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Erika Rackley and Clare McGlynn (Durham University) have written widely on extreme pornography. You can read more about their research at <http://www.dur.ac.uk/glad/activities/pornography/> and <http://www.dur.ac.uk/resources/glad/CMcGERExtremePornographyBriefingPaper.pdf>

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# Criminalising Extreme Pornography: A Lost Opportunity

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 [Keywords to Follow]

**Summary:** *This article considers provisions criminalising the possession of “extreme pornography” in the Criminal Justice and Immigration Act 2008. It begins by outlining the current criminal law regime governing pornography, before considering the new measures in detail. We highlight the areas which are most likely to witness challenges, and the areas about which confusion seems inevitable. We close by considering the arguments for proscribing the possession of extreme pornography and possible ways forward, while recognising that, regrettably, the legislative opportunity to take action in this field has most likely now been lost.*

## Introduction

In May 2008, the Criminal Justice and Immigration Act (CJIA) received Royal Assent and a new offence criminalising the possession of “extreme pornography” was created. This new offence, expected to come into force in January 2009, is a pale imitation of that originally proposed, with the final measure representing a lost opportunity to take much bolder, and intellectually more defensible, steps towards proscribing extreme forms of pornography. In the face of sustained criticism from arch-liberals and “sexual freedom” organisations, the Government lost sight of the real harm in extreme pornography and failed to justify its actions in terms acceptable to constituencies beyond the moral-conservative. Further, last-minute amendments were introduced which all but erode the potential benefits of this legislation.

This article begins by outlining the current criminal law regime governing pornography, before considering the new measures in detail. We highlight the areas which are most likely to witness challenges, and the areas about which confusion seems inevitable. We close by considering the arguments for proscribing the possession of extreme pornography and possible ways forward, while recognising that, regrettably, the legislative opportunity to take action in this field has most likely now been lost.

## Policing pornography

Prior to the CJIA, pornography itself (extreme or otherwise) was not directly regulated. Rather it fell within the remit of measures governing obscenity and indecency, principally the Obscene Publications Act 1959 (OPA). The OPA makes

it a criminal offence, punishable by up to three year's imprisonment,<sup>1</sup> to publish, or possess for gain, obscene articles (defined very broadly). The OPA thus targets those who produce and disseminate obscene materials; simple possession for private use is not covered. Obscenity is defined as being material which, "if taken as a whole", is such "as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear . . . it".<sup>2</sup> The focus on depraving and corrupting the consumers of obscene materials clearly highlights the moralistic nature of this regulation. There is no requirement to demonstrate harm (other than (presumably) moral harm to the consumer) and no further elucidation as to exactly what types of material might have this effect. Notwithstanding such potentially sweeping coverage, material can be "saved" if it is "justified as for the public good in that it is in the interests of science, literature, art, learning or of other objects of general concern".<sup>3</sup>

We have three broad criticisms of the OPA which are relevant to the current discussion. First, the offence itself is notoriously opaque. No one really knows what constitutes obscene material. Only a jury decision provides certainty and with the number of obscenity trials drastically reducing in recent years,<sup>4</sup> there is little to go on. The "deprave and corrupt" phraseology comes from Lord Cockburn's proscription of material which contained "thoughts of the most impure and libidinous kind" in *Hicklin* in 1868,<sup>5</sup> which has been given precious little precision since. While guidance provided to the CPS and customs and excise officials provides some clarity regarding the scope of the offence, the point still stands.

This leads us to the second main criticism of the obscenity legislation, namely that the material which is generally thought to be covered ranges from exceptionally violent and misogynistic pornography to material which depicts perfectly lawful activities. There is no clear rationale behind the approach to what constitutes obscene material and the arguments for including some material can only come from notions of disgust and offence (which are considered further below). For example, the CPS guidance states that it is "impossible to define all types of activity which are suitable for prosecution", but lists the following as those most commonly appropriate: sexual acts/assaults with children; incest; buggery with an animal; rape; drug taking; flagellation; torture with instruments; bondage (especially where gags are used); dismemberment or graphic mutilation; cannibalism; activities involving perversion or degradation (such as drinking urine or smearing excreta on a person's body).<sup>6</sup> A study by Susan Edwards showed that in addition to materials depicting unlawful and extremely violent acts, obscenity prosecutions were also brought in relation to depictions of lawful and (typically) harmless activities, such as "fisting".<sup>7</sup> The problem is that if an activity is not unlawful in itself, then

<sup>1</sup> The CJIA increases this to five years: OPA 1959 s.2(1), as amended by CJIA s.71 (not yet in force).

