

‘Paedophile Hunters’, Criminal Procedure and Fundamental Human Rights

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‘Paedophile hunters’ have attracted global media attention. The limited literature on paedophile hunters, which has documented their emergence in contemporary liberal democracies, pays scant attention to how the use by paedophile hunters of intrusive investigative methods may threaten the procedural rights of suspects, and undermine the integrity of the criminal justice system. This article fills this normative ‘gap’ in the literature. It draws upon media coverage, criminal procedure jurisprudence, and criminological scholarship to analyse the regulation of paedophile hunting in English and Welsh law. The article suggests that domestic law does not afford adequate protection to due process and the fundamental human rights of those falling under the paedophile hunter’s purview. Unless paedophile hunting is constrained by a narrower and more robustly enforced regulatory regime, it should not be permitted, let alone encouraged, in contemporary liberal democracies.

INTRODUCTION

This article analyses the regulation of so-called ‘paedophile hunter’ activities. It suggests that ‘paedophile hunters’, as citizens using proactive policing methods, can pose a unique threat to the fundamental rights of those they target, which lawmakers and practitioners have not adequately managed.

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Although there are variances in how different groups operate, ‘paedophile hunters’ predominantly operate by posing as children on online social media platforms and chatrooms, and luring potential child sex offenders to an ostensible illicit sexual encounter. Here, the suspect is confronted by the hunters, before the hunters typically report the alleged crime to the police and post video footage of the confrontation on social media.

Paedophile hunters are usually amateur self-starters. Their operations often require little more than a broadband connection and a camera phone. Though employing a crude method, these groups are incredibly popular, sometimes attracting hundreds of thousands of followers to their social media pages. Some paedophile hunting groups have assisted the authorities in bringing child sex offenders to justice. According to data obtained by the British Broadcasting Corporation (BBC), evidence provided by paedophile hunter groups was used to support 150 of the 302 prosecutions for the offence of meeting a child following sexual grooming in 2017.¹ The official line of the police is that these groups should not be encouraged, and may face prosecution for any offences they commit.² However, paedophile hunters are very rarely prosecuted for offences.³ On the back of their popularity and purported success, senior police figures have also reached out to hunting groups to offer vague opportunities for collaboration in the fight against child sexual abuse.⁴ These groups

1 See BBC News, ‘“Paedophile hunter” evidence used to charge 150 suspects’, at <<https://www.bbc.co.uk/news/uk-england-43634585>>.

2 S. Bailey and M. Skeer, *National Guidance on Responding to Online CSA Vigilante groups* (2017).

3 It is only in cases where paedophile hunters resort to violence that they tend to be charged. See J. Simpson, ‘Paedophile-hunters are warned off by police after brawl’ *Times*, 19 April 2017, at <<https://www.thetimes.co.uk/article/paedophile-hunters-are-warned-off-by-police-after-brawl-2cbzcpkpg>>.

4 BBC News, ‘Recruit “Paedophile Hunters” call to help Police’, at <<http://www.bbc.co.uk/news/uk-wales-40497162>>; K. Sandeman, ‘Why Nottinghamshire Police could strengthen links with paedophile hunters’

are controversial, and some have attracted negative attention after engaging in vigilante tactics, inciting criminality, and smearing innocent people.⁵ This raises the question: are these overtures to paedophile hunters imprudent?

This article answers the question affirmatively. It suggests that many of the investigatory practices of paedophile hunters are antithetical to numerous core values and functions of the criminal justice system. The under-regulated paedophile hunter may also undermine state-sanctioned efforts to prevent, detect, and prosecute child sex offences. The article brings normative legal analysis to what has, up to this point, been a largely descriptive conversation amongst criminologists. This criminological literature has documented developments in citizen-led policing, but pays scant attention to how the use by paedophile hunters of proactive and intrusive investigative methods may threaten the procedural rights of suspects, and undermine the integrity of the criminal justice system.

The article is structured in four parts. The first traces the emergence of paedophile hunting, situating the practice, and police responses to it, in social context. The next three parts consider the impact that paedophile hunting has on the criminal process, and those subject to it, through reference to the following broad, and somewhat overlapping, areas: the administration of justice; due process and procedural rights; and stigmatisation and collateral intrusion. Cumulatively, these parts demonstrate that English and Welsh law is failing to adequately regulate the activities of paedophile hunters. The muted response of the police, Crown Prosecution Service (CPS), and domestic courts to paedophile hunters is failing to deter paedophile hunter criminality. The article ends with suggestions for law reform,

Nottingham Post, 9 October 2018, at <<https://www.nottinghampost.com/news/nottingham-news/nottinghamshire-police-could-strengthen-links-2090840>>.

⁵ BBC News, ‘“Paedophile Hunter” to face criminal charges’, at <<https://www.bbc.co.uk/news/uk-northern-ireland-43049316>>.

reappraisal of existing legal doctrines, and more rigorous enforcement to control and, in some cases, deter paedophile hunting.

THE EMERGENCE OF PAEDOPHILE HUNTING

There is an unsurprising political and public unanimity regarding the wrongness of child sex offences, and the threat posed by the ‘paedophile’.⁶ Following a small number of high-profile cases of child abduction, rape, and murder since the 1980s, public anxieties have been orientated away from the sexual abuse of children by family members, and towards the threat posed by strangers.⁷ In England and Wales, these cases led to expansive law reform covering numerous areas, including disclosure schemes designed to empower parents to check if sex offenders could gain access to their children,⁸ and an overhaul of the system governing police

6 There is no offence of ‘paedophilia’ in English criminal law, and it is more accurate to speak of child sexual abuse or child sex offending when referring to the sorts of crimes paedophile hunters seek to remediate. However, given this paper’s focus on the intersection between public and legal responses to crime, I use the terms ‘paedophilia’ and ‘paedophile’ not to refer to any kind of psychological or neurological disorder, but as expressions, which are widely recognisable and have popular currency in the media. A similar approach is used in other works. See E. Campbell, ‘Policing Paedophilia: Assembling Bodies, Spaces and Things’ (2016) 12 *Crime, Media, Culture* 345.

7 This trend has occurred despite research indicating that the vast majority of child sexual abuse is perpetrated by an adult offender known personally to the victim. See Y. Jewkes and M. Wykes, ‘Reconstructing the Sexual Abuse of Children: “Cyber-paeds”, panic and power’ (2012) 15 *Sexualities* 934, at 935; L. Radford et al., *Child abuse and neglect in the UK today* (2011).

8 The child sex offender disclosure scheme (sometimes referred to as ‘Sarah’s law’ owing to the fact that the scheme was campaigned for by the family of eight-year-old Sarah Payne in the aftermath of her kidnap and murder) was rolled out across police forces in England and Wales in 2011. See: Suffolk Constabulary, ‘Sarah’s Law’, at <<https://www.suffolk.police.uk/advice/child-protection/sarahs-law>>.

information sharing practices and criminal records checking.⁹ Such offences have since become a mainstay of tabloid and broadsheet newspapers.¹⁰

Jewkes and Wykes note that this recent construction of the ‘dangerous paedophile’, in media discourses and policy initiatives, was instrumental in changing patterns of social interaction to put emphasis on the safety and security of children.¹¹ Information technology and the internet have given child sex offenders new opportunities to offend, making images of child sexual abuse easier to distribute, and children more accessible. Offenders can now utilise social media platforms to ‘groom’ children online: establishing friendships with children, gaining their trust, and lowering their inhibitions for the purpose of sexual abuse.¹² The emergence of this form of criminality in cyberspace has only served to heighten concerns, posing a novel threat to children that is more difficult for parents to understand or manage.

Online grooming has prompted innovative societal responses to predatory behaviour.¹³ These innovations are imbricated within broader trends towards what has variously been described as the ‘nodal governance’,¹⁴ ‘pluralisation’, or ‘privatisation’¹⁵ of policing; where the organisation of crime control has transitioned away from state-centric, ‘top-down’ action

9 See H. Oliver and L. White, ‘Safeguarding Vulnerable Groups Act 2006: the implications for employers in educational settings’ (2008) 20 *Education and the Law* 235.

10 T. Thomas, *Sex Crime: Sex offending and society* (2016, 3rd ed.) 1.

11 Jewkes and Wykes, *op. cit.*, n. 7, p. 935.

12 Thomas, *op. cit.*, n. 10, p. 3.

13 Campbell, *op. cit.*, n. 6, p. 346.

14 S. Burris et al., ‘Nodal Governance’ (2005) 30 *Aus. J. of Legal Philosophy* 31.

15 T. Jones, ‘The Governance of Security: Pluralization, Privatization, and Polarization in Crime Control’ in *The Oxford Handbook of Criminology*, eds. M. Maguire and R. Morgan (2012, 4th edn.) 841.

to a more diversified assortment of activity that encompasses a range of quasi- and non-state actors.¹⁶ According to Jones, various factors motivate these trends, including:

growing demands for policing and security services outstripping the resources of public providers, a degree of direct privatization and hiving off of policing functions as part of central government reform programmes, the changing nature of public space, and a range of broader structural changes in contemporary industrial societies that have contributed to growing concerns about risk and insecurity.¹⁷

The responsibility for policing child sex offences online is being taken up by numerous non-state actors and organisations, including internet service providers, social media platforms, and charities, who act in different ways to monitor and report the activities of paedophiles.¹⁸ Using the example of Facebook, Yar notes how the social media platform has been inspired to take pre-emptive action against online sexual abuse, which includes removing the profiles of registered sex offenders, and mobilising users to report inappropriate sexual behaviour through its 'child protection app'.¹⁹

The combination of policing pluralisation and the internet has created new avenues for citizens to 'get involved' in policing. The police have used social media to 'crowdsource' the analysis of public CCTV footage, harnessing the efforts of scattered social media users to assist in the identification of suspects captured on CCTV, at minimal cost.²⁰ Recently, internet users have gone beyond providing auxiliary support to the police. Nhan, Huey, and

16 See M. Yar, 'The Policing of Internet Sex Offences: Pluralised governance versus hierarchies of standing' (2013) 23 *Policing and Society* 482, at 488.

