tell the people to read or not to read something".[1275] Accepting state interference to protect public morality mirrors the view of Hart[1276] who "while continuing to oppose morality laws in principle, would permit the state to enact such laws when the act is public, as opposed to purely private".[1277] This was the same stance taken by the Wolfenden Committee that, when contemplating whether private acts of homosexuality should be decriminalised, stated "there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business".[1278]

Some of the survey participants' responses were also similar to that of Dworkin, who believed viewing pornography is morally wrong, but argued that people should nevertheless have "the right of moral independence".[1279] Dworkin argued it was unjustifiable to prohibit possession of pornography just because "their officials or fellow-citizens think that their opinions about the right way for them to lead their own lives are ignoble or wrong".[1280] This was reflected in comments made by some of the survey participants who believed that prohibiting certain comics on moral grounds "wouldn't really be fair"[1281] and "it's not your right to prohibit what you think is wrong".[1282]

Journal of Contemporary Japanese Studies, vol. 13, no. 2, available online, <http://ro.uow.edu.au/cgi/viewcontent.cgi?article=1895&context=lhapapers>.

[1273]M: 18.

[1274]M: 19.

[1275]F: 18.

[1276]Hart, H.L.A (1963), *Law*, *Liberty*, *and Morality*, Oxford University Press, Oxford, pp. 45-48.

[1277]Strong, above n 1242, 1303.

[1278]Committee on Homosexual Offences and Prostitution (1957), *Report of the Committee on Homosexual Offences and Prostitution*, Her Majesty's Stationery Office, London, at [62].

[1279]Dworkin, above n 1227, 353.

[1280]Ibid.

[1281]F: 25.

[1282]M: 18.

The analysis raises the broader issue of whether Legal Moralism would support prohibiting artistic works, where such works may breach community standards. Unlike child abuse material, legitimate art representing minors in a sexual context may be tolerated—some would say even fetishised—by society.[1283] This is evident in the widespread acceptance of works such as *Lolita* and *American Beauty,*[1284] as well as the ubiquitous sexualised images of children in the media.[1285] Yet the Bill Henson controversy, discussed in Chapter 5, highlighted the divide in the Australian community as to whether photographs of a nude 13-year-old girl should be tolerated.[1286] There were strong moral objections to Henson's photographs, but at the same time there were many who argued that there must be greater toleration when viewing art.[1287] It may be questioned why artistic merit is relevant when the image is produced using a real child, but it is apparent that artistic merit is extremely relevant when the image is purely fictional.[1288] This may make it more difficult to determine whether some sexually explicit fictional representations of minors breach the limits of toleration. For example, J7 stated that, in a case involving sexually explicit fantasy material, the trial judge held that the cartoons in question constituted child pornography.[1289] Conversely, J7 could not reach the same conclusion when viewing the material "in the eyes of a jury", believing that the images would not breach community standards.

[1283]See especially Kincaid, J.R (1992), *Child-Loving: The Erotic Child and Victorian Culture*, Routledge, New York; Faulkner, J (2010), "The Innocence Fetish: The Commodification and Sexualisation of Children in the Media and Popular Culture", *Media International Australia*, vol. 135, no. 1, pp. 106-117; Mulholland, M (2013), *Young People and Pornography: Negotiating Pornification*, Palgrave MacMillan, New York; Robinson, K.H (2013), *Innocence*, *Knowledge and the Construction of Childhood*, Routledge, Oxon.

[1284]See *Ashcroft v Free Speech Coalition*, 535 U.S. 234 (2002), at [248]; Mateo, G (2008), "The New Face of Child Pornography: Digital Imaging Technology and the Law", *Journal of Law*, *Technology & Policy*, vol. 2008, no. 1, p. 182; Clough, J (2012), "Lawful Acts, Unlawful Images: The Problematic Definition of 'Child' Pornography", *Monash University Law Review*, vol. 38, no. 3, p. 233.

[1285]There is now a plethora of literature discussing the sexualisation of children in the mainstream media. For example see Rush, E, and La Nauze, A (2006), *Corporate Paedophilia: Sexualisation of Children in Australia*, The Australian Institute, Discussion Paper 93, Canberra; Durham, M.G (2008), *The Lolita Effect: The Media Sexualization of Young Girls and What We Can Do About It*, Overlook Press, New York; Dines, G (2009), "Childified Women: How the Mainstream Porn Industry Sells Child Pornography to Men", in S Olfman (ed.), *The Sexualization of Childhood*, Prager Publishers, Connecticut, pp. 121-142; Attwood, F, Bale, C, and Barker, M (2013), *The Sexualization Report*, available online, <http://senseaboutsex.files.wordpress.com/2012/08/thesexualizationreport.pdf>.

[1286]Chapter 5, at [5.3].

[1287]See especially Taylor, C (2009), "Art and Moralism", *Philosophy*, vol. 84, no. 3, pp. 341-353.

[1288]Chapter 5, at [5.4].

[1289]See Chapter 6, at [6.1.2].

Another problem with legal enforcement of morality is that "virtue cannot be coerced".[1290] There must be willingness on the part of the individual for Moral Paternalism to be effective in making a person morally better. Accordingly, it can be argued that, while criminalising fictional child pornography might reduce the number of people putting their thoughts on paper or in digital format on a computer, the law does not necessarily remove or reduce the desire to engage in these fantasies. This means there would be no actual moral improvement resulting from criminalisation of such behaviour, highlighting the limits of the law in controlling peoples' fantasies.

The ineffectiveness of the law in promoting virtue can be evidenced by the majority of comic fans surveyed (67%), who said that the law did not prevent them from accessing sexually explicit comics. Others stated "I don't access sexually explicit content showing minors due to my morality rather than abiding the law".[1291] This challenges Devlin's contention that if morality were not enforced by the criminal law it would lead to the spread of immoral behaviour and the disintegration of society.[1292]

However, if criminalising fictional child pornography is necessary to protect the moral character of citizens, it is questionable why other fantasy materials are not also prohibited. This includes mystery novels that glorify murder or violent video games that reward players for engaging in killing, torture, and theft, such as *Call of Duty, Hitman,* and *Grand Theft Auto.*[1293] Some of the survey participants argued that if individuals are liable to criminal sanctions for sexually explicit fictional depictions of minors, "why not [also] charge people for shooting fictional characters in video games?".[1294] Indeed, a number of observers have pointed out that playing violent video

[1290]Scoccia, above n 1264, 54. Also see Ten, above n 1267.
[1291]F: 19.
[1292]Hart critcised Devlin for assuming that immoral acts would transpire if there were no laws against such acts. He believed that certain conduct, such as incest, would be seen as immoral regardless of whether it was forbidden by law. Hart, above n 1276, 67-68.
[1293]See Danaher, J (2014), "The Gamer's Dilemma: Virtual Murder versus Virtual Paedophilia (Part One)", *Philosophical Disquisitions*, 25 January, available online, <http://philosophicaldisquisitions.blogspot.com.au/2014/01/the-gamers-dilemma-virtual-murder.html>; Atkinson, R, and Rodgers, T (2016), "Pleasure Zones and Murder Boxes: Online Pornography and Violent Video Games as Cultural Zones of Exception", *British Journal of Criminology*, vol. 56, no. 6, p. 302.
[1294]F: 19.

games "must have a negative effect on [the player's] moral character"[1295] and that we either "reject the permissibility of virtual murder and virtual paedophilia, or … accept the permissibility of both".[1296]

Finally, if Legal Moralism and Moral Paternalism are accepted as legitimate grounds for criminalising fictional child pornography, there is a concern that other forms of speech or media are also susceptible to regulation on moral grounds.[1297] As one comic fan warned, "if you start censoring comics then you're going down a slippery slope. It's like in the 1950s, when they wanted to censor horror comics, but ended up censoring almost all comics".[1298] Conversely, the "slippery slope" argument can also be used to argue that tolerating fictional child pornography will lead to extreme permissiveness.[1299] This is a concern because, as discussed in the previous chapter, it may desensitise society to the seriousness of child sexual abuse.

The discussion above highlights that criminalising fictional child pornography solely on moral grounds is problematic. However, as will be seen in the next chapter, the prohibition should not be seen exclusively as a matter of morality.

8.3 Concluding Remarks

This chapter firstly discussed whether prohibiting fictional child pornography can be justified on the Offense Principle. It was found that the Offense Principle would

---

[1295]McCormick, M (2001), "Is it Wrong to Play Violent Video Games?", *Ethics and Information Technology*, vol. 3, no. 4, p. 278. Also see Young, G (2010), "Virtually Real Emotions and the Paradox of Fiction: Implications for the Use of Virtual Environments in Psychological Research", *Philosophical Psychology*, vol. 23, no. 1, pp. 1-21; Young, G (2013), "Enacting Taboos as a Means to an End; But What End? On the Morality of Motivations for Child Murder and Paedophilia within Gamespace", *Ethics & Information Technology*, vol. 15, no. 1, pp. 13-23.

[1296]Danaher, above n 1293. Also see Luck, M (2009), "The Gamer's Dilemma: An Analysis of the Arguments for the Moral Distinction between Virtual Murder and Virtual Paedophila", *Ethics and Information Technology*, vol. 11, no. 1, pp. 31-36; Young, G, and Whitty, M.T (2011), "Should Gamespace be a Taboo-Free Zone? Moral and Psychological Implications for Single-Player Video Games", Theory & Psychology, vol. 21, no. 6, pp. 802-820.

[1297]This is referred to in the literature as the "slippery slope argument". See White, above n 1162, 63; Adams, above n 1129, 69; Akselrud, G (1999), "Hit Man: The Fourth Circuit's Mistake in Rice v. Paladin Enters., Inc.", *Loyola of Los Angeles Entertainment Law Journal*, vol. 19, no. 2, p. 406; DeCew, J.W (2004), "Free Speech and Offensive Expression", *Social Philosophy & Policy*, vol. 21, no. 2, p. 84; Sorial, S (2012), *Sedition and the Advocacy of Violence: Free Speech and Counter-Terrorism*, Routledge, Oxon, p. 127.

[1298]F: 25.

[1299]White, above n 1162, 64.

support prohibiting the widespread dissemination of such material but not criminalising private possession, accessing, or sharing of such material with willing viewers. Provided there is no spiteful motive to cause offense to others, the Offense Principle would only go so far as regulating fictional child pornography to prevent unwitting exposure.

The second section of this chapter considered whether Legal Moralism supports prohibition. As discussed, Devlin's extreme Legal Moralism provides the strongest theoretical basis for criminalising both dissemination and private possession of fictional child pornography. Although Devlin argued that the law should, as far as possible, respect individuals' privacy, he emphasised that it is legitimate to criminalise certain conduct if it is beyond the limits of tolerance. Whether fictional child pornography crosses this limit is a question that needs to be investigated through future research. A modest Legal Moralism can also support prohibition, provided such material is considered objectively wrong. While Moral Paternalism may support criminalisation, it is questionable whether virtue can be coerced. Even though it is relatively unproblematic to find that both Legal Moralism and Moral Paternalism support criminalising fictional child pornography, legal enforcement of morality is controversial in liberal societies. This is reflected in the literature, as well as the survey findings.

In the following final chapter, a summary of the theoretical justifications for prohibiting fictional child pornography and recommendations for the way forward is provided.

Chapter 9: Conclusion—A Matter of Harm, Offense, and Morality

Chapter Contents

9.0 Aims of Chapter

This dissertation explored the criminalisation of fantasy material under Australia's child abuse material legislation. The first chapter provided an overview of the issue, the aim of the study, the research questions, and the methodology used to answer these questions. Chapter 2 set out the different types of potentially criminal fantasy material, highlighting the ramifications the law might have for Boys Love, YAOI, and slash fiction fans. Chapter 3 presented the main theories of criminalisation, namely the Harm Principle, the Offense Principle, and Legal Moralism, that were later used to assess whether the prohibition can be justified on any or all of these theories. Chapter 4 provided a descriptive analysis of the relevant laws, while Chapter 5 critically analysed the law. This was followed by a descriptive analysis of the survey and interview findings. Chapters 7 and 8 synthesised the literature, theories of criminalisation, and qualitative data collected to determine whether the criminalisation of fantasy material is justified. It was found that the prohibition is defensible on all three theories given its potential harm, offensiveness, and simply because it may fall below the common standards of morality.

The aims of this chapter are to complete the dissertation by summarising the answers to the research questions, reflect upon the findings, and provide recommendations. In doing so, it addresses the deficiencies in dealing with fictional representations of children under Australia's child abuse material legislation and how these offences can be better targeted in light of the cross-jurisdictional analysis of the law in Canada, the United States, and the United Kingdom. Recommendations on the way forward are then set out before summarising this study's significant contributions and directions for future research.

9.1 Summary Answers to the Research Questions

The research set out to answer five main questions:

1. How have the child abuse material offences restricted the possession and dissemination of fantasy material?
2. What are the possible theoretical rationales and justifications for prohibiting, or not prohibiting, sexually explicit fictional representations of minors?
3. Does the empirical evidence support these theoretical justifications?
4. What do those enforcing the offences, and fantasy material fans potentially criminalised under the child abuse material legislation, consider to be the justification for these laws?
5. In light of international approaches, can the offences be better targeted?

The answers led to more questions, and so the summary of each question below also considers the other issues raised by the findings.

9.1.1 Question 1

How have the child abuse material offences restricted the possession and dissemination of fantasy material?

As seen in Chapter 4, there have been major reforms to Australia's child abuse material legislation, commencing in 2004–2005. One of the most significant reforms was

broadening the definition of child pornography to include material that depicts or describes a person who "appears to be" a minor. Although the legislation does not explicitly state that it prohibits fictional representations of minors, the courts have concluded that the legislative intent was to capture fictitious characters who appear to be children. This is consistent with the law in other Western countries that have extended their child abuse material legislation due to the concerns surrounding the phenomenon of virtual child pornography.

However, unlike the law in Canada and the United States, Australia's legislation does not make an exception for private possession. Currently, it is an offence to possess fictional child pornography, even if it is self-produced and not shown to anyone else.

9.1.2 Question 2

What are the possible theoretical rationales and justifications for prohibiting, or not prohibiting, sexually explicit fictional representations of minors?

In answering this question, the pertinent theories of criminalisation – the Harm Principle, the Offense Principle, and Legal Moralism − were drawn upon. Whether these theories justified prohibiting fictional child pornography was determined by analysing the empirical research, literature, primary sources of law, legislative materials accompanying the legislation, as well as the interview and survey data.

The criminalisation of fictional child pornography has been presented in the literature as either a "matter of harm or morality".[1300] As seen throughout this dissertation, some have argued that the prohibition existed not to protect children from harm, but solely to protect morality.[1301] Some observers have assumed that sexually explicit fictional

[1300]See especially Ost, S (2010), "Criminalising Fabricated Images of Child Pornography: A Matter of Harm or Morality?", *Legal Studies*, vol. 30, no. 2, pp. 230-256.
[1301]For example Ryder, B (2003), "The Harms of Child Pornography Law", *University of British Columbia Law Review*, vol. 36, no. 1, pp. 101-135; Simpson, B (2009), "Controlling Fantasy in Cyberspace: Cartoons, Imagination and Child Pornography", *Information & Communications Technology Law*, vol. 18, no. 3, pp. 255-271; Zanghellini, A (2009), "Underage Sex and Romance in Japanese Homoerotic Manga and Anime", *Social and Legal Studies*, vol. 18, no. 2, pp. 159-177; McLelland, M (2013), "Ethical and Legal Issues in Teaching about Japanese Popular Culture to Undergraduate Students in Australia", *Electronic Journal of Contemporary Japanese Studies*, vol. 13, no. 2, available online, <http://ro.uow.edu.au/cgi/viewcontent.cgi?article=1895&context=lhapapers>;

material of minors "harms no one",[1302] claiming such materials are "being attacked merely because they are morally distasteful".[1303] It has been argued that, since the "discovery" [1304] of child sexual abuse in the 1970s, there has been an "overreaction"[1305] to the issue and "the effect of this overreaction is that behaviour is criminalised purely on the grounds of Legal Moralism rather than a real risk of harm".[1306] The analysis of the primary sources of law in Chapter 4 could not decipher the legislative intent behind prohibiting obviously fictional child pornography. As J2 stated, it was found that the explanatory memorandum accompanying the legislation "didn't clarify anything".

However, it was found that the law is likely to have been based simultaneously on harm, offense, and morality. This is because it is reasonably open for legislatures to believe that fictional child pornography creates an "unacceptable risk"[1307] in that it might lead to child sexual abuse. At the same time, the purpose of the legislation may have been to shield people from offensive material and to reflect that fictional child pornography may be "crossing the moral boundary, which society at the moment is saying should not be crossed in relation to children".[1308] Some will deny that the evidence supports claims fictional child pornography is sufficiently harmful to justify prohibition. Nevertheless, it is undeniable that the state has a legitimate interest in preventing the over-sexualisation of children in the public sphere, and the circulation of material that sends out the message that engaging in sexual activity with minors is desirable.

April, K (2012), "Cartoons Aren't Real People, Too: Does The Regulation of Virtual Child Pornography Violate the First Amendment and Criminalize Subversive Thought?", *Cardozo Journal of Law & Gender*, vol. 19, no. 1, pp. 241-272; Greenberg, M.H (2012), "Comics, Courts and Controversy: A Case Study of the Comic Book Legal Defense Fund", *Loyola of Los Angeles Entertainment Law Review*, vol. 32, no. 2, pp. 121-186.

[1302]April, above n 1301, 271.

[1303]Ibid.

[1304]Ryder, above n 1301, 102; Smyth, S (2009), "A 'Reasoned Apprehension' of Overbreadth: An Alternative Approach to the Problems Presented by Section 163.1 of the Criminal Code", *University of British Columbia Law Review*, vol. 42, no. 1, p. 76.

[1305]Ost, S (2009), *Child Pornography and Sexual Grooming: Legal and Societal Responses*, Cambridge University Press, Cambridge, p. 131.

[1306]Ibid. Also see Adler, A (2001), "Inverting the First Amendment", *University of Pennsylvania Law Review*, vol. 149, no. 4, pp. 925-926.

[1307]J1.

[1308]J6.

Thus, fictional child pornography should not be seen solely as a matter of morality, but a matter of harm, offensiveness, *and* morality. This was made evident in chapters 7 and 8, which demonstrated that the Harm Principle, Offense Principle, and Legal Moralism provide the theoretical foundation to justify criminalising dissemination and/or possession of fictional child pornography.

9.1.3 Question 3

Does the empirical evidence support these theoretical justifications?

There is no empirical research specifically showing that fictional child pornography causes harm. Accordingly, as seen in Chapter 8, Legal Moralism provided the strongest theoretical basis for criminalisation, as it does not demand empirical evidence. The only limitation Legal Moralism places on criminalisation is the requirement that the conduct in question lies "beyond the limits of tolerance".[1309] Therefore, the question is whether fictional child pornography is widely regarded as so immoral that even private possession of such material should not be tolerated. This is not a question that could be answered by the research findings because, as stressed in Chapter 6, the participants were purposefully selected based on their expertise or interest in sexually explicit comics, which means their responses cannot be generalised. The findings also did not reveal whether the "bare thought"[1310] that some individuals are viewing fictional child pornography causes profound offense to the majority, such that it would justify criminalising private possession on the Offense Principle.

Conversely, the Harm Principle does require empirical proof of harm in order to justify state intervention. Without definitive proof of harm, some have concluded that the Harm Principle simply does not justify criminalising fictional child pornography.[1311] However, it was emphasised in Chapter 7 that it is wrong to conclude that legislatures should not act until there is conclusive evidence. Given the ethical and legal barriers

[1309]Devlin, P (1968), *The Enforcement of Morals*, Oxford University Press, London, pp. 16-17.
[1310]Feinberg, J (1985), *Offense to Others: The Moral Limits of the Criminal Law*, Vol. II, Oxford University Press, New York, p. 68.
[1311]See literature cited in footnotes 1300 and 1301 above.

to conducting research on the effects of viewing fictional child pornography, it is unlikely such research will be forthcoming, but this of itself does not mean that such material should not be prohibited.

It was also emphasised that the Harm Principle plays an important role in risk prevention. In light of the existing research indicating the potential harm of viewing sexually explicit material of minors, and the role of fantasy in the aetiology of offending, precautionary measures that prevent dissemination of fictional child pornography are reasonable. Although this limits freedom of expression, the cost is relatively small compared with the potential risks such material may create, including desensitisation and, for some individuals, incitement to commit child sexual abuse.

The more contentious issue is whether the Harm Principle justifies criminalising private possession. Having considered the potential risks and benefits of criminalisation, it was determined that prohibiting individuals from possessing self-created fantasy material unduly interferes with individual freedoms. As elaborated below, this was reflected in the responses of many individuals who participated in this study, as well as in the case law in Canada and the United States.

9.1.4 Question 4

What do those enforcing the offences, and fantasy material fans potentially criminalised under the child abuse material legislation, consider to be the justification for these laws?

The interview and survey data highlighted divergent opinions on the justification for the offences. The judicial officers seemed uncertain of the rationale behind prohibiting fictional child pornography. On the one hand, it was suggested the law was aimed protecting real children from harm because "people's fantasies might turn into a reality".[1312] On the other hand, it was suggested the rationale was primarily to protect morality and the public from offensive material, and the laws were therefore "basically

[1312] J7.

the old laws on obscenity".[1313] However, it was also noted that whether the law extended to obviously fictional representations of children might have been "something the legislatures had not thought about at all".[1314] As seen in chapters 4 and 5, the judges in the Australian case law have also expressed different opinions as to the legislative purpose of prohibiting fictional child pornography.

Conversely, the law enforcement officers were adamant that the rationale behind criminalising fictional child pornography was to protect children from harm. It was assumed that it is only child molesters and paedophiles who create and disseminate fictional child pornography. Implicit in their responses was that fantasy was a valid indicator of an intention to commit child sexual abuse and "if the opportunity arose for [creators] to go out and play out their fantasies, having written it down, they know exactly what they want to do and they will do it".[1315] When prompted to consider other audiences, such as young people interested in sexually explicit comics, the law enforcement officers accepted that some otherwise innocent individuals who do not pose a genuine risk of harm to children might be potentially criminalised, but this was "not enough to get rid of the legislation".[1316] Indeed, the Australian case law analysis demonstrated that prosecutors were not punitively applying the law to prosecute otherwise innocent fantasy material fans.

Notably, not all the comic fans surveyed were against the prohibition. Although in the minority, some shared similar views to the law enforcement officers, believing that "sexually explicit comics depicting children should be prohibited because they may encourage real life sexual exploitation of minors".[1317] Others based their reasons on morality, arguing that depictions of underage characters in a sexual context are "immoral",[1318] "disturbing",[1319] and "disgusting".[1320] However, the majority were against criminalising any type of comics because "freedom of expression is of utmost

[1313]J2
[1314]Ibid.
[1315]LEO 3.
[1316]LEO 3.
[1317]M: 21.
[1318]F: 19; F: 20; M: 18.
[1319]F: 22.
[1320]M: 18.

importance to society".[1321]

Nevertheless, a common theme in the responses of the judicial officers and the comic fans was that it was not justified to prohibit private possession, which was described by several participants as "thought policing". The judicial officers questioned "why make it criminal for someone to create fictional material for their own purposes?"[1322] since "it is altogether a different thing if the material does not go anywhere".[1323] The majority of comic fans disapproved of criminalising private possession on the grounds that "it's not anyone's business what other people love".[1324] A limitation of the survey method was the inability to query whether the participants believed the right to possession included a right to access obscene materials for private viewing. However, their responses indicated that they were generally of the opinion that possession included a "right to access … what they wish".[1325] The judicial officers did not go as far as to suggest there should be a right to privately access fictional child pornography. It was generally accepted by the judicial officers that sharing it with even one other person may create an unacceptable risk of harm because "once that kind of material is published, control is lost as to where it goes [and] then a potential for a broader evil is created".[1326]

9.1.5 Question 5

In light of international approaches, can the offences be better targeted?

Chapter 4 set out chronologically the relevant law criminalising fictional child pornography in Australia and other Western countries. This was followed by a critical analysis of the law in Chapter 5. These chapters provided insight into how other liberal democracies, with similar legal systems to Australia, are dealing with fictional child pornography. From this analysis, several important lessons were learnt on how Australia's legislation can be better targeted.

[1321] M: 19.
[1322] J2.
[1323] J1.
[1324] F: 18.
[1325] F: 19.
[1326] J1.

