The Legal Regulation of Youth Produced Sexual Imagery (YPSI) and the Need for Reform

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Abstract

The sharing of nude and semi-nude imagery (images and videos) between children and young people, often referred to as youth produced sexual imagery (YPSI) or sexting, is a criminal offence in England and Wales.

Child protection legislation (s.1 Protection of Children Act 1978 and s.160 Criminal Justice Act 1988) criminalises all indecent images of anyone below the age of 18, regardless of how they were produced. The aim of this legislation was to prevent the recording of child sexual abuse, the production and distribution of child pornography and to protect children and young people from exploitation by adults. However, the broad nature of the offence means that children and young people who take and share sexual imagery of themselves, even consensually, also fall foul of these provisions.

Concern over the application of these laws to children and young people has resulted in a sizeable and growing body of research examining its legitimacy. In 2016, the Home Office responded by introducing a new way for police officers to classify these crimes: Outcome 21. This option enables police officers to record that a crime has occurred but that no further action is to be taken. This means that the children and young people involved will not receive a formal criminal record. However, it could be still disclosed on an Enhanced Criminal Records Check and is currently being applied and recorded inconsistently across England and Wales. It also fails to tackle the statutory root of the problem – that YPSI is conflated with the documentation of child sexual abuse and that sexual image sharing (by adults and those under 18) is covered by a patchwork of inconsistent, overlapping and incohesive provisions. This thesis argues that, instead, an overhaul of the existing regulatory framework is required to ensure children and young people are adequately protected but not unnecessarily criminalised.

To support this argument, the analysis draws on both criminal law theory, particularly the notions of harm and risk of harm, and on children's rights principles including the best interests principle enshrined in Article 3 of the United Nations Convention of the Rights of the Child (UNCRC). It argues that while YPSI carries its own risks and harms and can be exploitative it is substantially different from the specific set of harms that the Protection of Children Act 1978 (and subsequently s.160 Criminal Justice Act 1978) intended to capture. It further illustrates

why these differences demand legal separation and why the current approach is insufficient in addressing the problems.

This thesis concludes by considering options for amendment and reform. A holistic approach, which considers the psychological harms associated with varying forms of YPSI, the developing nature of the adolescent mind, and the legitimacy and impact of using the criminal law, is adopted. The final recommendations reflect on the arguments submitted throughout the thesis to illustrate how tailored regulation could be framed in a way that identifies and responds to a spectrum of behaviour under the definition of YPSI in a more nuanced way.

List of Terminology and Abbreviations

The table below provides a list of abbreviations used. The first time an abbreviation is used, in the main body of the thesis, it will be written in full, followed by the abbreviation. After this, only the abbreviation is used.

ACPO	Association of Chief Police Officers
CA	Court of Appeal
CAJA	Coroners and Justice Act 2009
CCRF	Canadian Charter of Rights and Freedoms 1982
CEOP	Child Exploitation and Online Protection Command
Children	Individuals aged 0-16
CGI	Computer Generated Image(s)
CJ	Chief Justice
CJA	Criminal Justice and Immigration Act 1988
CJEU	Court of Justice of the European Union
CJCA	Criminal Justice and Courts Act 2015
CJS	Criminal Justice System
CSA	Child Sexual Abuse
CSAI	Child Sexual Abuse Images
CSE	Child Sexual Exploitation
CoP	College of Policing
CPS	Crown Prosecution Service
CRIN	Child Rights International Network
DAA	Domestic Abuse Act 2021
DBS	Disclosure and Barring Service
DfE	Department for Education
DPP	Director of Public Prosecutions
DSL	Designated Safeguarding Lead

ECHR	European Convention on Human Rights
ECRC	Enhanced Criminal Records Check
ECtHR	European Court of Human Rights
FOI	Freedom of Information
GMC	General Medical Council
HC	House of Commons
HOCR	Home Office Counting Rules for Recorded Crime
HL	House of Lords
HRA	Human Rights Act 1998
Lanzarote Convention	The Council of Europe Convention on the Protection of Children Against Sexual Exploitation and Sexual Abuse
LJ	Lord / Lady Justice
MASH	Multi-Agency Safeguarding Hub
MCA	Malicious Communications Act 1988
MCPA	Marriage and Civil Partnership Act (Minimum Age) Act 2022
MPS	Metropolitan Police Service
MoJ	Ministry of Justice
NCRS	National Crime Recording Standard
NPCC	National Police Chiefs' Council
NPPIC	Non-Photographic Pornographic Images of Children
OPSC	Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography
Outcome 21	Police Crime Recording Code
PCA	Protection of Children Act 1978
PCSCA	Police, Crime, Sentencing and Courts Act 2022
PHA	Protection from Harassment Act 1997
SOA	Sexual Offences Act 2003
SCA	Serious Crime Act 2015
UKCIS	United Kingdom Council for Internet Safety
UNCRC	United Nations Convention on the Rights of the Child

USA	United States of America
YJB	Youth Justice Board
YJS	Youth Justice System
WHO	World Health Organisation
Young People	Individuals aged 16 and 17
YPSI	Youth Produced Sexual Imagery

Introduction

For over a decade increasing focus and concern has been placed on children and young people's involvement in creating and sharing private and sexual images and videos (imagery).[1] This behaviour is commonly referred to as sexting. However, because this term also refers to written messages,[2] with which this thesis is not primarily concerned, the alternative term 'youth produced sexual imagery' (YPSI) is used throughout this thesis.

Within this analysis, the definition of a child as set out in Article 1 of the United Nations Convention of the Rights of the Child (UNCRC),[3] as encompassing any person under the age of 18, is adopted.[4] However, for the purpose of this thesis, the term 'children' will be used to describe those aged 15 and under. The term 'young people' will be used to refer to those aged 16 and 17. The reason for this is to distinguish between those above and below the age of sexual consent (16),[5] given that this age distinction is central to the arguments within this research. For the most part, however, the phrase 'children and young people' will be used collectively.

Under the current law in England and Wales all YPSI is a criminal offence. There is no specific YPSI offence, but it is captured by existing legal provisions, predominantly s.1 Protection of Children Act 1978 (PCA). However, the PCA was never intended to be used in this way; it was originally enacted to target the documentation of child sexual abuse (CSA) and the creation of child sexual abuse imagery (CSAI) by adults,[6] but the broad and strict liability nature of the offence means that its remit extends far beyond this.

The rise of the digital age has led to almost ubiquitous use of mobile phones with image and video recording and sharing functionality. As a result, image-sharing has become a common part of modern life, particularly among children and young people. For the most part this is a

[1] One of the first substantive studies exploring youth sexting was carried out in 2009: Amanda Lenhart, 'Teens and sexting, how and why minor teens are sending sexually suggestive nude or nearly nude images via text messaging.' (Pew Internet and American Life Project Research, 15 Dec 2009) <https://www.pewresearch.org/internet/2009/12/15/teens-and-sexting/> accessed 22 August 2022.
[2] The term is defined the Oxford Dictionary of Social Media as: '*sending sexually explicit photographs, videoclips, or text messages to someone, typically via a mobile phone*': Daniel Chandler and Rod Munday, *A Dictionary of Social Media* (OUP 2016).
[3] UNCRC, Article 1 and 34.
[4] Ibid, Article 1.
[5] Sexual offences Act 2003 (SOA), s.9(1)(c)(i).
[6] The Introductory Text to the PCA states that it is: '*An Act to prevent the exploitation of children by making indecent photographs of them; and to penalise the distribution, showing and advertisement of such indecent photographs*.'

positive change, but it has also opened a new avenue for sexual communication. Imagery-sharing platforms are sometimes used to take and share sexual imagery. Among consenting adults, this behaviour is entirely lawful. It is only when such imagery is shared without consent (and with an intent to cause distress) that it becomes a criminal offence.[7] However, for those under 18 even the self-production of sexual imagery is a criminal offence.

This raises several questions and concerns, all of which are discussed throughout this thesis. However, several practical measures have been implemented to reduce the impact of these provisions on children and young people. The UK Council for Internet Safety (UKCIS), in partnership with the National Police Chief's Council (NPCC), have produced comprehensive policy guidance setting out how incidents of YPSI can (and should) be handled by schools and colleges.[8] Further, in 2016, the Home Office gave police officers the ability to formally record that no further action will be taken in entirely consensual instances of YPSI.[9] However, the success of these soft law and practical measures is limited and a continued cause for concern, not least because any association with these offences, even if not prosecuted, could remain on a child or young person's criminal record for life.[10]

Further, irrespective of the practical measures introduced, the current position fails to address two fundamental problems: first, that YPSI (even consensual YPSI) is conflated with the documentation of CSA and child sexual exploitation (CSE); and second that sexual image sharing (by adults and those under 18) is covered by a patchwork of incohesive provisions that are underinclusive and inconsistently applied.[11] Therefore, it is argued that an overhaul of the existing regulatory framework is required. In demonstrating this, the thesis engages with empirical research around YPSI, criminal legal theory responsible for guiding legislators on

[7] Criminal Justice and Courts Act 2015 (CJCA), s.33.
[8] UK Council for Internet Safety (UKCIS), 'Sharing nudes and semi-nudes: Advice for education settings working with children and young people: Responding to incidents and safeguarding children and young people' (UKCIS 2020) <https://www.gov.uk/government/publications/sharing-nudes-and-semi-nudes-advice-for-education-settings-working-with-children-and-young-people/sharing-nudes-and-semi-nudes-advice-for-education-settings-working-with-children-and-young-people> accessed 22 August 2022.
[9] Home Office, 'Crime outcomes in England and Wales: Technical Annex' (July 2020) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/901052/crime-outcomes-technical-annex-july20.pdf> accessed 22 August 2022, 10.
[10] Typically, cautions, as opposed to convictions, can be filtered after two years if the person was under 18 at the time of the offence. This means that the individual does not have disclose it. However, any caution relating to a listed offence is non-filterable, so will be disclosed on a criminal record check. Among these offences are indecent imagery offences under s.1 PCA. Law Commission, *Criminal Records Disclosure: Non-Filterable Offences* (Law Commission No 371, 2017) < https://www.gov.uk/government/publications/criminal-records-disclosure-non-filterable-offences> accessed 22 August 2022.
[11] Law Commission, *Intimate Image Abuse: A Consultation Paper* (Law Commission 253, 26 Feb 2021) < https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2021/02/Intimate-image-abuse-consultation-paper.pdf> accessed 22 August 2022, (Hereafter: Law Commission, IIA) 9, para 1.29.

the conduct that should and should not be a crime, as well as children's rights considerations relating to expression, privacy, autonomy, and best interests.

Thesis outline

The scope of the thesis is limited to England and Wales. However, some of the discussion still refers to other jurisdictions for comparative purposes. In addition, while the final proposals make the case for legislative change within England and Wales, they are worthy of consideration on a more universal scale.

Overall, this thesis serves to answer one overarching question:

> *What are the problems with the current regulation of YPSI in England and Wales, and what is the best solution to tackle these issues?*

In answering this, several fundamental issues and legal concepts are considered and addressed. The thesis offers a critical analysis of the existing legal framework and its operation in practice before turning to consider the theoretical legal principles which regulate the criminalisation of any given conduct. This is then followed by an exploration of children's rights arguments, underpinned by the UNCRC, as well as empirical research concerning the impact of the Criminal Justice System (CJS) on children and young people.

Chapter 1 provides a critical analysis of the current legislative framework governing YPSI in England and Wales and outlines why the existing legal and policy framework is unsuitable for application to YPSI. It discusses the issues caused by the existing legal provisions when applied to the actions of children and young people. Focus is given to the contrasting approaches enshrined in the legislation and in more recent practical guidance. Two main arguments are presented: first, the existing statutory law is outdated and problematic; and second the practical measures introduced to address these issues are ineffective.

Building on the issues identified in chapter 1, chapter 2 explains why academics, practitioners, and regulators must reframe the way they consider, label and handle YPSI behaviours. It discusses existing academic literature on YPSI and crime recording data made available by both the Ministry of Justice (MoJ) and police forces across England and Wales. The analysis suggests that existing information regarding YPSI is inconclusive, and the field is underpinned by contradictory empirical evidence currently responsible for perpetuating problematic regulatory responses to YPSI. The chapter argues that to rectify these issues, several changes

must be made. First, to ensure that accurate prevalence rates for YPSI can be obtained, a universal definition for YPSI and a more standardised methodology for researching these practices must be established. Additionally, to address the shortfalls of current crime data, specific YPSI offences are required, and future criminal justice responses must be applied consistently across police forces.

Chapter 3 explores YPSI in more detail. It explains why YPSI is so different from the type of behaviour that existing legislation intended to capture and argues that the current law which adopts an objective, de-contextualised approach is inappropriate for responding to YPSI. In demonstrating this, the analysis provides a critical examination of the current test for indecency in the context of photographs of children and young people. It then highlights the fundamental differences between YPSI and imagery produced by adults and explains why the existing indecency test cannot be applied to YPSI. It then explores the vast spectrum of behaviours that fall within the definition of YPSI and discusses why they cannot be effectively addressed under the existing legislation but instead necessitate tailored regulation.

Chapter 4 draws on criminal theory to explore the value and effects of legal responses to YPSI and to support the case for a youth-tailored framework. It does so with reference to two key principles of criminal law: criminalisation and fair labelling. The first, and more substantive part of this chapter, addresses criminalisation. It considers the principles which guide legislators in determining the conduct that should, and should not, constitute a crime. In doing so, it examines the possible grounds capable of providing a positive case for criminalisation before turning to discuss countervailing reasons against criminalisation. The second part of this chapter then addresses fair labelling. It considers how the differences between YPSI behaviours and other behaviours regulated by the PCA should be labelled and signalled by law. Three main conclusions are reached. First, all forms of YPSI are fundamentally different to adult-produced indecent imagery of children. They represent different levels and types of harm and wrongdoing. Second, different YPSI behaviours also represent different levels of harm and wrongdoing and are underpinned by differing theoretical rationales. Lastly, all these differences necessitate that YPSI be excluded from the existing legislation and a legal distinction be made between consensual and non-consensual YPSI.

Chapter 5 highlights the disjunction between the current legal response to YPSI and the UK's children's rights obligations at international and domestic level. It considers both consensual and non-consensual YPSI practices, autonomy rights and the best interests principle enshrined

in Article 3 of the UNCRC. Beyond this, it discusses the aim of the youth justice system (YJS) and explores evidence that suggests that any contact with the system leads to stigmatisation and can increase children and young people's risk of reoffending in adulthood. The ongoing physical and psychological development of children and young people is considered, and the analysis suggests that this necessitates an individualised regulatory response to YPSI which accounts for both their vulnerability and impressionability. Overall, the chapter argues that even when harmful behaviour is exhibited, focus should be placed on educational and rehabilitative approaches and, where possible, should be dealt with outside of the CJS.

Chapter 6, the final chapter of the thesis, draws all the arguments from earlier chapters together and offers a possible way forward in regulating YPSI. An overhaul of the existing legislation is suggested which allows for more proportionate responses to YPSI to take place. Underpinning the final proposal is the aim of protecting children and young people from over-sexualisation and sexual exploitation without unnecessarily criminalising them or subjecting them to the CJS. The chapter culminates in a summary of proposed changes, a reflection on the research conducted for this thesis and suggestions for future study.

Chapter 1: A Critical Analysis of the Current Legislative Framework Governing England and Wales

1.1: Introduction

This chapter critically analyses the current legal framework regulating YPSI. As has been outlined in the introduction to this thesis, there is no specific criminal offence of YPSI. Instead, these practices are primarily[1] captured by laws originally enacted to target the documentation of CSA and the creation of CSAI.[2] These offences, termed indecent photographs of children, are set out in s.1 PCA and s.160 Criminal Justice Act 1988 (CJA).

This chapter will highlight the issues caused by these laws when applied to the actions of children and young people. Two main arguments are presented. First, the existing statutory law is outdated and problematic. The current framing of both s.1 PCA and s.160 CJA, which capture all forms of YPSI (both consensual and non-consensual), are inherently flawed. Second, the practical measures introduced to address these issues are ineffective. To reduce the impact of these provisions on those aged under 18, numerous practical measures have been implemented. The UKCIS, in partnership with the NPCC, have produced comprehensive policy guidance setting out how incidents of YPSI can (and should) be handled by schools and colleges.[3] In 2016, the Home Office introduced Outcome 21; a formal recording code which allows police officers to classify that further investigation into a case of YPSI is not in the public interest.[4] This outcome is an alternative to arrest and was introduced as a way for police forces to respond proportionately to incidents of YPSI. However, the success of these practical measures is limited and a continued cause for concern. They rely entirely on the discretion of professional staff to ensure proportionate outcomes are reached. This risks inconsistent application and increased uncertainty.

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[1] As later sections of this thesis will explore, certain types of youth produced sexual imagery (YPSI), largely that which is non-consensual in nature, are captured by other criminal law provisions including CJCA, s.33: Disclosing, or threatening to disclose, private sexual photographs and films with intent to cause distress.
[2] PCA, s.1; CJA, s.160.
[3] UK Council for Internet Safety (UKCIS), 'Sharing nudes and semi-nudes: Advice for education settings working with children and young people: Responding to incidents and safeguarding children and young people' (UKCIS, 2020) <https://www.gov.uk/government/publications/sharing-nudes-and-semi-nudes-advice-for-education-settings-working-with-children-and-young-people/sharing-nudes-and-semi-nudes-advice-for-education-settings-working-with-children-and-young-people> accessed 22 August 2022.
[4] Home Office, 'Crime outcomes in England and Wales: Technical Annex' (July 2020) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/901052/crime-outcomes-technical-annex-july20.pdf> accessed 22 August 2022, 10.

Ultimately, the chapter serves to highlight why the existing legal and policy framework is unsuitable for application to YPSI. Focus is given to the contrasting approaches enshrined in the legislation and in more recent practical guidance. The analysis will first explore the legislative position before turning to the practical measures and policy guidelines.

1.2: Current law: Legislative position

The Protection of Children Bill (which subsequently became the PCA) was put before Parliament as a Private Member's Bill in 1978.[5] This Bill was a response to growing public concern and anxiety over the inadequacy of existing legislation, in conjunction with a nationwide investigation into the prevalence of child pornography.[6] Several pieces of legislation touched upon the criminalisation of such indecent material but they fell far short of offering the necessary protection to children and young people.[7] Indeed, research conducted at the time exposed that those who took obscene photographs of children, without assaulting them or touching them, were not being prosecuted.[8] This, therefore, necessitated rapid change and led to the implementation of the PCA.

The PCA's introductory text states that it is: '*An Act to prevent the exploitation of children by making indecent photographs of them; and to penalise the distribution, showing and advertisement of such indecent photographs*.'[9] Originally, in 1978, the Act referred solely to traditional photographs and video recordings.[10] Subsequent amendments have expanded this definition to also include, for example, pseudo-photographs,[11] tracings of photographs, and data that can be converted into an image.[12]

As a result of the PCA, and subsequent amendments, indecent imagery of anyone under the age of 18 is illegal in England and Wales. S.1 PCA states:

> *(1) [Subject to sections 1A and 1B,] it is an offence for a person—*

[5] Protection of Children Bill, HC Deb, 10 February 1978, vol 943, cols 1826-922. (Hereafter: Protection of Children Bill) 1828.
[6] Ibid, cols 1828-1829.
[7] Indecency with Children Act 1960, Obscene Publications Acts of 1959 and 1964, Children and Young Persons (Harmful Publications) Act 1955 and the Sexual Offences Act 1956.
[8] Protection of Children Bill, (n5) col 1834.
[9] PCA, Introductory Text.
[10] Ibid, s.7(2).
[11] These are images which are not photographs but appear to be: PCA, s.7(7).
[12] Criminal Justice and Public Order Act 1994, s.84(2)(a); Criminal Justice and Immigration Act 2008, s.69(3).

(a) to take, or permit to be taken [or to make], any indecent photograph [or pseudo-photograph] of a child; or

(b) to distribute or show such indecent photographs [or pseudo-photographs]; or

(c) to have in his possession such indecent photographs [or pseudo-photographs], with a view to their being distributed or shown by himself or others; or

(d) to publish or cause to be published any advertisement likely to be understood as conveying that the advertiser distributes or shows such indecent photographs [or pseudo-photographs], or intends to do so.

Further, s.7(6) PCA states that a child is anyone under 18. Moreover, s.160 CJA, which extends the law to include possession, states:

(1) [Subject to section 160A,] it is an offence for a person to have any indecent photograph [or pseudo-photograph] of a child . . . in his possession.

Together, these child protection laws make it a criminal offence to take, permit to take, distribute, or possess any indecent imagery of anyone under 18, regardless of how, why, or by whom, it was produced.

In many countries, including the United States of America (USA), these offences are referred to as child pornography.[13] However, this terminology has been considered problematic because it '*dismisses the impact on the child in the image*'.[14] In England and Wales, this material is instead referred to as indecent photographs of children.[15] When enacting the PCA, emphasis was placed on the '*fundamental difference between the problems of pornography as generally conceived'* and the problems being addressed by the Bill.[16] Indeed, the debate around pornography is centred upon the effect on the *consumer* of the material. Whereas, when children and young people are being depicted, '*we are concerned not with the consumer of pornography but solely with the children used in the production of pornography. That is a fundamental and totally different point*.'[17] Indeed, during the passing of the original Bill, Reverend Ian Paisley stated:[18]

[13] 18 US Code § 2251- Sexual Exploitation of Children (Production of child pornography).
[14] Jennifer Martin, '"It's Just an Image, Right?": Practitioners' Understanding of Child Sexual Abuse Images Online and Effects on Victims' (2014) 35(2) Child & Youth Services 96, 102.
[15] PCA, s.1; CJA, s.160.
[16] Protection of Children Bill, (n5) cols 1853-54.
[17] Ibid, cols 1853-54.
[18] Ibid, cols 1866-7.

> *The House should keep before it the fact that we are dealing with the welfare of the child. This is not a debate on pornography per se; it is a debate on the taking of a child and the ruining of it for financial purposes so that the child's future is so twisted and warped that it is destroyed in time and eternity.*

Ultimately, the PCA sought to address a unique and pressing issue in the context of CSE.

However, regardless of the terminology, CSE is not the only activity that these laws now capture. The broad wording of the statute, and the decision not to exclude self-production from its remit, means that children and young people who photograph themselves or their peers, even consensually, are also in breach of these laws. This is hugely problematic for reasons outlined below.

At the time of enaction, in 1978 (and 1988 for s.160 CJA), camera phones, instant messaging and the notion of digital sexual image sharing were not in existence, nor were they anticipated. However, the technological advances of the 21st Century have led to a fundamental shift in the way we communicate, and the ability to produce and share digital content. As a result, instant electronic image-sharing has become a part of many people's everyday lives. While this is, for the most part, unproblematic, it has led to the development of children and young people taking and sharing sexual imagery of themselves. This is occurring more routinely year on year.[19] This new form of online sexual behaviour creates a multitude of legal and societal problems. Not least, the risk of criminal sanction. S.1 PCA and s.160 CJA criminalise all indecent images of children regardless of how they were produced. Thus, sexual images created and shared between teenagers fall within this definition. As a result, child protection laws, that were originally intended to prohibit and protect against a very particular category of crimes (CSE and CSA), are now also responsible for criminalising an entirely different category of behaviour (the sharing of sexual imagery between children and young people). The following section explores the remit of, and problems associated with, these offences, specifically in relation to their application to children and young people.

1.2.1: Scope of s.1 PCA and s.160 CJA

[19] Sheri Madigan and others, 'Prevalence of Multiple Forms of Sexting Behavior Among Youth a Systematic Review and Meta-Analysis' (2018) 172(4) JAMA Pediatrics 327.

The law criminalises any indecent image of an under 18. However, the term indecent was not defined in the PCA or the CJA. Instead, its meaning is a matter for a jury or magistrate to decide based on the standards of '*right-thinking members of society*'.[20] It is an objective standard,[21] which does not involve any consideration of the circumstances in which the image was taken.[22] The only relevant matters are the image itself[23] and the age of the child depicted.[24] This strict liability position was confirmed by Lady Justice (LJ) Rafferty in the Court of Appeal (CA) case of *R v DM*[25] (discussed later at 1.2.4) where she states that the '*circumstances in which the photograph was taken and the motivation for taking or making it*' are not relevant and introducing this subjectivity would diminish the protection that the PCA currently maintains.[26] Thus, in respect of indecent image offences, the prosecution is only required to prove 3 things, beyond reasonable doubt:[27]

I. That the [defendant] deliberately and intentionally took the photographs.

II. That at the time the photograph was taken [the victim] was under 18.

III. That the photograph under consideration was indecent.

While the aim of this objective approach – to offer the highest level of protection to children - is commendable, the result is a simultaneously over and under-inclusive offence.

The current assessment of indecency does not include otherwise innocuous photographs which are used in an exploitative manner, such as someone who photographed children and / or young people playing in the park and later used it for sexual gratification. On the other hand, it could criminalise imagery taken solely for artistic purposes. This can be best demonstrated by two key cases: *R v Graham-Kerr*[28] and *R v Owen*.[29] In the first, an adult defendant took a photograph of a young boy at a naturist swimming pool. He admitted to using the image for his own sexual gratification. However, because the only test for the Court was whether the image itself was indecent – and a boy playing in the pool was deemed not to be indecent – he

[20] *R v Stamford* [1972] 2 QB 391; *R v Graham-Kerr* [1988] 1 WLR 1098.
[21] *R v Neal* [2011] EWCA Crim 461: A recorder had erred in directing the jury that their opinion of whether the photographs were indecent was important. It was held on appeal that an objective test must be applied.
[22] *Graham-Kerr* (n20).
[23] Ibid.
[24] PCA, s.2(3): The age of a child is a finding of fact for the jury based on the evidence as a whole.
[25] *R v DM* [2011] EWCA Crim 275, para 37.
[26] Ibid.
[27] Ibid, para 19.
[28] *Graham-Kerr* (n20).
[29] *R v Owen* [1988] 1 WLR 134.

was acquitted.[30] By contrast, in the second case, the defendant photographer took a partially nude photograph of a teenage girl for a modelling shoot. The image was deemed to be provocative and because the girl was a child (14) it constituted an indecent photograph of a child.[31] The defendant's state of mind, and his argument that the girl appeared much older than 14, were deemed irrelevant. Unlike other sexual offences,[32] the defendant's belief (reasonable or otherwise) that the child is above the age of consent, is immaterial. The only relevant factor is the image itself and the actual age of the child.[33]

There are compelling reasons why both images should constitute a criminal offence. For example, the risk of exploitation and abuse of power that could have occurred in both types of scenarios. In *R v Smethurst*[34] the Court observed that:[35]

> *The difficulty is that the [1978] Act is designed to protect children from being exploited. Unless there is a prohibition against the taking of indecent photographs, there is no way in which the children can be protected from being exploited*.

Framing the offence in this way avoids the lack of clarity that other offences, such as rape, have.[36] It removes the prosecution's evidential burden (proving a lack of consent beyond reasonable doubt) which is documented to cause serious emotional harm and distress to the victim and to result in low conviction rates.[37] However, the objective nature of the test means that the type of material that could be in breach of this legislation is extensive.

Case law suggests that, in relation to imagery of children, the term 'indecent' is synonymous with 'sexual', in the sense that anything that is sexual will fall under the scope of the offence.[38] Similarly, recently updated police guidance (December 2020) states that any '*nude or semi-nude sexual posing e.g. displaying genitals and/or breasts or overtly sexual images of young people in their underwear*' is likely to meet the indecency threshold.[39] Thus, any potentially sexual or suggestive imagery of an under 18 will constitute an offence, even if the subject is over the age of sexual consent (16) and fully and freely consents to it being taken.[40] It will,

[30] *Graham-Kerr* (n20).
[31] *Owen* (n29).
[32] For example, SOA, s.9(1)(c)(i).
[33] PCA, s.2(3): The age of a child is a finding of fact for the jury based on the evidence as a whole.
[34] *R v Smethurst* [2002] 1 Cr Ap R 6.
[35] Ibid, para 22.
[36] SOA, s.1.
[37] Jennifer Temkin, *Rape and the Legal Process* (2nd edn, OUP 2003), ch 4.
[38] *Graham-Kerr* (n20); *Owen* (n29), *R v Oliver* [2003] 1 Cr App R 28.
[39] UKCIS (n3) s.1.7.
[40] Consent as defined under SOA, s.74-76.

inevitably, include imagery produced by young people as part of what are otherwise lawful sexual relationships, such as two 16-year-old teenagers who are engaging in consensual physical sexual activity. This blanket prohibition is not necessarily unlawful, provided it pursues a legitimate aim,[41] but the current framing of the offence is problematic. The reasons for this are addressed below.

1.2.2: Issues of strict liability

Under the current law, the perpetrator of an indecent image offence can simultaneously be the victim. This is because the current law does not exclude self-production from within its remit. Therefore, even if a teenager takes and sends a nude or semi-nude image of themselves to someone they are engaged in a romantic or sexual relationship with, and they do so willingly without any coercion, they are committing a criminal offence. They are deemed, by law, to be the creators of an indecent image and are simultaneously both the victim and the perpetrator of the crime. In fact, it has been reported that children as young as 4 have been investigated for their involvement in an indecent imagery offence and have been listed as suspects on police databases despite being below the age of criminal responsibility (10 in England and Wales).[42]

This position / sanction is unique to indecent imagery. Other laws, governing alternative sexual offences involving children, specifically distinguish between those who are under and over 18. For example, s.15A Sexual Offences Act 2003 (SOA), an offence brought in by s.67 of the Serious Crime Act 2015 (SCA), and supplemented by new sentencing guidelines effective from July 2022,[43] prohibits sexual communication with a child. The offence clearly states that it can only be committed by those aged 18 or over. The provision sets out that:[44]

> *(1) A person aged 18 or over (A) commits an offence if—*

[41] Prohibitions must address a '*pressing social need*' in a manner which is '*proportionate to the legitimate aim pursued*': *Olsson v Sweden (No 1) A 130* (1988) 11 EHRR 259, para 67.
[42] Josh Halliday, 'Thousands of children under 14 have been investigated by police for sexting' *The Guardian* (30 Dec 2019) < https://www.theguardian.com/society/2019/dec/30/thousands-of-children-under-14-have-been-investigated-by-police-for-sexting> accessed 22 August 2022.
[43] Sentencing Council, 'Sexual communication with a child' (Sentencing Council, 1 July 2022) <https://www.sentencingcouncil.org.uk/offences/crown-court/item/sexual-communication-with-a-child/> accessed 22 August 2022.
[44] SOA, s.15A(1).

(a) for the purpose of obtaining sexual gratification, A intentionally communicates with another person (B),

(b) the communication is sexual or is intended to encourage B to make (whether to A or to another) a communication that is sexual, and

(c) B is under 16 and A does not reasonably believe that B is 16 or over.

Updated Sentencing Council guidelines make clear that sexual communication (for the purpose of this offence) includes soliciting or sharing images, for which the offender could face up to two years in custody.[45] However, the phrasing of this offence makes clear that it can only be committed by those over 18. Thus, although a child or young person could fall foul of s.1 PCA for sharing sexual *imagery*-based content, sexual communication that is restricted to *written* content would not be illegal because it is not captured by s.1 PCA (as this only covers visual content) or s.15A SOA (as this does not apply to those under 18). The exception to this would be if the communication was deemed to be malicious or obscene, in which case it could be captured by various communication offences.[46]

Other sexual offences, even those which do criminalise children and young people, also distinguish between under and over 18s. For example, s.9 SOA criminalises anyone aged 18 or over if they intentionally touch a minor in a sexual way. The offence stipulates that:[47]

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

(a)he intentionally touches another person (B),

(b)the touching is sexual, and

(c)either—

(i)B is under 16 and A does not reasonably believe that B is 16 or over, or

(ii)B is under 13.

Unlike s.15A, this offence is also criminal if perpetrated by a someone under the age of 18. However, under 18s are categorised under a different section of the Act (s.13). The SOA recognises that, for this type of crime, defendants who are under 18 may be less culpable than

[45] Sentencing Council, 'Sexual communication with a child' (n43).
[46] For an overview of the law relating to malicious and obscene communications, see: CPS, 'Obscene Publications' (CPS, Jan 2019) <https://www.cps.gov.uk/legal-guidance/obscene-publications> accessed 22 August 2022.
[47] SOA, s.9(1).

those aged 18 and over. The explanatory notes attached to s.13 state that: '*the purpose of this section is to provide a lower penalty where the offender is aged under 18*.'[48] They also confirm that it may not be in the public interest to prosecute under 18s for this offence and that consideration should be given to factors such as:[49]

> *The ages of the parties; the emotional maturity of the parties; whether they entered into a sexual relationship willingly; any coercion or corruption by a person; and the relationship between the parties and whether there was any existence of a duty of care or breach of trust.*

In addition, the corresponding sentencing guidelines reiterate the '*principal aim of the youth justice system (to prevent offending by children and young people); and the welfare of the young offender*.'[50] This is in stark contrast to the notes and guidelines linked to s.9 (the same offence but committed by someone 18 or over) which makes clear that '*whether or not the child consented to the activity is irrelevant*.'[51] This is a clear example of the law acknowledging that behaviour between two or more children / young people is not always exploitative and should be treated differently from behaviour between an adult and a child. This concept is explored in greater depth in chapter 5 (s.5.1 and 5.2). However, s.1 PCA and s.160 CJA do not follow this trend. Instead, a strict liability position is adopted which captures all offenders, irrespective of age. As a result, the offence sits out of line with the criminal law's regulation of other comparable sexual offences.

1.2.3: Age of consent

One further distinction between indecent imagery offences and other sexual offences revolves around the age of consent. In England and Wales, the age of consent for sexual activity is, by and large, set at 16.[52] There are exceptions such as when one party is in a position of trust.[53] However, in most circumstances the age at which a child can lawfully engage in sexual activity

[48] Ibid, Explanatory notes, s.13.
[49] Ibid.
[50] Sentencing Council, 'Sentencing Children and Young People' (Sentencing Council, 1 June 2017) < https://www.sentencingcouncil.org.uk/overarching-guides/magistrates-court/item/sentencing-children-and-young-people/> accessed 22 August 2022.
[51] SOA, Explanatory notes, s.9.
[52] Ibid, s.9(1)(c)(i).
[53] Ibid, s.16-20.

is 16. Conversely, to take, permit to be taken, or send a sexual image of yourself you must be 18. This creates disparity between online and offline behaviour and stands as a direct challenge to young people's sexual autonomy and freedom of expression (explored further in chapter 5, s.5.3.2).[54]

The two main provisions, in relation to indecent imagery of children are s.1 PCA and s.160 CJA. The PCA concerns the production and sharing of imagery whereas the CJA relates solely to possession. Originally, under both Acts, a child was defined as anyone under 16, in line with the age of (sexual) consent. However, in 2004, the age of a child under both the PCA and CJA was raised from under 16s to under 18s.[55] Meanwhile, the age of consent for physical sexual activity remained at 16. The change in age for imagery-based offences aimed to provide additional protection to 16 and 17-year-olds who could be at risk of exploitation.[56] During the passing of the Sexual Offences Bill, Members of Parliament (MPs) acknowledged that the change was necessary to meet the United Kingdom's (UK) international obligations.[57] These obligations included the European Union (EU) Council Framework decision on combating the sexual exploitation of children and child pornography,[58] the UNCRC,[59] and the Optional Protocol to the UNCRC on the sale of children, child prostitution and child pornography (OPSC).[60] All of these legal instruments require that *all* children be offered protection from all forms of sexual exploitation up to the age of 18. Therefore, raising the age of a child, for the purposes of indecent imagery, seemed to be a logical, and arguably necessary, way to bring domestic law in line with international obligations.

For the most part, this change was positive. It increased the level of protection afforded to all children and young people, even those who may be mature enough to consent to physical sexual activity but may not be mature enough to navigate the complexities of the digital environment.

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[54] These notions are also discussed at length in Alisdair Gillespie 'Adolescents, Sexting and Human Rights' (2013) 13(4) Human Rights Law Review 623, 631-639.
[55] SOA, s.45.
[56] Home Office 'Guidance on Part 1 of the Sexual Offences Act 2003' (Home Office, 29 March 2004) <https://webarchive.nationalarchives.gov.uk/20130126151149/http://www.homeoffice.gov.uk/about-us/corporate-publications-strategy/home-office-circulars/circulars-2004/021-2004/> accessed 22 August 2022.
[57] Sexual Offences Bill [Lords], HC Deb 18 September 2003, cols 247-258 (Hereafter: Sexual Offences Bill [Lords]), col 248.
[58] EU Council Framework Decision 2004/68/JHA on combating the sexual exploitation of children and child pornography, Article 1(a). Now replaced by Directive 2011/92/EU of 13 December 2011 on combatting the sexual abuse and sexual exploitation of children and child pornography [2002] OJ L 335/1.
[59] UNCRC, Articles 1 and 34.
[60] Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (OPSC) A/RES/54/263 of 25 May 2000, Article 2(c). The Optional Protocol was signed by the United Kingdom of Great Britain and Northern Ireland on 7 Sep 2000 and ratified on 20 Feb 2009.

However, by increasing the pool of individuals who could be a potential victim under these provisions, it also expanded the pool of individuals who could be perpetrators. Unlike other sexual offences, no distinction,[61] or exception,[62] is available to those under the age of 18 who choose to engage in this behaviour. As a result, 16-17-year-olds can lawfully engage in physical sexual activity but cannot record that activity or take / send a sexual image of themselves.

Despite the disparity, the amendment received very little public comment[63] and was unanimously welcomed in the House of Lords (HL).[64] Recognition was given by MPs to the fact that imagery is considerably different from physical sexual activity, not least because of its permanent nature and the potential consequences of the imagery being shared beyond the intended recipient.[65] Focus was also given to the view that young people, as well as children, need to be protected from themselves (as well as others),[66] a concept that had already been highlighted in the original passing of the Bill:[67]

> *Parliament must reserve to itself the right to act on behalf of and in defence of our children…[Children] cannot possibly anticipate or evaluate the consequences of involvement in child pornography.*

Moreover, in defence of the age disparity, MP Sandra Gidley, stated that indecent imagery concerns wider issues than sexual activity and '*as soon as a picture has been placed on the internet, a 16 or 17-year-old may bitterly regret the decision to consent*.'[68] She went on to confess: '*I would not like to have some of the decisions I made at that age to be with me for the rest of my life*.' Thus, the prevailing rationale for raising the age of consent to 18 (besides reconciling domestic law with international law) seems to have been grounded in preventing the risk of wider distribution.[69]

While the higher age of consent was widely accepted in Parliament, academics were more critical of the change. Gillespie noted that it is problematic to allow 16 or 17-year-olds to give consent to physical sexual activity (with as many partners as they like) but not to taking an

[61] For example: SOA, s.13 which sets out a separate section for under 18s for engaging in sexual activity with a child.
[62] For example: SOA, s.15A which excludes under 18s from being potential offenders.
[63] Alisdair A Gillespie, 'Child Pornography' (2018) 27(1) Information & Communications Technology Law 30, 32.
[64] Sexual Offences Bill [Lords] (n57) cols 247-49.
[65] Ibid, col 247.
[66] Ibid, col 247.
[67] Protection of Children Bill, (n5) col 1908.
[68] Sexual Offences Bill [Lords] (n57) col 247.
[69] Ethel Quayle and Max Taylor, *Child Pornography: An Internet Crime* (Routledge 2003) 24.

intimate photograph of their body.[70] He argued that both online and offline sexual activity should have the same age limit. This would offer consistency and clarity.

Similarly, a look across to approaches in medical law also casts doubt over the proportionality of the blanket ban on all YPSI. In medical law, individuals aged 16 and 17 are presumed to have sufficient capacity to consent to medical treatment.[71] Their consent is valid even if it contradicts their parent's or guardian's wishes. For those under 16, if they can demonstrate enough intelligence, competence and understanding regarding their treatment, they are also able to consent.[72] Thus, a lower age limit and much more nuanced approach to children and young people's evolving capacity is adopted in this context.[73] Yet, in the CA (*R v DM*)[74] the permanent higher age limit (18) was deemed to be a necessary and proportionate measure in protecting children from sexual exploitation (explored further at 1.2.4).[75] Therefore, while the evolving capacity of children and young people is acknowledged, regarding medical treatment and physical sexual activity, at least on some level, no such allowances are made for YPSI.

1.2.4: Statutory defences

Despite the PCA and CJA stating resolutely that all indecent imagery of under 18s is illegal, they do provide limited statutory defences.

The first defence is reserved for law enforcement officers and other professionals who are required to access indecent images of children as part of criminal proceedings.[76] The second was created for individuals who are at least 16 and are married (or in a civil partnership) and / or living together as part of an enduring family relationship.[77] This was brought in by s.45 of

[70] Gillespie, 'Child Pornography' (n63) 32.
[71] General Medical Council (GMC), 'Ethical Guidance: 0-18 Years: Making Decisions' (GMC) <https://www.gmc-uk.org/ethical-guidance/ethical-guidance-for-doctors/0-18-years/making-decisions> accessed 22 August 2022.
[72] *Gillick v West Norfolk and Wisbech AHA* [1985] UKHL 7.
[73] However, the approach to medical treatment for minors is far more complex than this discussion indicates. For the most part, the current approach appears to only allow children and young people to make decisions that coincide with the doctor's view of the patient's best interests. Therefore, where a child or young person refuses treatment that is deemed (by professionals) to be in their best interests, the child or young person's refusal is overridden. See, for example: *Re E (A minor) (Wardship: Medical Treatment)* [1993] 1 FLR 386; *Re W (A Minor) (Medical Treatment: Court's Jurisdiction)* [1993] Fam 64; *E & F (Minors: Blood Transfusions)* [2021] EWCA Civ 1888.
[74] *R v DM* (n25).
[75] Ibid, para 37-38.
[76] PCA, s.1B.
[77] Ibid, s.1A.

the SOA, alongside the raising of the age of a child from 16 to 18. However, this defence now stands on tenuous ground. The Government's recent decision to raise the minimum age of marriage (and civil partnerships) from 16 to 18 threatens to make it redundant.[78] The impact of the new law on indecent imagery was not discussed in Parliament. Nevertheless, the fact that no children under the age of 18 will be able to marry (or enter into a civil partnership) implies that there will be a very limited category of people to whom the defence will be available. Namely, those who are still 16 or 17 but are already married and those who are 16 or 17 and satisfy the definition of an enduring family relationship. Despite this, the defence is worthy of examination because it demonstrates Parliament's previous acknowledgement that certain young people should be permitted to exchange sexual imagery. The defence is set out in s.1A PCA. It states:

> *(1) This section applies where, in proceedings for an offence under section 1(1)(a) of taking or making an indecent photograph [or pseudo-photograph] of a child, or for an offence under section 1(1)(b) or (c) relating to an indecent photograph [or pseudo-photograph] of a child, the defendant proves that the photograph [or pseudo-photograph] was of the child aged 16 or over, and that at the time of the offence charged the child and he—*
>
> *(a)were married [or civil partners of each other], or*
>
> *(b)lived together as partners in an enduring family relationship.*

S.160A CJA states that:

> *(1) This section applies where, in proceedings for an offence under section 160 relating to an indecent photograph [or pseudo-photograph] of a child, the defendant proves that the photograph was of the child aged 16 or over, and that at the time of the offence charged the child and he—*
>
> *(a)were married [or civil partners of each other], or*
>
> *(b)lived together as partners in an enduring family relationship.*

The rationale behind this defence was discussed in Parliament during the passing of the Sexual Offences Bill.[79] There was some debate about whether such an exception was necessary. MP

[78] Marriage and Civil Partnership (Minimum Age) Act 2022 (MCPA), which received Royal Assent on 28 April 2022.
[79] Sexual Offences Bill [Lords] (n57) col 247.

Dominic Grieve stated that: '*if we agree that [indecent images are] an undesirable activity, but we accept that adults over the age of 18 must be allowed to do it if they want to*' there is no need for any exceptions for individuals below that age.[80] In his view, '*there is nothing philosophically wrong in providing restrictions on what is permissible with a child under 18*'.[81] The State prevents children and young people from engaging in various forms of behaviour including: purchasing and consuming alcohol and tobacco; gambling; watching certain films and accessing certain content (e.g. pornography). All of these restrictions are underpinned by a need to protect children and young people and are often framed in the context of rights and the best interests of the child.[82] The best interests principle (enshrined in Article 3 UNCRC and explored in chapter 5, s.5.3.5) requires State Parties to '*ensure the child such protection and care as is necessary for his or her well-being*'.[83] Thus, in theory, this logic and overarching principle could be used to enforce a blanket ban on all sexual imagery of under 18s, irrespective of marital status.

However, MP Beverley Hughes explained that the marriage and enduring relationship exception was necessary to '*accommodate the competing imperatives of protecting the privacy of an enduring relationship and of ensuring the maximum protection for children and young people*.'[84] However, this rationale begs the question of why those who are in such a relationship are any less vulnerable or have any greater capacity to consent than those who are not. What is it about a couple who cohabit or have entered a legally binding relationship that makes them more able to consent? The answer, perhaps, for Parliament at least, is less about the capacity of those involved and more about the lower risk of the imagery being disseminated more widely. A key and re-emerging theme that appears to underpin rhetoric on this topic. In addition to preventing the exploitation of children, the PCA's introductory text states that its main aim is to penalise the distribution and showing of indecent imagery.[85] Moreover, in the USA case of *AH v State of Florida* (one of the first cases to deal with electronic sexual image-sharing among children / young people),[86] Judge Wolf argued that in a teenage relationship there can be no expectation that the couple will stay together and therefore there is a significant risk that

[80] Ibid, cols 248 and 251.
[81] Ibid, cols 248.
[82] UNCRC, Article 3.
[83] Ibid, Article 3(2).
[84] Sexual Offences Bill [Lords] (n57) col 249.
[85] PCA, Introductory Text.
[86] *AH v State of Florida* 949 So.2d 234.

one or both parties may share the image more widely when the relationship breaks down. He stated:[87]

> *Minors who are involved in a sexual relationship, unlike adults who may be involved in a mature committed relationship, have no reasonable expectation that their relationship will continue and that the photographs will not be shared with others intentionally or unintentionally.*

On this logic, it is perhaps possible to argue that relationships that demonstrate commitment through cohabitation or a binding legal agreement (marriage / civil partnership) are less likely to break down and thus less likely to result in the imagery being shared beyond the intended recipient. However, such an argument seems tenuous at best and discriminatory at worst. It places misguided faith in marital relationships, especially considering known rates of marital and civil partnership breakdowns.[88] Indeed, the existence of s.33 Criminal Justice and Courts Act 2015 (CJCA; explored further at s.1.3.4) which criminalises the non-consensual distribution of any private sexual material, is evidence that all sharing of sexual imagery, irrespective of age or relationship status, runs a very real risk of being later disseminated more widely.

Moreover, while the *AH v State of Florida* judgement, and the existence of s.1A PCA and s.160A CJA, focuses on the security of commitment it overlooks a greater concern: that marriage and / or cohabitation at 16 or 17 could be an indicator of vulnerability; not evidence of durable, healthy, and committed relationships. This concern has now been recognised and is highlighted by the Marriage and Civil Partnership (Minimum Age) Act 2022 (MCPA), which prevents those under 18 from getting married. The rationale behind the MCPA centred around fears that allowing 16 and 17-year-olds to marry, puts young people at risk of being coerced or forced into early marriage.[89] Thus, while the defence (under s.1A PCA and s.160A CJA) was

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[87] Ibid, para 236.

[88] Between 1972 and 2012 there were at least 100,000 divorces per year in England and Wales. This data would have been available at the time the defence was introduced (by the SOA). In 2020, there were 103,592 divorces granted in England and Wales. Office for National Statistics (ONS), 'Divorces in England and Wales: 2012' (ONS, 6 Feb 2014) < https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/divorce/bulletins/divorcesinenglandandwales/2014-02-06> accessed 22 August 2022; ONS, 'Divorces in England and Wales: 2020' (ONS, 1 Feb 2022) < https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/divorce/bulletins/divorcesinenglandandwales/2020> accessed 22 August 2022.

[89] Hannah Summers, 'Back bill to ban marriage for under-18s in England and Wales, MPs urged' *The Guardian* (6 Oct 2020) <https://www.theguardian.com/global-development/2020/oct/06/back-bill-to-ban-marriage-for-under-18-in-england-and-wales-mps-urged> accessed 22 August 2022.

thought to protect privacy there is a real and inherent risk that it threatens the protection afforded to young people.[90] Also, given the decision to raise the age of consent for indecent imagery was based on protecting *all* children and young people under 18, it is questioned whether a defence which provides, or did provide, an exception for certain young people (married or otherwise) is counterproductive to this aim.

In addition to these fears, during the passing of the Sexual Offences Bill, concerns were also raised over the ambiguity of the phrase '*enduring family relationship*'.[91] Hughes confirmed that the definition would be left for the courts to interpret '*in the light of individual circumstances*' but that only those relationships which can be deemed '*tantamount to marriage*' should succeed.[92] The courts confirmed this approach and provided clarity on this definition in the case of *R v DM.*[93]

It is important to note that the facts of this case (*R v DM*) are far removed from the type of YPSI scenario with which this thesis is primarily concerned (whereby a child or young person takes a photograph of themselves and sends the image to a peer). In fact, this case concerned the alleged rape and non-consensual taking of sexual photographs of a 17-year-old girl (LC) by a 23-year-old male (DM). Despite this, the case is relevant to this analysis because the defendant directly challenged the scope of s.1A PCA. At the CA, LJ Rafferty set out the arguments of both the prosecution and the defence:[94]

> *The Crown's case was that appellant had intercourse with LC whilst she slept, then made a brief video and photographed her while she was undressed. The defence was that he thought her 18 because she had been in a public house drinking alcohol. Intercourse was consensual as was the photography.*

The defendant was acquitted of raping the complainant but was convicted of two counts under the PCA s.1(1)(a) – making indecent photographs of a child. The defence sought to challenge the convictions on the grounds that the enduring relationship defence, listed in S.1A PCA, should be available to the defendant because of their brief sexual encounter:[95]

[90] Sexual Offences Bill [Lords] (n57) col 249.
[91] Ibid, col 248.
[92] Ibid, col 249.
[93] *R v DM* (n25).
[94] Ibid, para 4.
[95] Ibid, para 7.

> *Since [the defence] adduced evidence of consent [DM] would not be guilty unless it were proved that LC did not consent and that he did not reasonably believe she did. A "one night stand" should be caught by s.1A .*

To the contrary, however, the Court held that '*there was no authority for such a bold interpretation*'.[96] On appeal, the defendant raised numerous points in attempt to challenge his convictions. In particular, the defendant sought to argue that his Article 8 (respect for private and family life) and Article 10 (freedom of expression) rights under the European Convention on Human Rights (ECHR) were violated:[97]

> *An unmarried and non-cohabiting 16 or 17 year old has the capacity in law to consent to intercourse but not to the taking of photographs during intercourse, whereas a married or cohabiting counterpart has both. The taking of a consensually given image, following lawful consensual sexual relations cannot require the imposition of criminal liability so as to protect children from sexual exploitation…The argument that such a photograph must be subject to criminal liability so as to prevent future pornographic use is speculative; Articles 8 and 10 are engaged… interference with the Appellant's rights is not necessary in a democratic society for any of the legitimate aims listed in Article 8(2) or 10(2)…and the Appellant's Article 8(2) and 10(2) rights are violated as a consequence of prosecution.*

However, the court rejected these submissions and made its position abundantly clear:[98]

> *The provisions of the 1978 Act are no more than is necessary to accomplish the objective. As our review makes plain the 1978 Act is drafted and interpreted so as to provide an effective protection of children whilst balancing rights under Article 8 of the Convention. Without the prohibition on the taking of indecent photographs there can be no effective protection, and Parliament has identified circumstances in which the taking of such a photograph should not be criminalised. Without the limit to the exception, there cannot be the same degree of certainty about the genuine nature of the commitment in a relationship which can easily be terminated and may be very short-term. A defence which includes a 'brief sexual relationship' would diminish the*

[96] Ibid.
[97] Ibid, para 12.
[98] Ibid, para 37.

protection provided and would risk the re-introduction of issues as to the circumstances in which the photograph was taken and the motivation for taking or making it.

38. The measures with which the court has been concerned are necessary for the prevention of crime, protection of morals and in particular for the protection of children from being exploited: Smethurst. The legislation does not criminalise consensual sexual activity between the Appellant and a child aged 16 or 17, rather the 1978 Act strikes the balance between keeping interference by the State in the private lives of individuals to the minimum and maintaining under the law maximum protection for children from sexual abuse and exploitation.

LJ Rafferty made clear that while imagery taken as part of a marriage (or enduring relationship) should not be criminalised, providing any further exceptions would threaten the underlying aim of the Act – to protect children and young people.