17 Jones, *op. cit.*, n. 15, p. 847.

18 Yar, *op. cit.*, n. 16, p. 489.

19 *id.*

20 D. Trottier, 'Crowdsourcing CCTV Surveillance on the Internet' (2013) 17 *Information, Communication & Society* 609, at 610.

Broll analysed the role that crowdsourcing played in the aftermath of the Boston Marathon bombings in April 2013.²¹ According to the authors, the public, through the online forum Reddit, conducted their own investigation into the bombings, drawing on the diverse experiences and expertise of forum contributors to analyse information related to the bombings. The authors found that such citizen-led investigations were a potentially useful source of professional knowledge and labour, largely untapped by the police.²²

Paedophile hunting might be characterised as a similar form of grassroots pluralised policing endeavour, with a key difference being that it blends online interactions with real world confrontations. This article has not set out to examine in depth the similarities and differences between paedophile hunter groups. However, some preliminary points are worth noting. First, paedophile hunting groups adopt varying methods and practices. Some groups, for example, have engaged in violence against targets,²³ whilst others have tried to practice in a professional way, training new members of their group, displaying an awareness of the laws governing criminal investigations, and providing evidence that leads to successful prosecutions.²⁴ One notable point of divergence is on how groups disseminate footage of their confrontations with targets. Some will not post videos before a target has been convicted of

21 J. Nhan et al., 'Digilantism: An Analysis of Crowdsourcing and the Boston Marathon Bombings' (2017) 57 *Brit. J. of Criminology* 341.

22 id., pp. 348-49.

23 N. Shaw, 'Judge slams "Wild West culture" of vigilante paedophile hunters' *Devon Live*, 10 May 2018, at <<https://www.devonlive.com/news/devon-news/judge-slams-wild-west-culture-1551190>>.

24 K. Hadjimatheou, 'Citizen-led digital policing and democratic norms: The case of self-styled paedophile hunters' (2019) 00 *Criminology and Criminal Justice* <<https://doi.org/10.1177/1748895819880956>>.

an offence, whereas others will live stream confrontations straight to their social media page, making no effort to conceal the target's identity.²⁵

Paedophile hunters are also 'networked' to some extent.²⁶ Some groups have been known to share information about how they operate with other groups. Groups have also divided the labour of running a sting operation with one group running the online part of the operation, before sharing the evidence with another group, who then carry out the confrontation.²⁷ In some circumstances, paedophile hunters seem to form part of a broader 'web' of 'self-help' security provision.²⁸ For example, in Northern Ireland, the police have investigated links between paedophile hunters and loyalist paramilitary groups.²⁹ The position of paedophile hunters in the broader 'web' of policing provision is complex, and merits further research falling beyond the scope of this article.

Online citizen-led policing has its uses. Indeed, paedophile hunter evidence has been used in numerous successful prosecutions for child grooming offences, including cases involving repeat offenders.³⁰ The police have acknowledged that they are overwhelmed by a

25 R. Malcolm, 'Paedophile hunters live streamed moment they confronted man who thought he was meeting a 14-year-old-girl' *Nottingham Post*, 13 July 2019, at <<https://www.nottinghampost.com/news/local-news/paedophile-hunters-live-streamed-moment-3088530>>.

26 J-P. Brodeur, *The Policing Web* (2010) ch. 9; Campbell, *op. cit.*, n. 6, p. 346.

27 BBC News, 'Hull "paedophile hunter" sting targets innocent couple', at <<https://www.bbc.co.uk/news/uk-england-sussex-50324952>>.

28 Campbell, *op. cit.*, n. 6.

29 C. Barnes, 'Shame of Northern Ireland paedophile hunters' *Belfast Telegraph*, 12 February 2018, at <<https://www.belfasttelegraph.co.uk/sunday-life/news/shame-of-northern-ireland-paedophile-hunters-sins-of-the-lynch-mob-revealed-36589316.html>>.

30 L. Elvin, 'Paedophile hunters catch same offender twice with two separate sting operations' *Independent*, 1 February 2018, at <<https://www.independent.co.uk/news/uk/crime/paedophile-entrapped-same-hunters-twice-nathan-wilson-child-sexual-abuse-convicted-offender-bristol-a8189281.html>>.

significant rise in online child sex offences,³¹ but as citizens attempt fill this policing ‘gap’, which has emerged in the digital age, the challenges that these attempts pose to established laws governing criminal investigations are ripe for detailed consideration. Three factors, taken together, make paedophile hunting a particularly useful case study of online citizen-led policing, against which to test its proper legal limits.

First, generally speaking, paedophile hunting goes further than other forms of online citizen-led policing, such as crowdsourcing or reporting abusive content, to use proactive and covert methods. Paedophile hunters frequently engage in covert online conversations of a sexual nature with targets, before meeting, confronting, and, sometimes, detaining them in real space. They play a role in facilitating the activities they seek to suppress by creating fictitious online profiles for their targets to groom. Whilst deceptive ‘honey trap’ techniques are nothing new, they are not typically geared towards assisting the authorities to mount criminal prosecutions.³² The use of such covert and deceptive methods represents something of a step-change in online citizen-led policing, and raises pressing questions regarding the extent of the threat that this activity poses to the fair trial and privacy rights of suspects.

Second, some groups routinely engage in a punishment ritual by shaming their targets online. They tend to subject targets to prolonged face-to-face confrontations, demanding that their targets answer for their alleged crimes and disseminating footage of these confrontations to their followers on social media.³³ This represents a departure from the typical role played by citizens in policing, passively serving as the extra eyes and ears of the police. Other groups, like foxhunt saboteurs, often engage in face-to-face confrontations when disrupting

31 BBC News, ‘Do not jail all paedophiles’, at <<https://www.bbc.co.uk/news/av/uk-39116222/do-not-jail-all-paedophiles-says-chief-constable>>.

32 G. Diebelius, ‘“Honeytrap” killer who led boyfriend, 16, to death is freed and deported’ *Metro*, 12 May 2019, at <<https://metro.co.uk/2019/05/12/honeytrap-killer-led-boyfriend-16-death-freed-deported-9503715/>>.

33 Campbell, *op. cit.*, n. 6.

suspected illegal activities.³⁴ However, paedophile hunters are doing this on a scale that has not previously been seen in England and Wales, and domestic policymakers have yet to seriously grapple with the problems this might pose for criminal process.

Third, as paedophile hunters seem to have situated themselves in significant sections of the public mind as a force for good in the fight against child sex offences, they may have made it difficult for the police and courts to take appropriate steps to deter their activities.³⁵ As paedophile hunting continues to grow, clear thinking on its compatibility with core criminal justice values is vital, the more so because the policing of child sex offences has become, for perfectly understandable reasons, an emotive issue in the public mind. If paedophile hunters are perceived by the public to be ‘doing something’ about child sexual abuse, there is a danger that policy makers and practitioners sensitive to this public mood may take too placatory a stance towards these groups.

FIRST THREAT: THE ADMINISTRATION OF JUSTICE

Paedophile hunting may undermine the proper administration of justice in numerous ways, owing to the haphazard methods of evidence gathering by some paedophile hunters, and their frequent failure to comply with the rules of criminal evidence and procedure. First, some hunting groups have adopted investigatory methods that may not stand up to scrutiny in

34 R. McGrath, ‘Meet the saboteurs who say they’re cracking down on “illegal hunting” ’ *Liverpool Echo*, 1 December 2018, at <<https://www.liverpoolecho.co.uk/news/liverpool-news/meet-saboteurs-who-say-theyre-15492772>>.

35 In September 2017, YouGov conducted a survey of 3,405 adults in Great Britain. 58 per cent of respondents suggested that working with paedophile hunters would be worth it if this led to more predatory paedophiles being caught. 25 per cent suggested that the police should find alternative ways to apprehend child sex offenders, and 17 per cent responded, ‘Don’t know’. See <<https://yougov.co.uk/opi/surveys/results#/survey/f239f61c-9c54-11e7-8370-e14fde485354>>.

court. A prominent example is the use of adult images and profiles to initiate interactions with their targets, before the decoy ‘admits’ that they are under the age of consent.³⁶ This tactic enables paedophile hunters to test the virtues of adult dating site users who may begin an interaction with what they believe to be an adult dating site user, but then continue to engage in conversation after the decoy has informed the user that he or she is really a child. There are times where such a tactic may prove fruitful. For example, in *R v. Patel*,³⁷ following a paedophile hunter group’s use of this tactic, the police seized the target’s electronic devices and found hundreds of child pornography images and several chat logs, which revealed that the target had been engaged in online communications with several other children.