One of these lessons was the importance of recognising the limits of the criminal law. As seen in Chapter 4, the courts in both Canada and the United States have refused to uphold laws prohibiting private possession of obscene material that does not depict real children on the grounds that "the State … cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts".[1327] Therefore, exceptions to the child pornography laws were made to "foreclose the law's application to visual works created and privately held by one person alone".[1328] The case law from both jurisdictions pointed to the need for Australian legislatures to reconsider whether it is justified to criminalise individuals for self-created fantasy material that is privately possessed. While such conduct may be seen as immoral, as pointed out in Chapter 8, even Devlin argued that, as far as possible, privacy should be respected.[1329]

Although the United Kingdom controversially introduced legislation in 2010 prohibiting private possession of obscene fictional child pornography,[1330] important lessons were also learnt from the United Kingdom's experience. The most pertinent is the Home Office's recognition that it is inappropriate to extend existing child pornography laws to deal with fictional images.[1331] This was based on the grounds that fictional material should not be conflated with real images and the recognition that the penalties under the existing child pornography laws were "too severe".[1332] There are now separate legislative provisions dealing with real and obviously fictional images of children in the United Kingdom,[1333] which the Internet Watch Foundation has described as "eminently sensible".[1334]

[1327] *Stanley v Georgia*, 394 U.S. 557 (1969), at [556].
[1328] *R v Sharpe* [2001] 1 SCR 45, at [71].
[1329] Devlin, above n 1309, 18.
[1330] See Chapter 4, at [4.6].
[1331] Home Office, Scottish Executive and Northern Ireland Office (2007), *Consultation on Possession of Non-Photographic Visual Depictions of Child Sexual Abuse*, Home Office, London.
[1332] Ibid, 7.
[1333] See the *Protection of Children Act 1978* (UK); *Criminal Justice Act 1988* (UK); *Coroners and Justice Act 2009* (UK).
[1334] Internet Watch Foundation (2007), "IWF response to the Government consultation on the Possession of Non-Photographic Visual Depictions", available online, <https://www.iwf.org.uk/accountability/consultations/non-photographic-visual-depictions>.

The law in the United Kingdom can be contrasted with that in Australia. As seen in Chapter 4, amendments to Australia's child abuse material legislation resulted in increased penalties and abandoning the term "child pornography", on the basis that this term does not reflect the harm caused to the participants.[1335] The law in most Australian jurisdictions now uses the term "child abuse material" or "child exploitation material".[1336] Where the material was produced using a real child, the change in terminology is highly appropriate. Conversely, where the material is purely fictional, no child has been abused, exploited, or had their rights violated to produce it. Therefore, labelling offences dealing with purely fictional material as "child abuse material" or "child exploitation material" is inaccurate.

As noted in Chapter 1, there is a lack of sentencing data on average sentences imposed on defendants convicted of possessing fictional child pornography in Australia.[1337] However, review of the case law, discussed in chapters 4 and 5, revealed that defendants were frequently appealing sentences on the grounds the sentence imposed for fictional material was manifestly excessive. This led to the odd circumstances where some offenders were subject to identical sentences for possessing, for example, "cartoons showing Bart and Lisa [Simpson] having sex as … for possessing on that thumb drive videos showing a number of real children having sex".[1338] Yet, analysis of the parliamentary debates in Chapter 4 demonstrated that Australian legislatures never considered the appropriateness and implications of criminalising fictional child pornography under the same provisions concerned with images depicting real children.

As emphasised in Chapter 2, there is significant difference between obviously fictional material and child abuse material depicting real children. This difference was further emphasised by some of the judicial officers, such as J1 who stated:

> "Material depicting real children involves physical abuse and is an evil of itself. If it is fictional, then you are sentencing the offender merely because there is a potential for others to abuse children".

[1335] Chapter 4, at [4.3.1].
[1336] See Table 4 in Chapter 4.
[1337] Chapter 1, at [1.3].
[1338] *Larkins v R* [2013] NSWDC 159, at [19]. See Chapter 4, at [4.5].

The logical solution is to follow the United Kingdom by creating a separate offence dealing with fictional child pornography to more accurately reflect offenders' wrongdoing.[1339] The penalty imposed should reflect the level of harm. By necessity, this means that the penalty should be less severe than the penalty attached to offences dealing with child abuse material that involved real children in its production. The label attached to the offence of fictional child pornography should not imply that the offender has sexually abused or exploited a child. However, the main recommended point of departure from the United Kingdom's legislation is that Australia should enact a separate offence dealing with fictional material that only criminalises the dissemination of such material, not private possession. Although this would provide only limited protection to individuals who self-produce fantasy material for personal use, it is a more proportionate response to the potential harms the law seeks to address. These recommendations and others are summarised in the following section.

9.2 Recommendations for Australia

As emphasised above, the findings of this study highlighted that otherwise innocent individuals are not being prosecuted for fantasy material under the child abuse material legislation in Australia. Nor is there evidence that law enforcement officers in Australia are enforcing the legislation "for purposes it was not designed for".[1340] Virtually all the Australian case law highlights that the offenders being prosecuted for purely fictional material pose a genuine risk of harm to children, given their previous convictions related to child sexual abuse and/or because they were also found in possession of material depicting real children.[1341] If there were evidence that a substantial amount of individuals who pose no real risk of committing child sexual abuse were being prosecuted for fantasy material, then the misuse of police discretion would need to be addressed to overcome any unintended consequences of the legislation.

[1339]Ost, above n 1305, 221.
[1340]LEO 2.
[1341]As discussed in Chapter 4, the only exception in Australia seems to be *Traynor v McCullough* [2011] TASSC 41. Nevertheless, it is acknowledged that not all cases are reported, which means the exact number of individuals prosecuted solely for fictional child pornography is unknown. This was a limitation of the study noted in Chapter 1, at [1.4].

However, the findings indicated that the rationales and justifications for prohibiting fictional representations have not been clearly articulated, creating unnecessary confusion. It is now patently obvious that what is required is "legislative guidance on what is being outlawed and why it is needed" [1342] in order for the courts, law enforcement, fans of sexually explicit materials, and non-fans to know the "real evil"[1343] that the legislation is attempting to address. The cross-jurisdictional analysis of the law in Canada and the United States further emphasised that legal recognition must be afforded to individual freedoms where the material is purely fictional and privately possessed. Additionally, the analysis of the law in the United Kingdom pointed out the need for the law to distinguish between images depicting real children and material that is obviously fictional. Thus, based on the findings, the following recommendations are made for Australia.

Recommendation 1—*State the purpose of prohibiting fictional sexually explicit representations of minors.* Legislatures should make clear the purpose of criminalising fictional child pornography. It may well be that the law serves multiple purposes, including protecting children from harm, shielding unwilling viewers from offensive material, and protecting morality, but this needs to be made explicit. This would communicate to the offender why he or she is being held criminally liable and would assist those responsible for enforcing the law to ensure the law is serving its stated purpose(s). It would also communicate to the community the rationale for the prohibition and the message that the dissemination of sexually explicit material representing children (real or fictional) will not be tolerated.

Recommendation 2—*Recognise the right of individuals to privately possess self-created fantasy material.* There are legitimate concerns that justify the dissemination of fantasy material, but individuals should be able to write down their fantasies for private purposes without fear of prosecution. Consistent with the law in the United States and Canada, it is recommended that Australia protect

[1342]Ost, above n 1305, 221.
[1343]Ibid.

the limited freedom to privately possess self-created fantasy material. This right is extremely limited in that it does not include a right to access, download, share, or distribute by any means, fictional child pornography.

Recommendation 3—*Create a separate offence dealing with the dissemination of sexually explicit fictional material depicting or describing minors.* The dissemination of fictional material should not be dealt with under the same offences as real child abuse material. The label attached to these offences implies the offender has been involved in the sexual abuse or exploitation of a real child, which is not the case when the material is purely fictional. A conviction for offences related to the abuse of real children carries one of the strongest moral condemnations in Australian society and deserves stigmatisation. However, the same powerful stigma is not warranted where the material is purely fictional. As recognised in the United Kingdom, dealing with fictional material and images depicting real children under the same provisions fails to reflect the relative moral culpability of offenders. It also fails to recognise the harm occasioned to real children who have been sexually abused to produce the images. To signal the reduced level of culpability, the penalty imposed for an offence dealing with fantasy material should be lower than penalties attached to offences concerned with real child abuse material.

9.3 Contributions of the Study and Directions for Future Research

Notwithstanding its limitations, this study has made several significant contributions to the understanding of fantasy and crime.[1344] It is the first dissertation of its kind to examine the criminalisation of fictional representations of children under Australia's child abuse material legislation, to compare the law with other jurisdictions, and to analyse the theoretical justifications for the prohibition. Notably, the methodology employed created a dialogue between law enforcement officers, judicial officers, and fans of sexually explicit comics themselves. The elite interviews provided insight from those responsible for enforcing and interpreting the law, while the surveys gave voice to fans potentially criminalised by the law, something clearly missing from the existing literature. This study highlighted that the current laws prohibiting fictional child pornography have several deficiencies and subsequently made recommendations on how these deficiencies can be addressed in light of international approaches.

The relationship between fantasy and contact offending is a complex issue that offers limitless opportunities for future research. However, four areas stood out while undertaking this study. Firstly, as noted in Chapter 1, much of the existing research was conducted on a small sample of serious child sex offenders, thereby limiting its usefulness. Future research should expand its sample to include less serious offenders and non-offenders. It should differentiate between those who view fantasy material and later commit child sexual abuse and those who use such materials as a substitute for contact offending. Researchers should also assess the influence of sexually explicit fantasy material across different genders, age groups, and other variables.

Secondly, it was noted in Chapter 8 that there is no research examining the Australian public's views on the illegality of fictional child pornography. Although this research obtained the views of specific individuals, it cannot be used to make generalisations. [1345] What is needed is research exploring public support for

[1344]The general limitations of this study were set out in Chapter 1, at [1.4]. More specifically, the limitations of the interview and survey data were set out in Chapter 6.

[1345]Also see Prichard, J, Spiranovic, C, Gelb, K, Watters, P.A, and Krone, T (2016), "Tertiary Education Students' Attitudes to the Harmfulness of Viewing and Distributing Child Pornography", *Psychiatry*, *Psychology and Law*, vol. 23, no. 2, pp. 224-239. As discussed in Chapter 1, although their study was mainly concerned with real child abuse material, they did ask participants, constituting a convenience sample of university students in Tasmania, about their perceptions of "pseudo-images".

criminalising the possession and dissemination of purely and obviously fictional child pornography, which would assist in determining whether such material goes beyond the boundaries of society's tolerance.

Thirdly, this study drew upon Boys Love, YAOI, and slash fiction in order to highlight the different types of potentially criminal fantasy material. It was impossible in a dissertation of this size to analyse these materials in greater depth. Hence, a more specific direction for future research is to explore why females in the West are drawn to Boys Love, YAOI, and slash fiction, despite potentially falling foul of child abuse material legislation. Research should also query how fans interpret these texts and how such material can be read as innocuous by fans notwithstanding its perverse content.[1346] This is of particular interest given that, as pointed out throughout this dissertation, Boys Love, YAOI, and slash fiction seem to provide females a relatively safe fantasy world away from the objectifying portrayals of females in mainstream media, indicating that it is material worthy of special attention.

Lastly, by investigating the criminalisation of fantasy material under child pornography laws, this dissertation revealed several anomalies in Australia's legislation. These were particularly highlighted in chapters 4 and 5, when analysing the law in each jurisdiction. As pointed out, the legislation in Australia is concerned with how viewers may potentially react to the material. The legislation in most Australian jurisdictions deems certain material to be child pornography if it is determined that it would offend the reasonable person, known as the community standards test.[1347] Researchers should explore the appropriateness of a community standards test for deciding whether sexually explicit images produced using a real child should be outlawed, and the appropriateness of retaining (as some Australian jurisdictions do) an artistic merit defence. As recognised by the Supreme Court in the

[1346]See Madill, A (2015), "*Boys' Love* Manga for Girls: Paedophilic, Satirical, Queer Readings and English Law", in E Renold, J Ringrose, and D Egan (eds.), *Children*, *Sexuality and Sexualization*, Palgrave MacMillan, Hampshire, pp. 273-288.
[1347]As stated in Chapter 4, the relevant legislation in South Australia and Australian Capital Territory does not require the material to be offensive to the reasonable person, but nor does it focus on how the material is produced in determining whether certain material should be deemed child pornography. See Chapter 4, at [4.3.4].

United States,[1348] if an image is a product of child sexual abuse and exploitation, it should not matter whether the hypothetical reasonable person would be offended by the image, whether it was intended to arouse, or whether it has artistic merit. Such matters would certainly be irrelevant to the child who has been harmed. Accordingly, future research should examine whether adopting a harm-based approach that focuses on how the image is produced would better protect real children.

[1348]See especially *New York v Ferber*, 458 U.S 747 (1982). This case is discussed in Chapter 4, at [4.2].

Appendix A:
Interview questions for judicial officers

1. Are you aware that Australia's child abuse material legislation prohibits fictional representations of children?
2. Who do you think is likely to be creating, collecting and circulating this type of material?
3. Where do you think people can access this type of material?
4. What are the chances of a young person creating or sharing sexually explicit fictional material that depicts minors being charged under the child abuse material legislation?
5. What do you think the purpose was in prohibiting fictional representations of children under Australia's child abuse material legislation?
6. Do you think prohibition is justified?
7. Do you think that the prohibition of fictional representations of children prevents harm to actual children? Are you aware of any evidence of this?
8. Does the fact that the material is fictional affect how you sentence a defendant?
9. Do you think this prohibition unduly interferes with individual freedoms?
10. Does it make a difference that Australia does not protect individual freedoms under its Constitution?
11. Do you think there is a general awareness that fictional representations of children may fall foul of the child abuse material legislation?
12. How do you think the public would best be informed about the types of fictional material that may potentially be criminalised under the child abuse material legislation?

Appendix B:
Interview questions for law enforcement officers

1. What is the role of your department within the Police Force?
2. What types of material does your department tackle?
3. How much of the material your department tackles purely fictional child pornography?
4. Who do you think is likely to be creating, collecting and circulating fictional sexually explicit material of minors?
5. Where do you think people can access this type of material?
6. What are the chances of a young person creating or sharing sexually explicit fictional material that depicts minors being charged under the child abuse material legislation?
7. Do you think that the prohibition of fictional representations of children prevents harm to actual children? Are you aware of any evidence of this?
8. Do you think this prohibition unduly interferes with individual freedoms?
9. Do you think there is a general awareness that fictional representations of children may fall foul of the child abuse material legislation?
10. How do you think the public would best be informed about the types of fictional material that may potentially be criminalised under the child abuse material legislation?

Appendix C:
Survey questions for comic fans

1. Please state your age.
2. Please state your gender.
3. Please select what State/Territory you reside in.
4. How old were you when you first became interested in comics?
5. On a scale from 1 to 10 (1 being unimportant and 10 being very important) how important is being able to access comics to you and why?
6. Where do you mainly access comics (e.g. online, in store)?
7. Are you aware of any sexually explicit comics that depict characters who appear to be under 18 years of age?
8. Are you aware that comics depicting characters who appear to be under 18 in a sexual context are prohibited under Australia's child pornography laws? If yes, has this prevented you from creating or accessing certain comics?
9. Do you think sexually explicit comics depicting characters who appear to be under 18 should be prohibited? Please state why or why not.
10. Have you seen certain comics that you consider offensive? If yes, what is it that makes these comics offensive?

Bibliography

Abel, G.G, and Blanchard, E.B (1974), "The Role of Fantasy in the Treatment of Sexual Deviation", *Archives of General Psychiatry,* vol. 30, no. 4, pp. 467–475.

Abel, G.G, and Rouleau, J.L (1990) "The Nature and Extent of Sexual Assault", in W.L Marshall, D.R Laws, and H.E Barbaree (eds.), *Handbook of Sexual Assault,* Plenum Press, New York, pp. 9–21.

Abramson, P.R, and Hayashi, H (1984), "Pornography in Japan: Cross-Cultural and Theoretical Considerations", in N Malamuth and E Donnerstein (eds.), *Pornography and Sexual Aggression,* Academic Press, Florida, pp. 173–183.

Adams, A (2010), "Virtual Sex with Child Avatars", in C Wankel and S Malleck (eds.), *Emerging Ethical Issues of Life in Virtual Worlds,* IAP, North Carolina, pp. 55–72.

Adelman, R.W (1996), "The Constitutionality of Congressional Efforts to Ban Computer-Generated Child Pornography: A First Amendment Assessment of S. 1237", *The John Marshall Journal of Computer Information & Privacy Law,* vol. 14, no. 3, pp. 483–492.

Adelstein, J, and Kubo, A.E (2014), "Japan's Kiddie Porn Empire: Bye-Bye?", *The Daily Beast,* 3 June, available online, <http://www.thedailybeast.com/articles/2014/06/03/japan-s-kiddie-porn-empire-bye-bye.html>.

Adler, A (2001), "The Perverse Law of Child Pornography", *Columbia Law Review*, vol. 101, no. 2, pp. 209–273.

Adler, A (2001), "Inverting the First Amendment", *University of Pennsylvania Law Review,* vol. 149, no. 4, pp. 921–1002.

AFP (2010), "'Manga Murderers' Accused of Slicing Up Victim", *Sydney Morning Herald,* 21 September, available online, <http://www.smh.com.au/world/manga-murderers-accused-of-slicing-up-victim-20100920-15k4r.html>.

Akagawa, M (2015),"Regulating Pornocomic Sales to Juveniles in Japan: Cycles and Path-Dependence of a Social Problem", *Qualitative Sociology Review*, vol. 11, no. 2, pp. 62–73.

Akdeniz, Y (2008), *Internet Child Pornography and the Law: National and International Responses,* Ashgate, Hampshire.

Akselrud, G (1999), "Hit Man: The Fourth Circuit's Mistake in Rice v. Paladin Enters., Inc.", *Loyola of Los Angeles Entertainment Law Journal*, vol. 19, no. 2, pp. 375–412.

Albury, K, Crawford, K, and Byron, P (2013), *Young People and Sexting in Australia: Ethics, Representation and the Law*, Final Report, ARC Centre of Excellence in Creative Industries and Innovation at the University of New South Wales, Australia.

Alexander, J.R (2003), "Obscenity, Pornography, and the Law in Japan: Reconsidering Oshima's In the Realm of the Senses", *Asian-Pacific Law & Policy Journal,* vol. 4, no. 1, pp. 148–168.

Alexander, L (1994), "Harm, Offense, and Morality", *Canadian Journal of Law and Jurisprudence,* vol. 7, no. 2, pp. 199–216.

Alexander, L (2008), "The Legal Enforcement of Morality", in C Heath and W Frey (eds.), *Companion to Applied Ethics*, Wiley, Hoboken, pp. 128–141.

Allen, M (2013), *Textbook on Criminal Law,* 12th edn., Oxford University Press, Oxford.

Allison, A (2000), *Permitted and Prohibited Desires: Mothers, Comics and Censorship in Japan,* University of California Press, California.

Allison, A (2006), "The Japan Fad in Global Youth Culture and Millennial Capitalism", *Mechademia,* vol. 1, pp. 11–21.

Ambrosiani, P (2016), "Vladimir Nabokov's *Lolita*: Text, Paratext and Translation", *Translation and Interpreting Studies,* vol. 11, no. 1, pp. 81–99.

American Psychiatric Association (2013), *Diagnostic and Statistical Manual of Mental Disorders—DSM-5,* 5th edn., APA, Arlington, Virginia.

Anderson, C, Gentile, D, and Buckley, K (2007), *Violent Video Game Effects on Children and Adolescents: Theory, Research, and Public Policy*, Oxford University Press, New York.

Anderson, N (2008), "Cowabunga! Simpsons Porn on the PC Equals Child Pornography", *Ars Technica,* 9 December, available online, <http://arstechnica.com/uncategorized/2008/12/cowabunga-simpsons-porn-on-the-pc-equals-child-pornography/>.

Andsager, J, and White, A (2007), *Self Versus Others: Media, Messages, and the Third-Person Effect,* Lawrence Erlbaum Associates, New Jersey.

Antoniou, A (2013), "Possession of Prohibited Images of Children: Three Years On", *Journal of Criminal Law,* vol. 77, no. 4, pp. 337–353.

April, K (2012), "Cartoons Aren't Real People, Too: Does The Regulation of Virtual Child Pornography Violate the First Amendment and Criminalize Subversive Thought?", *Cardozo Journal of Law & Gender,* vol. 19, no. 1, pp. 241–272.

Arata, C.M (2002), "Child Sexual Abuse and Sexual Revictimization", *Clinical Psychology: Science and Practice,* vol. 9, no. 2, pp.135–164.

Armagh, D.S (2002), "Virtual Child Pornography Criminal Conduct or Protected Speech?", *Cardozo Law Review,* vol. 23, no. 6, pp. 1993–2010.

Ashworth, A (2008), "Conceptions of Overcriminalization", *Ohio State Journal of Criminal Law,* vol. 5, no. 2, pp. 407–425.

Ashworth, A, and Horder, J (2013), *Principles of Criminal Law,* 7th edn., Oxford University Press, Oxford.

Aslan, D and Edelmann, R (2014), "Demographic and Offence Characteristics: A Comparison of Sex Offenders Convicted of Possessing Indecent Images of Children, Committing Contact Sex Offences or both Offences", *Journal of Forensic Psychiatry & Psychology*, vol. 25, no. 2, pp. 121-134.

Astinova, M (2013), *The Crime of Child Pornography: European Legislative and Police Cooperation Initiatives,* Masters Thesis, Tilburg University.

Atkinson, R, and Rodgers, T (2016), "Pleasure Zones and Murder Boxes: Online Pornography and Violent Video Games as Cultural Zones of Exception", *British Journal of Criminology,* vol. 56, no. 6, pp. 1291–1307.

Attorney General's Commission on Pornography (1986), *Final Report,* U.S Government Printing Office, Washington.

Attorney General Transcript (2002), *Response to Supreme Court Decision in Free Speech Coalition v. Ashcroft,* 16 April, DOJ Centre, available online, <http://www.justice.gov/archive/ag/speeches/2002/041602newsconferenceresponse.htm>.

Attwood, F, Bale, C, and Barker, M (2013), *The Sexualization Report,* available online, <http://senseaboutsex.files.wordpress.com/2012/08/thesexualizationreport.pdf>.

Aubel, J (1994), *Guidelines for Studies Using the Group Interview Technique,* International Labour Office, Geneva.

Austin, J.L (1962), *How to Do Things With Words,* Oxford University Press, London.

Australian Classification Board, *Classification Categories Explained,* Australian Government, available online, <http://www.classification.gov.au/Guidelines/Pages/Guidelines.aspx>.

Australian Commonwealth, Joint Committee on the National Crime Authority (1995), *Organised Criminal Paedophile Activity*, Australian Commonwealth Printing Office, Canberra.

Australian Federal Police (2014), "Media Release: Melbourne Man Charged with Child Exploitation Material Offences", *AFP,* 14 March, available online, <http://www.afp.gov.au/media-centre/news/afp/2014/march/media-release-melbourne-man-charged-with-child-exploitation-material-offences.aspx>.

Australian Institute of Criminology (2008), "Online Child Grooming Laws", *High Tech Crime Brief,* Report No. 17, Canberra.

Australian Institute of Family Studies (2013), *Offender Registration Legislation in Each Australian State and Territory*, Australian Government, available online, <http://aifs.gov.au/institute/pubs/carc/3b.html>.

Australian Law Reform Commission (2011), *National Classification Scheme Review,* Discussion Paper 77.

Baartz, D (2008) *Australians, the Internet and Technology-Enabled Child Abuse: A Statistical Profile,* Australian Federal Police, Canberra.

Bader, M.J (2002), *Arousal: The Secret Logic of Sexual Fantasies*, Thomas Dunne Books, New York.

Bailey, D.S (1961), "Public Morality and the Criminal Law", *Eugenics Review,* vol. 52, no. 4, pp. 201–204.

Bakan, J (1985), "Pornography, Law and Moral Theory", *Ottawa Law Review*, vol. 17, no. 1, pp. 1–32.

Baker, D.J (2007), "The Moral Limits of Criminalizing Remote Harms", *New Criminal Law Review,* vol. 10, no. 3, pp. 370–391.

Baker, D.J (2011), *The Right not to be Criminalized: Demarcating Criminal Law's Authority,* Ashgate, Surrey.

Baker, D.J (2014), "Should Unnecessary Harmful Nontherapeutic Cosmetic Surgery be Criminalized?", *New Criminal Law Review,* vol. 17, no. 4, pp. 587–630.

Bandura, A (1977), *Social Learning Theory,* Prentice-Hall, New Jersey.