This approach highlights a further separation between the criminal law's approach to imagery and to other forms of sexual activity. Effectively, outside of a very restrictive set of circumstances, which are largely irrelevant now that the age at which a person can marry has been raised to 18, consent is an immaterial factor. However, consent is usually '*the paradigm around which sexual offences are…constructed*'.[99] For most sexual activity, '*consent plays a morally transformative function*'[100] in that, provided there is valid consent, the activity is lawful.[101] Contrastingly, if one party does not consent '*that turns legal sexual relations into those which are criminal*.'[102] Yet, the PCA precludes under 18s from giving valid consent and makes all YPSI criminal.

1.2.5: No valid consent

This presumption - that children and young people cannot consent - is a common theme throughout sexual offences but it primarily applies to children aged under 13 (not under 18). Specifically, the SOA makes clear that a child aged 12 or under cannot, under any

[99] Matt Gibson, 'Deceptive Sexual Relations: A Theory of Criminal Liability' (2020) 40(1) Oxford Journal of Legal Studies 82, 85.
[100] Ibid, 92.
[101] There are exceptions, for example if the activity results in injury that may preclude valid consent: *R v Brown* [1993] 2 All ER 75.
[102] Gibson (n99) 92.

circumstances, lawfully consent to sexual activity.[103] For example, s.5 SOA is termed rape of a child under 13 and reads:

> *(1) A person commits an offence if—*
>
> *(a)he intentionally penetrates the vagina, anus or mouth of another person with his penis, and*
>
> *(b)the other person is under 13.*
>
> *(2) A person guilty of an offence under this section is liable, on conviction on indictment, to imprisonment for life.*

Contrastingly, sexual activity with a child above 13 (but under the age of consent – 16) is set out in s.9 and defined as sexual activity with a child. It is punished less severely than s.5 and if the alleged perpetrator is another minor (s.13) then the explanatory motes make clear that decisions on whether to prosecute are made on a case-by-case basis. The Crown Prosecution Service (CPS) further state that:[104]

> *[I]t is not in the public interest to prosecute children who are of the same or similar age and understanding that engage in sexual activity, where the activity is truly consensual for both parties and there are no aggravating features, such as coercion or corruption.*

However, for indecent imagery, no comparable flexibility (on age and capacity to consent) exists. This, once again, suggests that the law on indecent imagery is out of line with other sexual offences. Yet, there is some, albeit limited, potential for reconciling the law on indecent imagery with other areas of criminal law. This is explored below.

1.2.6: Partial reconciliation with other offences

The preceding discussion has highlighted the disparities between the criminal law's approach to indecent imagery and physical sexual activity. However, the approach to imagery offences

[103] SOA, s.5-8: Rape and other offences against children under 13.
[104] CPS, 'Rape and Sexual Offences: Chapter 2: Sexual Offences Act 2003 - Principal Offences, and Sexual Offences Act 1956 - Most commonly charged offences' (CPS) <https://web.archive.org/web/20150825043714/http://www.cps.gov.uk/legal/p_to_r/rape_and_sexual_offences/soa_2003_and_soa_1956/#a26> accessed 22 August 2022.

does not sit out of line with *all* laws governing sexual behaviour. There are some behaviours and / or circumstances which require both parties to be 18 (not 16 – the age of consent), for example s.16 SOA prohibits sexual activity between a person in a position of trust and a child under 18. The law recognises that the power and influence that an individual in a position of trust (e.g., a school or college teacher) may have over a child or young person demands a higher age threshold. The law also prohibits, for example, paying for the sexual services of anyone below the age of 18 (s.47 SOA). Consent of the child or young person will not constitute a defence to either of these offences.

Naturally, the imbalance of power necessitating the higher age limit for position of trust offences cannot be extended to indecent imagery. The offences themselves do not, necessarily, involve any imbalance of power, for example if the practice occurs as part of an existing sexual or romantic relationship between two young people of a similar age. However, it may be possible to argue that the permanency of a video or photograph, which carries the risks of wider dissemination, warrants a higher threshold than physical sexual activity which, if conducted safely (e.g., using protection to reduce risks of pregnancy and infection), is an inherently private behaviour. Though, the level of maturity required to navigate offline risk and to take the necessary precautions to engage in safe sex practices is arguably comparable to the level of maturity that is required to navigate risk in an online setting. Thus, the rationale for differing age restrictions remains dubious.

However, the aim of the PCA (and s.160 CJA) was to penalise the exercise, encouragement, and facilitation of CSE and CSA.[105] LJ Stocker confirmed that, because of this, the original motivation of the producer is irrelevant. [106] The issue is with the existence of *any* indecent imagery of children and the risk of it falling into wider circulation. Therefore, the most protective measure is to prohibit its initial creation.[107] This rationale, can be seen in various other fields of activity and provides a compelling argument for prohibiting the behaviour. Blanket restrictions aimed at protecting children are also used to prohibit, inter alia, children from purchasing and consuming tobacco and alcohol, gambling and accessing certain content, including pornography.

[105] PCA, Introductory Text. See also: Marie Eneman, 'The New Face of Child Pornography' in M Klang and A Murray, *Human Rights in the Digital Age* (Routledge-Cavendish 2005); Alisdair A Gillespie, 'The Sexual Offences Act 2003: (3) Tinkering With "Child Pornography" (2004) Criminal Law Review 361; Susan M Edwards, 'Prosecuting "child pornography"' (2000) 22 Journal of Social Welfare and Family Law 1.
[106] *Graham-Kerr* (n20).
[107] Ibid.

Taking tobacco as an example, we can see that the regulation focuses entirely on the protection of the child / young person over and above all else. No discussion is given to a child or young person's right to autonomy in a such circumstances. Instead, the restrictions are grounded in public health and the best interests principle (Article 3 UNCRC). For example, the World Health Organization (WHO), in its 2001 report on tobacco and children, stated:[108]

> *Article 3 provides perhaps the strongest foundation for implementing comprehensive tobacco control programs. Because of the enormous potential harm to children from tobacco use and exposure, States have a duty to take all necessary legislative and regulatory measures to protect children from tobacco and ensure that the interests of children take precedence over those of the tobacco industry. Given the overwhelming scientific evidence attesting to the harmful impact of tobacco use on child health, implementing comprehensive tobacco control is not only a valid concern falling within the legislative competence of governments, but is a binding obligation under the Convention.*

Here, minimising harm to the child or young person, provides the rationale behind a total ban on the sale of tobacco to under 18s. Similarly, and perhaps more comparably to the issue of YPSI, the UK's introduction of age-verification laws for accessing pornography are underpinned by the desire to protect children and young people from seeing content '*they're not emotionally ready for*'.[109] Therefore, it seems entirely plausible that such an approach, which focuses solely on the minimisation of harm, could also underpin restrictions on the sharing of YPSI.

However, unlike the sale of tobacco and alcohol to children / young people which is scientifically proven to be harmful,[110] and the exposure to pornography which is associated with harmful sexual behaviour and unrealistic expectations around sexual activity,[111] the harm caused to children and young people who take and send sexual imagery of themselves is

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[108] WHO, 'Tobacco & the Rights of the Child' (WHO Report, 2001) < http://apps.who.int/iris/bitstream/handle/10665/66740/WHO_NMH_TFI_01.3_Rev.1.pdf?sequence=1> accessed 22 August 2022, 17.

[109] Department for Digital, Culture, Media & Sport and Chris Philp MP, 'World-leading measures to protect children from accessing pornography online' (Gov.UK, 8 Feb 2022) <https://www.gov.uk/government/news/world-leading-measures-to-protect-children-from-accessing-pornography-online> accessed 22 August 2022.

[110] The harms caused by early consumption of tobacco, for example, are widely cited: WHO (n108).

[111] Australian Institute of Family Studies, 'The effects of pornography on children and young people: An evidence scan' (Australian Government, Research Report, 2017) <https://aifs.gov.au/sites/default/files/publication-documents/rr_the_effects_of_pornography_on_children_and_young_people_1.pdf> accessed 22 August 2022.

unclear. Crucially, these other blanket restrictions do not conflate the behaviours of children and young people with the heinous crimes of adults who exploit and sexually abuse children and young people. Thus, while it may be entirely legitimate to prohibit the production of *all* indecent imagery of children and young people, it is imperative that imagery taken and shared by and between them is explicitly distinguished from adults who sexually exploit and abuse children and young people.

Ultimately, there are several identifiable issues with the current statutory framework under s.1 PCA and s.160A CJA. The first is the broad spectrum of, and fundamental differences between, behaviours which fall within the remit of these provisions. An adult who films the rape of a child is vastly different from a young person who photographs their own body, yet both constitute an offence on an equal footing under s.1(1)(a) PCA. They may both represent undesirable content (a sexual image of someone under 18),[112] but the type and severity of the offence concerned is vastly different. The second relates to the potential consequences for a child or young person who is arrested and / or convicted of an offence under s.1 PCA or s.160 CJA. If implemented to its fullest extent, a conviction under the PCA could result in imprisonment and the perpetrator being subject to notification requirements.[113] This issue could, theoretically, be addressed through prosecutorial discretion and through sentencing. However, this still involves implicating children and young people in the criminal justice process which can have traumatising and stigmatising effects and, as is discussed below, the effectiveness of these mechanisms is limited.[114]

1.3: Practical approach: School and police responses

The first part of this chapter has detailed the issues with the existing legislative provisions (s.1 PCA and s.160 CJA). Both law enforcement and Government have acknowledged that a direct application of these laws to the behaviours of children and young people would be disproportionate. To address this, numerous measures have been put in place to enable incidents of YPSI to be dealt with in a more appropriate manner. First, policy guidance, updated in 2020, states that the majority of incidents should be handled by schools and colleges

[112] As was argued by MP Dominic Grieve during the passing of the Sexual Offences Bill: Sexual Offences Bill [Lords] (n57) col 248.
[113] PCA, s.6; SOA, Schedule 3, s.13.
[114] Child Exploitation and Online Protection (CEOP), 'ACPO CPAI Lead's Position on Young People Who Post Self-Taken Indecent Images' (CEOP) <https://www.cardinalallen.co.uk/documents/safeguarding/safeguarding-acpo-lead-position-on-self-taken-images.pdf> accessed 22 August 2022, para 2.5.

without involving the police.[115] Thus, many, perhaps most, instances of YPSI will be dealt with without any criminal justice involvement at all.[116] Second, if the police are notified about a particular incident they are obliged to record it as a crime but they are granted significant discretion about how to proceed and are not required to arrest or prosecute a child or young person for their involvement in YPSI.[117] Both of these approaches sought to reduce the potential impact of the statutory law. However, they are not foolproof solutions. The high levels of discretion granted to professionals (both school staff and police officers) by these measures risks inconsistent application. As crime data (outlined in chapter 2, s.2.3) shows, children and young people are still being arrested for YPSI and the handling of cases varies significantly across police forces in England and Wales.[118] The following analysis explores the practical framework for responding to YPSI and demonstrates that it is a '*conceptual muddle*' which demands revision.[119]

1.3.1: Policy guidance: Avoiding unnecessary criminalisation

Guidance issued by the College of Policing (CoP) makes clear that, if the taking and sharing of sexual imagery between children and young people is consensual and no other aggravating factors (such as the use of threats or significant disparity in age between the parties) are present, then the approach should be educational, rather than prosecutorial.[120] Similarly, in their guidance on prosecuting cases of CSA, the CPS noted that '*care should be taken when considering any cases*' of YPSI.[121] They explain that '*it would not usually be in the public interest to prosecute the consensual sharing of an image between two children of a similar age.*'[122] The CPS have not set out what care should be taken but the CoP have issued guidance

[115] UKCIS (n3) s.1.9.
[116] Gavin Hales, 'A Sexting Surge or Conceptual Muddle? The Challenges of Analogue Law and Ambiguous Crime Recording' (The Police Foundation, 31 Jan 2018) <http://www.police-foundation.org.uk/2017/wp-content/uploads/2010/10/perspectives_on_policing_sexting_FINAL.pdf > accessed 22 August 2022, 3.
[117] Home Office, 'Crime outcomes in England and Wales: Technical Annex' (n4).
[118] Emma Bond and Andy Phippen, 'Police Response to Youth Offending Around the Generation and Distribution of Indecent Images of Children and its Implications' (2019) <https://www.uos.ac.uk/sites/default/files/FOI-Report-Final-Outcome-21.pdf> accessed 22 August 2022.
[119] Hales (n116).
[120] College of Policing, 'Briefing Note: Police action in response to youth produced sexual imagery ('Sexting')' (College of Policing, Nov 2016) <https://www.college.police.uk/News/College-news/Documents/Police_action_in_response_to_sexting_-_briefing_(003).pdf> accessed 22 August 2022.
[121] CPS, 'Child Sexual Abuse: Guidelines on Prosecuting Cases of Child Sexual Abuse' (CPS, 16 June 2020) <https://www.cps.gov.uk/legal-guidance/child-sexual-abuse-guidelines-prosecuting-cases-child-sexual-abuse> accessed 22 August 2022.
[122] Ibid.

detailing how incidents of children and young people sharing sexual imagery should be handled.[123] They note that while offences concerning sexual activity involving a child will typically require a full criminal investigative response, imagery shared between under 18's should be treated differently.[124] In particular, support in the form of education, rather than criminalisation, should be the primary focus. Similarly, the Association of Chief Police Officers (ACPO) has stated that it '*does not support the prosecution or criminalisation of children for taking indecent images of themselves and sharing them*'.[125] Instead, they suggest a '*safeguarding approach should be at the heart of any intervention*.'[126] In particular, they note that '*these cases should be dealt with on a case by case basis*', and should be referred to children's social care so that any '*other underlying vulnerabilities*' and risks can be investigated.[127]

Thus, while the legislation maintains an unsatisfactory approach to imagery-based offences, those responsible for enforcing the law recognise that a more cautious approach needs to be adopted when applying this legislation to children and young people. This is a positive development. However, it places significant responsibility on school staff and police officers, many of whom may not be familiar with some or all the existing guidance. The following section explores this guidance and the options available to both schools and the police when responding to incidents of YPSI. Ultimately, the analysis demonstrates that the practical measures and guidance are insufficient and leave the law, and the consequences for children and young people, in a state of uncertainty.

1.3.2: Handling incidents internally (within education settings)

The guidance issued by the CoP makes it clear that the first point of contact when responding to YPSI should be the school or college. This is because '*although the production of such images will likely take place outside of education settings, sharing can take place and issues are often identified or reported [at school]*.'[128] Statutory guidance produced by the Department for Education (DfE) sets out that all schools should have an effective child protection policy

[123] College of Policing, 'Briefing Note' (n120).
[124] Ibid.
[125] CEOP (n114) para, 2.5-2.6.
[126] Ibid, para 2.5-2.6.
[127] Ibid, para 2.2-2.3.
[128] UKCIS (n3) s.1.5.

which covers YPSI and all staff should be clear about their school's or college's policy and procedures with regard to this.[129] They are also required to have Designated Safeguarding Leads (DSLs) – a senior member of staff who is responsible for safeguarding and child protection.[130] In partnership with the NPCC, the UKCIS Working Group[131] have produced comprehensive non-statutory advice for '*DSLs, their deputies, headteachers and senior leadership teams in school and educational establishments*' on how to respond when they are made aware of children and / or young people sharing sexual imagery.[132] In most cases, the guidance recommends supporting and educating the children and young people involved, rather than reporting the incident to the police or inflicting punishment. Ultimately, though, '*an education setting's response to an incident will differ depending on the motivations behind the incident and the appropriateness of the child or young person's / people's behaviour*.'[133]

To help educate staff on children and young people's image-sharing behaviour, the guidance points to Wolak and Finkelhor's typology of sexual image sharing (referred to by them as sexting)[134] which splits incidents into two broad categories: aggravated (incidents involving additional or abusive elements) and experimental (incidents with no adult involvement, no apparent intent to harm or reckless misuse).[135] It also refers to Hackett's '*continuum of children and young people's sexual behaviours*' model[136] which emphasises the need to '*place a child's sexual behaviour within the context of their age and development*' and highlights '*that children and young people's sexual behaviours exist on a wide continuum from normal to abusive and violent behaviours, and may move fluidly between each category*'.[137] Both Wolak and Finkelhor's and Hackett's models are explored in more depth in chapter 5, s.5.4.3. To support this material, Annex B (to the UKCIS guidance) offers a staff training exercise to illustrate the different types of peer-to-peer sharing incidents that can occur.[138]

[129] Department for Education, 'Keeping Children Safe in Education (2022): Statutory Guidance for Schools and Colleges' (Department for Education, 2022) < https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1080047/KCSIE_2022_revised.pdf> accessed 22 August 2022, 12-13, para 32-35.
[130] The role of DSLs: Ibid, 7, para 10.
[131] The UKCIS Working Group comprises multiple charities and government departments.
[132] UKCIS (n3) s.1.1.
[133] Ibid, s.1.6.
[134] Janis Wolak and David Finkelhor, 'Sexting: A typology' (2011) Crimes Against Children Research Center.
[135] UKCIS (n3) s.1.6(a).
[136] Simon Hackett, 'Children, Young People and Sexual Violence' in C Barter and D Berridge, *Children Behaving Badly? Exploring peer violence between children and young people* (Blackwell-Wiley 2011).
[137] UKCIS (n3) s.1.6(b).
[138] Ibid, Annex B.

Perhaps most usefully the document sets out step-by-step guidance on handling incidents[139] and gives example case studies indicating the appropriate course of action for typical incidents that may occur.[140] For indicative purposes, the first paragraph of each case study is displayed below:[141]

> ***Case study A: Children and young people aged 13-18***
>
> *A 15-year-old girl reported to her head of year she had consensually sent her boyfriend (another student, 16) a topless photo of herself. She has been told that her boyfriend has shown the photo to his friends and they are now posting comments about her being a 'slut' online. She was very upset and did not want to get into trouble for taking the photo. The head of year explained to her that what she had experienced was extremely serious and that they would need to speak to the DSL.*
>
> ***Case study B: Children and young people aged 13-18***
>
> *A 14-year-old girl reported to a DSL she had been forwarded a naked photo of one of her friends, 13. Her friend had initially sent the photo to a boy, 15, that she liked who attends a nearby school. The DSL reassured the girl that she had done the right thing in speaking to her and explained that the school needed to make sure her friend was safe. The school spoke to the DSL at the boys' school and they agreed to investigate. They stated the boy had been involved in nude image sharing concerns before.*
>
> ***Case study C: children and young people under the age of 13***
>
> *An 11-year-old boy reported to his class teacher that one of his friends took a photo of themselves naked and sent it to him last night. He was upset by the photo but had not told his parents in case they took his phone away. His teacher reassured him for speaking to them and explained that what he had been sent was not funny and that they would need to speak to the DSL to make sure everyone was safe*

The guidance goes into more detail (1 page per case study) and lists the suggested outcome of each of these examples. In none of the case studies were the police initially contacted. However, in case study B (concerning a forwarded image of a 13-year-old girl) the school reported the incident to the local Multi-Agency Safeguarding Hub (MASH) and '*it was agreed*

[139] Ibid, s.2.13.
[140] Ibid.
[141] Ibid.

via a strategy discussion that social care and police would visit both schools to speak to the children involved and their parents and act, as necessary'.[142] No reference to further outcomes is made.

All three examples demonstrate a clear attempt to keep YPSI out of the CJS. Police officers have even reported pushing incidents of YPSI back onto the school.[143] However, while the focus centres on pastoral support, and education, rather than criminalisation, schools are fully entitled to '*escalate the incident at any time*'.[144] The guidance also states that:[145]

> *The decision to respond to the incident without involving the police or children's social care should only be made in cases where the DSL (or equivalent) is confident that they have enough information to assess the risks to any child or young person involved and the risks can be managed within the education setting's pastoral support and disciplinary framework and, if appropriate, their local network of support.*

Therefore, there is still a very real potential that incidents may be reported to the police and there is no real certainty on when this will and will not occur. This lack of certainty risks discriminatory responses, for example presumptions (by those responding to incidents) around what is normal and what is harmful will likely dictate how an incident is handled. While the case studies, in Annex B of the UKCIS guidance, may aim to create a streamlined approach to incidents of YPSI, they are by no means exhaustive or conclusive. They also present an idealistic view that all relevant staff have the time and resources to be familiar with this guidance, which may not be a reality in all education settings. Thus, the handling of a case stemming from students at one school may be vastly different from the handling of an identical case in another school. This may be a result of differing staff priorities and resources (for responding to incidents) and / or differing perceptions around what is normal (or harmful) childhood and adolescent behaviour.

Regardless, there are instances where policy guidance suggests that reporting to the police will be necessary, such as if the child or young person has been harmed or is at risk of harm. Here,

[142] Ibid.
[143] Hales (n116).
[144] UKCIS (n3) s.2.3.
[145] Ibid.

the policy guidance makes clear that a referral should be made to children's social care and / or the police.[146] Examples of when such a referral should be made include situations where:[147]

> *1. The incident involves an adult*
>
> *2. There is reason to believe that a child or young person has been coerced, blackmailed or groomed, or there are concerns about their capacity to consent (for example, owing to special educational needs)*
>
> *3. What you know about the images or videos suggests the content depicts sexual acts which are unusual for the young person's developmental stage, or are violent*
>
> *4. The images involves sexual acts and any pupil in the images or videos is under 13*
>
> *5. You have reason to believe a child or young person is at immediate risk of harm owing to the sharing of nudes and semi-nudes, for example, they are presenting as suicidal or self-harming*

Interestingly, point 4 (which refers the reader to Annex A)[148] reflects the position under the SOA which separates children aged 12 and under (s.5 SOA) from those aged 13-15 (s.9 SOA). No specific reference is made to the SOA in this section of UKCIS guidance, or the corresponding Annex. However, the inclusion of point 4 (above) implies a level of synchronisation with position in the SOA which acknowledges that, while children and young people aged 13-15 may genuinely have consented to a given behaviour, a younger child cannot, in law, ever provide valid consent. Yet this approach directly contradicts the position set out in s.1 PCA and s.160 CJA stating that no child or young person under the age of 18 (except to the extent that s.1A still applies) can validly consent. It emphasises the disconnect between statutory law and the policy guidance governing YPSI.

Overall, while the existing guidance offers useful for support to DSLs and other relevant staff, it leaves much of the decisions about how to respond to YPSI in the hands of schools and colleges. Although this approach can act as a buffer between children and young people and the full brunt of the law, it is entirely subjective and places significant responsibility on school safeguarding teams therefore putting children and young people at risk of inconsistent and discriminatory treatment. Moreover, while many incidents will never be reported to the police,

[146] Ibid, s.2.1 and 2.3.
[147] Ibid, s.2.3.
[148] Ibid, s.2.3; Annex A.

thousands still are and at that point the child or young person will be subjected to an unpredictable CJS. [149] The following section explores what happens, and the different options available to police officers, when an incident of YPSI is reported to them.

1.3.3: Police responses: Crime recording and police decisions

When an incident is reported to the police that, on the balance of probabilities, appears to be a notifiable offence, the police are obliged to record it as a crime.[150] This requirement is set out by National Crime Recording Standard (NCRS) and the Home Office Counting Rules for Recorded Crime (HOCR).[151] The NCRS was introduced in April 2002 to '*promote accurate and consistent crime recording between police forces*'.[152] For state based crimes, that is '*offences where the offence is made out notwithstanding the fact that the crime in question is not directed toward a specific intended victim*' a crime should be recorded where the '*points to prove to evidence the offence*' are clearly '*made out*'.[153] Therefore, for indecent imagery offences, a crime should be recorded where there is evidence an image has been taken or made; that image was indecent (sexual or sexually suggestive or provocative) and was of a person aged 17 or under. Therefore, if YPSI is reported to the police directly (perhaps by a parent or guardian) or if the school decide to notify the police, the incident will be recorded as a crime. It is irrelevant that the individual who has taken the image is also the subject. The HOCR make it very clear that a crime must still be recorded. However, *how* that crime will be recorded is less certain. Take for example the following scenario, as presented by Gavin Hales of the Police Foundation:[154]

> *A 15-year-old boy whilst online asks a 14-year-old girl that he knows at school to send him pictures of her breasts and she does so.*

Theoretically, this could be broken down into, at least, four identifiable offences.

[149] National Police Chiefs' Council (NPCC), 'Police dealing with rising number of 'sexting' cases involving children' (NPCC, 6 Nov 2017) <https://news.npcc.police.uk/releases/police-responding-proportionately-to-rising-number-of-sexting-incidents> accessed 22 August 2022
[150] Home Office, 'Home Office Counting Rules 2022/23' (Home Office, 20 June 2022) < https://www.gov.uk/government/publications/counting-rules-for-recorded-crime> accessed 22 August 2022.
[151] Ibid.
[152] Ibid.
[153] Ibid.
[154] Hales (n116) 2.

- One crime of inciting a child to engage sexual activity involving a child under 16 (against the male for requesting the image), contrary to s.10 and s.13 SOA.
- One crime of taking an indecent photograph of a child (against the female for photographing her breasts), contrary to s.1(1)(a) PCA.
- One crime of distributing an indecent photograph of a child (against the female for sending the photograph to the male), contrary to s.1(1)(b) PCA.
- One crime of possessing an indecent photograph of a child (against the male for receiving and retaining the image of the female), contrary to s.160 CJA.

However, according to the HOCR these events, taken at face value and without evidence of undue pressure or force, should only result in two crimes being recorded:

- One crime of inciting a child to engage in sexual activity against the male.
- One crime of taking / making / distributing indecent photographs or pseudo-photographs of children against the female for photographing her breasts and sending the image to the male.

Thus, one incident results in two crimes. Although the girl took the image (s.1(1)(a)) and also later distributed it (s.1(1)(b)) that still only constitutes one offence. Hales argues that this is likely an attempt to avoid '*unwieldly crime counts*'.[155] Consideration of a potential follow-up scenario helps to illustrate this point:[156]

> *The boy in our example forwarded the image to five friends, each of whom forwarded it to another five friends who in turn knowingly retained the images.*

If each party's involvement was treated as a separate incident the number of recorded crimes stemming from one initial incident could increase exponentially. However, this scenario also raises an additional question of whether the boy's (and his friends') subsequent actions would, could, and should, be considered as having committed a separate offence entirely: disclosing private sexual photographs and films with intent to cause distress under s.33 CJCA.[157] The application of this offence to children and young people is considered below.

[155] Ibid, 4.
[156] Ibid.
[157] CJCA, s.33.

1.3.4: S.33 CJCA 2015

S.33 CJCA was originally enacted to capture the offence of '*disclosing private sexual photographs and films with intent to cause distress*' and is colloquially known as revenge porn. Its introduction signified a change in dynamic in the criminal law. Prior to the Act, the victims of so called 'revenge pornography' had to rely on various existing legislation never designed for the purpose. This included, s.1 Malicious Communications Act 1988 (MCA), s.127 Communications Act 2003 (CA), s.2 and s.4 of the Protection from Harassment Act 1997 (PHA). Despite its limitations, the creation of s.33 is a good example of the law responding to modern developments. Indeed, following significant criticism,[158] the offence was also recently extended to include the *threat* to disclose such imagery.[159] This level of responsiveness is required to ensure YPSI is effectively regulated. Currently, s.33 does not restrict the category of persons that can be prosecuted. Therefore, children and young people who share private and sexual images with the relevant intention could be guilty of both s.1(b) PCA (distributing indecent photographs of a child) and s.33 CJCA. However, for a s.33 CJCA prosecution, it must be proven that the perpetrator intended to cause the subject of the image distress, something which has been heavily criticised (explored further in chapter 3, s.3.3.2).[160] This threshold limits the number of defendants that can be convicted as establishing this intention serves as an evidential barrier. In the context of children and young people, this is a somewhat positive consequence as it reduces the number of children and young people in contact with the CJS which, as chapter 5 explores, can be harmful to their futures. However, it also reduces the protection available to victims of abuse both under and over 18 which is a serious cause for concern.

According to data from the MoJ, across the 3-year period (2016-2018), 767 adults were prosecuted and 651 sentenced for this offence (s.33 CJCA).[161] Whereas, 18 children and young

[158] Law Commission, *Intimate Image Abuse: A Consultation Paper* (Law Commission 253, 26 Feb 2021) < https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2021/02/Intimate-image-abuse-consultation-paper.pdf> accessed 22 August 2022 (Hereafter: Law Commission, IIA), para 3.76-3.79; For the harm caused by threats, see: Refuge, 'The Naked Threat: It's time to change the law to protect survivors from image-based abuse' (Refuge, 2020) <https://www.refuge.org.uk/wp-content/uploads/2020/07/The-Naked-Threat-Report.pdf> accessed 22 August 2022, 4.

[159] Domestic Abuse Act 2021 (DAA), s.69: Threats to disclose private sexual photographs and films with intent to cause distress.

[160] Law Commission, IIA (n158) para 3.58-3.62.

[161] Ministry of Justice data filtered by offence and age range: Ministry of Justice, 'Principal offence proceedings and outcomes by Home Office offence code data tool' (Gov.UK, 2020) < https://www.gov.uk/government/statistics/criminal-justice-system-statistics-quarterly-december-2019> accessed 22 August 2022.

people were prosecuted, and 11 sentenced.[162] This can be contrasted with the 113 children and young people prosecuted, and 94 sentenced (over the same time) for an offence under s.1 PCA.[163] It must be noted, however, s.1 PCA covers taking, making and possessing (with intent to distribute) as well as actual distribution of these images. Therefore, a direct comparison of the number of children and young people convicted under the PCA and the CJCA cannot be drawn. However, it does show that both offences have been used to criminalise the behaviour of children and young people.

Although far from perfect, s.33 CJCA better encapsulates the wrongdoing of sharing images without consent. It targets the true nature of the misconduct that occurs when sexual images are shared: specifically, the disclosing of, or threat to disclose, private material. It focuses solely on the actions of the distributor who went beyond the remit of the agreed terms, the *private* exchange of images. However, the law was created with adult defendants in mind. In a House of Commons (HC) debates, in 2014, it was noted that this was a '*growing problem faced by adult women*' but that '*men can also be part of this category of suffering*'.[164] It was made clear that other legislation should be used in relation to children and young people. Conservative MP Shailesh Vara noted:[165]

> '*if images misused for revenge porn activity are of children under 18, and are perhaps being used to bully the young, legislation such as the Protection of Children Act 1978 could be used against those making or circulating them. The Government are determined to do all they can to curb the distribution of indecent images of children, on the internet and elsewhere. The law in this area is very clear. Under the 1978 Act, the UK has a strict prohibition on the taking, making, circulation, and possession with a view to distribution of any indecent photograph of a child under 18, and such offences carry a maximum sentence of 10 years' imprisonment*.'

It is evident, then, that when this offence was created there was a clear view that s.33 CJCA should be reserved to target adult behaviour rather than that of children and young people. However, MoJ data shows that it is still used to prosecute children and young people.

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[162] Ibid.
[163] Full tables and figures for data on indecent imagery offences available in chapter 2, s.2.3.1.
[164] Revenge Pornography, HC Deb 19 June 2014, vol 582, cols 1368-1376 (Hereafter: Revenge Pornography), 1371.
[165] Ibid, col 1372.

1.3.5: Outcome 21

Despite all this uncertainty, and evidence that prosecutions do occur, there is an express desire by the police to avoid criminalising children and young people for YPSI.[166] Importantly, although police officers are obliged to record the incident as a crime,[167] they are not obliged to arrest or prosecute any individuals involved.[168] Further, to secure a prosecution for an offence under the s.1 PCA or s.160 CJA, consent must be sought from the Director of Public Prosecutions (DPP).[169] When the offence concerns one or more children or young people, their best interests must be considered before deciding whether to pursue a prosecution.[170] With this in mind, it is apparent that the full force of the law will not always be engaged. Moreover, the NPCC have worked with the CoP to produce new operational guidance on how law enforcement officials should respond to this behaviour if it is reported to the police.[171]

Crucially, one key change, introduced by the Home Office in 2016, sought to streamline police responses to YPSI and provide a more proportionate outcome to the behaviour than the law previously allowed. The Home Office developed a new crime recording option (Outcome 21), specific to YPSI, which enables police officers to formally record that no further action is to be taken against the individuals involved.[172] Outcome 21 acts as a middle ground between the incident going unreported, and the child or young person receiving a criminal record. It allows police officers to record the crime having occurred without progressing it any further. The code states:[173]

> *Further investigation, resulting from the crime report, which could provide evidence sufficient to support formal action being taken against the suspect is not in the public interest – police decision.*

If Outcome 21 is utilised, the record will show that a child or young person has committed a crime (by producing or sharing imagery) but that, on this occasion, no further action against

[166] College of Policing, 'Briefing Note' (n120).
[167] Home Office, 'Home Office Counting Rules' (n150).
[168] This includes, among other things: a charge, a youth cation and community resolutions. See: College of Policing, 'Prosecution and case management: Possible justice outcomes following investigation' (College of Policing) <https://www.app.college.police.uk/app-content/prosecution-and-case-management/justice-outcomes/#further-investigation> accessed 22 August 2022.
[169] PCA, s.1(3); CJA, s.160(4).
[170] Crime and Disorder Act 1989, s.37(1).
[171] College of Policing, 'Briefing Note' (n120).
[172] Home Office, 'Crime outcomes in England and Wales: Technical Annex' (n4) 10.
[173] Ibid.

those involved is to be taken. If this outcome is recorded, this will not result in a criminal record and is unlikely (though not impossible) to be disclosed on a future Disclosure and Barring Service (DBS) check / certificate.[174] It could, potentially, be disclosed on an Enhanced Criminal Records Check (ECRC) if it is deemed relevant to the job role.[175] Currently, police forces (specifically chief constables) can utilise their discretion in deciding whether to disclose an Outcome 21 recording. It is possible to imagine scenarios (e.g., an individual applying to work in child social care) where an officer may deem any previous involvement in YPSI relevant information. However, given that the very nature of Outcome 21 is in identifying that no further action was necessary, it is equally possible to imagine why an officer would choose not to disclose that data. This is further supported by recent changes to the disclosure rules which have limited the information about children and young people that will be automatically disclosed on DBS certificates.[176] Nevertheless, the lack of a definitive answer on whether this information will be disclosed leaves the consequences for children and young people under a cloud of uncertainty.

Ultimately, the introduction of Outcome 21, in conjunction with policy guidance, shows a clear focus on responding to YPSI in a proportionate manner. While this is an improvement on criminalising YPSI with archaic child protection laws, significant issues remain. All the practical measures which have been implemented rely on the discretion of professionals. This creates increasing uncertainty around the handling of this behaviour. Moreover, these practical changes do not tackle the underlying root of the problem. Namely, that image-sharing between children and young people is criminalised by the same legal provisions as those criminalising the documentation of sexual abuse. Therefore, if YPSI is reported to the police, children and young people are still at risk of prosecution for the same crimes as adult sex offenders.

1.4: Conclusion

[174] UKCIS (n3) s.1.9(c).
[175] Gov.UK, 'Disclosure and Barring Service: About Us' (Gov.UK) < https://www.gov.uk/government/organisations/disclosure-and-barring-service/about#dbs-checks> accessed 22 August 2022.
[176] Disclosure & Barring Service and Ministry of Justice, 'DBS Filtering Guide' (Gov.UK, 19 November 2020) <https://www.gov.uk/government/publications/dbs-filtering-guidance/dbs-filtering-guide> accessed 22 August 2022.

This chapter has explored both the statutory and non-statutory framework regulating YPSI. It has presented two overarching arguments. First, the current framing of s.1 PCA and s.160 CJA (and to some degree s.33 CJCA) is ill-fitted for dealing with YPSI. The PCA and s.160 CJA were originally enacted to target CSA perpetrated by adults and therefore the application of these laws to the behaviours of children and young people is inappropriate and disproportionate. Second, the practical measures introduced to mitigate the impact of these laws on children and young people are ineffective. The high levels of discretion now granted to schools and to the police place too much responsibility in the hands of individuals and leave many questions unanswered. It remains unclear whether an incident of YPSI which is not prosecuted, could be disclosed on a future criminal records check. In addition, the subjective assessment for deciding how to handle cases of YPSI mean that responses are likely to be inconsistent from place-to-place. This poses a real risk of reinforcing existing discriminatory approaches to victims and perpetrators based on differing perceptions around what is normal and harmful behaviour, as well as biases stemming from religious and cultural backgrounds.

The next chapter explores existing research examining the prevalence of, and crime recording data linked to, YPSI. It demonstrates that despite over a decade of global research, YPSI remains ill-defined leading to an array of contradictory findings. In addition, the crime statistics associated with this behaviour are equally inconclusive. Yet this data informs regulators in producing policy guidance around the handling of YPSI.[177] Overall, chapter 2 argues that more clarity is required in academic research and that practical responses are misguided and in need of revision.

[177] UKCIS (n3).

Chapter 2: Chaos, Confusion and Conceptual Uncertainty: The Reality of YPSI and the Criminal Justice System

2.1: Introduction

Chapter one outlined the legal framework surrounding YPSI. This chapter explains the need for academics, practitioners, and regulators to reframe the way they consider, label and handle YPSI behaviours. Existing research and crime recording data is inconclusive and the field is underpinned by contradictory empirical evidence currently responsible for perpetuating problematic regulatory responses to YPSI.

Despite over a decade of global research,[1] YPSI remains ill-defined and there is no accurate consensus around how many children and young people are taking, sending, or receiving sexual imagery. Moreover, while there is wealth of literature from across the Atlantic,[2] there are a limited number of UK-based studies.[3] Indeed, most studies which do include research from the UK are part of larger-scale European projects.[4] Therefore, the extent to which existing research

[1] One of the first substantive studies exploring youth sexting was carried out in 2009: Amanda Lenhart, 'Teens and sexting, how and why minor teens are sending sexually suggestive nude or nearly nude images via text messaging.' (Pew Internet and American Life Project Research, 15 Dec 2009) <https://www.pewresearch.org/internet/2009/12/15/teens-and-sexting/> accessed 22 August 2022.
[2] Roughly half of the studies included in existing meta-analyses are from the USA. See: Cristian Molla-Esparaza, Josep-Maria Losilla & Emelina Lopez-Gonzalez, 'Prevalence of sending, receiving and forwarding sexts among youths: A three-level meta-analysis (2020) 15(2) PLos ONE; Sheri Madigan and others, 'Prevalence of Multiple Forms of Sexting Behavior Among Youth a Systematic Review and Meta-Analysis' (2018) 172(4) JAMA Pediatrics 327; Bianca Klettke, David J Hallford, David J Mellor, 'Sexting prevalence and correlates: A systematic literature review' (2014) 34(1) Clinical Psychology Review 44.
[3] One of the few UK-based studies: Ester McGeeney and Elly Hanson, 'Digital Romance: A research project exploring young people's use of technology in their romantic relationships and love lives' (National Crime Agency and Brook, 2017) < https://www.basw.co.uk/system/files/resources/basw_85054-7.pdf> accessed 22 August 2022. See also the small scale qualitive study by Jessica Ringrose and others in conjunction with the NSPCC: Jessica Ringrose and others, 'A qualitative study of children, young people and 'Sexting': A report prepared for the NSPCC' (National Society for the Prevention of Cruelty to Children Report, 2012) < https://eprints.lse.ac.uk/44216/1/__Libfile_repository_Content_Livingstone%2C%20S_A%20qualitative%20study%20of%20children%2C%20young%20people%20and%20%27sexting%27%20%28LSE%20RO%29.pdf> accessed 22 August 2022.
[4] Susanne E Baumgartner and others, 'Does Country Context Matter? Investigating The Predictors of Teen Sexting Across Europe' (2014) 34 Computers in Human Behavior 157; Sonia Livingstone and Anke Gorzig, 'When Adolescents Receive Sexual Messages on the Internet: Explaining Experiences of Risk and Harm' (2014) 33 Computers in Human Behavior 8; Anna Sevcikova, 'Girls' and Boys' Experience with Teen Sexting In Early and Late Adolescence' (2016) 51 Journal of Adolescence 156; Marsha Wood and others, 'Images Across Europe: The Sending and Receiving of Sexual Images and Associations with Interpersonal Violence in Young People's Relationships' (2015) 59 Children and Youth Services Review 149; Nicky Stanley and others, 'Pornography, Sexual Coercion and Abuse and Sexting in Young People's Intimate Relationships: A European Study' (2018) 33 Journal of Interpersonal Violence 2919.

is transferable, and to which stakeholders in England and Wales should be concerned about children and young people's involvement in these behaviours, remains unknown.

Similarly, while MoJ crime statistics, from 2013-2019,[5] indicate that the numbers of children and young people being arrested is low,[6] data from the NPCC shows that the number of reported incidents of YPSI is increasingly high.[7] However, there is limited and contradictory information relating to cases that do not result in a prosecution.[8] Yet this inconsistent data continues to guide regulators in producing policy guidance around the handling of YPSI.[9] Perhaps most concerning of all is that, irrespective of whether a child or young person is convicted or discharged for an image-sharing crime, their involvement will be recorded on a police database as an indecent image offence (s.1 PCA or s.160 CJA) – offences originally intended for capturing the documentation of CSE and CSA.

This chapter argues that current responses to YPSI are misguided, disproportionate, and in need of revision. In demonstrating the above claims, it first examines existing literature on YPSI before turning to the crime data made available by both the MoJ and police forces across England and Wales. Ultimately, it argues that, to generate reliable and representative prevalence estimates, two clear changes must be made. First, and most importantly, a standardised definition for YPSI is required. The practical difficulties with establishing such a definition are acknowledged (s.2.2.2), but a level of consistency (at least on a domestic level) is imperative. Second, a more standardised methodology must be established. Although a range of research methodologies (e.g., qualitative interviews and quantitative questionnaires) are, and will continue to be, invaluable in shedding light on YPSI, to establish accurate prevalence estimates studies must be comparable. Therefore, more large-scale studies – which specifically define each YPSI behaviour - are necessary to enable mean estimates to be drawn. Additionally, to address the shortfalls of current crime data, future criminal justice responses

[5] At the time this research was conducted and collected (Oct 2020 – Jan 2021), data from the year ending 2019 was the most recent data available.
[6] Ministry of Justice, 'Principal offence proceedings and outcomes by Home Office offence code data tool' (Gov.UK, 2020) <https://www.gov.uk/government/statistics/criminal-justice-system-statistics-quarterly-december-2019> accessed 22 August 2022.
[7] NPCC, 'Police dealing with rising number of 'sexting' cases involving children' (NPCC, 6 Nov 2017) <https://news.npcc.police.uk/releases/police-responding-proportionately-to-rising-number-of-sexting-incidents> accessed 22 August 2022.
[8] Ibid.
[9] UKCIS, 'Sharing nudes and semi-nudes: advice for education settings working with children and young people' (23 December 2020) <https://www.gov.uk/government/publications/sharing-nudes-and-semi-nudes-advice-for-education-settings-working-with-children-and-young-people/sharing-nudes-and-semi-nudes-advice-for-education-settings-working-with-children-and-young-people> accessed 22 August 2022.

must be applied consistently from force to force and the offence that is recorded on police databases must accurately represent and label the crime that has been committed.

2.2: Prevalence of YPSI

Media portrayals and global public discourse around YPSI suggest the behaviour is an alarming and uncontrollable epidemic.[10] However, these views are often shaped by '*moral panic, fear-mongering, and generalized social anxiety instead of informed, research-based knowledge*'.[11] Unfortunately, existing research around YPSI is inconclusive, unreliable, and unrepresentative of YPSI practices in England and Wales. Indeed, research in this field is replete with inconsistencies stemming from both methodological issues and definitional differences. As a result, global prevalence rates range from 1.3 per cent through to 60 per cent.[12]

2.2.1: Inconsistent findings

Various meta-analyses and systematic reviews have attempted to collate the literature from across the globe and offer a clearer picture on the reality of this behaviour. However, even between these studies, rates and definitions have varied. In 2014, Klettke, Hallford and Mellor published their analysis of 25 studies which measured the prevalence of, what they refer to as, 'sexting' behaviours.[13] 12 of the selected studies sampled adolescents, defined by the authors as participants aged between 10-19 (therefore including some individuals for whom sexual imagery sharing is not, *prima facie*,[14] illegal). The analysis obtained a mean prevalence (from

[10] See for example: Lizzie Dearden, 'Children as young as six among hundreds of underage 'sexting' offence suspects' Independent (14 Feb 2020) <https://www.independent.co.uk/news/uk/crime/sexting-children-suspects-snapchat-whatsapp-metropolitan-police-a9336231.html> accessed 22 August 2022; BBC, 'Thousands of children sexting, police say' *BBC* (11 July 2017) < https://www.bbc.co.uk/news/uk-40566026> accessed 22 August 2022; Lynn Moore, 'Sexting 'epidemic' among teens alarms school, law enforcement officials' *MLive* (19 Jan 2019) < https://www.mlive.com/news/muskegon/2016/06/sexting_epidemic_among_teens_a.html> accessed 22 August 2022.
[11] Justin W Patchin and Sameer Hinduja, 'The Nature and Extent of Sexting Among a National Sample of Middle and High School Students in the U.S.' (2019) 48 Archives of Sexual Behaviour 2333.
[12] Madigan and others (n2) 328.
[13] Klettke, Hallford & Mellor (n2).
[14] Sexual image sharing is not, in itself, illegal among those over 18 but it can be in certain contexts, e.g., if it falls within the remit of s.33 Criminal Justice and Courts Act 2015 (CJCA).

6 studies)[15] of 10.2 per cent for sending messages with sexually suggestive text or photo content. When restricted to photographic content (3 studies),[16] the mean prevalence was 11.96 per cent. It also led to an estimate of 15.64 per cent for receiving messages with sexual text or photo content (from 5 studies)[17] and 11.95 per cent when restricted to photographic content (2 studies).[18]

Subsequently, Madigan and others conducted a larger meta-analysis of 39 studies from multiple different countries (participants were aged 11-17).[19] They obtained mean prevalence rates for sending (from 34 studies), receiving (from 20 studies) and forwarding (from 5 studies) messages with sexual image or text content (therefore, including content – written messages – which are not, *prima facie*,[20] illegal for adults or children). The rates of prevalence were 14.8 per cent, 27.4 per cent and 12 per cent respectively. Most recently, in 2020, Molla-Esparaza, Losilla and Lopez-Gonzalez conducted a meta-analysis of 79 articles (with participants aged 17 or under). They found mean prevalence rates for sending (14 per cent) receiving (31 per cent) and forwarding (7 per cent).[21] Usefully, there is a high level of similarity between these latter two studies which perhaps offers some indication of global prevalence rates. However, the reliability and representative nature of this data is limited. A large majority of the studies are from the USA (11/12 of Klettke, Hallford and Mellor; 22/39 of Madigan and others; and 34/79 of Molla-Esparaza, Losilla and Lopez-Gonzalez). Therefore, the extent to which these figures represent all children and young people, or more importantly those in England and Wales, is questionable. Indeed, the UKCIS policy guidance on YPSI[22] relies on data from an entirely separate 2017 UK-wide survey (with over 1,500 participants aged 14-17).[23] This study

[15] Associated Press & MTV 'AP-MTV Digital Abuse Study, Executive Summary' (2009) < https://vawnet.org/sites/default/files/materials/files/2016-08/MTV-AP_Digital_Abuse_Study_Executive_Summary.pdf> accessed 22 August 2022; Cox Communications and others, 'Teen online and wireless safety survey: Cyberbullying, sexting, and parental controls' (May 2009) <http://www.scribd.com/doc/20023365/ 2009-Cox-Teen-Online-Wireless-Safety-Survey-Cyberbullying-Sexting-andParental-Controls> accessed 22 August 2022; Sameer Hinduja and Justin W Patchin, 'Sexting: A brief guide for educators and parents' <https://cyberbullying.org/Sexting-Fact-Sheet.pdf> (Cyberbullying Research Center) accessed 22 August 2022; Lenhart (n1); Kimberly Mitchell and others, 'Prevalence and characteristics of youth sexting: a national study' (2012) 129 (1) Pediatrics 13; Eric Rice and others, 'Sexually explicit cell phone messaging associated with sexual risk among adolescents' (2012) 130(4) Pediatrics 667.
[16] Associated Press & MTV (n15); Patchin and Hinduja (n11); Mitchell and others (n15).
[17] Associated Press & MTV (n15); Cox (n15); Patchin and Hinduja (n11); Lenhart (n1); Mitchell and others (n15).
[18] Patchin and Hinduja (n11); Mitchell and others (n15).
[19] Madigan and others (n2) 328.
[20] Unless it amounts to a separate offence, for example, under s.127 Communication Act 2003 (CA) or s.2 Protection from Harassment Act 1997 (PHA).
[21] Molla-Esparaza, Losilla and Lopez-Gonzalez (n2).
[22] UKCIS (n9).
[23] McGeeney and Hanson (n3).

gave much higher prevalence estimates than those found in any of the aforementioned meta-analyses. In fact, 26 per cent of that sample reported sending a sexual or nude image and 48 per cent receiving one. These figures, which are nearly twice as high as the global mean estimations for this behaviour, highlight the complete lack of consistency in this field and suggest that studies from other jurisdictions should not be generalised to applying to England and Wales.

However, the higher results are supported by one of the only consistent conclusions that has been drawn by researchers. Namely, engagement in YPSI increases with age. For example, Molla-Esparaza, Losilla and Lopez-Gonzalez found that mean prevalence for sending sexual messages at the age of 12 was 4 per cent, whereas, at the age of 16, it was 21 per cent.[24] This overarching finding was also found by both of the earlier analyses.[25] Therefore, given that the minimum age of participants for the UK-wide study was 14 (whereas the meta-analyses included participants as young as 10), this may explain its higher estimates. Nevertheless, the lack of consistency in both the age of participants and overall findings is problematic because it makes it impossible to gain an accurate picture of children and young people's engagement in YPSI.

The only other conclusive finding that can be drawn from the literature is that the number of children and young people engaging in YPSI has increased year on year. For example, the mean prevalence for sending YPSI in studies collecting data in 2009 was 7 per cent, whereas, in studies collecting data in 2018 it was 33 per cent.[26] This is unsurprising given that the number of children and young people with access to smartphones has also increased.[27] However, it suggests that mean prevalence estimates, which incorporate studies from earlier years (when engagement was lower), likely underestimate current levels of engagement.

Beyond these two broad findings very little else is clear. Conclusions regarding demographic correlates are particularly inconclusive, especially concerning gender differences.[28] Some studies report similar rates of image-sharing across the genders,[29] while others indicate that the

[24] Molla-Esparaza, Losilla & Lopez- Gonzalez (n2).
[25] Klettke, Hallford & Mellor (n2); Madigan and others (n2).
[26] Molla-Esparaza, Losilla & Lopez- Gonzalez (n2).
[27] Influence Central, 'Kids & tech: the evolution of today's digital natives' (Influence Central, 2016) <https://influence-central.com/trendspotting/launching-the-new-influence-central-trend-report> accessed 22 August 2022.
[28] Klettke, Hallford & Mellor (n2); Madigan and others (n2).
[29] Joseph Dake and others, 'Prevalence and correlates of sexting behaviour in adolescents' (2012) 7(1) American Journal of Sexuality Education 1; Lenhart (n1); Rice and others (n15).

behaviour is more frequent in one gender over the other.[30] There are equally mixed findings around race and ethnicity[31] and there is no indication that image sharing is significantly higher in one particular country or continent.[32] Some research in the USA suggests higher rates of YPSI among sexual minorities[33] compared to those who identify as cisgender and heterosexual.[34] However, this is not a finding that has emerged consistently and is not something that has been explored in all studies.[35] Thus, the reliability of these findings is unknown.