However, as Taylor and Quayle argue, this tactic is dangerous as it could give those who wish to harm children grounds to dispute *mens rea* for an offence and escape justice.³⁸ The question of whether a paedophile hunter’s target believes he or she was illegally communicating with a child is, of course, a matter for the tribunal of fact to decide weighing all of the evidence in a given case. That said, in using an image of an adult as part of a sting operation, which is predicated on the target attempting to groom a *child*, paedophile hunters make the tribunal of fact’s task needlessly difficult. This particular technique also risks inadvertently subjecting those who are innocently using a social networking site to meet adults to the harrowing ordeal of a paedophile hunter sting.

English and Welsh law could exacerbate these problems. Often targets of stings will be charged with attempting to ‘meet a child following sexual grooming’ under s. 15 of the Sexual Offences Act 2003 read with s. 1 of the Criminal Attempts Act 1981. The s. 15

³⁶ *R v. Walters and Ali* (Crown Court of Newcastle, 6 April 2017), at <<https://www.judiciary.uk/wp-content/uploads/2017/04/r-v-walters-and-r-v-ali.pdf?LinkSource=PassleApp>>.

³⁷ *R v. Patel* [2019] EWCA Crim 1058.

³⁸ For example, under Sexual Offences Act 2003, s. 10, a defendant can argue that he or she is not guilty if he or she can raise reasonable doubts that he or she had reasonable grounds to believe the ‘child’ was over 16.

offence is drafted in such broad terms that a paedophile hunter's target may have to do very little before committing the offence. As originally enacted, s. 15, when read with s. 1 of the Criminal Attempts Act 1981, required proof that the defendant communicated with a child at least twice, and travelled to meet the child, with the intention to commit a specified sexual offence on the child.³⁹ Following a series of amendments, which aimed to tighten the offence,⁴⁰ the *actus reus* for this offence now requires as little as a single, non-sexual communication and an attempt to arrange a meeting with a child, whether or not any such meeting ever takes place. Such a broadly drawn *actus reus* may create confusion for the tribunal of fact to discern the true intentions of a defendant, especially where paedophile hunters use adult images and profiles to initiate interactions with their targets, before the decoy 'admits' that they are in fact under the age of consent. The combination of minimal interaction between targets and decoys in a paedophile hunter sting, and the use of adult profiles to initiate interactions, has served to create confusion as to the precise motivations of targets on a number of occasions.⁴¹

Poor investigatory practices such as this might also have the effect of unduly diverting criminal justice resources from high-risk sex offenders towards low-risk offenders. Whereas, in their own covert investigations, the police will tend to focus their resources on dangerous offenders, paedophile hunters are focusing on low-risk targets that may not even have been

³⁹ Sexual Offences Act 2003, s. 15 (as enacted).

⁴⁰ See Criminal Justice and Immigration Act 2008, s. 73 and Sch. 15; Criminal Justice and Courts Act 2015, s. 36.

⁴¹ See G. Bennett, 'Judge throws out court case involving man detained by "paedophile hunter"' *Bristol Post*, 29 August 2018, at <<https://www.bristolpost.co.uk/news/bristol-news/judge-throws-out-court-case-1949588>>; K. Dickinson, 'Paramedic who was caught trying to meet boy, 14, by paedophile hunters suspended' *Chronicle*, 14 April 2018, at <<https://www.chroniclelive.co.uk/news/north-east-news/paramedic-who-caught-trying-meet-14526779>>.

tempted to offend, but for the activities of paedophile hunters. Thus, paedophile hunters may be driving the diversion of criminal justice resources away from offenders who pose a considerable risk to the public, and towards the so-called ‘low hanging fruit’.⁴²

Concerns about the effect that paedophile hunting may have on police resources have also been expressed by National Police Chiefs’ Council and National Police Child Protection and Abuse Investigation working group.⁴³ The two policing governance bodies circulated an internal guidance document to police investigators, which articulated that the contributions of paedophile hunters to police investigations may be more hindrance than help, as significant input by police is often required to manage and develop the evidence these groups provide.⁴⁴

There are further risks to the administration of justice that may arise, depending on precisely how a particular paedophile hunter group operates. As we have seen, some groups publicise their activities on social media and publish personal information of individuals targeted. This could jeopardise subsequent criminal proceedings. As Smith explains, the integrity of the trial process may be compromised where ‘extraneous material is introduced into the process, as it potentially is when prejudicial commentary is made available to the members of the public who will eventually constitute the jury.’⁴⁵ The Contempt of Court Act 1981 established a strict liability rule prohibiting any ‘publication’⁴⁶ which creates a substantial risk that the course of justice will be seriously impeded or prejudiced, subject to

42 See Hadjimatheou, *op. cit.*, n. 24.

43 Bailey and Skeer, *op. cit.*, n. 2.

44 *id.*

45 A.T.H, Smith, *Reforming the New Zealand Law of Contempt of Court: An Issues/Discussion Paper* (2011), para. 2.5.

46 A term taken to include ‘any speech, writing, or other communication in whatever form, which is addressed to the public at large or any section of the public.’ See Contempt of Court Act 1981, s. 2.

certain conditions.⁴⁷ Under this Act, hunting groups may attract liability not only for any prejudicial material they post about a target, but also for prejudicial comments posted on their pages by third parties. Here, the hunting group is a distributor of the post, and their exemption from liability is subject to them taking reasonable care not to distribute such material.⁴⁸

We do not know how many times the poor investigative practices of paedophile hunters have jeopardised potential criminal prosecutions or otherwise led to the unnecessary expenditure of police resources. Given the nature of the prosecution process, the poorest evidence gathering practises of paedophile hunters are the least likely to result in a decision to prosecute the target, and, thus, are probably the least likely to come to light through media reporting of this process. Even the reported examples of paedophile hunting, however, lend support to the view that this activity can interfere with the proper administration of justice.

SECOND THREAT: DUE PROCESS

If maximising the number of successful criminal prosecutions was the sole concern of policy makers, then it might well be the case that paedophile hunting produces a net gain: the free-of-charge evidence supplied by these groups might be useful to the authorities more often than it is detrimental to their own investigations. However, this is not self-evident, and it is not the only concern. There is a real danger that untrained paedophile hunters may undermine due process and violate the fundamental human rights of suspects.

There are numerous cases where this general threat to targets' fair trial and privacy rights has materialised. In April 2018, a paedophile hunting group, ironically named 'Protecting the Innocent', issued a public apology after live-streaming a confrontation with an

⁴⁷ *id.*

⁴⁸ See *R v. F* [2016] 2 Cr. App. R. 13.

innocent, mistakenly identified target.⁴⁹ As well as mistakenly identifying targets, paedophile hunters may also misuse the power of citizen's arrest. During many of these filmed confrontations hunters tell suspects that they are making a 'citizen's arrest', but this is a narrow legal power.⁵⁰ There is a heavy burden on the citizen who is contemplating making an arrest, as he or she must carefully consider whether a constable could have made the arrest, even if no constable is present at the scene of the confrontation.⁵¹ In cases where, in the end, no crime has been committed, or even in cases where it would be reasonably practicable for a constable to make the arrest instead of a paedophile hunter, hunters could be liable for false imprisonment.

False imprisonment does not require any use of force or violence by the defendant provided that the words said or things done by the defendant amount to a complete restraint on the person,⁵² and the defendant is not *lawfully* exercising powers of arrest.⁵³ Given the

49 G. Newton, 'Yorkshire Paedophile hunters make public apology for falsely shaming innocent man on live sting' *Yorkshire Post*, 24 April 2018, at <<https://www.yorkshirepost.co.uk/news/yorkshire-paedophile-hunters-make-public-apology-for-falsely-shaming-innocent-man-on-live-sting-1-9133413>>.

50 The law permits an individual who is not a police constable to make an arrest. However, this power to make a 'citizen's arrest' is narrower than the police powers of arrest. It applies only to more serious, 'indictable' offences, and can only be exercised where the citizen reasonably believes that the suspect is committing the indictable offence. See Police and Criminal Evidence Act 1984 (PACE), s. 24A, as inserted by Serious Organised Crime and Police Act 2005, s. 110.

51 R.C. Austin, 'The New Powers of Arrest: Plus ça Change: More of the Same or Major Change?' [2007] *Criminal Law Rev.* 459, at 469; G. Pearson et al., 'Policy, Practicalities, and PACE s. 24: The Subsuming of the Necessity Criteria in Arrest Decision Making by Frontline Police Officers.' (2018) 45 *J. of Law and Society* 282.

52 See *Bird v. Jones* [1845] 7 Q.B. 742, at 748; *Alleyne v. Commissioner of Police of the Metropolis* [2012] EWHC 3955 (QB), para. 171.

53 See *Walker v. Commissioner of Police of the Metropolis* [2015] 1 W.L.R. 312, at 326 (applying *Collins v. Wilcock* [1984] 1 W.L.R. 1172).

prevalence of this tactic of making a ‘citizen’s arrest’ in videos shared by these groups, it is perhaps an indication of police sensitivity to paedophile hunters and their followers that hunters are seldom prosecuted for falsely imprisoning their targets.