Bandura, A, Ross, D, and Ross, S (1963), "Imitation of Film-Mediated Aggressive Models", *Journal of Abnormal and Social Psychology*, vol. 66, no. 1, pp. 3–11.

Bartels, R.M. and Gannon, T.A. (2009), "Rape Supportive Cognition, Sexual Fantasies and Implicit Offence-scripts: A Comparison between High and Low Rape Prone Men", *Sexual Abuse in Australia and New Zealand*, vol. 2, no. 1, pp. 14-20.

Baskin, S (2006), "Deviant Dreams: *Extreme Associates* and the Case for Extreme Porn", *New York City Law Review*, vol. 10, no. 1, pp. 155–197.

Bassham, G (2012), "Legislating Morality: Scoring the Hart- Devlin Debate after Fifty Years", *Ratio Juris*, vol. 25, no. 2, pp.117–132.

Bauer, C.K (2012), *Naughty Girls and Gay Male Romance/Porn: Slash Fiction, Boys' Love Manga, and Other Works by Female 'Cross-Voyeurs' in the U.S. Academic Discourses,* Anchor Academic Publishing, Hamburg.

Baum, L (1997), *The Puzzle of Judicial Behavior*, University of Michigan Press, Michigan.

Baumgartner, J, Scalora, M, and Huss, M (2002), "Assessment of the Wilson Sex Fantasy Questionnaire Among Child Molesters and Nonsexual Forensic Offenders", *Sexual Abuse,* vol. 14, no. 1, pp.19–30.

Bauwens-Sugimoto, J (2016), "Negotiating Religious and Fan Identities: 'Boys Love' and Fujoshi Guilt", in M McLelland (ed.), *The End of Cool Japan: Ethical, Legal, and Cultural Challenges to Japanese Popular Culture,* Routledge, Oxon, pp. 184–195.

BBC News (2012), "Outlaw possession of written accounts of child abuse says MP", *BBC News* (UK), 12 September, available online, <http://www.bbc.co.uk/news/uk-politics-19574487>.

BBC News (2015), "Alresford Woman Amy Hickson Admits Animal Porn Charges", *BBC News* (UK), 2 February, available online, <http://www.bbc.com/news/uk-england-hampshire-31092432>.

Becker, H.S (1963), *Outsiders: Studies in the Sociology of Deviance*, Free Press, New York.

Becker-Blease, K, Friend, D, and Freyd, J (2006), *Child Sex Abuse Perpetrators Among Male University Students,* poster presented at the 22nd Annual Meeting of the International Society for Traumatic Stress Studies, California.

Bell, D (2014), "Nugent Loses Child Sex Mag Appeal", *Perth Voice Interactive,* 21 November, available online <https://perthvoiceinteractive.com/2014/11/21/nugent-loses-child-sex-mag-appeal/>.

Bell, S (2001), "Sharpe's Perverse Aesthetic", *Constitutional Forum,* vol. 12, no. 1, pp. 30–39.

Benedet, J (2002), "Children in Pornography after Sharpe", *Les Cahiers de Droit,* vol. 43, no. 2, pp. 327–350.

Bergelt, K (2003), "Stimulation by Simulation: Is there really any difference between Actual and Virtual Child Pornography? The Supreme Court gives Child Pornographers a New Vehicle for Satisfaction", *Capital University Law Review,* vol. 31, no. 3, pp. 565–595.

Bergen, R.K, and Bogle, K.A (2000), "Exploring the Connection Between Pornography and Sexual Violence", *Violence and Victims,* vol. 15, no. 3, pp. 227–234.

Berger, R, Searles, P, and Cottle, C (1990), "Ideological Contours of the Contemporary Pornography Debate: Divisions and Alliances", *Frontiers,* vol. 11, no. 2/3, pp. 30–38.

Berndt, J (2006), "'Adult' Manga: Maruo Suehiro's Historically Ambiguous Comics", in J Berndt and S Richter (eds.), *Reading Manga: Local and Global Perceptions of Japanese Comics,* Leipziger Universitatsverlag, Leipzig, pp. 107–126.

Bernstein, R (2005), "Must Children Be Sacrificed: The Tension Between Emerging Imaging Technology, Free Speech and Protecting Children", *Rutgers Computer & Technology Law Journal,* vol. 31, no. 2, pp. 406–429.
Bird, P (2011), "Virtual Child Pornography Laws and the Constraints Imposed by the First Amendment", *Barry Law Review,* vol. 16, no. 1, pp. 161–177.

Blanchard, R (2009), "The DSM Diagnostic Criteria for Pedophilia", *Archives of Sexual Behavior*, vol. 39, no. 2, pp. 304–316.

Blitz, M.J (2008), "The Freedom of 3D Thought: The First Amendment in Virtual Reality", *Cardozo Law Review,* vol. 30, no. 3, pp. 1141–1243.

Blundell, B, Sherry, M, Burke, A, and Sowerbutts, S (2002), "Child Pornography and the Internet: Accessibility and Policing", *Australian Police Journal*, vol. 56, no. 1, pp. 59–65.

Blundell, B, Sherry, M, Burke, A, and Sowerbutts, S (2002), "Child Pornography and the Internet: Policing and Treatment Issues", *Psychiatry, Psychology and Law*, vol. 9, no. 1, pp. 79–84.

Bourke, M.L and Hernandez, A.E (2009), "The 'Butner Study' Redux: A Report of the Incidence of Hands-on Child Victimization by Child Pornography Offenders", *Journal of Family Violence*, vol. 24, no. 3, pp. 183–191.

Boxall, H, Tomison, A, and Hulme, S (2014), *Historical Review of Sexual Offence and Child Sexual Abuse Legislation in Australia: 1788–2013,* Report Prepared by the Australian Institute of Criminology for the Royal Commission into Institutional Responses to Child Sexual Abuse, Canberra.

Boyce, B (2008), "Obscenity and Community Standards", *Yale Journal of International Law,* vol. 33, no. 2, pp. 299–368.

Brannigan, A (1985), "Delinquency, Comics and Legislative Reactions: An Analysis of Obscenity Law Reform in Post-War Canada and Victoria", *Australian–Canadian Studies*, vol. 3, pp. 53–69.

Brannigan, A (1986), "Crimes from Comics: Social and Political Determinants of Reform of the Victoria Obscenity Law 1938–1954", *Australian and New Zealand Journal of Criminology,* vol. 19, no. 1, pp. 23–42.

Brannigan, A (1987), "Pornography and Behavior: An Alternative Explanation", *Journal of Communications,* vol. 3, no. 3, pp. 185–189.

Bravehearts (2011), *Submission to the Select Legal and Constitutional Legal and Constitutional Committees: Inquiry into the Australian Film and Literature Classification Scheme,* Prepared by Bravehearts Inc.

Breckenbridge, J, James, K, and Salter, M (2014), "Child Sexual Abuse—The Contribution of Social Work to the Legal Process", in S Rice and A Day (eds.), *Social Work in the Shadows of the Law,* The Federation Press, Sydney, pp. 63–79.

Brenner, S.W (2008), "Fantasy Crime: The Role of Criminal Law in Virtual Worlds", *Vanderbilt Journal of Entertainment and Technology Law,* vol. 11, no. 1, pp. 1–97.

Briere, J, and Malamuth, N (1983), "Self-Reported Likelihood of Sexually Aggressive Behaviour: Attitudinal versus Sexual Explanations", *Journal of Research in Personality*, vol. 17, no. 3, pp. 315–323.

Briere, J, and Runtz, M (1989), "University Males' Sexual Interest in Children: Predicting Potential Indices of 'Pedophilia' in Nonforensic Sample", *Child Abuse & Neglect,* vol. 13, no. 1, pp. 65–75.

Briere, J, and Smiljanich, K (1996), "Self-Reported Sexual Interest in Children: Sex Differences and Psychosocial Correlates in a University Sample", *Violence and Victims*, vol. 11, no. 1, pp. 39–50.

Briere, J, Henschel, D, and Smiljanich, K (1992), "Attitudes Toward Sexual Abuse: Sex Differences and Construct Validity", *Journal of Research in Personality,* vol. 26, no. 4, pp. 398–406.

British Library, *Socio-Legal Studies: An Introduction to Collections,* available online, <http://www.bl.uk/reshelp/findhelpsubject/busmanlaw/legalstudies/soclegal/socioleg al.html>

Brown, D, Farrier, D, McNamara, L, Steel, A, Grewcock, M, Quilter, J, and Schwartz, M (2015), *Criminal Laws: Materials and Commentary on Criminal Law and Process of New South Wales,* 6th edn., The Federation Press, NSW.

Brown, L (2013), "Pornographic Space-Time and the Potential of Fantasy in Comics and Fan Art", *Transformative Works and Cultures,* vol. 13, available online, <http://journal.transformativeworks.org/index.php/twc/article/view/465/396 >.

Browne, K, and Hamilton-Giachritsis, C (2005), "The Influence of Violent Media on Children and Adolescents: A Public-Health Approach", *Lancet,* vol. 365, no. 9460, pp. 702–710.

Bruce, J (2014), "Banned Comics—Love Illustrated", *John Oxley Library*, 23 September, available online, <http://blogs.slq.qld.gov.au/jol/2014/09/23/banned-comics-love-illustrated/>.

Bruns, A (2006), "Towards Produsage: Futures for User-Led Content Production", in F Sudweeks, H Hrachovec, and C Ess (eds.), *Proceedings Cultural Attitudes towards Communication and Technology*, Murdoch University, Perth pp. 275–284.

Bryman, A (2008), *Social Research Methods,* 3rd edn., Oxford University Press, Oxford.

Buchman, J.G. (1988), *Effects of Repeated Exposure to Nonviolent Erotica on Attitudes about Child Sexual Abuse*, PhD Thesis, Indiana University.

Buckingham, D and Willett, R (eds.) (2013), *Digital Generations: Children, Young People, and New Media,* Lawrence Erlbaum Associates, New Jersey.

Bunnin, N, and Yu, J (2004), *The Blackwell Dictionary of Western Philosophy,* Blackwell Publishing, Oxford.

Burke, D (1997), "The Criminalization of Virtual Child Pornography: A Constitutional Question", *Harvard Journal of Legislation,* vol. 34, no. 2, pp. 439–472.

Byberg, J (2012), "Childless Child Porn—A 'Victimless' Crime?", *Social Science Research Network,* available online, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2114564>.

Calder, M.C (2004), "The Internet: Potential, Problems and Pathways to Hands-on Offending", in M.C Calder (ed.), *Child Sexual Abuse and the Internet: Tackling the New Frontier,* Russell House Publishing, Lyme Regis, pp. 1–24.

Calvert, C (2000), "The 'Enticing Images' Doctrine: An Emerging Principle in First Amendment Jurisprudence?", *Fordham Intellectual Property, Media & Entertainment Law Journal,* vol. 10, no. 3, pp. 595–617.

Calvert, C, and Richards, R.D (2008), "A War Over Words: An Inside Analysis and Examination of the Prosecution of the Red Roses Stories & Obscenity Law", *Journal of Law and Policy,* vol. 16, no. 1, pp. 177–223.

Calvert, C, and Richards, R.D (2009), "When Sex and Cell Phones Collide: Inside the Prosecution of a Teen Sexting Case", *Hastings Communication & Entertainment Law Journal,* vol. 32, no. 1, pp. 1–39.

Canada, Committee on Sexual Offences Against Children and Youths (1984), *Report of the Committee on Sexual Offences Against Children and Youths: Summary Volume,* Department of Supply and Services, Ottawa.

Carabellese, F, Maniglio, R, Greco, O, and Catanesi, R (2011), "The Role of Fantasy in a Serial Sexual Offender: A Brief Review of the Literature and a Case Report", *Journal of Forensic Sciences,* vol. 56, no. 1, pp. 256–60.

Carnagey, N, and Anderson, C (2004), "Violent Video Game Exposure and Aggression: A Literature Review", *Minerva Psichiatrica,* vol. 45, no. 1, pp. 1–18.

Caron, Y (1969), "The Legal Enforcement of Morals and the So-Called Hart-Devlin Controversy", *McGill Law Journal,* vol. 15, no. 1, pp. 9–47.

Carr, J (2001), *Theme Paper on Child Pornography for the 2nd World Congress on Commercial Sexual Exploitation of Children*, Children & Technology Unit NCH, London.

Carter, M.N (2007), *Ain't Nothin' Like the Real Thing: Sexual Fantasy and Modus Operandi in Adult and Juvenile Sexual Offenders,* PhD Thesis, Pacific University.

Carter, D.L, Prentky, R.Z, Knight, R.A, Vanderveer, P, and Boucher, R (1987), "Use of Pornography in the Criminal and Developmental Histories of Sexual Offenders", *Journal of Interpersonal Violence,* vol. 2, no. 2, pp. 196–211.

Casavant, L, and Robertson, J.R, (2007), *The Evolution of Pornography Law in Canada,* Current Issue Review, Library of Parliament, Canada, available online, <http://www.parl.gc.ca/content/lop/researchpublications/843-e.htm>.

Cavalieri, P (1991), "Principle of Liberty or Harm Principle?", *Between the Species,* vol. 7, no. 3, p. 161–164.

Chalmers, M (2013), "Who Defines Community Standards?", *New Matilda,* 27 August, available online, <https://newmatilda.com/2013/08/27/who-defines-community-standards/>.

Chalmers, J and Leverick, F (2008), "Fair Labelling in Criminal Law", *Modern Law Review,* vol. 71, no. 2, pp. 217-246.

Cheung, A (2007), "The Regulation of Chinese Women's Sexuality on the Internet", *Media and Arts Law Review,* vol. 12, no. 1, pp. 106–126.

Child Exploitation and Online Protection (2013), "New Trends in Child Sexual Abuse Offending Reported by CEOP", *CEOP Command,* available online, <https://ceop.police.uk/Media-Centre/Press-releases/2013/New-trends-in-child-sexual-abuse-offending-reported-by-CEOP/>.

Child Family Community Australia (2016), "Age of Consent Laws", Australian Institute of Family Studies, available online, <https://aifs.gov.au/cfca/publications/age-consent-laws>.

Child Pornography Working Party (2010), *Report of the Child Pornography Working Party,* NSW Department of Justice and Attorney-General.

Choo, K.R (2009), *Online Child Grooming: A Literature Review on the Misuse of Social Networking Sites for Grooming Children for Sexual Offences*, Australian Institute of Criminology, Research and Public Policy Series 103.

Cicioni, M (1998), "Male Pair-Bonds and Female Desire in Fan Slash Writing", in C Harris and A Alexander (eds.), *Theorizing Fandom: Fans, Subcultures, and Identity,* Hampton Press, New Jersey, pp. 153–177.

Cisneros, D (2002), "Virtual Child Pornography on the Internet: A 'Virtual' Victim?", *Duke Law & Technology Review,* available online, <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1060&context=dltr>.

Cline, V.B (1974), "Another View: Pornography Effects, the State of the Art", in V.B Cline (ed.), *Where Do You Draw the Line?*, Brigham Young University Press, Utah, pp. 203–244.

Cline, V.B (1976), "The Scientists vs. Pornography: An Untold Story", *Intellect*, vol. 104, no. 2375, pp. 574–576.

Cline, V.B (1994), "Pornography Effects: Empirical and Clinical Evidence", in D Zillmann, J Bryant, and A.C Huston (eds.), *Media, Children and the Family: Social Scientific, Psychodynamic and Clinical Perspectives,* Erlbaum, New Jersey, pp. 229–247.

Cline, V.B (2001), "Pornography's Effects on Adults and Children", *Morality in Media,* available online, <http://www.scribd.com/doc/20282510/Dr-Victor-Cline-Pornography-s-Effects-on-Adults-and-Children>.

Clor, H.M (1969), *Obscenity and Public Morality: Censorship in a Liberal Society,* University of Chicago Press, Chicago.

Clough, J (2009), "Now You See It, Now You Don't: Digital Images and the Meaning of 'Possession'", in D.S Wall (ed.), *Crime and Deviance in Cyberspace,* Ashgate, Surrey, pp. 273–307.

Clough, J (2012),"Lawful Acts, Unlawful Images: The Problematic Definition of 'Child' Pornography", *Monash University Law Review,* vol. 38, no. 3, pp. 213–245.

Clough, J (2012), "'Just looking': When Does Viewing Online Constitute Possession?", *Criminal Law Journal,* vol. 36, vol. 4, pp. 233–248.

Clough, J (2015), *Principles of Cybercrime,* 2nd edn., Cambridge University Press, Cambridge.

Cochran, A.L (2009), "Punishment For Virtual Child Pornography…It's Just A Fantasy", *ExpressO*, available online, <http://works.bepress.com/allison_cochran/1/>.

Cohen, K.F (1997), *Forbidden Animation: Censored Cartoons and Blacklisted Animators in America,* McFarland & Company North Carolina.

Cohen-Almagor, R (1997), "Why Tolerate? Reflections on the Millian Truth Principle", *Philosophia*, vol. 25, no. 1, pp.131–152.

Cole, D (1994), "Playing by Pornography's Rules: The Regulation of Sexual Expression", *University of Pennsylvania Law Review*, vol. 143, no. 1, pp. 111–177.

Coleman, J (1997), "Pornography Easy to Find in Japan—It's Even in Your Mailbox", *Associated Press,* 31 May, available online, <https://news.google.com/newspapers?nid=1876&dat=19970601&id=qbgeAAAAIBAJ&sjid=iM8EAAAAIBAJ&pg=6895,78947&hl=en>.

Coleman, J (1997), "Comics Appeal To Every Age In Japan 'Manga' Account For 40 Percent Of Books, Magazines Published", *The Spokesman,* 21 August, available online, <http://m.spokesman.com/stories/1997/aug/18/comics-appeal-to-every-age-in-japan-manga-account/>.

Coleman, S (2009), "You Only Live Twice: How the First Amendment Impacts Child Pornography in Second Life", *Loyola of Los Angeles Entertainment Law Review,* vol. 29, no. 2, pp. 193–232.

Comic Book Legal Defense Fund (CBLDF) (2012), "CBLDF Case file—R v Matheson", available online, <http://cbldf.org/about-us/case-files/cbldf-case-files/cbldf-case-files-canada-customs-case/>.

Comic Book Legal Defense Fund (CBLDF) (no date), "CBLDF Case file—U.S v Handley", available online, <http://cbldf.org/about-us/case-files/cbldf-case-files/handley/>.

Committee on Homosexual Offences and Prostitution (1957), *Report of the Committee on Homosexual Offences and Prostitution,* Her Majesty's Stationery Office, London.

Court, J.H (1984), "Sex and Violence: A Ripple Effect", in N Malamuth and E Donnerstein (eds.), *Pornography and Sexual Aggression*, Academic Press, Florida, pp. 143–172.

Craissati, J, and McClurg, G (1996), "The Challenge Project: Perpetrators of Child Sexual Abuse in South East London", *Child Abuse & Neglect,* vol. 20, no. 11, pp. 1067–1077.

Craven, S, Brown, S, Gilchrist, E (2006), "Sexual Grooming of Children: Review of Literature and Theoretical Considerations", *Journal of Sexual Aggression*, vol. 12, no. 3, pp. 287-299.

Crawford, A (2013), "Computer-Generated 'Sweetie' Catches Online Predators", *BBC News,* 5 November, available online, <http://www.bbc.com/news/uk-24818769>.

Crime and Corruption Commission (2015), *Child Sexual Victimisation in Queensland: An Overview of Legal and Administrative Developments since 2000,* CCC, Brisbane.

Crofts, T and Lee, M (2013), "'Sexting', Children and Child Pornography", *Sydney Law Review,* vol. 35, no. 1, pp. 85–106.

Crone, J (2015), "Woman, 20, Spared Prison Despite Being Caught with More than 600 Indecent Images of Babies, Children and Animals", *Daily Mail*, 7 March, available online, <http://www.dailymail.co.uk/news/article-2983306/Woman-20-spared-prison-despite-caught-600-indecent-images-babies-children-animals.html>.

Crown Prosecution Service (2009), "CPS Statement on Darryn Walker", *CPS,* 29 June, available online, <http://www.cps.gov.uk/news/latest_news/cps_statement_on_darryn_walker/>.

Crowne, D.P, and Marlowe, D (1960), "A New Scale of Social Desirability Independent of Psychopathology", *Journal of Consulting Psychology,* vol. 24, no. 4, pp. 349–354.

Cusak, C (2015), *Pornography and the Criminal Justice System,* CRC Press, Florida.

Dahlquist, J.P, and Vigilant, L.G (2004), "Way Better than Real: Manga Sex to Tentacle Hentai", in D. D. Waskul (ed.), *Net.SeXXX: Readings on Sex, Pornography and the Internet*, Peter Lang Publishing, New York, pp. 91–103.

Daleiden, E, Kaufman, K, Hilliker, D, and O'Neil, J (1998), "The Sexual Histories and Fantasies of Youthful Males: A Comparison of Sexual Offending, Nonsexual Offending, and Nonoffending Groups", *Sexual Abuse*, vol. 10, no. 3, pp. 195–209.

Dalton, H.L (1987), "Offense to Others: The Moral Limits of the Criminal", *Yale Law Journal,* vol. 96, no. 4, pp. 881–913.

Danaher, J (2014), "The Gamer's Dilemma: Virtual Murder versus Virtual Paedophilia (Part One)", *Philosophical Disquisitions,* 25 January, available online, <http://philosophicaldisquisitions.blogspot.com.au/2014/01/the-gamers-dilemma-virtual-murder.html>.

Dandescu, A, and Wolfe, R (2003), "Considerations on Fantasy Use by Child Molesters and Exhibitionists", *Sexual Abuse of Research and Treatment,* vol. 15, no. 4, pp. 297–305.

Danielsen, S (2008), "These Photographs aren't Sexual: They're Just Human", *The Guardian,* 27 May, available online, <https://www.theguardian.com/artanddesign/artblog/2008/may/27/thesephotographsarentsexual>.

DeBaker, D (2008), *Harmful Offense to Others: A New Liberty-Limiting Principle and the 'New' Child Pornography,* Honours Thesis, College of William and Mary.

De Certeau, M (1984), *The Practices of Everyday Life,* University of California Press, California.

De Zwart, M (2010), "Japanese Lessons: What can Otaku Teach Us about Copyright and Gothic Girls?", *Alternative Law Journal,* vol. 35, no. 1, pp. 27–30.

De Zwart, M (2010), "Angel(us) is My Avatar! An Exploration of Avatar Identity in the Guise of the Vampire", *Media and Arts Law Review,* vol. 15, no. 3, pp. 318–339.

DeCew, J.W (2004), "Free Speech and Offensive Expression", *Social Philosophy & Policy,* vol. 21, no. 2, pp. 81–103.

Devlin, P (1962), "Law, Democracy, and Morality", *University of Pennsylvania Law Review,* vol. 110, no. 5, pp. 635–649.

Devlin, P (1968), *The Enforcement of Morals,* Oxford University Press, London.

Diamond, M, and Uchiyama, A (1999), "Pornography, Rape and Sex Crimes in Japan", *International Journal of Law and Psychiatry,* vol. 22, no. 1, pp. 1–22.

Dines, G (2009), "Childified Women: How the Mainstream Porn Industry Sells Child Pornography to Men", in S Olfman (ed.), *The Sexualization of Childhood*, Prager Publishers, Connecticut, pp. 121–142.

Dines-Levy, G, and Smith, G (1988), "Representations of Women and Men in *Playboy* Sex Cartoons", in C Powell and G Paton (eds.), *Humour in Society: Resistance and Control*, Macmillan, London, pp. 234–259.

Dombert, B, Schmidt, A, Banse, R, Briken, P, Hoyer, J, Neutze, J, and Osterheider, M (2015), "How Common is Males' Self-Reported Sexual Interest in Prepubescent Children", *The Journal of Sex Research*, available online, <https://www.academia.edu/Documents/in/Sexual_Fantasy>.

Donnerstein, E (1980), "Pornography and Violence Against Women: Experimental Studies", *Annals of the New York Academy of Sciences*, vol. 347, no. 1, pp. 277–288.

Donnerstein, E (1984), "Pornography: Its Effect on Violence against Women", in N Malamuth and E Donnerstein (eds.), *Pornography and Sexual Aggression,* Academic Press, Florida, pp. 53– 81.

Downe-Wamboldt, B (1992), "Content Analysis: Method, Applications, and Issues*",* *Health Care for Women International*, vol. 13, no. 3, pp. 313–321.

Downs, D (1989), *The New Politics of Pornography*, University of Chicago Press, Chicago.

Downs, J.F (1990), "Nudity in Japan Visual Media: A Cross-Cultural Observation", *Archives of Sexual Behavior,* vol. 19, no. 6, pp. 583–594.