2.2.2: Reasons for inconsistencies

One of the main issues with existing literature, and an underpinning reason for the lack of conclusive data, is that definitions of YPSI are inconsistent. While much of the research focuses solely on imagery-based exchanges, some studies also include written messages which are not, *prima facie*, illegal (even between under 18s).[36] All three meta-analyses include written messages as well as imagery (images and videos) in their definitions. Therefore, the prevalence estimates are not an accurate representation of the type of behaviour that is criminalised in England and Wales. Unsurprisingly, studies which include written messages have higher rates of prevalence.[37] For example, in a study with 304 undergraduate students on the West Coast

[30] (Boys) Linda S Jonsson and others, 'Voluntary sexual exposure online among Swedish youth – social background, internet behaviour and psychosocial health' (2014) 30 Computers in Human Behaviour 181. (Girls) Kathy Martinez-Prather and Donna M Vandiver, 'Sexting among teenagers in the United States: a retrospective analysis of identifying motivating factors, potential targets and the role of a capable Guardian' (2014) 8(1) International Journal of Cyber Criminology 21; Mitchell and others (n15); Bradford W Reyns, Billie Henson and Bonnie S Fisher, 'Digital deviance: low self-control and opportunity as explanations of sexting among college students' (2014) 34(3) Sociological Spectrum: Mid-South Sociological Association 273.
[31] Dake and others (n29); Rice and others (n15); Sloane Burke Winkelman and others, 'Sexting on the college campus' (2014) 17(3) Electronic Journal of Human Sexuality; Melissa Fleschler Peskin and others, 'Prevalence and patterns of sexting among ethnic minority urban high school students' (2013) 16(6) Cyberpsychology, Behaviour and Social Networking 454.
[32] Baumgartner and others (n4).
[33] i.e., those who identify as LGBTQ+.
[34] Rice and others (n15)
[35] For example, some studies have resulted in inconclusive data as a result of predominantly heterosexual samples: e.g., Allyson L Dir and others, 'Understanding Differences in Sexting Behaviors Across Gender, Relationship Status, and Sexual Identity, and the Role of Expectancies in Sexting' (2013) 16(8) Cyberpsychology, Behavior and Social Networking 568. Other studies have not identified or explored the role of participant's sexual identity: e.g., Mitchell and others (n15).
[36] Written messages could still amount to other offences e.g., if it amounts to harassment (PHA) or is grossly offensive (s.127 CA) but written sexual communication is not prohibited by s.1 PCA or s.160 CJA.
[37] Raquel Devlevi and Robert S Weisskirch, 'Personality Factors as Predictors of Sexting' (2013) 29 Computers in Human Behavior 2589; Dir and others (n35); Michelle Drouin and Carly Landgraff, 'Texting, sexting, and attachment in college students' romantic relationships (2012) 28 Computers in Human Behavior 444; Michelle

of the USA (aged 18-30), 75.7 per cent had sent a written message, 43.7 per cent had sent an underwear image and 28.9 per cent had sent a nude image.[38] In addition, while much of the literature is separated into adult behaviour and youth behaviour, a considerable number of studies include both under and over 18s within their samples making it difficult to ascertain accurate rates of prevalence amongst children and young people.[39] Another inconsistency is the extent of the nudity required.[40] Most of the research appears to include underwear images within the definition. Some studies, however, differentiate between underwear imagery and imagery depicting naked breasts, genitals, or bottoms, despite both being a criminal offence.[41] Predictably, there are higher rates of prevalence when underwear images are included.[42]

Another result to be highlighted is that elements such as the context of the behaviour and willingness of participants have been left undefined by researchers.[43] The meaning of consensual and non-consensual is often left for participants to interpret but, while one respondent may consider showing their friend a nude image of another person non-consensual behaviour, another respondent may consider this to be an unspoken but accepted risk of sending an image (thus within the realms of consensual behaviour). This is problematic for two reasons. First, because findings as to these behaviours are consequently unreliable but secondly because these contextual factors are a key indicator used by professionals in deciding how to proceed with an incident. One of the key issues reported by professionals, is the difficulty in differentiating between incidents which can, and should, be dealt with at a school or parental level and those necessitating further investigation and the involvement of the police or children's social care.[44] The UKCIS policy advice states that: '*situations should be considered on a case-by-case*' basis but that '*in many cases, education settings may respond to incidents without involving the police*'.[45] Where an incident can be defined as '*experimental*', that is an

Drouin and others, 'Let's talk about sexting, baby: Computer-mediated sexual behaviors among young adults' (2013) 29 Computers in Human Behavior A25.

[38] Devlevi and Weisskirch (n37).

[39] Andrea Anastassiou, 'Sexting and Young People: A Review of the Qualitative Literature' (2017) 22(8) The Qualitative Report 2231; Karen Cooper and others, 'Adolescents and Self-Taken Sexual Images: A Review of The Literature' (2016) 55 Computers in Human Behavior 706; Kaitlin Lounsbury, Kimberly J Mitchell and David Finkelhor, 'The true prevalence of 'sexting'' (2011) University of New Hampshire Crimes Against Children Research Centre.

[40] Molla-Esparaza, Losilla and Emelina Lopez-Gonzalez (n2) 8.

[41] Mitchell and others (n15).

[42] Ibid.

[43] Molla-Esparaza, Losilla and Emelina Lopez-Gonzalez (n2) 12.

[44] Ethel Quayle and Laura Cariola, 'Youth-Produced Sexual Images: A Victim-Centred Consensus Approach' (University of Edinburgh, 2017) <https://www.ed.ac.uk/files/atoms/files/ypsi_reporta4_pages.pdf> accessed 22 August 2022, 31.

[45] UKCIS (n9) s.1.9.

incident with '*no adult involvement, no apparent intent to harm and no reckless misuse*', then no police involvement will be necessary.[46] However, identifying this behaviour in practice, and distinguishing it from more serious ('*aggravated*') incidents, is not straightforward.[47]

Regarding CSAI (including that created by adults of very young children), Martin has highlighted how practitioners differ in their conceptualisation of what constitutes harmful imagery.[48] This issue is particularly prevalent in relation to YPSI whereby an image may have started out as part of a consensual relationship but was later shared more widely and has now been seen by innumerable others. Or, equally, in situations where the victim was initially a willing participant but is now being threatened because they do not wish to send further imagery. Attendees of Quayle and Cariola's symposia (which explored the challenges of managing cases of YPSI), confirmed this and identified that '*the shifting purpose and function of images as they are shared between different audiences makes it difficult to decide upon appropriate interventions*' and to differentiate between coercive and non-coercive behaviour.[49] Given that professionals have difficulty identifying and differentiating between these behaviours it is inevitable that participants in research also struggle to differentiate between them. This leads to yet further uncertainty around the reality of YPSI. Interestingly, some professionals have noted that children and young people's understanding of interpersonal relationships can also serve as a barrier to identifying whether behaviour is coercive or not. Their values regarding healthy relationships,[50] and a general normalisation of YPSI and nudity stemming from a '*generational upbringing*' dictated a different perception around what is normal from older generations.[51] Thus, the respondents participating in these studies may have decidedly different definitions of a given behaviour than the researchers setting the questions and interpreting the data. Therefore, without clearly defined terminology, prevalence rates can only ever be indicative rather than conclusive.

In addition to definitional variances, studies also differ in their methodology. According to Molla-Esparaza and others' analysis, the most commonly used tools to measure prevalence were questionnaires, employed online (27 per cent) or on paper (48 per cent), followed by

[46] Ibid, s.1.6(a).
[47] Ibid: '*incidents involving additional or abusive elements beyond the creation, sending or possession of nudes and semi-nudes'*.
[48] Jennifer Martin, '"It's Just an Image, Right?": Practitioners' Understanding of Child Sexual Abuse Images Online and Effects on Victims' (2014) 35(2) child & Youth Services 96, 101-104.
[49] Quayle and Cariola, (n44) 31.
[50] Ibid, 31.
[51] Ibid, 32.

telephone or face-to-face interviews (8 per cent), and mixed online and paper surveys (7 per cent).[52] These data collection procedures seemingly impact on prevalence estimates with self-reporting studies giving higher and more homogeneous estimations of prevalence than face-to-face and telephone interviews.[53] There are also huge discrepancies in study sample sizes, ranging from 51 participants to 21,372 participants which makes it hard to compare findings and reach reliable mean estimates.[54] Such inconsistencies – definitionally, methodologically and empirically – have confounded representations around the prevalence of YPSI and both reflect and perpetuate inappropriate legal and policy responses. Available criminal justice data, explored below, only serves to confuse understanding around these behaviours further.

2.3: Crime statistics and police responses

Information from the MoJ, the NPCC and individual police forces sheds some light on the number of cases that enter the CJS and how they are dealt with. However, there are limitations to this data. First, crime data is purely quantitative; it does not offer any information as to the context of the incident, making it difficult to reach any conclusions as to the appropriateness of police and CPS responses. Second, while these figures provide some insight into incidents which have been reported to the police, a large proportion of YPSI never enters the CJS. Therefore, the following figures can only ever present a fraction of the overall picture. Data related to unreported incidents (either because they are never disclosed or because they are dealt with outside the context of the CJS e.g., by schools or colleges) must, instead, be extracted from the (unreliable) academic literature. Lastly, the information provided by individual police forces is inconsistent and thus the findings discussed are indicative only.

Altogether, the criminal justice data enables four main conclusions to be drawn. First, reported cases of YPSI are high and increasing. Second, prosecutions for these behaviours remains low but do occur. Third, data relating to YPSI that is not prosecuted, either because it is never reported to the police or because the police utilise their discretion in not proceeding with the case, is wholly unreliable. Fourth, all YPSI incidents which are reported to the police will result in one or more child or young person being listed on a police database as involved in an indecent image offence. This label misrepresents the behaviour concerned and could have

[52] Molla-Esparaza, Losilla & Lopez-Gonzalez (n2) 6.
[53] Ibid, 6.
[54] Ibid, 11.

lasting detrimental impact on that person's future. Therefore, changes to the processing, recording, and handling of YPSI is imperative.

2.3.1: Prosecution, conviction, and sentencing data

An initial inspection of the criminal justice statistics appears to suggest that very few minors are prosecuted for engaging in YPSI. In England and Wales, the available data suggests that year on year, only handful of under-18s have been prosecuted for their involvement.[55] In fact, between 2013 and 2019 legal action was only brought against 338 young people for an offence listed under s.1 PCA or s.160 CJA and only 277 of those were sentenced - an average of 40 per year. The majority of those resulted in a community sentence – 91 per cent (251/277).

Total (s.1 PCA and s.160 CJA)	**2013**	**2014**	**2015**	**2016**	**2017**	**2018**	**2019**	**Totals**
Prosecuted	38	49	54	61	53	42	41	**338**
Convicted	28	38	46	56	37	40	31	**276**
Sentenced	28	38	47	54	39	40	31	**277**
Discharged (Absolute or Conditional)	0	4	1	1	1	0	0	**7**
Community Sentence	25	31	41	50	35	39	30	**251**
Custody	1	3	4	3	2	0	1	**14**
Otherwise Dealt With[56]	2	0	1	0	1	1	0	**5**
s.1 PCA	**2013**	**2014**	**2015**	**2016**	**2017**	**2018**	**2019**	**Totals**
Prosecuted	33	35	38	40	41	32	27	**246**
Convicted	25	29	32	36	29	29	19	**199**
Sentenced	25	29	33	35	30	29	19	**200**
Discharged (Absolute or Conditional)	0	3	1	1	0	0	0	**5**

[55] Ministry of Justice, 'Principal offence proceedings and outcomes by Home Office offence code data tool' (n6).
[56] Otherwise dealt with includes restriction orders, hospital orders, guardianship orders, police cells, and other disposals.

Community Sentence	22	24	30	31	28	29	19	**183**
Custody	1	2	2	3	2	0	0	**10**
Otherwise Dealt With	2	0	0	0	0	0	0	**2**
s.160 CJA – possession	**2013**	**2014**	**2015**	**2016**	**2017**	**2018**	**2019**	**Totals**
Prosecuted	5	14	16	21	12	10	14	**92**
Convicted	3	9	14	20	8	11	12	**77**
Sentenced	3	9	14	19	9	11	12	**77**
Discharged (Absolute or Conditional)	0	1	0	0	1	0	0	**2**
Community Sentence	3	7	11	19	7	10	11	**68**
Custody	0	1	2	0	0	0	1	**4**
Otherwise Dealt With	0	0	1	0	1	1	0	**3**

Table 1: Ministry of Justice statistics on charges against s.1 PCA and s.160 CJA for under 18s. This does not include any incidents which were handled via out of court disposals. [57]

MoJ data also shows that the number of prosecutions and convictions are relatively evenly distributed across all territorial police forces in the UK.[58] Between the years 2013 to 2019 the maximum number of convictions stemming from one individual police force was 8 (Metropolitan Police Service (MPS) in 2015 and South Wales in 2018). For the most part convictions per police force remain 4 or below year on year.[59]

Similarly, since the introduction of s.33 CJCA in 2015, until the year ending 2019, legal action has only been brought against 21 children and young people (across England and Wales) for disclosing private and sexual images without consent (s.33 CJCA).[60] 14 of these individuals were sentenced. However, the extent to which this represents YPSI is unclear. First, as was

[57] Ministry of Justice, 'Principal offence proceedings and outcomes by Home Office offence code data tool' (n6); Ministry of Justice and Youth Justice Board, 'Youth Out-of-Court Disposals: Guide for Police and Youth Offending Services' (Youth Justice Board for England and Wales, 2013) <https://www.yjlc.uk/wp-content/uploads/2015/03/Youth-Out-of-Court-Disposals-Guide-for-Police-and-Youth-Offending-Services.pdf> accessed 22 August 2022.
[58] Ministry of Justice, 'Court outcomes by Police Force Area data tool' (Gov.UK, 2020) < https://www.gov.uk/government/statistics/criminal-justice-system-statistics-quarterly-december-2019> accessed 22 August 2022.
[59] Ibid.
[60] Ministry of Justice data filtered by offence and age range: Ministry of Justice, 'Principal offence proceedings and outcomes by Home Office offence code data tool' (n6).

discussed in chapter 1 (1.3.4), s.33 CJCA was not intended to be used to criminalise minors who share private and sexual material of their peers. Instead, it was felt that this should be left to the PCA.[61] Second, it is not known whether those individuals prosecuted under s.33 CJCA were found guilty of sharing images of people under or over 18. Therefore, the insight this data provides in relation to YPSI is limited.

In addition, while all YPSI is prohibited under either s.1 PCA or s.160 CJA, and may be captured by s.33 CJCA, some forms of YPSI could also, at least theoretically, be captured by other existing legal provisions including under the PHA and SOA. In recent years, the Law Commission has reviewed the plethora of offences which regulate, among other things, online communications.[62] They have concluded that the criminal law comprises a patchwork of over and under inclusive offences which risk '*inconsistent outcomes for victims and offenders*'.[63]

Consistent requests or demands for sexual imagery of fellow children or young people could be captured by the PHA. The offence of harassment was implemented to criminalise individuals who pursue a course of conduct (defined as something occurring on more than one occasion), that causes another person alarm or distress.[64] Although harassment is not fully defined in the PHA, it has been interpreted in case law as conduct which is *'oppressive and unacceptable*'.[65] It is possible, then, to imagine a situation where continuous requests for a sexual image could amount to an offence under the PHA. So too could situations where a person continuously threatens to distribute private and sexual images.[66] However, although the MoJ statistics indicate that the number of children and young people prosecuted for harassment

[61] Revenge Pornography, HC Deb 19 June 2014, vol 582, cols 1368-1376 (Hereafter: Revenge Pornography) col 1372.
[62] Law Commission, *Abusive and Offensive Online Communications: A Scoping Report* (Law Commission No 381, 2018) <https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2018/10/6_5039_LC_Online_Comms_Report_FINAL_291018_WEB.pdf> accessed 13 April 2022 (Hereafter: Law Commission, AOOC Scoping Report). See also: Law Commission, *Intimate Image Abuse: A Consultation Paper* (Law Commission 253, 26 Feb 2021) < https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2021/02/Intimate-image-abuse-consultation-paper.pdf> accessed 22 August 2022 (Hereafter: Law Commission, IIA); Law Commission, *Harmful Online Communications: The Criminal Offences: A Consultation Paper* (Law Commission 248, 11 Sep 2020) < https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2020/09/Online-Communications-Consultation-Paper-FINAL-with-cover.pdf> accessed 22 August 2022. (Hereafter: Law Commission, HOC).
[63] Law Commission, IIA (n62) para 1.29.
[64] PHA, s.7(2).
[65] *Majrowski v Guy's and St. Thomas' NHS Trust* [2006] UKHL 34, para 30.
[66] *WXY v Gewanter* [2012] EWHC 496 (QB). In this case, posting and threatening to post private information about the victim on the internet amounted to harassment.

offences is in the thousands it is impossible to know how many, if any, are related to YPSI given that harassment can come in many forms.[67]

There are also numerous offences contained within the SOA that could extend to cover forms of YPSI. S.10 SOA criminalises anyone who causes or incites a child to engage in sexual activity and s.12 criminalises anyone who causes a child to watch a sexual act. Although both offences are restricted to the actions of those over 18, s.13 SOA covers the same situations when perpetrated by children or young people. Therefore, it is possible that a child or young person who incites another to send YPSI (e.g., asking a peer to send a photograph of themselves naked or in underwear) and / or who shows YPSI to others (e.g., by sharing images they receive with others) could be guilty of these offences, in addition to s.1 PCA and s.160 CJA offences.

S.66 of the SOA (Exposure) criminalises those who intentionally expose their genitals with the intention of causing alarm or distress. This offence can apply to online communications. For example, in *R v Alderton,* [68] the defendant pleaded guilty for exposing his genitals over 'Facetime' (a video calling service operated by Apple). Yet, it is not clear whether the offence extends as far as covering those who send unsolicited images via social media platforms, on the basis that such conduct does not occur 'live'. However, this conduct (sending unsolicited images online) known as 'cyberflashing'[69] is described by victims as being as distressing as traditional forms of indecent exposure.[70] For this reason, the Law Commission argued that such conduct should be captured by s.66.[71] It is now set to become its own criminal offence.[72] This further extends the scope of offences which children and young people could fall foul of.

The conduct captured by these offences, as well others, such as the voyeurism (S.67 SOA) and upskirting[73] offences (s.67A SOA), all prohibit harmful conduct which necessitates criminalisation. Indeed, the variety of different offences, all capable of capturing slightly different behaviour and wrongdoing, is beneficial in that it offers the CPS flexibility to decide

[67] Ministry of Justice, 'Principal offence proceedings and outcomes by Home Office offence code data tool' (n6).
[68] *R v Alderton* [2014] EWCA Crim 2204.
[69] Law Commission, HOC (n62) para 3.155-3.158.
[70] Sophie Gallagher, '70 women on what it is like to be sent unsolicited dick pics' (*Huffpost*, 12 July 2019) <https://www.huffingtonpost.co.uk/entry/cyberflashing-70-women-on-what-its-like-to-be-sent-unsolicited-dickpics_uk_5cd59005e4b0705e47db0195> accessed 6 May 2022.
[71] Law Commission, HOC (n62) para 6.132.
[72] John Woodhouse, 'Regulating Online Harms' (House of Commons Library, 15 March 2022) <https://researchbriefings.files.parliament.uk/documents/CBP-8743/CBP-8743.pdf> accessed 22 August 2022, s.6.6; Chris Philip, *Online safety update* (HCWS 675, 14 March 2022) <https://questions-statements.parliament.uk/written-statements/detail/2022-03-14/hcws675> accessed 22 August 2022.
[73] Taking a photograph or video underneath a person's skirt without consent.

the most appropriate offence(s) (if any) to proceed with, in any given situation, and, if applied accurately, can aid in fair labelling (a point explored in Chapter 4, s.4.3). However, it is not clear to what extent these overlapping collection of offences are used to criminalise children and young people for YPSI practices. Given that there is no specific YPSI offence, the same act (for example, pressuring a peer to send a naked photograph) might result in differing outcomes, depending on who the incident is being responded to by. All that is clear is that all YPSI (regardless of its form) runs the risk of being recorded as s.1 PCA or s.160 CJA, as well as a range of other offences. Further issues with this are outlined below.

2.3.2: Reported cases

While only a small number of incidents recorded as s.1 PCA or s.160 CJA offences have resulted in sentencing, we know from the literature that YPSI is on the rise. Indeed, thousands of incidents have been reported to the police. A NPCC press release reported that in the year 2014/15 there were 2,700 cases reported.[74] In 2015/16 this rose to 4,681 and it rose again to 6,238 in 2016/17.[75] Most cases were not prosecuted and were instead dealt with through other means. According to the NPCC, of the 6,238 YPSI offences that were recorded in 2016/17, 2,079 were classified by Outcome 21 and 63 children / young people were charged – although it is not clear what they were charged with.[76] All that is clear about the remaining 4,096 is that they: '*were not pursued as judged not to be in the public interest, had evidential difficulties or the victim did not support a prosecution. A proportion were also dealt with through out of [court] disposals*.'[77]

This finding is problematic for multiple reasons. First, although the record of a crime on a police database does not constitute criminalisation (this only occurs upon formal sanction e.g., caution or conviction), the recording of a crime is not a neutral act.[78] Second, even if a suspect is acquitted of their involvement, this can still be disclosed on an ECRC.[79] Therefore, any future

[74] NPCC (n7).
[75] Ibid.
[76] Ibid.
[77] Ibid.
[78] Gavin Hales, 'A Sexting Surge or Conceptual Muddle? The Challenges of Analogue Law and Ambiguous Crime Recording' (The Police Foundation, 31 Jan 2018) <http://www.police-foundation.org.uk/2017/wp-content/uploads/2010/10/perspectives_on_policing_sexting_FINAL.pdf > accessed 22 August 2022, 6.
[79] *R (on the application of AR) v Chief Constable of Greater Manchester Police and another* [2018] UKSC 47, para 74.

checks of police records for their personal details (including name and date of birth) would very likely highlight their connection to these offences.[80] Moreover, due to existing legislation, the label attached to this crime (either s.1 PCA or s.160 CJA) is the same as that attributed to adults who seek to sexually abuse children or gain pleasure from their sexual abuse. Third, although forces are not obliged to record personal details of victims and suspects, it is:[81]

> *Almost unimaginable that a force would choose not to record the personal details of the child or children involved – not least given a strong concern to safeguard children, including in case those named reoffend or are re-victimised in future, however benign the initial incident may be.*

As a result, '*we must work from the presumption that personal details will always be recorded when a 'sexting' incident is reported to the police*.'[82] Therefore, while the prosecution figures suggest that only a few children and young people are prosecuted, the problem is much greater. Moreover, while we know that a significant proportion of cases have been classified by Outcome 21 (in 2016/17 roughly a third were categorised in this way) and a small number resulted in charges, very little is known about the remaining cases.[83] Therefore the future impact on the child or young person cannot be identified.

2.3.3: Impact of Outcome 21

When the police are notified of an incident of YPSI, they must record that a crime has been committed.[84] The police will then investigate the incident and decide on an appropriate outcome.[85] If there are any abusive and / or aggravating factors (e.g., absence of consent, blackmail, threats, deception, sexual abuse or exploitation)[86] the child or young person may receive a caution or be charged.[87] If none of these factors are present, the police may, instead, choose to discharge the child or young person by classifying the incident using an Outcome 21

[80] Hales, (n78), 6.
[81] Ibid.
[82] Ibid.
[83] NPCC (n7).
[84] Home Office, 'Home Office Counting Rules 2022/23' (Home Office, 20 June 2022) < https://www.gov.uk/government/publications/counting-rules-for-recorded-crime> accessed 22 August 2022.
[85] UKCIS (n9) s.1.9(b).
[86] Ibid.
[87] For more information on the potential outcomes for children and young people who commit crimes see: Ministry of Justice and Youth Justice Board, 'Youth Out-of-Court Disposals: Guide for Police and Youth Offending Services' (n57), paras 3.1-3.22.

code. This means that even though a crime has been committed, and the police have sufficient evidence to prove this, a decision has been made to discharge those concerned and not to take further action.[88] This decision should then be communicated by police to the child or young person affected, their parent or carers and the school where appropriate (e.g., if they were the ones to report the incident).

We know from the NPCC data that many incidents are classified in this way and a closer inspection of the crime statistics shows that since the introduction of Outcome 21 (2016), the number of prosecutions of minors has reduced (below, figure 1). Indeed, despite a rise in the number of reported cases,[89] prosecution rates have remained consistently low (peaking at 61 in 2016 and dropping to 41 in 2019). While there is no way of demonstrating causation, it is likely that the availability of this new outcome has contributed to this reduction.

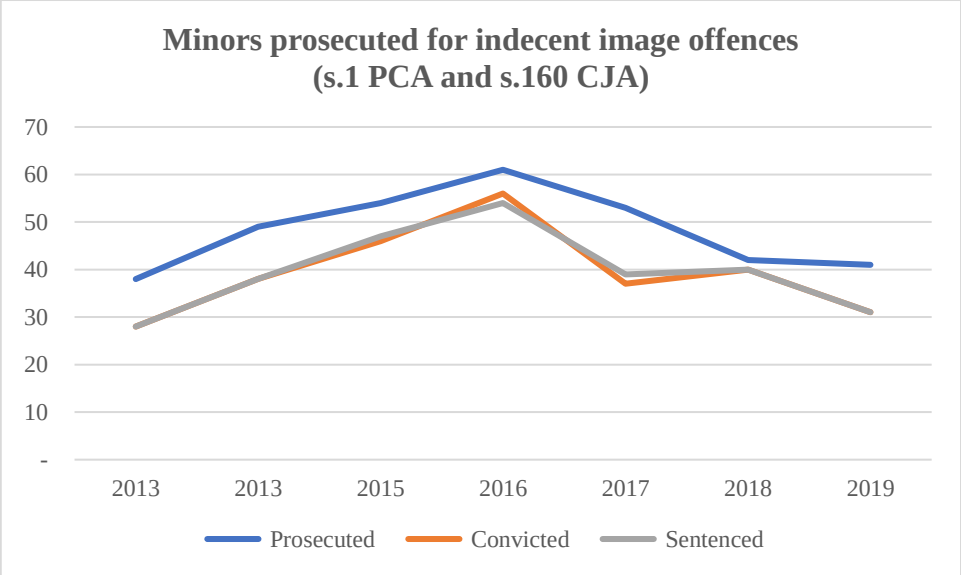

Figure 1: Ministry of Justice statistics on charges against under 18s for s.1 PCA and s.160 CJA.[90]

This is positive result because it means fewer children and young people are being prosecuted and convicted of crimes that were originally aimed at capturing adults who commit, or seek pleasure from, CSA. However, as this chapter goes on to demonstrate, it does not eliminate all existing issues with the current legal framework.

[88] Home Office, 'Crime outcomes in England and Wales: Technical Annex' (July 2020) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/901052/crime-outcomes-technical-annex-july20.pdf> accessed 22 August 2022, 4 and 10.
[89] NPCC (n7).
[90] Ministry of Justice, 'Principal offence proceedings and outcomes by Home Office offence code data tool' (n6).

As was outlined in chapter 1, s.1.3.5, Outcome 21 was specifically introduced for YPSI and is an alternative to arresting and formally charging the child or young person. It was intended to mitigate the impact of the statutory law on children and young people whilst also enabling police officers to meet the crime recording requirements under the NCRS.[91] While this is, undoubtedly, preferable to arresting and charging children and young people under these laws, it is problematic for three distinct reasons.

Firstly, despite the very nature and wording of Outcome 21 making clear that further action is not necessary or in the public interest, its utilisation could still impact a child or young person's future, for example if their involvement is disclosed on an ECRC.[92]

Second, the introduction of Outcome 21 simply masks a greater issue. YPSI should not be captured by s.1 PCA or s.160 CJA because those offences were created to regulate entirely different behaviours. However, that does not necessarily mean the behaviour should not be criminalised at all. Indeed, some YPSI can be very harmful, and because of this the outcome code is not available for all forms of the behaviour. The CoP guidance confirmed that it should only be used:[93]

> *[I]n youth produced sexual imagery cases where the making and sharing is considered non-abusive and there is no evidence of exploitation, grooming, profit motive, malicious intent (e.g. extensive or inappropriate sharing (e.g. uploading onto a pornographic website) or it being persistent behaviour. Where these factors are present, outcome 21 would not apply.*

Importantly, not all incidents are the same; while a peer-to-peer exchange might be consensual, other factors, such as deception, coercion, or blackmail, could also prompt a child or young person's engagement in the behaviour. In these instances, there may be a public interest (as well as an interest for the victim) in sanctioning the behaviour of the offending party and thus utilising Outcome 21 would not be appropriate. However, by criminalising all YPSI under s.1 PCA and s.160 CJA (which also criminalises CSAI taken by adult perpetrators) the true nature of the conduct cannot be denoted and harmful practices are conflated with non-harmful ones.

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[91] Hales (n78) 7.
[92] UKCIS (n9) s.1.9(c).
[93] College of Policing, 'Briefing Note: Police action in response to youth produced sexual imagery ('Sexting')' (College of Policing, Nov 2016) <https://www.college.police.uk/News/College-news/Documents/Police_action_in_response_to_sexting_-_briefing_(003).pdf> accessed 22 August 2022.

Instead, if a more accurately labelled crime was created to denote non-consensual YPSI these issues could be avoided. This fair labelling point is returned to in chapter 4, s.4.3.

Lastly, but linked to the preceding point, is the concern that despite Outcome 21 being available, and recommended by the CoP and UKCIS for any cases in which formal sanction is not necessary,[94] a large proportion of cases are not classified in this way. In 2016/17, 4,096 out of 6,238 cases did not result in charges or Outcome 21.[95] It is not known how these cases were handled. However, what we do know is that the application of Outcome 21 is inconsistent across England and Wales.[96]

The UKCIS guidance outlines that:[97]

> *Children and young people should not be unnecessarily criminalised… Situations should be considered on a case by case context, considering what is known about the children and young people involved and if there is an immediate risk of harm.*

However, subjective views of what constitutes harm and risk of harm are central to the decision-making process. As a result, there remains a very real risk that a child or young person will be subject to a postcode lottery if found to be engaging in YPSI. Some children and young people may be cautioned or charged for doing something that in another location would be recorded and classified as Outcome 21, or indeed not reported to the police at all.

2.3.4: Application of Outcome 21 by police forces

Concerns over disproportionate and inconsistent application of Outcome 21 led Professor's Emma Bond and Andy Phippen to conduct Freedom of Information (FOI) requests to all police forces in England and Wales in 2019.[98] Their requests sought to determine the volume of arrests and Outcome 21 recordings of minors made by each force for offences under the PCA (Home Office crime code 86/2) between December 2016 and March 2019.[99] Crime code 86/2 covers all offences listed under s.1 PCA but does not include possession of indecent imagery as set

[94] Ibid; UKCIS (n9).
[95] NPCC (n7).
[96] Emma Bond and Andy Phippen, 'Police Response to Youth Offending Around the Generation and Distribution of Indecent Images of Children and its Implications' (2019) <https://www.uos.ac.uk/sites/default/files/FOI-Report-Final-Outcome-21.pdf> accessed 22 August 2022.
[97] UKCIS (n9) s.1.8.
[98] Bond and Phippen, (n95), 3.
[99] Ibid.

out under s.160 CJA. As a result, the following data relates solely to children and young people who have *generated* or *distributed* (not simply possessed) nude or semi-nude imagery. It does not include those who have received, and stored imagery sent by others.

As with any FOI request related to crime data, the responses do not provide any context, for example whether the imagery was created freely and voluntarily or created following pressure or coercion. Thus, the proportionality of each outcome cannot be assessed. Nevertheless, the responses are useful in indicating the lack of consistency in police responses and methods of recording. Bond and Phippen received useful data from 30 territorial forces in England and Wales.[100] However, 2 of these forces stated that they did not store Outcome 21 recordings (Gwent Police and Wiltshire Police) – an initial indication of the lack of consistency. Moreover, due to differences in crime recording, processing, and retrieval, as well as differing population sizes in each jurisdiction, direct comparisons across forces are not possible.

	Arrests 14-17	**Arrests <14**	**OC21 14-17**	**OC21 <14**
Avon and Somerset Constabulary	8	0	85	70
Bedfordshire Police	2	0	67	29
Cambridgeshire Constabulary	10	0	17	34
Cheshire Constabulary	4	0	0	10
Cleveland Police	3	0	2	0
Derbyshire Constabulary	3	7	300	204
Devon & Cornwall Police	2	0	103	43
Dorset Police	2	0	103	43
Durham Constabulary	3	0	9	1
Gloucestershire Constabulary	6	1	78	31
Greater Manchester Police	6	3	414	495
Gwent Police	4	0	N/A	N/A
Hampshire Constabulary	15	1	2	0
Hertfordshire Constabulary	5	0	117	67
Kent Police	15	3	103	31
Leicestershire Police	8	0	38	90
Lincolnshire Police	7	0	171	117
Merseyside Police	6	0	80	42
Metropolitan Police Service	102	10	54	166
Norfolk Constabulary	14	0	75	60
North Yorkshire Police	18	2	0	2
South Yorkshire Police	0	0	0	2
Staffordshire Police	5	0	365	294

[100] In addition to these 30 forces, 2 forces gave responses with no data and 3 others claimed exemptions from disclosure under s.12 Freedom of Information Act 2000 (FOI).

Suffolk Constabulary	17	1	99	67
Sussex Police	8	3	70	49
Thames Valley Police	16	1	257	227
Warwickshire Police	1	0	77	30
West Mercia Police	8	0	112	58
West Midlands Police	10	5	153	367
Wiltshire Police	7	1	N/A	N/A

Table 2: Bond and Phippen's data showing arrest and Outcome 21 recording from Home Office crime code 86/2 from 30 police forces[101]

The above dataset, extracted from Bond and Phippen's report, is disaggregated according to those aged 14-17 and those under 14. This enabled the researchers to examine how those who are '*pre-teen, or barely teenagers*' are being dealt with.[102] From the collated data, the researchers made four overarching points:[103]

- Children and young people are still being arrested for indecent image (s.1 PCA) offences
- In some forces, while small in number, arrests are being made to those under the age of 14
- Outcome 21 recording is being applied by most forces but to varying levels
- For most police forces, the number of Outcome 21 recordings far exceeds the number of arrests

In addition to this, the researchers also expressed the number of arrests as a proportion of the Outcome 21 recordings, with a view to showing which of the two outcomes was more likely in each jurisdiction.[104] However, given that Outcome 21 serves as an *alternative* to an arrest (rather than Outcome 21 being a potential result following an arrest), the value and purpose of that data is questionable.

Instead, it made more sense, for the purposes of this thesis, to calculate the number of arrests as a proportion of the combined total of both arrests and Outcome 21 recordings. This total does not represent the overall number of recorded YPSI incidents for each force because the

[101] This table is extracted from Bond and Phippen (n96), 5.
[102] Ibid, 4.
[103] Ibid, 5.
[104] Ibid, 6; Table 2.

outcomes of a large number of cases is not known.[105] However, it does, at the very least, provide an indication of the distribution of arrests vs Outcome 21 recordings made by each force. To demonstrate this, the table below reshuffles and expands on Bond and Phippen's dataset and provides 5 additional columns of data. These are:

- The percentage of <14 arrested (column 3)
- The percentage of 14-17-year-olds arrested (column 6)
- Total number of arrests made for ALL minors (column 7)
- Total number of outcome 21 recordings for ALL minors (column 8)
- Percentage of ALL minors arrested (column 9)

Category	**Under 14s**			**14-17-year-olds**			**Combined Totals**		
Column no.	**1**	**2**	**3**	**4**	**5**	**6**	**7**	**8**	**9**
Outcome	**Arrests**	**OC21**	**% of Arrests**	**Arrests**	**OC21**	**% of Arrests**	**Arrests**	**OC21**	**% of Arrests**
Avon and Somerset	0	70	0	8	85	8.6	8	155	4.9
Bedfordshire	0	29	0	2	67	2.9	2	96	2.0
Cambridgeshire	0	34	0	10	17	37	10	51	16.4
Cheshire	0	10	0	4	0	100	4	10	28.6
Cleveland	0	0	0	3	2	60	3	2	60.0
Derbyshire	7	204	3.3	3	300	1	10	504	1.9
Devon & Cornwall	0	43	0	2	103	1.9	2	146	1.4
Dorset	0	43	0	2	103	1.9	2	146	1.4
Durham	0	1	0	3	9	25	3	10	23.1
Gloucestershire	1	31	3.1	6	78	7.1	7	109	6.0
Greater Manchester	3	495	0.6	6	414	1.4	9	909	1.0
Gwent	0	N/A	N/A	4	N/A	N/A	4	N/A	N/A
Hampshire	1	0	100	15	2	88.2	16	2	88.9
Hertfordshire	0	67	0	5	117	4.1	5	184	2.6

[105] NPCC (n7).

Kent	3	31	8.8	15	103	12.7	18	134	11.8
Leicestershire	0	90	0	8	38	17.4	8	128	5.9
Lincolnshire	0	117	0	7	171	3.9	7	288	2.4
Merseyside	0	42	0	6	80	7	6	122	4.7
Metropolitan	10	166	5.7	102	54	65.4	112	220	33.7
Norfolk	0	60	0	14	75	15.7	14	135	9.4
North Yorkshire	2	2	50	18	0	100	20	2	90.9
South Yorkshire	0	2	0	0	0	0	0	2	0.0
Staffordshire	0	294	0	5	365	1.4	5	659	0.8
Suffolk	1	67	1.5	17	99	14.7	18	166	9.8
Sussex	3	49	5.7	8	70	10.2	11	119	8.5
Thames Valley	1	227	0.4	16	257	5.9	17	484	3.5
Warwickshire	0	30	0	1	77	1.3	1	107	0.9
West Mercia	0	58	0	8	112	6.7	8	170	4.5
West Midlands	5	367	1.3	10	153	6.1	15	520	2.8
Wiltshire	1	N/A	N/A	7	N/A	N/A	8	N/A	N/A
Totals	**38**	**2629**	**1.4%**	**315**	**2951**	**9.8%**	**353**	**5580**	**6%**

Table 3: Arrest and Outcome 21 recording from Home Office crime code 86/2 and percentage of overall incidents resulting in arrest. NB: The percentages (columns 3, 6 and 9) are calculated by adding the number of arrests to the number of Outcome 21 recordings to give an overall total. The number of arrests is then divided by the overall total and multiplied by 100 to give a percentage.

These figures present mixed results. We can see that, with the exception of Greater London (MPS), where a total of 112 arrests were reportedly made, a maximum of 20 arrests (North Yorkshire) have been made by individual police forces over the course of the 2-year 4-month time period (Dec 2016 - March 2019) investigated. Interestingly, aside from the MPS, none of the police forces with high percentages (above 20%) of total arrests (Cheshire, Cleveland, Durham, Hampshire and North Yorkshire) have a significantly high number of actual arrests. Instead, the total number of recorded incidents in these areas is also low (thus giving a high percentage). This suggests that, irrespective of how else reported incidents are handled or classified, there is an almost universal reluctance to arrest children and young people for this type of offence. Moreover, in relation to under 14s, the number of arrests is exceptionally low

across the board (38 in total). This suggests that the police do not usually feel it is appropriate to arrest younger children for these types of crimes.

Whilst there is at least some consistency in the number of cases resulting in arrest, the use and application of Outcome 21 tells a different story. The number of Outcome 21 recordings varies from 2 (Cleveland, Hampshire, North and South Yorkshire) to 909 (Greater Manchester) across the same time period. While some discrepancy can potentially be explained by differing population sizes, the extent of this incongruity raises concerns.

To explore this in more depth, and in the hope of corroborating Bond and Phippen's findings, the author conducted new FOI requests, to the forces who responded to Bond and Phippen. The wording of the request to each force, submitted either as part of a generic online FOI request form[106] or an email directly to the department responsible for processing FOI requests, was:

> *I would like to request information regarding the number of arrests and proceedings of minors for an indecent imagery offence under either s.1 Protection of Children Act 1978 or s.160 Criminal and Justice Act 1988 since 2010.*
> *I would also like to request the number of Outcome 21 recordings that have been made for these offences since the code's induction in 2016.*
> *If this request is too wide or unclear, I would be grateful if you could contact me so that I can refine the request.*

Unfortunately, because of issues related to the global COVID-19 pandemic, only 18 of the 30 contacted forces responded.[107] The other forces claimed exemption under s.12(1) FOI Act 2000 or did not respond.[108] Each of these 18 forces provided their data in differing formats and provided a variation of the following preamble:[109]

> *The systems used for recording these are not generic, nor are the procedures used locally in capturing the crime data. It should be noted that for these reasons this force's response to your questions should not be used for comparison purposes with any other response you may receive.*

[106] For example, see: Metropolitan Police Service, 'FOI request form' <https://www.met.police.uk/rqo/request/ri/request-information/rip/request-information-police/request-information-about-police/FOI-request-form/> accessed 22 August 2022.
[107] For consistency, requests were submitted to the same forces as Bond and Phippen received responses from.
[108] FOI Act, s.12(1) allows exemptions where the requestion would be too time consuming or costly.
[109] Metropolitan Police Service FOI response.

This is problematic for numerous reasons, not least because it makes analysing the findings and coming to any concrete conclusions incredibly difficult. Beyond this, it also points to the lack of reliability and interpretative value of this kind of data.

This unreliability was further consolidated by a closer inspection of the FOI responses. The responses all displayed different data from that cited by Bond and Phippen. For example, Bond and Phippen recorded that for offences listed under crime code 86/2, Cheshire Constabulary made a total of 10 Outcome 21 recordings between December 2016 and March 2019. However, the FOI response received by this author painted a very different picture with 161 recorded in 2017 and 2018 alone.

	2010	**2011**	**2012**	**2013**	**2014**	**2015**	**2016**	**2017**	**2018**	**2019**
Arrests			7	3	1	1		1	3	
Charged	1		1	2	1	1			2	
Outcome 21							7	56	105	132

Table 4: Adapted from Cheshire Constabulary's FOI response related to crime codes 86/2 for under 18s.

While the discrepancy could be explained by human error in one of the responses or Cheshire Constabulary updating their systems between Bond and Phippen's response and this one, an inspection of further FOI responses (from other forces) shows that the inconsistency was not isolated to the one force. All the responses appeared to give different (albeit to varying degrees) findings to those cited by Bond and Phippen. For example, Bond and Phippen cite 2 arrests and 146 Outcome 21 recordings for Devon and Cornwall Police between Dec 2016 and March 2019. However, this author's response shows 7 arrests and 598 Outcome 21 recordings in 2017 and 2018 alone.

	2012 (Apr-Dec)	**2013**	**2014**	**2015**	**2016**	**2017**	**2018**	**2019**
Arrests	1	5	3	9	8	2	5	5
Proceeded with*	1	3	2	4	6	0	4	0
Outcome 21					85	299	299	268

*Proceeded with includes outcomes of: Admin disposal; Charge; Community Resolution; Postal Charge; Proposed; Reprimand; Youth Caution

Table 5: Adapted from Devon and Cornwall Police's FOI response related to crime codes 86/2 for under 18s.

Similarly, for Dorset Police, Bond and Phippen recorded 2 arrests and 146 Outcome 21 recordings between Dec 2016 and March 2019. Whereas this response shows 203 Outcome 21 recordings just in 2017 and 2018.

	2013	2014	2015	2016	2017	2018	2019
Arrests	1	0	2	5	0	1	3
Outcome 21			4	37	137	66	52

Table 6: Adapted from Dorset Police's FOI response related to crime codes 86/2 for under 18s.

Some of the responses from forces, e.g., that provided by the MPS (Table 7), did appear to roughly correspond with Bond and Phippen's data. They recorded 112 arrests and 220 Outcome 21 classifications between Dec 2016 and March 2019. This response shows 96 arrests and 101 Outcome 21 classifications in 2017 and 2018, which could potentially marry up with their findings. However, overall, the responses received were vastly disparate. It is impossible to note which, if either, of the FOI responses are accurate. Consequently, any further discussion of this data was rendered futile.

	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019
Arrests	28	24	25	32	26	49	59	59	37	48
Proceeded Against	4	12	3	1	6	10	14	12	10	8
Outcome 21						4	21	40	61	161

Table 7: Adapted from Metropolitan Police Service's FOI response related to crime code 86/2 for under 18s.

Overall, while the data from Bond and Phippen allowed for some conclusions to be reached regarding police decisions and handling of YPSI, the subsequent FOI responses, conducted by the author of this thesis, have served only to cast doubt across the reliability of this data. Ultimately, all that can be concluded is that the nature of YPSI, and more specifically how it is handled by the police, is unclear. There appears to be some clarity over prosecutions – which are few in number between but do still occur in all parts of England and Wales. However, nothing is known about the context of these incidents and thus no conclusions can be drawn as to the proportionality of these charges. As for the use of Outcome 21, the data is so inconsistent both between forces and between the FOI responses that very little can be concluded, except so far as to say it is being used by police forces to varying degrees and has likely had some

impact in reducing the number of arrests and prosecutions that are made of young people for these behaviours (figure 1).

2.4: Conclusion

Considering all of this together, the only incontrovertible conclusion that can be drawn is that the data relating to prevalence and crime recording of YPSI is highly equivocal. Yet, this data has been used to shape policy guidance and legislative reform across the globe.[110] The definitional and methodological differences in research studies have resulted in varied findings and incomparable datasets. In addition, the different systems used by police forces for recording, processing, and retrieving data have led to equally unreliable conclusions about how YPSI is handled by the CJS.

The only definitive information currently available is that provided by the NPCC and MoJ which confirms that there are thousands of reported cases of YPSI each year, but that prosecutions and convictions remain low.[111] A large proportion of cases result in the Home Office's new crime classification (Outcome 21). This is, in many cases, preferable to charging children and young people under s.1 PCA or s.160 CJA but it is far from a magic bullet to existing issues with the law. And, in any event, a greater proportion of cases are dealt with in some other unidentified way.[112] Therefore, the impact of the criminal law on children and young people who are caught engaging in YPSI remains to be seen. We know that many cases will likely never be reported to the police (because they will be dealt with within an education setting),[113] but for those children and young people who are reported to the police the potential outcome and impact on their future is shrouded in uncertainty.

Even if no prosecution takes place, a child or young person's association with the crime remains documented on police databases. All reported cases are recorded under Home Office crime codes which represent all offences listed under s.1 PCA and s.160 CJA. Therefore, whether the child or young person is convicted or discharged of an alleged crime (either through Outcome 21 or via other means), they will be linked indefinitely to a crime originally

[110] UKCIS (n9).
[111] NPCC (n7); Ministry of Justice, 'Principal offence proceedings and outcomes by Home Office offence code data tool' (n6).
[112] Ibid.
[113] UKCIS (n9).

intended to capture the documentation of CSA. Given that many of those reported incidents will likely be for an entirely different behaviour e.g., the generation or distribution of a sexual image of oneself or a peer, this result is disproportionate. It is imperative that the criminal law recognises the distinctions between these behaviours so that the crime data can accurately represent the wrongdoing that has taken place and so that the offender is correctly labelled (explored in chapter 4, s.4.3). A tightening of the law in this way would prevent the conflation of CSA and consensual peer practices. It would also limit the reliance on police and prosecutorial discretion which can lead to disparate and uncertain outcomes.

Overall, this chapter has demonstrated that existing literature and crime recording data fails to accurately depict the true prevalence of YPSI and the regulatory measures in place to tackle YPSI are being used and recorded inconsistently. To truly understand this behaviour, and to provide effective regulation which offers the greatest levels of protection to children and young people, a clearer understanding of YPSI is required. To achieve this, nationally representative research is needed which adopts a clear definition for YPSI (and all the behaviours which fall under this umbrella term). Achieving such a definition poses significant challenges, for example because of differing views regarding what constitutes exploitative, coercive, and harmful practices.[114] However, for accurate data to be collated and be comparable, the meaning of such terms requires a level of consistency across statute, policy, and research. To ensure this can be achieved, at the very least on a domestic level, consultation with key stakeholders, including children and young people, school and college staff and law enforcement is required. A Law Commission consultation process, reminiscent of that conducted for online communications and intimate image abuse,[115] could assist in facilitating this. If final recommendations were accepted by Parliament, the terminology (and guidance detailing its remit and definition) could then be incorporated into statute, providing a legislative foothold for the range of terms associated with YPSI behaviours. In addition to definitional consistency, any recording, and sanctions of YPSI must be applied routinely and must also accurately represent the crime that has been committed. They must not, as is currently the case, conflate YPSI with CSA. The latter sections of this thesis explore these notions in more detail and offer suggestions for new terminology which could help to achieve these aims.

[114] Martin (n48), Quayle and Cariola (n44) 31.
[115] Law Commission (n62).

Chapter 3: Distinctly Different: Indecency and the Unique Nature of YPSI

3.1: Introduction

The previous chapters have outlined the difficulty YPSI presents for the CJS and the range of offences that children and young people who engage in this behaviour may fall foul of. The primary piece of legislation with which we are concerned is s.1 PCA. The broad framing of this provision means that it covers material far beyond its originally intended scope: the sexual abuse and exploitation of children and young people, committed by adults. It also captures, sexual images produced by and shared between children and young people (YPSI). This chapter explains why YPSI is so different from the type of behaviour the PCA intended to capture and argues that the current law, which adopts an objective, de-contextualised approach, is inappropriate for responding to YPSI.

In setting out the above, the analysis will break down the criminal law's definition of all sexual imagery of children and young people. The chapter first provides a critical examination of the current test for indecency in the context of s.1 PCA. It then highlights the fundamental differences between YPSI and imagery produced by adults and explains why the existing indecency test cannot be applied to YPSI. Lastly, it explores the vast spectrum of behaviours that fall within the definition of YPSI. It explains that they cannot be effectively addressed under the existing legislation and that YPSI is simply an extension of offline sexual behaviours and thus incorporates both harmful and non-harmful behaviour. Therefore, tailored regulation, capable of differentiating between consensual and non-consensual, harmful and non-harmful, behaviour, is required.

3.2: Defining indecent photographs of children and young people

There is no universal term to define criminalised material of children and young people. Indeed, much of the terminology that is used is controversial.[1] Outside of England and Wales, it is commonly referred to as child pornography but this term has been criticised on the grounds

[1] Internet Watch Foundation (IWF), 'There's #NoSuchThing as child pornography. It's child sexual abuse' (IWF) <https://www.iwf.org.uk/nosuchthing> accessed 22 August 2022.

that it downplays the severity and significance of the material.[2] As was touched upon in chapter 1 (s.1.2), for these reasons, legislators in England and Wales rejected this term and adopted alternative labels: indecent photographs of children (the label given to the offences themselves) and Protection of Children Act (the title of the legislation encapsulating the offences).[3] It was felt that these terms better denoted the harm and wrongdoing at hand.[4] Mr Michael Alison (then MP for Barkston Ash), noted that '*there is a fundamental difference between the problems of pornography as generally conceived*' and the problems associated with indecent images of children.[5] The former is concerned with protecting the consumer. Specifically, with protecting '*the person who reads the article, the person who sees the film, the person who, unhappily, may see the poster or come across a publication*' and the impact this may have upon them.[6] Whereas, with indecent imagery of children we are concerned with protecting '*the children used in the production*', their '*innocence and integrity*', and the '*corruption and depravity*' that is experienced by those who are exploited and drawn into the industry.[7] For these reasons, the term child pornography was deemed incapable of accurately representing the harm inflicted on, and experienced by, the children featuring in the material.

In addition to the differing terminology, the scope of the material covered is also inconsistent. Different definitions are used in the OPSC[8] and the Lanzarote Convention (Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse).[9] Both of these Conventions have been ratified and in force in the UK since 2009 and 2018, respectively. The OPSC offers the broadest definition by referring to *'any representation, by whatever means'*,[10] suggesting audio and written text content is included. Whereas the Lanzarote Convention restricts its scope to visual depictions:[11]

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[2] Susanna Greijer and Jaap Doek, 'Terminology Guidelines for the protection of children from sexual exploitation and sexual abuse' (Interagency Working Group on Sexual Exploitation of Children, June 2016) <https://www.ilo.org/ipec/Informationresources/WCMS_490167/lang--en/index.htm> accessed 22 August 2022.
[3] Protection of Children Act 1978 (PCA).
[4] Protection of Children Bill, HC Deb 10 February 1978, vol 943, cols 1853-54 (Hereafter: Protection of Children Bill).
[5] Ibid, 1853.
[6] Ibid, 1853-54.
[7] Ibid, 1854.
[8] Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (OPSC) A/RES/54/263 of 25 May 2000, Article 2(c). The Optional Protocol was signed by the United Kingdom of Great Britain and Northern Ireland on 7 Sep 2000 and ratified on 20 Feb 2009.
[9] Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (Lanzarote Convention) CATS No 201, Article 20(2). The Lanzarote Convention was signed by the UK on 5 May 2008, ratified on 20 June 2018 and entered into force 1 October 2018.
[10] OPSC (n8) Art 2(c).
[11] Lanzarote Convention (n9) Article 20(2).

'any material that visually depicts a child engaged in real or simulated sexually explicit conduct or any depiction of a child's sexual organs for primarily sexual purposes.'

The Lanzarote Convention also makes clear that State signatories to the Convention reserve the right not to criminalise, in whole or in part, the production and possession of material that does not depict *real* children and to material involving children and young people who have reached the age of consent (for sexual activity), '*where these images are produced and possessed by them with their consent and solely for their own private use*.'[12] The presence of these opt-out clauses suggests that there is uncertainty around whether criminalisation of this type of material is appropriate. However, the decision to include or restrict such content is expressly at the discretion of States.

Domestic law criminalises all visual (written and audio is excluded) depictions of children and young people, including 16- and 17-year-olds who have reached the age of consent, as well as material which does not depict real children or young people.[13] Real photographs and pseudo-photographs,[14] are covered by s.1 PCA and s.160 CJA. In addition, s.62 Coroners and Justice Act 2009 (CAJA) criminalises all non-photographic images of children and young people (also known as fantasy images,[15] e.g., computer-generated images (CGI's), cartoons, manga (a style of Japanese cartoon) images and drawings.[16] These non-photographic images are criminalised on the assumption that they might reinforce potential abusers' inappropriate feelings towards children, and, in turn, result in a rise in actual abuse.[17] However, there is no evidence linking these crimes with the commission of other offences against children.[18] The scope and legitimacy of these laws (on the basis of unproven risk) are explored in more detail by other scholars[19] and in the next chapter (chapter 4, s.4.2.3), but for now the discussion focuses on indecent images of *real* children and young people captured by s.1 PCA and s.160 CJA.