<sup>2</sup> OPA s.1.

<sup>3</sup> OPA s.4.

<sup>4</sup> The number of prosecutions has fallen from 131 in 1999 to 35 in 2005 (Ministry of Justice, *Criminal Justice and Immigration Bill Regulatory Impact Assessment* (2007), p.90).

<sup>5</sup> *Hicklin* (1868) L.R. 3 Q.B. 360 Q.B.

<sup>6</sup> Crown Prosecution Service, *Obscene Publications*, [http://www.cps.gov.uk/legal/l-to\\_o/obscene-publications/index.html](http://www.cps.gov.uk/legal/l-to_o/obscene-publications/index.html) [Accessed January 30, 2009].

<sup>7</sup> Susan Edwards, "On the Contemporary Application of the Obscene Publications Act 1959" [1998] Crim. L.R. 843.

proscribing its depiction raises serious issues of clarity and coherence and raises the question of where is the harm.

This brings us to the third criticism; that the obscenity legislation is inspired and underpinned by conservative and conventional views of “appropriate” sexuality. Thus, whereas once the OPA covered depictions of oral sex,<sup>8</sup> as noted above, it now appears to include images of sexual activity which may not be that common, or advisable, but is not unlawful, such as coprophilia. It is a paternalistic legislative regime, which seeks to protect the *consumers* of the obscene materials from themselves.<sup>9</sup> Nowhere in the legislation or practice of the OPA is concern expressed regarding harm to any other constituency.

Accordingly, when the Government proposed a new free-standing provision to address the “increasing public concern” about the availability of extreme pornography,<sup>10</sup> particularly one which moved away from the universally criticised obscenity provisions and focused instead on the links between pornography and sexual violence against women, there were grounds for a cautious welcome.<sup>11</sup> However, while this may have represented the Government’s ambition in 2005, by the time the legislation had been adopted in 2008, things were very different.

#### **Criminalising the possession of “extreme pornographic images”**

The new measures in the CJIA are radical to an extent, for instance in the introduction of a possession offence, and yet, at the same time, antiquated in their reliance on the language of “disgust” and “obscenity”. In addition, they differ considerably from the original proposals in 2005, the amended versions in 2006 and the Criminal Justice and Immigration Bill (CJIB) as first presented to Parliament in 2007.<sup>12</sup> Indeed, as is perhaps all too familiar, last-minute amendments to the legislation, purportedly in order to clarify, in fact obscure and render some parts of the final Act very unclear.

The CJIA provides that it is “an offence for a person to be in possession of an extreme pornographic image”.<sup>13</sup> An image is one that is “moving or still”, or is in the form of data capable of conversion into such a form.<sup>14</sup> The image must also be “explicit and realistic”,<sup>15</sup> thereby excluding cartoons, drawings and written work.<sup>16</sup> There are three principal issues here: what are “pornographic”, “extreme” and “possession”?

<sup>8</sup> *Anderson* [1972] 1 Q.B. 304 CA (Crim Div).

<sup>9</sup> To the extent that the harm is conceived as harm to children viewing the material, then the paternalism is likely to be justified. But the principal criticism here of paternalism is its focus on the users of pornography rather than on others who might be harmed.

<sup>10</sup> Home Office, *Consultation: On the Possession of Extreme Pornographic Material* (2005), p.1.

<sup>11</sup> Indeed our article “Striking a Balance: Arguments for the Criminal Regulation of Extreme Pornography” [2007] *Crim. L.R.* 677 broadly supported the Government’s proposals.

<sup>12</sup> See further McGlynn and Rackley, “Striking a Balance” [2007] *Crim. L.R.* 677 and McGlynn and Rackley, “The Politics of Porn” (2007) 157 *N.L.J.* 1142.

<sup>13</sup> CJIA s.63(1).