Dray, K (2013), "Should the Government Provide 'Virtual Child Pornography' to Stop Paedophiles coming into Contact with Real Children?", *Closer Online,* 27 November, available online, <http://www.closeronline.co.uk/2013/11/should-the-government-provide-virtual-child-pornography-to-stop-paedophiles-coming-into-contact-with-real-children>.

Dressler, J (2006), *Understanding Criminal Law*, 4th edn., LexisNexis, New Jersey.

Duff, R.A (2005), "Criminalizing Endangerment", *Louisiana Law Review,* vol. 65, no. 3, pp. 941–965.

Duff, R.A (2007), *Answering for Crime: Responsibility and Liability in the Criminal Law,* Oxford University Press, Oxford.

Duff, R.A (2014), "Towards a Modest Legal Moralism", *Criminal Law and Philosophy,* vol. 8, no. 1, pp. 217–235.

Duff, R.A, Farmer, L, Marshall, S.E, Renzo, M, and Tadros, V (2010), *The Boundaries of Criminal Law*, Oxford University Press, Oxford.

Duff, R.A, and Green, S (2005), "Introduction: The Special Part and its Problems", in R Duff and S Green (eds.), *Defining Crimes: Essays on the Special Part of the Criminal Law,* Oxford University Press, Oxford, pp. 1–20.

Duff, R.A, and Marshall, S.E (2015) "'Abstract Endangerment', Two Harm Principles, and Two Routes to Criminalization", *Minnesota Legal Studies Research Paper Series,* Research Paper No. 15–19.

Durham, M.G (2008), *The Lolita Effect: The Media Sexualization of Young Girls and What We Can Do About It,* Overlook Press, New York.

Durkin, K, Forsyth, C, and Quinn, J (2006), "Pathological Internet Communities: A New Direction for Sexual Deviance Research in a Post Modern Era", *Sociological Spectrum,* vol. 26, no. 6, pp. 595–606.

Dworkin, A (1992), "Against the Male Flood: Censorship, Pornography and Equality", in C Itzin (ed.), *Pornography: Women, Violence and Civil Liberties*, Oxford University Press, Oxford, pp. 515–535.

Dworkin, A and MacKinnon, C (1997), *In Harm's Way: The Pornography Civil Rights Hearings,* Harvard University Press, Cambridge.

Dworkin, G (1972), "Paternalism", *The Monist*, vol. 56, no. 1, pp. 64–84.

Dworkin, G (2005), "Moral Paternalism", *Law and Philosophy,* vol. 24, no. 3, pp. 305–319.

Dworkin, R (1977), *Taking Rights Seriously,* Harvard University Press, Cambridge.

Dworkin, R (1985), *A Matter of Principle,* Oxford University Press, Oxford.

Dworkin, R (1994), *Taking Rights Seriously: New Impression with a Reply to Critics,* Duckworth, London.

Easton, S (1994), *The Problem of Pornography: Regulation and the Right to Free Speech,* Routledge, London.

Edmunds, D.R (2014), "Child Pornography on basis of Manga Cartoon", *Breitbart,* 21 October, available online, <http://www.breitbart.com/london/2014/10/21/british-court-convicts-man-of-possessing-child-pornography-on-basis-of-stash-of-manga-cartoons/>.

Eiland, M.L (2009), "From Cartoon Art to Child Pornography", *International Journal of Comic Art,* vol. 11, no. 2, pp. 396–409.

Einsiedel, E.F (1992), "The Experimental Research Evidence: Effects of Pornography on the 'Average Individual'", in C Itzin (ed.), *Pornography: Women, Violence and Civil Liberties*, Oxford University Press, Oxford, pp. 248–283.

Ek, K (2015), "Conspiracy and the Fantasy Defense: The Strange Case of the Cannibal Cop", *Duke Law Journal,* vol. 64, no. 5, pp. 901–945.

Eldrige, H (1998), *The Rapists Guide for Maintaining Change: Relapse Prevention for Adult Male Perpetrators of Child Sexual Abuse,* Sage Publications, London.

Elliott, I.A. and Beech, A.R. (2009), "Understanding Online Child Pornography Use: Applying Sexual Offense Theory to Internet Offenders", *Aggression & Violent Behavior*, vol. 14, no. 3, pp. 180-193.

Elliott, I.A., Beech, A. R., and Mandeville-Norden, R (2013), "The Psychological Profiles of Internet, Contact, and Mixed Internet/Contact Sex Offenders", *Sexual Abuse,* vol. 25, no. 1, pp. 3-20.

Elliott, M, Browne, K, and Kilcoyne, J (1995), "Child Sexual Abuse Prevention: What Offenders Tell Us", *Child Abuse and Neglect,* vol. 19, no. 5, pp. 579–594.

Emmers-Sommer, T.M. and Burns, R.J. (2005),"The Relationship between Exposure to Internet Pornography and Sexual Attitudes toward Women", *Journal of Online Behavior*, vol. 1, no. 4, available online, <http://www.behavior.net/JOB/v1n4/emmers-sommer.html>.

End Child Prostitution, Child Pornography and the Trafficking of Children for Sexual Purposes (2005), *Violence against Children in Cyberspace,* Contribution to the United Nations Study on Violence against Children, Bangkok.

End Child Prostitution, Child Pornography and the Trafficking of Children for Sexual Purposes (2008), *Strengthening Laws Addressing Child Sex Exploitation: A Practical Guide,* ECPAT International, Bangkok.

Endrass, J, Urbaniok, F, Hammermeister, L, Benz, C, Elbert, T, Laubacher, A, and Rossegger, A (2009), "The Consumption of Internet Child Pornography and Violent Sex Offending", *BMC Psychiatry*, vol. 9, no. 1, pp. 43–50.

Eneman, M, Gillespie, A, and Stahl, B.S (2009), *Criminalising Fantasies: The Regulation of Virtual Child Pornography*, Proceedings of the 17th European Conference on Information Systems, available online, <http://www.cse.dmu.ac.uk/~bstahl/publications/2009_Criminalising_Fantasies_ECIS.pdf>.

Evans, A (2006), *The Global Playground: Fan Fiction in Cyberspace,* Masters Thesis, Roehampton University.

Evans, J.R, and Mathur, A (2005), "The Value of Online Surveys", *Internet Research,* vol. 15, no. 2, pp. 195–219.

Fagan, P, Wise, T, Schmidt, C, and Berlin, F (2002), "Pedophilia", *Journal of the American Medical Association*, vol. 288, no. 19, pp. 2458–2465.

Farmer, L (2011), "Disgust, Respect, and the Criminalization of Offence", in R Cruft, M.H Kramer, and M.R Reiff (eds.), *Crime, Punishment, and Responsibility: The Jurisprudence of Anthony Duff,* Oxford University Press, Oxford, pp. 273–291.

Faulkner, J (2010), "The Innocence Fetish: The Commodification and Sexualisation of Children in the Media and Popular Culture", *Media International Australia,* vol. 135, no. 1, pp. 106–117.

Faulkner, J (2011), "Vulnerability and the Passing of Childhood in Bill Henson: Innocence in the Age of Mechanical Reproduction", *Parrhesia,* vol. 11, pp. 44–55.

Feinberg, J (1973), *Social Philosophy,* Prentice-Hall Inc., New Jersey.

Feinberg, J (1979), "Pornography and the Criminal Law", *University of Pittsburgh Law Review*, vol. 40, no. 4, pp. 567–604.

Feinberg, J (1983), "Obscene Words and the Law", *Law & Philosophy,* vol. 2, no. 2, pp. 139–161.

Feinberg, J (1984), *Harm to Others: The Moral Limits of the Criminal Law, Vol. I,* Oxford University Press, New York.

Feinberg, J (1985), *Offense to Others: The Moral Limits of the Criminal Law, Vol. II,* Oxford University Press, New York.

Feinberg, J (1986), *Harm to Self: The Moral Limits of the Criminal Law, Vol. III,* Oxford University Press, New York.

Feinberg, J (1988), *Harmless Wrongdoing: The Moral Limits of the Criminal Law, Vol. IV,* Oxford University Press, New York.

Feng, J (2009) "'Addicted to Beauty': Consuming and Producing Web-Based Chinese *Danmei* Fiction at Jinjiang", *Modern Chinese Literature and Culture*, vol. 21, no. 2, pp. 1–41.

Ferguson, C.J (2013), *Adolescents, Crime, and the Media,* Springer, New York.

Ferguson, C.J, and Hartley, R.D (2009), "The Pleasure is Momentary…The Expense Damnable?: The Influence of Pornography on Rape and Sexual Assault", *Aggression and Violent Behavior,* vol. 14, no. 5, pp. 323–329.

Fermin, T (2010), "Yaoi: Voices from the Margins", *Otaku University Knowledge Archive,* pp. 215–227.

Fermin, T (2013), "Appropriating Yaoi and Boys Love in the Philippines: Conflict, Resistance and Imaginations Through and Beyond Japan", *EJCJ,* vol. 13, no. 1, available online, <http://japanesestudies.org.uk/ejcjs/vol13/iss3/fermin.html>.

Fink, A (2003), *The Survey Handbook,* 2nd edn., Sage Publications, California.

Finkelhor, D (1984), *Child Sexual Abuse: New Theory and Research,* Free Press, New York.

Finnane, M (1989), "Censorship and the Child: Explaining the Comics Campaign", *Australian Historical Studies,* vol. 23, no. 92, pp. 220–240.

Fisher, W, and Grenier, G (1994), "Violent pornography, Antiwoman Thoughts and Antiwoman Acts: In Search of Reliable Effects", *Journal of Sex Research*, vol. 31, no. 1, pp. 23−38.

Flanagan, T (2014), *Persona Non Grata: The Death of Free Speech in the Internet Age,* Signal, Toronto.

Flew, T (2012), "Globalisation, Media Policy and Regulatory Design: Rethinking the Australian Media Classification Scheme", *Australian Journal of Communication*, vol. 39, no. 2, pp. 1–17.

Flood, M (2009), "The Harms of Pornography Exposure Among Children and Young People", *Child Abuse Review*, vol. 18, no. 6, pp. 384–400.

Flood, M and Hamilton, C (2003), *Youth and Pornography in Australia: Evidence on the Extent of Exposure and Likely Effects,* The Australia Institute, Discussion Paper 52, Canberra.

Flugel, J.C (1954), "Humor and Laughter", in G Lindzey (ed.), *Handbook of Social Psychology,* Addison-Wesley, Cambridge, pp. 709–734.

Fowler, F (2014), *Survey Research Methods,* 5th edn., Sage Publications, California.

Fox, A.J (2010), *Girls Coming of Age: Possibilities and Potentials within Young Adult Literature,* Master Thesis, DePaul University.

Fox, R.G (1978), "Censorship Policy and Child Pornography", *Australian Law Journal,* vol. 52, vol. 7, pp. 361–371.

Fox, R.G (1981), "Depravity, Corruption and Community Standards", *Adelaide Law Review*, vol. 7, no. 1, pp. 66–78.

Frennea, M (2011), *The Prevalence of Rape and Child Pornography in Yaoi*, Proceedings of the National Conference on Undergraduate Research, available online, <http://urpasheville.org/proceedings/ncur2011/papers/NP51669.pdf>.

Freud, S (1908), "Creative Writers and Day-Dreaming", in *Standard Edition* 9.

Freund, K (1981), "Assessment of Pedophilia", in M Cook and K Howells (eds.), *Adult Sexual Interest in Children,* Academic Press, New York, pp. 137–180.

Friel, S.M (1997), "Porn by Any Other Name? A Constitutional Alternative to Regulating 'Victimless' Computer-Generated Child Pornography", *Valparaiso University Law Review,* vol. 32, no. 1, pp. 207–267.

Fujimoto, Y (2004), "Transgender: Female Hermaphrodites and Male Androgynes", *U.S.–Japan Women's Journal,* vol. 27, no. 1, pp. 76–117.

Fusch, P, and Ness, L (2015), "Are We There Yet? Data Saturation in Qualitative Research", *The Qualitative Report,* vol. 20, no. 9, pp.1408–1416.

Galbraith, P.W (2011), "Lolicon: The Reality of 'Virtual Child Pornography' in Japan", *Image and Narrative: Online Magazine of the Visual Narrative*, vol. 12, no. 1, pp. 83–119.

Galbraith, P.W (2014), *The Moe Manifesto: An Insider's Look at the Worlds of Manga, Anime, and Gaming,* Tuttle Publishing, Tokyo.

Galbraith, P.W (2014), "The *Misshitsu* Trial: Thinking Obscenity with Japanese Comics", *International Journal of Comic Art,* vol. 16, no. 1, pp. 125–146.

Galbraith, P.W (2015), "*Moe* Talk: Affective Communication among Female Fans of *Yaoi* in Japan", in M McLelland, K Nagaike, K Suganuma, and J Welker (eds.), *Boys Love Manga and Beyond: History, Culture, and Community in Japan,* University Press of Mississippi, Mississippi, pp. 153–168.

Gardner, S (2015), "Morgan Huxley's Killer, Daniel Kelsall, Sentenced for Possessing Child Porn", *Sydney Morning Herald,* 17 August, available online, <http://www.smh.com.au/nsw/morgan-huxleys-killer-daniel-kelsall-sentenced-for-possessing-child-porn-20150817-gj0ogv.html>.

Garfield, A (2005), "Protecting Children from Speech", *Florida Law Review,* vol. 57, no. 3, pp. 565–651.

Gauntlett, D (1998), "Ten Things Wrong with the Media 'Effects' Model", in R Dickson, R Harindranath, and O Linne (eds.), *Approaches to Audiences—A Reader,* Arnold, London.

Gee, D, and Belofastov, A (2007), "Profiling Sexual Fantasy: Fantasy in Sexual Offending and the Implications for Criminal Profiling", in R.N Kocsis (ed.) *Criminal Profiling: International Theory, Research, and Practice,* Humana Press, New Jersey, pp. 49–71.

Gee, D, Devilly, G.J, and Ward, T (2004), "The Content of Sexual Fantasies for Sexual Offenders", *Sexual Abuse: A Journal of Research and Treatment,* vol. 16, no. 4, pp. 315–331.

Geers, T, and Geers, E (2003), *Making Out in Japanese: Revised Edition,* Turtle Publishing, Tokyo.

Gentile, D.A, Saleem, M, and Anderson, C.A (2007), "Public Policy and the Effects of Media Violence on Children", *Social Issues and Policy Review*, vol. 1, no. 1, pp. 15–61.

George, R.P (1990), "Social Cohesion and the Legal Enforcement of Morals: A Reconsideration of the Hart-Devlin Debate", *American Journal of Jurisprudence*, vol. 35, no. 1, pp. 15–46.

George, R.P (1993), *Making Men Moral: Civil Liberties and Public Morality,* Clarendon Press, Oxford.

George, R.P (2000), "The Concept of Public Morality", *American Journal of Jurisprudence,* vol. 45, pp. 17–31.

George, R.P (2011), “Pornography, Public Morality, and Constitutional Rights”, *The Witherspoon Institute,* 17 October, available online, <http://www.thepublicdiscourse.com/2011/10/3958/>.

Gillespie, A (2011), *Child Pornography: Law and Policy,* Routledge, New York.

Gillespie, A (2013), “Adolescents, Sexting and Human Rights”, *Human Rights Law Review,* vol. 13, no. 4, pp. 632–643.

Gillespie, A (2014), “Obscene Conversations, the Internet and the Criminal Law”, *Criminal Law Review,* no. 5, pp. 350–363.

Gillespie, A (2015), *Cybercrime: Key Issues and Debates,* Routledge, Oxon.

Gleeson, M (2004), *Out of Touch or Out of Reach*, Paper presented at the Judicial Conference of Australia Colloquium, Adelaide, available online, <http://www.hcourt.gov.au/assets/publications/speeches/former-justices/gleesoncj/cj_02oct04.html>.

Goldblatt, B (2012), “Virtual Pornography: The Children Aren’t Real, But the Dangers Are; Why the Ashcroft Court Got it Wrong”, *Law School Student Scholarship,* Paper 41, available online, <http://erepository.law.shu.edu/cgi/viewcontent.cgi?article=1040&context=student_scholarship>.

Goldstein, L, and Phelan, M (2009), “Are You There God? It’s Me, Manga: Manga as an Extension of Young Adult Literature”, *Young Adult Library Services,* vol. 7, no. 4, pp. 32–38.

Gomez, B (2015), “Two Federal Prisoners Face Additional Time for Possession of Comics”, *CBLDF,* 20 November, available online, <http://cbldf.org/2015/11/two-federal-prisoners-face-additional-time-for-possession-of-comics/>.

Goode, S.D (2010), *Understanding and Addressing Adult Sexual Attraction to Children,* Routledge, New York.

Graffeo, C (2014), *The Great Mirror of Fandom: Reflections of (and on) Otaku and Fujoshi in Anime and Manga,* Masters Thesis, University of Central Florida.

Gravett, P (2004), *Manga: Sixty Years of Japanese Comics,* Laurence King, London.

Green, L (2012), “Censoring, Censuring or Empowering?”, in M Strano, H Hrachovec, F Sudweeks and C Ess (eds.), *Proceedings Cultural Attitudes Towards Technology and Communication,* Murdoch University, Western Australia, pp. 514–529.

Greenberg, M.H (2012), “Comics, Courts and Controversy: A Case Study of the Comic Book Legal Defense Fund”, *Loyola of Los Angeles Entertainment Law Review*, vol. 32, no. 2, pp.121–186.

Greenberg, M.H (2014), *Comic Art, Creativity, and the Law,* Edward Elgar, Massachusetts.

Greenawalt, K (1983), "Punishment", *Journal of Criminal Law & Criminology,* vol. 74, no. 2, pp. 343–362.

Greenawalt, K (1989), *Speech, Crime, and the Uses of Language,* Oxford University Press, New York.

Greer, C and Reiner, R (2012), "Mediated Mayhem: Media, Crime, Criminal Justice", in M Maguire, R Morgan, and R Reiner, Robert (eds.), *The Oxford Handbook of Criminology*, 5th edn., Oxford University Press, Oxford, pp. 245-278.

Griffin, G (2013), "Interviewing", in G Griffin (ed.), *Research Methods for English Studies,* 2nd edn., Edinburgh University Press, Edinburgh, pp. 179–199.

Griffith, G and Simon, K (2008), *Child Pornography Law*, NSW Parliamentary Library Research Service, Briefing Paper No 9/08.

Groves, R.M, Fowler, F.J, Couper, M.P, Lepkowski, J.M, Singer E, and Tourangeau, R (2013), *Survey Methodology,* 2nd edn., Wiley, Hoboken.

Gruen, L (2008), "Pornography and Censorship", in C Wellman and R.G Frey, *Companion to Applied Ethics*, Blackwell Publishing, Massachusetts, pp. 154–166.

Guglielmi, K (2001), "Virtual Child Pornography as a New Category of Unprotected Speech", *CommLaw Conspectus*, vol. 9, no. 2, pp. 207–223.

Gunter, B and Furnham, A (1984), "Perceptions of Television Violence: Effects of Programme Genre and Type of Violence on Viewers' Judgements of Violent Portrayals", *British Journal of Social Psychology*, vol. 23, no. 2, pp.155–64.

Gunther, A (1995),"Overrating the X- Rating: The Third- Person Perception and Support for Censorship of Pornography", *Journal of Communication*, vol. 45, no. 1, pp. 27–38.

Gural, J (2012), "Kawaii, too Sexy: The Eroticized Portrayal of Children in Manga and Media", *Humble Mumbles,* 21 January, available online, <http://humblemumbles-writes.blogspot.com.au/2012/01/kawaii-too-sexy-eroticized-portrayal-of.html?m=1>.

Häggström-Nordin, E, Hanson, U, and Tydén, T (2005), "Associations between Pornography Consumption and Sexual Practices among Adolescents in Sweden", *International Journal of STD & AIDS,* vol. 16, no. 2, pp. 102–107.

Hall, A (2010), "Gay or Gei?: Reading 'Realness' in Japanese Yaoi Manga", in A Levi, M McHarry, and D Pagliassotti (eds.), *Boys' Love Manga: Essays on the*

Sexual Ambiguity and Cross-Cultural Fandom of the Genre, McFarland & Company Inc. Publishers, London, pp. 211–220.

Hall, G, Hirschman, R, and Oliver, L (1995), "Sexual Arousal and Arousability to Pedophilic Stimuli in a Community Sample of Normal Men", *Behavior Therapy,* vol. 26, no. 4, pp. 681–694.

Hall, J (1960), *General Principles of Criminal Law,* Bobbs-Merrill, Indianapolis.

Halliday, S and Schmidt, P (2009), *Conducting Law and Society Research: Reflections on Methods and Practice,* Cambridge University Press, New York.

Hamilton, M (2011), "The Efficacy of Severe Child Pornography Sentencing: Empirical Validity or Political Rhetoric?", *Stanford Law & Policy Review,* vol. 22, no. 2, 545–586.

Hamoy, A.G (2002), "The Constitutionality of Virtual Child Pornography: Why Reality and Fantasy are Still Different Under the First Amendment", *Seton Hall Constitutional Law Journal,* vol. 12, no. 2–3, pp. 471–518.

Hapkiewicz, W, and Roden, A (1971), "The Effect of Aggressive Cartoons on Children's Interpersonal Play", *Child Development*, vol. 42, no. 5, pp. 1583–1585.

Hapkiewicz, W and Roden, A (1974), "The Effect of Realistic versus Imaginary Aggressive Models on Children's Interpersonal Play", *Child Study Journal,* vol. 4, no. 2, pp. 47–58.

Harcourt, B.E (1999), "The Collapse of the Harm Principle", *Journal of Criminal Law & Criminology,* vol. 90, no. 1, pp. 109–194

Harcourt, B.E (2001), *Illusion of Order: The False Promise of Broken Windows Policing*, Harvard University Press, Cambridge.

Harris, B (2005), "Censorship: A Comparative Approach Offering a New Theoretical Basis for Classification in Australia", *Canberra Law Review,* vol. 8, pp. 25–58.

Harrison, R (1981), *The Cartoon: Communication to the Quick*, Sage Publications, California.

Harris, R, (1994), "The Impact of Sexually Explicit Media", in J Bryant and D Zillman (eds.), *Media Effects: Advances in Theory and Research*, Lawrence Erlbaum Associates, New Jersey, pp. 247–272.

Hart, H.L.A (1963), *Law, Liberty, and Morality,* Oxford University Press, Oxford.

Harvey, W (2011), "Strategies for Conducting Elite Interviews", *Qualitative Research,* vol. 11, no. 4, pp. 431–441.

Hashimoto, M (2007), "Visual Kei Otaku Identity—An Intercultural Analysis", *Intercultural Communication Studies*, vol. 16, no. 1, pp. 87–99.

Hasinoff, A.A (2012), "Sexting as Media Production: Rethinking Social Media and Sexuality", *New Media & Society,* vol. 15, no. 4, pp. 449–465.

Healy, J (2008), "Bart Simpson, Child Pornography and Free Speech", *The Lede,* 8 December, available online, <http://thelede.blogs.nytimes.com/2008/12/08/bart-simpson-child-pornography-and-free-speech/?_r=0>.

Healy, M.A (2004), "Child Pornography: An International Perspective", Computer Crime and Research Centre, available online, <http://www.oijj.org/en/docs/general/child-pornography-an-international-perspective>.

Heins, M (2001), *Not in Front of the Children: 'Indecency', Censorship, and the Innocence of Youth,* Hill and Wang, New York.

Heins, M (2005), "Do We Need Censorship to Protect Youth?", *Michigan State Law Review,* vol. 2005, no. 3, pp. 795–808.

Hemmann, K (2014), "Short Skirts and Superpowers: The Evolution of the Beautiful Fighting Girl", *U.S.–Japan Women's Journal,* vol. 47, no. 1, pp. 45–72.

Hernandez, A.E (2006), *Sexual Exploitation of Children Over the Internet: The Face of a Child Predator and Other Issues,* paper presented at the Subcommittee on the Oversight and Investigations Committee on Energy and Commerce, United States House of Representatives.

Herring, J (2012), *Great Debates in Criminal Law,* 2nd edn., Palgrave Macmillan, Basingstoke.

Herring, J (2015), *Great Debates in Criminal Law,* 3rd edn., Palgrave Macmillan, London.

Hershfield, J (2009), "The Ethics of Sexual Fantasy", *International Journal of Applied Philosophy,* vol. 23, no. 1, pp. 27–49.

Hewson, B (2009), "Fetishising Images", in D.S Wall (ed.), *Crime and Deviance in Cyberspace,* Ashgate, Surrey, pp. 265–72.