[12] Ibid, Article 20(3).
[13] PCA, s.1; CJA, s.160; Coroners and Justice Act 2009 (CAJA), s.62.
[14] A pseudo-photograph is an image made by computer-graphics or otherwise which appears to be a photograph.
[15] Home Office, Scottish Executive, Northern Ireland Office, 'Consultation on the Possession of Non-photographic Visual Depictions of Child Sexual Abuse' (National Offender Management Service, 2007) <https://webarchive.nationalarchives.gov.uk/ukgwa/20091207125738mp_/http://www.homeoffice.gov.uk/documents/cons-2007-depiction-sex-abuse?view=Binary> accessed 22 August 2022, Executive Summary.
[16] Coroners and Justice Act 2009 (CAJA), s.65(5).
[17] Home Office, Scottish Executive, Northern Ireland Office (n15) 5. See also: Suzanne Ost, 'Criminalising Fabricated Images of Child Pornography: A Matter of Harm or Morality?' (2010) 30 Legal Studies 230; CAJA, s.62-65.
[18] Home Office, Scottish Executive, Northern Ireland Office (n15) 1.
[19] See, for example: Ost, (n17).

Specifically, the analysis challenges the legislative test for determining indecency in this context.

3.3: Challenging the scope and the test for indecency under the PCA

The main objective of the PCA is defined in its introductory text as preventing '*the exploitation of children by making indecent photographs of them; and to penalise the distribution, showing and advertisement of such indecent photographs.*' Traditionally, it was seen to capture, and to target, the visual depictions of children being sexually abused.[20] This material is also known as CSAI and is often part of long-term CSA.[21] It has been described as both the '*picture of a serious crime in progress*'[22] and the '*picture of a crime scene*'.[23] Such material requires a child or young person to be abused and therefore it directly contributes to the harm suffered. Not only does the subject suffer during production (i.e., the abuse) but there is clear evidence that additional psychological harm is caused by being filmed whilst abused.[24] It has also been noted that this type of imagery leads to long-term psychological suffering and secondary victimisation.[25] The victim has to come to terms with the fact that a permanent record of their abuse is perpetually circulating and that some individuals will get '*a perverted thrill from watching it*',[26] and use these images for the purposes of sexual gratification.[27] For these reasons, this type of crime is perceived by some of the British public to be more heinous than murder and rape.[28]

It is apparent, then, that s.1 PCA and s.160 CJA serve a legitimate aim – to protect children and young people from abuse and exploitation. Indeed, most of the material classified under these provisions warrants criminalisation. Where a child or young person is photographed

[20] Alisdair Gillespie, 'Child Pornography' (2018) 27(1) Information & Communications Technology Law 30, 41.
[21] Ateret Gewirtz-Meydan and others, 'The complex experience of child pornography survivors' (2018) 80 Child Abuse & Neglect 238.
[22] Ethel Quayle and Max Taylor, *Child Pornography: An Internet Crime* (Routledge 2003).
[23] Lesli C Esposito, 'Regulating the Internet: The New Battle Against Child Pornography' (1998) 30 Case Western Reserve Journal of International Law 541, 544.
[24] Ethel Quayle and others, *Only Pictures? Therapeutic Work with Internet Sex Offenders* (Russell House Publishing 2006) 48.
[25] Quayle and Taylor (n22), 24.
[26] Ibid.
[27] Tink Palmer and Lisa Stacey, *Just One Click: Sexual Abuse of Children and Young People Through the Internet and Mobile Technology* (Barnado's 2004).
[28] Alex Strangways-Booth and Rob England, 'Child abuse less 'forgivable' than murder and rape' *BBC* (14 April 2019) <https://www.bbc.co.uk/news/uk-england-47652050> accessed 22 August 2022.

being abused or exploited, few would question the need to prohibit this material. However, not all material captured by these offences – not even all material taken / produced by adults - features children or young people being abused. As was discussed in chapter 1 (s.1.2.1), the context in which the imagery was taken is deemed irrelevant for the purposes of the offence. As a result, it also criminalises content which may not be abusive or exploitative. For example, in *R v Owen*[29] a photographer took pictures of a 14-year-old girl who wished to become a model. The pictures included shots that showed the victim in limited clothing and with bare breasts. Such photographs were not uncommon for modelling at that time, but they were deemed by the Court to be indecent and, because the girl was only 14, they constituted indecent photographs of a child, contrary to s.1 PCA. This conclusion was upheld despite no evidence of abuse or exploitation.

Similarly, and more importantly for the purposes of this thesis, the legislation also captures content that is not taken by adults but by children and young people themselves. Yet, the whole concept of YPSI is incompatible with the strict drafting of indecent imagery laws which have at their core the notion of children and young people as '*innocents who are in need of protection*.'[30] With YPSI, the child or young person is both the victim (in need of protection) and the perpetrator (that they need protecting from). But given that most YPSI is self-produced, it is questioned whether any harm is suffered. This question is explored in section 3.4. However, what is clear at this stage is that many images beyond CSAI are also captured by the current legislation, despite not being *prima facie* exploitative. This begs the question: what is the test for criminal material in this context? Specifically, what is the threshold that distinguishes criminal content from lawful content and, importantly, is this test fit for purpose?

3.3.1: Existing test for indecency

At an international level, there is no standard test for indecency. Most instruments operate by proscribing the depiction of sexual activities or sexual organs of children.[31] This has the advantage of being certain, but it is potentially under-inclusive. It is possible to imagine an image (e.g., of a child in underwear) which does not show genitalia but is still both sexual and exploitative. In England and Wales, the approach is different. The test is whether the given

[29] *R v Owen* [1988] 1 WLR 134.
[30] Gillespie, 'Child Pornography' (n20) 50.
[31] For example: OPSC (n8) Article 2(c).

material is indecent. But the Acts are silent on what constitutes indecency. It has led critics to question where decency ends and indecency starts and '*who, ultimately, is the moral arbiter of taste*?'[32] This unanswered question remains.

There was a conscious decision, on behalf of legislators, to use indecency rather than obscenity as the threshold. This is despite obscenity (defined as material which would '*deprave or corrupt*') being the threshold for other forms of criminalised material.[33] In *R v Stanley*,[34] the CA held that indecent and obscene were separate terms, existing on the same scale, with '*indecent being at the lower end of the scale and obscene at the upper end of the scale*'.[35] Thus, by choosing the term indecent, Parliament were knowingly reducing the threshold for criminal intervention in this context. However, they acknowledged that they were '*not quite certain*' how much lower the threshold was than that for obscenity.[36] In *R v Graham-Kerr*,[37] the Court confirmed that indecency was, as stated in *R v Stamford*,[38] to be assessed applying the '*recognised standards of propriety*'. Home Office guidance explains that this is '*the standard of decency which ordinary right-thinking members of the public would set*'.[39] However, this approach has been criticised. Naturally, the lack of definition leads to uncertainty. But it has also been argued that the test (which is comparable to that adopted under Federal US Law)[40] requires the jury to '*take on the gaze of the pedophile to root out pictures of children that harbor secret pedophillic appeal*'.[41] In determining whether an image is indecent, the jury are required to sexualise images that may not have otherwise been sexualised. For example, the definition (or lack thereof) has led to doubt around whether pictures, taken by parents, of children playing in the bath (and may, therefore, show genitalia) meet the threshold for criminalisation.[42] A parent photographing their child in the bath is unlikely, in most instances,

[32] Rebecca Fowler and Decca Aitkenhead, 'Julia's pictures: could it happen to you?' *The Independent* (23 Oct 2011) < https://www.independent.co.uk/news/julia-s-pictures-could-it-happen-to-you-1580611.html> accessed 22 August 2022.
[33] Obscene Publications Act 1959, s.1(1).
[34] *R v Stanley* [1965] 2 QB 327.
[35] Ibid, per Lord Parker CJ, para 333.
[36] Protection of Children Bill (n4) col 1850.
[37] *R v Graham-Kerr* [1988] WLR 1098.
[38] *R v Stamford* [1972] QB 391.
[39] Home Office, 'Indecent and obscene materials' (Home Office, 14 October 2015) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/468768/Indecent_and_obscene_materials_v_1_0.pdf> accessed 22 August 2022.
[40] The Federal test for child pornography includes, inter alia, the lascivious exhibition of the genitals or pubic area. However, 'lasciviousness' is not defined and is left for the courts. See: 18 US Code §2256(8) read in conjunction with 18 US Code §2256(2)(B).
[41] Amy Adler, 'The Perverse Law of Child Pornography' (2001) 101 Columbia Law Review 209, 213.
[42] One particularly famous case surrounded pictures taken by television newsreader Julia Somerville: Rebecca Fowler and Decca Aitkenhead, 'Julia's pictures: could it happen to you?' (n32).

to be sexualised. But one famous case, concerning newsreader Julia Somerville who had photographed her six-year-old daughter in the bath, led to police investigation on the basis that it might constitute an indecent photograph. A leading family lawyer suggested Somerville was '*playing with fire*' by photographing her own child in this environment, despite her simply capturing a moment of family time.[43] Thus, the current test, which disregards context, presents a very real risk of sexualising (and criminalising) otherwise harmless material.

The same is also true in relation to YPSI. The disregard for contextual factors means that even material produced in a non-harmful way is criminal. The judiciary have previously emphasised that, outside of the exception in s.1A PCA (discussed in s.1.2.4), regardless of the motivations of the initial producer, if the imagery was leaked it could be used for a more sinister purpose and to fuel prurient interests, which in turn could lead to a rise in actual abuse.[44] This position, therefore, asks those responsible for assessing the imagery to question whether the content, which may have been taken as part of a consenting and age-appropriate adolescent relationship or self-produced, could, hypothetically, fuel the desires of an adult with a sexual interest in children. Essentially, '*in order to decide whether material is illegal we become the paedophile*.'[45]

3.3.2: Alternative tests for assessing indecency

It is evident, then, that the current strict liability approach is not fit for purpose. However, a wholly subjective test, requiring the law to consider whether the material has been taken or used for inappropriate purposes, would not work either.

3.3.2.1: A wholly subjective test?

First, it would be potentially under-inclusive. It is known from existing laws on rape, sexual assault, and the law on disclosing private sexual images (criminalised by s.33 CJCA and outlined in chapter 1, s.1.3.4), that proving intention creates a barrier to prosecution. In cases

[43] Rebecca Fowler, 'Julia Somerville defends 'innocent family photos'' *The Independent* (5 November 1995) < https://www.independent.co.uk/news/julia-somerville-defends-innocent-family-photos-1538516.html> accessed 22 August 2022.
[44] *R v Graham-Kerr* (n37).
[45] Gillespie, 'Child Pornography' (n20), 36.

of rape and sexual assault, having to prove an absence of consent has been known to cause significant distress.[46] It has been described as a re-traumatising process that often places the victim, rather than the defendant, on trial.[47] In some instances, this experience has led to the victim to take their own life.[48] Similarly, in relation to disclosing private and sexual photographs, the requirement that the perpetrator intended to cause distress to the victim sets a high threshold.[49] It leaves certain situations, where the victim may still suffer distress, unaccounted for.[50] If, for example, bragging to a friend was the motivation for sharing an image this would not, necessarily, be captured. The framing of the legislation, which focuses on the alleged mens rea of the defendant, rather than the impact on the victim, or simply the absence of consent, is problematic. Therefore, applying a comparable subjective test to the law on indecent images of children and young people, which considered whether the perpetrator took or used the image for indecent purposes, would be equally flawed. While this approach would limit the amount of non-exploitative material that was captured it would also diminish the level of protection afforded to children and young people.

In addition to being under-inclusive, such an approach would also risk being overinclusive. Given the breadth of material that offenders use for sexual gratification, it may include a vast extension of the law. It is known that some offenders use images of children in bathing suits (e.g., those in shopping catalogues) as stimuli.[51] However, to bring photographs from underwear and swimwear catalogues within the definition of prohibited content would be excessive. It would pose many of the same issues as the current law (in that it criminalises un-exploitative material) and would likely undermine the public's confidence in the law (on the basis that it was overbroad).

3.3.2.2: A combined test?

[46] Jennifer Temkin, *Rape and the Legal Process* (2nd edn, Oxford, Oxford University Press 2002), ch 4.
[47] Jacqueline M Wheatcroft, Graham F Wagstaff & Annmarie Moran, 'Revictimizing the Victim? How Rape Victims Experience the UK Legal System' (2009) 4(3) Victims & Offenders 265. See also: Temkin (n46) ch 1(c) and ch 4.
[48] Amelia Gentleman, 'Prosecuting sexual assault: 'Raped all over again'' *The Guardian* (13 April 2013) <https://www.theguardian.com/society/2013/apr/13/rape-sexual-assault-frances-andrade-court> accessed 22 August 2022.
[49] CJCA, s.33.
[50] For a more detailed critique of the law see: Alisdair Gillespie, '"Trust me, it's only for me": 'Revenge Porn' and the Criminal Law' (2015) 11 Criminal Law Review 866.
[51] Max Taylor, Gemma Holland and Ethel Quayle, 'Typology of Paedophile Picture Collections' (2001) 74 The Police Journal 97, 100.

This issue (of what makes something criminally indecent) has been grappled with in the past in relation to indecent assault (now repealed).[52] The HL in *R v Court*[53] (concerning a shop assistant who hit a 12-year-old girl on her clothed bottom) held that a combined objective and subjective test was necessary to assess whether an assault was, for the purposes of the law, indecent. They relied on the earlier decision in *R v George*,[54] where it was held that a person who removed a shoe from a woman could not be convicted of indecent assault on the basis that he had a foot fetish. The House was clear that there had to be some objective element to justify a conclusion of indecency but that a purely objective test was not appropriate. They held that the circumstances in which the assault took place were a necessary consideration and the motivation of the offender could be a circumstance of the assault. Thus, while an indecent motivation could not turn an innocuous assault into an indecent one, it could be the factor which transforms a *potentially* indecent assault into one which was, in fact, indecent. Equally, the absence of any such indecent motivation could ensure the same *potentially* indecent assault was not regarded as indecent. This led to the *Court* test for indecency. It now forms the basis for the statutory definition of sexual under the SOA:[55]

a) *whatever its circumstances or any person's purpose in relation to it, it is because of its nature sexual, or*
b) *because of its nature it may be sexual and because of its circumstances or the purpose of any person in relation to it (or both) it is sexual.*

This is an interesting test, and one which Gillespie has argued could be taken forward to define indecent in the context of photographs of children and young people.[56] The first element is objective. If right-thinking members of society would consider the content of the imagery to be indecent then it is indecent irrespective of what the producer's intention was. This would, for example, include any documentation of sexual activity with a child – the material the PCA primarily sought to capture. However, if the image is not capable of being indecent, e.g., pictures in clothing catalogues, then it cannot be deemed indecent just because it is used for sexual gratification. However, if the content depicted *could* be indecent, but *might not* be, then the motivation of the producer / consumer should be considered when drawing a conclusion as to indecency. One example might be a child photographed in the bath or nude on a beach. Here,

[52] Sexual Offences Act 1956, s.14 and 15. See also: *R v Leeson* (1968) 52 Cr App R 185.
[53] *R v Court* [1989] AC 28.
[54] *R v George* [1956] Crim LR 52.
[55] Sexual Offences Act 2003 (SOA), s.78.
[56] Gillespie, 'Child Pornography' (n20), 39.

the photograph would only be indecent if it was being taken or used for an indecent purpose. This approach would seemingly resolve some of the existing issues around over-inclusivity in the law. However, it would not resolve the issues around proving intention and thus would still be potentially underinclusive in certain contexts.

In a situation where the image *could* be indecent (e.g., a child in the bath), the photographer (e.g., the child's parent or guardian) may claim that the photograph was taken innocently as part of family time (as was the case with Julia Sommerville).[57] It is highly likely, that without any evidence to the contrary, this would be accepted at face value. This could cause harmful perpetrators to slip through the net. Particularly given that most CSA is committed by someone known to the victim and / or the victim's family.[58] This would be in addition to those who already fall through the net because the images they take or use for sexual gratification are not objectively indecent.[59] Moreover, in many indecent photograph cases, the subject is very young and would be unable to recognise or articulate their exploitation, therefore such risks could not be alleviated by considering the testimony of the victim and, even if they could, the evidential issues around proving intent would still reside. Thus, while the *Court*-style approach may address some of the existing issues it still has limitations. In any event, this approach is of no use to YPSI behaviours which are, by their very nature, sexual (and thus would be classified as indecent under the *Court* test). This is considered further below.

3.3.2.3: Application to YPSI

Research suggests that the primary reason for engaging in YPSI is a way of expressing sexual identity.[60] Therefore, even those photographs which did not fall under the first *Court*-definition of being objectively indecent (e.g., because they were not inherently sexual) would nevertheless be deemed indecent on the basis that they were taken and sent with the view to being sexual (subjective test). The issue is that imagery taken by adults and imagery taken by children / young people are – at their core – distinctly different. With imagery taken by adults,

[57] Rebecca Fowler, 'Julia Somerville defends 'innocent family photos'' (n43).
[58] Office for National Statistics, 'Child sexual abuse survey in England and Wales: year ending March 2019' (Office for National Statistics, 14 Jan 2020) < https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/articles/childsexualabuseinenglandandwales/yearendingmarch2019> accessed 22 August 2022.
[59] E.g., D was acquitted of an offence when he took a photograph of a 7-year-old boy at a naturist swimming pool on the grounds that image was not objectively indecent. *R v Graham-Kerr* (n37).
[60] Lara Karaian, 'Lolita Speaks: Sexting, Teenage Girls and the Law' (2012) 8 Crime, Media, Culture 57, 63.

a sexual motive automatically makes the material into something exploitative and harmful and thus necessitating criminalisation. However, in relation to YPSI, a sexual motive does not necessarily problematise the behaviour or the material. Indeed, for those aged 16 and 17 it simply represents a digital depiction of behaviour in which they can lawfully engage. Even for those under the age of consent (16) it is difficult to see how genuinely consensually produced imagery (e.g., taken by the subject or by a partner as part of an existing relationship) is any more exploitative than consensual physical sexual activity which the law acknowledges it will seldom prosecute.[61] Yes, it carries risks (e.g., wider distribution) but so too does physical sexual activity (e.g., pregnancy and sexually transmitted infections (STIs)). For these reasons it is argued that the current legislation (even if amended to adopt the *Court*-style test) cannot effectively regulate YPSI. Therefore, in considering how best to regulate YPSI, and to assess what content / circumstances should be criminalised, further factors must be borne in mind.

3.4: The role of self-production and unique nature of YPSI

One of the most striking differences between YPSI and other forms of indecent imagery is that, with YPSI, the subject and producer of the image are often the same person. In these situations, the child or young person is simultaneously the victim and the perpetrator. They are a victim because the law says they require protection. Yet, by taking and distributing the image, they are (if it meets the threshold of indecency) also deemed to be a perpetrator acting in an exploitative way.

The prosecution of children and young people for consensual YPSI can, and has, caused considerable harm.[62] In England and Wales, as explored in chapter 2 (s.2.3.1), there is a reluctance by police to arrest children for YPSI.[63] However, arrests, formal cautions and further sanctions are issued in some cases.[64] Strictly speaking, the producer, sender, and recipient are

[61] SOA 2003, s.13 Explanatory notes. Note a different approach is taken to children aged under 13: SOA, s.5.
[62] Robert D Richards and Clay Calvert, 'When sex and cell phones collide: Inside the prosecution of a teen sexting case' (2009) 32 Hastings Communications and Entertainment Law Journal 1.
[63] College of Policing, 'Briefing Note: Police action in response to youth produced sexual imagery ('Sexting')' (College of Policing, Nov 2016) <https://www.college.police.uk/News/College-news/Documents/Police_action_in_response_to_sexting_-_briefing_(003).pdf> accessed 22 August 2022; Child Exploitation and Online Protection (CEOP), 'ACPO CPAI Lead's Position on Young People Who Post Self-Taken Indecent Images' (CEOP) <https://www.cardinalallen.co.uk/documents/safeguarding/safeguarding-acpo-lead-position-on-self-taken-images.pdf> accessed 22 August 2022, para 2.5.
[64] See data in chapter 2, s.2.3.1. See also: Martin Evans, 'Teenage girl given police caution for sexting explicit selfie to boyfriend' The Telegraph (22 July 2014)

all committing an offence.[65] The criminal law appears to adopt the view that self-exploitation is as worthy of punishment (and protection) as the exploitation of others. Yet, taken at face value (that is on the assumption that the YPSI is engaged in wholly voluntarily and is not a result of coercion),[66] there is seemingly no direct harm, as the activity portrayed will be consensual. There is also unlikely to be any secondary harm, caused by another person viewing that image (as is the case with CSAI, for example), because it is sent with the intention of it being viewed. Thus, it seems that, although the PCA and s.160 CJA hold themselves as preventing harm to children and young people, their application, at least to consensual forms of YPSI, cannot be explained in this way.

However, YPSI is not always consensual. Some children and young people are coerced into sending content and some imagery is shared beyond the intended recipient without the subject's consent.[67] The reality is that YPSI encompasses a wide spectrum of behaviour, and much like other forms of sexual activity, it can be both consensual and non-consensual. It is best understood as a nuanced collection of practices with very real risks and equally real gains; it occupies a grey zone from socially acceptable to unacceptable sexual practices that can, but do not always, result in harm.[68] This raises two key questions. First, what harms, if any, do different YPSI behaviours pose? Second, do any of these harms justify criminalising any or all YPSI?

3.5: What harms do YPSI behaviours pose?

<https://www.telegraph.co.uk/news/uknews/crime/10983055/Teenage-girl-given-police-caution-for-sexting-explicit-selfie-to-boyfriend.html> accessed 22 August 2022.

[65] The former for taking an indecent photograph of a child and for distributing it (PCA, s.1). The latter for possession (CJA, s.160) although if it was unsolicited, then this would only be the case if it was kept for an unreasonable length of time (CJA, s.160(2)(c)).

[66] As per the definition of consent provided by the SOA, s.74.

[67] Cristian Molla-Esparaza, Josep-Maria Losilla & Emelina Lopez-Gonzalez, 'Prevalence of sending, receiving and forwarding sexts among youths: A three-level meta-analysis (2020) 15(2) PLos ONE.

[68] Andrea Slane, Jennifer Martin and Jonah R Rimer, 'Views and Attitudes about Youth Self-Produced Sexual Images among Professional with Expertise in Child Sexual Abuse (2021) 30(2) Journal of Child Sexual Abuse 207, 210; Jessica Ringrose and others, 'A qualitative study of children, young people and 'Sexting': A report prepared for the NSPCC' (National Society for the Prevention of Cruelty to Children Report, 2012) < https://eprints.lse.ac.uk/44216/1/__Libfile_repository_Content_Livingstone%2C%20S_A%20qualitative%20study%20of%20children%2C%20young%20people%20and%20%27sexting%27%20%28LSE%20RO%29.pdf> accessed 22 August 2022, 7.

YPSI has sparked significant, and worldwide, public concern for over a decade.[69] Initial surveys and reports on YPSI, in the late 2000s,[70] tended to exaggerate consequences of YPSI,[71] and to focus on the few tragic cases that resulted in suicide (e.g., Jessica Logan and Hope Whitsell).[72] The behaviour was depicted as a '*titillating activity that all too often had horrific results*'.[73] Since then, research has advanced and, instead of being seen as a catastrophic and inherently deviant activity, YPSI is now understood in a more nuanced way.[74] Indeed, much of the literature around YPSI suggests that it is just a contemporary form of sexual expression.[75] The following analysis explores the extent to which it is an age-appropriate activity, symptomatic of the current digital-age, and the extent to which some or all of these behaviours are a cause for concern.

3.5.1: Consensual YPSI

A large proportion of YPSI research has now created a normalcy discourse around YPSI.[76] Bond compares the use of YPSI to earlier generation's use of '*behind the bike shed*'.[77] Now, adolescents simply use virtual spaces (rather than, or in addition to, physical meeting places) to explore their developing sexual and romantic relationships.[78] Richards and Calvert have

[69] E.g., Chana Joffe-Walt, 'Sexting': A disturbing new teen trend? (*NPR*, 11 March 2009) <https://www.npr.org/templates/story/story.php?storyId=101735230> accessed 22 August 2022; and, Cooper G, 'Sexting: a new teen cyber-bullying 'epidemic'' *The Telegraph* (12 April 2012) < https://www.telegraph.co.uk/technology/facebook/9199126/Sexting-a-new-teen-cyber-bullying-epidemic.html> accessed 22 August 2022. For commentaries on media and moral panic regarding YPSI, see: Thomas Crofts and others, *Sexting and Young People* (Palgrave Macmillan 2015) ch 3; Amy A Hasinoff, *Sexting Panic: Rethinking Criminalization, Privacy, and Consent* (University of Illinois Press 2015)

[70] National Campaign to Prevent Teen and Unplanned Pregnancy, 'Sex and tech: Results from a survey of teens and young adults' (*The National Campaign to Prevent Teen and Unplanned Pregnancy*, 2008) <https://www.dibbleinstitute.org/pdf/SexTech_Summary.pdf> accessed 22 August 2022.

[71] Stacey Garfinkle, 'Sex + texting = sexting parenting' *Washington Post* (10 Dec 2008) <http://voices.washingtonpost.com/parenting/2008/12/sexting.html> accessed 22 August 2022.

[72] Elizabeth J Meyer, 'Sexting and suicide' (*Psychology Today*, 16 Dec 2009) <https://www.psychologytoday.com/gb/blog/gender-and-schooling/200912/sexting-and-suicide> accessed 22 August 2022.

[73] Elizabeth Englander, 'What Do We Know About Sexting, and When Did We Know It?' (2019) 65 Journal of Adolescent Health 577, 577.

[74] Ibid.

[75] Christopher J Ferguson, 'Sexting behaviours among young Hispanic women: Incidence and association with other high-risk sexual behaviours' (2011) 82 Psychiatric Quarterly 239; Donald S Strassberg and others, 'Sexting by high school students: an exploratory and descriptive study' (2013) 42(1) Archives of Sexual Behaviour 15.

[76] Nicola Döring, 'Consensual sexting among adolescents: risk prevention through abstinence education or safer sexting?' (2014) 8(1) Cyberpsychology: Journal of Psychosocial Research on Cyberspace 1.

[77] Emma Bond, 'The mobile phone = bike shed? Children, sex and mobile phones' (2011) 13 New Media and Society 587.

[78] Ibid.

argued that YPSI is '*a high-tech form of flirting – using a forum that has become synonymous with [the younger] generation*'.[79] In support of these arguments, children and young people (who have participated in research about YPSI) have said that they often send sexual imagery to '*feel sexy*' and because they enjoy the '*thrill*' of this type of behaviour.[80] For example, in Lenhart's telephone survey with 800 12-17-year olds across the USA, 66 per cent of girls and 60 per cent of boys said they sent images to be '*fun*' and '*flirtatious*'.[81] Many children and young people have also stated that their motivation is to attract potential romantic partners.[82] 65 per cent of Englander's sample (617 18-year-olds in Massachusetts) confirmed that image-sharing was done with the anticipation of attracting '*someone they were interested in*', a motivation that did not appear to differ between genders.[83]

Within an existing and established relationship, YPSI has also been associated with positive expressions of mutual affection (e.g., sending content with the '*expectation – or at least the hope – that [it] would be reciprocated*').[84] Findings from Drouin and others' research, involving 253 Midwestern college students (aged 18-26), suggests that sexual image sharing can also take place as a method of sustaining intimacy in a long-distance relationship.[85] 26 per cent of those in a committed relationship cited their partner being far away (e.g. living apart) as a reason for engaging in the practice.[86] In addition, 66 per cent of Englander's sample of 18-year-olds said they sent images '*because a date or boyfriend / girlfriend wanted the picture*'.[87] Lastly, Lenhart concluded (from the anecdotal comments of her sample of 800) that often

[79] Richards and Calvert, (n62) 35.
[80] Allyson L Dir and others, 'Understanding Differences in Sexting Behaviors Across Gender, Relationship Status, and Sexual Identity, and the Role of Expectancies in Sexting' (2013) 16(8) Cyberpsychology, Behavior and Social Networking 568; Lori Henderson, 'Sexting and sexual relationships among teens and young adults' (2011) 7(1) McNair Scholars Research Journal Article 9; Andrew B Perkins and others, 'Sexting behaviours among college students: cause for concern?' (2014) 26(2) International Journal of Sexual Health 79; Daniel G Renfrow and Elisabeth A Rollo, 'Sexting on campus: minimizing perceived risks and neutralizing behaviours' (2014) 35(11) Deviant Behaviour 903; Rob S Weisskirch and Raquel Delevi, ''Sexting' and adult romantic attachment' (2011) 2 Computers in Human Behaviour 1697.
[81] Amanda Lenhart, 'Teens and sexting, how and why minor teens are sending sexually suggestive nude or nearly nude images via text messaging.' (Pew Internet and American Life Project Research, 15 Dec 2009) <https://www.pewresearch.org/internet/2009/12/15/teens-and-sexting/> accessed 22 August 2022.
[82] Elizabeth Englander, 'Low risk associated with most teenage sexting: A study of 617 18-year-olds' (Research Report, Massachusetts Aggression Reduction Center, July 2012) < http://webhost.bridgew.edu/marc/SEXTING%20AND%20COERCION%20report.pdf > accessed 22 August 2022; Henderson (n80); Kamil Kopecký, 'Sexting among Czech pre-adolescents and adolescents' (2011) 28(2) New Educational Review 39; Lenhart (n81).
[83] Englander, 'Low risk associated with most teenage sexting' (n82).
[84] Study with 85 undergraduates in the Northeast of the USA: Renfrow and Rollo (n80).
[85] Michelle Drouin and others, 'Let's talk about sexting, baby: Computer-mediated sexual behaviors among young adults' (2013) 29 Computers in Human Behavior A25.
[86] Ibid.
[87] Englander, 'Low risk associated with most teenage sexting' (n82).

'*images are shared between two romantic partners, in lieu of, as a prelude to, or as a part of sexual activity*'.[88]

It appears, then, that some sexual imagery practices occur consensually between children and young people who are, or who want to be, romantically or sexually involved. In these situations, the process often seems to be a mutual exchange between parties of a similar age, typically as an alternative, or addition to, other sexual activity. This is in stark contrast to victims of CSAI who have no choice or control in the production of such imagery, and where the production is underpinned by an imbalance of power.[89] While it should be noted that the power dynamic in children and young people's relationships may also be imbalanced (e.g., in a peer on peer abuse context[90] or simply stemming from socially ingrained double standards around male and female sexuality[91] – a point returned to in s.3.5.2), the above research has demonstrated that this is not always the case. However, much of this research has been carried out with participants from the USA, a large proportion of whom were 18 or over. Therefore, the extent to which they represent under 18s in England and Wales is unknown. Additionally, while the research suggests that sexual image sharing can be a standardised part of children and young people's day-to-day lives, it does not eradicate fears that YPSI may also occur non-consensually, either because of varying forms of coercion or because it is later shared more widely. Therefore, to truly understand how best to regulate YPSI, an understanding of (potentially) harmful YPSI behaviours must be explored.

3.5.2: Non-consensual YPSI

It is not disputed that some, perhaps even many, children and young people who engage in YPSI may do so willingly, satisfying the definition of consent used for sexual activity generally, under s.74 SOA: engaging by choice, and with '*the freedom and capacity to make*

[88] Lenhart (n81).
[89] See for example a direct account of the experience suffered by a victim of CSA and CSAI. Amy, 'Victim Impact Statement of Amy – the Victim in the Misty Series' (25 October 2009, *The Virginian Pilot*) < http://graphics8.nytimes.com/packages/pdf/national/20100202-impact-statement.pdf> accessed 22 August 2022.
[90] Ofsted, 'Review of sexual abuse in schools and colleges' (Ofsted, 10 June 2021) < https://www.gov.uk/government/publications/review-of-sexual-abuse-in-schools-and-colleges/review-of-sexual-abuse-in-schools-and-colleges> accessed 22 August 2022.
[91] Jessica Ringrose and others, 'Teen girls, sexual double standards and 'sexting': gendered value in digital image exchange' (2013) 14 Feminist Theory 305.

that choice'. However, there is clear evidence, from across the globe, to suggest that not all behaviours are engaged in freely.

3.5.2.1: Images induced through coercion or pressure

A 2011 digital abuse survey in the USA, based on 1,355 interviews (with 631 teenagers aged 14-17 and 724 adults aged 18-24), reported that 61 per cent of children and young people who had previously sent imagery felt pressured to do so on at least one occasion.[92] In terms of where this pressure comes from, a survey of 498 Belgian adolescents aged 15–18, led to the conclusion that the main sources of pressure were from friends and romantic partners – particularly for females.[93] Englander (study of 617 18-year-olds) also found that this pressure was typically from peers and most notably boyfriends.[94]

In addition, there is also evidence that resisting pressure to send imagery may have negative consequences. Ringrose and others' research (with 35 pupils from secondary schools in London) found that being asked for images is commonly viewed by young people as a compliment, but that refusing to send images can have negative repercussions.[95] One female participant stated that '*when you say no to people, like you fall out with them*'.[96] In fact, fear of being ostracised is cited as a key motivator for sending imagery.[97] In line with other forms of sexual violence, where women are significantly more likely than men to be victims,[98] girls are far more likely than boys to be pressured into sending images of themselves.[99] Englander found coercion to be twice as common for girls as for boys.[100] Other research has also found that some girls view sending sexual imagery as a type of '*sexual compliance*' or an '*undesirable*

[92] Associated Press & MTV 'AP-MTV digital abuse study' (2009) <http://www.athinline. org/pdfs/MTV-AP_2011_Research_Study-Exec_Summary.pdf> accessed 22 August 2022.
[93] Michel Walgrave, Wannes Heirman and Lara Hallam, 'Under pressure to sext? Applying the theory of planned behaviour to adolescent sexting' (2013) Behaviour and Information Technology.
[94] Englander, 'Low risk associated with most teenage sexting' (n82).
[95] Ringrose and others, 'Teen girls, sexual double standards and 'sexting'' (n91).
[96] Ibid.
[97] Ibid.
[98] Office for National Statistics, 'Sexual offences victim characteristics, England and Wales: year ending March 2020' (Office for National Statistics, 18 March 2021) < https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/articles/sexualoffencesvictimcharacteristicsenglandandwales/march2020> accessed 22 August 2022.
[99] Englander, 'Low risk associated with most teenage sexting' (n82); Henderson (n80); Lenhart (n81); Ringrose and others, 'A qualitative study of children, young people and 'Sexting' (n68).
[100] Englander, 'Low risk associated with most teenage sexting' (n82).

price' they have to pay to maintain a good relationship.[101] Indeed, an Australian news report, from as far back as 2008, reported that teenage girls enjoyed the positive reaction sending images creates but also noted that they '*feel like they can't get attention without putting themselves out there like that*'.[102] Lippman and Campbell found similar results in their study (with 51 American 12-18 year-olds) which showed that girls sometimes use YPSI as a strategy for gaining the acceptance and attention of a potential partner, and also as a means of attaining popularity with boys.[103] However, girls are faced with a double-edged sword. While their desirability seemingly stems from a willingness to display their bodies, any such display runs the risk of being marked as shameful. Consonant with familiar sexual double standards,[104] both boys and girls described girls who sent images as '*skets*'[105] who lacked self-respect.[106] All of these findings suggest that, while some YPSI may occur consensually, there are equally problematic trends within the behaviour, particularly for females.

However, boys' engagement also appears to be motivated by external pressures. Yet, the type of pressures, and how they respond to them, differs from girls' experiences. Whereas heterosexual girls reportedly send imagery to gain (and sustain) attention from male romantic interests, heterosexual boys seemingly gain popularity (amongst their peers) by sharing the pictures they have been sent by girls.[107] Indeed, Ringrose and others' found that for boys '*acquiring images can work as proof of their desirability and access to girls' bodies, constituting new norms masculine performance*'.[108] Equally, they may be '*at risk of peer exclusion if they do not brag about sexual experiences*'.[109] Interestingly, girls are more commonly asked to send images,[110] but are also more likely to be sent unsolicited images.[111]

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[101] Michelle Drouin and Elizabeth Tobin, 'Unwanted but consensual sexting among young adults: Relations with attachment and sexual motivations.' (2014) 31 Computers in Human Behaviour 412; Julia R Lippman and Scott W Campbell, 'Damned if you do, Damned if you don't…If you're a girl: relational and normative contexts of adolescent sexting in the United States' (2014) 8(4) Journal of Children and Media 371; Renfrow and Rollo (n80).
[102] Lucy Battersby, 'Alarm at teenage 'sexting' traffic' *The Age* (10 July 2008) <https://www.theage.com.au/national/alarm-at-teenage-sexting-traffic-20080709-3clg.html> accessed 22 August 2022.
[103] Lippman and Campbell (n101).
[104] Robin R Milhausen & Edward S Herold, 'Reconceptualizing the Sexual Double Standard' (2001) 13(2) Journal of Psychology and Human Sexuality 63.
[105] A derogatory British slang term for a promiscuous young woman.
[106] Ringrose and others, 'Teen girls, sexual double standards and 'sexting'' (n91).
[107] Ibid.
[108] Ibid.
[109] Ringrose and others, 'A qualitative study of children, young people and 'Sexting' (n68)
[110] Englander, 'Low risk associated with most teenage sexting' (n82); Henderson (n80); Lenhart (n81); Ringrose and others, 'A qualitative study of children, young people and 'Sexting' (n68).
[111] Mairead Foody and others, '"It's not just sexy pics": An investigation into sexting behaviour and behavioural problems in adolescents' (2021) 17 Computers in Human Behavior 10662, 5.

In one study with 838 Irish students aged 15-18, the research showed that 21.9 per cent of girls and 7.5 per cent of boys had frequently received '*a sexually explicit image…when [they] didn't want to*'.[112] The study does not specify whether these images depicted the sender or other individuals. Regardless, though, these findings suggest very real and very concerning undertones to YPSI. Specifically, the notion that girls' bodies are commodities, to be '*traded like currency*', while boys' popularity and status stems from their sexual prowess.[113]

These beliefs are consistent with longstanding perceptions about sexuality.[114] They are undoubtedly harmful but, importantly, it is the presence of these factors (e.g., coercion by another as well as ingrained societal pressures and harmful attitudes about sexuality) that make some YPSI harmful. The current framing of the law, under s.1 PCA, which criminalises the producer overlooks this. It is noted that other offences (outlined in chapter 2, s.2.3.1) such as harassment (PHA) and unsolicited imagery,[115] are capable of criminalising harmful conduct without criminalising the victim. However, the current inclusion of consensual practices under s.1 PCA is problematic. These problems are highlighted even more clearly in relation to images which are shared without consent.

3.5.2.2: Images shared without consent

One of the most frequently cited negative experiences of YPSI is the content being shared without the subject's consent.[116] There are instances where a child or young person may willingly send a sexual image to one person but where that same image is later shared with others, without their consent. The psychological harm and stress that can arise from this type of non-consensual image-sharing – even for adults – has been well documented.[117] Bates has identified (from 18 qualitative interviews) that '*the negative mental health consequences…are similar in nature to the negative mental health outcomes that rape survivors experience.*'[118]

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[112] Ibid, 4-5.
[113] Ringrose and others, 'Teen girls, sexual double standards and 'sexting'' (n91), 319.
[114] Milhausen & Herold, (n104).
[115] John Woodhouse, 'Regulating Online Harms' (House of Commons Library, 15 March 2022) <https://researchbriefings.files.parliament.uk/documents/CBP-8743/CBP-8743.pdf> accessed 22 August 2022, s.6.6; Chris Philip, *Online safety update* (HCWS 675, 14 March 2022) <https://questions-statements.parliament.uk/written-statements/detail/2022-03-14/hcws675> accessed 22 August 2022.
[116] Lenhart (n81).
[117] See, for example: BBC, 'Chrissy Chambers: Revenge porn almost killed me' *BBC* (18 Jan 2018) <https://www.bbc.co.uk/news/technology-42733034> accessed 22 August 2022
[118] Samantha Bates, 'Revenge Porn and Mental Health: A Qualitative Analysis of the Mental Health Effects of Revenge Porn on Female Survivors' (2017) 12(1) Feminist Criminology 22.

For these reasons sharing private images of anyone – even adults – without consent is a criminal offence.[119] In relation to children and young people specifically, Livingstone and Smith have highlighted links between the disclosure of sexual imagery and cyberbullying (bullying or harassment that occurs online).[120] Unlike traditional bullying, there is no limit to the time or location that cyberbullying can occur.[121] Research by Wolak and Finkelhor shows that young people who have had their YPSI made public have also experienced threats, blackmail and abuse.[122] In a number of tragic, well-documented cases, the widespread sharing of pictures has corresponded with severe negative psychological outcomes including anxiety disorders,[123] depression and suicide.[124]

Research relating to how frequently non-consensual distribution occurs is unclear,[125] but a recent meta-analysis found a mean prevalence of forwarding sexual messages and imagery to be 7 per cent.[126] Findings relating to whether boys or girls were more likely to be the subject of non-consensual distribution are unclear.[127] Ultimately, as with much of the data around YPSI,[128] a conclusive picture around non-consensual sharing / distribution is yet to be established. However, what is clear is that there is no guarantee that YPSI will remain within the private domain and, if it is shared beyond the intended recipient, the consequences can be particularly harmful.[129]

Overall, it is clear that while some YPSI may be consensual and part of healthy age-appropriate relationship dynamics, some YPSI is non-consensual and can be harmful. Whether it be a desire

[119] CJCA, s.33.
[120] Sonia Livingstone and Peter K Smith, 'Annual research review: harms experienced by child users of online and mobile technologies: the nature, prevalence and management of sexual and aggressive risks in the digital age' (2014) 55(6) The Journal of Child Psychology and Psychiatry 635, 638.
[121] Vesna Vesela Bilic, 'Violence among peers in the real and virtual world' (2013) 9(1) Paediatrics Today 78.
[122] Janis Wolak and David Finkelhor, 'Sexting: A Typology' (2011) Crimes against Children Research Center.
[123] Bilic (n121); Panagiota Korenis and Stephen Bates Billick, 'Forensic implications: adolescent sexting and cyberbullying' (2014) 85 Psychiatry Quarterly 97.
[124] Del Siegle, 'Cyberbullying and sexting: technology abuses of the 21st Century' (2010) 33(2) Gifted Child Today 14.
[125] Studies have led to differing findings. For example, Mitchell and other's sample of 1560 teenagers led to a finding of 10 per cent while Perkins and others found higher figures of 12 (nude) and 19 (semi-nude) percent. Kimberly J Mitchell and others, 'Prevalence and characteristics of youth sexting: a national study' (2012) 129(1) Pediatrics 13; Andrew B Perkins and others, 'Sexting behaviours among college students: cause for concern?' (2014) 26(2) International Journal of Sexual Heath 79.
[126] Molla-Esparaza, Josep-Maria Losilla & Emelina Lopez-Gonzalez (n67).
[127] Contrasting findings were found in Reyns and others; study and Johnsson and others' study. Bradford W Reyns and others, 'The unintended consequences of digital technology: exploring the relationship between sexting and cyber victimization' (2013) Journal of Crime and Justice 1; Linda S Jonsson and others, 'Voluntary sexual exposure online among Swedish youth – social background, internet behaviour and psychosocial health' (2014) 30 Computers in Human Behavior 181.
[128] See chapter 2, s.2.4.
[129] Wolak and Finkelhor (n122); Bilic (n121); Korenis and Bates Billick, (n123); Siegle (n124).

to gain popularity or approval, a desire to meet social norms, or a more explicit form of coercion, decisions to take / send imagery are not always freely reached, especially for females.[130] Moreover, some YPSI is shared more widely posing further risks and harms. This, therefore, leads us to our second question (posed at the end of section 3.4): do these harms justify criminalising YPSI?

3.6: Do the harms justify criminalisation?

3.6.1: Wider dissemination

In certain contexts, YPSI can cause serious harm.[131] The act itself (taking a digital image of film) carries long-term risk. Namely, the presence of lasting imagery that could be widely distributed without consent and could cause harm to the subject. This risk formed part of the legislators reasoning for adopting a strict liability approach in the PCA. This was confirmed by the judiciary who felt that the *risk* that imagery *may* be distributed more widely (and could then be used to fuel prurient interests) could justify criminalising the initial production.[132] If uploaded to the internet, imagery can be downloaded, mirrored, and widely distributed.[133] Although there are mechanisms in place to remove such content, underpinned by Article 17 of the General Data Protection Regulation (GDPR), the process is complicated and the harm caused to an individual whose images are posted online are likely to be extremely severe.[134]

In a YPSI context, even if the images are only circulated between peers, and never viewed by adults with a sexual interest in children, they can still cause significant harm to the subject. In this situation, the distributor will have interfered with the autonomy of the subject and potentially caused (secondary) harm. Thus, a prosecution may well be necessary and in the public interest. However, while the harmfulness of this outcome should not be understated, it

[130] Jennifer A Jewell, and Christina Spears Brown, 'Sexting, catcalls, and butt slaps: how gender stereotypes and perceived group norms predict sexualised behaviour' (2013) 69 Sex Roles 594.
[131] Including depression and suicide: Bilic (n121); Korenis and Bates Billick, (n123); Siegle (n124).
[132] *R v Graham-Kerr* (n37).
[133] Quayle and Taylor, (n22) 4-6; Alisdair Gillespie, *Child Pornography: Law and Policy* (Routledge 2011) 24.
[134] *EU General Data Protection Regulation* (GDPR): Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data. Repealing Directive 95/46/EC (General Data Protection Regulation), OJ 2016 L 119/1. See also: Eugenia Georgiades, 'Down the Rabbit Hole: Applying a Right to Be Forgotten to Personal Images Uploaded on Social Networks' (2020) 30(4) Fordham Intellectual Property, Media & Entertainment Law Journal 1111.

is possible to criminalise wider distribution without criminalising the initial production. Even with the law remaining as it is, the recipient who further disseminates the image will have distributed an indecent photograph of a child or young person and thus be subject to s.1(b) PCA and, perhaps more appropriately, their actions could also be captured by the existing laws on disclosing private and sexual images which target this exact behaviour (s.33 CJCA). We know from MoJ data that some children and young people have been prosecuted for this offence (s.33 CJCA).[135]

However, for successful prosecution, under s. 33 CJCA, the prosecution must prove an intent to cause distress which sets a high threshold. It carries with it the same evidential issues as the laws on sexual assault and rape.[136] Yet, any disclosure of private sexual materials could cause harm to the subject – even if they were not intended to do so. This is a limitation of the current law. A more nuanced approach would focus on the absence of consent and the harm caused to the victim, rather than the intention of the perpetrator. To some degree this is achieved by s.1(b) of the PCA as it is not concerned with the motivation of the defendant. However, for reasons already discussed, applications of this provision to children and young people are problematic. Nevertheless, there are existing mechanisms for capturing wider dissemination which do not involve criminalising the initial producer. Adopting such an approach would be beneficial to the regulation of YPSI.

3.6.2: Absence of free and informed consent

However, in addition to wider dissemination, there are other risks and harms linked to YPSI. Namely, the risk that a child or young person may feel pressured (e.g., pressures inherent in society and adolescent life) or may be coerced (e.g., by a partner) to send imagery. These risks are not unique to imagery, they are also a risk in relation to other forms of physical sexual activity. Yet, in much the same way that offline sexual activity is not intrinsically harmful, harm does not arise automatically from a child or young person taking (and sending) a photograph of their (or a peer's) nude or partially nude body. Instead, it stems from additional

[135] Ministry of Justice data filtered by offence and age range: Ministry of Justice, 'Principal offence proceedings and outcomes by Home Office offence code data tool' (Gov.UK, 2020) < https://www.gov.uk/government/statistics/criminal-justice-system-statistics-quarterly-december-2019> accessed 22 August 2022.
[136] Wheatcroft, Wagstaff & Moran (n47): Temkin (n46).

factors, including but not limited to, the fact that, in some instances, an individual feels pressured, in some way, to take and send such an image (or be the subject of one).

The absence of consent is a great cause for concern. However, the risk that in certain situations a person may not fully and freely consent does not justify a blanket ban. If that were the case all forms of sexual activity, for adults as well as children, would be illegal. In fact, this undermines the autonomy of those who do genuinely consent and diminishes the harm caused to those who do not. It suggests that all production, regardless of how or why it is being produced, is equally culpable and, in relation to self-production, it holds the subject of the image as responsible for their own exploitation. Doing so perpetuates victim-blaming; it positions those who take sexual imagery as responsible for the subsequent actions of those who receive it or the actions of those who use coercion to induce it being sent. It is reminiscent of how women have historically been held as '*responsible for protecting themselves from sexual assault*.'[137] Moreover, it risks deterring victims of non-consensual behaviour from coming forward out of fear of being prosecuted themselves.[138] It is imperative that new regulation moves away from this approach and plays an active role in facilitating the promotion of healthy sexual relationships and addressing harmful and exploitative behaviour.

It seems, therefore, that the harms associated with YPSI do not justify full criminalisation. However, some form of criminalisation is necessary to target specific wrongdoing. Ideally, each harmful behaviour would be uniquely regulated. Yet it is not always possible to '*consider the particularities of every person's situation*.'[139] In certain circumstances the risk of harm may still necessitate over-criminalisation which captures non-harmful, as well as harmful, behaviour. This concept is returned to in chapter 4 (s.4.2.1.1). However, to improve the current legal framework and offer a greater level of protection to children and young people separation between consensual and non-consensual behaviour is imperative.

3.7: Conclusion

[137] Michael Salter, Thomas Crofts and Murray Lee, 'Beyond Criminalisation and Responsibilisation: "Sexting", Gender and Young People' (2013) 24(3) Current Issues in Criminal Justice 302, 312.
[138] This notion was discussed in relation to physical sexual activity, in which Baroness Walsmley discussed her fear that criminalisation may prevent children and young people coming forward and seeking advice: Sexual Offences Bill HL Deb 13 Feb 2003 vol 644 col 869.
[139] Simester AP and others, *Simester and Sullivan's Criminal Law: Theory and Doctrine* (7th Edn, Hart Publishing 2019) 692.

This chapter has demonstrated that YPSI and the material the PCA (and s.160 CJA) were enacted to capture are vastly different. However, the current framing of the Act fails to recognise this and, instead, criminalises *all* production irrespective of context. The rationale behind this was to offer the greatest level of protection to children and young people and to avoid evidential issues. However, it creates more problems than it solves. To rectify this, YPSI behaviours must be considered in isolation from the actions of adults and any future regulation should make a distinction between consensual and non-consensual YPSI practices. The next chapter explores how, whilst adhering to fundamental principles of criminal legal theory (criminalisation and fair labelling) and ensuring victims of harmful practices are not left unprotected, this could be achieved.

Chapter 4: Theoretical Differences: Principles of Criminalisation and Fair Labelling

4.1: Introduction

Chapter 3 demonstrated the practical differences between YPSI and other forms of indecent imagery of children and young people and considered the specific harms associated with these behaviours. This chapter builds on this argument with reference to two key principles of criminal law: criminalisation and fair labelling. The first, and more substantive part of this chapter, addresses criminalisation. It considers the principles which guide legislators in determining the conduct that should, and should not, constitute a crime. In doing so, it examines the possible grounds capable of providing a positive case for criminalisation before turning to consider any countervailing reasons against. The second part of this chapter then addresses fair labelling. It considers how the differences between YPSI behaviours and adult-produced imagery of children and young people should be labelled, '*respected and signalled by law*'.[1]

Ultimately, the chapter makes three key arguments. The first two are underpinned by criminalisation principles, the other by fair labelling. First, all forms of YPSI are fundamentally different to adult-produced indecent imagery of children and young people. They represent different levels and types of harm and wrongdoing. Second, different YPSI behaviours also represent different levels of harm and wrongdoing and are underpinned by differing theoretical rationales. Lastly, these differences necessitate that all YPSI be accurately labelled (and separated from the existing legislation) and a legal distinction be made between consensual and non-consensual YPSI. Achieving this will ensure compliance with the principle of fair labelling and certify that the true nature of the conduct is accurately communicated to its audiences and '*represent fairly the nature and magnitude of the law-breaking*'.[2]

4.2: Theory of Criminalisation: Positive reasons and negative constraints

[1] Andrew Ashworth, *Principles of Criminal Law* (6th edn, OUP 2009) 78.
[2] Ibid.