In many stings, paedophile hunters play a role in encouraging the criminality they seek to remediate, by engaging in sexual communications and arranging meetings whilst posing as a child. Here, liability for encouraging or assisting an offender in his or her attempted grooming offence could be made out.⁵⁴ As Stark suggests, for this offence, liability would be dependent on whether the ‘reasonableness’ defence in s. 50 would apply to non-state entrapment cases.⁵⁵ However, as paedophile hunters are not acting under any official state authority, and it is questionable whether they are acting for the purpose of *preventing* crime, as opposed to garnering a large internet following or virtue testing, it is not clear that they would be covered by the s. 50 defence.⁵⁶ Given the broad *actus reus*, paedophile hunters will also usually be secondary parties to the attempted s. 15 offence, unless their enterprise is a complete failure.⁵⁷ Undercover police officers are not generally prosecuted for these secondary offences as part of sting operations, owing to the fact that they are acting under a duty to the public to enforce the law.⁵⁸ However, paedophile hunters are operating without any state authorisation of their activities, and by parity of reasoning they are also outside policies and practices of immunity from prosecution, including the ‘reasonableness’ defence in s. 50.

Despite extensively researching legal databases and newspaper reports of paedophile hunting, the author has not come across a single reported case where paedophile hunters have

⁵⁴ Serious Crime Act 2007, s. 44.

⁵⁵ See F. Stark, ‘Non-state entrapment’ (2018) 10 *Archbold Rev.* 6, at 8.

⁵⁶ See Serious Crime Act 2007, s. 50.

⁵⁷ See Accessories and Abettors Act 1861, s. 8 as amended by the Criminal Law Act 1977, s. 65.

⁵⁸ See *R v. Latif* [1996] 1 W.L.R. 104, at 112; *Nottingham City Council v. Amin* [2000] 1 Cr. App. R. 426, at 431.

been prosecuted for encouraging or assisting their targets. The CPS's legal guidance is also conspicuously nonspecific on how paedophile hunter stings often involve the commission by paedophile hunters of these offences.⁵⁹ The guidance merely stipulates that offences committed by paedophile hunters 'may include, but are not limited to assaults, public order offences, or possession of indecent images offences.'⁶⁰

The law does set limits on paedophile hunter investigations, whether or not the groups themselves observe them. Where hunters egregiously undermine the fundamental rights of suspects they may attract various forms of civil or criminal liability. Although this is not an exhaustive list, paedophile hunters could foreseeably attract liability for offences against the person (assault, actual bodily harm, false imprisonment), other serious crimes (blackmail), and, civil wrongs (defamation, assault). Some hunters have faced charges for this more flagrant law breaking.⁶¹

Since 2018, the Police Service of Northern Ireland (PSNI) has taken a more robust stance against paedophile hunting activities. Despite reportedly providing assistance and advice to paedophile hunter groups in the past,⁶² PSNI and the Public Prosecution Service have launched a review of paedophile hunter cases with a view to charging paedophile hunters as well as their targets with any offences they might have committed in past cases.⁶³

59 CPS, at <<https://www.cps.gov.uk/legal-guidance/vigilantes-internet-cases-involving-child-sexual-abuse>>.

60 id.

61 A. Forrest, 'Paedophile hunters deny holding two men against their will as they face trial for false imprisonment' *The Independent*, 5 April 2019, at <<https://www.independent.co.uk/news/uk/crime/paedophile-hunters-predator-exposure-leeds-false-imprisonment-assault-court-a8856681.html>>.

62 C. Young, 'PSNI provided paedophile hunters with official statement sheets' *The Irish News*, 25 April 2019, at <<https://www.irishnews.com/news/northernirelandnews/2019/04/25/news/psni-provided-paedophile-hunters-with-officials-statement-sheets-1605490/>>.

63 V. Kearney, ' "Paedophile Hunter" to face criminal charges' *BBC*, 14 February 2018, at <<https://www.bbc.co.uk/news/uk-northern-ireland-43049316>>.

This follows a famous case where paedophile hunters from ‘Silent Justice’ were convicted for a series of public order offences after confronting a journalist who was reporting a story on their activities.⁶⁴ This seems to suggest that the response by law enforcement to paedophile hunters has been varied, even within individual force areas. It seems that police forces are treading a fine line between their duty to act on credible evidence of child sexual abuse (even if this is supplied by paedophile hunters), and their responsibility to discourage vigilantism or other public disorder.

Courts may also intervene to safeguard due process at trial. Paedophile hunters are under no legal obligation to have regard to any relevant PACE Codes of Practice when carrying out their investigations. This is because, unlike some local or central government officials, or, in some circumstances, store detectives, paedophile hunters are not ‘charged with the duty of investigating offences’ under s. 67(9) of PACE, as they are not under ‘any type of legal duty, whether imposed by statute or by the common law’ to investigate offences.⁶⁵ However, any evidence gathered through the use of questionable or illegal investigatory practices (for example, by trespassing onto private property) could potentially be excluded at the discretion of a trial judge under s. 78 of PACE if the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the judge ought not to admit it.⁶⁶ Moreover, where paedophile hunters ‘interview’ their targets, without adhering to relevant PACE Codes of Practice which govern police interviews, this could

64 This case also illustrates the dark underbelly of some paedophile hunter groups. Two of the members of Silent Justice had criminal histories themselves and had been investigated in relation to alleged links to organised crime. See BBC News, ‘“Paedophile hunters” convicted of intimidating BBC reporter’, 7 February 2019, at <<https://www.bbc.co.uk/news/uk-northern-ireland-47156874>>.

65 See *R v. Bayliss* (1994) 98 Cr. App. R. 235, at 238; *R v. Dhorajiwala* [2010] EWCA Crim 1237, para. 18.

66 *R v. Morley* [1994] Crim. L.R. 919, at 920; *R v. Shannon* [2001] 1 W.L.R. 51, at 70.

provide the necessary conditions for the exclusion of a successfully elicited ‘confession’ by paedophile hunters under s. 76 of PACE.⁶⁷

Are these legal protections sufficient to adequately safeguard the rights of suspects from the activities of paedophile hunters? The frequency with which these rights are undermined seems to suggest not. This might be because paedophile hunters are still able to circumvent other important legal safeguards that exist to regulate police investigations. Unlike the police, paedophile hunters are under no obligation to seek prior authorisation for their covert online investigations. Moreover, as will be discussed, there is a greater reluctance for courts to exercise their discretion to stay proceedings as an abuse of process where an accused is entrapped by a non-state party such as a paedophile hunter, and not the police. These two areas, where there is seemingly a significant disparity between police and paedophile hunter regulation, will be explored in turn.

1. Should paedophile hunters be authorised as Covert Human Intelligence Sources (CHIS)?

As we have seen, paedophile hunters often rely on covert surveillance methods to gather evidence: setting up fake social network profiles to engage in interactions with targets and collect incriminating evidence. If the police covertly develop online relationships in a similar way, as they often do in their own investigations, their conduct in all likelihood would engage the target’s right to respect for private life under Article 8(1) of the European Convention on Human Rights⁶⁸ (ECHR); thus requiring the police, under Article 8(2), to justify their

⁶⁷ *Dhorajiwala*, op. cit., n. 65.

⁶⁸ Convention for the Protection of Human Rights and Fundamental Freedoms, CETS 005. The European Court of Human Rights (ECtHR) has held that Article 8 protects the right to establish and develop personal relationships, which, of course, is a cornerstone of social networking and participation in online interactions on chatrooms. See *S and Marper v. UK* (App nos 30562/04 and 30566/04) (2008) 48 EHRR

conduct as lawful, and necessary in the pursuit of a legitimate aim. Accordingly, police officers must seek CHIS authorisation, as defined by s. 26(8) of the Regulation of Investigatory Powers Act 2000 (RIPA), before engaging in a covert surveillance operation of this kind. RIPA, sets limits on the powers of the police to authorise the use of a CHIS, requiring authorising officers to be satisfied that the use of a CHIS is necessary (in pursuit of a purpose specified in s. 29(3)),⁶⁹ and proportionate. No such constraints apply to paedophile hunters who are not, it seems, exercising a public function on behalf of a public authority.⁷⁰ This is concerning, particularly as reports emerge that police officers are providing support and advice to paedophile hunters;⁷¹ effectively encouraging paedophile hunters to engage in investigatory practices that they themselves would not be able to do without obtaining, and operating within the four corners of, a CHIS authorisation.⁷²

The need to authorise is pressing where police offer guidance and support to paedophile hunters.⁷³ Indeed, in *MM v. Netherlands*, the European Court of Human Rights (ECtHR) held

1169, para. 66; M. O’Floinn and D. Ormerod, ‘Social networking sites, RIPA and criminal investigations’ [2011] *Criminal Law Rev.* 766, at 780; A. Gillespie, ‘Regulation of Internet Surveillance’ (2009) 4 *European Human Rights Law Rev.* 552, at 562.

⁶⁹ The two most relevant purposes for the topical focus of this article are perhaps ‘for the purposes of preventing or detecting crime or of preventing disorder’ and ‘in the interests of public safety’.

⁷⁰ Human Rights Act 1998, s. 6; Regulation of Investigatory Powers Act 2000, Sch. 1.

⁷¹ Sandeman, *op. cit.*, n. 4.

⁷² J. Simpson, ‘Police praise us for job well done, say vigilante paedophile hunters’ *Times*, 26 April 2017, at <<https://www.thetimes.co.uk/article/police-praise-us-for-job-well-done-say-vigilante-paedophile-hunters-gsjs7pjr>>.