Holtug, N (2002), "The Harm Principle", *Ethical Theory and Moral Practice,* vol. 5, no. 4, pp. 357–389.

Home Office, Scottish Executive and Northern Ireland Office (2007), *Consultation on Possession of Non-Photographic Visual Depictions of Child Sexual Abuse,* Home Office, London.

Hornle, J (2011), "Countering the Dangers of Online Pornography: Shrewd Regulation of Lewd Content", *European Journal of Law and Technology,* vol. 2, no. 1, pp. 1–26.

Hornle, T (2006), "Legal Regulation of Offence", ", in A von Hirsch and A.P Simester (eds.), *Incivilities: Regulating Offensive Behaviour,* Hart Publishing, Oregon, pp. 133–148.

Hornle, T (2014), "Theories of Criminalization", in M.D Dubber and T Hornle (eds.), *The Oxford Handbook of Criminal Law,* Oxford University Press, Oxford, chapter 30.

Hornsby, J and Langton, R (1998), "Free Speech and Illocution", *Legal Theory,* vol. 4, no. 1, pp. 21–37.

Houtepen, J, Sijtsema, J, and Bogaerts, S (2014), "From Child Pornography Offending to Child Sexual Abuse: A Review of Child Pornography Offender Characteristics and Risks of Cross-Over", *Aggression and Violent Behavior*, vol. 19, no. 5, pp. 466–473.

Howitt, D (2004), "What is the Role of Fantasy in Sex Offending?", *Criminal Behaviour and Mental Health,* vol. 14, no. 3, pp. 182–188.

Howitt, D and Cumberbatch, G (1975), *Mass Media Violence and Society,* John Wiley, New York.

Hsieh, H.F, and Shannon, S.E (2005), "Three Approaches to Qualitative Content Analysis", *Qualitative Health Research*, vol. 15, no. 9, 1277–1288.

Hudson, L (2011), "Why Comics Get Confiscated at the Canadian Border (and How to Protect Yours)", *Comics Alliance,* available online, <http://comicsalliance.com/comic-books-canada-customs/>.

Husak, D (2007) *Overcriminalisation: The Limits of Criminal Law,* Oxford University Press, New York.

Huston, A, Wartell, E, and Donnerstein, E (1998), *Measuring the Effects of Sexual Content in the Media,* A Report to the Kaiser Family Foundation, California.

Hutchinson, T (2012), "Defining and Describing What We Do: Doctrinal Legal Research", *Deakin Law Review,* vol. 17, no. 1, pp. 83–119.

Huxtable, R (2007), *Euthanasia, Ethics and the Law: From Conflict to Compromise,* Routledge-Cavendish, New York.

Internet Watch Foundation (2007), "IWF response to the Government consultation on the Possession of Non-Photographic Visual Depictions", available online, <https://www.iwf.org.uk/accountability/consultations/non-photographic-visual-depictions>.

Itzin, C (1992), "Pornography and Civil Liberties: Freedom, Harm and Human Rights", in C Itzin (ed.), *Pornography: Women, Violence and Civil Liberties*, Oxford University Press, Oxford, pp. 553–585.

Itzin, C (2002), "Pornography and the Construction of Misogyny", *Journal of Sexual Aggression*, vol. 8, no. 3, pp. 4–42.

Jenkins, H (1992), *Textual Poachers: Television Fans and Participatory Culture,* Routledge, London.

Jenkins, H (2006), "'Normal Female Interest in Men Bonking': Selections from the Terra Nostra Underground and Strange Bedfellows", in H Jenkins (ed.), *Fans, Bloggers, and Gamers: Exploring Participatory Culture*, New York University Press, New York, pp. 61–88.

Jenkins, H (2009), *Confronting the Challenges of Participatory Culture: Media Education for the 21st Century*, MIT Press, Cambridge.

Jenkins, P (2001), *Beyond Tolerance: Child Pornography on the Internet*, New York University Press, New York.

Jewkes, Y (2010), "Much Ado About Nothing? Representations and Realities of Online Soliciting of Children", *Journal of Sexual Aggression,* vol. 16, no. 1, pp. 5–18.

Jewkes, Y, and Wykes, M (2012), "Reconstructing the Sexual Abuse of Children: 'Cyber-Paeds', Panic and Power", *Sexualities,* vol. 15, no. 8, pp. 934–952.

Jiji (2014), "Japan to Finally Outlaw Possession of Child Porn, but Manga gets Free Pass", *Japan Times,* 4 June, available online, <http://www.japantimes.co.jp/news/2014/06/04/national/crime-legal/japan-finally-moving-to-ban-child-porn-possession/#.U5wSxBZcTzL>.

Johnson, M.C (2010), "Freedom of Expression in Cyberspace and the Coroner's and Justice Act 2009", *Procs 3rd International Seminar on Information Law*, Corfu, Greece, 25–26 June.

Johnston, P, Hudson, S, and Marshall, W.L (1992), "The Effects of Masturbatory Reconditioning with Nonfamilial Child Molesters", *Behaviour Research and Therapy*, vol.30, no. 5, pp. 559-561.

Jones, S (2003), "Oriental Lolitas", *New Statesman*, 3 February, available online, <http://www.newstatesman.com/node/157046>.

Jones, T and Wilson, D (2008), "'In My Own World': A Case Study of Paedophile's Thinking and Doing and His Use of the Internet", *Howard Journal of Criminal Justice,* vol. 47, no. 2, pp. 107–120.

Jones, T and Wilson, D (2009), "When Thinking Leads to Doing: The Relationship Between Fantasy and Reality in Sexual Offending", in J.L Ireland, C.A Ireland, and P Birch (eds.), *Violent and Sexual Offenders: Assessment, Treatment and Management,* Willan Publishing, Oregon, pp. 235–256.

Joyal, C, Cossette, A, and Lapierre V (2015), "What Exactly is an Unusual Sexual Fantasy?", *Journal of Sexual Medicine,* vol. 12, no. 2, pp. 328–340.

Jung, S, Ennis, L, Stein, S, Choy, A, and Hook, T (2013) "Child Pornography Possessors: Comparisons and Contrasts with Contact- and Non-Contact Sex Offenders", *Journal of Sexual Aggression*, vol. 19, no. 3, pp. 295–310.

Kadish, S.H (1997), "Reckless Complicity", *Journal of Criminal Law and Criminology*, vol. 87, no. 2, pp. 369–394.

Kam, T.H (2013), "The Anxieties that Make the 'Otaku': Capital and the Common Sense of Consumption in Contemporary Japan", *Japanese Studies*, vol. 33, no. 1, pp. 39–61.

Kamm, B.O (2013), "Rotten Use Patterns: What Entertainment Theories Can Do for the Study of Boys' Love", *Transformative Works and Cultures,* no. 12, available online, <http://journal.transformativeworks.org/index.php/twc/article/view/427/391>.

Katyal, S.K (2006), "Performance, Property, and the Slashing of Gender in Fan Fiction", *Journal of Gender, Social Policy & the Law,* vol. 14, no. 3, pp. 461–518.

Kee, T.B (2010), "Rewriting Gender and Sexuality in English-Language Yaoi Fanfiction", in A Levi, M McHarry, and D Pagliassotti (eds.), *Boys' Love Manga: Essays on the Sexual Ambiguity and Cross-Cultural Fandom of the Genre,* McFarland & Company Inc. Publishers, London, pp. 126–156.

Kehily, M.J (2012), "Contextualising the Sexualisation of Girls Debate: Innocence, Experience and Young Female Sexuality", *Gender and Education,* vol. 24, no. 3, pp. 255–268.

Kekes, J (2000), "The Enforcement of Morality", *American Philosophical Quarterly*, vol. 37, no. 1, pp. 23–35.

Keneally, M and Robinson, K (2014), "Girl Accused in 'Slender Man' Stabbing Says She Talks to Unicorns and Voldemort", *ABC News,* 1 August, available online, <http://abcnews.go.com/US/girl-12-accused-slender-man-stabbing-ruled incompetent/story?id=24796126>.

Kennedy, L, and Narushima, Y (2008), "Henson Refuses to Name Model", *Sydney Morning Herald,* 29 May, available online, <http://www.smh.com.au/news/arts/henson-refuses-to-name-model/2008/05/28/1211654124098.html>.

Kennedy, K.C (1983), "A Critical Appraisal of Criminal Deterrence Theory", *Dickinson Law Review*, vol. 88, no. 1, pp. 1-13.

Kennedy, R (2004), "Ashcroft v. Free Speech Coalition: Can We Roast the Pig Without Burning Down the House in Regulating Virtual Child Pornography?", *Akron Law Review,* vol. 37, no. 2, pp. 379–415.

Kenyon, B.J (2002), *The Effects of Televised Violence on Students*, Masters Thesis, Grand Valley State University.

Kift, S, Campbell, M, and Butler, D (2010), "Cyberbullying in Social Networking Sites and Blogs: Legal Issues for Young People and Schools", *Journal of Law, Information and Science,* vol. 20, no. 2, pp. 60–97.

Kim, C (2004), "From Fantasy to Reality: The Link Between Viewing Child Pornography and Molesting Children", *American Prosecutors Research Institute,* vol. 1, no. 3, available online, <http://www.ndaa.org/pdf/Update_gr_vol1_no3.pdf>.

Kincaid, J.R (1992), *Child-Loving: The Erotic Child and Victorian Culture,* Routledge, New York.

King, P (2008), "No Plaything: Ethical Issues Concerning Child Pornography", *Ethical Theory and Moral Practice,* vol. 11, no. 3, pp. 327–345.

Kingston, D.A, Federoff, P, Firestone, P, Curry, S, and Bradford, J.M. (2008), "Pornography Use and Sexual Aggression: The Impact of Frequency and Type of Pornography Use on Recidivism amongst Sexual Offenders", *Aggressive Behavior*, vol. 34, no. 4, pp. 341-351.

Kinsella, S (1995), "Cuties in Japan", in B Moeran and L Skov (eds.), *Women, Media and Consumption in Japan,* Curzon Press, Richmond, pp. 220–254.

Kinsella, S (1998), "Japanese Subculture in the 1990s: Otaku and the Amateur Manga Movement", *Journal of Japanese Studies,* vol. 24, no. 2, pp. 289–316.

Kinsella, S (1999), "Pro-Establishment Manga: Pop-Culture ad the Balance of Power in Japan", *Media, Culture & Society,* vol. 21, no. 4, pp. 567–572.

Kinsella, S (2000), *Adult Manga: Culture & Power in Contemporary Japanese Society,* Curzon, Surrey.

Kirsh, S.J (2006), "Cartoon Violence and Aggression in Youth", *Aggression and Violent Behavior*, vol. 11, no. 6, pp. 547–557.

Kitzinger, J (1988), "Defending Innocence: Ideologies of Childhood", *Feminist Review,* vol. 28, no. 1, pp. 77–87.

Klain, E.J, Davies, H.J, and Hicks, M.A (2001), *Child Pornography: The Criminal-Justice-System Response,* American Bar Association Center on Children and the Law

for the National Center for Missing & Exploited Children, available online, <http://www.popcenter.org/problems/child_pornography/PDFs/Klain_etal_2001.pdf >

Kliethermes, B.C (2015), *Perceptions of Computer-Generated Child Pornography,* Masters Thesis, University of North Dakota.

Knudsen, D (1988), "Child Sexual Abuse and Pornography: Is there a Relationship?", *Journal of Family Violence*, vol. 3, no. 4, pp. 253–267.

Kontominas, B (2008), "Simpsons Cartoon Rip-Off is Child Porn: Judge", *Sydney Morning Herald,* 8 December, available online, <http://www.smh.com.au/news/technology/simpsons-cartoon-ripoff-is-child-porn-judge/2008/12/08/1228584707575.html>.

Koppelman, A (2005), "Does Obscenity Cause Moral Harm?", *Columbia Law Review,* vol. 105, no. 5, pp. 1635–1679.

Koppelman, A (2008), "Is Pornography 'Speech'"?, *Legal Theory,* vol. 14, no. 1, pp. 71–89.

Kowanko, E.D (2000), "Literature Reviews: Evolution of a Research Methodology", *The Australian Journal of Advanced Nursing,* vol. 18, no. 2, pp. 33–38.

Krause, K (2015), "Two Imprisoned for Child Porn Face more Time for Obscene Comics", *Dallas Morning News,* 17 November, available online, <http://www.dallasnews.com/news/crime/headlines/20151117-two-imprisoned-for-child-porn-face-more-time-for-obscene-comics.ece>.

Kravets, D (2014), "UK Convicts Man Over Manga Sex Images of Children", *Ars Technica,* 21 October, available online, <http://arstechnica.com/tech-policy/2014/10/uk-convicts-man-over-manga-sex-images-of-children/>.

Kreston, S (2004), "Defeating the Virtual Defense in Child Pornography Prosecutions", *Journal of High Technology Law,* vol. 4, no. 1, pp. 49–84.

Krone, T (2004), "A Typology of Online Child Pornography Offending", *Trends & Issues in Criminal Justice,* Australian Institute of Criminology, Canberra, Report No. 279.

Krone, T (2005),"Combating Online Child Pornography in Australia", in E Quayle and M Taylor (eds.), *Viewing Child Pornography on the Internet: Understanding the Offence, Managing the Offender, Helping the Victims,* Russell House Publishing, Dorset, pp. 17–30.

Krone, T (2005), "Does Thinking Make It So? Defining Online Child Pornography Possession Offences", *Trends and Issues in Crime and Criminal Justice*, Australian Institute of Criminology, Canberra, Report No. 299.

Krone, T (2005), "Queensland Police Stings in Online Chat Rooms", *Trends and Issues in Crime and Criminal Justice*, Australian Institute of Criminology, Canberra, Report No. 301.

Krone, T (2009), "Child Pornography Sentencing in NSW", Australian Institute of Criminology, High Tech Crime Brief No. 8, Canberra.

Krone, T (2009), "International Police Operations Against Online Child Pornography", in D.S Wall (ed.), *Crime and Deviance in Cyberspace,* Ashgate, Surrey, pp. 250–263.

Kutchinsky, B (1973), "The Effect of Easy Availability of Pornography on the Incidence of Sex Crimes: The Danish Experience", *Journal of Social Issues*, vol. 29, no. 3, pp. 163–181.

Kutchinsky, B (1991), "Pornography and Rape: Theory and Practice?", *International Journal of Law & Psychiatry,* vol. 14, no. 1–2, pp. 47–64.

Lam, A, Mitchell, J, and Seto, M.C (2010), "Lay Perceptions of Child Pornography Offenders", *Canadian Journal of Criminology & Criminal Justice,* vol. 52, no. 2, pp. 173–201.

Lambert, S and O'Halloran, E (2008), "Deductive Thematic Analysis of a Female Paedophilia Website", *Psychiatry, Psychology and Law,* vol. 15, no. 2, pp. 284–300.

Langevin, R, Lang, R, and Curnoe, S (1998), "The Prevalence of Sex Offenders with Deviant Fantasies", *Journal of Interpersonal Violence,* vol. 13, no. 3, pp. 315–327.

Langton, R (1993), "Speech Acts and Unspeakable Acts", *Philosophy & Public Affairs,* vol. 22, no. 4, pp. 293–330.

Langton, R (2012), "Beyond Belief: Pragmatics in Hate Speech and Pornography", in I Maitra and M.K McGowan (eds.), *Speech and Harm: Controversies Over Free Speech,* Oxford University Press, Oxford, pp. 72–93.

Lanning, K.V (2010), *Child Molesters—A Behavioral Analysis: For Professionals Investigating the Sexual Exploitation of Children,* National Centre for Missing and Exploited Children, 5th edn, available online, <http://www.missingkids.com/en_US/publications/NC70.pdf>.

Laroy, A (2008), "Discovering Child Pornography: The Death of the Presumption of Innocence", *Ave Maria Law Review*, vol. 6, no. 2, pp. 559–587.

LaSelva, S.V (1987), "Controlling Obscenity: What Difference Does the Charter of Rights Make?", *Journal of Canadian Studies,* vol. 22, no. 3, pp. 20–34.

Lauterwein, C (2010), *The Limits of Criminal Law: A Comparative Analysis of Approaches to Legal Theorizing,* Ashgate, Surrey.

Law Council of Australia (2010), *Registration and Reporting Obligations for Child Sex Offenders: Law Council Policy Principles v Current State and Territory Practice,* Canberra.

Law Council of Australia (2013), *Inquiry into Options for Addressing the Issue of Sexting by Minors,* Senate Select Committee on Cyber-Safety, Canberra.

Law Reform Committee, Parliament of Victoria (2013), *Inquiry into Sexting,* Victorian Government Printer, Parliamentary Paper No. 230.

Laws, D.R, and Marshall, W.L (1990), "A Conditioning Theory of the Etiology and Maintenance of Deviant Sexual Preference in Behavior", in W.L Marshal, D.R Laws, and H.E Barbaree (eds.), *Handbook of Sexual Assault: Issues, Theories, and Treatment of the Offender,* Plenum, New York, pp. 209–229.

Laws, D.R, and Marshall, W.L (1991), "Masturbatory Reconditioning with Sexual Deviates: An Evaluative Review", *Advances in Behaviour Research and Therapy*, vol. 13, no. 1, pp. 13–25.

Leach, J (2002), "Reacting to Ashcroft v. Free Speech Coalition and the Burial of the CPPA: An Argument to Regulate Child Pornography because it Incites Imminent Lawless Action", *Vanderbilt Journal of Entertainment Law & Practice,* vol. 5, no. 1, pp. 114–132.

Leary, M.G (2007), "Self-Produced Child Pornography: The Appropriate Societal Response to Juvenile Self-Sexual Exploitation", *Virginia Journal of Social Policy & the Law,* vol. 15, no. 1, pp. 1–50.

Leary, M.G (2010), "Sexting or Self-Produced Child-Pornography—The Dialog Continues—Structured Prosecutorial Discretion with a Multidisciplinary Response", *Virginia Journal of Social Police & the Law,* vol. 17, no. 3, pp. 486–566.

Leavitt, A, and Horbinski, A (2012), "Even a Monkey Can Understand Fan Activism: Political Speech, Artistic Expression, and a Public for the Japanese Dojin Community", *Transformative Works & Culture,* vol. 10, available online, <http://journal.transformativeworks.org/index.php/twc/rt/printerFriendly/321/311>.

Leitenberg, H and Henning, K (1995), "Sexual Fantasy", *Psychological Bulletin,* vol. 117, no. 3, pp. 469–496.

Levi, A (2010), "Introduction", in A Levi, M McHarry, and D Pagliassotti (eds.), *Boys' Love Manga: Essays on the Sexual Ambiguity and Cross-Cultural Fandom of the Genre,* McFarland & Company Inc. Publishers, London, pp. 1–8.

Levy, N (2002), "Virtual Pornography: The Eroticization of Inequality", *Ethics and Information Technology,* vol. 4, no. 1, pp. 319–323.

Libertus (2010), "Australia's Classification (Censorship) System", *Libertus.net,* 11 April, available online, <http://libertus.net/censor/clscensor.html>.

Linz, D, Donnerstein, E, and Penrod, S (1988), "Effects of Long-Term Exposure to Violent and Sexually Degrading Depictions of Women", *Journal of Personality and Social Psychology*, vol. 55, no. 5, pp. 758–768.

Linz, D and Adams, S.M (1989), "Physiological Desensitization and Judgments about Female Victims of Violence", *Human Communication Research,* vol. 15, no. 4, pp. 509–522.

Linz, D, and Imrich, D (2001), "Child Pornography", in S White (ed.), *Handbook of Youth and Justice,* Kluwer Academic/Plenum Publishers, New York, pp. 79–111.

Livingstone, S (1996), "On the Continuing Problems of Media Effects Research", in M Gurevitch and J Curran (eds.), *Mass Media and Society,* 2nd edn., Edward Arnold, London, pp. 305–324.

Loewy, A (2003), "Taking Free Speech Seriously: The United States Supreme Court and Virtual Child Pornography", *First Amendment Law Review,* vol. 1, no. 3, pp. 1–12.

Loewy, A (2005), "Obscenity: An Outdated Concept for the Twenty-First Century", *NEXUS,* vol. 10, pp. 21–30.

Long, M, Alison, L, and McManus, M (2013), "Child Pornography and Likelihood of Contact Abuse: A Comparison between Contact Child Sexual Offenders and Noncontact Offenders", *Sexual Abuse,* vol. 25, no. 4, pp. 370–395.

Looman, J (1995), "Sexual Fantasies of Child Molesters", *Canadian Journal of Behavioural Science,* vol. 27, no. 3, pp. 321–332.

Lucas, K (2014), "Does the Harm Principle Justify Criminal Drug Statutes Against Drug Use?", *Hilltop Review*, vol. 7, no. 1, pp. 33–44.

Lucas, T (2013), "Sweetie: The Legality of Using a Virtual Child to Catch a Webcam Predator", *North Carolina Journal of Law & Technology,* 7 November, available online, <http://ncjolt.org/sweetie-the-legality-of-using-a-virtual-child-to-catch-a-webcam-predator/>.

Luck, M (2009), "The Gamer's Dilemma: An Analysis of the Arguments for the Moral Distinction between Virtual Murder and Virtual Paedophilia", *Ethics and Information Technology,* vol. 11, no. 1, pp. 31–36.

Lucy, G (2015), "Creating Transnational Fandoms—Adaptation of Japanese Terminology Among English-Language *Dojinshi* Users", *Nagyoya Repository*, vol. 15, pp. 27–43.

Lui, S (2007), "*Ashcroft,* Virtual Child Pornography and First Amendment Jurisprudence", *UC Davis Journal of Juvenile Law & Policy,* vol. 11, no. 1, pp. 1–54.

Lunceford, B (2011), "The New Pornographers: New Media, Sexual Expression, and the Law," in B.E German and B Drushel (eds.), *Ethics of Emerging Media: Information, Social Norms and New Media Technology,* Continuum International Publishing, London, pp. 99–118.

MacKinnon, C (1987), *Feminism Unmodified: Discourses on Life and Law*, Harvard University Press, Cambridge.

MacKinnon, C (1992), "Pornography, Civil Rights and Speech", in C Itzin (ed.), *Pornography: Women, Violence and Civil Liberties*, Oxford University Press, Oxford, pp. 456–511.

MacKinnon, C (1993), *Only Words,* Harvard University Press, Cambridge.

MacVean, A (2003), "Understanding Sexual Predators on the Internet: Towards a Greater Knowledge", in A MacVean and P Spindler (eds.), *Policing Paedophiles on the Internet,* The New Police Bookshop, London, pp. 2–10.

Madill, A (2015), "*Boys' Love* Manga for Girls: Paedophilic, Satirical, Queer Readings and English Law", in E Renold, J Ringrose, and D Egan (eds.), *Children, Sexuality and Sexualization,* Palgrave MacMillan, Hampshire, pp. 273–288.

Maitra, I and McGowan, M.K (2012), "Introduction and Overview", in I Maitra and M.K McGowan (eds.), *Speech and Harm: Controversies Over Free Speech,* Oxford University Press, Oxford, pp. 1–23.

Malamuth, N and Ceniti, J (1986), "Repeated Exposure to Violent and Nonviolent Pornography: Likelihood of Raping Ratings and Laboratory Aggression against Women", *Aggressive Behavior*, vol. 12, no. 2, pp. 129−137.

Malamuth, N and Check, J.V. P (1980), "Penile Tumescence and Perceptual Responses to Rape as a Function of Victim's Perceived Reactions", *Journal of Applied Social Psychology*, vol. 10, no. 6, pp. 528–547.

Malamuth, N and Check, J.V.P (1985), "The Effects of Aggressive Pornography on Beliefs in Rape Myths", *Journal of Research in Personality,* vol. 19, no. 3, pp. 299–320.

Malamuth, N, and Huppin, M (2007), "Drawing the Line on Virtual Child Pornography: Bringing the Law in Line with Research Evidence", *NY University of Law & Social Change,* vol. 31, no. 4, pp. 773–828.

Malleson, K (2012), "White, Male and Middle Class—Is a Diverse Judiciary a Pipe Dream", Paper presented at Mansfield College, Oxford, available online, <http://www.law.qmul.ac.uk/eji/docs/78402.pdf>.

Malloy, S, and Krotoszynski, R (2000), "Recalibrating the Cost of Harm Advocacy: Getting Beyond Brandenburg", *William and Mary Law Review,* vol. 41, no. 4, pp. 1159–1245.

Malone, P (2013), "Transplanted Boys' Love Conventions and Anti–Shota Polemics in German Manga: Fahr Sindram's Losing Neverland", *Transformative Works and Cultures,* no. 12, available online, <http://journal.transformativeworks.org/index.php/twc/rt/printerFriendly/434/395>.