As with other types of law, the criminal law is a means of regulating behaviour but, a distinction can be made between criminal and civil law.[3] Academics have offered a variety of explanations for their differences.[4] The lay conception, though, is that criminal liability signals moral condemnation of the offender, while civil liability does not.[5] Criminal conduct is described by Allen as '*wrongdoing which directly and in a serious degree threatens the security or well-being of society*'.[6] It is prohibited by law and, if committed, can be followed by prosecution, conviction and punishment.[7]

Criminalisation is the process of determining behaviours which must not be done.[8] When the legislature marks an action as criminal it condemns it, rules it out as an acceptable course of conduct, and signals to society that those who engage in it could face criminal sanction. In doing so, it acts as a method of control and as a barrier to total autonomy and individual liberty. Therefore, it is imperative that criminal offences are '*created only when absolutely necessary*'.[9] The question is how this is to be determined and by whom. Broadly speaking, two criteria must be met. There must, first, be a *prima facie* positive case for State regulation; some reason for preventing the behaviour (e.g., because it causes harm to be suffered by others). Second, any reasons against criminalisation must be considered, for example practical considerations, such as how easily the offence could be implemented and administered, as well as an assessment of whether the criminal law is the most appropriate tool for regulating that behaviour. According to criminal legal theory, only if both criteria are satisfied (presence of a positive reason, or reasons, which outweigh any countervailing reasons) should behaviour be criminalised. However, while there is a broad consensus that these criteria must be met, legal theorists and philosophers disagree about what constitutes a valid positive ground for criminalisation. Feinberg identified four possible grounds for justifiable intervention: (i) harm to others, (ii) offence to others, (iii) immorality, and (iv) harm to self.[10] Each of these grounds, and their

[3] Paul H Robinson, 'The Criminal-Civil Distinction and the Utility of Desert' (1996) 76 Boston University Law Review 201.
[4] See, e.g., Richard A Posner, 'An Economic Theory of the Criminal Law' (1985) 85 Columbia Law Review 1193; Earl C Dudley Jr., 'Getting Beyond the Civil-Criminal Distinction: A New Approach to the Regulation of Indirect Contempts' (1993) 79 Virginia Law Review 1025; John C Coffee Jr., 'Does 'Unlawful' Mean 'Criminal'?: Reflections on the Disappearing Tort/Crime Distinction in American Law (1991) Boston University Law Review 193.
[5] Robinson, (n3) 206.
[6] Carleton Kemp Allen, *Legal Duties and Other Essays in Jurisprudence* (OUP 1931) 233.
[7] Glanville Williams, 'The Definition of Crime' (1955) Current Legal Problems 107, 123.
[8] Herbert Lionel Adolphus Hart, *The Concept of Law* (2nd edn, OUP 1994) 27.
[9] Per Lord Williams of Moyston, New Criminal Offences, HL Deb 18 June 1999 vol 602, WA58.
[10] Joel Feinberg, *The Moral Limits of the Criminal Law* (OUP 1984-87): vol. 1, *Harm to Others* (1984); vol. 2, *Offense to Others* (1985); vol. 3, *Harm to Self* (1986); vol. 4, *Harmless Wrongdoing* (1988).

application to indecent imagery of children and YPSI, will now be explored in turn. The analysis demonstrates that the legal basis for criminalising indecent imagery differs based on the way it was produced. It further argues that these differences warrant legal distinction.

4.2.1: Harm to others

The notion of harm, specifically preventing harm to others, is the most widely accepted basis for criminalisation.[11] Arguably the most famous articulation of this principle, familiarly known as the harm principle, was purported by Mill. He stated: *'the only purpose for which power can rightfully be exercised over any member of a civilised community against his will is to prevent harm to others'*.[12] Thus, in the absence of harm, or risk of harm to others, the State must not intervene. For Mill, the notion of harm is not *a* reason but rather *the only* reason for criminalisation. However, there are multiple versions of the harm principle.[13] For Mill, harm acts a negative constraint and without it, criminalisation is unjustified. However, for Feinberg, it operates as a positive reason. He states that '*it is always a good reason in support of penal legislation that it would be effective in preventing (eliminating, reducing) harm to persons other than the actor (the one prohibited from acting)'*.[14] Phrased in this way, harm (or preventing harm) is *a* (but not the *only* reason) for criminalising behaviour. Regardless of which version of this principle is adopted, the essence remains the same: if prohibiting conduct or behaviour will avoid or reduce harm to others, this provides a justification in favour of criminalisation.

4.2.1.1: Application to Indecent Imagery of Children: The complexities of harm

Applying the harm principle(s) to indecent imagery of children and young people, produced by adults, is, for the most part, unproblematic. The traditional aim of the PCA (and

[11] AP Simester and others, *Simester and Sullivan's Criminal Law: Theory and Doctrine* (7th Edn, Hart Publishing 2019) 686.
[12] John Stuart Mill, 'On Liberty' in JS Mill, *Utilitarianism, On Liberty, Considerations on Representative Government* (Orion 1993) ch 1, para 9.
[13] See: Feinberg, *vol. 1 Harm to Others* (n10) 4; Arthur Ripstein, 'Beyond the Harm Principle' (2006) 34 Philosophy and Public Affairs 216; AP Simester and Andreas von Hirsch, *Crimes, Harms and Wrongs: On the Principles of Criminalisation* (Hart Publishing 2011) ch 3; James Edwards, 'Harm Principles' (2014) 20 Legal Theory 253.
[14] Feinberg, *vol. 1 Harm to Others* (n10) 26.

subsequently s.160 CJA) was to prevent the exploitation of children.[15] The PCA was enacted, primarily, to target the visual depictions of children being sexually abused. As was discussed in chapter 3 (s.3.3), the documentation of this abuse causes direct harm to the child or young person (because they are harmed during the production), and the subsequent viewing and possession of such material (captured by s.160 CJA) causes secondary harm.[16] For the subjects of such imagery, the knowledge that there is a permanent record of their abuse, which may be used for the purposes of sexual gratification, can cause further psychological distress and secondary victimisation.[17] Therefore, on both Mill's and Feinberg's account of the harm principle, there is a solid basis for criminalisation, as prohibiting even just the possession of such material prevents harm.

However, this can be contrasted with the consensual actions of children and young people. Although consensual YPSI (chapter 3, s.3.5.1) does result in the production of a sexual image of a child or young person, no direct harm is caused during production, as it will either have been self-produced or produced by a peer, with the consent of the subject. Similarly, the possession of such imagery (provided it was obtained consensually e.g., willingly sent by the subject) will not lead to any secondary harm as the viewing of the image was the intended purpose. Therefore, no direct or secondary harm is caused in such circumstances. The only direct harm which may be present relates to the role sexual image sharing plays in the oversexualisation of children and young people.[18] Even YPSI which is entirely consensual may well be considered harmful if we accept the view that allowing children to engage in sexual behaviour is potentially harmful to their development. [19] However, this would constitute harm to self and thus fall under the scope of paternalism which we turn to later (s.4.2.4). Thus, consensual forms of YPSI cannot, *prima facie*, be justified under the harm principle.

While CSAI fits neatly within even the most restrictive formulations of the harm principle, it is difficult reconcile consensual YPSI under the principle at all. However, these two categories

[15] PCA, Introductory Text.
[16] Alisdair Gillespie, 'Child Pornography' (2018) 27(1) Information & Communications Technology Law 30, 41.
[17] Tink Palmer and Lisa Stacey, *Just One Click: Sexual Abuse of Children and Young People Through the Internet and Mobile Technology* (Barnado's 2004); Ethel Quayle and Max Taylor, *Child Pornography: An Internet Crime* (Routledge 2003).
[18] For an in depth take on this debate, see: Reg Bailey 'Letting Children Be Children: Report of an Independent Review of the Commercialisation and Sexualisation of Childhood' (Department for Education, 6 June 2011) <https://www.gov.uk/government/publications/letting-children-be-children-report-of-an-independent-review-of-the-commercialisation-and-sexualisation-of-childhood> accessed 22 August 2022.
[19] For a general overview on the impacts of YPSI on mental health and wellbeing, see: Chapter 3, s.3.5 of this thesis and Aina M Gasso and others, 'Sexting, Mental Health, and Victimization Among Adolescents: A Literature Review' (2019) 16(13) International Journal of Environmental Research and Public Health 2364.

of behaviour represent opposing ends of the indecent imagery spectrum. Between them lie a range of other scenarios e.g., non-exploitative images produced by adults of children or young people (such as the example in *R v Owen*[20] concerning a modelling shoot (discussed in chapter 3, s.3.3)) and exploitative production and distribution by children and young people (including where images are shared without consent or induced via coercion, a practice which we know, from empirical evidence, disproportionally affects females (discussed in chapter 3, s.3.5.2)). All these behaviours represent different levels and degrees of harm, wrongdoing, and culpability.[21] To achieve total clarity, and in an ideal world, each behaviour would be uniquely regulated and labelled to account for these differences. However, as Simester and others point out, '*it is simply uneconomic to frame and administer laws that consider the particularities of every person's situation*.'[22] Instead, the criminal law '*tends to prohibit actions on the basis of their typical risks and consequences*'.[23] The question, then, is whether this rationale can be extended to justify the inclusion of YPSI under existing indecent imagery laws or if their differences are too significant to be conflated together.

To answer this question, we must consider wrongdoing. According to Simester and von Hirsch: '*legitimate criminalization requires that the prohibited conduct is in some manner reprehensible*.'[24] This follows from the very nature of the criminal law (as opposed to the civil law) as a condemnatory institution.[25] But, while many legal theorists believe that only wrongdoers and wrongful behaviour may be punished,[26] Cornford argues that there are certain situations where it will be permissible to criminalise non-wrongful conduct.[27] On this logic, laws (including those relating to indecent imagery) which capture a multitude of behaviours, both exploitative and non-exploitative, may still adhere to, at least certain articulations of, the harm principle.[28]

[20] *R v Owen* [1988] 1 WLR 134, CA.
[21] For a discussion of these concepts, see: AP Simester and ATH Smith, *Harm and Culpability* (Clarendon Press 1996).
[22] Simester and others, *Theory and Doctrine* (n11) 692.
[23] Ibid.
[24] AP Simester and Andreas von Hirsch, 'Remote Harms and Non-Constitutive Crimes' (2009) 28(1) Criminal Justice Ethics 89, 90.
[25] Andreas von Hirsch and Andrew Ashworth, *Proportionate Sentencing* (OUP 2005) ch 2; AP Simester and GR Sullivan, *Criminal Law: Doctrine and Theory*, (3rd edn, Hart Publishing 2007) ch 1 and 16.
[26] Simester and von Hirsch, ''Remote Harms and Non-constitutive Crimes' (n24) 90. See also: Andrew Cornford, 'Rethinking the Wrongfulness Constraint on Criminalisation' (2017) 36 Law and Philosophy 615.
[27] Cornford (n26) 617.
[28] It would not be consistent with Mill's proposal as, for him, behaviour must cause harm to others to justify restriction.

Cornford explores the crime of sexual activity with a child[29] by way of example.[30] The offence targets a '*genuine underlying wrong: the exploitation of children who are not yet mature enough to make fully informed decisions about sexual activity*.'[31] However, some children are sufficiently mature, and some adults (and other young people) who engage in sexual activity with those below the age of consent do not exploit them. Therefore, the offence criminalises behaviour which is not necessarily wrongful or harmful. However, it can still be justified because of the benefit overcriminalisation offers.[32] Indeed, by stating clearly that any sexual activity with someone under 16 is punishable, the provision avoids the lack of clarity that an offence hinging on exploitation would have. It also removes the need to put the victim 'on trial' and to require them to provide evidence of exploitation which risks causing serious emotional harm.[33] Contrastingly, an offence which enabled defendants to escape liability by providing evidence that their conduct was not exploitative would risk victim blaming and the low success rates most commonly associated with rape.[34] Moreover, while the over-inclusion of this offence (s.9 SOA) is not '*benign*', Cornford argues that it pursues valid goals and does so '*in a way that's relatively fair to those whose liberties are restricted*.'[35]

This, then, provides one argument for defending the current position of the law on indecent imagery. There is, undoubtedly, a genuine underlying wrong being targeted (sexual exploitation of children and young people) and a blanket ban offers an appealing degree of clarity. It could also aid in addressing the gendered nature of harmful YPSI (explored in chapter 3, s.3.5.2.1). As Ost has argued in a different context (explored later in s.4.2.2), '*the harm stemming from objectification*' and the perpetuation of any harmful attitudes towards children and young people, particularly girls and young women, '*could be perceived as offering a persuasive justification*' for criminalisation.[36] Therefore, criminalising all indecent imagery, including non-wrongful conduct (such as consensual YPSI and the non-exploitative actions of adults), may well be legitimate. But crucially the law relating to sexual activity with a child, as has been discussed (chapter 1 (s.1.2)), separates adult and child perpetrators and the context of the behaviour is central to the offence. In contrast, the strict liability nature of indecent imagery

[29] SOA, s.9.
[30] Cornford (n26) 640.
[31] Ibid.
[32] For all the justifications see: Ibid, 639-44.
[33] Jennifer Temkin, *Rape and the Legal Process* (2nd edn, OUP 2003) ch 4.
[34] See for example: Shaw D, 'Rape convictions fall to record low in England and Wales' *BBC* (30 July 2020) <https://www.bbc.co.uk/news/uk-53588705> accessed 22 August 2022.
[35] Cornford (n26) 639-641.
[36] Suzanne Ost, 'Criminalising Fabricated Images of Child Pornography: A Matter of Harm or Morality?' (2010) 30 Legal Studies 230, 245.

laws does not. S.1 PCA and s.160 CJA brand all imagery production under the same label, irrespective of age and context. In practice, the discretion awarded to police officers and the CPS (for dealing with YPSI) enables them to consider context (discussed in s.1.3 and s.2.3.3) but it is not formally recognised in the legislation and if arrested, a child or young person will have an indecent imagery offence linked to their name. The problems with this are returned to in s.4.3.

Moreover, the current legislative position oversimplifies the broad spectrum of behaviours that come within its remit. While few would question that indecent imagery laws target a '*genuine underlying wrong'*[37] the framing of the offence, which does not account for context or degrees of harm caused by different actions, is problematic. CSAI is clearly harmful. So too are some forms of YPSI. Children and young people who are coerced to send sexual imagery will be directly harmed,[38] in the same (or similar) way that those who are coerced into physical sexual activity are harmed.[39] Similarly, children and young people who have their sexual imagery shared without their consent will also be directly harmed.[40] However, the level of harm suffered by the victim(s) of coerced YPSI, imagery distributed without consent, and CSAI, may vary significantly. A teenager who shows a picture of his naked girlfriend to his friend may cause serious emotional distress to the subject of that image. Yet this harm is not the same as that caused to a child who is filmed being sexually abused. There are a full range of different behaviours that constitute indecent images of a child or young person and the type and degree of harm caused by them can differ substantially. For this reason, even Cornford's articulation of the harm principle (allowing for the criminalisation of non-wrongful behaviour) is ineffective at justifying the conflation of all these behaviours under the same provisions.

As Simester and others argue, '*one of the payoffs of the Harm Principle*' is that '*in forcing us to consider more precisely why we are concerned about the activity that is to be criminalised, it gives us tools with which to rank the seriousness of offences and thus decide what level of punishment, if any, is appropriate.*'[41] Indeed, the different levels of harm caused by those who

[37] Ibid, 640.
[38] Michel Walgrave, Wannes Heirman and Lara Hallam, 'Under pressure to sext? Applying the theory of planned behaviour to adolescent sexting' (2013) Behaviour and Information Technology.
[39] Gillespie, 'Child Pornography' (n16) 51.
[40] Sonia Livingstone and Peter K Smith, 'Annual research review: harms experienced by child users of online and mobile technologies: the nature, prevalence and management of sexual and aggressive risks in the digital age' (2014) 55(6) The Journal of Child Psychology and Psychiatry 635, 638. In relation to adults, see: Samantha Bates, 'Revenge Porn and Mental Health: A Qualitative Analysis of the Mental Health Effects of Revenge Porn on Female Survivors' (2017) 12(1) Feminist Criminology 22.
[41] Simester and others, *Theory and Doctrine* (n11) 690.

actively create CSAI, and those who simply possess it, are signalled by the law. The former, which also captures distribution, possession with intent to distribute and advertising such imagery, are covered by s.1 PCA. The latter is covered by s.160 CJA. Therefore, rather than extending the coverage of the PCA to also cover mere possession, a different provision was enacted, to signal the difference between possession and more active roles in the exploitation of children. In the same way that distinguishing between possession and production, of the very same imagery, was considered by legislators as necessary so too should distinguishing between different types of production method.

It is acknowledged that the legal system must restrict some abstract wrongs by criminalising behaviour which is not itself wrongful,[42] however, the current framing of the law cannot withstand critical legal analysis. This is further emphasised when we consider what is known as the Standard Harm Analysis.[43] Under this approach, which provides a basis for assessing whether conduct can be legitimately proscribed under the harm principle, the gravity and likelihood of possible harm must be weighed against the implications of criminalisation.[44] This exposes further issues with the current law. The analysis will yield different results depending on the behaviour at hand (e.g., CSAI v YPSI). This demonstrates further the need for legal separation. The gravity (severe) and likelihood (inevitable) of harm caused to children and young people who are filmed being sexual abused will outweigh any possible drawbacks of criminalisation. However, the balancing test as applied to a child or young person who is, for example, coerced, via peer pressure, to send an image, whilst persuasive in favour of criminalisation, may not be as conclusive because, inter alia, as chapter 5 (s.5.4.3 - 5.4.5) explores in more detail, there are compelling reasons not to criminalise children and young people who offend. Moreover, the impacts of criminalising a fellow peer for this behaviour may be more harmful than beneficial. An alternative method of regulation focusing on rehabilitation and keeping the child out of the CJS may be preferable in the circumstances. This is a point we return to briefly later in this chapter (s.4.2.5) and more substantially throughout chapter 5.

Ultimately, the harm principle can be used to justify many forms of indecent imagery. CSAI is fully justified under the harm principle. Even possession of such imagery (s.160 CJA) is justified because it can cause secondary harm. It can also be used to justify non-consensual

[42] Simester and von Hirsh, *Crimes, Harms and Wrongs* (n13) 55.
[43] See: Andreas von Hirsch, 'Extending the Harm Principle: 'Remote' Harms and Fair Imputation' in AP Simester and ATH Smith, *Harms and Culpability* (OUP 1996); Feinberg, *vol. 1 Harm to Others* (n10) 216.
[44] For an extensive consideration of this, see: Feinberg, *vol.1 Harm to Others* (n10) 216

YPSI behaviours. However, its application to consensual YPSI is more tenuous (the rationale for overcriminalisation unlikely extends this far). Therefore, it is useful to consider other possible justifications to assess whether (consensual) YPSI is compatible with any criminalisation principles or if other regulatory tools should, instead, be considered and relied upon to regulate this type of behaviour. What is fundamentally clear at this stage is that the different levels of harm and wrongdoing across differing indecent imagery behaviours demand legal separation.

4.2.2: Offence to others

In addition to the harm principle, many liberalists also accept that causing serious offence (as opposed to injury or harm) to others may provide a valid reason for prohibiting conduct, provided that it satisfies a balancing test.[45] Merely showing that conduct is unpleasant will not be sufficient; the seriousness of the offence suffered must be balanced against the reasonableness of the behaviour in question. Factors such as the importance of the offending conduct, from the actor's perspective, as well as how easily it is for members of the public to avoid settings where the conduct occurs must also be considered. When used sparingly the offence principle is widely accepted as a secondary principle of criminalisation, supplementing the harm principle.[46] However, its relevance to YPSI is somewhat limited because, in instances where the imagery is unsolicited, the harm principle will apply and, in instances where the imagery is consensual, no offence will be caused. These notions are explored further below.

4.2.2.1: Application to YPSI: Entirely futile?

It is possible to argue that receiving sexual imagery may cause offence to some recipients. Indeed, opening an unsolicited image of exposed genitalia for example, may cause distress to some, perhaps many, children and young people (as well as many adults).[47] This conduct is now known as cyberflashing[48] and is described by victims as being as distressing as traditional

[45] Feinberg, *vol. 2 Offense to Others* (n10) 1.
[46] Simester and others, *Theory and Doctrine* (n11) 694.
[47] Mairead Foody and others, '"It's not just sexy pics": An investigation into sexting behaviour and behavioural problems in adolescents' (2021) 17 Computers in Human Behavior 10662, 5.
[48] Law Commission, *Harmful Online Communications: The Criminal Offences: A Consultation Paper* (Law Commission 248, 11 Sep 2020) < https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2020/09/Online-Communications-Consultation-Paper-FINAL-with-cover.pdf> accessed 22 August 2022 (Hereafter: Law Commission, HOC) para 3.155.

forms of indecent exposure.[49] However, this behaviour is now set to become its own criminal offence and, in any event, distress will likely only be caused where the image was not requested at all, or the image is beyond the scope of what was requested (or expected) by the recipient. [50] By contrast, in consensual interactions, the recipient will be expecting the image and is therefore unlikely to be offended by viewing it. For this reason, the offence principle seems limited in its application to consensual behaviours. Moreover, in non-consensual (e.g., unsolicited) scenarios the impact on the recipient would mean the behaviour also satisfied the harm principle. If the recipient were to suffer psychological distress this would likely constitute harm.

CSAI and non-consensual YPSI are already covered by the harm principle. Prima-facie, non-exploitative images of children and young people produced by adults can likely be justified by Cornford's overcriminalisation approach (discussed above at 4.2.1.1) and be justified under the harm principle.[51] However, as we have seen, consensual YPSI cannot be justified by the harm principle or the offence principle. This begs the question of whether there is any scope for the application of the offence principle at all. To answer this question, Ost's analysis of the offence principle, in relation to non-photographic pornographic images of children (NPPIC), which are criminalised by s.62 CAJA, is useful.[52]

When enacting s.62 CAJA, the Home Office contended that these images – which are entirely fictitious (i.e., do not depict any real children) – were potentially harmful as they might '*fuel the abuse of real children*'.[53] If that were true, the offence (s.62 CAJA) could have been justified under the harm principle. However, the Home Office conceded that no evidence to support this claim existed. Ost has considered whether any other possible grounds could justify criminalising this material. She notes that crimes justified by the offence principle have tended

[49] Sophie Gallagher, '70 women on what it is like to be sent unsolicited dick pics' (*Huffpost*, 12 July 2019) <https://www.huffingtonpost.co.uk/entry/cyberflashing-70-women-on-what-its-like-to-be-sent-unsolicited-dickpics_uk_5cd59005e4b0705e47db0195> accessed 6 May 2022.
[50] John Woodhouse, 'Regulating Online Harms' (House of Commons Library, 15 March 2022) <https://researchbriefings.files.parliament.uk/documents/CBP-8743/CBP-8743.pdf> accessed 22 August 2022, s.6.6; Chris Philip, *Online safety update (*HCWS 675, 14 March 2022) <https://questions-statements.parliament.uk/written-statements/detail/2022-03-14/hcws675> accessed 22 August 2022.
[51] Cornford (n26) 617. However, for a contrary view, see: Gillespie, 'Child Pornography' (n16) 39.
[52] Ost, (n36), 235-8.
[53] Home Office, Scottish Executive, Northern Ireland Office, 'Consultation on the Possession of Non-photographic Visual Depictions of Child Sexual Abuse' (National Offender Management Service, 2007) <https://webarchive.nationalarchives.gov.uk/ukgwa/20091207125738mp_/http://www.homeoffice.gov.uk/documents/cons-2007-depiction-sex-abuse?view=Binary> accessed 22 August 2022, 6.

to include a public element, for example the common law offences of outraging public decency[54] and the statutory offences of public display of indecent matter[55] and sending an indecent article through the postal system.[56] However, s.62 CAJA is restricted solely to private possession. Therefore, the only explanation (regarding offensiveness) that can be applied is that it '*offends others simply to know that individuals can possess NPPIC*'.[57] In the same vein, to justify criminalising consensual YPSI (that is material that is shared only between those who have consented to it), and / or non-exploitative imagery produced by adults (e.g., *R v Owen*[58]), the rationale would need to be that it offends others simply to know that this practice occurs and is lawful. The question, then, is whether the offence principle can legitimately extend this far.

Feinberg suggests that it is potentially justifiable to criminalise something if simply the idea of its existence, even in private, causes serious offence to others (this is referred to as the bare knowledge problem).[59] However, in these instances (regarding NPPIC and YPSI), '*the offended party experiences moral shock, revulsion, and indignation, not on his own behalf of course, but on behalf of his moral principles'*.[60] Thus, adopting Ost's analysis, this type of conduct does not constitute a wrongful offence since the individuals who are offended do not have their rights violated; they are not victims of the behaviour. Contrast this, as Ost does, with a homosexual hate speech that occurs in a private meeting: '*[a]s a member of the insulted group, a homosexual individual might…feel personally offended at the bare knowledge that this speech is occurring in private'*.[61] With NPPIC, however, that is not the case. The same is also true of consensually shared YPSI. Those individuals who are offended by the existence of YPSI or NPPIC are offended on the basis of their '*moral principles and moral regard for children…rather than any affront felt because they see themselves as victims of the behaviour.*'[62] Therefore, since the existence of consensual YPSI is not a wrong to those who are offended by it, the offence principle cannot extend to prohibit it, even if the offence it may

[54] *Knuller v DPP* (1972) 56 Cr App R 157; *R v Gibson* [1990] 2 QB 619; *R v Hamilton* [2007] EWCA Crim 2026, [2008] 1 All ER 1103.
[55] Indecent Displays (Control) Act 1981, s 1(1).
[56] Postal Services Act 2000, s 85(3). Although indecent photographs of children, regulated by the PCA, also concern morality and involve a public element, they are aimed at targeting a harm. Discussed in chapter 3, s.3.3.
[57] Ost (n36) 237.
[58] *R v Owen* (n20).
[59] Feinberg, *vol. 2 Offense to Others* (n10) 58-71.
[60] Ibid, 68.
[61] Ost (n36) 237. See also: Feinberg, *vol. 2 Offense to Others* (n10) 69-70.
[62] Ost (n36) 237.

cause is profound.[63] Without such wrongfulness, morality based arguments for criminalisation are, on the whole, rejected by liberalists as legitimate grounds for criminalisation.[64] We turn to discuss these next but, for these reasons, the offence to others principle fails to provide adequate justification for the criminalisation of YPSI.

4.2.3: Moralism

Unlike the offence principle, moralism does not require any public element to legitimise criminalisation. Legal moralists argue that it may be legitimate to prohibit immorality per se – that is any conduct which is deemed '*inherently immoral, even though it causes neither harm nor offense to the actor or to others*'.[65] In other words, victimless morality. However, criminalising on this basis alone is at odds with liberalism.[66] Criminalisation limits autonomy. Therefore, there must be a compelling reason for imposing such restrictions. The strongest reason for doing so is to prevent harm (discussed at s.4.2.1). Under the harm principle, the interests of two parties (the autonomy of the actor and wellbeing of the victim) are balanced against each other. If the harm that could be caused is, inter alia, sufficiently serious, prohibiting the actor's conduct will be justified. Whereas, with moralism, the autonomy of the actor is weighed against an abstract notion of immorality. A view that may not be held by all, or even many. Restricting autonomy for these reasons is more problematic.

Most obviously, victimless immoral acts might include private, consensual conduct.[67] A good example is *Brown*,[68] where the HL held that, in the context of sadomasochistic sexual activity, the infliction of actual bodily harm upon a consenting adult was an offence. From the perspective of the harm principle, there is no wrong (or harm caused) to the victim since the activity occurs with victim's consent. However, from the perspective of legal moralism, a defendant's conduct may be regarded as inherently wrong – and therefore legitimately proscribed. Another illustration is *Shaw v DPP*,[69] in which the defendant was charged with an

[63] In the words of Hart: 'a right to be protected from the distress which is inseparable from the bare knowledge that others are acting in ways you think wrong, cannot be acknowledged by anyone who recognises individual liberty as a value'. HLA Hart, *Law, Liberty and Morality* (OUP 1963) 4.
[64] Mill, (n12), 78; Feinberg, *vol. 2 Offense to Others* (n10) 68; Feinberg, *vol. 4 Harmless Wrongdoing* (n10) 145. For an absorbing liberal defence of legal moralism, however, see Michael S Moore, *Placing Blame* (Clarendon Press 1997).
[65] Feinberg, *vol. 1 Harm to Others* (n10) 27.
[66] Feinberg, *vol. 4 Harmless Wrongdoing* (n10) 145.
[67] See e.g., Feinberg, *vol. 4 Harmless Wrongdoing* (n10) 20-5.
[68] *Brown* [1994] 1 AC 212.
[69] *Shaw v DPP* [1962] AC 220.

offence of conspiring to corrupt public morals (for, inter alia, publishing documentation advertising prostitution). According to Lord Simonds, the Court retains a residual power to '*enforce the supreme and fundamental purpose of the law, to conserve not only the safety and order but also the moral welfare of the state*'.[70]

The main issue with legal moralism is its subjectivity. It relies on the prevailing views of the time, culture, and location. For example, a private, consensual homosexual act used to be a serious crime and now is not.[71] Yet the essential nature of the conduct has not changed. By contrast, slavery which was once permissible is now unlawful and abhorrent. This ad hoc view of morality was identified, and celebrated, by Lord Devlin who stated that '*morality in England means what twelve men and women think it means – in other words it is to be ascertained as a question of fact*'.[72] However, this is problematic because of the uncertainty it creates and the risk that it inflicts individual moral values upon a whole nation.

However, Lord Devlin controversially defended legal moralism on the basis that society's moral values are an indispensable part of its structural framework.[73] In his view, if harmless immoralities were permitted, this would dissolve the moral consensus underpinning society and lead, ultimately, to social disintegration. Yet, as Simester and others identified, Devlin's argument does not reflect pure legal moralism.[74] Instead, it rests on the harm principle. Social disintegration, if it occurred, would be detrimental to the lives and interests of citizens and risk harm. In relation to YPSI, if we accept that allowing the behaviour to occur perpetuates oversexualisation of children and young people, and more negatively impacts girls (than boys), permitting the behaviour could, in theory, lead to the reinforcement of harmful perceptions and expectations. It could be argued that this risks harmful social disintegration.[75] If viewed in this way, while linked to morality, the consequences of permitting such conduct can be viewed as an extension of the harm principle. This is explored by Ringrose and others and is considered below.[76]

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[70] Ibid, para 267.
[71] Sexual Offences Act 1967 s.1.
[72] Patrick Devlin, 'Law, Democracy and Morality' (1962) 110 Pennsylvania Law Review 635, 648.
[73] Patrick Devlin, *The Enforcement of Morals* (OUP 1965) 8-14.
[74] Simester and others, *Theory and Doctrine* (n11) 697.
[75] For a discussion of oversexualisation and the gendered nature of YPSI, see: Jessica Ringrose and others, 'Teen girls, sexual double standards and 'sexting': gendered value in digital image exchange' (2013) 14 Feminist Theory 305. For a broader discussion on the sexualisation of girls, see: Eileen L Zurbriggen and Tomi-Ann Roberts, *The Sexualization of Girls and Girlhood: Causes, Consequences and Resistance* (OUP 2013).
[76] Ringrose and others, 'Teen girls, sexual double standards' (n75).

4.2.3.1: Application to YPSI: Morality and harm

Broadly speaking, to justify criminalising consensual YPSI based on these morality and harm-based rationales, we must accept that allowing such practices to occur (and this material to exist) will gradually degrade the moral attitudes of society.[77] If such factors are established, this may serve as a positive moralistic reason for criminalisation which links to notions of harm. However, the more compelling argument focuses less on social disintegration and more on the reality of the harm caused by attitudes that propagate objectification and over-sexualisation, particularly of girls and young women. As Roberts and Zurbriggen have argued, '*the sexualization of girls is…a broad and increasing problem, with consequences not only for girls themselves, but for us all.*'[78] Indeed, while the research (explored in chapter 3, s.3.5) suggests that sexual image sharing can be a standardised part of children and young people's day-to-day lives, it did not eradicate fears that YPSI may contribute to the oversexualisation and objectification of children and young people and to gendered norms around sexuality. On this presumption, permitting the behaviour may exacerbate these perceptions, and facilitate their acceptance within modern society, thus causing harm.

Studies from as far back as 2008, reported that teenage girls enjoyed the positive reaction sending images creates but also noted that they *'feel like they can't get attention without putting themselves out there like that*',[79] and that girls sometimes use YPSI as a strategy for gaining the acceptance and attention of a potential partner, and also as a means of attaining popularity with boys.[80] Additionally, while girls' desirability seemingly stems from a willingness to display their bodies, any such display runs the risk of being marked as shameful. Consonant with familiar sexual double standards,[81] both boys and girls described girls who sent images in

[77] This argument was made in support of legal moralism, by Devlin, on the grounds that moral values are an indispensable part of its structural framework: Devlin, *The Enforcement of Morals* (n73) 8-14.
[78] Tomi-Ann Roberts and Eileen L Zurbriggen, 'The Problem of Sexualization: What Is It and How Does It happen?' in Eileen L Zurbriggen and Tomi-Ann Roberts, The Sexualization of Girls and Girlhood: Causes, Consequences and Resistance (OUP 2013), 3.
[79] Lucy Battersby, 'Alarm at teenage 'sexting' traffic' *The Age* (10 July 2008) <https://www.theage.com.au/national/alarm-at-teenage-sexting-traffic-20080709-3clg.html> accessed 22 August 2022.
[80] Julia R Lippman and Scott W Campbell, 'Damned if you do, Damned if you don't…If you're a girl: relational and normative contexts of adolescent sexting in the United States' (2014) 8(4) Journal of Children and Media 371.
[81] Robin R Milhausen & Edward S Herold, 'Reconceptualizing the Sexual Double Standard' (2001) 13(2) Journal of Psychology and Human Sexuality 63.

a derogatory manner.[82] All of these findings suggest that, while some YPSI may occur consensually, there are equally problematic trends within the behaviour, particularly for females.

With this in mind, criminalisation of the production and distribution of YPSI, even when conducted consensually, may be justified by applying Nussbaum's liberal humanist approach.[83] This form of liberalism is '*driven primarily by a desire to craft a political morality that is both ethical in its conception and pragmatic in its application*'.[84] It focuses on human beings '*as an end rather than as a means to the ends of others*'.[85] In the context of pornography, this approach has engaged directly with real harms suffered by women stemming from their objectification in providing a defence for regulation.[86] Similarly, Ost has utilised Nussbaum's approach to submit a defence for the regulation of the possession (and more persuasively the creation and dissemination) of NPPIC (discussed above at 4.2.2.1) arguing that criminalisation avoids a '*cultural sanctioning*' of the abuse of powerless victims.[87] Taking this approach forward, it could be contended that criminalising the creation and dissemination of YPSI avoids the same cultural sanctioning of the over-sexualisation and objectification of children and young people.

To this end, the criminal law could be used to educate popular opinion and to pave the way for social change. However, to do so, the law must change. In much the same way that offline sexual activity is not intrinsically harmful, harm does not arise automatically from a young person taking (and sending) a photograph of their (or a peer's) nude or partially nude body.[88] Instead, it stems from the fact that, in some instances, a young person (a) feels pressured, or is coerced, to take and send such an image (or be the subject of one); (b) the image is shared more widely, without the subject's consent; and / or, (c) the subject is shamed for expressing their sexuality. To best address the issues at hand, and to offer the greatest level of protection to children and young people, a regulatory shift is required which responds differently to YPSI

[82] Ringrose and others, 'Teen girls, sexual double standards and 'sexting'' (n75).
[83] Martha Nussbaum, *Cultivating Humanity: A Classical Defence of Reform in Liberal Education* (Cambridge, Mass, Harvard University Press 1997).
[84] Clare McGlynn and Ian Ward, 'Pornography, Pragmatism, and Proscription' (2009) 36 Journal of Law and Society 327, 336.
[85] Martha Nussbaum, *Sex and Social Justice (*OUP 1999), 10.
[86] Ibid, 57-62; McGlynn and Ian Ward (n84), 327.
[87] Ost, (n36), 245.
[88] HyeJeong Choi, Joris Van Ouytsel and Jeff R Temple, 'Association between sexting and sexual coercion among female adolescents' (2016) 53 Journal of Adolescence 164; Jody M Ross, Michelle Drouin and Amanda Coupe, 'Sexting coercion as a component of intimate partner polyvictimization' (2019) 34(11) Journal of Interpersonal Violence 2269.

than to adult-produced imagery and targets harmful actions rather than broadly criminalising all YPSI behaviours. New regulation could, and should, play an active role in facilitating a paradigm shift that promotes healthy sexual relationships and addresses harmful and exploitative behaviour. In doing so, it has the possibility, not only to avoid social disintegration, but to promote equality. Ultimately, then, purely morality-based rationales are unable to provide a justification for the criminalisation of YPSI. However, when considered in conjunction with harm they may provide a partial basis for doing so.

4.2.4: Paternalism

The final possible ground for criminalisation is preventing harm to oneself (paternalism). Legal paternalists, accept that there may be situations where self-harm, as opposed to harm to others, can be legitimately criminalised.[89] Dworkin defines the reasons underpinning paternalism as *'referring exclusively to the welfare, good, happiness, needs, interests, or values of the persons'* whose behaviour is being restricted.[90] Standard legal examples include the requirement to wear a seat belt while driving[91] or the numerous restrictions placed upon children and young people (e.g., sexual activity, tobacco, and alcohol (discussed at s.1.2.6)). In the context of adults, paternalism, as a basis for criminalising and prohibiting conduct, is largely rejected.[92] Feinberg suggests that: *'a consistent application of legal paternalism … invades the realm of personal autonomy where each competent, responsible, adult human being should reign supreme.'* [93] However, he goes on to note that it is possible to defend legal paternalism if it is understood in the context of a balancing strategy. In his words, protecting people '*from their own foolishness*' could be a reason, perhaps even a good reason, to criminalise but never a '*decisive reason*'.[94] A defendable version of paternalism, then, balances countervailing arguments against criminalisation, including respect for personal autonomy, before deciding to prohibit conduct.[95] However, in the context of adult-produced indecent imagery, paternalism is futile. The person who is harmed is the subject (the child or young person) as opposed to the adult. So too is it redundant in relation to non-consensual YPSI. Therefore, the legitimacy of such an approach

[89] Feinberg, *vol. 3 Harm to Self* (n10) 25.
[90] Gerald Dworkin, 'Paternalism' in R Wasserstrom, *Morality and the Law* (Wadsworth Publishing Company 1971) 108.
[91] Passengers are also required to wear seat belts, however, as well as harming themselves (paternalism) they could also cause harm to those seated in front of them (harm to others).
[92] Most famously: Mill (n12) 13.
[93] Feinberg, *vol. 3 Harm to Self* (n10) 25.
[94] Ibid.
[95] Ibid.

is immaterial in these contexts. By contrast, though, paternalism could be used in relation to consensual YPSI, whereby the person who is being protected (the child or young person) plays an active role in the conduct.

4.2.4.1: Application to YPSI: Paternalism as a basis for prohibition

In the context of children and young people, paternalism is broadly accepted because, they (children and young people) are – as a collective – deemed to lack full adult capacities and decision-making capabilities.[96] However, children and young people develop at different rates. They are not a homogeneous group who automatically gain full capacity at 18. Therefore, legitimate paternalistic intervention will be sensitive to the particular child or young person's level of development.[97] This position is reflected in the explanatory notes of existing sexual offences e.g., the law on underage sexual activity.[98] While the law prohibits all sexual activity under 16, the explanatory notes state that when deciding how to proceed, and whether to prosecute, regard should be given to the emotional maturity of the parties involved.[99] This recognises the possibility that some children under 16 may be capable of providing valid consent in certain situations and therefore the behaviour in question may not warrant criminal sanction.

Broadly speaking, '*to protect children from harm, and to help them to develop into autonomous adults*' paternalism is justified when it is used to advance children and young people's interests.[100] Godwin states, '*even the most consistent opponents of paternalism … generally make exceptions for children, or stipulate that their opposition to paternalism extends only to adults*.'[101] Simester and others state that while paternalism '*cannot be generalised very far*' it might be justifiable in relation to children and young people on the basis that, in those cases, '*D's choice to harm herself cannot be said to be considered or responsible'* or, indeed, *'fully understood*'.[102] Therefore, it may suffice as a valid reason to prohibit the behaviour of children and young people. This is of particular importance for two reasons. First, because it provides a

[96] For a discussion on this see: Brian Carey, 'Children and the limits of paternalism' (2017) 20 Ethical Theory and Moral Practice 581.
[97] Ibid, 584.
[98] SOA, s.13.
[99] SOA, Explanatory Notes, s.13.
[100] Carey (n96) 591.
[101] Samantha Godwin, Children's Capacities and Paternalism' (2020) 24 Journal of Ethics 307, 307.
[102] AP Simester and others, *Theory and Doctrine* (n11) 700.

possible rationale for prohibiting consensual forms of YPSI (e.g., if evidence suggests that children engaging in sexual image-sharing practices is potentially harmful to their development).[103] Second, it illuminates further the differences between different indecent imagery behaviours and demonstrates further the need for legal separation.

Paternalism in this context is intertwined with the notion of consent. If we accept paternalism as a basis for prohibiting conduct, we essentially say that, even though the subject of the image has factually consented to the conduct, that consent carries no weight in law. This was the approach adopted in *Brown*[104] and adopted in relation to children under the age of 13 (who are deemed incapable of consenting to physical sexual activity).[105] There are persuasive arguments in favour of paternalistic actions. Indeed, it was certainly believed by MPs to be a sufficient ground for incorporating YPSI within the law on indecent imagery. As was discussed in chapter 1 (s.1.2.4), during the passing of the Sexual Offences Bill, MP Dominic Grieve stated that: '*if we agree that [indecent images are] an undesirable activity, but we accept that adults over the age of 18 must be allowed to do it if they want to'* there is no need for any exceptions for individuals below that age.[106] In his view, '*there is nothing philosophically wrong in providing restrictions on what is permissible with a child under 18*'.[107]

However, as has been central to the discussion so far, the initial aim of the legislation (governing indecent photographs of children and young people) was to protect victims from the harms caused by others (adults) not from themselves. The paternalism argument, then, while potentially justifiable for governing the behaviour of children and young people, is far removed from the initial aim of the Act: to prevent the exploitation of children by adults.[108] Thus, irrespective of whether we accept paternalism as basis for regulation, consensual YPSI must be considered separately from the existing provisions as it only constitutes harm to self, which is fundamentally different from the type of harm (harm to others) caused by other indecent imagery.[109] Beyond this, however, it is questioned whether this is a job for the criminal law, when, in essence, what is being criminalised is self-harm. Gillespie, for example, contends

[103] Gasso (n19); Ringrose (n75).
[104] *Brown* (n68).
[105] SOA, s.5-8.
[106] Sexual Offences Bill [Lords], HC Deb 18 September 2003, cols 247-258 (Hereafter: Sexual Offences Bill [Lords]) col 248 and 251.
[107] Ibid, col 248.
[108] PCA, Introductory Text.
[109] Ashworth, *Principles of Criminal Law* (n1) 78.

that '*more appropriate responses would be educational or welfare-based*.'[110] This is explored briefly in the subsequent section (s.4.2.5) and in depth in chapter 5.

4.2.5: Negative constraints on criminalisation

Many of the positive reasons discussed above incorporate a form of balancing exercise (e.g., standard harms analysis),[111] which weigh the reason(s) for criminalisation against any countervailing reason(s) for not doing so. In addition to these assessments, broader constraints must also be considered. First and foremost, it must be shown that the criminal law offers the best method of regulation, over and above alternative (less coercive) methods of legal control (e.g., civil law,[112] taxation[113] or licensing).[114] In relation to children and young people, who are typically protected from the full weight of the criminal law,[115] there must be specific consideration of their best interests[116] before criminal justice measures are implemented. As such, '*alternatives to judicial proceedings such as mediation, diversion (of judicial mechanisms) and alternative dispute resolution should be encouraged whenever these may best serve the child's best interests*.'[117] The following chapter (chapter 5) will explore these issues in depth. However, it is important to note that even if we can establish a positive reason for regulating activity via the criminal law, there may still be strong reasons against using it. Generally, if some other form of intervention would be effective in regulating the behaviour, that alternative should be used. The criminal law should be deployed only as a last resort.[118]

However, if the criminal law is to be used in some form, its deployment must comply with a variety of constraints. Legislators must consider practical considerations (e.g., any negative

[110] Gillespie, 'Child Pornography' (n16) 51.
[111] See: von Hirsch, 'Extending the Harm Principle: 'Remote' Harms and Fair Imputation' (n43); Feinberg, *vol. 1 Harm to Others* (n10) 216.
[112] Civil law has been described as 'pricing' rather 'prohibiting' behaviour; it does not involve any criminal sanction or criminal record but it can incur considerable cost to the defendant: Simester and others, *Theory and Doctrine* (n11), 702-3; Coffee Jr., (n4) 194.
[113] Taxation is used to regulate behaviour by manipulating the cost of products to reduce (e.g., tobacco and alcohol duties) or increase (tax credits for children) demand.
[114] The performance of certain activities (e.g., running a public house, possessing a firearm, driving) requires a licence. These activities carry risks but are potentially valuable and are therefore permitted subject to clear conditions.
[115] Various Government regimes and Acts of Parliament recognise the importance of age as a distinguishing feature of offending and punishment. See: Harry Hendrick, 'Histories of Youth Crime and Youth Justice' in Barry Goldson and John Muncie, *Youth Crime & Justice* (2nd edn, Sage 2015).
[116] As prescribed by the UNCRC, Article 3.
[117] Council of Europe, 'Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice' (Council of Europe Publishing, October 2011) <https://rm.coe.int/16804b2cf3> accessed 22 August 2022.
[118] Douglas Husak, 'The Criminal Law as Last Resort' (2004) 24(2) Oxford Journal of Legal Studies 207.

repercussions of criminalising the conduct as well as how easily the law can be administered), before concluding that criminalisation is the best course of action. For example, one negative side-effect of the current approach is that it deters victims of exploitative image-sharing practices from coming forward for fear of being prosecuted themselves.[119] As Gillespie points out: *'[w]here a 14-year-old girl is pressurised into allowing her boyfriend to feel her breasts, nobody would suggest criminalising the girl, so why is there that risk when she takes a photograph of her breasts?'*[120] Yet the law governing indecent imagery (and thus YPSI) does just that. Therefore, it is questioned – given the aim of the PCA was to protect children from exploitation – whether, in effect, the law as it currently stands does more harm than good.

In addition to these considerations, all criminal offences must satisfy the Rule of Law,[121] a principle that applies equally to children as it does to adults.[122] Inter alia, laws must be clear and understandable. The Rule of Law is not a legally mandatory doctrine in its own right,[123] but the Human Rights Act 1998 (HRA; which incorporates the ECHR into UK domestic law) requires that many of the principles associated with the Rule of Law are respected by legislators and the judiciary.[124] Thus, criminal offences must be defined with sufficient certainty and be correctly labelled. To respect the Rule of Law, offences should make clear what type of crime an offender is responsible for by accurately naming and describing the crime of which they are convicted. The current legislation fails to achieve this. By conflating together numerous behaviours, ranging from the consensual actions of children and young people exploring their sexuality through to the exploitative actions of adults, the law fails to signal to society the type, degree and level of harm and wrongdoing that has occurred. This is an issue of fair labelling which we turn to now.

[119] This notion was discussed in relation to physical sexual activity, in which Baroness Walsmley discussed her fear that criminalisation may prevent children and young people coming forward and seeking advice: Sexual Offences Bill HL Deb 13 Feb 2003, vol 644, col 869.
[120] Gillespie, 'Child Pornography' (n16) 51.
[121] The Rule of Law demands that those under the State's control must be dealt with by fixed and knowable law. It embodies a series of legal values including certainty, clarity and prospectivity: Joseph Raz, *The Authority of Law: Essays on Law and Morality* (2nd edn, OUP 2009), ch 11.
[122] Council of Europe 'Guidelines of the Committee of Ministers' (n117) 19.
[123] Except in so far as it operates as an informing principle of statutory interpretation. *B (A Minor) v DPP* [2000] 2 AC 428, 470: '*Parliament must be presumed to legislate on the assumption that the principle of legality will supplement the text*'.
[124] For example, ECHR, Article 7 prohibits retroactive criminal law thus giving constitutional value to the prospectivity requirement of the Rule of Law.

4.3 Fair Labelling: Signalling the nature of the crime to society

The principle of fair labelling was originally discussed by Ashworth. He noted the importance of signalling the differences between different offences and their respective *'degrees of wrongdoing'* and ensuring *'that offences are subdivided and labelled so as to represent fairly the nature and magnitude of the law-breaking.'*[125] Vague or inappropriate labelling risks misrepresenting the nature and wrongfulness of the defendant's actions and can lead to significant negative repercussions. The current framing of the law – which conflates very different behaviours under the same provisions – sees these risks materialised.

When an individual commits a crime, that crime is recorded on a police database. In relation to children and young people the disclosure of past offences is a complicated and heavily criticised process.[126] In a Justice Committee Report for the HC, it was cited, inter alia, as an arbitrary process which is not working effectively.[127] Typically, cautions, as opposed to convictions, can be filtered after two years if the person was under 18 at the time of the offence.[128] This means that the individual does not have to disclose it. However, any caution relating to a listed offence is non-filterable, so will be disclosed on a DBS check. Among these offences are indecent imagery offences under s.1 PCA.[129] Therefore, if a child or young person, who engages in YPSI, is reported to the police, their actions could have a lifelong impact. This is particularly true if that person commits a further crime in the future as any previous convictions may be admitted to trial as evidence of the defendant's bad character.[130] Thus, a caution which '*is supposed to be a low-level punishment... truly isn't*'.[131]

This issue is partly addressed by the introduction of Outcome 21 (chapter 1, s.1.3.4). This policy change, together with relevant guidance on YPSI, enables the police to record children and young people's YPSI involvement as a crime but to formally note that no further action

[125] Andrew Ashworth, 'The Elasticity of Mens Rea' in CFH Tapper, *Crime, Proof and Punishment: Essays in Memory of Sir Rupert Cross* (Butterworth 1981) 45, 53.
[126] See for example the discussion in: House of Commons Justice Committee, *Disclosure of Youth Criminal Records* (HC 416, 27 October 2017) < https://publications.parliament.uk/pa/cm201719/cmselect/cmjust/416/416.pdf> accessed 22 August 2022.
[127] Ibid, para 44.
[128] Law Commission, *Criminal Records Disclosure: Non-Filterable Offences* (Law Commission No 371, 2017) < https://www.gov.uk/government/publications/criminal-records-disclosure-non-filterable-offences> accessed 22 August 2022.
[129] House of Commons Justice Committee (n126) para 49.
[130] CPS, 'The Code for Crown prosecutors' (CPS, 26 Oct 2018) <https://www.cps.gov.uk/publication/code-crown-prosecutors> accessed 22 August 2022.
[131] Comment submitted as written evidence to the Committee: House of Commons Justice Committee (n126) para 49.

will be taken. If this process is applied, the crime is unlikely (though not impossible) to ever be disclosed on a DBS certificate (chapter 1, s.1.3.4). However, it was pointed out by the NPCC that this leaves unresolved the position of those with earlier childhood records of such offences (e.g., those recorded prior to the introduction of Outcome 21).[132] Also, it does not address situations where Outcome 21 is not utilised. As was explored in chapter 2 (s.2.3.1), some children and young people are still charged with / convicted of a s.1 PCA offence for their involvement in YPSI. In such instances, this information would be disclosed on a future criminal records check. For this reason, inter alia, it is imperative that the label given to a child or young person's conduct accurately represents the wrongdoing that has taken place. An individual who has photographed their own body and sent this consensually should be labelled differently from an individual who has distributed such an image without consent. More pressingly, both should be labelled differently from an adult who has documented the sexual abuse of a child. By removing YPSI from the current remit of the PCA, even if some or all YPSI were to remain a criminal offence, it could become a filterable offence. Thus, any caution administered under for these new offences could be filtered after two years (and would not be disclosed on even an enhanced criminal records check).[133] Meanwhile, a conviction for such offence (provided it did not result in a custodial or suspended sentence)[134] would be filtered after five and half years.[135] This would reduce the impact on a child or young person's future.