<sup>14</sup> CJIA s.63(8).

<sup>15</sup> CJIA s.63(7).

<sup>16</sup> Explanatory Notes to Criminal Justice and Immigration Act, para.459, [http://www.uk-legislation.hmso.gov.uk/acts/acts2008/en/ukpgaen\\_20080004\\_en\\_1](http://www.uk-legislation.hmso.gov.uk/acts/acts2008/en/ukpgaen_20080004_en_1) [Accessed January 30, 2009]

**What is “pornographic”?**

An image is “‘pornographic’ if it is of such a nature that it must reasonably be assumed to have been produced solely or principally for the purpose of sexual arousal”.<sup>17</sup> In determining whether an image satisfies this test, the overall context or narrative of the image will be relevant.<sup>18</sup> In its original form, the definition of pornographic had been based on the producer’s intention. The Government, however, amended this, replacing it with a requirement that the material can be “‘reasonably assumed’” to have been produced for pornographic purposes. This was based on the idea that it would be more certain than an inquiry into the mind and intention of the producer.<sup>19</sup> This may not be the case, but it may still be a better test. In order to make such a determination, the jury or magistrate will be taking into account more than just the expressed intention of the producer, for example the overall context of the material, such as the nature and form of publication. The downside is that there is likely to be considerable variance between juries as to what can be “‘reasonably assumed’” to be pornographic, but it is difficult to see how this can be avoided.

**What is an “extreme image”?**

A pornographic image is “‘extreme’” if it is “‘grossly offensive, disgusting or otherwise of an obscene character’”<sup>20</sup> and portrays, in an explicit and realistic way, any of the following,

- “(a) an act which threatens a person’s life,
- (b) an act which results, or is likely to result, in serious injury to a person’s anus, breasts or genitals,
- (c) an act which involves sexual intercourse with a human corpse, or
- (d) a person performing an act of intercourse or oral sex with an animal (whether dead or alive) and a reasonable person looking at the image would think that any such person or animal was real’”.<sup>21</sup>

*Life-threatening and serious injury*

These provisions gave rise to considerable debate and their current form reveals much about the legislative process. In the 2005 consultation, the Government proposed taking action against “‘serious violence in a sexual context’” and “‘serious sexual violence’”.<sup>22</sup> There were many objections to these proposals, the most successful being the charge of imprecision.<sup>23</sup> Accordingly, by 2006, the Government had amended its proposals to cover life-threatening and “‘serious, disabling’” injury,

<sup>17</sup> CJA s.63(3).

<sup>18</sup> CJA s.63(4), (5).

<sup>19</sup> Lord Hunt, Parliamentary Under Secretary of State in the Ministry of Justice, *Hansard*, HL Vol.699, col.894 (March 3, 2008).

<sup>20</sup> CJA s.63(6)(b).

<sup>21</sup> CJA s.63(7).

<sup>22</sup> Home Office, *Consultation: On the Possession of Extreme Pornographic Material* (2005), paras 39–42.

<sup>23</sup> See, e.g. Parliament’s Joint Report on Human Rights, *Fifth Report of Session 2007–08, Legislative Scrutiny: Criminal Justice and Immigration Bill*. HL Paper No.37, HC Paper No.269 (Session 2007/08), paras 1.45–1.51.

further amended in the original Bill to life-threatening images or those resulting (or likely to result) in serious (but no longer disabling) injury to the “anus, breasts and genitals”.

In pursuit of clarity and precision, much had changed. Images will now fall within the scope of the measures if they are of life-threatening acts (such as depictions of suffocation or hanging), or of acts which result, or are likely to result, in serious injury (for example the insertion of a sharp object) to the anus, breasts or genitals.<sup>24</sup> In practice, these provisions are likely to capture the depiction of many sado-masochistic practices, such as asphyxiation. While the intention of those involved in such activities is not to threaten or endanger life (though this may not be apparent when the images are viewed in isolation), such images are likely to be deemed depictions of life-threatening acts since serious injury or death could result.