Maniglio, R (2009), "The Impact of Child Sexual Abuse on Health: A Systematic Review of Reviews," *Clinical Psychology Review,* vol. 29, no. 7, pp. 647–657.

Marcus, C (2015), "Anime Images not a Big Leap to Viewing Child Pornography: SA Judge", *ABC News,* 12 August, available online, <http://www.abc.net.au/news/2015-08-12/anime-not-a-big-leap-to-child-pornography-sa-judge-says/6691372>.

Margolis, E (2014), "The Lost Comics Code of Australia", *CBLDF,* 11 February, available online, <http://cbldf.org/2014/02/the-lost-comics-code-of-australia/>.

Maris, C (2013), "Pornography is going on-line: The Harm Principle in Dutch law", *Law, Democracy & Development,* vol. 17, pp. 1–23.

Marr, D (2008), *The Henson Case,* Text Publishing, Melbourne.

Marshall, W.L (1988), "The Use of Sexually Explicit Stimuli by Rapists, Child Molesters, and Nonoffenders", *Journal of Sex Research,* vol. 25, no. 2, pp. 267–288.

Marshall, W.L (2000), "Revisiting the Use of Pornography by Sexual Offenders: Implications for Theory and Practice", *Journal of Sexual Aggression*, vol. 6, no. 1–2, pp. 67–77.

Marshall, W.L, and Barbaree. H.E (1990), "An Integrated Theory of Sexual Offending", in W.L Marshall, D.R Laws, and H.E Barbaree (eds.), *Handbook of Sexual Assault,* Plenum Press, New York, pp. 257–275.

Marshall, W.L, Barbaree, H.E, and Eccles, A (1991), "Early Onset and Deviant Sexuality in Child Molesters", *Journal of Interpersonal Violence,* vol. 6, no. 3, pp. 323–336.

Martin, F (2012), "Girls who Love Boys' Love: Japanese Homoerotic Manga as Trans-National Taiwan Culture", *Inter-Asia Cultural Studies,* vol. 13, no. 3, pp. 365–383.

Matacin, M and Burger, J (1987), "A Content Analysis of Sexual Themes in Playboy Cartoons", *Sex Roles*, vol. 17, no. 3, pp. 179–186.

Mateo, G (2008), "The New Face of Child Pornography: Digital Imaging Technology and the Law", *Journal of Law, Technology & Policy,* vol. 2008, no. 1, pp. 175–203.

Matheson, R (2012), "Ryan Matheson's Personal Statement", *CBLDF,* 15 March, available online, <http://cbldf.org/2012/03/ryan-mathesons-personal-statement/>.

Mathews, C (2011), "Manga, virtual child pornography and censorship in Japan", in Centre for Applied Ethics and Philosophy (ed.), *Applied Ethics: Old Wine in New Bottles?,* Hokkaido University, Sapporo, pp. 165–174.

Maxwell, J.A (2010), "Using Numbers in Qualitative Research", *Qualitative Inquiry*, vol. 16, no. 6, pp. 475–482.

Mays, N and Pope, C (1995), "Qualitative Research: Rigour and Qualitative Research", *BMJ Journals,* vol. 311, no. 6697, pp. 109–112.

McAlinden, A.M (2012), *'Grooming' and the Sexual Abuse of Children: Institutional, Internet, and Familial Dimensions,* Oxford University Press, Oxford.

McCabe, K (2000), "Child Pornography and the Internet", *Social Science Computer Review*, vol. 18, no. 1, pp. 73–76.

McCloud, S (1994), *Understanding Comics: The Invisible Art,* Harper Perennial, New York.

McCloud, S (2015), "Girls are Taking the Comic Book World by Storm", *Time,* 1 May, available online, <http://time.com/3841761/scott-mccloud-free-comic-book-day/>.

McConaghy, N, Zamir, R, and Manicavasagar, V (1993), "Nonsexist Sexual Experiences Survey and Scale of Attraction to Sexual Aggression", *Australian and New Zealand Journal of Psychiatry*, vol. 27, no. 4, pp.686–693.

McCormick, M (2001), "Is it Wrong to Play Violent Video Games?", *Ethics and Information Technology,* vol. 3, no. 4, pp. 277–287.

McCurry, J (2015), "Japan Urged to Ban Manga Child Abuse Images", *The Guardian,* 27 October, available online, <https://www.theguardian.com/world/2015/oct/27/japan-urged-to-ban-manga-child-abuse-images>.

McGary, D (2002), "Japan's Gross National Cool", *Foreign Policy,* May/June, p. 44–54.

McGowan, M.K (2003), "Conversational Exercitives and the Force of Pornography", *Philosophy & Public Affairs,* vol. 31, no. 2, pp. 155–189.

McGuire, M and Dowling, S (2013), "Chapter 3: Cyber-Enabled Crimes—Sexual Offending Against Children", *Cyber Crime: A Review of the Evidence,* Research Report No. 75, Home Office (UK).

McGuire, R, Carlisle, J, and Young, B (1964), "Sexual Deviations as Conditions Behaviour: A Hypothesis", *Behaviour Research and Therapy,* vol. 2, no. 2–4, pp. 185–190.

McHarry, M (2011), "(Un)gendering the Homoerotic Body: Imagining Subjects in Boys' Love and Yaoi", *Transformative Works and Cultures,* no. 8, available online, <http://journal.transformativeworks.org/index.php/twc/article/view/257/250>.

McKee, A (2007), "The Relationship Between Attitudes Towards Women, Consumption of Pornography, and Other Demographic Variables in a Survey of 1,023 Consumers of Pornography", *International Journal of Sexual Health*, vol. 19, no. 1, pp. 31−45.

McKinnon, C (2007), "Sex, Speech and Status: New Developments in the Pornography Debate", in G Newey (ed.), *Freedom of Expression: Counting the Costs,* Cambridge Scholars Publishing, Newcastle, pp. 30–53.

McLatchie, J (2014), "Why Pornography Harms", *Cross Examined,* 20 August, available online, <http://crossexamined.org/pornography-harms/>.

McLelland, M (2000), "No Climax, No Point, No Meaning? Japanese Women's Boy-Love Sites on the Internet", *Journal of Communication Inquiry,* vol. 24, no. 3, pp. 274–291.

McLelland, M (2005), "The World of Yaoi: The Internet, Censorship and the Global 'Boys Love' Fandom", *Australian Feminist Law Journal,* vol. 23, no. 1, pp. 61–77.

McLelland, M (2010), "Australia's Proposed Internet Filtering System: Its Implications for Animation, Comic and Gaming (ACG) and Slash Fan Communities", *Media International Australia,* no. 134, pp. 7–19.

McLelland, M (2011), "Australia's 'Child Abuse Material' Legislation, Internet Regulation and the Juridification of the Imagination", *International Journal of Cultural Studies,* vol. 15, no. 5, pp. 467–483.

McLelland, M (2013), "Ethical and Legal Issues in Teaching about Japanese Popular Culture to Undergraduate Students in Australia", *Electronic Journal of Contemporary Japanese Studies*, vol. 13, no. 2, available online, <http://ro.uow.edu.au/cgi/viewcontent.cgi?article=1895&context=lhapapers>.

McLelland, M (2015), "Regulation of Manga Content in Japan: What Is the Future for BL?", in M McLelland, K Nagaike, K Suganuma, and J Welker (eds.), *Boys Love Manga and Beyond: History, Culture, and Community in Japan,* University Press of Mississippi, Mississippi, pp. 253–273.

McLelland, M (2016),"'Not in Front of the Parents!' Young People, Sexual Literacies and Intimate Citizenship in the Internet Age", *Sexualities*, in press, pp. 1–21.

McLelland, M and Yoo, S (2007), "The International Yaoi Boys' Love Fandom and the Regulation of Virtual Child Pornography: Current Legislation and its Implications", *Journal of Sexuality Research & Social Policy,* vol. 4, no. 1, pp. 93–104.

McNeil, D (2012), "In One Major Nation, Child Pornography is Legal", *UCA News,* 16 October, available online, <http://www.ucanews.com/news/in-one-major-nation-child-pornography-is-legal/62629>.

McNicol, T (2004), "Does Comic Relief Hurt Kids?", *Japanese Times,* 27 April, available online, <http://www.japantimes.co.jp/community/2004/04/27/community/does-comic-relief-hurt-kids/#.UmeW1lOKapA>.

Meagher, D (2009), "Investigating 'Indecent, Obscene or Pornographic' Art: Lessons from the Bill Henson Controversy", *Media and Arts Law Review,* vol. 14, no. 3, pp. 292–307.

Mears, D, Mancini, C, Gertz, M, and Bratton, J (2008), "Sex Crimes, Children, and Pornography: Public Views and Public Policy", *Crime & Delinquency*, vol. 54, no. 4, pp. 532–559.

Merdian, H, Thakker, J, Wilson, N, and Boer, D (2013), "Assessing the Internal Structure of the COPINE Scale", *Psychology, Crime & Law*, vol. 19, no. 1, pp. 21–34.

Meyer, U (2010), "Hidden in Straight Sight: Trans*gressing Gender and Sexuality via BL", in A Levi, M McHarry, and D Pagliassotti (eds.), *Boys' Love Manga: Essays on the Sexual Ambiguity and Cross-Cultural Fandom of the Genre,* McFarland & Company Inc. Publishers, London, pp. 232–256.

Michie, R (2013), "Sexting: Matching Reality and Law", *Civil Liberties Australia,* 29 June, available online, <http://www.cla.asn.au/News/sexting-matching-reality-and-law/>.

Middleton, D (2009), "Linkages between Viewing Indecent Images of Children and Contact Sexual abuse: Issues from Research", Compendium of articles: Research findings on child abuse images and sexual exploitation of children online, ECPAT, pp. 22-26.

Mikecz, R (2012), "Interviewing Elites: Addressing Methodological Issues", *Qualitative Inquiry,* vol. 18, no. 6, pp. 482–493.

Mikulsky, J (2005), "Use of Web-Based Surveys in Social Science and Education Research: Practical and Methodological Considerations", *Change: Transformations in Education,* vol. 8, no. 1, pp. 71–90.

Milstead, V (2012), "Ashcroft v. Free Speech Coalition: How Can Virtual Child Pornography Be Banned Under the First Amendment?", *Pepperdine Law Review,* vol. 31, no. 3, pp. 825–874.

Mill, J.S (1991, org. 1859), *On Liberty and Other Essays,* edited by J Gray, Oxford University Press, Oxford.

Mitchell, K, Finkelhor, D, and Wolak, J (2005), "The Internet and Family and Acquaintance Sexual Abuse", *Child Maltreatment*, vol. 10, no. 1, pp. 49–60.

Miyake, T (2015), "Towards Critical Occidentalism Studies Re-inventing the 'West' and 'Japan' in Mangaesque Popular Cultures", in P Calvetti and M Mariotti (eds.), *Contemporary Japan Challenges for a World Economic Power in Transition,* Ca'Foscari Japanese Studies, Venezia, pp. 93–116.

Mizzi, P, Gotsis, T, and Poletti, P (2010), *Sentencing Offenders Convicted of Child Pornography and Child Abuse Material Offences*, Judicial Commission of NSW, Monograph 34, Sydney.

Moore, M (1997), *Placing Blame: A General Theory of the Criminal Law,* Oxford University Press, New York.

Moosa, T (2012), "Virtual Child Porn and Paedophilia", *Big Think,* 25 November, available online, <http://bigthink.com/against-the-new-taboo/virtual-child-porn-and-paedophilia>.

Morgan, D.L (1997), *Focus Group as Qualitative Research,* Sage Publications, California.

Morgan, R (1980), "Theory and Practice: Pornography and Rape", in L Lederer (ed.), *Take Back the Night: Women on Pornography*, William Morrow, New York.

Mulac, A, Jansma, L, and Linz, D (2002), "Men's Behavior toward Women after Viewing Sexually-Explicit Films: Degradation Makes a Difference", *Communication Monographs*, vol. 69, no. 4, pp. 311-28.

Mulholland, M (2013), *Young People and Pornography: Negotiating Pornification,* Palgrave MacMillan, New York.

Mullen, J, and Wakatsuki, Y (2014), "After long wait, Japan moves to ban possession of child pornography", *CNN News,* 10 June, available online, <http://edition.cnn.com/2014/06/06/world/asia/japan-child-pornography/>.

Nagaike, K (2003), "Perverse Sexualities, Perversive Desires: Representations of Female Fantasies and 'Yaoi Manga' as Pornography Directed at Women", *U.S.–Japan Women's Journal,* vol. 25, pp. 76–103.

Nagaike, K (2012), *Fantasies of Cross-Dressing: Japanese Women Write Male-Male Erotica,* Brill, Leiden.

Nair, A (2010), "Real Porn and Pseudo Porn: The Regulatory Road", *International Review of Law, Computer and Technology,* vol. 24, no. 3, pp. 223–232.

Napier, S (2005), "The Problem of Existence in Japanese Animation", *Proceedings of the American Philosophical Society,* vol. 49, no. 1, pp. 72–79.

Nathanson, A and Cantor, J (2000), "Reducing the Aggression-Promoting Effect of Violent Cartoons by Increasing Children's Fictional Involvement with the Victim", *Journal of Broadcasting and Electronic Media*, vol. 44, no. 1, pp. 125–142.

Neu, J (2002), "An Ethics of Fantasy?", *Journal of Theoretical and Philosophical Psychology,* vol. 22, no. 2, pp. 133–157.

New Matilda (2008), "Helen Lovejoy Gets Her Way", *New Matilda,* 12 December, available online, <https://newmatilda.com/2008/12/12/helen-lovejoy-gets-her-way/>.

New South Wales Council for Civil Liberties, Submission to Committee Secretary, *Australia's Ratification of the Optional Protocol to the Convention on the Rights of the Child*, 2 November 2005.

New South Wales Government, "New Alcohol Laws Now in Place: Sydney's Alcohol Laws", available online, <http://www.nsw.gov.au/newlaws>.

New South Wales Law Reform Commission (2013), *Sentencing,* Report 129, Sydney.

Nicholls, C, Mitchell, M, Simpson, I, Webster, S, and Hester, M (2012), *Attitudes to Sentencing Sexual Offences*, Sentencing Council Research Series, London.

Niveau, G (2010), Cyber-Pedocriminality: Characteristics of a Sample of Internet Child Pornography Offenders", *Child Abuse & Neglect*, vol. 34, no. 8, pp.570–575.

Norris, C (2003), *The Cross-Cultural Appropriation of Manga and Anime in Australia*, PhD Thesis, University of Western Sydney.

Noxon, C (2003) "When Harry Met Smutty", *Metroactive,* 26 June to 2 July issue, available online, <http://www.metroactive.com/papers/metro/06.26.03/potter-0326.html>.

Nunan, R (1996), "Legal Moralism: From Hart and Devlin to Feinberg and George", *The American Philosophical Association,* vol. 96, no. 1, pp. 64–71.

Oates, J (2010), "Aussie Man Convicted for *Simpsons* Smut", *The Register,* 28 January, available online, <http://www.theregister.co.uk/2010/01/28/australia_simpsons/>.

O'Connell, R (2003), *A Typology of Child Cybersexploitation and Online Grooming Practices,* Cyberspace Research Unit University of Central Lancashire, available online, < http://image.guardian.co.uk/sys-files/Society/documents/2003/07/17/Groomingreport.pdf>.

O'Brien, A (2008), *Boys' Love and Female Friendships: The Subculture of YAOI as a Social Bond Between Women,* Masters Thesis, Georgia State University.

Oddone-Paolucci, E, Genuis, M, and Violato, C (2000), "A Meta-Analysis of Published Research on the Effects of Pornography", National Foundation for Family Research and Education, University of Calgary, available online, <http://ccoso.org/library%20articles/Meta-analysis.pdf>.

Okabe, D and Ishida, K (2012), "Making *Fujoshi* Identity Visible and Invisible", in M Ito, D Okabe, and I Tsuji (eds.), *Fandom Bound: Otaku Culture in a Connected World,* Yale University Press, Connecticut, pp. 207–224.

Orsini, L (2013), "The Truth about Boys' Love and Rape Culture", *Otaku Journalist,* 14 October, available online, <http://otakujournalist.com/the-truth-about-boys-love-and-rape-culture/>.

Ortega-Brena, M (2009), "Peek-a-Boo, I see You: Watching Japanese Hard-Core Animation", *Sexuality & Culture,* vol. 13, no. 1, pp. 17–31.

Ost, S (2009), *Child Pornography and Sexual Grooming: Legal and Societal Responses,* Cambridge University Press, Cambridge.

Ost, S (2010) "Criminalising Fabricated Images of Child Pornography: A Matter of Harm or Morality?", *Legal Studies,* vol. 30, no. 2, pp. 230–256.

Pagliassotti, D (2008), "Reading Boys' Love in the West", *Particip@tions,* vol. 5, no. 2, available online, <http://www.participations.org/Volume%205/Issue%202/5_02_pagliassotti.htm>.

Pagliassotti, D (2008), "Boys' Love vs. YAOI: An Essay on Terminology", available online, <http://drupagliassotti.com/2008/07/17/boys-love-vs-yaoi-an-essay-on-terminology/>.

Pagliassotti, D (2010), "Better than Roman? Japanese BL Manga and the Subgenre of Male/Male Romantic Fiction", in A Levi, M McHarry, and D Pagliassotti (eds.), *Boys' Love Manga: Essays on the Sexual Ambiguity and Cross-Cultural Fandom of the Genre,* McFarland & Company Inc. Publishers, London, pp. 59–83.

Palmer, E (1979), "Pornographic Comics: A Content Analysis", *The Journal of Sex Research,* vol. 15, no. 4, pp. 285–298.

Palmer, J (2010), "Sexual Fantasy and Sex Offending", in J.M Brown and E.A Campbell (eds.), *The Cambridge Handbook of Forensic Psychology,* Cambridge University Press, Cambridge, pp. 552–561.

Paradise, A, and Sullivan, M (2012), "(In)Visible Threats? The Third-Person Effect in Perceptions of the Influence of Facebook", *Cyberpsychology, Behavior and Social Networking*, vol. 15, no. 1, pp. 55–60.

Parker, D (2010), "The Kefauver Comic Book Hearings as Show Trial: Decency, Authority and the Dominated Expert", *Cultural Studies,* vol. 16, no. 2, pp. 259–288.

Patton, M.Q (1980), *Qualitative Evaluation and Research Methods, Sage Publications*, California.

Patton, M.Q (2002), *Qualitative Research and Evaluation Methods*, 3rd edn., Sage Publications, California.

Paul, B, and Linz, D (2008), "The Effects of Exposure to Virtual Child Pornography on Viewer Cognitions and Attitudes Toward Deviant Sexual Behavior", *Communication Research,* vol. 35, no. 1, pp. 13–38.

Peek, C.M (2009), *KAWAII Aesthetics: The Role of Cuteness in Japanese Society,* Honours Thesis, University of Arizona.

Persak, N (2007), *Criminalising Harmful Conduct: The Harm Principle, its Limits and Continental Counterparts,* Springer, New York.

Peters, J (2013), "Media and Sexual Development", in D Lemish (edn.), *The Routledge International Handbook of Children, Adolescents and Media,* Routledge, New York, pp. 217–223.

Petersen, T (2010), "New Legal Moralism: Some Strengths and Challenges", *Criminal Law and Philosophy*, vol. 4, no. 2, pp. 215–232.

Petersen, T (2016) "No Offense! On the Offense Principle and Some New Challenges*", Criminal Law and Philosophy*, vol. 10, no. 2, pp. 355–365.

Peterson, J (2015), "Legal Moralism, Interests and Preferences: Alexander on Aesthetic Regulation", *Philosophia*, vol. 43, no. 2, pp. 485–498.

Peysakhovich, S (2004), "Virtual Child Pornography: Why American and British Laws are at Odds with Each Other", *Albany Law Journal of Science & Technology*, vol. 14, no. 3, pp. 799–834.

Phillips, A, and Daniluk, J.C (2004), "Beyond 'Survivor': How Childhood Sexual Abuse Informs the Identity of Adult Women at the End of the Therapeutic Process," *Journal of Counseling & Development,* vol. 82, no. 2, pp. 177–184.

Phoenix, D (2006), *Protecting Young Eyes: Censorship and Morals Standards of Decency in Japan and the United States as Reflected in Children's Media,* Bachelor Thesis, Massachusetts Institute of Technology.

Pierce, J.L (2002), "Interviewing Australia's Senior Judiciary", *Journal of Political Science,* vol. 37, no. 1, pp. 131–142.

Pilcher, T, and Kannenberg, G (2008), *Erotic Comics: A Graphic History of Tijuana Bibles to Underground Comix,* Abrams, New York.

Poborilova, M (2011), "Virtual Child Pornography", *Masaryk University Journal of Law and Technology,* vol. 5, no. 2, pp. 241–254

Potter, W and Warren, R (1998), "Humor as Camouflage of Televised Violence", *Journal of Communication,* vol. 48, no. 2, pp. 40–57.

Powell, A (2007), *Paedophiles, Child Abuse and the Internet: A Practical Guide to Identification, Action and Prevention*, Radcliffe Publishing, Oxon.

Preper, T and Cornog, M (2002), "Eroticism for the Masses: Japanese Manga Comics and Their Assimilation into the U.S.", *Sexuality and Culture,* vol. 6, no. 1, pp. 3–126.

Price, T.L (2006), "Feinberg's Offense Principle and the Danish Cartoons of Muhammad", *APA Newsletters,* vol. 6, no. 1, pp. 6–12.

Prichard, J, and Spiranovic, C (2014), *Child Exploitation Material in the Context of Institutional Child Sexual Abuse,* Report Commissioned by the Royal Commission into the Institutional Responses to Child Sexual Abuse, University of Tasmania.

Prichard, J, Spiranovic, C, Gelb, K, Watters, P.A, and Krone, T (2016), "Tertiary Education Students' Attitudes to the Harmfulness of Viewing and Distributing Child Pornography", *Psychiatry, Psychology and Law*, vol. 23, no. 2, pp. 224–239.

Prichard, J, Watters, P, Krone, T, Spiranovic, C, and Cockburn, H (2015), "Social Media Sentiment Analysis: A New Empirical Tool for Assessing Public Opinion in Crime?", *Current Issues in Criminal Justice*, vol. 27, no. 2, pp. 217–23.

Pringle, H (2013), "Cartoon Wars: The Interpretation of Drawn Images", in R Frances and D Bandyopadhyay (eds.), *Remapping the Future: History, Culture and Environment in Australia and India,* Cambridge Scholars Publishing, Newcastle, pp. 114–127.

Prynne, M (2013), "Virtual girl 'Sweetie' Catches Thousands of Paedophiles", *The Telegraph (UK),* 6 November, available online, <http://www.telegraph.co.uk/news/uknews/crime/10429608/Virtual-girl-Sweetie-catches-thousands-of-paedophiles.html>.

Pursel, W.L (1998), "Computer-Generated Child Pornography: A Legal Alternative", *Seattle University Law Review,* vol. 22, no. 2, pp. 643–665.

Quayle, E (2008), "Online Sex Offending: Psychopathology and Theory", in D Laws and T O'Donohue (eds.) 2nd edn., *Sexual Deviance: Theory, Assessment, and Treatment,* The Guilford Press, New York, pp. 439–458.

Quayle, E, and Taylor, M (2001), "Child-Seduction and Self-Representation on the Internet", *Cyberpsychology & Behavior,* vol. 4, no. 5, pp. 597–608.

Quayle, E, and Taylor, M (2002), "Paedophiles, Pornography and the Internet: Assessment Issues", *British Journal of Social Work,* vol. 32, no. 7, pp. 863–875.

Quayle, E, and Taylor, M (2003), *Child Pornography: An Internet Crime,* Routledge, London.

Quayle, E, Erooga, M, Wright, L, Taylor, M, and Harbinson, D (2006), *Only Pictures?: Therapeutic Work with Internet Sex Offenders,* Russell House Publishing, Lyme Regis.

Quayle, E, Loof, L, and Palmer, T (2008), *Children Pornography and Sexual Exploitation of Children Online*, A contribution of ECPAT International to the World Congress III against Sexual Exploitation of Children and Adolescents, Rio de Janeiro.

Quinn, J, and Forsyth, C (2005), "Describing Sexual Behavior in the Era of the Internet: A Typology for Empirical Research", *Deviant Behavior,* vol. 26, no. 3, pp. 191–207.

Quinsey, V.L, and Earls, C.M (1990), "Modification of Sexual Preferences", in W.L Marshall, D.R Laws, and H.E Barbaree (eds.), *Handbook of Sexual Assault,* Plenum Press, New York, pp. 279–295.