In addition to this, offence labels and a criminal record can also detrimentally impact on access to jobs, education, housing, insurance, and travel.[136] Indeed, many businesses '*use a criminal conviction either to reject an applicant outright or favour a candidate without a conviction*'.[137] It is not clear what impact the type of crime has on any or each of these factors. But, given that CSA is considered by some members of the public to be more heinous than murder,[138] crimes grouped under this family of offences will no doubt be treated with the utmost disregard. Whereas, if the label given to the offence was, for example, underage sexual image-sharing, it may be viewed less harshly. This demonstrates further the need to accurately denote the true

[132] Ibid, para 50.
[133] From 2020 onwards youth cautions, warnings and reprimands are no longer disclosed automatically on DBS certificates, but they still could be: Disclosure & Barring Service and Ministry of Justice, 'DBS Filtering Guide' (Gov.UK, 19 November 2020) <https://www.gov.uk/government/publications/dbs-filtering-guidance/dbs-filtering-guide> accessed 22 August 2022.
[134] In this instance it could still never be filtered.
[135] Disclosure & Barring Service and Ministry of Justice, 'DBS Filtering Guide' (n133).
[136] House of Commons Justice Committee (n126) para 24-40.
[137] Ibid, para 16.
[138] Alex Strangways-Booth and Rob England, 'Child abuse less 'forgivable' than murder and rape' *BBC* (14 April 2019) <https://www.bbc.co.uk/news/uk-england-47652050> accessed 22 August 2022.

nature of the crime that has been committed in each instance. That is not to say that a YPSI label will not be viewed negatively. It may still limit an individual's access to these prospects but, in deciding whether to embark upon a professional relationship with the individual concerned, individuals should, at least, be given a clear idea about the type of conduct that has been perpetrated.

In addition to ensuring that offenders are correctly labelled and thus treated fairly, accurately defined offences also serve to uphold the integrity of the criminal law.[139] Naturally, then, inappropriate labels serve to undermine this integrity. If an offence is too broadly drafted, the outcome for the accused is subject to the decisions of officials, creating the risk of unfair, inappropriate, or potentially even discriminatory prosecutions.[140] In addition, if the law is too far removed from public perception around what should constitute a crime, compliance is less likely. Offences perceived to be disproportionate or extending too far, are less likely to be respected by members of the public. Indeed, it is possible that an accurate label would have a stronger deterrent effect. However, this could lead to a rise in the number of children and young people entering the CJS. As it currently stands, the disproportionate nature of the offence (under s.1 PCA or s.160 CJA) may lead law enforcement officers to decide against formal proceedings. However, if the offence was accurately labelled, they may be more inclined to charge children and young people – on the basis the label does reflect the wrongdoing at hand. Given a desire to minimise the number of children involved in the CJS, and to utilise alternative routes to resolution,[141] new offences / offence labels, and their impact, must therefore be considered carefully.

Ultimately, though, all criminal offences should be labelled and defined in such a way that can convey to the public an accurate picture of the prohibited conduct. Offences should, so far is practical, reflect different levels of culpability. Thus, the differences present in different forms of indecent imagery should be signalled by law through accurate labelling.[142] To achieve this, all YPSI must be distinguished from the exploitative actions of adults (primarily CSAI). Second, a legal distinction must also be made between consensual and non-consensual YPSI

[139] For further discussion on this, in respect of deceptive sexual relations, see Matthew Gibson, 'Deceptive Sexual Relations: A Theory of Criminal Liability' (2020) 40(1) Oxford Journal of Legal Studies 82.
[140] One past example is the use of Anti-Social Behavioural Orders against prostitutes and beggars: Elizabeth Burney, 'No Spitting': Regulation of Offensive Behaviour in England and Wales' in Andrew von Hirsh and AP Simester, *Incivilities: Regulating Offensive Behaviour* (Hart Publishing 2006) 206.
[141] Council of Europe 'Guidelines of the Committee of Ministers' (n117) 25.
[142] Ashworth, *Principles of Criminal Law* (n1) 78.

behaviours. Achieving this will ensure that the true nature of the conduct is accurately communicated to society and is compliant with the fair labelling principle.[143]

4.4: Conclusion

As it stands, the law on indecent imagery of children and young people captures a broad expanse of behaviours which represent different types and levels of wrongdoing. This raises matters of criminalisation and fair labelling. Together, these legal principles necessitate that the true nature of the given conduct is accurately signalled by law. Consequently, the conclusions reached throughout this chapter dictate that the current broad framing of the law is revisited. While some forms of imagery are underpinned by the harm principle (the most widely accepted rationale for criminalisation), other consensual forms of imagery production and sharing cannot be explained in this way. Instead, more contested rationales are required to justify criminalisation. Whether these justifications are accepted or not – particularly in relation to children and young people – is explored in the following chapter. Regardless, though, the reasons in favour of criminalisation demonstrate the unique nature of the wrongdoing in different indecent imagery behaviours and practices. And to be compatible with key legal principles, such differences must be legally recognised and labelled.

[143] Ibid, 78.

Chapter 5: To Criminalise or Not to Criminalise: Children, Young People and the Criminal Justice System

5.1: Introduction

The previous chapter explained that to criminalise a specific act, there must be a legitimate positive reason, outweighing any countervailing reasons, for doing so.[1] It must also be shown that the criminal law offers the best method of regulation, over and above alternative (less coercive) methods (e.g., educational or welfare-based solutions).[2] This is particularly important in the context of children and young people, who are at a pivotal stage of development.[3] Involvement in the CJS is known to have a detrimental effect on their futures.[4] The aim of the YJS is to treat children fairly, aid in rehabilitating them and help them '*to build on their strengths so they can make a constructive contribution to society*'.[5] However, evidence suggests that any contact with the CJS leads to stigmatisation and can increase their risk of reoffending in adulthood.[6] As such, it has '*far reaching consequences for the child and society*'.[7] Childhood is a time for gathering and developing the skills and qualities necessary to becoming fully autonomous adults,[8] but this development can be negatively impacted by contact with the CJS.[9] Therefore, to minimise this, and to ensure the aims of the YJS are met,[10]

[1] See: Andreas von Hirsch, 'Extending the Harm Principle: 'Remote' Harms and Fair Imputation' in AP Simester and ATH Smith, *Harms and Culpability* (OUP 1996); Joel Feinberg, *The Moral Limits of the Criminal Law* (Oxford; Oxford University Press 1984-87): vol. 1, *Harm to Others* (1984) 216.
[2] Alisdair A Gillespie, 'Child Pornography' (2018) 27(1) Information & Communications Technology Law' 30, 51.
[3] See e.g., General Comment No. 24 on children's rights in the child justice system (2019) CRC/C/GC/24, para 2.
[4] Youth Justice Board, 'Youth Justice Board for England and Wales: Strategic Plan 2019-2022' (Youth Justice Board, 2019) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/802702/YJB_Strategic_Plan_2019_to_2022.pdf> accessed 22 August 2022, 7.
[5] Ibid, 6.
[6] Lesley McAra and Susan McVie, 'Youth Justice? The Impact of System Contact on Patterns of Desistance from Offending' (2007) 4(3) European Journal of Criminology 315; Robert J Sampson and John H Laub, 'A life-course theory of cumulative disadvantage and the stability of delinquency', in TP Thornberry, *Developmental Theories of Crime and Delinquency* (Routledge 1997)
[7] Kate Aubrey-Johnson, Sauneen Lambe and Jennifer Twite, *Youth Justice Law and Practice* (Legal Action Group 2019), Foreword.
[8] Kathryn Hollingsworth, 'Theorising Children's Rights in Youth Justice: The Significance of Autonomy and Foundational Rights' 2013 76(6) Modern Law Review 1046.
[9] Ibid.
[10] Youth Justice Board, 'Youth Justice Board for England and Wales: Strategic Plan 2019-2022' (n4) 6.

when responding to children in conflict with the law, there must be specific consideration of the particular child or young person's best interests.[11]

Hollingsworth argues that, to achieve this, *'there should be an obligation placed on the state to ensure that the youth justice system is structured in such a way that children's foundational rights are not permanently or irreparably harmed*.'[12] It is submitted that recognition of children's rights, in this way, would be a welcome step forward in ensuring consistent and proportionate responses to YPSI. In England and Wales, the Youth Justice Board (YJB) have implemented the '*Child First, Offender Second*' initiative (for responding to all children's criminal behaviour).[13] This requires all youth justice services to '*prioritise the best interests of children, recognising their needs, capacities, rights and potential*'.[14] This principle was implemented in response to evidence that showed '*treating children as children, rather than as potential offenders, is the best way to*' prevent reoffending and help those '*children make positive contributions to society*'.[15] In addition, the UNCRC has emphasised the differences between adults and children and stated that '*such differences constitute the basis for the recognition of lesser culpability, and for a separate system with a differentiated, individualized approach*'.[16] They further note that: '*State parties are required to promote the establishment of measures for dealing with children without resorting to judicial proceedings, whenever appropriate*.'[17] Therefore, methods such as mediation, diversion (of judicial mechanisms) and alternative dispute resolution should be utilised as possible alternatives to prosecuting the behaviour of children and young people.

Ultimately, while criminal legal theory (chapter 4, s.4.2) provides possible support for criminalising at least certain forms of YPSI, principles of youth justice provide compelling cases against criminalisation of all YPSI. This chapter purports that the ongoing physical and psychological development of children and young people necessitates an individualised regulatory response to YPSI which accounts for both their vulnerability and

[11] As prescribed by UNCRC, Article 3. In domestic law, see: Children Act 1989, s.1(1).
[12] Hollingsworth, 'Theorising Children's Rights in Youth Justice' (n8) 1049.
[13] See the 'Child First' initiative in England and Wales which requires that agencies 'prioritise the best interests of children, recognising their needs, capacities, rights and potential' when responding to children in the criminal justice system: Ministry of Justice and Youth Justice Board, 'Standards for children in the youth justice system 2019' (Ministry of Justice, 2019) < https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/957697/Standards_for_children_in_youth_justice_services_2019.doc.pdf> accessed 22 August 2022, 6.
[14] Ibid.
[15] Youth Justice Board, 'Youth Justice Board for England and Wales: Strategic Plan 2019-2022' (n4) 7.
[16] General Comment No. 24 (n3) para 2.
[17] Ibid, para 13.

impressionability.[18] Further, any YPSI which is (potentially) harmful or consensually problematic should be responded to proportionately in a way that acknowledges children and young people's reduced culpability. Indeed, given that involvement in the CJS can limit their chances of becoming responsible adults,[19] and increases the risk of reoffending,[20] the criminal sanction of children and young people should be reserved for very limited circumstances. Instead, focus should be placed on educational and rehabilitative approaches and, where possible, should be dealt with outside of the CJS. In demonstrating these arguments, this chapter analyses both consensual and non-consensual YPSI practices in turn.

5.2: Current landscape: Avoiding unnecessary criminalisation

As the preceding chapters have outlined, all sexual imagery of those under 18 is prohibited. Consequently, children and young people who engage in YPSI are at risk of criminal prosecution. However, guidance, published in 2016, by the CoP makes clear that, if the YPSI is consensual and no other aggravating factors (such as any evidence of coercion or exploitation) are present, then prosecution should be avoided.[21] Similarly, the CPS confirm that it is not usually '*in the public interest to prosecute the consensual sharing of an image between two children of a similar age*' as this seldom causes harm.[22] However, they do note that '*a prosecution may be appropriate in other scenarios*' such as '*instances of children being exploited, groomed, and bullied into sharing images, which in turn may be shared with peers or adults without their consent*.'[23] For the CPS, a decision to prosecute (or not) is driven by context. However, ACPO state that they never support '*the prosecution or criminalisation of children for taking indecent images of themselves and sharing them*'.[24] They argue that '*the*

[18] Ibid, para 2.
[19] Ibid.
[20] House of Commons Justice Committee, *Disclosure of Youth Criminal Records* (HC 416, 27 October 2017) < https://publications.parliament.uk/pa/cm201719/cmselect/cmjust/416/416.pdf> accessed 22 August 2022, para 17.
[21] College of Policing, 'Briefing Note: Police action in response to youth produced sexual imagery ('Sexting')' (College of Policing, Nov 2016) <https://www.college.police.uk/News/College-news/Documents/Police_action_in_response_to_sexting_-_briefing_(003).pdf> accessed 22 August 2022.
[22] CPS, 'Child Sexual Abuse: Guidelines on Prosecuting Cases of Child Sexual Abuse' (CPS, 16 June 2020) <https://www.cps.gov.uk/legal-guidance/child-sexual-abuse-guidelines-prosecuting-cases-child-sexual-abuse> accessed 22 August 2022.
[23] Ibid.
[24] Child Exploitation and Online Protection (CEOP), 'ACPO CPAI Lead's Position on Young People Who Post Self-Taken Indecent Images' (CEOP) <https://www.cardinalallen.co.uk/documents/safeguarding/safeguarding-acpo-lead-position-on-self-taken-images.pdf> accessed 22 August 2022, para 2.5.

label of 'sex offender' that would be applied to a child or young person convicted of such offences is regrettable, unjust and clearly detrimental to their future health and wellbeing.'[25] Thus, even among authorities there is discrepancy around when it will be appropriate, if ever, to criminalise and prosecute YPSI. However, there does appear to be a consensus that prosecuting consensual conduct is not justified and much of the reasoning behind this appears to centre on the label the child or young person would receive.

This approach is commendable, but these policy concessions are merely guidance; they are not legally binding. Therefore, there is still a real risk that even consensual YPSI will be reported to the police and be recorded as a crime.[26] The issues with this have been discussed in earlier chapters (see, e.g., chapter 1, s.1.3). The CoP,[27] CPS[28] and Government guidance[29] all makes clear that if one or more aggravating factors are present then immediate referral to external authorities (including the police) should be made.[30] These factors include: evidence of adult involvement; evidence of coercion or exploitation; imagery that depicts an act or acts which are unusual for the child or young person's developmental stage; imagery depicting a person or persons under 13; and / or, if there is any immediate risk of harm linked to the incident (e.g., young person is suicidal or at risk of self-harm).[31] Therefore, a significant proportion of YPSI still risks criminal prosecution. The remainder of this chapter explores the extent to which this risk (of prosecution), as well as the criminalisation of (both consensual and non-consensual) YPSI, is justified and compatible with principles of youth justice.

5.3: Consensual YPSI

Chapter 4 (s.4.2.4) outlined that paternalism could serve as a positive reason for criminalising even consensual YPSI. Paternalistic regulations seek to protect individuals from harm they may inflict on themselves. Therefore, if sufficient evidence can be presented to show that even

[25] Ibid, para 2.5.
[26] Gavin Hales, 'A Sexting Surge or Conceptual Muddle? The Challenges of Analogue Law and Ambiguous Crime Recording' (The Police Foundation, 31 Jan 2018) <http://www.police-foundation.org.uk/2017/wp-content/uploads/2010/10/perspectives_on_policing_sexting_FINAL.pdf > accessed 22 August 2022, 6.
[27] College of Policing, 'Briefing Note' (n21) para 6.
[28] CPS, 'Child Sexual Abuse' (n22).
[29] UKCIS, 'Sharing nudes and semi-nudes: Advice for education settings working with children and young people: Responding to incidents and safeguarding children and young people' (UKCIS 2020) <https://www.gov.uk/government/publications/sharing-nudes-and-semi-nudes-advice-for-education-settings-working-with-children-and-young-people> accessed 22 August 2022, s.2.1-2.3.
[30] Ibid, s.2.1-2.3.
[31] Ibid, s.2.3.

self-produced and consensual sexual image-sharing practices are potentially harmful to children and young people (e.g., to their self-esteem and / or development),[32] paternalism could provide a positive reason for criminalising anyone who engages in YPSI (including those who take pictures of themselves). However, a recent literature review of 30 studies examining the effects of YPSI on mental health concluded that although '*psychological aspects are related in some way to*' YPSI, potentially as predictors of the behaviour or as consequences of it, ultimately, '*the evidence regarding the relationship between [YPSI] and mental health symptoms remains scarce, to some degree inconclusive and heterogeneous*'.[33] Therefore, the paternalistic rationale underpinning the regulation is not grounded in empirical reality.

However, there is strong evidence to suggest that YPSI reflects existing issues around sex and sexuality.[34] One prominent finding that emerged from the empirical literature (outlined in chapter 3, s.3.5.2) is that children and young people, predominantly girls, feel the only way to get attention and maintain relationships with boys is to engage in YPSI.[35] There is also pressure, often from romantic partners, to send such sexual images,[36] and thus consent to YPSI is both complicated and problematic. It cannot be reduced to a simple yes or no. Decisions to engage in YPSI may reflect complex power dynamics. Indeed, consent (regarding YPSI and sexual activity more widely) is best understood as existing on a spectrum. In *Olugboja,*[37] decided in 1982, the defendant was convicted of rape. The Court stated that there was a spectrum of consent ranging from complete desire to unequivocal non-consent. Along this spectrum sits more complex manifestations / expressions of consent (or lack thereof). This includes reluctant acquiescence, that is agreeing but unwillingly (still consent) and submission (not consent). In *Olugboja* the court deemed that the difference between consenting and submitting hinges on the state of mind of the victim immediately before the act and the events leading up to it.[38] An example of submission is illustrated by the 2008 case of *Kirk.*[39] The victim was a homeless 14-year-old girl. She agreed to have sexual intercourse with the defendant in exchange for money for food. In his direction, the Judge asked the jury to consider what was in the victim's mind:

[32] Aina M Gasso and others, 'Sexting, Mental Health, and Victimization Among Adolescents: A Literature Review' (2019) 16(13) International Journal of Environmental Research and Public Health 2364; Jessica Ringrose and others, 'Teen girls, sexual double standards and 'sexting': gendered value in digital image exchange' (2013) 14 Feminist Theory 305.
[33] Gasso and others (n32).
[34] Ringrose and others, 'Teen girls, sexual double standards and 'sexting'' (n32).
[35] Ibid.
[36] Ibid.
[37] *R v Olugboja* [1982] QB 320.
[38] Ibid.
[39] *R v Kirk* [2008] EWCA Crim 434.

'*Did she agree to have sex, or did she just submit to get £3.25?*'[40] The Court held that this was a submission (and not consent) because of the lack of options the victim had available to her. Therefore, applying this logic, if the victim feels that there is no real option but to agree to the conduct in question it will vitiate the validity of that consent.

In the context of YPSI, heterosexual girls have described their engagement as a form of sexual compliance; the price to pay to maintain a relationship.[41] This raises similar concerns, regarding submission, as the scenario above. It begs the question of whether these girls are genuinely consenting to sending these images, or merely submitting to it, and it raises serious concerns around welfare, consent, and healthy sexual interactions. Applying this logic, it is possible to see why the State may wish to prohibit this behaviour. By implementing a blanket ban and setting out that all production and sharing is wrong it avoids the difficulties around determining what is genuine consent and what is mere submission. This is a concept that even adults find difficult to understand. In a recent survey, with 3,992 adults, a third of all respondents believed it was not usually rape if a woman was pressured to have sex but there was no physical violence.[42] Further, a third of male respondents, and 21 per cent of female respondents, believed that it was not rape if a woman had flirted on a date, even if she did not consent to sex. These misconceptions show that even among adults, who are presumed to have the capacity to consent to sexual activity, the definition of consent is misconstrued. This demands immediate efforts to rectify this issue. However, to avoid children and young people having to navigate these issues, and with a view to preventing any exploitation, Parliament sought to prevent the production and sharing of all sexual imagery of children and young people.[43] Yet, whether this aim is met in practice is questionable. Over criminalisation in this way sweeps the real issue (misconceptions about consent) under the carpet. A better approach would be to tackle the issues linked to consent head-on.

[40] Ibid, para 88.
[41] Michelle Drouin and Elizabeth Tobin, 'Unwanted but consensual sexting among young adults: Relations with attachment and sexual motivations.' (2014) 31 Computers in Human Behaviour 412; Julia R Lippman and Scott W Campbell, 'Damned if you do, Damned if you don't…If you're a girl: relational and normative contexts of adolescent sexting in the United States' (2014) 8(4) Journal of Children and Media 371.
[42] YouGov, 'Attitudes to Sexual Consent' (End Violence Against Women Coalition, December 2018) < https://www.endviolenceagainstwomen.org.uk/wp-content/uploads/1-Attitudes-to-sexual-consent-Research-findings-FINAL.pdf> accessed 22 August 2022.
[43] Sexual Offences Bill [Lords], HC Deb 18 September 2003, cols 247-258 (Hereafter: Sexual Offences Bill [Lords]) col 247.

As was explored in chapter 4 (s.4.2.1.1), there are certain situations where over-criminalisation is permissible.[44] To be legitimate, it must, inter alia, target a genuine underlying wrong. In the context of indecent imagery and YPSI this requirement is met. The law seeks to prevent the exploitation of children and young people. It would seem logical that making a behaviour illegal would have a deterrent effect and thus, by default, minimise the number of children and young people who are pressured and exploited to engage in the practice. However, given the increasing prevalence of YPSI,[45] the existing law has seemingly failed to achieve this aim. It is therefore questioned whether this approach is the most appropriate method of protecting children and young people from harm. Indeed, more nuanced analyses suggest that outright bans and abstinence-only approaches are counterproductive.[46] Instead, focus should be placed on working with children and young people to discuss '*digital sexual cultures without shame or judgment, whilst emphasising vital messages about respect, consent and boundaries*.'[47] Such an approach would target the crux of the issue – the absence of true consent, in which a person '*agrees by choice, and has the freedom and capacity to make that choice*'.[48]

However, the existing definition for consent (s.74 SOA) has been criticised for its vagueness.[49] As Horder has argued, '*the concepts of freedom, agreement, choice and capacity*' are ambiguous and will inevitably lead to inconsistent outcomes.[50] This submission is supported by research with mock juries which found that many jurors focused on one or more of the four terms in s.74 SOA to justify quite different interpretations of consent.[51] Further, as Finch and Munro comment, people's understanding of these terms differ both '*in the abstract [and] in specific cases.*'[52] Therefore, sole, or even primary, reliance on this definition is problematic. Horder submits that a better approach might instead focus on the degree to which '*various*

[44] Andrew Cornford, 'Rethinking the Wrongfulness Constraint on Criminalisation' (2017) 36 Law and Philosophy 615, 617.
[45] For example, the mean prevalence for sending sexts in studies collecting data in 2009 was 7 per cent, whereas, in studies collecting data in 2018 it was 33 per cent: Cristian Molla-Esparaza, Josep-Maria Losilla & Emelina Lopez-Gonzalez, 'Prevalence of sending, receiving and forwarding sexts among youths: A three-level meta-analysis (2020) 15(2) PLos ONE.
[46] Jessie Hunt, 'Beyond 'Sexting': Consent and Harm Minimization in Digital Sexual Cultures' (28 September 2016) < https://yfoundations.org.au/wp-content/uploads/2018/11/Beyond-Sexting.pdf > accessed 22 August 2022.
[47] Ibid.
[48] As per Sexual Offences Act 2003 (SOA), s.74.
[49] Catherine Elliott and Claire de Than, 'The Case for a Rational Reconstruction of Consent in Criminal Law' (2007) 70(2) Modern Law Review 225; Emily Finch and Vanessa E Munro, 'Breaking Boundaries? Sexual Consent in the Jury Room' (2006) 26 Legal Studies 303; Jeremy Horder, *Ashworth's Principles of Criminal Law* (9th edn, OUP 2019), 363.
[50] Horder (n49), 363.
[51] Finch and Munro (n49), 315.
[52] Ibid.

forms of threat, deception, and other pressure' impair an individual's capacity to consent.[53] Horder explains that this would extend beyond the limited situations set out in s.75 and s.76 SOA and offer a broader consideration of such issues.[54] This still carries a degree of ambiguity particularly given that one individual's response to various forms of threat may differ to another's. However, assessing the impact of these factors (on a case-by-case basis) may go some way to alleviating the issues with the current approach and could aid in promoting the importance of consent (free from threat, deception, and other pressures).

As has been discussed, the existing law, risks punishing victims rather than promoting genuine consent. It remains possible that a producer of YPSI who is coerced in to taking and sending the image, or whose images are later distributed without consent, could have their actions recoded as a crime. HOCR state that if the police are '*satisfied the only reason for sending the photographs was the undue duress'* then the image creation *may* not be recorded as a crime.[55] The only crime that *must* be recorded, in this situation, would be against the individual who coerced the victim into sending the image. However, in a situation where a child or young person takes and sends an image to one person, and this is then later shared more widely, they could still be prosecuted for the initial creation and – even if not prosecuted – it would be recorded as a crime (chapter 2, s.2.3.3). This approach positions those who have their imagery shared, without their consent, as equally culpable as the subsequent distributor. Both parties (the creator and distributor) are criminalised under s.1 PCA. However, the harm is caused – not by the initial self-production – but by the subsequent non-consensual distribution. It is argued that a law focused, at least primarily, on condemning non-consensual actions would be more appropriate than the current approach. This argument is further evidenced when rights and freedoms-based arguments are considered and applied.

5.3.1: YPSI: Human rights and freedoms and legitimate restriction

[53] Horder (n49), 363.
[54] Ibid.
[55] Home Office, 'Home Office Counting Rules 2022/23' (Home Office, 20 June 2022) < https://www.gov.uk/government/publications/counting-rules-for-recorded-crime> accessed 22 August 2022, 318.

There is now a nuanced understanding of YPSI in the academic literature.[56] It is understood that children and young people now use virtual spaces (rather than, or in addition to, physical meeting places) to explore their developing sexual and romantic relationships. [57] In this regard, it can be understood as a contemporary form of sexual expression.[58] Indeed, the Law Reform Committee of Victoria (Australia), in their review into YPSI in the State of Victoria, noted that YPSI does not usually suggest a problematic expression of sexuality, instead it is typically motivated by children and young people's desire to obtain explicit images of people in their age group and is in age appropriate expression of autonomy.[59] Therefore, consideration must be given to whether the prohibition of consensual YPSI is compatible with international conventions (to which the UK is a signatory) that uphold children's right to both free expression and a private life. Two Conventions are of particular importance: the ECHR and the UNCRC.[60]

The ECHR has direct relevance in the UK and requires that the domestic Courts act, and interpret statutes, in a way which is compatible with its rights and freedoms.[61] With this in mind, Article 10 (concerning the right to freedom of expression) and Article 8 (concerning, inter alia, the right to private life and right to private correspondence) are engaged. However, the ECHR was not drafted with children and young people, much less children's rights, in mind. It '*contains few specific references to the rights of the child*'.[62] As Fenton-Glynn points out: '*at the time of drafting [the ECHR], the child rights movement was in its infancy, with children predominantly seen as objects of benevolence and recipients of special protection, rather than subjects holding individual legal rights'.*[63] Yet, while the ECHR does not overtly advance children's rights, other Conventions do. Most notably is the UNCRC,[64] arguably the

[56] Elizabeth Englander, 'What Do We Know About Sexting, and When Did We Know It?' (2019) 65 Journal of Adolescent Health 577.
[57] Emma Bond, 'The mobile phone = bike shed? Children, sex and mobile phones' (2011) 13 New Media and Society 587.
[58] Christopher J Ferguson, 'Sexting behaviours among young Hispanic women: Incidence and association with other high-risk sexual behaviours' (2011) 82 Psychiatric Quarterly 239; Donald S Strassberg and others, 'Sexting by high school students: an exploratory and descriptive study' (2013) 42(1) Archives of Sexual Behaviour 15.
[59] Parliament of Victoria Law Reform Committee, *Inquiry into Sexting: Report of the Law Reform Committee for the Inquiry into Sexting* (Parliamentary Paper No 230) < https://www.parliament.vic.gov.au/file_uploads/LRC_Sexting_Final_Report_0c0rvqP5.pdf> accessed 22 August 2022.
[60] European Convention on Human Rights, entered into force 3 September 2003; United Nations Convention on the Rights of the Child, entered into force 2 September 1990.
[61] Human Rights Act 1998, ss.3 and 6.
[62] Ursula Killkelly, 'The Best of Both Worlds for Children's Rights? Interpreting the European Convention on Human Rights in the Light of the UN Convention on the Rights of the Child' (2001) 23 Human Rights Quarterly 308, 308.
[63] Claire Fenton-Glynn, *Children and the European Convention on Human Rights* (OUP 2020), ch 1, s.1.1.
[64] The Convention covers all aspects of a child's life and sets out the civil, political, economic, social and cultural rights that everyone under the age of 18 is entitled to.

most important global instrument on children's rights. Indeed, the European Court of Human Rights (ECtHR), as well as other European regional courts such as the Court of Justice of the EU (CJEU), have directly engaged with the UNCRC in attempting to accommodate the specific rights of children.[65] This, combined with the fact that England and Wales are required to take note of the UNCRC and to interpret domestic law in good faith and in a manner that is compatible with the Convention,[66] means it is imperative relevant Articles are considered here.

5.3.2: Freedom of expression

Turning first to consider Article 10. The ECtHR have suggested that all forms of expression are capable of protection and that Article 10 is '*one of the essential foundations to a [democratic society]*'.[67] However, freedom of expression is a qualified right. Unlike absolute rights, e.g., the right to life (Article 2 ECHR), which cannot be interfered with, qualified rights can be restricted in some circumstances. Here, while Article 10(1) states that '*everyone has the right to freedom of expression'*, 10(2) confirms that '*the exercise of these freedoms…may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society*.' For such an interference to be justifiable, four requirements must be met. First, it must be in accordance with the law. Second, it must be in the pursuance of a legitimate aim. Third and fourthly, it must be necessary and proportionate. In England and Wales, the criminalisation of consensual YPSI is in accordance with the law – it is currently proscribed by s.1 PCA and s.160 CJA. As regards the pursuance of a legitimate aim, the protection of health (including psychiatric harm) may be put forward as a rationale. However, the evidence as to the harm genuinely consensual YPSI causes is not fully substantiated.[68] Nevertheless, the ECtHR has previously demonstrated that it considers the

[65] For a discussion of the Court's application of the UNCRC, see: Helen Stalford and Kathryn Hollingsworth, Judging Children's Rights: Tendencies, Tensions, Constraints and Opportunities' in H Stalford, K Hollingsworth and S Gilmore, *Rewriting Children's Rights Judgments: From Academic Vision to New Practice* (Bloomsbury Publishing 2017), 24; Ursula Kilkelly, 'The CRC in Litigation under the ECHR' in Ton Liefaard and Jaap E Doek, *Litigating the Rights of the Child: The UN Convention on the Rights of the Child in Domestic and International Jurisprudence* (Springer 2015); Ciara Smyth, 'The Best Interests of the Child in the Expulsion and First-entry Jurisprudence of the European Court of Human Rights: How Principled is the Court's Use of the Principle?' (2015) 17 European Journal of Migration and the Law 70.
[66] Vienna Convention on the Law of the Treaties 1969, Article 26: *'Every treaty in force is binding upon the parties to it and must be performed by them in good faith.'* See also: Articles 31-32.
[67] *Handyside v UK A 24* (1976); 1 EHRR 737.
[68] Gasso and others (n32).

protection of children from sexualised material to be an issue that can justify the use of the criminal law in a manner that is both necessary and proportionate.[69]

In *Handyside v UK*,[70] the ECtHR was called upon to rule on a book which aimed to educate children and young people on sex and sexuality. The book contained subsections on issues such as masturbation, pornography, homosexuality, and abortion. The Court confirmed that censoring specific parts was not a violation of Article 10. They concluded that the State's aim to protect minors, as well as its measured and precise application, met the qualifications for a restriction on free expression and met the threshold of necessary in a democratic society. Crucial to the Court's decision was the target audience (children and young people aged 12-18) and the fact that although the book was primarily factual, there were passages that '*young people at a critical stage of their development could have interpreted as an encouragement to indulge in precocious activities harmful for them or even to commit certain criminal offences'*.[71] For this reason, inter alia, the Court were willing to accept that placing restrictions on this content was lawful and not a violation of Article 10. Moreover, given that the ECHR was not drafted with children, much less their rights, in mind,[72] combined with the fact that *Handyside* was decided on in the conservative mid 70's, the decision of the ECtHR, regarding interference with Article 10, is perhaps unsurprising.

More recently, in *Bayev and others v Russia* the ECtHR ruled that Russia's restriction of free speech and sexuality-based rights was unlawful.[73] This case concerned the Russian prohibition on public activities aimed at the promotion of homosexuality amongst minors. Russia argued that this restriction on free speech was justified for the protection of children from information, propaganda, and activism which are harmful to their health and development. The ECtHR firmly rejected this argument and the argument that social acceptance of homosexuality was at odds with the maintenance of family values. Thus, in *Bayev* the Court was willing to challenge a State's decision to interfere with citizens' rights to sexual expression. However, this case concerned LGBTQ+ rights (to which there is a very clear European consensus); it is not clear to what extent '*the same scrutiny would now be applied to other, less clear-cut, 'moral' issues'*,[74] such as YPSI. In addition, both *Handyside* and *Bayev* concern access to material

[69] *Handyside* (n67).
[70] Ibid.
[71] Ibid, para 52.
[72] Ursula Killkelly, 'The Best of Both Worlds for Children's Rights?' (n62), 308.
[73] *Bayev and others v Russia* (67667/09, 44092/12, 56717/12) 20.06.2017.
[74] Claire Fenton-Glynn (n63) ch 3, s.3.3.

whereas YPSI primarily concerns the production of material. Thus, to assess the protection that certain rights and freedoms offer to YPSI, further factors must be considered.

In conjunction with Article 10 ECHR, Article 13 UNCRC provides that '*the child shall have the right to freedom of expression'* through any *'media of the child's choice*'. This raises the possibility that YPSI should be a protected form of communication. However, like Article 10 ECHR, Article 13 UNCRC is a qualified right and so can be interfered with for legitimate reasons. The question, then, is whether protecting children and young people from themselves, and their peers, is reason enough. This issue was touched upon by the Canadian Supreme Court, albeit referencing the right to expression under s.2(b) Canadian Charter of Rights and Freedoms 1982 (CCRF), rather than Article 13 UNCRC.

R v Sharpe[75] is a constitutional rights case in which the Canadian Supreme Court were required to balance the societal interest in the regulation of child pornography against the right to freedom of expression. Although the case concerned the possession of some 517 photographs by an adult defendant, the Court considered, inter alia, whether '*privately created visual recordings of lawful sexual activity*' should be excluded from the definition of prohibited materials.[76] The Court specifically referenced '*sexually explicit photographs taken by a teenager of him- or herself*' and '*a teenaged couple's private photographs of themselves engaged in lawful sexual activity*'.[77] The majority judgement, delivered by Chief Justice (CJ) McLachlin, submitted that extending the prohibition on child pornography to include this class of material was not legitimate if the children or young persons concerned were above the age of sexual consent. In drawing this conclusion, the majority accepted that there are dangers to self-produced material but held that these risks were not sufficient to justify their criminalisation. This rationale was underpinned by the view that such a prohibition '*trenches heavily on freedom of expression while adding little to the protection the law provides children*'.[78] It was further noted that the '*possession of such materials may implicate the values of self-fulfilment and self-actualization'* and pose *'little risk of harm to children'* on the basis that they depict *'only lawful sexual activity.*'[79]

However, in their dissenting opinion, the minority of the Court expressed the view that the exceptions set out by CJ McLachlin should be rejected. They felt that the Canadian

[75] *R v Sharpe* 2001 SCC 2.
[76] Ibid, para 76.
[77] Ibid.
[78] Ibid, para 110.
[79] Ibid, para 76.

Government's existing definition and prohibition of child pornography was compatible with s.2(b) of the CCRF. They expressed that the limitations placed on freedom of expression were necessary to protect children and young people from harm. In doing so, explicit reference was made to Canada's international obligations under Article 34 UNCRC (the right to be protected from sexual abuse),[80] and to the definition of a child, as '*a person under the age of eighteen years*' under Article 1 UNCRC.[81] L'Heureux-Dubé, delivering the dissenting opinion, stated: '*while adolescents between the ages of 14 and 17 may legally engage in sexual activity, the creation of a permanent record of such activity has consequences which children of that age may not have sufficient maturity to understand*' and '*because of their vulnerability, are not always accorded the same autonomy as adults*.'[82] This is comparable to the view submitted by MPs during the passing of the Sexual Offences Bill in England and Wales, where it was acknowledged that prohibiting indecent imagery of all those under 18 was necessary to meet international obligations,[83] including the UNCRC.[84] The HL, in England and Wales, gave recognition to the view that imagery is considerably different from physical sexual activity, not least because of its permanent nature and the potential consequences of the imagery being shared beyond the intended recipient.[85] Nevertheless, the majority decision in *Sharpe* adopted a different view and created limited exceptions to this category of prohibited material. This decision was supported by the Children's Rights International Network (CRIN) who confirmed that the decision was compliant with Article 34 of the UNCRC whilst also avoiding the unnecessary criminalisation of children.[86] Therefore, while British MPs claimed the total prohibition of self-produced sexual imagery by all those under 18 (including those aged 16 and 17 who are above the age of consent) was necessary to meet international obligations (including Article 34 UNCRC), such a conclusion has been undermined by CRIN.

However, the scope of this *Sharpe*-exemption is limited. Specifically, the Canadian Supreme Court stated:[87]

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[80] Ibid, para 196.
[81] Ibid, para 226.
[82] Ibid, para 231.
[83] Sexual Offences Bill [Lords] (n43) col 248.
[84] UNCRC, Articles 1 and 34. See also: Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (OPSC) A/RES/54/263 of 25 May 2000, Art 2(c). The Optional Protocol was signed by the United Kingdom of Great Britain and Northern Ireland on 7 Sep 2000 and ratified on 20 Feb 2009 and Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (Lanzarote Convention) CATS No 201, Art 20(2).
[85] Sexual Offences Bill [Lords] (n43) col 247.
[86] Children's Rights International Network (CRIN), 'R v Sharpe' (CRIN, 2001) <https://archive.crin.org/en/library/legal-database/r-v-sharpe.html> accessed 22 August 2022.
[87] *R v Sharpe* (n75) para 116.

> *The recording must be kept in strict privacy by the person in possession, and intended exclusively for private use by the creator and the persons depicted therein. Thus, for example, a teenage couple would not fall within the law's purview for creating and keeping sexually explicit pictures featuring each other alone, or together engaged in lawful sexual activity, provided these pictures were created together and shared only with one another.*

The exempted class of material is reserved for that which is self-produced by a person or person(s) over the age of consent and held only for their private use.[88] A strict reading of the judgement suggests that it does not extend to include photographs taken privately of oneself and then sent to another person (i.e., the type of behaviour most associated with YPSI). The final part of the statement: '*provided these pictures were created together',* appears to restrict the scope of the exemption to a documentation of activity that occurs when the couple are in the physical presence of one another. However, the case judgement has been interpreted as permitting '*youth to send images of themselves to their sexual partners via a mobile device, so long as the recipient (or the sender) does not forward it to anyone else*'.[89] Similarly, closer to home, in Denmark and Germany for example, complete defences are available to the offence of possession of child pornography for children and young people, above the age of consent who produce and share imagery consensually.[90] In Australia, there also exists '*a defence to the possession of child pornography when the minor, or one of the minors depicted in the film or photograph is the defendant*.'[91] However, the legal positions of other jurisdictions create no obligation on England and Wales to follow suit and, to date, despite calls from academics to do so,[92] no such exemption, partial or otherwise, applies to YPSI in England and Wales.

[88] This argument is also explored in: Alisdair Gillespie, 'Adolescents, Sexting and Human Rights' (2013) 13(4) Human Rights Law Review 623, 639.
[89] Andrea Slane, 'Sexting and the Law in Canada' (2013) 22(3) Canadian Journal of Human Sexuality 117.
[90] Danish Criminal Code, s.235(3): provides an exception of the '*possession of obscene pictures of a person who has reached the age of 15, if the person has consented to the possession*'. German Criminal Code, s.184c(4): provides an exception to the production of pornography depicting those aged 14 – 18, '*produced by them while under eighteen years of age and with the consent of the persons therein depicted*.'
[91] As discussed in: *R v Sharpe* (n75) para 230. See also: Department of Justice and Regulation, 'Victoria's New Sexual Offence Laws: An Introduction' (Criminal Law Review, June 2015) <https://files.justice.vic.gov.au/2021-06/copy%20of%20cd%2015%20260259%20discussion%20paper%20victoria%20s%20new%20sexual%20offence%20laws%20an%20introduction%20web%20site%20version%203%20pdf.pdf> accessed 22 August 2022, s.13.
[92] Gillespie, 'Adolescents, Sexting and Human Rights' (n88) 642-3.

5.3.3: Right to a private life

In addition to freedom of expression arguments, it is also useful to look to privacy-based arguments (Article 8 ECHR and Article 16 UNCRC). Like Article 10 ECHR and Article 13 UNCRC, Article 8 ECHR and Article 16 UNCRC, concerning the right to a private life, are qualified rights and thus can be restricted with legitimate cause. The case of *G v UK*[93] offers a useful demonstration of how this operates in practice. The case made no specific reference to the UNCRC and instead relied solely on the ECHR. Here, a 15-year-old boy, who was convicted of rape of a child (s.5 SOA) after he had consensual sexual intercourse with a girl aged 12, sought to argue that Article 8 ECHR required the State to charge him with the lesser offence of sexual activity between minors (s.13 SOA). This was rejected by the Court as manifestly ill founded. Although they accepted that the sexual activities concerned fell within the scope of Article 8 and the meaning of private life, they held that the State were entitled to restrict this right in pursuing the aim of protecting children from '*premature sexual activity, exploitation and abuse*'.[94] Their decision acknowledged Member State's wide margin of appreciation in this regard.[95] This judgement highlights the Court's willingness to enforce the view that children and young people sometimes need protecting from their peers and themselves. However, in this case the alleged victim was very young (12) – the age at which a bright line appears to be drawn.[96] Note, by contrast, CPS guidance which makes clear that for underage sexual activity in which both parties are 13 or older a different approach should be adopted: [97]

> *It is not in the public interest to prosecute children who are of the same or similar age and understanding that engage in sexual activity, where the activity is truly consensual for both parties and there are no aggravating features, such as coercion or corruption. In such cases, protection will normally be best achieved by providing education for the children and young people and providing them and their families with access to advisory and counselling services.*

[93] *G v UK* 37334/08 [2011] ECHR 1308.
[94] Ibid, para 36.
[95] Ibid, paras 36-9.
[96] SOA, s.5.
[97] CPS, 'Rape and Sexual Offences: Chapter 2: Sexual Offences Act 2003 - Principal Offences, and Sexual Offences Act 1956 - Most commonly charged offences' (CPS) <https://web.archive.org/web/20150825043714/http://www.cps.gov.uk/legal/p_to_r/rape_and_sexual_offences/soa_2003_and_soa_1956/#a26> accessed 22 August 2022.

No justification, as to why this approach should be taken for older children and young people, is provided, except so far as to state that this was the intention of Parliament.

Yet, in *R v DM*[98] (discussed in detail in chapter 1, s.1.2.4), although only considered at a domestic level (and not by the ECtHR) the decision to restrict Article 8 and 10 rights was maintained in relation to much older children, including those above the age of consent. Here, the defendant (23) faced two charges of making an indecent photograph with a young person. He had a brief sexual encounter with a 17-year-old girl, where he engaged in sexual intercourse and took photographs of her. The defendant tried to argue that the photographs should be protected under Article 8 and 10 of the ECHR. This was rejected by the Court who confirmed that, whilst the defendant could engage in sexual activity with a 17-year-old girl, he had no right to make her '*the subject of pornography'*.[99] Consequently, s.1 PCA, preventing such production from taking place, was considered by the Court to be necessary and proportionate. However, it is important to note two factors which likely had an impact on the Court's decision. First, the victim alleged that she did not consent to any of the sexual activity, or to the photographs being taken. Second, the defendant was an adult. Thus, although the PCA is a strict liability offence, the Court may have reached a different conclusion if the victim had alleged the conduct was consensual and if the defendant was also under 18. Nevertheless, it is useful in demonstrating the Court's willingness to restrict privacy rights in this context. It is apparent that despite YPSI seemingly engaging both the right to freedom of expression and the right to privacy, restrictions surrounding this behaviour can done in a manner that is lawful.

5.3.4: Overall legitimacy of restricting YPSI

Ultimately, the legitimacy of the law (in England and Wales) in restricting YPSI (and by default the rights to freedom of expression and privacy) remains unclear. The answer hinges on an assessment of necessity and proportionality. Specifically, whether the potential negative elements around YPSI are sufficient to justify the criminalisation of the material. Given the limited evidence supporting the harm caused to children and young people by consensual behaviour, the negative elements are more compellingly linked to the coercive behaviour of others and the wider distribution of imagery. While we know this is a real risk (for adults as

[98] *R v DM* [2011] EWCA Crim 2752.
[99] Ibid, para 36.

much as children), it is questioned whether this risk justifies criminalising the initial production of imagery and genuinely consensual image sharing,[100] particularly given that other jurisdictions have taken less restrictive approaches and international obligations do not require such a high level of criminalisation.

To answer this question, we can look to the Lanzarote Convention.[101] It makes clear that State signatories to the Convention reserve the right not to criminalise, in whole or in part, the production and possession of material involving children who have reached the age of consent (for sexual activity), '*where these images are produced and possessed by them with their consent and solely for their own private use*.'[102] The presence of this opt-out clauses suggests a desire to avoid criminalisation of this type of material. Indeed, in a press release summarising some of the Lanzarote Convention's key conclusions, it was stated that:[103]

> *"Sexting" by children (generating, receiving and sharing sexually suggestive or explicit images/videos of themselves through mobile technology) does not amount to conduct related to "child pornography", when it is intended solely for the children's own private use. Children coerced into such conduct should be addressed to victim support and not subjected to criminal prosecution.*

This is indicative of a firm position and view held by the Council of Europe. However, the decision to include or exempt YPSI within or from so-called child pornography laws was left expressly at the discretion of individual countries. Thus, while some Member States have utilised this discretion, such as Denmark and Germany,[104] no exceptions are made in England and Wales. It is submitted that providing such an exception in domestic law could assist in providing a more proportionate way to frame the regulation of YPSI. Moreover, such an approach would ensure compliance with, and promotion of, the rights and freedoms set out in Article 13 and 16 UNCRC and Article 10 and 8 ECHR (expression and privacy rights).

This approach is already integrated into policy approaches, which recognise that genuinely consensual behaviour should not be prosecuted.[105] However, a legislative foothold for that

[100] For a discussion of these issues see also: Gillespie, 'Adolescents, Sexting and Human Rights' (n88), 640.
[101] Lanzarote Convention (n84).
[102] Ibid, Article 20(3).
[103] Tatiana Baeva, '"Sexting": children who generate, receive and share sexual images of themselves do not produce and possess "child pornography' (Council of Europe Communications, 2019) < https://search.coe.int/directorate_of_communications/Pages/result_details.aspx?ObjectId=0900001680956a88> accessed 22 August 2022.
[104] Danish Criminal Code, s.235(3); German Criminal Code, s.184c(4). See: (n90).
[105] CPS, 'Child Sexual Abuse: Guidelines on Prosecuting Cases of Child Sexual Abuse' (n22).

policy guidance would be a welcome step forward. Yet, while this is advocated here, such an approach would be in direct conflict with discussions in the HL during the passing of the Sexual Offences Bill.[106] When the age of consent regarding sexual images was raised from 16 to 18 (discussed in depth in chapter 1, s.1.2.3) recognition was given by MPs to its unique and permanent nature and the potential consequences of the imagery being shared beyond the intended recipient.[107] Focus was also given to the view that young people need to be protected from themselves (as well as others).[108] Yet, while this opinion appeared to be held entirely unanimously in Parliament, academics highlighted the illogicality in allowing 16 or 17-year-olds to give consent to physical sexual activity (with as many partners as they like) but not to taking an intimate photograph of their body.[109] Moreover, the Sexual Offences Bill was debated in Parliament almost two decades ago. The views around online communication, both sexual and otherwise, have shifted and therefore a different outcome may now be reached by Parliament if this issue was reconsidered.

5.3.5: Reconciling best interests with autonomous expression: a way forward for consensual YPSI

On a more general level, the regulation of YPSI reignites the age-old battle between best interests (Article 3 UNCRC) and autonomy (including those rights set out in Articles 12-16 UNCRC). If we accept that (some) children and young people wish to express and explore their sexuality through the sharing of images we must, therefore, acknowledge that it is an expression of autonomy, protected by various articles within the UNCRC. However, the exercise of this autonomy is arguably in conflict with (some) adult's views of their best interests.[110] As Fovargue and Ost argue, the existing regulation '*evidences a protectionist discourse surrounding children within the criminal law, in which their personal autonomy rights are ignored'* on the presumption that engaging in such behaviour is perceived to be *'harmful to their well-being*.'[111] Yet, in the context of adults,[112] central to the upholding of

[106] Sexual Offences Bill [Lords] (n43) cols 247-250.
[107] Ibid.
[108] Ibid.
[109] Gillespie, 'Child Pornography' (n2) 32; Sara Fovargue and Suzanne Ost, 'Does the theoretical framework change the legal end result for mature minors refusing medical treatment or creating self-generated pornography?' (2013) 13(1) Medical Law International 6, 12.
[110] For example, the views expressed by MPs during the passing of the Sexual Offences Bill in 2003: Sexual Offences Bill [Lords] (n43), cols 248 and 251.
[111] Fovargue and Ost (n109), 12.
[112] Except those who are deemed to lack capacity under the Mental Capacity Act 2005.

rights is accepting that individuals have the right to make mistakes and to do things others would not do.[113] The question is whether this principle extends to children and young people and, more specifically, their engagement in YPSI. In other words, can their privacy and expression rights (to YPSI) be restricted, in the name of their best interests?[114] Or, alternatively, does Government's (and to some degree wider society's) desire to shield children and young people from '*potential and perceived harm…[outweigh] mature minors' autonomy rights concerns in this context*'?[115]

Freeman stresses the importance of taking children's rights (and their views) seriously.[116] However, according to Morrow, the answer to upholding children's rights is not in transferring unlimited powers of decision making to children and young people but, instead, in allowing them '*to make decisions in controlled conditions*'.[117] Similarly, Fortin argues that '*the concept of children's rights does not prevent interventions to stop children making dangerous short-term choices*' if doing so would protect '*their potential for long-term autonomy*'.[118] Archard and Skivenes further consider the approach that should be taken when the child's expressed view or desire (Article 12 UNCRC) is in conflict with their perceived best interests (Article 3).[119] Their argument culminates in a checklist that should be considered by the Court before decisions on behalf of children are made. Inter alia, though, they argue that: '*the child's wishes do not have the status they would have if made by a competent adult'* and therefore *'the court must simply do what it judges is best overall for the child*.'[120]

It appears, then, that even amongst supporters and advocates of children's rights there is a consensus that some of their rights can be curtailed, provided this is done in a proportionate way. Therefore, legal provisions which prohibit, even consensual YPSI, are not necessarily, or automatically, in conflict with children's rights. However, Freeman reiterates that before we

[113] Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1977) 188-189; see also, Mental Capacity Act 2005, s.1(4): '*A person is not to be treated as unable to make a decision merely because he makes an unwise decision*'.
[114] John Eekelar, 'The interests of the child and the child's wishes: the role of dynamic self-determinism' (1994) 8 International Journal of Law, Policy and the Family 42, 53.
[115] Fovargue and Ost (n109), 12.
[116] Michael Freeman, 'Why It Remains Important to Take Children's Rights Seriously' (2007) 15 International Journal of Children's Rights 5.
[117] Victoria Morrow, '"We are people too": Children and young people's perspectives on children's rights and decision making in England' (1999) 7 International Journal of Children's Rights 149, 166.
[118] Jane Fortin, 'Children's rights? Are the courts taking them more seriously now?' (2004) 15 King's College Law Journal 253, 259.
[119] David Archard and Marit Skivenes, 'Balancing a Child's Best Interest and a Child's Views' 17(1) (2009) International Journal of Children's Rights 1.
[120] Ibid, 16.

enforce adult-made decisions on children (that are contrary to their desires), we must engage with them and '*understand their experiences and their culture*.'[121] We must appreciate the different, more technologically advanced, world in which children and young people now live. We must also appreciate the new opportunities this creates for them '*in their developing sexual and romantic relationships, just as 'behind-the-bike-shed' facilitated such explorative, albeit often fumbling, adventures into young people's developing relationships previously*.'[122]

In this vein, YPSI brings to the fore two competing issues. On the one hand rests the overwhelming desire to protect children from harm, and to protect them from early sexualisation.[123] On the other hand, lies the need to ensure children and young people are not unnecessarily criminalised and are, instead (or as well), supported in exploring and expressing their sexual autonomy in a healthy fashion. The question is how both can be effectively achieved. It is clear from earlier analysis that the current framing of the law is inappropriate. Among other things, it perpetuates victim blaming and overlooks the true harm causing issue surrounding YPSI – the absence of consent. However, avoiding this consequence, while still protecting children and young people from both exploitation and premature sexualisation, is a near impossible challenge.

If the law were reframed to decriminalise consensual behaviour entirely (e.g., by providing a defence for all children and young people who genuinely consented) this would present its own risks. Such an approach would then, in alleged instances of non-consensual conduct (e.g., where a child or young person had been coerced to send imagery), require the prosecution to prove the absence of consent / presence of exploitation to secure a prosecution. It would present the same evidential issues as other sexual offences such as rape,[124] and it may create a barrier to prosecution and could be re-traumatising for the victim.[125] Without clear caveats (e.g., requiring the parties to be above the age of sexual consent and to be similar in age), it also risks sending a message to adults, with a sexual interest in children, that sexual communication and activity with them is permissible.