Beyond images of life-threatening acts, s.63 also includes images of acts resulting or likely to result in “serious injury to a person’s anus, breasts or genitals”. “Serious injury” remains undefined, though images of “mutilation” of the genitals or breasts are likely to be covered.<sup>25</sup> It is important to stress the specificity of this provision: it does not include serious injury to any other part of the body. Pornographic images of harm to the buttocks, for example, will not be covered, nor will people having their limbs broken or suffering other lasting disabling injuries (unless they can be considered life-threatening) to other parts of the body.

Many criticisms can be levelled at this provision. The specificity of body parts can only lead to potentially ludicrous results with some images being proscribed, but others not, simply because of the possible injury to specific body parts, rather than due to the nature of the images as a whole, their harm and impact. As we shall argue below, this is, at least partly, a result of the Government’s failure to set out and address directly the nature of the harm in extreme pornography.

Moreover, although non-statutory guidance on the sorts of images to be covered by these provisions will provide greater clarity,<sup>26</sup> as will CPS charging standards, there remains uncertainty about what images will be covered. This could have been avoided, at least to some extent, had greater clarity been expressed regarding the real target which should not be average depictions of consensual sado-masochistic activity but what might be seen as the really problematic pornographic images—that is images which normalise, even glorify sexual violence through, for example, the deliberate, misogynistic valorisation of rape.

For instance, it is unlikely that pornographic pro-rape websites,<sup>27</sup> which are freely and easily accessible online,<sup>28</sup> will be covered by these measures. This is lamentable,

<sup>24</sup> Explanatory Notes to CJA, para.457.

<sup>25</sup> Explanatory Notes to CJA, para.457.

<sup>26</sup> The Government’s intention to publish such guidance is confirmed in a Ministry of Justice letter to the organisation backlash to be found at <http://www.backlash-uk.org.uk/ruddell.html> [Accessed January 30, 2009].

<sup>27</sup> See further in McGlynn and Rackley, “Striking a Balance” [2007] Crim. L.R. 677 fn.67 and also Jennifer Gossett and Sarah Bryne, “Click Here: A Content Analysis of Rape Websites” (2002) 16(5) *Gender & Society* 689.

<sup>28</sup> A number of times in debate, it was stated that the type of material under discussion is very difficult to access. For example, Baroness Howarth stated that “one cannot get to it by accident; a determined effort has to be made” (*Hansard*, HL Vol.699, col.905 (March 3, 2008)). In fact, what is disturbing is how easy it is to access much of the material being called extreme. It is entirely straightforward to access, for free, without giving any personal

not least because the “extensive availability of sites featuring violent rape”<sup>29</sup> was within the initial purview of the Government. Although some “violent” rapes may be covered (what is “non-violent” rape?), if they involve weapons or result in serious injury to the anus, breasts or genitals,<sup>30</sup> this excludes many pornographic rape images.

While many of the “rapes” on pornographic rape websites may not be “real”, but staged, they nonetheless are often presented as real and certainly presented to valorise forced sex. Indeed, one deeply ironic aspect of the exclusion of pornographic rape websites from the scope of the CJIA is that the apparent evidence of a causal link between exposure to violent pornography and a propensity to commit acts of sexual violence (deployed by the Government) is based on research which invariably deploys images of rape as the basis for investigation.<sup>31</sup>

Rape sites, such as those described above, should have been brought within the scope of these measures, whether or not the rape involves additional physical violence, and their exclusion reveals the extent to which the Government has strayed from its initial ambition and lost sight of the harms to be addressed by these measures.<sup>32</sup>

#### *Bestiality and necrophilia*

The incongruity of pro-rape websites not being included is all the more evident, and deplorable, when consideration is given to the generally accepted inclusion of images of bestiality and necrophilia.<sup>33</sup> While debate has largely focused on life-threatening and seriously harmful acts, the bestiality and necrophilia provisions attracted little critical attention and slipped into the Act largely unnoticed. Although this may be explained on the grounds that these measures are, perhaps, of less significance than the others in terms of the number of people and images affected, their inclusion raises significant questions about the aim and scope of the new measures and has, it is suggested, paved the way for a full-on retreat to the disgust-based justifications of the OPA.

Both the necrophilia and bestiality provisions cover acts which are not in themselves unlawful to perform. Section 70 of the Sexual Offences Act 2003

details, large amounts of material covering bestiality, necrophilia and other forms of violent pornography. Sometimes there are front web pages, warning of the nature of the content, but there is no mechanism to prevent further access.