⁷³ Recently, for example, it was reported that the Police Service of Northern Ireland issued guidance to paedophile hunting groups to enable them to gather usable evidence: ‘Police tell “paedophile hunters” what they need for court – but say stop what you’re doing’ *Belfast Telegraph*, 6 February 2018, at <<https://www.belfasttelegraph.co.uk/news/northern-ireland/police-tell-paedophile-hunters-what-they-need-for-courts-but-say-stop-what-youre-doing-36572782.html>>.

that, where an individual had been guided and assisted by a public authority to collect evidence in a criminal case, the actions of the individual could be imputable to the public authority, thus engaging the responsibility of the state under Article 8 ECHR.⁷⁴ The balance of ECtHR jurisprudence in this area does seem to suggest that where police officers offer assistance, equipment, or advice to paedophile hunters (without first authorising their conduct) this will constitute a violation of the Article 8 rights of targets.⁷⁵

There is ambiguity in cases where the police do not explicitly assist or equip paedophile hunters, but develop more subtle or implicit working relationships. This is illustrated in *R v. Walters and Ali*, where a joint application for a stay of proceedings was refused. Langstaff J observed that it was not a precondition of admissibility of evidence that private citizens acting as paedophile hunters should be expressly subject to CHIS authorisation, or behave as if they are when conducting their investigations.⁷⁶ In this case, 'Dark Justice', a self-described paedophile hunter group, targeted the defendants. Each defendant interacted with a false persona, created by Dark Justice and placed on a social networking site. Each defendant was led to believe that he was interacting with a girl of 13; and, subsequently, each defendant engaged in conversations of a sexual nature and made attempts to meet the child.

Langstaff J rejected the defendants' suggestion that the controls on police investigations in RIPA were unlawfully sidestepped by Dark Justice, and the police, who sought to rely on their evidence. In short, Langstaff J observed that there is no need for the police to authorise

⁷⁴ *MM v. Netherlands* (App no 39339/98) (2004) 39 EHRR 19, para. 39.

⁷⁵ *A v. France* (App no 14838/89) (1994) 17 EHRR 462, para. 36.

⁷⁶ *Walters and Ali*, op. cit., n. 36, para. 42.

paedophile hunters, where the police do not ‘use or conduct’ them for the purposes of RIPA, Pt. II, but hunters are not exempt from any liability arising from their conduct.⁷⁷

Whilst this might be true in cases where the police do not in fact ‘use or conduct’ paedophile hunters to act as CHISs, Langstaff J adopted an unduly narrow interpretation of the phrase ‘use or conduct’ in this context. Langstaff J held that the police or CPS are not ‘using or conducting’ those that fall within the definition of a CHIS merely by accepting the evidence offered by them; and, they are only ‘using or conducting’ a CHIS when they specifically ask a CHIS in advance to provide information, covertly.⁷⁸ Langstaff J drew support for this construction from an example contained in the *Covert Human Intelligence Sources Code of Practice*, issued under s. 71 of RIPA.⁷⁹ The example details how no authorisation would be required where Y volunteers information to a representative of a public authority about a work colleague out of a sense of civic duty. However, Langstaff J does not seem to recognise that this hypothetical provides slender support for his conclusions regarding the relationship, or lack thereof, between the police and Dark Justice. Here, Y is not acting as a CHIS at all, as ‘he has not established or maintained (or been asked to establish or maintain) a relationship with his colleague for the covert purpose of obtaining and disclosing information.’⁸⁰ Langstaff J does not acknowledge the contextual differences between Y’s conduct and the typical paedophile hunter’s sting.

The Code stipulates that public authorities should avoid inducing individuals to engage in the conduct of a CHIS either expressly or implicitly without obtaining a CHIS

⁷⁷ id., para. 23.

⁷⁸ id., para. 39.

⁷⁹ Home Office, *Covert Human Intelligence Sources Code of Practice* (2014), para. 2.24. This Code has since been superseded by a revised version: Home Office, *Covert Human Intelligence Sources Code of Practice: Revised Code of Practice* (2018).

⁸⁰ id., (2014), para. 2.24.

authorisation.⁸¹ What might count as an implicit inducement? This is a fact-sensitive matter of judgement, but the Code does suggest that those who, like many paedophile hunting groups, covertly gain access to personal information and voluntarily disclose this information to the police ‘on a repeated basis’ will need to be ‘managed appropriately’, and may need to be subject to CHIS authorisation.⁸² Indeed, in a revised version of the Code, the following clarifying sentence is added to the section on defining and authorising CHISs: ‘An authorisation should be considered, for example, where a public authority is aware that a third party is independently maintaining a relationship (i.e. “self-tasking”) in order to obtain evidence of criminal activity, and the public authority intends to make use of that material for its own investigative purposes.’⁸³ This seems to speak precisely to circumstances in which paedophile hunters are repeatedly supplying evidence to the police, and suggests that Langstaff J’s interpretation of ‘using or conducting’ is too narrow.

One objection to a wider interpretation of ‘use or conduct’ might be that, in acting on evidence provided by paedophile hunters, the police and CPS are only performing their legitimate duties to prevent and prosecute criminality. Indeed this objection may have merit in some cases; say where a group provides evidence of criminality, without acting covertly and without breaking any laws. However, in many of the cases discussed in this analysis, paedophile hunters are developing covert relationships for the purposes of gathering evidence, and are relying on state law enforcement agencies to develop and prosecute cases that they initiate.⁸⁴

In these circumstances, the state becomes the partner in a joint undercover policing enterprise, where paedophile hunters undercut the safeguards in RIPA and the state uses the

81 *id.*, para. 2.23.

82 *id.*

83 Home Office, *op. cit.* (2018), n. 79, para. 2.26.

84 Bailey and Skeer, *op. cit.*, n. 2.

fruits of their labour to mount criminal prosecutions. At the point that state law enforcement agencies become aware of this partnership, they should seek to formalise the relationship through the CHIS authorisation process. To keep accepting evidence provided by these groups and turn a blind eye to how the evidence is gathered is to signal tacit approval of these activities and implicitly induce them.

A useful analogy can be drawn between RIPA, Pt. II and how the courts have interpreted the scope of omissions liability when delineating the limits of the substantive criminal offence of aiding or abetting an offender under s. 8 of the Accessories and Abettors Act 1861, as amended by the Criminal Law Act 1977. In this context, it is sufficient for an individual to be held liable for aiding or abetting if he or she has ‘full knowledge of the facts which constitute the offence’ and there is ‘some form of voluntary assistance in the commission of the offence.’⁸⁵ Here, passive tolerance of criminality in circumstances where D has a power (but not necessarily a legal duty) to take reasonable steps to intervene *in itself* constitutes voluntary assistance and thus meets the *actus reus* requirement of aiding and abetting.⁸⁶ In this context, the law already recognises that an individual or body can provide implicit assistance or inducement to another by passively tolerating their conduct in circumstances where they have knowledge of it and have a power to take reasonable steps to intervene.

Any interpretation of the police’s obligations under RIPA which would permit them to circumvent their responsibilities under Article 8 to engage in covert surveillance operations only where such surveillance is lawful, proportionate, and necessary, by tacitly inducing or assisting paedophile hunters to act as an unregulated proxy, is wholly unsatisfactory. It is not in keeping with the Code of Practice, or the intentions of Parliament in enacting RIPA, Pt. II,

⁸⁵ See *Tuck v. Robson* [1970] 1 W.L.R. 741, p. 744.

⁸⁶ *id.* See A.P. Simester et al., *Simester and Sullivan’s Criminal Law* (2016, 6th edn.) 227.

which sought to provide robust regulation of privacy interfering criminal investigation techniques.⁸⁷

Moving forward then, the term ‘use or conduct’ should be given broad interpretation. ECtHR jurisprudence suggests that Article 8 can be violated not only where the police ask groups to operate undercover on their behalf, but also where they equip, assist or induce groups to do so. ‘Use or conduct’ may not be amenable to exhaustive definition, but where the police know of paedophile hunters acting covertly and supplying evidence on an on-going basis, they must carefully consider formalising the relationship so that the rights of targets are safeguarded by the protections in RIPA.

2. Paedophile hunting as entrapment

The fair trial rights of those targeted by paedophile hunters may also be undermined as suspects are afforded inadequate protection from entrapment in cases where they are enticed to commit offences by non-state agents.⁸⁸ In *R v. Looseley*,⁸⁹ the leading domestic authority on entrapment, the House of Lords held that the principal remedy for entrapment is a stay of proceedings for abuse of process.⁹⁰ The House of Lords set out numerous factors the courts should consider in separating acceptable and unacceptable forms of police conduct. Courts

⁸⁷ ‘Regulation of Investigatory Powers Bill’ debate, 381 *H.C. Debs.*, col. 774 (6 March 2000).

⁸⁸ Entrapment is a tactic whereby a person is encouraged to commit a crime so that he or she can be prosecuted for it. See M. Redmayne, ‘Exploring Entrapment’ in *Principles and Values in Criminal Law and Criminal Justice: Essays in Honour of Andrew Ashworth*, eds. L. Zedner and J.V. Roberts (2012) 157; H.L. Ho, ‘State Entrapment’ (2010) 31 *Legal Studies* 71.