Quinsey, V.L, Steinman, C.M, Bergersen, S.G, and Holmes, T.F (1975), "Penile Circumference, Skin Conductance, and Ranking Responses of Child Molesters and 'Normals' to Sexual and Nonsexual Visual Stimuli", *Behaviour Therapy*, vol. 6, no. 2, pp. 213–219.

Raes, K (2001), "Legal Moralism or Paternalism? Tolerance or Indifference? Egalitarian Justice and the Ethics of Equal Concern", in P Alldridge and C Brants (eds.), *Personal Autonomy, the Private Sphere and Criminal Law: A Comparative Study,* Hart Publishing, Oxford, pp. 25–47.

Reeves, C (2013), "Fantasy Depictions of Child Sexual Abuse: The Problems of Ageplay in Second Life", *Journal of Sexual Aggression,* vol. 19, no. 2, pp. 236–246.

Reisman, D (1964), *Abundance for What? And Other Essays,* Garden City, New York.

Reisman, J (1986), "Children in Playboy, Penthouse and Hustler", *Preventing Sexual Abuse*, Summer, p. 6.

Rettinger, L.J (2000), *The Relationship between Child Pornography and the Commission of Sexual Offences against Children: A Review of the Literature,* Department of Justice Canada.

Richards, D (1996), "Elite Interviewing: Approaches and Pitfalls", *Politics,* vol. 16, no. 3, pp. 199–204.

Richards, K (2011), *Misperceptions about Child Sex Offenders*, Trends and Issues in Crime and Criminal Justice No. 429, Canberra.

Richardson, P (2014), "Engaging the Russian Elite: Approaches, Methods and Ethics", *Politics,* vol. 34, no. 2, pp. 180–190.

Riegel, D (2004), "Effects on Boy-Attracted Pedosexual Males of Viewing Boy Erotica", *Archives of Sexual Behavior,* vol. 33, no. 4, pp. 321–323.

Riley, J (2007), "Mill, Liberalism, and Exceptions to Free Speech", in G Newey (ed.), *Freedom of Expression: Counting the Costs,* Cambridge Scholars Publishing, Newcastle, pp. 191–210.

Robinson, K.H (2013), *Innocence, Knowledge and the Construction of Childhood,* Routledge, Oxon.

Rogers, A (2008), Child Pornography's Forgotten Victims", *Pace Law Review,* vol. 28, no. 4, pp. 847–863.

Rokach, A, Nutbrown, V, and Nexhipi, G (1988), "Content Analysis of Erotic Imagery: Sex Offenders and Non-Sex Offenders", *International Journal of Offender Therapy and Comparative Criminology*, vol. 32, no. 2, pp. 107–122.

Romano, A (2014), "A Man's Manga Collection got him Convicted on Child Porn Charges", *Daily Dot,* 20 October, available online, <http://www.dailydot.com/geek/uk-manga-fan-convicted-for-loli-possession/>.

Ross, J (2000), "*R. v. Sharpe* and Private Possession of Child Pornography", *Constitutional Forum,* vol. 11, no. 2, pp. 50–59.

Roth, J, and Flegel, M (2013), "'I'm not a Lawyer but…': Fan Disclaimers and Claims against Copyright Law", *Journal of Fandom Studies,* vol. 1, no. 2, pp. 201–218.

Rush, E, and La Nauze A (2006), *Corporate Paedophilia: Sexualisation of Children in Australia,* The Australian Institute, Discussion Paper 93, Canberra.

Rush, E, and La Nauze A (2006), *Letting Children Be Children: Stopping the Sexualisation of Children in Australia,* The Australian Institute, Discussion Paper 93, Canberra.

Russell, D (1993), *Against Pornography,* Russell Publications, California.

Russell, D and Purcell, N (2006), "Exposure to Pornography as a Cause of Child Sexual Victimization", in N Dowd, D Singer, and R Wilson (eds.), *Handbook of Children, Culture, and Violence,* Sage Publications, California, pp. 59–83.

Russell, G (2008), "Pedophiles in Wonderland: Censoring the Sinful in Cyberspace", *Journal of Criminal Law & Criminology,* vol. 98, no. 4, pp. 1467–1500.

Ryder, B (2003), "The Harms of Child Pornography Law", *University of British Columbia Law Review,* vol. 36, no. 1, pp. 101–135.

Said, E.W (1978) *Orientalism,* Pantheon, New York.

Saitō, T (2011), *Beautiful Fighting Girl*, translated by J. K Vincent and D Lawson, University of Minnesota Press, Minneapolis.

Salmon, C (2005), "Crossing the Abyss: Erotica and the Intersection of Evolutionary Psychology and Literary Studies", in J Gottschall and D Wilson (eds.), *The Literary Animal: Evolution and the Nature of Narrative*, Northern University Press, Illinois, pp. 244–258.

Salmon, C (2015), "The Impact of Prenatal Testosterone on Female Interest in Slash Fiction", *Evolutionary Behavioral Sciences,* vol. 9, no. 3, pp. 161–169.

Salter, M (2012), *Organised Sexual Abuse,* Routledge, Oxon.

Sandelowski, M (2001), "Real Qualitative Researchers do not Count: the Use of Numbers in Qualitative Research*", Research in Nursing & Health*, vol. 24, no. 3, pp. 230–240.

Sandelowski, M, Voils, C, and Knafl, G (2009), "On Quantitizing", *Journal of Mixed Methods Research*, 2009, vol. 3, no. 3, pp. 208–222.

Sandin, P (2004), "Virtual Child Pornography and Utilitarianism", *Information, Communication & Ethics in Society,* vol. 2, no. 1, pp. 217–223.

Saul, J (2006), "Pornography, Speech Acts and Context", *Proceedings of Aristotelian Society,* vol. 106, no. 1, pp. 229–248.

Schauer, F (1982), *Free Speech: A Philosophical Inquiry,* Cambridge University Press, Cambridge.

Schmitz, M (2016), "Why It's Time to Ban Pornography", *Sydney Morning Herald,* 30 May, available online, <http://www.smh.com.au/comment/the-case-for-banning-pornography-20160529-gp6vg7.html>.

Schloenhardt, A (2013), *Queensland Criminal Law,* 3rd edn., Oxford University Press, Melbourne.

Schodt, F.L (1986), *Manga! Manga! The World of Japanese Comics,* Kodansha International, Tokyo.

Schodt, F.L (1996), *Dreamland Japan: Writings on Modern Manga,* Stone Bridge Press, California.

Schroeder, L.P (2015), "Around the World: Protecting Victims of Child Pornography in Japan", *Children's Rights Law Journal,* vol. 35, no. 2, pp. 197–199.

Scoccia, D (2000), "Moral Paternalism, Virtue and Autonomy", *Australasian Journal of Philosophy*, vol. 78, no. 1, pp. 53–71.

Scoccia, D (2013), "In Defense of 'Pure' Legal Moralism", *Criminal Law and Philosophy*, vol. 7, no. 3, pp. 513–530.

Scott, J and Cuvelier, S (1987) "Sexual Violence in Playboy Magazine: A Longitudinal Content Analysis", *Journal of Sex Research*, vol. 23, no. 4, pp. 534–539.

Seidman, L.M (1984), "Soldiers, Martyrs, and Criminals: Utilitarian Theory and the Problem of Crime Control", *Yale Law Journal*, vol. 94, no. 2, pp. 315-349.

Seigfried, K.C, Lovely, R.W, and Rogers, M. K (2008), "Self-Reported Online Child Pornography Behavior: A Psychological Analysis", *International Journal of Cyber Criminology,* vol. 2, no. 1, pp. 286–297.

Sengupta, L (2010), "Using Morality to Censor Speech: Justifying Social Conservatism Through Children", *Children's Legal Rights Journal,* vol. 30, no. 4, pp. 30–42.

Sentencing Advisory Council Tasmania (2015), *Sex Offence Sentencing,* Final Report.

Sentencing Advisory Council Victoria (2008), "Sentencing Trends for Knowingly Possess Child Pornography in the Magistrates' Court of Victoria 2004–05 to 2006–07", *Sentencing Snapshot,* Report No. 51.

Sentencing Council (2012), *Sexual Offences Guideline: Consultation,* Sentencing Council (UK).

Seto, M.C (2008), *Pedophilia and Sexual Offending Against Children: Theory, Assessment, and Intervention,* American Psychology Association, Washington.

Seto, M.C (2010), "Child Pornography Use and Internet Solicitation in the Diagnosis of Pedophilia", *Archives of Sexual Behavior,* vol. 39, no. 2, pp. 591–593.

Seto, M.C (2015), "Crossing the Line: Distinguishing Fantasy and Intent in Sexual Crimes", *Medium,* 15 May, available online, <https://medium.com/@MCSeto/crossing-the-line-distinguishing-fantasy-and-intent-in-sexual-crimes-dfe5daf4631b>.

Seto, M.C, Cantor, J.M, and Blanchard R (2006), "Child Pornography Offenses are a Valid Diagnostic Indicator of Pedophilia", *Journal of Abnormal Psychology,* vol. 115, no. 3, pp. 610–615.

Seto, M.C, and Eke, A.W (2005), "The Criminal Histories and Later Offending of Child Pornography Offenders", *Sexual Abuse*, vol. 17, no. 2, pp. 201–210.

Shackel, R (1999), "Regulation of Child Pornography in the Electronic Age: The Role of International Law", *Macarthur Law Review,* vol. 3, pp. 143–176.

Shamoon, D (2004), "Office Sluts and Rebel Flowers: The Pleasure of Japanese Pornographic Comics for Women", in L Williams (ed.), *Porn Studies,* Duke University Press, Durham, pp. 77–103.

Sheldon, K (2011), "What we know about Men who Download Child Abuse Images", *British Journal of Forensic Practice*, vol. 13, no. 4, pp. 221–234.

Sheldon, K and Howitt, D (2007), *Sex Offenders and the Internet,* John Wiley & Sons, West Sussex.

Sheldon, K and Howitt, D (2008), "Sexual Fantasy in Paedophile Offenders: Can Any Model Explain Satisfactorily New Findings from a Study of Internet and Contact Sexual Offenders?", *Legal & Criminological Psychology,* vol. 13, no. 1, pp. 137–158.

Shigematsu, S (1999), "Dimensions of Desire: Sex, Fantasy, and Fetish in Japanese Comics", in J.A Lent (ed.), *Themes and Issues in Asian Cartooning: Cute, Cheap, Mad, and Sexy*, Bowling Green State University Popular Press, Ohio, pp. 127–163.

Shoemaker, D.W (2000), "'Dirty Words' and the Offense Principle", *Law and Philosophy,* vol. 19, no. 5, pp. 545–584.

Siegel, A.E (1956), "Film-Mediated Fantasy Aggression and Strength of Aggressive Drive", *Child Development*, vol. 27, no. 3, pp. 365–378.

Simester, A.P, and Sullivan, G.R (2007), *Criminal Law: Theory and Doctrine,* 3rd edn., Hart Publishing, Oxford.

Simester, A.P, and von Hirsch, A (2002), "Rethinking the Offense Principle", *Legal Theory,* vol. 8, no. 3, pp. 269–295.

Simester, A.P, and von Hirsch, A (2009), "Remote Harms and Non-Constitutive Crimes", *Criminal Justice Ethics,* vol. 28, no. 1, pp. 89–107.

Simester, A.P, and von Hirsch, A (2011), *Crimes, Harms, and Wrongs: On the Principles of Criminalisation,* Hart Publishing, Oxford.

Simpson, B (2009), "Controlling Fantasy in Cyberspace: Cartoons, Imagination and Child Pornography", *Information & Communications Technology Law,* vol. 18, no. 3, pp. 255–271.

Simpson, B (2013), "Challenging Childhood, Challenging Children: Children's Rights and Sexting", *Sexualities,* vol. 16, no. 5/6, pp. 690–709.

Skillen, A (1982), "Offences Ranked: The Williams Report on Obscenity" *Philosophy*, 1982, vol. 57, no. 220, pp. 237–245.

Slane, A (2015), "Legal Conceptions of Harm Related to Sexual Images Online in the United States and Canada", *Child & Youth Services*, vol. 36, no. 4, pp. 288–311.

Slocum, B.G (2004), "Virtual Child Pornography: Does It Mean the End of the Child Pornography Exception to the First Amendment", *Albany Law Journal of Science & Technology,* vol. 14, no. 3, pp. 637–698.

Smith, S.D (2004), "The Hollowness of the Harm Principle", *University of San Diego Public Law and Legal Theory Research Paper Series*, Working Paper No 17.

Smith, S.D (2006), "Is the Harm Principle Illiberal?", *American Journal of Jurisprudence,* vol. 51, no. 1, pp. 1–42.

Smith, M, and Cree, V.E (2014), "Social Work and Pornography: Some Ethical Considerations", *Ethics & Social Welfare,* vol. 8, no. 4, pp. 317–331.

Smolla, R.A (1992), *Free Speech in an Open Society,* Alfred A. Knopf, New York.

Smyth, S (2009), "A 'Reasoned Apprehension' of Overbreadth: An Alternative Approach to the Problems Presented by Section 163.1 of the Criminal Code", *University of British Columbia Law Review,* vol. 42, no. 1, pp. 69–123.

Sorial, S (2012), *Sedition and the Advocacy of Violence: Free Speech and Counter-Terrorism,* Routledge, Oxon.

Sparks, G (2016), *Media Effects Research: A Basic Overview,* 5th edn., Wadsworth, Boston.

Report of the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography, (Juan Miguel Petit), United Nations Commission on Human Rights, E/CN.4/2005/78, 23 December 2004.

Stanley, J (2001), *Child Abuse and the Internet,* Australian Institute of Family Studies*,* NCPC Issue No. 15, available online, <http://www.aifs.gov.au/nch/pubs/issues/issues15/issues15.html>.

Stanley, M (2010), "101 Uses for Boys: Communing with the Reader in Yaoi and Slash", in A Levi, M McHarry, and D Pagliassotti (eds.), *Boys' Love Manga: Essays on the Sexual Ambiguity and Cross-Cultural Fandom of the Genre,* McFarland & Company Inc. Publishers, London, pp. 99–109.

Steel, A (2008), "The Harms and Wrongs of Stealing: The Harm Principle and Dishonesty in Theft", *University of New South Wales Law Journal,* vol. 31, no. 3, pp. 712–737.

Steel, C (2014), *Digital Child Pornography: A Practical Guide for Investigators,* Lily Shiba Press, Virginia.

Stephen, J.M (1874), *Liberty, Equality, Fraternity,* Smith Elder & Co, London.

Sternberg, S (2001), "The Child Pornography Prevention Act of 1996 and the First Amendment: Virtual Antitheses", *Fordham Law Review,* vol. 69, no. 6, pp. 2783–2823.

Steward, I (2013), "Man Sent to Jail for Watching 'Pixie Sex'", *Stuff (NZ),* 21 April, available online, <http://www.stuff.co.nz/national/crime/8577037/Man-sent-to-jail-for-watching-pixie-sex>.

Stewart, J (1997), "If this is the Global Community, We must be on the Bad Side of Town: International Policing of Child Pornography on the Internet", *Houston Journal of International Law,* vol. 20, no. 1, pp. 205–246.

Strasburger, V.C (2004), "Children, Adolescents, and the Media", *Current Problems in Pediatric and Adolescent Health Care,* vol. 34, no. 2, pp. 54–113.

Strikwerda, L (2011), "Virtual Child Pornography: Why Images do Harm from a Moral Perspective", in C Ess and M Thorseth (eds.), *Trust and Virtual Worlds: Contemporary Perspectives,* Peter Lang, New York. pp. 139–161.

Strikwerda, L (2012*),* "When Should Virtual Cybercrime be Brought Under the Scope of the Criminal Law?", in *4th International Conference on Digital Forensics & Cyber Crime*, ICDF2C, Lafayette.

Strikwerda, L (2014), "Should Virtual Cybercrime be Regulated by means of Criminal Law? A Philosophical, Legal-Economic, Pragmatic and Constitutional Dimension", *Information & Communication Technology Law,* vol. 23, no. 1, pp. 31–60.

Strong, S.I (1997), "Romer v. Evans and the Permissibility of Morality Legislation", *Arizona Law Review,* vol. 39, no. 4, pp. 1259–1314.

Strossen, N (1993), "A Feminist Critique of 'the' Feminist Critique of Pornography", *Virginia Law Review,* vol. 79, no. 5, pp. 1099–1190.

Strossen, N (1995), *Defending Pornography: Free Speech, Sex, and the Fight for Women's Rights,* Scribner, New York.

Sullivan, J and Beech, A (2003), "Are Collectors of Child Abuse Images a Risk to Children?", in A MacVean and P Spindler (eds.), *Policing Paedophiles on the Internet,* The New Police Bookshop, London, pp. 11–20.

Sunstein, C.R (1986), "Legal Interference with Private Preferences", *University of Chicago Law Review,* vol. 53, no. 4, pp. 1129–1174.

Sunstein, C.R (1993), "Words, Conduct, Caste", *University of Chicago Law Review,* vol. 60, no. 3/4, pp. 795–844.

Suzuki, K (1998), "Pornography or Therapy? Japanese Girls Creating the Yaoi Phenomenon", in S.A Inness (ed.), *Millennium Girls: Today's Girls Around the World,* Rowman & Littlefield Publishers, Maryland, pp. 243–268.

Suzuki, K (2014), "Beyond Duality and Heteronormativity: Gender Display and Manipulation in Japanese Yaoi/BL Narratives", paper presented at the XVIII ISA World Congress of Sociology, 13–19 July, Yokohama.

Suzuki, T (2001), "Frame Diffusion from the U.S. to Japan: Japanese Arguments Against Pornocomics, 1989–1992", in J Best (ed.), *How Claims Spread: Cross-National Diffusion of Social Problems,* Aldine De Gruyter, New York, pp. 129–146.

Sweeney, J (2013) "Sexting and Freedom of Expression: A Comparative Approach", *Kentucky Law Journal,* vol. 102, no. 1, pp. 103–146.

Svedin, C, Akerman, I, and Priebe, G (2011), "Frequent Users of Pornography. A Population Based Epidemiological Study of Swedish Male Adolescents", *Journal of Adolescence,* vol. 34, no. 4, pp.779–788.

Szerletics, A (2009), "The Theoretical Aspects of Legal Moralism", *Silesian Journal of Legal Studies*, vol. 1, pp. 98–110.

Tabuachi, H (2011), "In Tokyo, a Crackdown on Sexual Images of Minors", *New York Times,* 9 February, available online, <http://www.nytimes.com/2011/02/10/business/global/10manga.html?_r=0>.

Takeuchi, C (2015), "Regulating *Lolicon*: Toward Japanese Compliance with Its International Legal Obligations to Ban Virtual Child Pornography", *Georgia Journal of International and Comparative Law*, vol. 44, no. 1, pp. 195-236.

Tansey, O (2007), "Process Tracing and Elite Interviewing: A Case for Non-Probability Sampling", *Political Science & Politics,* vol. 40, no. 4, pp. 765–772.

Taylor, C (2009), "Art and Moralism", *Philosophy,* vol. 84, no. 3, pp. 341–353.

Templeman, T, and Stinnett, R (1991), "Patterns of Sexual Arousal and History in a 'Normal' Sample of Young Men", *Archives of Sexual Behavior*, vol. 20, no. 2, pp. 137–150.

Ten, C.L (1971), "Paternalism and Morality", *Ratio,* vol. 13, no. 1, pp. 56–66.

Terre des Hommes (2013), "Becoming Sweetie: A Novel Approach to Stopping the Global Rise of Webcam Child Sex Tourism", available online, <https://www.terredeshommes.nl/en/publications/webcam-child-sex-tourism>.

Tess, P.A (2013), "The Role of Social Media in Higher Education Classes (Real and Virtual): A Literature Review", *Computers in Human Behavior,* vol. 29, no. 5, pp. A60–A68.

Thomas, M, and Buckmaster, L (2010), *Paternalism in Social Policy: When is it Justifiable?,* Research Paper No. 8, Parliament of Australia Department of Parliamentary Services, available online, <http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1011/11rp08>.

Thorburn, M (2011), "Constitutionalism and the Limits of the Criminal Law", in R.A. Duff, Lindsay Farmer, S.E. Marshall, Massimo Renzo, and Victor Tadros (eds.), *The Structure of the Criminal Law*, Oxford University Press, Oxford, pp. 85-105.

Thorn, M (2001), "Shojo Manga—Something for Girls", *Japan Quarterly,* vol. 48, no. 3, pp. 43–50.

Thorn, M (2004), "Girls and Women Getting Out of Hand: The Pleasure and Politics of Japan's Amateur Comics Community", in W.W Kelly (ed.), *Fanning the Flames: Fans and Consumer Culture in Contemporary Japan,* State University of New York Press, Albany, pp. 169–186.

Thornhill, T (2012), "'Virtual' Child Pornography 'Could Quell Paedophiles' Sexual Urges', Claim Dutch Sex Therapists", *Huffington Post,* 20 November, available online, <http://www.huffingtonpost.co.uk/2012/11/20/virtual-child-pornography-paedophiles_n_2163908.html>.

Tilley, C.L (2012), "Seducing the Innocent: Fredric Wertham and the Falsifications That Helped Condemn Comics", *Information & Culture: A Journal of History,* vol. 47, no. 4, pp. 383–413.

Tosenberger, C (2008), "Homosexuality at the Online Hogwarts: Harry Potter Slash Fiction", *Children's Literature,* vol. 36, no. 1, pp. 185–207.

Tosenberger, C (2008), "'The Epic Love Story of Sam and Dean': *Supernatural,* Queer Readings, and the Romance of Incestuous Fan Fiction", *Transformative Works*

and Cultures, vol. 1, available online, <http://journal.transformativeworks.org/index.php/twc/article/view/30/36-Subtext>.

Tourangeau, R, and Yan, T (2007), "Sensitive Questions in Surveys", *Psychological Bulletin,* vol. 133, no. 5, pp. 859–883.

Trebilcock, M.J (1993), *Freedom of Contract,* Harvard University Press, Cambridge.

Tresca, D (2014), "Spellbound: An analysis of Adult-Oriented Harry Potter Fanfiction", in K.M Barton and J.M Lampley (eds.), *Fan Culture: Essays on Participatory Fandom in the 21st Century*, McFarland and Co., North Carolina, pp. 36–46.

Tribunella, E.L (2008), "From Kiddie Lit to Kiddie Porn: The Sexualization of Children's Literature", *Children's Literature Association Quarterly,* vol. 33, no. 2, pp. 135–155.

Tushnet, R (1997), "Legal Fiction: Copyright, Fan Fiction, and a New Common Law", *Loyola of Los Angeles Entertainment Law Review,* vol. 17, no. 3, pp. 651–686.

Turner, S (2016), *YAOI Online: The Queer and Affective Practices of a YAOI Manga Fan Community*, PhD Thesis, University of London.

Uidhir, C.M, and Pratt, H.J (2012), "Pornography at the Edge: Depiction, Fiction, and Sexual Predilection", in H Maes and J Levinson (eds.), *Art and Pornography: Philosophical Essays,* Oxford University Press, Oxford, pp. 137–157.

United Families International (2008), *Guide to Family Issues: The Harms of Pornography,* available online, <http://unitedfamilies.org/issues-and-answers/guides-to-family-issues/the-harms-of-pornography/>.

United States Sentencing Commission (2012), *Report to the Congress: Federal Child Pornography Offenses*, available online, <http://www.ussc.gov/news/congressional-testimony-and-reports/sex-offense-topics/report-congress-federal-child-pornography-offenses>.

Van de Mortel, T.F (2008), "Faking It: Social Desirability Response Bias in Self-Report Research", *Australian Journal of Advanced Nursing,* vol. 25, no. 4, pp. 40–48.

Van Mill, D (2012), *Freedom of Speech*, Stanford Encyclopaedia of Philosophy, available online, <http://plato.stanford.edu/entries/freedom-speech/>.

Vega, V, and Malamuth, N.M. (2007), "Predicting Sexual Aggression: The Role of Pornography in the Context of General and Specific Risk Factors", *Aggressive Behavior*, vol. 33, no. 22, pp. 104-117.

Verber, M (2004), "Virtual Child Pornography", *Public Affairs Quarterly,* vol. 18, no. 1, pp. 75–90.