<sup>29</sup> Home Office, *Consultation: On the Possession of Extreme Pornographic Material* (2005), para.5.

<sup>30</sup> Such focus on body parts excluding any possibility of bring psychological harm within “serious injury”.

<sup>31</sup> Catherine Itzin, Ann Taket and Liz Kelly, *The Evidence of Harm to Adults Relating to Exposure to Extreme Pornographic Material: a Rapid Evidence Assessment (REA)* (Ministry of Justice Research Series 10/07, 2007), <http://www.justice.gov.uk/docs/280907.pdf> [Accessed January 30, 2009].

<sup>32</sup> It is worth noting here that the Criminal Justice and Licensing Bill (due to be introduced into the Scottish Parliament in January 2009) will include measures which will criminalise the possession of extreme pornographic material which realistically depict “Rape and other non-consensual penetrative sexual activity, whether violent or otherwise” (Scottish Government, *Revitalising Justice—Proposals To Modernise And Improve The Criminal Justice System* (September 2008), p.18, <http://www.scotland.gov.uk/Publications/2008/09/24132838/0> [Accessed January 30, 2009].

<sup>33</sup> Home Office, *Consultation on the Possession of Extreme Pornographic Material—Summary of Responses and Next Steps* (2006), para.35.

(SOA) proscribes sexual penetration of a dead person, while the CJIA extends to include “sexual interference with a human corpse”.<sup>34</sup> In relation to bestiality, the Act criminalises the possession of pornographic material depicting “intercourse or oral sex with an animal (whether dead or alive)” which goes further than the SOA which proscribes only *penile* penetration of the vagina or anus of, or by, a *live* animal.<sup>35</sup> That it will be lawful to perform certain sexual acts with a corpse or animal, but not to view images of such acts is clearly anomalous. It is this sort of inconsistency between provisions which should have been ironed out in the legislative process, with either the SOA being amended or the extreme pornography provisions changed to mirror the current law.

It is likely that the Government’s intentions were to capture as much pornographic material depicting acts of bestiality and necrophilia as possible. In the area of bestiality, in particular, depictions of oral sex are common and would not be caught if the provisions did not go beyond the SOA. However, equally common are images of manual masturbation of or by an animal, yet these are not covered. Users of such materials, particularly online, will have to take care to avoid encountering proscribed “extreme” images among those which fall outside the scope of the measures.

This only serves to raise another concern with the inclusion of the bestiality images. Sexual acts with animals may be viewed as disgusting and considered degrading or perverted by some people, but this alone should not be enough for the possession of such images to be criminalised.<sup>36</sup> There may be an issue of animal cruelty, but this is not best dealt with by pornography laws. There may also be an issue of participants’ consent, but unless one is willing to say that there is no true consent in any pornographic images, it is difficult to single out bestiality. Finally, if the purpose of the new measures is justified on the basis of a concern about sexual violence, as we would suggest, then it is not always clear that the bestiality provisions fit within this paradigm.

*Grossly offensive, disgusting or otherwise obscene*

One further threshold must be satisfied before an image is considered to be “extreme”: the image must be “grossly offensive, disgusting or otherwise of an obscene character”.<sup>37</sup> This provision was added during the final stages of the parliamentary process as a response to criticisms and was acknowledged by the Government to constitute the “most significant” change to the original proposals.<sup>38</sup> This new clause taken, apparently, from a dictionary definition of what constitutes “obscene”, is intended to “clarify the alignment between this offence and the Obscene Publications Act” and ensure that “only material that would be caught by” the OPA is caught by the new Act.<sup>39</sup>

<sup>34</sup> This was the focus of much criticism after the 2005 consultation, but the Government remained with its original proposal in its 2006 document without specifying why (Pt II, para.12).

<sup>35</sup> SOA s.69

<sup>36</sup> It has been a continuing source of irony, and dismay, to us that while there has been a general consensus about including the bestiality provisions within the Act, this has not extended to the images of sexual violence against women and that people appear to find images of bestiality more abhorrent than forced sex or extreme violence against women.