⁸⁹ *R v. Looseley* [2001] 1 W.L.R. 2060.

⁹⁰ *id.*, p. 2067.

should consider, among other things ‘whether the police did no more than present the defendant with an unexceptional opportunity to commit a crime’;⁹¹ whether there is reasonable suspicion of criminal activity;⁹² the necessity and proportionality of the operation; and, the degree of oversight and supervision of the police operation.⁹³ The focus for ordering a stay then is on remedying an abuse of *police* power. This seems to suggest that entrapment in English and Welsh law is understood as a police-directed activity. Commentators have also expressed doubts as to whether a stay of proceedings should be available in so-called non-state or private entrapment cases, whereby non-state actors have enticed an individual into committing a crime.⁹⁴ These commentators tend to focus on differences in the role and conduct of state and private entrappers.⁹⁵

On this basis, one might view the laws regulating entrapment as inapplicable to paedophile hunters, who are characteristically non-state actors.⁹⁶ However, such a conclusion would be premature. In *Looseley*, the House of Lords did not focus on private entrapment.⁹⁷ Moreover, the domestic courts have not completely closed the door on the prospect of ordering a stay of proceedings in a private entrapment case. In *Council for the Regulation of*

91 *id.*, p. 2069.

92 *id.*, p. 2077.

93 *id.*, p. 2069.

94 A. Ashworth, ‘Re-drawing the boundaries of entrapment’ [2002] *Criminal Law Rev.* 161, at 174; D. Ormerod, ‘Recent Developments in Entrapment’ [2006] *Covert Policing Rev.* 65; K. Hofmeyr, ‘The problem of private entrapment’ [2006] *Criminal Law Rev.* 319.

95 Hofmeyr, *id.*, p. 332; Ho, *op. cit.*, n. 88, p. 91.

96 Indeed, in *Looseley*, the House of Lords took a state-centric view when defining entrapment as the commission of an offence by a defendant brought about by an agent of the state. See *Looseley*, *op. cit.*, n. 89, p. 2066.

97 Hofmeyr, *op. cit.*, n. 94, p. 324.

Health Care Professionals v. General Medical Council and Saluja,⁹⁸ Goldring J concluded that private entrapment could lead to a stay of proceedings, but only in exceptional circumstances, where the conduct of the non-state agent is so egregious that reliance upon it in the court's proceedings would compromise the court's integrity.⁹⁹ This door was also left open by the ECtHR in *Shannon v. United Kingdom*, where the ECtHR explicitly stated that private entrapment might render proceedings unfair for the purposes of Article 6 ECHR.¹⁰⁰

In *R v. TL* the Court of Appeal, for the first time, considered whether a stay of proceedings for abuse of process should have been available to a defendant on the basis that he had been entrapped by paedophile hunters.¹⁰¹ The respondent, L, allegedly made arrangements via WhatsApp to meet a girl he believed to be 14 years old, so she could take part in a threesome with him and his girlfriend. The person with whom L was actually communicating was U, an adult male, who ran a paedophile hunting group called 'Predator Hunters'. After U set up a sting and contacted the police, L was prosecuted.¹⁰² At trial, L successfully applied to stay the proceedings as an abuse of process relying on the entrapment principles set out in *Looseley*. The Court of Appeal subsequently allowed the prosecution's appeal of this decision, determining that, as U did no more than provide an unexceptional opportunity to offend, the requirements of entrapment were not satisfied.

Lord Burnett CJ held that the trial judge erred in making no distinction between the conduct of U, a private citizen, and agents of the state, when deciding whether to stay the

98 *Council for the Regulation of Health Care Professionals v. General Medical Council and Saluja* [2007] 1 W.L.R. 3094 (henceforth, *Saluja*).

99 *id.*, p. 3110.

100 *Shannon v. United Kingdom* (App no 67537/01, 6 April 2004), para. 12.

101 *R v. TL* [2018] 1 W.L.R. 6037.

102 *id.*, p. 6039.

prosecution as an abuse of process.¹⁰³ Lord Burnett CJ acknowledged that misconduct by a private citizen might found a successful application for a stay, but in the absence of state impropriety, his Lordship observed, ‘the situations in which that might occur would be rare.’¹⁰⁴ Applying this general rule to the immediate facts, Lord Burnett CJ concluded that, given U had committed no offences, did not take the lead in interactions with L, and was scrupulous to avoid encouraging his interlocutor in the proposed sexual activity, U’s conduct was far removed from the sort that might attract a stay.¹⁰⁵

The judgment left some uncertainty over exactly where the line is to be drawn between acceptable misconduct by paedophile hunters, and misconduct so gross that a stay would be in order. What we might assume is that in cases where paedophile hunters have manufactured or interfered with the evidence to create a false impression that the defendant was engaged in criminal activity, a stay might be available (although, the senior courts have yet to confirm that even these circumstances are exceptional enough in their egregiousness to warrant a stay). Conversely, at a minimum, if paedophile hunters stay within the parameters of acceptable police-directed undercover operations, as Lord Burnett CJ suggested U did in *TL*, then it is plain that a stay would not be available to the defendant. Lord Burnett CJ’s interpretation of the rule in *Saluja* was sound, but it leaves uncertain terrain between these poles. Given the growth of paedophile hunting and the variation in the methods used by hunters, this lack of clarity is regrettable.

It is also difficult to discern a principled basis for the distinction English law draws between private and state entrapment, at least in the context of paedophile hunting. Defenders of the distinction tend to focus on the moral authority of the state to prosecute offenders, in

103 *id.*, para. 31.

104 *id.*, para. 32.

105 *id.*, para. 33.

cases where state's agents have had a hand in cultivating or encouraging the offending.¹⁰⁶ In cases of private entrapment, so the argument runs, the state has no hand in the dubious methods of evidence collection adopted by the private party and, consequently, it does not lose its moral authority to use this evidence.¹⁰⁷ However, as we have seen, the paedophile hunter's *modus operandi* often involves committing criminal offences, and some of these groups are developing close ties with the police.¹⁰⁸ Even if this was a principled basis for treating private and state entrapment differently, courts should still be alert to cases where the police contradict their oft-stated condemnatory position on paedophile hunting by collaborating with, or assisting, these groups.

Stark rejects the state/private distinction altogether, suggesting that the main concern for domestic courts when considering a stay on grounds of entrapment should be whether the alleged activity involved the manufacture of criminal behaviour.¹⁰⁹ On this view, the problem is not that the state has 'dirtied its hands' by engaging in illegitimate investigatory techniques. Rather, it is that the state endorses entrapment as a legitimate investigatory technique upon which a criminal conviction can be founded.¹¹⁰ Thus, where an individual goes to exceptional lengths to tempt another to commit crime, owing to the nature of activity, the court's moral authority to condemn the accused is compromised regardless of whether the

106 D.J. Birch and C. Barsby, 'Abuse of process: supply of cocaine to journalists posing as drug users' [2001] *Criminal Law Rev.* 220, at 221; Hofmeyr, *op. cit.*, n. 94.

107 A. Dyer, 'The Problem of Media Entrapment' [2015] *Criminal Law Rev.* 311, p. 327; P. Roberts, 'Normative Evolution in Evidentiary Exclusion: Coercion, Deception and the Right to a Fair Trial' in *Criminal Evidence and Human Rights: Reimagining Common Law Procedural Traditions*, eds. P. Roberts and J. Hunter (2013) 189.

108 Simpson, *op. cit.*, n. 72.

109 Stark, *op. cit.*, n. 55, p. 8.

110 A. Duff et al., *The Trial on Trial, Volume Three: towards a normative theory of the criminal trial* (2007) 236.

individual is a private citizen or representative of the state. There have been reported cases where paedophile hunters have engaged in such virtue testing activities, and courts at first instance have consequently stayed proceedings.¹¹¹ Recently, in *Procurator Fiscal, Dundee v. P*, a Scottish court also held that the activities of two paedophile hunters in luring an individual to engage in illicit sexual communications were inadmissible.¹¹² However, this was overturned on appeal in a decision that focused narrowly on the lower court's competency to consider the admissibility of the evidence before the trial had commenced, and thus did not grapple with the entrapment related issues.¹¹³ Whilst the willingness of courts at first instance to recognise the problems of excessive tempting and manipulation is encouraging, the senior courts of the United Kingdom have yet to delineate how much investigatory leeway should be afforded to paedophile hunters over the police when they actively tempt their targets to engage in criminal activity, or explicate a rationale for affording this leeway at all.

The advantage of Stark's approach is that it gives defendants increased protection from this illegitimate investigatory practice at times when people are more likely to be subject to it: namely, when they are targeted by unregulated, trained, or vetted amateur sleuths. It also seems to better capture why entrapment is objectionable, and why a stay of proceedings is the primary remedy. Citizens should reasonably expect to go about their business without being subject to random virtue testing or coaxed into criminal conduct. The criminal justice system exists to remediate and deter criminal wrongdoing, and these functions are not served when criminal conduct is manufactured. To the extent that courts 'play their part' by affording paedophile hunters investigatory leeway to engage in precisely this manufacturing of criminality, they undermine their own integrity. Where paedophile

111 Bennett, op. cit., n. 41.

112 *Procurator Fiscal, Dundee v. P* [2019] G.W.D. 16-247, para. 5.