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[121] Michael Freeman, 'Why It Remains Important to Take Children's Rights Seriously' (n116) 15.
[122] Emma Bond, 'The mobile phone = bike shed?' (n57) 587.
[123] This latter desire was explicitly outlined in: Reg Bailey 'Letting Children Be Children: Report of an Independent Review of the Commercialisation and Sexualisation of Childhood' (Department for Education, 6 June 2011) <https://www.gov.uk/government/publications/letting-children-be-children-report-of-an-independent-review-of-the-commercialisation-and-sexualisation-of-childhood> accessed 22 August 2022.
[124] Jennifer Temkin, Rape and the Legal Process (2nd edn, Oxford, Oxford University Press 2002) ch 4.
[125] Jacqueline M Wheatcroft, Graham F Wagstaff & Annmarie Moran, 'Revictimizing the Victim? How Rape Victims Experience the UK Legal System' (2009) 4(3) Victims & Offenders 265.

For these reasons, physical sexual activity with a child is entirely prohibited.[126] Indeed, by stating clearly that any sexual activity with someone under 16 is a crime, the provision avoids the lack of clarity that an offence hinging on exploitation would have (discussed in detail in chapter 4, s.4.2.1.1).[127] It sends the message that such behaviour is never condoned. However, the law regarding physical activity also separates adult perpetrators from children and young people who offend and considers the context of the behaviour when deciding how to proceed. In practice, the discretion awarded to police officers (for dealing with YPSI) also enables them to consider contextual factors in relation to YPSI (chapter 2, s.2.3.3). However, this is not formally recognised in the legislation and means that, if arrested, a child or young person will have a sexual offence linked to their antecedent history and that label is the same as would be attributed to an adult defendant. This is hugely problematic (chapter 4, s.4.3) and must be amended.

The ideal solution to the regulation of YPSI (both inside and outside the CJS) would avoid the unnecessary criminalisation of children and young people's genuinely consensual behaviour whilst tackling harmful and exploitative behaviour. However, the most effective way to achieve this, whilst ensuring the advancement of children's fundamental rights and freedoms, is exceptionally difficult.[128] Indeed, rather than provide all the answers to the regulation of YPSI, this chapter has demonstrated the complexity of the issue and the principles with which legislators must grapple. These concepts are problematised further when we consider non-consensual YPSI practices.

5.4: Non-consensual YPSI

The theoretical basis for criminalising non-consensual behaviours is preventing harm to others - the most widely accepted basis for criminalisation.[129] Indeed, while the evidence as to the harm caused by consensual YPSI is limited and unreliable, the harm caused by non-consensual YPSI is well established.[130] However, non-consensual YPSI can be broken down into two

[126] SOA, s.9. For further discussion see: chapter 1 (s.1.2) and chapter 3 (s.3.6.3).
[127] See also: Cornford (n44) 640.
[128] This argument is explored in depth by Fovargue and Ost, in the context of minors refusing medical treatment and minors who self-produce sexual imagery. See: Fovargue and Ost (n109), 20.
[129] AP Simester and others, *Simester and Sullivan's Criminal Law: Theory and Doctrine* (7th Edn, Hart Publishing 2019) 686.
[130] Gasso and others (n32).

further subcategories. First, is imagery induced through exploitative practices (e.g., threats and or blackmail). Second is imagery which is shared without consent (e.g., by posting online, sending to others via messaging services or showing to others in person) or threatening to share in this way. Each of these behaviours is harmful but represents different levels, degrees, and types of harm.

5.4.1: Images induced via coercive or exploitative behaviour

The first of these behaviours (coercive or exploitative behaviour) could lead to both the subject of the image (victim) and the individual requesting the image (perpetrator) being prosecuted for an indecent imagery offence. According to the HOCR,[131] the victim could face criminal sanction for taking and sending the image(s) and the defendant for requesting the image(s).[132] The Home Office states that '*unless she was unduly forced into doing so*' and / or under '*undue duress*' a crime would be recorded against the subject for taking and sharing the image.[133] Thus, while there is recognition that a person who has been forced to send an image should not be criminalised, it is not clear what constitutes force and undue duress and whether those who have been pressured (e.g., blackmailed, for example with the threat of the end of a relationship) would be granted the same treatment.

In the recent case of *R v Bowman* (concerning a total of 25 sexual offences committed by the defendant (aged 14-18) against 7 victims (aged 12-16),[134] threatening to commit suicide appeared to constitute undue duress in the context of sending a sexual image. One of the 25 offences concerned a request by Bowman (then aged 14) for sexual images of C2 (a girl aged 12). Bowman '*required [C2] to send him indecent images of herself, threatening to commit suicide if she did not do so. C2 naively believed that the threats were serious. She sent him an image of her breasts.*'[135] C2 was not prosecuted and was granted lifelong anonymity in line with the provisions of the Sexual Offences (Amendment) Act 1992.[136] However, the case concerned a series of offending and focus was placed on the very young age and vulnerability

[131] Home Office, 'Home Office Counting Rules' (n55).
[132] Ibid, 318. See also a discussion of this in: Hales (n26).
[133] Home Office, 'Home Office Counting Rules' (n55) 318.
[134] *R v Bowman* [2022] EWCA Crim 1206.
[135] Ibid, para 5.
[136] Ibid, para 1.

of C2 (as well as the other victims).[137] The judgement makes no comment on whether other children and young people who send comparable content as a result of varying forms of pressure would receive the same protection from prosecution. Therefore, whether other (lesser) threats (e.g., a threat to self-harm or terminate a relationship), or threats given to older children and young people, would prevent action being taken against the sender is unclear.[138] Given the restrictions on the data made available by the MoJ, the factors which have determined decisions on whether to prosecute remain unknown.[139] However, given the legislation holds that *any* (even coerced) production of sexual imagery is a crime, combined with the knowledge that duress has a very high threshold and is particularly difficult to prove,[140] there is a real risk that individuals who have been pressured to send content could still be criminalised. This demands immediate revision.

5.4.2: Images shared without consent

By contrast, the second of these behaviours (sharing images without consent) would be criminalised under s.1(b) PCA for distributing an indecent photograph of a child. The issues with this have been discussed at length (see, e.g., chapter 3, s.3.4) but can be summarised as follows. The offence is a strict liability offence, holding consensual and non-consensual conduct as equally culpable; any individual who sends YPSI, whether consensually (e.g., by the producer to the intended recipient) or, as we are concerned with here, by the recipient to a wider audience (e.g., to friends or posting publicly online) is criminalised in the same way.

Alternatively, or in addition to s.1(b) PCA, a person who distributed such material, without the consent of the subject, could also be prosecuted for the offence of '*disclosing private sexual photographs and films with intent to cause distress*' under s.33 CJCA. Now, following recent amendments, a threat to disclose would also be captured.[141] However, unlike s.1 PCA (which requires no specific intention by the defendant), for successful prosecution, s.33 CJCA requires

[137] Ibid, para 23.
[138] Specific reference was made to the '*young, vulnerable victims*'; '*this was serious sexual offending against victims who were vulnerable by reason of their age and, in some instances, also by reason of their personal circumstances*': Ibid, para 23 and 31.
[139] For a more detailed discussion on this see: Chapter 2, s.2.3.
[140] As was noted Edwards, '*the common law defence of duress retains its high threshold by requiring a threat of immediate death or serious physical violence before it can be considered*': Susan M Edwards, 'Coercion and Compulsion -- Re-Imagining Crimes and Defences' (2016) 12 Criminal Law Review 876, 877.
[141] DAA: Threats to disclose private sexual photographs and films with intent to cause distress.

an intent to cause distress. This threshold remains undefined but places an enhanced burden on the prosecution. It requires them to show, not only that the victim did not consent, but also that the defendant intended to cause harm by disclosing the material. However, harm could still be caused even it was not intended. Circumstances where this might be the case include, but are not limited to, the following examples.

1) Person A shares a photograph with Person B for their private use as part of their existing sexual relationship. However, without obtaining consent from person A, person B sends that photograph to a group of friends (Persons C, D, E, and F) via a social media communication platform. Person B's intention was to brag and show off their new partner. Persons C, D, E, and F save the photograph to their respective phones.
2) Same as above except, instead of sending to friends, person B posts the photograph to a pornography site, because they think it is a good photograph that will gain large amounts of traction. They have not considered the impact it may have on person A.
3) Person A loses their mobile phone. It is not password protected. Person B finds the phone and browses the content. They discover private visual sexual content and post it online. They do not know person A and have no appreciation of how they will feel about this disclosure.

In none of the above examples was there an intention to cause distress to the victim. Entirely different motivations underpinned the disclosure. However, in every scenario harm or distress could still occur and the potential impact on the subject could be long lasting. The crux of the issue, therefore, is not intention to cause harm but the absence of consent.

This raises questions as to whether, in the context of disclosing private sexual photographs, the absence of consent (regardless of the intention of the defendant) should be sufficient for prosecution. Such an approach would then mirror the law on other sexual offences such as rape, under s.1 SOA, where it must be established that the victim did not consent and the defendant did not reasonably believe they consented. However, rape has high levels of attrition. In the year ending March 2019, 58,675 allegations of rape were made in England and Wales but only 1,925 resulted in successful prosecution.[142] It is acknowledged that not all allegations will

[142] HM Crown Prosecution Service Inspectorate (HMCPSI), '2019 Rape Inspection: A thematic review of rape cases by HM Crown Prosecution Service Inspectorate' ((HMCPSI, December 2019) < https://www.justiceinspectorates.gov.uk/hmcpsi/wp-content/uploads/sites/3/2019/12/Rape-inspection-2019-1.pdf > accessed 22 August 2022, 7.

necessitate a conviction. However, this conviction rate (approximately 3 per cent) is indicative of a serious problem within the CJS. Fortunately, evidence made available from FOI requests, suggests that prosecution rates for s.33 CJCA are considerably higher than those for rape. This is likely due, in part, to the digital nature of the offence and the presence of physical paper trails. From April to December 2015 (the year in which the offence was established) there were 1,160 reported cases.[143] Action was taken in 39 per cent of these cases and in approximately 11 per cent of these cases the alleged perpetrator was charged. Although higher than 3 per cent, the figures suggest that there are still many victims left without justice. To avoid this consequence, an alternative approach to prosecution may be required.

One option would be to incorporate an evidential presumption about consent, echoing (or extending) the presumptions set out in s.75 SOA. In criminal proceedings, generally, the prosecution bears the legal burden of proving all elements of the offence beyond reasonable doubt and the evidential burden of adducing sufficient evidence on any issues being put to the jury. However, in certain circumstances a matter of law may be presumed. In these circumstances, the burden shifts from the prosecution to the defence who must then adduce sufficient evidence to the contrary. This is known as a reverse evidential presumption. In the context of sexual activity, to convict a defendant of an offence (e.g., rape, assault by penetration, sexual assault) the prosecution is typically required to establish that the victim did not consent (s.74 SOA). However, in certain circumstances (e.g., where the alleged victim was asleep or otherwise unconscious at the time of the relevant act)[144] it will be presumed that the alleged victim did not consent (and that the defendant did not reasonably believe the alleged victim consented) unless the defence can raise sufficient evidence to contest this. This puts an evidential, but not a legal, burden on the defence. The prosecution is still required to prove that all elements of the offence have been made out (legal burden) and therefore such presumptions (reverse evidential burdens) have been deemed compatible with the presumption of innocence (as protected by Article 6(2) of the ECHR).[145] Applying this logic, a reverse evidential burden could prove useful in the context of s.33 CJCA.

If this position were adopted, where private sexual material is disclosed, the complainant could be presumed not to have consented to the relevant act, unless sufficient evidence is adduced to

[143] Peter Sherlock, 'Revenge pornography victims as young as 11, investigation finds' *BBC* (27 April 2016) < https://www.bbc.com/news/uk-england-36054273> accessed 22 August 2022.
[144] SOA, s.75(2)(d).
[145] This issue is explored by Ost regarding s.62 CAJA: Suzanne Ost, 'Criminalising Fabricated Images of Child Pornography: A Matter of Harm or Morality?' (2010) 30 Legal Studies 230, 247.

the contrary. This would dramatically alter the current position of the law, it would to be more victim-focused and could lead to a rise in successful prosecutions.

Another alternative route would be to utilise a recklessness test, as is the case in other areas of criminal law.[146] Technically, there are two types of recklessness, subjective and objective.[147] Subjective recklessness questions whether the defendant knew of the risk of harm and nonetheless took the risk. Objective recklessness, on the other hand, questions whether a reasonable person would have foreseen the risk of harm. The former still requires the prosecution to prove the defendant's state of mind, and therefore maintains the very issue with which we are trying to avoid. Whereas objective recklessness potentially criminalises those who genuinely did not foresee the risk of harm in their actions. Objective recklessness has received widespread criticism and was overruled in *R v G & R*.[148] Theoretically, an objective approach, in the context of sharing private imagery, could be justified on the basis that the harm suffered by the victim is not reliant on the defendant's state of mind and thus, arguably, the offence should not be either. However, following *R v G & R* and given the widespread criticism the *Caldwell*[149] objective test received, it is unlikely that a return to objective recklessness in the criminal law would ever be accepted. Regardless, such an approach, which assesses the foreseeability of harm (whether it was foreseen or should have been), undermines the crux of the issue – the absence of consent. Instead, any amendments should focus solely on whether there was consent. If there was not, and private sexual content was disclosed, the offence should be made out. An offence which adopts this approach would emphasise the importance of obtaining consent and could serve to facilitate a shift in legal and societal approaches to sexual activity and consent. Whether the law be reframed to incorporate the aforementioned evidential presumptions or not, the key submission here is that the question should be one of consent (on behalf of the subject of the image) and not on the intention of the discloser.

However, even if this logic were adopted, and all that was required was for the prosecution to establish an absence of consent (and no reasonable belief in consent), there is still a question mark over whether this law should be used to criminalise the behaviour of children and young people. In some ways, the law is preferable to the PCA, because it focuses solely on the actions

[146] For example, regarding criminal damage and non-fatal offences against the person: *R v G & R* [2003] 3 WLR.
[147] Subjective recklessness: *R v Cunningham* [1957] 2 QB 396; *R v G & R* (n146). Objective recklessness: *MPC v Caldwell* [1982] AC 341 (now overruled by *R v G & R*).
[148] *R v G & R* (n146).
[149] *MPC v Caldwell* [1982] AC 341.

of the distributor, rather than the producer. Further, if the law was amended, and the requirement for an intention to cause distress was removed, a greater number of victims (than would be the case under the existing framing of the offence) could achieve justice. But children and young people are widely understood to be in a stage of developing capacity,[150] and criminalising their behaviour is more controversial than criminalising the behaviour of adults. The next section explores these concepts further.

5.4.3: Issues with criminalisation of children and young people

The application of these laws (primarily indecent imagery laws under s.1 PCA and s.160 CJA but also s.33 CJCA) to children and young people is problematic, even regarding exploitative behaviour used to induce imagery being sent and sharing imagery without consent. Children and young people's brains are still developing and while they may understand the key differences between right and wrong, evidence suggests they are more prone to risk-taking and impulsive behaviour than older age groups.[151] Arguments centring on the developmental immaturity of youth have been used to advocate for specific consideration of age in sentencing prosecutorial decisions.[152] Moreover, research by Blakemore and Robbins shows that adolescents are more likely, than both younger children and adults, to make risky decisions.[153] This likelihood is increased further in situations '*where emotions are at stake or peers are present*'.[154] Therefore, teenagers involvement in sending and sharing sexual images, which involves both of these aspects, is highly predictable. Further, given the ease at which digital images can be shared, combined with children and young people's inherent impulsivity, it is not difficult to understand how easily, and indeed frequently, non-consensual distribution might occur (e.g., forwarding of images to friends). This has been recognised by the CPS who

[150] Sheila Varadan, 'The Principle of Evolving Capacities under the UN Convention on the Rights of the Child' 27 (2019) International Journal of Children's Rights 306; Aoife Daly, 'Assessing Children's Capacity: Reconceptualising our Understanding through the UN Convention on the Rights of the Child' (2020) 28(3) International Journal of Children's Rights 471.
[151] Laurence Steinberg, A dual systems model of adolescent risk-taking'(2010) 52(3) Developmental Psychobiology 216.
[152] See: Catherine Insel and others, 'White Paper on the Science of Late Adolescence A Guide for Judges, Attorneys, and Policy Makers' (Center for Law, Brain & Behavior, 2022) <https://clbb.mgh.harvard.edu/white-paper-on-the-science-of-late-adolescence/> accessed 22 August 2022; Laurence Steinberg, 'Adolescent brain science and juvenile justice policymaking' (2017) 23(4) Psychology, Public Policy, and Law 410.
[153] Sarah-Jayne Blakemore & Trevor W Robbins, 'Decision-making in the adolescent brain' (2012) 15(9) Nature Neuroscience 1184.
[154] Ibid, 1189.

have highlighted that, in the context of disclosing private sexual photographs and films (s.33 CJCA):[155]

> *When assessing whether a prosecution is required in the public interest prosecutors…One factor that may warrant particular consideration is the involvement of younger or immature perpetrators. Children may not appreciate the potential harm and seriousness of their communications and as such the age and maturity of suspects should be given significant weight, particularly if they are under the age of 18.*

Although the commentary by the CPS on this issue is brief, and they instead direct readers to the CoP briefing note,[156] it is acknowledged that prosecution for this behaviour, when exhibited by children and young people, may not be appropriate. However, the CPS statement is vague and subject to interpretation. To rectify this, and to avoid disparate outcomes, clear guidelines must be established. These guidelines should recognise the need to protect children and young people from the full weight of the law.

In addition, in deciding how to respond to a child or young person's offending behaviour, there must be specific consideration of their best interests.[157] As such, alternatives to judicial proceedings should be considered as possible replacements for prosecuting the behaviour of children and young people.[158] Therefore, while criminal legal theory provides a strong case in favour of criminalisation for non-consensual and exploitative YPSI practices, principles of youth justice and evolving neuroscientific evidence may provide compelling reasons against criminalising this behaviour. Unfortunately, the long-term impacts and reoffending rates of children and young people who have been involved in the CJS for YPSI are unknown. This is in part because YPSI is a relatively new practice so no longitudinal studies to assess the impact have been carried out. However, we can look to the regulatory responses of other forms of harmful sexual behaviour for an indication of the role criminalisation plays. This is explored below.

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[155] CPS, 'Revenge Pornography - Guidelines on prosecuting the offence of disclosing private sexual photographs and films' (CPS, 24 Jan 2017) <https://www.cps.gov.uk/legal-guidance/revenge-pornography-guidelines-prosecuting-offence-disclosing-private-sexual> accessed 22 August 2022.
[156] College of Policing, 'Briefing Note' (n21).
[157] As prescribed by UNCRC, Article 3. See also: General Comment No. 24 (n3) para 2.
[158] Council of Europe, 'Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice' (Council of Europe Publishing, October 2011) <https://rm.coe.int/16804b2cf3> accessed 22 August 2022.

5.4.4: Harmful sexual behaviour and criminalisation

It is imperative that any assessment of a child or young person's sexual behaviour is considered within a developmental context. For clarity, harmful sexual behaviour (among children and young people) is defined, in policy and academic literature, as:[159]

> *[S]exual behaviours expressed by children and young people under the age of 18 years old that are developmentally inappropriate, may be harmful towards self or others, or be abusive towards another child, young person or adult*.

According to Hackett, '*the sexual behaviours of children and young people exist on a continuum which ranges from normal and developmentally appropriate on the one hand, to highly abnormal and violent on the other*.'[160] As Ryan points out, some behaviours are normal if they are demonstrated in pre-adolescent children but concerning if they continue into adolescence and vice-versa.[161] Nevertheless, making distinctions about where on this continuum any given behaviour falls is a complex process, not least because the perceived appropriateness of sexual behaviours is culturally influenced and changes over time. This is particularly true with YPSI where public opinion around the harmfulness (or not) of the behaviour is divided and fluctuates according to the context of any given case.[162]

Despite this difficulty, numerous researchers have attempted to create frameworks for identifying conduct which may be a cause for concern.[163] Hackett, for example, created the

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[159] NSPCC, 'Harmful sexual behaviour framework: An evidence informed operational framework for children and young people displaying harmful sexual behaviours' (NSPCC 2016) <https://www.icmec.org/wp-content/uploads/2019/04/harmful-sexual-behaviour-framework.pdf> accessed 22 August 2022.

[160] Simon Hackett, 'Children and young people with harmful sexual behaviours: Research Review' (Research in Practice, 2014) < https://tce.researchinpractice.org.uk/wp-content/uploads/2020/05/children_and_young_people_with_harmful_sexual_behaviours_research_review_2014.pdf> accessed 22 August 2022.

[161] Gail Ryan 'Childhood Sexuality: A decade of study. Part 1 – research and curriculum development' (2000) 24(1) Child Abuse & Neglect 33.

[162] E.g., Chana Joffe-Walt, 'Sexting': A disturbing new teen trend? (*NPR*, 11 March 2009) <https://www.npr.org/templates/story/story.php?storyId=101735230> accessed 22 August 2022; Glenda Cooper, 'Sexting: a new teen cyber-bullying 'epidemic'' (12 April 2012, The Telegraph) < https://www.telegraph.co.uk/technology/facebook/9199126/Sexting-a-new-teen-cyber-bullying-epidemic.html> accessed 22 August 2022. Contrastingly see: Thomas Crofts and others, *Sexting and Young People* (Palgrave Macmillan 2015) ch 3; Amy A Hasinoff, *Sexting Panic: Rethinking Criminalization, Privacy, and Consent* (University of Illinois Press 2015); Englander, 'What Do We Know About Sexting, and When Did We Know It?' (n50).

[163] Gail Ryan, Tom Leversee and Sandy Lane, *Juvenile Sex Offending: Causes consequences and corrections* (3rd edn, Wiley 2010); Ryan, 'Childhood Sexuality: A decade of study (n141); Mark Chaffin, Elizabeth Letourneau, and Jane F Silovsky, 'Adults, adolescents, and children who sexually abuse children: a developmental perspective' in JEB Myers and others, *The APSAC handbook on child maltreatment* (Sage 2002); Phil Rich, *Understanding, Assessing and Rehabilitating Juvenile Sexual Offenders* (2nd edn, Wiley 2011).

continuum of behaviour model (below, Figure 2) to assist in assessing the appropriateness of given sexual behaviours.[164] An adapted version of this is now featured in the UKCIS policy guidance on YPSI for schools and colleges.[165] So too is Finkelhor and Wolak's sexting typology (below, Figure 3),[166] which provides guidance around how to identify the severity of YPSI incidents from experimental (non-harmful) through to aggravated (harmful). Considered together, professionals now have access to a broad framework around which children and young people's YPSI practices, and sexual behaviours more generally, can be assessed.[167] It provides some support for school staff on how to respond to certain types of incidents. In short, it aims to distinguish between consensual age-appropriate behaviours (which will not require the involvement of external authorities) and aggravated behaviour (which will require external intervention). However, the extent to which it is successful in this pursuit is unclear.

[164] Simon Hackett, 'Children, Young People and Sexual Violence' in C Barter and D Berridge, *Children Behaving Badly? Exploring peer violence between children and young* people (Blackwell-Wiley 2011).
[165] UKCIS (n29) s.1.6(b).
[166] Janis Wolak and David Finkelhor, 'Sexting: A Typology' (2011) Crimes Against Children Research Center.
[167] UKCIS (n29) s.1.6(a).

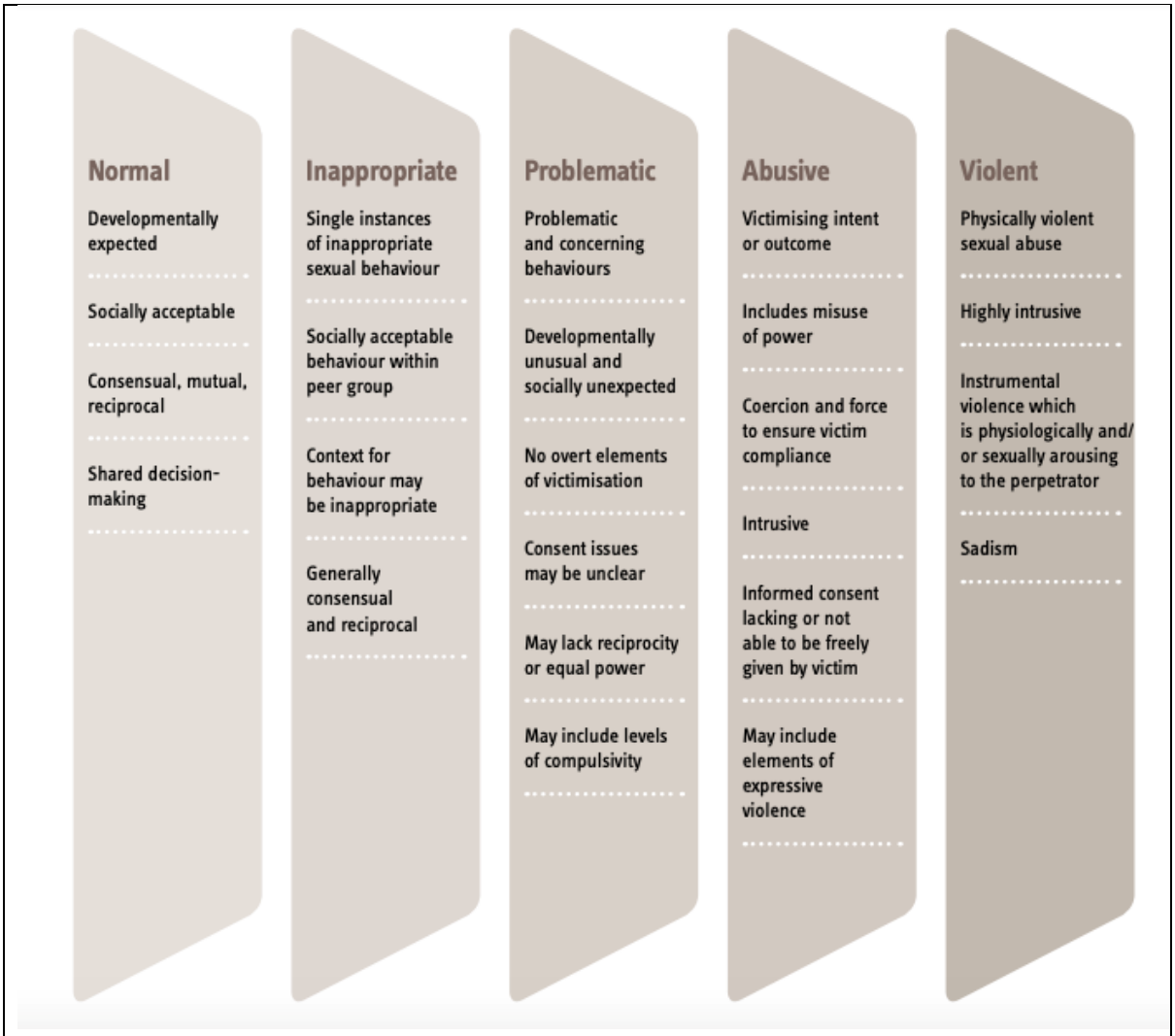

Figure 2: Hackett's continuum of children and young people's sexual behaviours[168]

[168] Hackett 'Children, Young People and Sexual Violence' (n164).

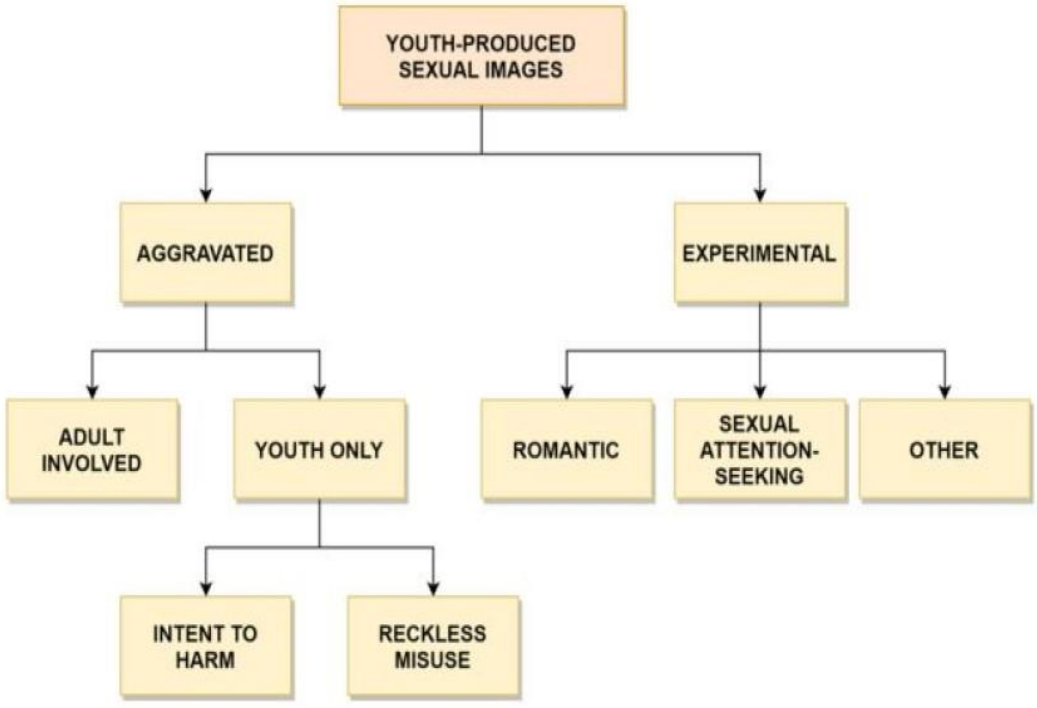

Figure 3: Finkelhor and Wolak: *Sexting, A Typology* [169]

The infographics, in figures 2 and 3, indicate that children and young people's sexual behaviour can vary significantly. However, they also suggest that they can be neatly separated into identifiable categories. In reality, the experimental behaviour (outlined by Finkelhor and Wolak: figure 3) might overlap with the aggravated. Binary distinction will not always be possible. This is particularly true in the context of adolescence where capacities are evolving and changing from day to day. Children and young people's behaviour cannot be neatly sorted into healthy and unhealthy categories. Often it will flit between them. This goes right to the heart of the issue; namely, the need to respond to children and young people's behaviour differently from that of adults. Children and young people's behaviour is fundamentally different from adults because they are still learning and developing and therefore the way their behaviour is regulated must accommodate for these differences.

In addition to these models (figures 2 and 3), children and young people's sexual health charity Brook have also created an online sexual behaviours traffic light tool which distinguishes

[169] Wolak and Finkelhor (n166).

between three levels of sexual behaviour (green, amber, red).[170] Green behaviours reflect safe and healthy development, through to red behaviours which reflect behaviour that may be a cause for concern. All these behaviour models follow a similar pattern, with consensual, reciprocal actions at the healthy end of the spectrum and non-consensual, compulsive, and violent behaviour at the opposite end. But, while useful in theory, these models are generally broad in nature and, when applied in practice, are limited in their effectiveness. They are open to interpretation and thus subject to the discretion of professionals which risks inconsistent outcomes (as explored in chapter 2, s.2.3).

5.4.5: Is criminalising children and young people's behaviour counterproductive?

Harmful sexual behaviour may be difficult to identify but a key question remains. What should occur if, at any given point, potentially harmful behaviour (e.g., non-consensual, coercive and / or violent behaviour) is identified? In certain situations, there may be clear indications, e.g., because the child or young person is consistently behaving in a harmful manner, perhaps by continuously requesting and sharing naked images of their peers. Or, it may be less explicit, e.g., what started out as a consensual and reciprocal exchange of images has now become non-consensual as one party has distributed the image more widely. Irrespective of the situation, the right response to harmful sexual behaviours, exhibited by children and young people, is to address the causes of the offending behaviour and to repair harm to victims. However, this does not always require criminal justice intervention.[171]

A 2016 review into the YJS in England and Wales, by then Chair of the YJB Charlie Taylor, found that for most children, offending is temporary.[172] Crucially, though, their future trajectory depends on the type of intervention – if any – that they receive.[173] This is particularly true of sexual offences. Recidivism studies of those who committed sexual offences as children have concluded that child sex offenders are likely to desist in adulthood. Beckett concludes that: '*most adolescents who sexually abuse will cease this behaviour by the time they reach*

[170] Brook, 'Sexual behaviours traffic light tool' (Brook) <https://www.brook.org.uk/training/wider-professional-training/sexual-behaviours-traffic-light-tool/> accessed 22 August 2022.
[171] Charlie Taylor, 'Review of the Youth Justice System in England and Wales' (Dec 2016) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/577105/youth-justice-review-final-report-print.pdf > accessed 22 August 2022, para 9.
[172] Ibid, para 9.
[173] Rich (n163); Simon Hackett, 'What works for children and young people with harmful sexual behaviours?' (Barnardo's 2004) <https://core.ac.uk/download/66195.pdf> accessed 22 August 2022

adulthood, especially if they are provided with specialised treatment and supervision.'[174] Similarly, Weinrott's extensive literature review concludes that what '*virtually all of the studies show, contrary to popular opinion, is that relatively few JSOs [juvenile sex offenders] are charged with a subsequent sex crime*'.[175] This is consistent with research that suggests that general criminal behaviour by children and young people is adolescent-limited and declines as adulthood approaches.[176] In addition, even where children and young people exhibit harmful behaviour, in the context of YPSI, it is typically motivated by their desire to obtain explicit images of people in their age group.[177] In the vast majority of cases, children and young people's interests will remain with their peers as they enter into adulthood. They '*are not paedophiles in the making, but instead are experiencing a phase of normal development*'.[178] Therefore, the current law, of indecent imagery, which would label these children and young people as child sex offenders fails to accurately reflect the nature of the offending.

Moreover, evidence shows that contact with the CJS can increase the likelihood of children and young people reoffending.[179] It can '*inhibit their capacity to change*'.[180] Therefore, where possible, crimes should be dealt with outside the CJS, and when a criminal justice response is necessary children and young people should be responded to in '*a child-appropriate context*'.[181] This is supported by Janes' research which shows that, not only is contact with the CJS harmful in itself, but it also prevents and interferes with access to intervention that is known to improve chances of effective rehabilitation.[182]

Janes' interviews with individuals with histories of harmful sexual behaviour (in childhood and adolescence) highlighted that the CJS presents '*a major barrier to the most effective ways of*

[174] Richard Beckett, 'Risk prediction, decision making and evaluation of adolescent sexual abusers', in M Erooga and H Masson, *Children and Young People Who Sexually Abuse Others: Current Developments and Practice Responses* (2nd edn, Routledge 2006), 233.
[175] MR Weinrott, 'Juvenile Sexual Aggression: A Critical Review' (1996) University of Colorado, Institute for Behavioral Sciences, Center for the Study and Prevention of Violence, 67. See a discussion of this in: Sue Righthand and Carlann Welch, 'Juveniles Who Have Sexually Offended: A Review of the Professional Literature' (US Department of Justice: Office of Juvenile Justice and Delinquency Prevention, 2001) <https://www.ojp.gov/pdffiles1/ojjdp/184739.pdf> accessed 22 August 2022, 31.
[176] Beckett (n174).
[177] Parliament of Victoria Law Reform Committee (n59).
[178] Ibid, 139.
[179] Barry Goldson, *The New Youth Justice* (Russell House Publishing 2000); Lesley McAra and Susan McVie, 'Youth Justice? The Impact of System Contact on Patterns of Desistance from Offending' (2007) 4(3) European Journal of Criminology 315-34. Anthony Petrosino, Carolyn Turpin-Petrosino and Sarah Guckenburg, 'Formal system processing of juveniles: Effects on delinquency' (2010) 1 Campbell Systematic Reviews' (2010) 3.
[180] McAra and McVie (n179) 340.
[181] Barry Goldson and John Muncie, 'Rethinking Youth Justice: Comparative Analysis, International Human Rights and Research Evidence' (2006) 6(2) Youth Justice 91.
[182] Laura Janes, 'Is criminalising children's sexual behaviour counterproductive?' (2016) 28 Child and Family Law Quarterly 239, 253.

becoming and keeping safe, including delaying specialist interventions to reduce reoffending and developing protective factors such as education, jobs and relationships.'[183] Further, she concluded that '*the natural resilience'* which was apparent in these young offenders, and inherent in many children and young people generally, '*is something that might be more easily harnessed if their sexual behaviour is dealt with through the child protection system rather than the criminal justice system*.'[184] Ultimately, the low rates of reoffending for sexual offences, and the fact that appropriate treatment and intervention reduces these rates further, provide a compelling argument for the avoidance of the CJS.

This argument is strengthened further when considered in conjunction with the impacts of labelling discussed in the previous chapter (Chapter 4, s.4.3). In short, labelling theory holds that labels, especially deviant labels resulting from official decisions made in childhood or adolescence, are capable of negatively impacting a person's chances of a normal life,[185] and increasing chances of reoffending in adulthood.[186] Therefore, it seems that even in the context of harmful behaviour, in most cases, children and young people should be diverted away from the CJS.

5.5: Conclusion

The analysis in this chapter has highlighted the countervailing reasons against criminalisation. Focus has been placed on children and young people's rights and freedoms as well as the need to respond to children and young people's harmful behaviour differently from adults. These arguments all provide rationales for utilising regulatory methods outside of the CJS and to avoid prosecuting the behaviour of children and young people.[187]

Above all else, it is imperative that YPSI is approached in a way that takes the specific circumstances into account. YPSI may be engaged in in a voluntary and consensual manner. Although some commentators consider all sexual contact between those under the age of

[183] Ibid, 260.
[184] Ibid.
[185] Howard Becker, *Outsiders: Studies in the sociology of deviance* (Free Press 1963); BG Link, 'Mental patient status, work and income: An examination of the effects of a psychiatric label' (1982) 47 American Sociological Review 202.
[186] Robert J Sampson and John H Laub, 'A life-course theory of cumulative disadvantage and the stability of delinquency', in TP Thornberry, *Developmental Theories of Crime and Delinquency* (Routledge 1997)
[187] Council of Europe, 'Guidelines of the Committee of Ministers' (n158).

consent is harmful and, by definition, abusive,[188] other commentators take a more pragmatic approach. They argue that '*mutually agreed experimentation*' is often '*a normal part of sexual development*' which '*does not do any harm in most cases between young people close in age*'.[189] In this context, it can be argued that YPSI is a legitimate exploration of sexual identity. It could also be viewed as falling within the scope of a child's freedom of expression and right to privacy, as provided by Articles 13 and 16 UNCRC and Articles 10 and 8 ECHR.

However, other YPSI may also reflect harmful sexual behaviours including the use of coercion (e.g., blackmail) or violence, and / or the absence of consent. In these situations, where children and young people inflict harm on their peers (or adults), authorities must act. However, rather than prosecution, as far as possible alternative approaches should be pursued. Focus should be placed on repairing the harm done to the victim instead of treating the young offender as a perpetrator. This would reflect the YJB's '*Child First, Offender Second*' initiative which requires all youth justice services to '*prioritise the best interests of children, recognising their needs, capacities, rights and potential*'.[190] However, the alternative approaches used must be executed with caution. For example, one possible route might utilise restorative justice (which involves interaction between the victim and perpetrator). Yet, while this may be beneficial in rehabilitating the young offender and / or in enabling them to understand the harm they have caused, it may be triggering and harmful for the victim. The controversy around restorative justice in sexual offence cases has been widely documented and thus a thorough risk assessment must be carried out before such routes are adopted when responding to cases on non-consensual YPSI.[191] Indeed, the primary focus should be on the welfare of the involved parties.

Overall, there remains a strong legal and legitimate basis for prohibiting the production of YPSI. However, the evidence points us away criminalisation, even for non-consensual and harmful behaviours. Indeed, the most effective methods of regulation occur outside the CJS and focus on support, treatment, and rehabilitation. The next chapter builds upon these findings

[188] Linda Papadopoulos, Sexualisation of Young People Review (Home Office, 2010) < https://dera.ioe.ac.uk/10738/1/sexualisation-young-people.pdf> accessed 22 August 2022, 74; see also: Bailey (n115).
[189] Sexual Offences Bill [Lords] (n43) cols 869.
[190] Ministry of Justice, 'Standards for children in the youth justice system 2019' (n13) 6.
[191] See: Annemieke Wolthuis, 'Restorative Justice and Sexual Violence' (European Forum for Restorative Justice, 2022) < https://www.euforumrj.org/sites/default/files/2020-11/Thematic%20Brief%20on%20Restorative%20Justice%20and%20Sexual%20Violence.pdf> accessed 28 December 2022. For a discussion of how restorative justice could be used effectively in the context of victims of child pornography see: Suzanne Ost, 'A New Paradigm of Reparation for Victims of Child Pornography' (2016) 36(4) Legal Studies 613.

and proposes amendments to the law which can account for the diverse nature of YPSI and ensure proportionate outcomes and child-friendly justice.

Chapter 6: Proposal for Reform: A Framework for Change

6.1: Introduction

Having explained, in the preceding chapters, the problems with the existing regulation of YPSI, this chapter reflects on these concerns and presents suggestions for change, which could serve to alleviate some of these issues. The analysis has focused almost exclusively on the consensual and non-consensual online practices of children and young people. However, in doing so, it has also shed light on a wider expanse of issues surround sexual activity generally. These issues are all underpinned by the notion of genuine consent and the capacity to give that consent. Moving forward, legislative reform needs to facilitate a shift in societal and legal attitudes and responses to sexual behaviour which are more permissive of consensual activity and target the harm caused by the absence of consent. This chapter highlights important areas for reform and provides a set of recommendations and considerations which align, in part, with those made by the Law Commission in their consultation papers relating to intimate images of adults[1] and online harms.[2]

In addition, this chapter reiterates the need to overhaul the current approach to the regulation of children and young people's sexual behaviour and to advance the rights enshrined in the UNCRC. Future reform must ensure that children and young people can be protected from over sexualisation and sexual exploitation (Article 34) without unnecessarily criminalising them or subjecting them to the criminal justice system (Article 3 (best interests) and 40 (juvenile justice)). In doing so, legislation, policy and guidance must prioritise children and young people's right to expression (Article 13) and to privacy (Article 16) by ensuring that, by and large, consensual actions are handled outside of the CJS (e.g., through educational settings and, where appropriate, relevant welfare services) and prosecutorial responses are only used in the most severe circumstances, where no other approach would be adequate.

[1] Law Commission, *Intimate Image Abuse: A Consultation Paper* (Law Commission 253, 26 Feb 2021) < https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2021/02/Intimate-image-abuse-consultation-paper.pdf> accessed 22 August 2022. (Hereafter: Law Commission, IIA).
[2] Law Commission, *Harmful Online Communications: The Criminal Offences: A Consultation Paper* (Law Commission 248, 11 Sep 2020) < https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2020/09/Online-Communications-Consultation-Paper-FINAL-with-cover.pdf> accessed 22 August 2022. (Hereafter: Law Commission, HOC)

6.2: Points to address

As evidenced in previous chapters, the term YPSI encapsulates a broad range of behaviours. On the one hand, it can include private and consensual activities such as photographing one's own body or the taking and sharing of images between mutually consenting partners of a similar age, who may already be involved in an offline romantic and or sexual relationship. On the other hand, it includes the sending of unsolicited graphic imagery (known as cyberflashing),[3] sharing private imagery without consent (through instant messaging or posting online via social media platforms) and forcing others to send imagery (through methods such as threats, blackmail, or physical force). Each of these behaviours represents a different level of wrongdoing and culpability and requires a different type of response. The appropriate method for responding to the behaviours of teenagers mutually exploring their sexuality (albeit through a method which generates a permanent digital record) will be vastly different from the response needed to tackle children and young people violating consent and / or utilising force. Yet, while there are some guidelines in place to facilitate tiered responses to these behaviours, law and policy remains uncertain and lacks nuance. The statutory guidance affords educational settings and the police a great deal of discretion in responding to these incidents.[4] Although this is useful in mitigating the impact of decontextualised criminal legislation, it is shrouded in ambiguity, places a heavy burden on professionals and risks differing outcomes for children and young people. Instead, new, clear, and accurately labelled regulation is necessary to ensure that consistent and proportionate outcomes are reached across England and Wales.

To achieve this, YPSI is best understood, and responded to, as an extension of children and young people's offline sexual activity.[5] In much the same way that offline sexual activity is not intrinsically harmful, harm does not arise automatically from a young person taking (and sending) a photograph of their (or a peer's) nude or partially nude body. Indeed, this action is a form of private behaviour and expression protected by Article 13 and 16 UNCRC.[6] Instead, harm stems from the presence of other aggravating factors, specifically, the absence of consent

[3] Ibid, para 3.155.
[4] UK Council for Internet Safety (UKCIS), 'Sharing nudes and semi-nudes: Advice for education settings working with children and young people: Responding to incidents and safeguarding children and young people' (UKCIS 2020) <https://www.gov.uk/government/publications/sharing-nudes-and-semi-nudes-advice-for-education-settings-working-with-children-and-young-people> accessed 22 August 2022.
[5] For further discussion of this notion, see: HyeJeong Choi, Joris Van Ouytsel and Jeff R Temple, 'Association between sexting and sexual coercion among female adolescents' (2016) 53 Journal of Adolescence 164; Jody M Ross, Michelle Drouin and Amanda Coupe, 'Sexting coercion as a component of intimate partner polyvictimization' (2019) 34(11) Journal of Interpersonal Violence 2269.
[6] As discussed by the Court in the Canadian case *R v Sharpe* 2001 SCC 2, para 76 and 110.

(including the absence of capacity to consent, e.g., because the individual is very young) and / or presence of pressure, coercion, or exploitation. This parallels the factors that also problematise and catastrophise sexual activity generally and are linked to a so-called rape-culture.[7] Therefore, to best address the issues at hand, regulation must avoid broadly criminalising acts of expression and instead tackle aggravating behaviours and emphasise vital messages regarding respect, consent, and boundaries.[8]

6.3: Moving forward

The critical legal analysis provided by this thesis has created an opportunity to rethink the regulation of sexual activity, particularly regarding children and young people. Legal regulation which adheres to principles of legal theory as well as children's rights has several key aims. First, it must be underpinned by a legitimate aim. In the context of YPSI this is to prevent sexual exploitation and harm to others. Second, it must be proportionate in its approach, and be the best method of regulation, over and above alternative (less coercive) methods of legal control. In relation to children and young people, who are at a pivotal stage in their development, there must be specific consideration of their best interests. In achieving this, regard must be had to the relevant rights (including rights to expression and privacy and to protection from sexual exploitation provided by the UNCRC (Articles 13, 16 and 34)). However, striking the right balance between these competing rights is a difficult challenge. The answer to upholding children's rights is not in transferring children and young people unlimited powers to exercise at their will but, rather, in allowing them '*to make decisions in controlled conditions*'.[9] However, before we enforce adult-made regulations on children, we must engage with them and '*understand their experiences and their culture*.'[10] We must acknowledge the technologically driven world in which children and young people now live and appreciate the new opportunities this creates for them in their developing sexual and

[7] BBC, 'Everyone's Invited: sex abuse claims 'not limited to private schools'' *BBC* (27 March 2021) <https://www.bbc.co.uk/news/uk-england-london-56549070> accessed 22 August 2022; Katherine Sellgren & Ella Wills, 'Girls asked for nudes by up to 11 boys a night, Ofsted finds' *BBC* (10 June 2021) <https://www.bbc.co.uk/news/education-57411363> accessed 22 August 2022.
[8] Jessie Hunt, 'Beyond 'Sexting': Consent and Harm Minimization in Digital Sexual Cultures' (28 September 2016) < https://yfoundations.org.au/wp-content/uploads/2018/11/Beyond-Sexting.pdf > accessed 22 August 2022, 3.
[9] Victoria Morrow, '"We are people too": Children and young people's perspectives on children's rights and decision making in England' (1999) 7 International Journal of Children's Rights 149, 166.
[10] Michael Freeman, 'Why It Remains Important to Take Children's Rights Seriously' (2007) 15 International Journal of Children's Rights 5, 15.

romantic relationships.[11] The key to future regulatory responses is to offer the highest level of protection in conjunction with the lowest level of infringement of privacy and expression. The following suggestions would aid in achieving this.

6.3.1: Distinguishing adults from children and young people

The need to distinguish adult perpetrators from children and young people has been consistently demonstrated. As well as facilitating fair labelling, this would allow for more proportionate responses to be taken in relation to children and young people who offend. This is of particular importance because s.1 PCA and s.160 CJA offences are specified offences that can never be filtered (removed from a criminal record).[12] Therefore, currently, even if a child or young person only received a caution for one or more of these offences, it would always be disclosed on a criminal records check. However, by dealing with the behaviour of children and young people differently (and offences committed by them being filterable offences), the impact on their futures could be reduced. As is the case for physical sexual activity,[13] the law should distinguish between adults who exploit children and young people and children and young people who exploit their peers.[14] Doing so would put into effect the UNCRC's requirement on States to recognise children and young people's '*lesser culpability'* and the need to reflect this through a *'a separate system with a differentiated, individualized approach*'.[15]

6.3.2: Defence for 16- and 17-year-olds

[11] Emma Bond, 'The mobile phone = bike shed? Children, sex and mobile phones' (2011) 13 New Media and Society 587.
[12] Disclosure & Barring Service and Home Office, 'List of offences that will never be filtered from a DBS certificate' (Gov.UK, 16 May 2018) < https://www.gov.uk/government/publications/dbs-list-of-offences-that-will-never-be-filtered-from-a-criminal-record-check> accessed 22 August 2022.
[13] SOA, s.13.
[14] The focus of YPSI regulation is on children and young people who exploit their peers (other individuals under 18). However, it is also possible that children and young people could exploit adults. When this occurs, YPSI regulation would not apply because the victim and subject of the image would not be under 18. However, it could be captured by s.33 CJCA or other existing offences. See: CPS, 'Obscene Publications' (CPS, Jan 2019) <https://www.cps.gov.uk/legal-guidance/obscene-publications> accessed 22 August 2022.
[15] UNCRC, General Comment No. 24 on children's rights in the child justice system (2019) CRC/C/GC/24 para 2.

The current framing of the PCA and s.160 CJA provides a defence for those married or in an enduring relationship. However, as was discussed in chapter 1, s.1.2.4 this defence is arbitrary and raises a range of discriminatory and practical application concerns, not least the impact of the MCPA which renders the defence almost entirely redundant. Therefore, both s.1A PCA and s.160A CJA should be repealed in their entirety. However, a new defence, or exemption, for YPSI should be introduced. This would apply to children and young people, above the age of consent (16 and 17-year-olds), who consensually share sexual imagery with another person or persons of a similar age. While there are risks associated with this behaviour, outright bans and abstinence-only approaches are both unrealistic and counterproductive.[16] Instead, focus should be placed on respect, consent, and boundaries.[17] Such an approach would target the crux of the issue – the absence of true consent, in which a person '*agrees by choice, and has the freedom and capacity to make that choice*'.[18] This defence (and, in effect, decriminalisation for older children) will face inevitable criticism for its potential to green light the production of such imagery, the risk of over-sexualising young people and the risk of reducing protection afforded to young people from sexual abuse and exploitation. However, two key arguments are raised to challenge these criticisms.

First, in line with the majority in the Canadian case of *R v Sharpe,*[19] the risks associated with consensual YPSI are not sufficient to warrant criminalisation. Indeed, such a prohibition '*trenches heavily on freedom of expression while adding little to the protection the law provides children*' and young people on the basis that it only depicts lawful sexual activity (that is those who are old enough to consent to sexual activity).[20] Second, by providing a defence to consensual behaviour it may encourage victims of non-consensual YPSI to come forward, as there will be no fear of their own prosecution. In this regard it could increase protection and shift the focus away from victim blaming and on to the harm caused by an absence of consent. However, it is acknowledged that the presence (or indeed absence) of consent is problematic for the CJS to ascertain. It is often described as being a case of 'one person's word against another' which therefore makes a conclusion 'beyond reasonable doubt' difficult to find.[21] There are also further issues linked, inter alia, to witness credibility and reliability and

[16] Hunt (n8).
[17] Ibid.
[18] As per SOA 2003, s.74.
[19] *R v Sharpe* (n6).
[20] Ibid, para 110.
[21] For an exploration of these issues see: Candida Leigh Saunders, 'Rape as 'one person's word against another's': Challenging the conventional wisdom' (2018) 22(2) The International Journal of Evidence & Proof 161.

contradictory evidence and statements.[22] These issues are perhaps even more difficult when considered in relation to children and young people whose appreciation of consent may not be fully developed (explored in chapter 2, s.2.2.2).[23] However, while it is accepted that issues around establishing consent will nevertheless remain, and the introduction of this defence will require the law to grapple with these issues, they might be less acute if there is a digital footprint (e.g., exchange of messages) to refer to. In deciding how to proceed, an investigation into the written exchanges between the parties (e.g., those sent through social media and other messaging applications), and any relevant testimonies, will likely be necessary. Although this is far from a perfect solution, it is submitted that it is the lesser of two evils (the other being criminalising these young people for consensual conduct).