Violence in Cyberspace (2006), *Violence Against Children,* UNCIEF, issue no. 4, available online, <http://www.unicef.org/eapro/VAC_newsletter_04Cyber.pdf>.

von Hirsch, A (1996), "Extending the Harm Principle: 'Remote' Harms and Fair Imputation", in A Simester and A Smith (eds.), *Harm and Culpability,* Clarendon Press, Oxford, pp. 259–276.

von Hirsch, A (2014), "Harm and Wrongdoing in Criminalisation Theory", *Criminal Law and Philosophy*, vol. 8, no. 1, pp. 245–256.

Voon, T (2001), "Online Pornography in Australia: Lessons from the First Amendment", *UNSW Law Journal,* vol. 24, no. 1, pp. 142–170.

Vorde, J.T (2014), "Prohibiting Remote Harms: On Endangerment, Citizenship and Control", *Utrecht Law Review,* vol. 10, no. 1, pp. 163–179.

Wall, D.S (2007), *Cybercrime: The Transformation of Crime in the Digital Age*, Polity Press, Cambridge.

Wall, D.S (ed.) (2009), *Crime and Deviance in Cyberspace,* Ashgate, Surrey.

Wall, D.S, and Williams, M (2007), "Policing Diversity in the Digital Age: Maintaining Order in Virtual Communities", *Criminology and Criminal Justice,* vol. 7, no. 4, pp. 391–415.

Wall, S (2013), "Enforcing Morality", *Criminal Law and Philosophy*, vol. 7, no. 3, pp. 455–471.

Wallace, D, Hedberg, E, and Cesar, G (2014), *The Effects of Survey Mode on Socially Undesirable Responses to Open-Ended Questions: A Mixed Method Approach,* NORC, University of Chicago, available online, <http://www.norc.org/PDFs/Working%20Paper%20Series/WP-2014-003.pdf>.

Wallerstein, S (2007), "Criminalising Remote Harm and the Case of Anti-Democratic Activity", *Cardozo Law Review,* vol. 28, no. 6, pp. 2697–2738.

Warburton, J (2010), "Me/Her/Draco Malfoy: Fangirl Communities and Their Fictions", in S.R Mazzarella (ed.), *Girl Wide Web 2.0: Revisiting Girls, the Internet, and the Negotiation of Identity,* Peter Lang, New York, pp. 117–137.

Ward, T, and Hudson, S.M (2000), "Relapse Prevention: Assessment and Treatment Implications", in D.R Laws, S.M Hudson, and T Ward (eds.), *Remaking Relapse Prevention with Sex Offenders: A Sourcebook,* Sage Publications, London, pp. 102–122.

Warner, K (2010), "Sentencing for Child Pornography", *Australian Law Journal,* vol. 84, no. 6, pp. 384–395.

Watkins, J (1966), "John Stuart Mill and the Liberty of the Individual", *Political Ideas*, in D Thomson (ed.) Watts, London, pp. 161–175.

Watson, M, and Smith, R (2012), "Positive Porn: Educational, Medical, and Clinical Uses", *American Journal of Sexuality Education,* vol. 7, no. 2, pp. 122–145.

Weaver, J (1992), "The Social Science and Psychological Research Evidence: Perceptual and Behavioural Consequences of Exposure to Pornography", in C Itzin (ed.), *Pornography: Women, Violence and Civil Liberties*, Oxford University Press, Oxford, pp. 284–309.

Webb, L, Craissati, J, and Keen, S (2007), "Characteristics of Internet Child Pornography Offenders: A Comparison with Child Molesters", *Sexual Abuse,* vol. 19, no. 4, 449–465.

Welker, J (2006), "Beautiful, Borrowed, and Bent: 'Boys' Love' as Girls' Love in *Shojo Manga*", *Chicago Journals,* vol. 31, no. 3, pp. 841–870.

West, C (2012), "Pornography and Censorship", *Stanford Encyclopedia of Philosophy*, available online <http://plato.stanford.edu/entries/pornography-censorship/>.

White, A (2006), *Virtually Obscene: The Case for an Uncensored Internet*, McFarland & Company, North Carolina.

White, A (2013), "Liberty and Pornography: An Examination of the Use of John Stuart Mill in Pro-Censorship Feminist Arguments", *Journal of Applied Ethics and Philosophy,* vol. 5, no. 1, pp. 18–24.

Wicclair, M.R (1993), "Feminism, Pornography, and Censorship", in J.E White (ed.), *Contemporary Moral Problems,* 4th edn., West Group, Minneapolis, pp. 325–332.

Williams, G (2004), *The Case for An Australian Bill of Rights: Freedom in the War on Terror,* UNSW Press, Sydney.

Williams, K.S (2004), "Child Pornography Law: Does It Protect Children?", *Journal of Social Welfare & Family Law,* vol. 26, no. 3, pp. 245–261.

Williams, K.M, Cooper, B.S, Howell, T.M, Yuille, J.C, and Paulhus, D.L (2008), "Inferring Sexually Deviant Behavior From Corresponding Fantasies", *Criminal Justice and Behavior,* vol. 36, no. 2, pp. 198–222.

Williams, M (2013), "Researcher Proves Wertham Fabricated Evidence Against Comics", *CBLDF,* 13 February, available online, <http://cbldf.org/2013/02/researcher-proves-wertham-fabricated-evidence-against-comics/>.

Williams, M (2013), "The Beginning of the End for Australian Comics Censorship", *CBLDF,* 12 March, available online, <http://cbldf.org/2013/03/the-beginning-of-the-end-for-australian-comics-censorship/>.

Williams, M (2014), "CNN Spectacularly Fails to Understand Manga and Anime", *CBLDF,* 19 June, available online, <http://cbldf.org/2014/06/cnn-spectacularly-fails-to-understand-manga-and-anime/>.

Williams, M (2014), "*Lost Girls* Rated 18+ by New Zealand Government Censors", *CBLDF,* 8 July, available online, <http://cbldf.org/2014/07/lost-girls-rated-18-by-new-zealand-government-censors/>.

Williams, M (2014), "Florida Sheriff Says Soul Eater and Slender Man Directed Teen to Kill", *CBLDF,* 11 September, available online, <http://cbldf.org/2014/09/florida-sheriff-says-soul-eater-and-slender-man-directed-teen-to-kill/>.

Williams, M (2015), "UN Envoy Recommends Japanese Ban on Some Manga and Anime", *CBLDF,* 30 October, available online, <http://cbldf.org/2015/10/un-envoy-recommends-japanese-ban-on-some-manga-and-anime/>.

Wilson, W (2002), *Central Issues in Criminal Theory*, Hart Publishing, Oxford.

Wilson, W (2014), *Criminal Law: Doctrine and Theory,* 5th edn., Pearson Education, Harlow.

Wilson, B, and Toku, M (2003), "Boys' Love, YAOI, and Art Education: Issues of Power and Pedagogy", *Visual Culture Research in Art and Education*, available online, <http://www.csuchico.edu/~mtoku/vc/Articles/toku/Wil_Toku_BoysLove.html>.

Wolak, J, Finkelhor, D, and Mitchell, K (2005), *Child-Pornography Possessors Arrested in Internet-Related Crimes: Findings from the National Juvenile Online Victimization Study*, National Centre for Missing and Exploited Children, available online, <http://www.unh.edu/ccrc/pdf/jvq/CV81.pdf>.

Wolak, J, Finkelhor, D Mitchell, K, and Ybarra, M (2008), "Online 'Predators' and Their Victims", *American Psychologist,* vol. 63, no. 2, p. 111–128.

Wolf, S.C (1988), "A Model of Sexual Aggression/Addiction", *Journal of Social Work & Human Sexuality,* vol. 7, no. 1, pp. 131–148.

Wolfson, S (2012), "Fan Fiction Allows Teenagers to Explore their Sexuality Freely", *The Guardian,* 8 October, available online, <http://www.theguardian.com/commentisfree/2012/oct/07/fan-fiction-teenagers-explore-sexuality>.

Woo, J (2004), "The Concept of 'Harm' in Computer-Generated Images of Child Pornography", *The John Marshall Journal of Computer & Information Law,* vol. 22, no. 4, pp. 717–730.

Wortley, R and Smallbone, S (2006), "Applying Situational Principles to Sexual Offenses Against Children", in R Wortley and S Smallbone (eds.), *Situational Prevention of Child Sexual Abuse*, Criminal Justice Press, New York, pp. 7–35.

Wyre, R (1992), "Pornography and Sexual Violence: Working with Sex Offenders", in C Itzin (ed.), *Pornography: Women, Violence and Civil Liberties*, Oxford University Press, Oxford, pp. 236–247.

Yamoah, E and Dei, D (2015), "Effects of Pornography on Christian Marriage: An Empirical Review", *Global Journal of Arts Humanities and Social Sciences*, vol. 13, no. 1, pp. 1–13.

Yar, M (2010), "Cyber-sex Offences: Patterns, Prevention and Protection", in K Harrison (ed.), *Managing High Risk Sex Offenders*, Willan Publishing, Cullompton, pp. 229–248.

Young, G (2010), "Virtually Real Emotions and the Paradox of Fiction: Implications for the Use of Virtual Environments in Psychological Research", *Philosophical Psychology*, vol. 23, no. 1, pp. 1–21.

Young, G (2013), "Enacting Taboos as a Means to an End; But What End? On the Morality of Motivations for Child Murder and Paedophilia within Gamespace", *Ethics & Information Technology,* vol. 15, no. 1, pp. 13–23.

Young, G and Whitty, M.T (2011), "Should Gamespace be a Taboo-Free Zone? Moral and Psychological Implications for Single-Player Video Games", *Theory & Psychology,* vol. 21, no. 6, pp. 802–820.

Young, J (2005), "Profound Offense and Culture Appropriation", *Journal of Aesthetics and Art Criticism*, vol. 63, no. 2, pp. 135–146.

Zanghellini, A (2009), "Underage Sex and Romance in Japanese Homoerotic Manga and Anime", *Social and Legal Studies,* vol. 18, no. 2, pp. 159–177.

Zanghellini, A (2009), "'Boys' Love' in *Anime* and *Manga*: Japanese Subcultural Production and its End Users", *Continuum,* vol. 23, no. 3, pp. 279–294.

Zariski, A (2014), *Legal Literacy: An Introduction to Legal Studies,* AU Press, Alberta.

Zillmann, D, and Bryant, J (1982), "Pornography, Sexual Callousness and the Trivialisation of Rape", *Journal of Communication,* vol. 32, no. 4, pp. 10–21.

Zillmann, D, and Bryant, J (1988), "Pornography's Impact on Sexual Satisfaction", *Journal of Applied Social Psychology,* vol. 15, no. 5, pp. 438–453.

Zurbriggen, E.L and Yost, M.R (2004), "Power, Desire, and Pleasure in Sexual Fantasies", *The Journal of Sex Research,* vol. 41, no. 3, pp. 288–300.

Australian Legislation

Acts Interpretation Act 1901 (Cth)

Charter of Human Rights and Responsibilities Act 2006 (Vic)

Child Protection (Offenders Registration) Act 2000 (NSW)

Child Protection (Offender Reporting) Act 2004 (Qld)

Child Protection (Offender Reporting and Registration) Act 2004 (NT)

Child Sex Offenders Registration Act 2006 (SA)

Classification (Publications, Films, & Computer Games) Enforcement Act 1995 (Cth)

Classification (Publications, Films, & Computer Games) Enforcement Act 1995 (Tas)

Classification (Publications, Films, & Computer Games) Enforcement Act 1996 (Vic)

Community Protection (Offender Reporting) Act 2005 (Tas)

Community Protection (Offenders Reporting) Act 2004 (WA)

Crimes Act 1900 (ACT)

Crimes Act 1914 (Cth)

Crimes Act 1900 (NSW)

Crimes Act 1958 (Vic)

Crimes Amendment (Sexual Offences) Act 2008 (NSW)

Crimes Amendment (Sexual Offences and Other Matters) Act 2014 (Vic)

Crimes (Child Sex Offenders) Act 2005 (ACT)

Crimes Legislation Amendment (Sexual Offences Against Children) Act 2010 (Cth)

Crimes Prevention Act 1916 (NSW)

Criminal Code Act 1995 (Cth)

Criminal Code 1899 (Qld)

Criminal Code Act 1983 (NT)

Criminal Code Act 1924 (Tas)

Criminal Code Act Compilation Act 1913 (WA)

Criminal Law (Child Exploitation and Dangerous Drugs) Amendment Act 2013 (Qld)

Criminal Law Consolidation Act 1935 (SA)

Customs Act 1901 (Cth)

Human Rights Act 2004 (ACT)

Interpretation Act 1987 (NSW)

Sex Offenders Registration Act 2004 (Vic)

Canadian Legislation

Canadian Charter of Rights and Freedoms, Part 1 of the *Constitution Act 1982*

Criminal Code of Canada (R.S.C, 1985, c. C-46)

United Kingdom Legislation

Coroners and Justice Act 2009 (UK)

Criminal Justice Act 1988 (UK)

Human Rights Act 1998 (UK)

Obscene Publications Act 1959 (UK)

Protection of Children Act 1978 (UK)

United States Legislation

Child Pornography Prevention Act of 1996 (USA)

Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 (PROTECT ACT) (USA)

Japan

Penal Code (Act No. 45 of 1907) (Japan)

Australian Case Law

Anderson v The State of Western Australia [2014] WASCA 137

Attorney-General Queensland v Roles [2015] QSC 223

Australian Capital Television Pty Ltd v Commonwealth (1992) 177 CLR 106

Ball v McIntyre (1966) 9 FLR 237

Bayliss v R [2013] VSCA 70

Beck v NSW [2012] NSWSC 1483

Bennie v R (2009) (unreported case heard at Wagga Wagga Local Court)

BGX v Children's Guardian [2014] NSWCATAD 173

Burbridge v R [2016] NSWCCA 128

CFJ v Children's Guardian [2016] NSWCATAD 62

Clark v R [2008] NSWCCA 122

Colbourn v R [2009] TASSC 108

Colin Nugent (formerly Harry Holland) v The State of Western Australia [2014] WASCA 213

Connolly v Willis [1984] 1 NSWLR 373

Crowe v Graham (1968) 121 CLR 375

Grehan v R (2010) 199 A Crim R 408

Dodge v R [2002] WASCA 286

DPP v Butterfield [2014] VCC 1663

DPP v Cabo [2016] VCC 579

DPP v Davies [2013] VCC 1671

DPP v Gunawardena [2015] VCC 477

DPP v Latham [2009] TASSC 101

DPP v Ward [2014] VCC 314

DPP v Waters [2014] VCC 875

DPP (WA) v Wesley (No 2) [2015] WASC 168

Godfrey v R [2013] WASCA 247

Grehan v R (2010) 199 A Crim R 408

Hampson v R [2011] QCA 132

Hardwick v Western Australia [2011] WASCA 164

Harkin v R (1989) 38 A Crim R 296

He Kaw Teh v R (1985) 157 CLR 523

Hitchen v R [2010] NSWCCA 77

Holland v R [2005] WASCA 140

Hutchins v State of WA [2006] WASCA 258

Isherwood v Tasmania (2010) 20 Tas R 375

James v R [2009] NSWCCA 62

Johnson v Yore [2014] (Magistrates Court of Victoria) (1 October 2014)

Keith v R [2014] NSWCCA 124

Lange v Australian Broadcasting Corporation (1997) 189 CLR 520

Larkins v R [2013] NSWDC 159

Martin v R [2014] NSWCCA 124

McEwen v Simmons & Anor [2008] NSWSC 1292

Minehan v R (2010) NSWCCA 140

Nationwide News Pty Ltd v Wills (1992) 177 CLR 1

Nomikos Papatonakis v Australian Telecommunications Commission (1985) 156 CLR 7

O'Sullivan v R [2015] NSWCCA 329

Pettersen v R [2013] VSCA 185

Phillips v Police (1994) 75 A Crim R 480

Police v Butler [2003] NSWLC 2

Ponniah v R [2011] WASCA 105

Puhakka v R [2009] NSWCCA 290

R v Booth [2009] NSWCCA 89

R v Campbell [2009] QCA 128

R v Carget-Bennett [2010] QCA 231

R v Cargnello [2009] NSWDC 132

R v Carlton (2009) 197 A Crim R 220

R v Carson [2008] QCA 268

R v Clarke [2008] SASC 100

R v Cook; Ex p DPP (Cth) [2004] QCA 469

R v Cowell [2011] NSWDC 249

R v Davis [2012] QCA 324

R v Dennison [2011] NSWCCA 114

R v Gelding [2007] SADC 124

R v Gibb [2009] NSWDC 340

R v Gridley [2013] SASCFC 29

R v Falzon [2015] ACTSC 104

R v Feuerstein [2015] NSWCCA 82

R v Hancock [2011] NTCCA 14

R v Hickey [2011] QCA 385

R v Jarrold [2010] NSWCCA 69

R v Jones [1999] WASCA 24

R v Lanham [2014] ACTSC 128

R v Lewsam [2016] WASCA 60

R v Liddington (1997) 18 WAR 394

R v MBM [2011] QCA

R v McNamara [2014] NTSC 53

R v Pederson [2011] QDC 69

R v Pol (Unreported, District Court of Adelaide, 12 August 2015)

R v Quick [2004] VSC 270

R v Ross [2009] NSWDC 104

R v Shelford [2013] NSWDC 102

R v Tahiraj [2014] QCA 353

R v W (A Child) (2000) 27 SR (WA)

R v Walshe [2016] ACTSC 267

R v Williams [2014] QDC 62

R v XB [2009] VSCA 51

State of Western Australia v Cunningham (2008) 190 A Crim R 430

State of Western Australia v Dallmeyer [2008] WADC 108

Stephenson v State of Western Australia [2010] WADC 160

Taylor v R [2015] TASCCA 7

Traynor v McCullough [2011] TASSC 41

Whiley v R [2010] NSWCCA 53

R v Zarb [2014] VCC 1517

Canadian Case Law

Canada (Human Rights Commission) v Taylor [1990] 3 SRC 892

M.K v R (2010) NBCA 71

R v Austin [2006] BCJ No 3430

R v Beattie (2005) 75 OR (3d) 117

R v B.D. [2008] OJ No. 6040

R v Butler [1992] 1 SCR 452

R v Chin [2005] AJ No. 1712

R v Crone [2009] BCJ No. 2787

R v Dupuis-Gendron [2010] OJ No. 3733

R v Ewing [2007] OJ No. 1710

R v Houston [2008] SKQB 174

R v Keegstra (1990) 61 CCC (3d) 1

R v Mahannah [2013] OJ No. 6330

R v Matheson, Notice of Application, Ontario Court of Justice (2012)

R v Missions (2005) NSCA 82

R v Oakey [2011] ONCJ 404

R v Sharpe (1999) 22 CR (5^{th}) 129

R v Sharpe [2001] 1 SCR 45

R v Stroempl (1995) 105 CCC (3d) 187

R v Zinck [2004] MJ No. 337

Re Paintings, Drawings and Photographic Slides [by Eli Langer], [1995] OJ No. 1045

United Kingdom Case Law

DPP v Whyte [1972] AC 849

Handyside v United Kingdom (1976) 1 EHRR 737

Knuller (Publishing, Printing and Promotions) Ltd v DPP [1973] AC 435

R v Beaney [2004] EWCA Crim 449

R v Brown [1994] 1 AC 212

R v Calder and Boyars Ltd [1969] 1 QB 151

R v Cutler et al. [2011] EWCA Crim 2781

R v H [2005] EWCA Crim 3037

R v Hicklin (1868) LR 3 QB 360

R v Milsom [2011] EWCA Crim 2325

R v Oliver [2003] 1 Cr. App. R. 28

R v Palmer [2011] EWCA Crim 1286

R v Perrin [2002] EWCA Crim 747

R v Ransford (1874) 13 Cox CC 9

R v Smith (Gavin) [2012] EWCA Crim 398

R v Streeter [2012] EWCA Crim 2103

United States Case Law

A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v Attorney General of Massachusetts, 383 U.S. 413 (1966)

American Booksellers Association v Hudnut, 598 F.Supp 1316 (1984)

Ashcroft v Free Speech Coalition, 535 U.S. 234 (2002)

Dunlop v United States, 165 U.S. 486 (1897)

Free Speech Coalition v Reno, 198 F.3d (9th Cir. 1999)

Kaplan v California, 413 U.S. 115 (1973)

Jacobeellis v Ohio, 378 U.S 184 (1964)

Lawrence v Texas, 539 U.S. 558 (2003)

Miller v California, 413 U.S. 15 (1973)

New York v Ferber, 458 U.S 747 (1982)

Osborne v Ohio, 495 U.S 103 (1990)

Paris Adult Theatre I v Slaton, 413 U.S. 49 (1973)

R v Acheson, 195 F.3d 645 (11th Cir. 19999)

Roth v United States, 354 U.S. 476 (1957)

Stanley v Georgia, 394 U.S. 557 (1969)

United States v Extreme Associates, 431 F.3d 150 (3d Cir. 2005)

United States v Farrelly, 389 F 3d 649 (6th Cir. 2004)

United States v Fletcher, No. 06-329 (W.D. Pa. Aug. 7, 2008)

United States v Fox, 248 F.3d 394 (5th Cir. 2001)

United States v Handley, 564 F. Supp. 2d 996 (S.D. Iowa 2008)

United States v Hilton, 167 F.3d 61 (1st Cir. 1999)

United States v Kilmer, 353 F3d 58 (10th Cir. 2003)

United States v Kimbrough, 69 F.3d 723 (5th Cir. 1995)

United States v Koegel, 777 F Supp 2d 1014 (E.D Va. 2011)

United States v Kutzner, No. CR-10-0252-SEJL (D.Id 2010)

United States v McCoy, 678 F. Supp. 2d 1336 (M.D. Ga. 2009)

United States v McCoy, 937 F. Supp. 2d 1374 (M.D, Ga. 2013)

United States v Mees, (2009) No. 4:09CR00145 ERW

United States v Mento, 231 F.3d 912 (4th Cir. 2000)

United States v Platz, 2015 U.S. Dist. LEXIS 80789

United States v Rearden, 349 F 3d 608 (9th Cir. 2003)

United States v Reidel, 402 U.S. 351 (1971)

United States v Runyan, 290 F.3d 223 (5th Cir. 2002)

United States v Ryan, No. 2:07-CR-35, (2009) U.S. Dist. LEXIS 53644

United States v Sluss, 2014 US Dist. LEXIS 8090 (ED Tenn. 2014)

United States v Thirty-Seven Photographs, 402 U.S. 363 (1971)

United States v Thomas, 74 F.3d 701 (6th Cir. 1996)

United States v Valle, 301 F.R.D. 53 (S.D.N.Y. 2014)

United States v Whorley, 550 F.3d 326 (4th Cir. 2008)

United States v Williams, 553 U.S. 285 (2008)

Bills, Parliamentary Debates, and Explanatory Memorandum

Crimes Amendment (Child Pornography and Abuse Material) Bill (No 9) 2010 (NSW).

Explanatory Memorandum, Child Pornography and Exploitation Material and Classification Legislation Amendment Bill 2009 (WA).

Explanatory Memorandum, Criminal Code Amendment (Child Abuse Material) Bill 2004 (Qld).

Explanatory Memorandum, Crimes Amendment (Child Pornography) Bill 2004 (NSW).

Explanatory Memorandum, Crimes Amendment (Child Pornography and Other Matters) Bill 2015 (Vic).

Explanatory Memorandum, Crimes Legislation Amendment (Telecommunications Offences & Other Measures) Bill 2004 (Cth).

Explanatory Memorandum, Criminal Law (Child Exploitation and Dangerous Drugs) Amendment Bill 2012 (Qld).

New South Wales, *Parliamentary Debates,* Legislative Council, 26 November 2008.

Northern Territory, Criminal Code Amendment (Child Abuse Material Bill), Presentation and Second Reading Speech, 10 June 2004.

Queensland, Criminal Law (Child Exploitation and Dangerous Drugs) Amendment Bill 2012, Second Reading Speech, 21 March 2013.

Senate Report (1996), Child Pornography Prevention Act of 1995, Report No. 104-358 (USA).

Western Australia, Child Pornography and Exploitation Material and Classification Legislation Amendment Bill 2009, Second Reading Speech, 24 June 2010.

International Instruments and Materials

Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950, in force 3 September 1953, 213 UNTS 221.

Convention on the Rights of the Child, New York, 20 November 1989, in force 2 September 1990, 1557 UNTS 3.

Council of Europe (2001), *Explanatory Report to the Convention on Cybercrime ETS No. 185,* Budapest.

Cybercrime Convention, Budapest, 23 November 2001, in force 1 July 2004, ETS No. 185.

International Covenant on Civil and Political Rights, New York, December 1966, in force 23 March 1976, 999 UNTS 171.

Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography, New York, 25 May 2000, in force 18 January 2002, 2171 UNTS 227.