113 *Procurator Fiscal, Dundee v. P* [2019] S.A.C. Crim. 7.

hunters create exceptional opportunities to offend, going beyond the established boundaries of legitimate proactive policing by state agents, the proceedings should be stayed.

THIRD THREAT: STIGMATISATION AND COLLATERAL INTRUSION

Confrontations uploaded to social media, and sometimes live streamed, are perhaps the most striking feature of paedophile hunting. As discussed above, there is an obvious risk to the fair trial rights of targets where footage of a confrontation is uploaded before the conclusion of criminal proceedings. This footage is often circulated widely and left open for comment by members of the public, before a court has the opportunity to make an order restricting publication to safeguard the target's right to a hearing in front of an impartial jury.¹¹⁴ The dangers to the presumption of innocence¹¹⁵ have also been exhibited above.¹¹⁶

This section considers how, even if a targeted individual is ultimately found guilty, the practice of uploading filmed confrontations may have an unjustifiably corrosive effect. Before discussing the consequences and justifications for this activity, it is worth reflecting on English and Welsh law's approach to this practice, which offers very little protection to targets. First, paedophile hunters are not a 'public authority' and are not exercising a 'public function' under s. 6 of the Human Rights Act 1998,¹¹⁷ so a target could not bring an Article 8 ECHR claim against the group directly. This leaves a cause of action for misuse of private information. Article 8 ECHR, as enforced via the Human Rights Act 1998, obliges courts to develop the common law so as give effect to that right by extending (if required) the tort of

114 See, for example, *R v. F*, op. cit., n. 48.

115 Taken as a fundamental principle of political morality that the treatment of an individual should be consistent with his or her innocence, and not as a narrow doctrinal safeguard, grounded in a trial setting. See A. Stumer, *The Presumption of Innocence: Evidential and Human Rights Perspectives* (2010) 38.

116 Newton, op. cit., n. 49.

117 See *YL v. Birmingham City Council* [2008] A.C. 95, para. 103.

misuse of private information.¹¹⁸ Here, again, the claim would in all likelihood fail. Any such action would likely fall at the first stage of the Article 8 analysis. In *Kinloch v. HM Advocate*, the Supreme Court held that the appellant's Article 8(1) rights could not be engaged where he partook in criminal activities in places where he was open to public view.¹¹⁹ Moreover, in *In re JR38*, the Supreme Court declined the opportunity to draw a distinction between *Kinloch* in circumstances where the applicant committed crimes in public when aged 14, and footage of his involvement in criminal activity was circulated to the local media in his community.¹²⁰

Although human rights law does not (currently) protect individuals who have footage of their confrontation with a paedophile hunter circulated online, the general principles of human rights law and, particularly, the proportionality analysis which is implicit in Article 8 ECHR case law,¹²¹ provide a useful framework for structuring a normative analysis of the practice. This requires a consideration of the nature and seriousness of any conflicting interests; an assessment of whether the measure pursues a legitimate aim; and, analysis of whether the measure can be expected to achieve this aim, and is proportionate.¹²²

Thus, we should first examine some of the detrimental consequences that can and, indeed, have, arisen from the practice of disseminating footage of confrontations. These consequences can be devastating for the individual, who is likely to be stigmatised in his or her own community and will inevitably become the target of malicious comments by followers of the group's social media page. In some cases, those subject to such treatment have ended their own lives, and, in the case of a 43-year-old man confronted by the Southampton Trap group in 2017, an inquest concluded that social media activity following

118 *Campbell v. Mirror Group Newspapers Ltd.* [2004] 2 A.C. 457, para. 16.

119 *Kinloch v. H.M. Advocate* [2013] 2 A.C. 93, p. 107.

120 *In re JR38* [2016] A.C. 1131.

121 M. Kumm, 'Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice' (2004) 2 *International J. of Constitutional Law* 574, at 579.

122 See M. Klatt and M. Meister, *The Constitutional Structure of Proportionality* (2012) 8.

the circulation of video footage of his sting online was a causal factor that led to his suicide.¹²³

Drawing on interview data collected in the United States from those who have had their custody images circulated online by private companies on so called ‘mugshot databases’, Lageson and Maruna suggest that the circulation of this information can disrupt traditional criminal justice processes:

Whereas police and prosecutors (representing the state) and journalists (representing the public interest) have historically been key gatekeepers of punishment practices, the internet has profoundly changed this model by offering users easy access to criminal justice information and platforms to actively engage in the stigmatization process by republishing, commenting, and critiquing criminal records.¹²⁴

The authors’ participants reported that the publication of their image and criminal record online was stigmatising and humiliating. Moreover, the authors noted how this disruption to traditional criminal justice processes could have a criminogenic effect.¹²⁵ That is to say, the existence of these permanent and ever-multiplying online records of an individual’s confrontation with hunters might disrupt his or her efforts to build family ties and gain employment, and this disruption, in turn, can reduce the likelihood that the individual will desist from criminal offending.

The idea that the degradation and stigmatisation of an individual by society can diminish the individual’s bonds to the community and push the individual towards crime is

123 R. Hartley-Parkinson, ‘Man killed himself after paedophile hunters exposed him for grooming girl’ *Metro*, 27 February 2018, at <<https://metro.co.uk/2018/02/27/man-killed-paedophile-hunters-exposed-grooming-girl-7344952/>>.

124 S.E. Lageson and S. Maruna, ‘Digital Degradation: Stigma management in the internet age’ (2018) 20 *Punishment & Society* 113, at 115

125 *id.* pp. 125-126.

well established in criminological literature, and has received significant empirical support.¹²⁶ Moreover, there is the potential that this extrajudicial stigmatisation online will unduly exacerbate collateral damage in the lives of the targeted individual's family members. Empirical research from Levenson suggests that family members living with a registered sex offender are likely to experience differential treatment and stigmatisation as knowledge of their family member's criminal past filters out into the community.¹²⁷ An internal guidance document setting out the joint position of the National Police Chiefs' Council and National Police Child Protection and Abuse Investigation working group acknowledges these risks, and suggests that paedophile hunters often 'have little or no consideration for any safeguarding intervention required for vulnerable adults or children who may have contact with the suspect.'¹²⁸ The practice of uploading footage of confrontations will, in all likelihood, accelerate and exacerbate any detrimental impact occasioned by a paedophile hunter sting, both for the target and also for his or her immediate family.

From the above analysis it is prudent to conclude that, even in less damaging cases where, say, family impact is quite remote and footage is disseminated post-conviction, this activity is likely to carry serious implications for the individual's private life. Any interests served through dissemination should be justified in the face of serious countervailing consequences. This raises the following questions: what is the aim of disseminating footage? And, could the activities of paedophile hunters in pursuing this aim ever be considered proportionate?

126 See K.T. Erikson, *Wayward Puritans: A Study in the Sociology of Deviance* (1966); J. Braithwaite, *Crime, Shame and Reintegration* (1989); D.P. Farrington and J. Murray (eds.), *Labelling Theory: Empirical Tests* (2014).

127 J.S. Levenson, 'Collateral Damage: Family Members of Registered Sex Offenders' (2009) 34 *Am. J. of Criminal Justice* 54, at 65.

128 Bailey and Skeer, *op. cit.*, n. 2.

Some groups have defended uploading videos of their confrontations on the grounds that the public have a ‘right to know’ about child sex offenders in their community.¹²⁹ It is questionable whether the public has any such putative right. First, it is not clear what this right entails. This is not a claim right, such that any resident could sue the Government for failures of notification that a person living in his or her community has been subject of a paedophile hunter sting. Such groups appear to be describing a bare liberty, such that people are – currently – free to disseminate and receive such information (provided they do not defame the target or commit any other civil wrong).

This is yet another area where paedophile hunters are able utilise social media to engage in policing activities (here, quickly disseminating their work to a mass public audience), but are not constrained by the rules that limit state law enforcement agencies (police guidance limits the police identification of suspects and arrestees to exceptional circumstances,¹³⁰ and the House of Lords is currently legislating to narrow the circumstances in which arrestees’ personal information can be publicised¹³¹). If the aim is simply to inform the public of offenders in their community, then uploading video footage of stings—where targets are often subject to (frequently abusive) interrogations in states of acute emotional distress—seems to go much further than necessary.

129 ITV, ‘Paedophile hunter group defend their work after eight men take their lives after being named and shamed online’ at <<https://www.itv.com/news/tyne-tees/2019-01-09/paedophile-hunter-group-defend-their-work-after-eight-men-take-their-lives-after-being-named-and-shamed-online/>>.

130 College of Policing Guidance on this matter stipulates ‘police will not name those arrested, or suspected of a crime, save in exceptional circumstances where there is a legitimate policing purpose to do so... A legitimate policing purpose may include circumstances such as a threat to life, the prevention or detection of crime, or where police have made a public warning about a wanted individual.’ See College of Policing, *Authorised Professional Practice: Media Relations* (2016), para. 4.2.

131 ‘Anonymity (Arrested Persons) Bill [HL]’ debate, 796 *H.L. Debs.*, col. 418 (1 March 2019).

A second aim of dissemination is perhaps to deter others from engaging in online child sexual abuse. On this view, any negative consequences may be justified when taken in the round as the publication of stings will reduce crime; sending out a clear message that those who engage in this offending run not only the risk of criminal sanction, but also the additional risks of humiliation and stigmatisation at the hands of paedophile hunters. Thus, the publication of videos may have a general deterrent effect on would-be child sex offenders, and will consequently safeguard children from degrading or even violent sexual abuse.