To ensure that this defence is not applied too broadly, and is utilised appropriately, clear legislative and policy guidance is necessary. This guidance should explain several key points. First, that the defence only applies to 16- and 17-year-olds. While it is acknowledged that certain younger children may be mature enough to consent to this behaviour,[24] the law should remain consistent with the approach to sexual activity generally and must ensure that it does not facilitate the sexualisation of even younger children. However, when younger children do engage in consensual YPSI this should still be responded to outside of the CJS. This would reflect the UNCRC's requirement for State parties to '*promote the establishment of measures for dealing with children without resorting to judicial proceedings, whenever appropriate*.'[25] The explanatory notes should explain that it will never be in the public interest to prosecute children under the age of consent who engage in genuinely consensual YPSI.

The exception to this should be where the YPSI concerns one or more individuals under the age of 13. There is a general presumption throughout the law on sexual offences that children under 13 cannot consent. Specifically, the SOA makes clear that a child aged 12 or under cannot, under any circumstances, lawfully consent to sexual activity.[26] This position is referred to in the UKCIS policy guidance in outlining when police involvement will be necessary but

[22] Ibid.
[23] See: Ethel Quayle and Laura Cariola, 'Youth-Produced Sexual Images: A Victim-Centred Consensus Approach' (University of Edinburgh, 2017) <https://www.ed.ac.uk/files/atoms/files/ypsi_reporta4_pages.pdf> accessed 22 August 2022, 31. See also: YouGov, 'Attitudes to Sexual Consent' (End Violence Against Women Coalition, December 2018) < https://www.endviolenceagainstwomen.org.uk/wp-content/uploads/1-Attitudes-to-sexual-consent-Research-findings-FINAL.pdf> accessed 22 August 2022.
[24] In much the same way that this can be demonstrated regarded medical treatment as per *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112.
[25] UNCRC, General Comment No. 24 (n15) para 13.
[26] SOA, s.5-8: Rape and other offences against children under 13.

is not acknowledged in the current framing of the PCA.[27] Under the SOA, a separate set of provisions (ss.5-8) exist to protect those under 13 from sexual offences. Whereas the PCA makes no such distinction; children and young people of all ages are protected under the very same provision: s.1. Not enough research has been conducted here to confidently argue whether the new regulation should create separate provisions but, at the very least, the explanatory notes should make clear that any YPSI involving a person under the age of 13 will warrant external intervention. Importantly, though, when dealing with children and young people, the CJS response should be welfare-focused, rather than punitive-focused. Indeed, particularly where both parties are under 13 it is unlikely that criminal sanction will be the most appropriate response. Instead, referral to relevant safeguarding and child services teams will be the best course of action. If, however, one party is below 13 and another is older, a different approach will be necessary and sentencing guidelines should consider the age difference as an aggravating factor. Continuing in this vein, the next section considers how the law should respond to non-consensual behaviour.

6.3.3: Proportionate responses for non-consensual behaviour

Chapter 5 focused on the need to limit the involvement of the criminal law in children and young people's lives. [28] Further, to be compatible with both criminal legal theory and principles of youth justice, use of the criminal law must provide the best method of regulation, over and above alternative (less coercive) methods (e.g., educational or welfare-based solutions).[29] The aim of the youth justice system is to treat children fairly, aid in rehabilitating them and help them '*to build on their strengths so they can make a constructive contribution to society*'.[30] Also, given that evidence shows children and young people's involvement in the CJS can cause harm, and limits their chances of becoming responsible adults,[31] criminal sanction should be reserved for very limited circumstances. Yet, while legal responses to consensual behaviour should be more permissive, some behaviour may warrant criminal justice intervention. A key

[27] UKCIS (n4) s.2.3.
[28] Youth Justice Board, 'Youth Justice Board for England and Wales: Strategic Plan 2019-2022' (Youth Justice Board, 2019) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/802702/YJB_Strategic_Plan_2019_to_2022.pdf> accessed 22 August 2022, 7.
[29] Alisdair A Gillespie, 'Child Pornography' (2018) 27(1) Information & Communications Technology Law 30, 51.
[30] Youth Justice Board, 'Youth Justice Board for England and Wales: Strategic Plan 2019-2022' (n28) 6.
[31] UNCRC, General Comment No. 24 (n15) para 2.

aim of this research is to shift focus on to the harms caused by an absence of consent, in any capacity. However, there are a full spectrum of non-consensual YPSI behaviours which require different levels and types of intervention.

Lower-level offences, committed by minors, for example non-consensual distribution of an image or images to peers (but not posted online)[32] should not, necessarily, require prosecution. However, to ensure that a strong message is conveyed about the importance of consent, and to protect victims from the harms that may be caused by this behaviour, it should still amount to an offence, but a method of diversion should be utilised. Diversion, also referred to as out of court disposals, offers alternatives to prosecution (e.g., community resolutions and youth cautions) which will have a reduced impact on the individual's future.[33] In this instance, a youth caution may be sufficient.[34] Youth cautions are intended to provide a proportionate and effective response to offending behaviour but still requires the police to refer the individual to a youth offending team.[35] The offence would be recorded on the person's record for two years after which it would be filtered (removed) and would not be disclosed on even an ECRC.[36] In reality, following new guidelines in 2020, youth cautions, warnings and reprimands are unlikely to ever be disclosed on DBS checks, but they *could* be for up to two years.[37] To avoid

[32] Content which is posted online will reach a much larger audience and is complicated to remove. There is a 'right to be forgotten' / 'right to erasure' set out in the General Data Protection Regulation (Article 17) and mechanisms for removal do exist, however, the harm caused to an individual whose images are posted online are likely to be extremely severe. Therefore, when imagery is posted online, without consent, the incident should be considered and treated as more serious. For more information regarding the right to be forgotten, see: *EU General Data Protection Regulation* (GDPR): Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ 2016 L 119/1. See also: Eugenia Georgiades, 'Down the Rabbit Hole: Applying a Right to Be Forgotten to Personal Images Uploaded on Social Networks' (2020) 30(4) Fordham Intellectual Property, Media & Entertainment Law Journal 1111.

[33] Ministry of Justice and Youth Justice Board, 'Youth Out-of-Court Disposals: Guide for Police and Youth Offending Services' (Youth Justice Board for England and Wales, 2013) <https://www.yjlc.uk/wp-content/uploads/2015/03/Youth-Out-of-Court-Disposals-Guide-for-Police-and-Youth-Offending-Services.pdf> accessed 22 August 2022.

[34] CPS, 'Youth Offenders' (CPS, Apr 2020) <https://www.cps.gov.uk/legal-guidance/youth-offenders> accessed 3 August 2022.

[35] Crime and Disorder Act 1998, s.66ZB(1).

[36] This follows a landmark Supreme Court judgement which ruled that the disclosure of youth reprimands on criminal record checks was incompatible with human rights legislation and inconsistent with their intended purpose as a diversion from the criminal justice system: *R (on the application of P) (Appellant) v Secretary of State for the Home Department and others (Respondents)* [2019] UKSC; Disclosure & Barring Service and Ministry of Justice, 'DBS Filtering Guide' (Gov.UK, 19 November 2020) <https://www.gov.uk/government/publications/dbs-filtering-guidance/dbs-filtering-guide> accessed 22 August 2022.

[37] For example, if there is an ongoing pattern of offending which persisted for several years, police officers may feel it is necessary to disclose this information.

this, guidance attached to these offences could make clear an express desire not to disclose this type of out of court disposal on a DBS certificate.

Further, while diverting children and young people from the CJS (and minimising the impact on their futures) is the primary aim in most cases of youth offending, in certain circumstances prosecution may well be necessary. For example, prosecution may be required for a repeat offender and / or where many aggravating factors are present (e.g., a significant age gap; targeting of a vulnerable / very young child; use of force; malicious sharing of content). This type of repeat and premeditated behaviour is particularly concerning. It is far removed from the type of YPSI we are primarily concerned with (young people sharing images between themselves). In this more severe situation, a conviction, in conjunction with a rehabilitation programme, might be necessary to ensure the safety of the victim(s) (past and potentially future victims) and to ensure that the young offender can be supported in reforming their behaviour.

One example where this type of offending was present was in *R v Bowman*,[38] discussed earlier in chapter 5 (s.5.4.1). The case concerned a total of 25 sexual offences, committed by the defendant when he was aged 14 to 18, both on and offline. Combined, they constitute a collection of '*very serious*' offences '*committed over a lengthy period against a number of young, vulnerable victims*'.[39] In addition to the offences committed against the 7 identified victims, the defendant also possessed '*a large number of indecent images of children, some as young as two and three*'[40] indicating that, unlike the majority of children and young people who engage in YPSI, the defendant had a sexual interest in children far younger than himself.[41] The combination of these factors (the consistent pattern of offending, the severity of the offences, and additional aggravating factors) meant that a conviction was unavoidable. However, on appeal, it was accepted that although weight had been placed on the defendant's own young age and mental health condition, the judge had failed to give sufficient weight to these factors. As a result, the defendant's sentence was reduced (from 14 years detention in a young offender's institution to 10 years) to allow for a better reflection of these mitigating factors. This case shows the challenges faced by the court in dealing with sexual offences

[38] *R v Bowman* [2022] EWCA Crim 1206.
[39] Ibid, para 23.
[40] Ibid, para 16.
[41] In a Parliament of Victoria Law Reform Committee Inquiry, it was discussed that, for the most part children and young people who engage in YPSI are *'not paedophiles in the making, but instead are experiencing a phase of normal development'*. See: Parliament of Victoria Law Reform Committee, *Inquiry into Sexting: Report of the Law Reform Committee for the Inquiry into Sexting* (Parliamentary Paper No 230) < https://www.parliament.vic.gov.au/file_uploads/LRC_Sexting_Final_Report_0c0rvqP5.pdf> accessed 22 August 2022, 139.

committed by children and young people and points to the need for more rigorous and concrete guidance on appropriate sentencing. However, it is also evidence of the fact that serious offending, warranting criminal justice intervention and criminal conviction, does occur.

While incidents resulting in diversion are unlikely to ever be disclosed on a criminal records check, offences resulting in a conviction (e.g., *R v Bowman*) have a longer lasting effect. Convictions that do not result in a custodial or suspended sentence (e.g., those leading to community sentences or fines) will be filtered after five and a half years, provided the offender was under 18 at the time the offence took place. If, however, the conviction results in a custodial sentence or a suspended sentence, information regarding the offence will never be filtered. Therefore, wherever possible custodial sentences should be avoided and alternative sanctions including community service should be utilised. This would allow the offender the opportunity to give back to the society to which they have caused significant harm, whilst also limiting the impact on their future, should they be capable of rehabilitation. Given that most children and young people '*who sexually abuse will cease this behaviour by the time they reach adulthood, especially if they are provided with specialised treatment and supervision*',[42] this route is arguably the most proportionate.

Of particular importance, especially regarding the more serious cases that lead to conviction, is how the offence is labelled, it must accurately represent the crime. As was explored in chapter 4 (s.4.3), offence labels and a criminal record can negatively impact all aspects of a person's life, including access to jobs and housing.[43] Therefore, whether the criminal record would be filtered or not, it should accurately denote the wrongdoing that occurred. In addition, even where children and young people exhibit harmful behaviour, in the context of YPSI, it is typically motivated by children and young people's desire to obtain explicit images of people in their age group.[44] Therefore, ensuring that they are not associated with paedophilic offences is of the utmost importance.

These amendments would assist in facilitating a much clearer position regarding YPSI that is proportionate, contextually understood, and responds cautiously to the actions of children and young people at a pivotal stage in their development. However, to ensure that these new

[42] Richard Beckett, 'Risk prediction, decision making and evaluation of adolescent sexual abusers', in M Erooga and H Masson, *Children and Young People Who Sexually Abuse Others: Current Developments and Practice Responses* (2nd edn, Routledge 2006), 233.
[43] House of Commons Justice Committee, *Disclosure of Youth Criminal Records* (HC 416, 27 October 2017) < https://publications.parliament.uk/pa/cm201719/cmselect/cmjust/416/416.pdf> accessed 22 August 2022, para 24-40.
[44] Parliament of Victoria Law Reform Committee (n41).

provisions operate effectively, further clarifications are required. A consensus on the appropriate terminology and further clarification on the specific content and context that warrants criminalisation must be established. This is addressed below.

6.4: Terminology and consistency

To ensure future amendments can be effective as possible, it is important that the new regulation adopts clear terminology that is consistent with other legal provisions governing associated crimes. In recent years, the Law Commission has reviewed the plethora of offences which regulate, among other things, online communications.[45] They have concluded that the criminal law in this area comprises: '*a patchwork of poorly fitting offences*' which has resulted '*in a legal framework which is unclear, unnecessarily complicated and inconsistent in application.*'[46] Particular reference is made to the confusing and inconsistent use of terminology across a range of image-based offences.[47] These inconsistencies are explored below.

6.4.1: Definition of image

For example, s.1 PCA is entitled: Indecent photographs of children. However, s.7(2) defines indecent photographs as also including film.[48] Film is defined as '*any form of video-recording*'.[49] Photograph includes '*the negative as well as the positive version'; 'data stored on a computer disc or by other electronic means which is capable of conversion into a photograph';* and, *'a tracing or other image, whether made by electronic or other means...derived from the whole or part of a photograph.*'[50] The definition of photographs also extends to include pseudo-photographs. These are images which are not photographs but

[45] Law Commission, *Abusive and Offensive Online Communications: A Scoping Report* (Law Commission No 381, 2018) <https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2018/10/6_5039_LC_Online_Comms_Report_FINAL_291018_WEB.pdf> accessed 13 April 2022. (Hereafter: Law Commission, AOOC Scoping Report). See also: Law Commission, IIA (n1) para 1.29; Law Commission, HOC (n2).
[46] Law Commission, IIA (n1) para 1.39.
[47] Ibid, para 1.51.
[48] PCA, s.7(2)
[49] Ibid, s.7(5).
[50] Ibid, s.7(4) and (4A).

appear to be.[51] According to the CPS, an artificially generated image will be treated as a pseudo-photograph, under the meaning of this Act if, when printed, it appears to be a photograph.[52]

Other image abuse offences (which apply to adults as well as children) utilise different terminology. Unlike s.1 PCA and s.160 CJA, s.33 CJCA explicitly refers to both photographs and films in the title. Now amended to include threats,[53] the title reads: *Disclosing or threatening to disclose, private sexual photographs and films with intent to cause distress*. S.34 explains that photograph or film means '*a still or moving image in any form that'* comprises *'or includes one or more photographed or filmed images*.'[54] It includes the negative versions of images and data stored by any means which is capable of conversion into a photograph or film.[55] Filming refers to '*a recording, on any medium, from which a moving image may be produced by any means.*'[56] Importantly though, while s.33 covers images that have been altered or enhanced, it does not cover images which have been entirely computer-generated, even if they are made to look like photographs (e.g., pseudo-photographs).[57] It also does not cover images which are only sexual because of the way they have been edited, e.g., by merging the face of the victim onto a pornographic photograph or video. In this regard it differs from the PCA and s.160 CJA.

However, these offences do broadly capture the same mediums: photographs and videos / film, s.1 PCA and s.160 CJA then go a step further and criminalise anything which appears to be a photograph. But, as the Law Commission have pointed out, '*there are other ways that individuals can be represented visually…For instance, an individual could be depicted nude, or engaging in a sexual act, in a drawing, painting or sculpture without their consent*.'[58] In relation to children and young people, non-photographic images that are clearly not photographs (e.g., cartoons, manga images, drawings and paintings) are criminalised by s.62

[51] Ibid, s.7(7).
[52] CPS, 'Indecent and prohibited images of children' (CPS, 30 Jun 2020) <https://www.cps.gov.uk/legal-guidance/indecent-and-prohibited-images-children> accessed 22 August 2022.
[53] DAA (c. 17), ss. 69(2), 90(2).
[54] CJCA, s.34(4).
[55] CJCA, s.34(8).
[56] CJCA, s.34(7).
[57] Ibid, s.34(5); the Law Commission (IIA (n1) para 6.15) explain that altered and enhanced images that are captured would include: '*for example, a picture which has been digitally enhanced, or a picture where the background has been edited to make it appear as though the victim is somewhere else. However, by virtue of section 35(4) and (5) of the CJCA 2015, the disclosure offence does not include pictures or videos that are only private or sexual because of the way in which they have been altered.*'
[58] Law Commission, IIA (n1) 6.13.

CAJA, provided they are pornographic,[59] and meet the threshold set out in ss.62(2) (depicting the genital region, anal region, or physical sexual activity, and being of a grossly offensive, disgusting or otherwise of an obscene character). The rationale behind criminalising this content was that such images might lead to a rise in CSA and could reinforce inappropriate views around children.[60] This offence has been explored more fully in chapter 4, s.4.2.2.1 and by Ost.[61] However, non-photographic pornographic depictions of those over 18 are not criminalised at all, even if they are created or shared without consent. The Law Commission argue that: '*nude or sexualised drawing, painting or sculpture is not, even in part, an actual image of the victim. It is far enough removed from the victim not to warrant criminalisation.*'[62] Therefore, in relation to adults, the definition of image is much narrower than in relation to children and young people. This begs the question of how far new or amended regulation pertaining to YPSI should extend.

It is submitted here that, for the purposes of YPSI, any indecent, private, or sexual image of a person which is, or appears to look like, an actual photograph or video should potentially be capable of criminalisation, even if it is produced entirely artificially. The reason for this is that anything that could be mistaken for the victim could be harmful. To the untrained eye, a fully CGI may be difficult to distinguish from a real photograph. This is particularly true since the development of technology has enabled the creation of hyper-realistic digital falsification of images, video, and audio, known as deepfakes.[63] These images are '*weaponized disproportionately against women, representing a new and degrading means of humiliation, harassment and abuse. The fakes are explicitly detailed…and increasingly challenging to detect.*'[64] The Law Commission highlighted the limitation of s.33 CJCA in failing to criminalise this content when it is shared without consent.[65] Developments in technology now

[59] Defined in CAJA s.62(3) as: of such a nature that it must reasonably be assumed to have been produced solely or principally for the purpose of sexual arousal.
[60] Home Office, Scottish Executive, Northern Ireland Office, 'Consultation on the Possession of Non-photographic Visual Depictions of Child Sexual Abuse' (National Offender Management Service, 2007) <https://webarchive.nationalarchives.gov.uk/ukgwa/20091207125738mp_/http://www.homeoffice.gov.uk/documents/cons-2007-depiction-sex-abuse?view=Binary> accessed 22 August 2022. Explored by Ost: Suzanne Ost, 'Criminalising Fabricated Images of Child Pornography: A Matter of Harm or Morality?' (2010) 30 Legal Studies 230, 231.
[61] Ost (n60) 231
[62] Law Commission, IIA (n1) para 6.14.
[63] Danielle Citron and Robert Chesney, 'Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security' (2019) 107 California Law Review 1753.
[64] Drew Harwell, 'Harwell D, 'Fake-porn videos are being weaponized to harass and humiliate women: 'Everybody is a potential target'' *Washington Post* (30 December 2018) <https://www.washingtonpost.com/technology/2018/12/30/fake-porn-videos-are-being-weaponized-harass-humiliate-women-everybody-is-potential-target/> accessed 22 August 2022.
[65] Law Commission, IIA (n1) para 3.13.

enable the production of '*sufficiently realistic representations*' and therefore '*their creation and disclosure can cause similar harms to the sharing of a "real" intimate image.*'[66] As it currently stands, s.1 PCA and s.160 CJA would already capture this material (because of its extended coverage including pseudo-photographs). However, s.33 CJCA would not. Regardless of how any relevant Acts of Parliament and policy are amended to accommodate YPSI, such content should be included to ensure the greatest level of protection can be provided. However, to ensure that new regulation is not extended too widely, to constitute a YPSI offence, the artificially generated image must look so much like the victim that the average person would believe it was a real photograph of them. This would avoid situations where an alleged victim claimed to be the target / inspiration for such an image, when in fact the image is a generic, albeit offensive, depiction that was not based on that individual. These situations may still be harmful and may still warrant prohibition, but they would not fall with the remit of YPSI.

A further consideration is the terminology used to refer to these photographs and films, however produced. One suggestion would be to utilise the term 'material' rather than photograph and film. By doing so the protection afforded to victims could be extended and it would ensure that all possible content (artificial or otherwise) could be captured. However, without clear clarification, this would raise the possibility that other mediums such as audio would be covered. For example, if s.33 CJCA was amended to: *Disclosing or threatening to disclose, private sexual material* rather than *disclosing or threatening to disclose, private sexual photographs and films,* the non-consensual disclosure of a voice recording could potentially be criminalised. While there may be good reason to criminalise such a disclosure the harms and impact of this type of content has not been explored within this thesis and thus more research would be required before a recommendation could be made.[67] Moreover, central to this analysis has been the harm that is caused by material which does depict, or is so realistic it appears to depict, an identifiable individual. With audio content the speaker may be more difficult to identify. These differences will likely necessitate separate regulation but more research on this issue is required.

[66] Ibid, para 3.15.

[67] Further, for the purpose of fair and accurate labelling it is argued that a distinction should remain between image-based and audio-based content. However, if further research is conducted to demonstrate the harm that can be caused by the non-consensual sharing of private and sexual audio content, then it is submitted that regulation may require expansion.

One alternative approach would be to adopt language used in other jurisdictions. As was highlighted by the Law Commission, more straightforward terminology is utilised in Australia, New Zealand and Canada.[68] Every Australian jurisdiction which has enacted intimate image offences refers to 'images' which are defined as a still or moving image.[69] In New Zealand and Canada the term 'visual recording' is used. In New Zealand, the phrase is not defined, but '*photograph, videotape or digital image*' are given as examples.[70] In Canada the term '*includes a photographic, film or video recording made by any means*'.[71] Utilising this term ('visual recording') would allow for a singular term that captured both still and moving images and would offer some future proofing for any new developments in technology. If the term visual recording was used across all the discussed offences, it would allow for more cohesion. However, regardless of the specific terminology, given the rise in hyper-realistic falsification of image-based content, and the harm this can cause,[72] it is imperative that the term adopted is defined in a way that allows for both photographs and videos, as well as any visual depictions which appear to look like real photographs and or videos of the victim, to be captured by these types of offences.

6.4.2: Nature of the image

In addition to the current inconsistencies over the definition of an image, there is even less consensus around what content (depicted in these visual recordings) amounts to an offence. While the PCA and s.160 CJA hinge on a judicial interpretation of indecency, s.33 CJCA refers to photographs and videos which are both private and sexual. As discussed in chapter 1 (s.1.2.1), indecency is not defined in the PCA;[73] it is left for a jury or magistrate to decide based

[68] Law Commission, IIA (n1) para 6.11.
[69] Crimes Act 1900, s.91N (New South Wales); Criminal Code 1899, s.207A (Queensland); Summary Offences Act 1966, s.40 (Victoria); Summary Offences Act 1953, s.26A (South Australia); Criminal Code Act Compilation Act 1913, s.221BA (Western Australia); Criminal Code Act 1983, s.208AA (Northern Territory); and Crimes Act 1900, s.72A (Australian Capital Territory).
[70] Crimes Act 1961, s.216G.
[71] Criminal Code, RSC 1985, c C-46, s.162.
[72] Alisdair Gillespie, "'Trust me, it's only for me': 'revenge porn' and the criminal law" [2015] Criminal Law Review 866; Sabbagh D and Ankel S, "Call for upskirting bill to include "deepfake" pornography ban" *The Guardian* (21 June 2018) <https://www.theguardian.com/world/2018/jun/21/call-for-upskirting-bill-to-include-deepfake-pornography-ban> accessed 22 August 2022.
[73] PCA, s.7 which provides definitions for many terms referred to in s.1, does not provide a definition of indecency.

on the standards of '*right-thinking members of society*'.[74] It is an objective standard,[75] which does not involve any consideration of the circumstances in which the image was taken.[76] This can be contrasted to the position under s.33 CJCA. Here, to secure a prosecution, the image must be both private and sexual (rather than indecent). S.35 CJCA defines private as '*something that is not of a kind ordinarily seen in public*'[77] and explains that a photograph or film will be sexual if: [78]

> '*(a)it shows all or part of an individual's exposed genitals or pubic area,*
>
> *(b)it shows something that a reasonable person would consider to be sexual because of its nature, or*
>
> *(c)its content, taken as a whole, is such that a reasonable person would consider it to be sexual.*'

The s.67 SOA voyeurism offence utilises a similar definition to s.33 CJCA but there are some slight differences. Here, the recorded material must be a private act. S.68(1) explains that for the purposes of s.67, an image will amount to recording a private act:

> '*if the person is in a place which, in the circumstances, would reasonably be expected to provide privacy, and—*
>
> *(a)the person's genitals, buttocks or breasts are exposed or covered only with underwear,*
>
> *(b)the person is using a lavatory, or*
>
> *(c)the person is doing a sexual act that is not of a kind ordinarily done in public.*'

S.67A is more restrictive and only criminalises those who record an image beneath the clothing of another person and where that image shows '*genitals or buttocks (whether exposed or covered with underwear)…in circumstances where the genitals, buttocks or underwear would not otherwise be visible*'.[79] Recent amendments, introduced by the Police, Crime, Sentencing and Courts Act 2022 (PCSCA), have expanded the scope to also include recordings of

[74] *R v Stamford* [1972] 2 QB 391; *R v Graham-Kerr* [1988] 1 WLR 1098.
[75] *R v Neal* [2011] EWCA Crim 461: A recorder had erred in directing the jury that their opinion of whether the photographs were indecent was important. It was held on appeal that an objective test must be applied.
[76] *Graham-Kerr* (n74).
[77] CJCA, s.35(2).
[78] Ibid, s.35(3).
[79] SOA, 67A(2).

breastfeeding.[80] Current debate also points towards this being extended further to cover the recording of exposed or partially exposed breasts, taken down an individual's top.[81] This suggests some political will to extend the scope of the offence but no desire to move away from an exhaustive list of content. The result is differing approaches and definitions across similar image-based offences.

There is significant overlap between the definitions in s.33 CJCA, s.67 and s67A SOA. However, s.33 only covers disclosure. It does not cover the taking of the recording itself. While an argument could be made to extend the definition of s.33 to include this initial recording this would involve subsuming (or at the very least generating further crossover between) the voyeurism offences set out in s.67 and s.67A. Before such proposals could be suggested a more thorough legal analysis of these offences (their purpose and the harms they seek to target) is required. However, the scope of these offences (s.67 and 67A) in covering both 'private' as well as 'sexual' is something from which s.33 could gain insight.

It is submitted here that s.33 CJCA could be amended from 'private sexual photographs and films' to 'private visual recordings'. This could be defined as:

- those not of a kind ordinary seen in public or in a place which, in the circumstances, could reasonably be expected to provide privacy; and,
- show, partially or in entirety, a person's genitals, buttocks, or breasts, whether exposed or covered with underwear or an item acting as underwear; or,
- shows something that a reasonable person would consider to be a violation of privacy.

These revisions are suggested for several reasons. First, it encapsulates all situations currently covered by the s.33 CJCA offence. Second, it does not conflate sexual images with nude and semi-nude images (as s.35 of the CJCA does). Avoiding this comparison would be preferable because, for example, some naturists do not perceive nudity to be synonymous with sexuality.[82] However, if taken without consent it could still be harmful to the subject (therefore warranting inclusion within the offence). Third, it leaves open the potential for something that a reasonable person would consider to be a violation of privacy to be capable of protection. It provides a safeguard for other visual recordings that may not fall directly within exhaustive categories,

[80] Ibid, 67A(2A).
[81] Law Commission, IIA (n1) para 6.142. See also, comments made during recent Conservative leadership debates: Martina Bet, Bet M, 'Sunak says he would make downblousing a criminal offence' *Independent* (27 July 2022) <https://www.independent.co.uk/news/uk/prime-minister-wales-england-liz-truss-boris-johnson-b2132754.html> accessed 22 August 2022.
[82] Law Commission, IIA (n1) para 6.48.

but which could be harmful to the victim, to still be captured. Fourth, it would avoid the loophole exposed in *Police Service for Northern Ireland v MacRitchie*.[83] In this case the CA in Northern Ireland considered if swimwear could be underwear for the purpose of section 67 SOA.[84] The defendant who took photographs of a women under a cubicle door escaped liability because the subject of the image was in swimwear not underwear and therefore, had not been doing a private act within the meaning of s.67. Although this concerned the recording of the initial image (and not the wider disclosure with which s.33 CJCA is concerned) it presents the same issue. Thus, to avoid this loophole, and in line with the Law Commission's recommendations, '*any garment that is being worn as underwear should be considered to be underwear*'.[85] Further, the definition of breasts, for the purposes of imagery which depicts '*partially or in entirety, a person's genitals, buttocks, or breasts*', should include the chest area of trans women, women who have undergone a mastectomy and girls who have started puberty and are developing breast tissue. As was argued by the Law Commission, '*these women and girls retain the same expectation of privacy of the chest area and should have the same protection against violations of that privacy.*'[86]

These terminology and definitional changes could have a significant impact on the number of victims who could be protected and would enable the law to be framed in a more inclusive way. The proposed changes also seek to offer more cohesion across image-based offences and to place privacy and consent at the forefront. As is set out in s.6.5, subject to a crucial caveat (a specific provision pertaining to children and young people), it is proposed that these laws apply to both adults and children and young people who commit these crimes given that the wrongdoing that occurs is comparable, it is just the treatment of those who have not yet reached adulthood which warrants more caution.

In many ways, particularly regarding consistency, it could be preferable to adopt the same definition, as above, for criminal content under the PCA and s.160 CJA. By replacing the test for indecency, with the proposed definition for criminal visual recordings under s.33 CJCA, further cohesion could be achieved. However, as this thesis has consistently reiterated, the PCA and s.160 CJA are primarily aimed at CSAI and a distinctive type of wrongdoing. Therefore,

[83] *Police Service for Northern Ireland v MacRitchie* [2008] NICA 26.
[84] For further discussion, see: Alisdair Gillespie, "Tackling Voyeurism: Is The Voyeurism (Offences) Act 2019 A Wasted Opportunity?" (2019) 82 Modern Law Review 1107, 1118; Law Commission, IIA (n1) paras 6.63-6.70.
[85] Law Commission, IIA (n1) para 6.70.
[86] Law Commission, IIA (n1) para 6.61.

bringing the law in line with s.33 CJCA (and voyeurism offences), in this way, could minimise this distinction. The possibility of such a change is not dismissed entirely. In fact, a radical change may be what is necessary to rectify the issues with the indecency test (as discussed in chapter 3, s.3.3). However, before such a change is proposed, more research into whether this new definition would be sufficiently inclusive is required.

6.4.3: Context surrounding the image

The most important factor surrounding the production and sharing of imagery is the context. However, for the purposes of s.1 PCA and s.160 CJA, the context surrounding production is irrelevant.[87] The only relevant matters are the image itself[88] and the age of the child depicted.[89] According to the court, the '*circumstances in which the photograph was taken and the motivation for taking or making it*' are not relevant and introducing this subjectivity would diminish the protection afforded to children and young people.[90] For prosecution, the Crown is only required to prove 3 things:[91]

I. *That the [defendant] deliberately and intentionally took the photographs.*

II. *That at the time the photograph was taken [the victim] was under 18.*

III. *That the photograph under consideration was indecent.*

The disregard for contextual factors means that even material produced in a non-harmful way is criminal. The judiciary have previously emphasised that regardless of the motivations of the initial producer, *if* the imagery was leaked it could be used for a more sinister purpose and to fuel prurient interests, which in turn could lead to a rise in actual abuse.[92]

However, in the context of YPSI, this decontextualised approach to determining indecency (and thus criminal content) is not fit for purpose. YPSI is by its very nature, sexual (and thus would be classified as indecent). The issue is that imagery taken by adults and imagery taken

[87] Contextual factors, as well as the specific content of the image, are however relevant for sentencing purposes: Sentencing Council, 'Possession of indecent photograph of child/ Indecent photographs of children' (Sentencing Council, 1 April 2014) <https://www.sentencingcouncil.org.uk/offences/crown-court/item/possession-of-indecent-photograph-of-child/> accessed 22 August 2022.
[88] *Graham-Kerr* (n74).
[89] PCA, s.2(3): The age of a child is a finding of fact for the jury based on the evidence as a whole.
[90] *R v DM* [2011] EWCA Crim 2752.
[91] Ibid, para 19.
[92] *R v Graham-Kerr* (n74).

by young people are – at their core – distinctly different. With imagery taken by adults, a sexual motive automatically makes the material into something exploitative and harmful and thus necessitating criminalisation. But, in relation to YPSI, a sexual motive does not necessarily problematise the behaviour or the material. Indeed, for those aged 16 and 17 it simply represents a digital depiction of behaviour in which they can lawfully engage. Even for those under the age of consent (16) it is difficult to see how genuinely consensually produced imagery (e.g., taken by the subject or by a partner as part of an existing relationship) is any more exploitative than consensual physical sexual activity which the law acknowledges it will seldom prosecute.[93] Yes, it carries risks (e.g., wider distribution) but so too does physical sexual activity (e.g., pregnancy and infection). Therefore, change is paramount.

However, if we were to adopt the approach of the current s.33 CJCA offence, alternative issues would arise. In relation to disclosing private sexual photographs (S.33 CJCA), the requirement that the perpetrator intended to cause distress to the victim sets a high threshold.[94] It leaves certain situations, where the defendant was reckless as to the harm that might be suffered by the victim, unaccounted for (see chapter 5, s.5.4.2).[95] The framing of the current legislation, which focuses on the alleged intention of the defendant is problematic. Therefore, applying a comparable subjective test to the law on indecent images of children, which considered whether the perpetrator took or used the image for indecent purposes, would be equally flawed. Regulation of YPSI must avoid this shortfall.

Differently still, s.67 SOA requires that the defendant made the recording for '*the purpose of obtaining sexual gratifications*'.[96] For 67A, to constitute an offence, the defendant's intention can be for either sexual gratification, or to humiliate, alarm or distress the victim.[97] While the differentiations between s.67 and s.67A are not explained in the Act or explanatory notes, they too present the same evidential issues as s.33 CJCA. As a result, none of the existing legislation provides a suitable model for determining criminal content. Instead, the focus must centre on the absence of consent and the harm suffered by the victim. As outlined in chapter 5, s.5.4.2, this will still lead to evidential challenges, but they would be less acute than the current approach.

[93] SOA, Explanatory notes, s.13. Note a different approach is taken to children aged under 13: SOA, s.5.
[94] CJCA, s.33.
[95] For a more detailed critique of the law see: Alisdair Gillespie, '"Trust me, it's only for me": 'Revenge Porn' and the Criminal Law' (n72).
[96] SOA, s.67(3).
[97] Ibid, s.67A(3).

It is proposed, instead, where a private visual recording (of a person aged 13 or older)[98] is distributed, the prosecution is required only to prove that there was no consent by the subject of that recording (the victim), and that the defendant did not reasonably believe there was such consent. The focus on consent, rather than the defendant's intent to cause harm, would emphasise the importance of full and informed consent and ensure that the greatest level of protection is available to victims. The removal of the existing requirement (under s.33 CJCA) to prove specific intention is necessary because, irrespective of the defendant's intention and state of mind; the harm caused to the victim will be the same. Similarly, in cases of rape, a victim will suffer the same harm whether the defendant wanted the victim to consent, was reckless as to whether the victim consented, or whether they specifically intended that the victim did not consent. The key is that the victim did not consent. This is what generates the harm. For this reason, it is argued that the intention to cause distress element of the offence be removed. Evidence of malicious or specific intention (e.g., intention to cause distress, to humiliate or to obtain sexual gratification) could serve as an aggravating factor, but it should not be necessary for the victim to prove in relation to any offence under s.33 CJCA. Moreover, while the reasonable belief element provides a potential loophole for defendants to escape liability, the burden of proof lies with them (the defence). In line with other sexual offences, including s.1 SOA offence of rape, whether such a belief is reasonable is to be determined having regard to all the circumstances, including any steps the defendant has taken to ascertain whether the victim consents. This approach is not without limitations, but it is preferable to the existing law which requires proof of specific intention.

However, in relation to children and young people this approach may prove problematic. For example, while adults should know that taking or sharing private visual recordings of another person, without their consent, would cause harm (and thus having stricter laws around such conduct is justified), children and young people may have less understanding around the consequences of such an action. Therefore, holding them criminally accountable in this manner may be too harsh, particularly given the discussions set out in chapter 5 which focused on the need to avoid criminalising children and young people's behaviour. However, to mitigate this concern and to ensure a proportionate response is taken in relation to children and young people, a separate provision linked to s.33 CJCA should be created (covering children and young people who disclose private recordings). The explanatory notes should make clear that

[98] The strict liability position regarding those aged under 13, that exists in relation to physical sexual activity (under s.5 SOA), would be adopted here to maintain the principle that very young children do not have the capacity to consent to sexual activity.

a specific assessment of the circumstances should be considered and only where the conduct is particularly severe (e.g., repeat conduct and / or evidence of an intention to cause serious harm) should a prosecution be sought when the perpetrator is under 18. Where such aggravating factors are not present, methods of diversion should be utilised.

One other alternative, that has not yet been considered, but that would allow for a unique approach to be taken regarding children and young people, is to extend the existing s.13 SOA provision (child sex offences committed by children or young persons) to cover YPSI. For this to be effective, s.33 CJCA, s.1 PCA and s.160 CJA would need to specify that the offences contained within these provisions can only be committed by those aged 18 and over. S.13 could then cover each of these offences when committed by a person aged 17 or under. Currently s.13(1) states that:

> *A person under 18 commits an offence if he does anything which would be an offence under any of sections 9 to 12 if he were aged 18.*

Theoretically, this could be extended to state:

> *Subject to any defences, a person under 18 commits an offence if he does anything which would be an offence under any of sections 9 to 12 of this Act, s.33 Criminal Justice and Courts Act 2015, s.1 Protection of Children Act 1978 and / or s.160 Criminal Justice Act 1988*.

The addition of the phrase 'subject to any defences' would accommodate the 16-17-year-old defence outlined in s.6.3.2. Given the focus that this thesis has placed on recognising that YPSI is simply an extension of children and young people's offline sexual behaviour bringing the regulation of YPSI directly under the SOA would provide statutory recognition of such a stance. Ultimately, though, whether s.13 SOA was extended or whether each of the provisions (s.33 CJCA, s.1 PCA and s.160 CJA) were expanded to better accommodate YPSI within the remit of their own provisions, the key is ensuring that children and young people's behaviour is separated from adults both in how it is handled by the CJS and in how it is labelled to wider society.

6.5: Conclusion of key changes

As a result of the arguments made throughout this chapter, and the thesis more generally, a provisional suggestion for several key amendments is summarised below. It highlights potential ways in which some of the identified issues could be addressed. However, as will be returned to in the concluding remarks, this is not an exhaustive list, nor does it neatly tie together the vast range of issues explored in this thesis. Instead, it simply serves as a starting point for further research and discussion, which must engage directly with a range of stakeholders, including children and young people (with whom these changes will largely affect), around how to move forward with the regulation of private digital imagery production and sharing.

6.5.1: Suggested amendments to s.1 PCA and s.160 CJA:

1. Amend the term 'indecent photographs' in both Acts to become 'indecent visual recordings'. The purpose of this is to allow for consistency across offences and ensure that the definition is inclusive of a full range of different imagery (both organically produced e.g., via a camera, and artificially produced e.g., through means of computer generation).
2. Amend the current s.1 PCA and s.160 CJA to only be capable of being carried out by those over 18. This amendment, in line with the one below (amendment 3), draws a bright line between adults and children and young people who offend. In doing so it will bring the law more in line with other sexual offences and allow for more tailored responses to be taken regarding children and young people. Such an approach can ensure better facilitation of the children's rights arguments and youth justice principles referred to chapter 5.
3. Reflect the current law in s.13 SOA and introduce an offence of s.1 PCA and s.160 CJA that is carried out by children or young persons.
4. Provide a defence for those children who are over the age of consent (16) and genuinely consent to the image being taken. In the explanatory notes also make clear that even for those under 16, where the engagement appears to be genuinely consensual and no aggravating factors (e.g., indication of pressure that might be evidenced through an exchange of messages) are present, prosecution will not be in the public interest but referral to relevant child services may be required. However, where the YPSI concerns one or more individuals aged 12 or under a more serious approach will be necessary.

This is required to ensure the existing line – holding that those aged 12 and under can never consent in law – is maintained. In practice, this defence (and the guidelines associated with it) would require meticulous scrutiny from all stakeholders, including children and young people, but also professionals who can bring evidence to bare on the workability and potential impact such a change would have on the lives of children and young people.

5. Repeal entirely the current s.1A and s.160A defence which is both arbitrary and discriminatory and holds limited to no relevance after the introduction of the recent Marriage and Civil Partnership (Minimum Age) Act 2022.

6.5.2: Suggested amendments to s.33 CJCA:

1. Amend the term '*private sexual photographs and films*' to become '*private visual recordings*'. In doing so, also extend the definition of visual recording to include any images which appear to look like actual visual recordings, even where they are partially or entirely artificially generated on the basis that this can cause comparable harm to the victim.
2. Create a new separate offence of disclosing, or threatening to disclose, private visual recordings, committed by children and young people. The purpose of which echoes that set out in amendment 2 for s.1 PCA and s.160 CJA.
3. Remove the requirement under s.33 CJCA to prove an '*intent to cause distress*'. This is imperative on the basis that the current approach fails to capture a vast range of possible scenarios capable of causing harm and which lack the consent of the victim. It could symbolise a shift towards a more victim and consent focused CJS.

6.6: Concluding remarks: reflection and future research

The preceding section has provided 8 suggestions for legislative amendments. Whilst they are by no means presented as a magic bullet, they do seek to offer constructive proposals for moving forward and could act as a catalyst for important and significant legal, and societal, change. Ultimately, the aim of this thesis has been to answer one overarching two-fold question: What are the problems with the current regulation of YPSI, in England and Wales; and what is the best solution to tackle these issues? The first part, 'what are the problems with

the current regulation?', have been identified, through a forensic examination of the legal framework. The most fundamental issues are recapped below.

First and foremost, this thesis has demonstrated that the existing law responsible for regulating YPSI is categorically not fit for purpose. It is counterintuitive from both a children's rights and a child protection perspective. It is paradoxical in that it is simultaneously paternalistic and criminalising. The aim of the PCA is to protect children, specifically from sexual abuse and exploitation. However, the current framing of the law serves also to criminalise them, and the potential legal consequences are far reaching. In addition, the practical measures introduced to mitigate the issues stemming from the legislation, including Outcome 21, and increased professional discretion, are not working effectively. Police forces use their discretion inconsistently, and there is no clear consensus around the type of content and conduct which should warrant criminal justice intervention. As a result, by subjecting children and young people to this uncertainty, the current regulation undermines the entire purpose of the legislation to protect children.

In addition, the current law (particularly the framing of the provisions in s.1 PCA and s.33 CJCA) is responsible for perpetuating harmful messages about sexual conduct and creating a barrier for victims of abuse to overcome. S.1 PCA holds persons who self-produce content, or who produce content with the consent of the relevant parties, as equally culpable as those who share content without consent, send content unsolicited and those who induce others to send content through coercive practices. This could prevent victims of abuse from coming forward out of fear of their own prosecution. It also sends the message that self-production and consensual production are equally as wrongful as exploitative practices. S.33 CJCA requires a level of intention (on behalf of the defendant) that fails to account for all situations in which a victim may be harmed. In doing so, it imposes a high evidential burden which the prosecution must meet. In this regard, both Acts are responsible for colluding in the harm caused to victims of image-based abuse.

Beyond this, the analysis has led to the exposure of broader, more deep-rooted, issues. It has shed light on fundamental issues with both societal and legal approaches to consent, as well as with the law's failure to implement principles of youth justice and to give effect to the rights of children and young people enshrined in the UNCRC. Change is paramount. Recent years have seen the development of more victim-focused legislation regarding abuse in domestic settings. This has included the implementation of the Domestic Abuse Act 2021 (DAA), which

has led to, inter alia, the expansion of s.33 CJCA to include the threat to disclose (as well actual disclosure).[99] The law has also offered recognition of the harm caused by coercive and controlling behaviour.[100] These changes are a welcome step forward, but more change is necessary, particularly regarding the regulation of children and young people's behaviour. It is now time for more offences to be placed under the microscope and for a full consultation process on the legal regulation of both online and offline sexual activity to take place. This has commenced, to some degree, by the Law Commission who have reviewed a plethora of online offences and offered significant recommendations for change.[101] However, this consultation process focused solely on adult-based offences. It is now paramount that a comprehensive review of children and young people's sexual activity takes place. Indeed, by looking at the legislative framework through a children's (rights) lens, with an appreciation of the current reality of children's intimate relationships and digital literacy, the legal response to their behaviour should be quite different.

This leads on to the second part of the overarching question: 'what is the best solution?'. This is far more difficult to answer and, as indicated above, will require a much more comprehensive review process than can be provided by a doctrinal thesis. Two important considerations must be borne in mind: first, how a liberal CJS can adequately protect individuals from an array of physical and digital sexual offences whilst also safeguarding their right to engage in consensual sexual conduct; and second, how a primarily adult-focused CJS can operate effectively to regulate the conduct of children and young people, who are at a pivotal stage of development. Ultimately, the CJS aims to protect the public and to punish, deter, and rehabilitate offenders. These goals must remain key features in criminal law but, regarding the criminalisation of YPSI, the law must be adaptive and contextually sensitive. It must also be capable of responding to the rapid development of technology and to the explorative nature of adolescence. Chapter 6 has sought to propose suggestions which could serve as a starting point for consideration. However, prior to any change or implementation, more research is required. Now that the groundwork into this issue has been conducted, it is imperative that future research engages with a broad spectrum of stakeholders to ensure that new reforms are workable in practice and reflect the reality of children and young people's lives.

[99] CJCA, s.33. As amended by DAA (c. 17), ss. 69(2), 90(2).
[100] Serious Crime Act 2015, s.76. As amended by DAA, s.68.
[101] Law Commission, IIA (n1); Law Commission, HOC (n2) Law Commission, AOOC Scoping Report (n45).

Educational staff, such as secondary school and college teachers will be responsible for responding to a large proportion of YPSI incidents. Therefore, discussions with them, as well parents of children and young people, are important to ensure the guidance on dealing with incidents (which are not reported to the police) are clear and workable in practice. Consultation with academics (from across disciplines), government officials, criminal justice, and child services staff, is also imperative. Often academia and legal practice sit out of line with each other because what may be ideal in theory may not be possible in practice. Therefore, to ensure that new regulation is as effective as possible, all stakeholders should come together to discuss the most appropriate way forward. However, central to this consultation process must be the children and young people themselves.

As various scholars have noted, and as in enshrined in Article 12 of the UNCRC (concerning the right of the child to be heard), it is imperative that decisions which affect children and young people are informed by direct consultation with them, a children's rights impact assessment, and reference to the empirical evidence.[102] Article 12 of the UNCRC provides that:

> *1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.*
>
> *2. For this purpose the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.*

Indeed, these laws will directly affect children and young people and therefore their involvement within discussions around any new regulation is of the utmost importance. While paternalistic approaches may well be necessary, involving children and young people in the discussion could facilitate greater respect for the regulation that is created. Further, they may

[102] See, for example: Laura Lundy, ''Voice' is not enough: Conceptualising Article 12 of the United Nations Convention on the Rights of the Child' (2007) 33(6) British Educational Research Journal 927; Louise Forde and others, 'The Right of Children to Participate in Public Decision-Making Processes' (Save the Children International, 2020) <https://resourcecentre.savethechildren.net/pdf/the_right_of_children_to_participate_in_public_decision-making_processes-save_the_children_0.pdf/> accessed 22 August 2022; Aoife Daly, 'No Weight for "Due Weight"? A Children's Autonomy Principle in Best Interest Proceedings' (2018) 26(1) The International Journal of Children's Rights 61.

be able to identify issues that policy makers, many of whom may never have been a child or young person in the digital world, would not consider.

Unfortunately, due to time constraints, this research was unable to engage directly with children and young people. Initially, the PhD was going to explore the regulation of children and young people's sexual activity more generally. For this initial project, ethical approval for questionnaires and interviews with children and young people was granted. However, preliminary research stages then showed that YPSI was an issue demanding a research project of its own. An expanse of empirical literature already existed on the topic (chapter 2, s.2.2) but due to a lack of standardised methodology and a clear definition of YPSI, the findings were entirely inconclusive. For this reason, rather than replicate existing research, it was decided that a more valuable project would be to conduct a comprehensive legal analysis, reflecting upon existing works in the field, with a view to providing a clear research strategy for moving forward. Now that this has been conducted, research which addresses the existing gaps would be hugely beneficial.

Future research should be conducted, across England and Wales, and with individuals who are under 18. Researchers must clearly define the behaviour with which they are exploring. For example, questions should specify what is meant by consensual behaviour and detail the different types of non-consensual behaviour with which they are concerned (e.g., when it is distributed to friends without consent, if it is posted online without consent, if it was induced via blackmail). Current research has failed to be specific in this regard which has made drawing conclusions around this behaviour particularly difficult. However, research which addressed these gaps could be used to generate accurate prevalence estimates and to aid in understanding the reality of YPSI across England and Wales. In addition, there are further aspects of YPSI which warrant more exploration. Due to the time constraints, not all issues could be fully explored within this thesis. However, their consideration is imperative if the law is to provide a fully considered, holistic, set of regulations and if future research is going to present an accurate depiction of prevalence and consequences of YPSI. Some key areas which require further investigations are outlined below.

One important avenue for future research would be around the ongoing effects of both consensual and non-consensual YPSI. Camera phones and the ability to share digital imagery have only been in existence for a decade or so, therefore, the long-term impact of YPSI is difficult to identify. Future research could take a more longitudinal approach to assessing the

effects, with a view to determining if seemingly consensual practices have any significant impacts on children and young people. This is important because if such evidence were to be found it may necessitate more restrictive regulation. Currently, however, no clear picture as to the harm caused by this behaviour exists. Instead, the evidence points to the harm caused by non-consensual practices.

Another point of interest and concern is regarding the rise of platforms which enable individuals to generate content, some of which may be pornographic, which customers pay for.[103] These sites are intended for use for those over 18. However, some children and young people are creating accounts and producing content for financial gain.[104] Those who pay for such content would be committing an offence under s.47 SOA (paying for sexual services of a child). However, the production of this content by the child or young person would fall under s.1 PCA. This issue has not been explored in this thesis, however, before any new regulation regarding YPSI is implemented an exploration of this issue is paramount.

Overall, this thesis has served to explore the range of issues associated with the current regulation of a broad and ever-growing aspect of children and young people's lives. It could not explore every possible angle, or relevant consideration. However, it has demonstrated that, at its heart, YPSI is an extension of offline sexual activity. It is engaged in both consensually and non-consensually, but it is the presence of aggravating factors, linked to the absence of consent, which is the greatest cause for concern. To offer the greatest level of protection to children and young people, without unnecessarily incumbering on their autonomy, a more nuanced approach is required. This approach must adhere to criminal legal theory: it must be underpinned by a positive case for criminal regulation; be the most appropriate tool for that regulation; and it must encompass accurately labelled offences. It must also advance and reflect children's rights. To do so, the law must be *'structured in such a way that children's foundational rights are not permanently or irreparably harmed*.'[105] It must also '*prioritise the best interests of children, recognising their needs, capacities, rights and potential*'.[106] The

[103] Noel Titheradge and Rianna Croxford, 'The children selling explicit videos on OnlyFans' *BBC* (27 May 2021) <https://www.bbc.com/news/uk-57255983> accessed 18 August 2022; VoiceBox, 'OnlyFans and young people: exploitation or empowerment?' (VoiceBox, 2021) < https://voicebox.site/assets/OnlyFansReport.pdf> accessed 22 August 2022.
[104] Ibid.
[105] Kathryn Hollingsworth, 'Theorising Children's Rights in Youth Justice: The Significance of Autonomy and Foundational Rights' 2013 76(6) Modern Law Review 1046, 1049.
[106] Ministry of Justice and Youth Justice Board, 'Standards for children in the youth justice system 2019' (Ministry of Justice, 2019) < https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/957697/Standards_for_children_in_youth_justice_services_2019.doc.pdf> accessed 22 August 2022, 6.

conclusions of each chapter, and the suggested amendments put forward in chapter 6, all strive to achieve this and to facilitate '*a differentiated, individualized approach*' to the regulation of children and young people's conduct.[107] However, to ensure that all the issues identified in this thesis are addressed, to the best of the CJS's ability, and to ensure all legal and theoretical principles are upheld, a full consultation process on the regulation of YPSI is now necessary.

[107] General Comment No. 24 (n15) para 2.

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