It is perfectly legitimate for concerned citizens to safeguard the rights of children within the parameters of the law and, as we have seen, the dissemination of footage of confrontations is (typically) perfectly legal. It seems understandable, then, that some groups have attracted popular public support for their efforts to deter future offending by stigmatising targets. However, none of this makes the practice of disseminating footage of stings desirable or proportionate. First, the notion that disseminating footage of confrontations will reduce crime is asserted without empirical evidence of this deterrent effect. Although the idea, that more severe stigmatisation administered through this quasi punishment will have a deterrent effect, might be intuitively appealing to some, deterrence research suggests that increasing the severity of punishments in this way is unlikely to have any significant effect on crime rates.¹³² There is some evidence to suggest that a perceived high risk of *detection* on the part of the potential offender may have a deterrent effect for certain categories of offenders in favourable conditions,¹³³ and in publicising their stings so widely paedophile hunters could conceivably increase the general perception among potential

132 A.N. Doob and C.M. Webster, 'Sentence Severity and Crime: Accepting the Null Hypothesis' (2003) 30 *Crime and Justice* 143; J.M. Darley, 'On the Unlikely Prospect of Reducing Crime Rates by Increasing the Severity of Prison Sentences' (2005) 13 *J. of Law and Policy* 189.

133 A. von Hirsh et al., *Criminal Deterrence and Sentence Severity: an analysis of recent research* (1999) ch.

offenders that they are at a high risk of getting caught. However, it is not clear that child sex offenders—who often lack empathy, act impulsively, and display anti-social personality traits—make good candidates for this form of deterrence.¹³⁴ Any measure of stigmatisation designed to deter offending behaviour should be underpinned by reliable evidence of likely responsiveness on the part of the targeted offender or potential offender. The circulation of footage of confrontations in all their grim detail, by paedophile hunters, cannot be said to satisfy this criterion.

Even if this form of shaming could successfully reduce offending, there is good reason for resisting its tacit acceptance as a legitimate citizen-led response to child sexual abuse. Paedophile hunters, as private citizens acting on their own intuitions, lack the constitutional standing to administer this measure as a form of quasi punishment. It is the state's responsibility to punish criminal offending, and this responsibility should not be systematically usurped by paedophile hunters in the way that it is when they take deliberate punitive measures to stigmatise their targets. This conclusion rests on social contract reasoning: it is the responsibility of the state to administer punishments for those who have committed crimes, and not individual citizens (unless the state itself has chosen to delegate this function).¹³⁵ This is the prevailing model of criminal justice in liberal democratic

134 R.K. Hanson and K.E. Morton-Bourgon, 'The Characteristics of Persistent Sexual Offenders: A Meta-Analysis of Recidivism Studies' (2005) 73 *J. of Consulting and Clinical Psychology* 1154; D. Fisher, A. Beech and K. Browne, 'Comparison of Sex Offenders to Nonoffenders on Selected Psychological Measures' (1999) 43 *International J. of Offender Therapy and Comparative Criminology* 473; T.N. Gingrich and J.B. Campbell, 'Personality characteristics of sexual offenders' (1995) 2 *Sexual Addiction & Compulsivity* 54; S. Smallbone et al., *Preventing Child Sexual Abuse: Evidence, policy and practice* (2008) 102.

135 See Ashworth, writing on the potentially deleterious impacts of increased victim involvement in sentencing: A. Ashworth, 'Is Restorative Justice the Way Forward for Criminal Justice' (2001) 54 *Current Legal Problems* 347, at 367; M. Thorburn, 'Proportionate Sentencing and the Rule of Law' in *Principles*

societies, and its practical justification lies in preventing the breakdown of social order that would result if people were left to ‘take the law into their own hands’ in responding to criminal offences.¹³⁶

Where paedophile hunters administer their own quasi punishments, there is no transparency regarding the principles or values guiding their decisions. The various paedophile hunting groups to emerge, each with its own largely *ad hoc* practices, are bound to produce inconsistent and unjust outcomes, which are contrary to the rule of law. These detrimental consequences have been documented above. The dissemination by paedophile hunters of video footage of confrontations with targeted individuals seems gratuitously stigmatising, and thus it does not strike a fair or proportionate balance between the interests and rights of those targeted and the ostensible aim pursued by paedophile hunters, namely, safeguarding children from sexual abuse. This stigmatising treatment of the target occurs in the absence of a principled basis or the sort of coherent, evidence-based crime prevention rationale that might justify the pains of a formal criminal sanction.

CONCLUSION

Any balanced analysis of paedophile hunting must recognise that these groups are diverse. Some groups have collected evidence that has led to the successful prosecution of repeat child sex offenders, and sometimes those same groups have engaged in troublesome practices. Other groups have engaged in serious violence, and do not produce evidence that could be used in a criminal prosecution. The main finding from the above analysis is that English and Welsh law, both in books and action, seems to afford more investigatory discretion to paedophile hunters than is afforded to state law enforcement agencies.

and Values in Criminal Law and Criminal Justice: Essays in Honour of Andrew Ashworth, eds. L. Zedner and J.V. Roberts (2012) 282.

136 Ashworth, *id.*, p. 357.

Paedophile hunting groups can circumvent procedural safeguards and regulations that exist to moderate state power and protect the human rights of those subject to a criminal process. In praising these groups and offering opportunities for collaboration, some police forces are tacitly encouraging paedophile hunters to think they can and should operate without having regard to the limits the legislature has imposed on police investigations. In giving unduly narrow interpretation to procedural safeguards, such as the CHIS authorisation process and entrapment, the domestic courts have only served to fuel this misconception.

Consequently, targets of paedophile hunter investigations are not afforded the same level of protection as those targeted in police-led covert investigations. Empirical claims that the success of these groups justifies affording this discretion are specious. They tend to overlook the various risks of paedophile hunting, and rely on unproven generalisations about the deterrent effect of disseminating video footage of confrontations.

Even if empirical claims that paedophile hunting significantly reduces crime could be substantiated, it is unprincipled to afford greater discretion to citizens to conduct intrusive covert surveillance operations than we afford to state law enforcement agencies, which are not unproblematic by any means, but at least have the standing to act in the public interest to prevent crimes. It should not be permissible for procedural safeguards and human rights laws to be by-passed by groups of citizens who decide for themselves to engage in intrusive surveillance, public censure, and shaming exercises. The idea undermines the ethos of these provisions, which exist to ensure the fair trial rights of suspects and protect against arbitrary abuses of power. Yet English and Welsh law, as it is currently constituted and applied, tolerates these protections and safeguards being circumvented in this way.

There is good reason then, for robustly regulating the activities of paedophile hunters. One approach might involve creating a criminal offence for impersonating a child in an online communication. Such an offence would prohibit people from luring individuals to engage in such illicit conversations online and, thus, would effectively prohibit a key element

of most paedophile hunter stings. This would clear up any ambiguity on behalf of the police and CPS over whether engaging in paedophile hunter activities involves the commission of a criminal offence, and would communicate a clear message to law enforcement agencies that unregulated covert operations are not to be tolerated. However, the downside of this approach is that the blunt instrument of an encompassing criminal offence could prevent the police from using strong evidence gathered by groups that are more cognisant of the rules of engagement, and mindful of due process concerns.

To harness the benefits that more conscientious groups could provide, whilst minimising the risks where this activity is left without specific regulation, the new criminal offence could incorporate a defence for those who are working as part of a formal collaboration with the police. This could bring paedophile hunting activities into alignment with the regulations and policies that state law enforcement agencies adhere to in their criminal investigations. Whilst at this stage, calls from senior police figures for collaboration between police and paedophile hunters seem premature at best, and, at worst, self-serving, there might be some scope for police-paedophile hunter collaboration in future. The creation of an offence, with a defence for those working with law enforcement, leaves the door open to positive collaborations as a possibility, whilst enabling and encouraging state institutions to take a firmer approach in suppressing harmful paedophile hunter activities. However, there are a number of obstacles that would need to be overcome before such collaboration could be considered viable.

Any such collaboration would need to be resourced. It is difficult to see how collaboration would work without considerable investment of police resources to recruit, vet, train, equip and supervise collaborative operations. If restrictions on police resources really do explain why paedophile hunting has emerged as a response to online child sexual abuse, then it is not clear that formal collaboration offers the solution. Second, as the above analysis indicates, it is not clear that any paedophile hunting groups share the precise aims or values

as state law enforcement, such that they would make suitable candidates for formal collaboration.

Whether or not such an offence and defence are ever enacted, it is crucial that the courts and the prosecutorial arm of the state do more to deter and denounce paedophile hunting. Where paedophile hunters commit criminal offences in the pursuit of their targets (such as encouraging the commission of the s. 15 offence), both hunter and target should be prosecuted so that the conduct of both is meaningfully deterred. The CPS should issue clearer guidance on the breadth of offences these groups can, and often do, commit; and the courts should not allow paedophile hunters to operate outside the constraints of police-led covert investigations. The institutions of the state have been too placatory towards paedophile hunters, and this approach is being exposed for its shortcomings with each passing report of a paedophile hunter investigation gone wrong. A new approach is needed to safeguard not only those subject to paedophile hunter stings and their families, but also the core institutional values of the criminal justice system.