<sup>37</sup> CJIA s.63(6)(b).

<sup>38</sup> Lord Hunt, *Hansard*, HL Vol.699, col.894 (March 3, 2008).

<sup>39</sup> Lord Hunt, *Hansard*, HL Vol.699, col.894 (March 3, 2008).



This intention was not new. The Government had often stated that only those materials which were already included within the scope of the OPA would be covered by the new extreme pornography measures.<sup>40</sup> However, until this clause was introduced there was no explicit link in the text to the existing obscenity provisions and, given the malleability of the OPA, it was unclear exactly what would be covered. Its inclusion is retrograde for many reasons.

First, it makes an express link to the OPA, by its use of the terminology “obscene character” which is likely to be interpreted by reference to the current obscenity legislation. This is regrettable for all the reasons set out above regarding the current problems with the OPA. Thus, whereas there was potential for the CJIA to move from the OPA’s disgust and offence-based terminology toward a harm-based standard, this has been lost. Secondly, while this threshold was, in all apparent honesty, introduced to provide clarity, it does nothing but obscure. We already know that what constitutes “obscene” material is notoriously vague, but there is even less clarity regarding what might be “grossly offensive” or “disgusting”. Further, not only are such terms highly subjective and vague, they clearly import an offence-based charge. While offence is a basis for legal regulation of sexually explicit material, this is generally confined to zoning or shielding measures, keeping sexual imagery confined to specific spaces. It is not generally a sufficient basis for a criminal possession offence. Disgust, as Martha Nussbaum has clearly argued, is a wholly inadequate basis for law-making.<sup>41</sup> Liberty expressed similar sentiments stating that: “Extreme caution should be exercised when new criminal laws are imposed with the intention of imposing a subjective opinion of what is morally acceptable.”<sup>42</sup> The focus should be on harmful, not disgusting, material.

#### What constitutes possession?

The concept of possession is key to the offence. However, the development of computer technology has, unfortunately, given rise to much complexity in determining when an individual will be held to be in “possession” of the particular image. What appears to be the case from *Porter*,<sup>43</sup> concerning possession of child abuse images, is that the answer depends on the extent to which the image is in the defendant’s “custody and control”. Where, for example, images have been deleted, though retrievable with specialist software (as in *Porter*), defendants will not be in possession of the image so long as they do not have the relevant software and/or the capability to carry out the retrieval. As Yaman Akdeniz explains, this “introduces a subjective element into the concept of physical possession in the context of computer images”,<sup>44</sup> as well as raising the question, posed by David Ormerod, of whether a “defence” of deletion should really be available to the computer illiterate but not to the knowledgeable.<sup>45</sup>

<sup>40</sup> Lord Hunt, *Hansard*, HL Vol.699, col.894 (March 3, 2008). See also Home Office, *Consultation: On the Possession of Extreme Pornographic Material* (2005), para.20.

<sup>41</sup> Martha Nussbaum, *Hiding from Humanity—Disgust, Shame and the Law* (2004).

<sup>42</sup> Liberty, *Liberty’s Committee Stage Briefing on the Criminal Justice and Immigration Bill in the House of Commons* (2007), p.16.

<sup>43</sup> *Porter* [2006] EWCA Crim 560; [2006] 2 Cr. App. R. 25.

<sup>44</sup> Yaman Akdeniz, “Possession and Dispossession: a critical assessment of defences in possession of indecent photographs of children cases” [2007] Crim. L.R. 274, 283.

<sup>45</sup> David Ormerod, “Indecent Photograph of a Child” [2006] Crim. L.R. 748, 751.

This leads onto the issue of whether there is possession when an individual is “just looking” at images on a computer screen. When viewing internet images on screen, the hard drive of the computer keeps a record of those images, what is known as a “cache”. Ormerod states clearly that, following *Atkins*,<sup>46</sup> “any images that remain in the internet cache on a computer are in D’s possession” and such a defendant can be convicted of the possession offence, subject to proof of knowledge.<sup>47</sup> Thus, unless it can be established that they knew about the existence of the cache (for example by admission or proof that they have accessed the temporary internet file off-line), computer illiterate defendants are able to “just look” at as many images of extreme pornography as they wish.<sup>48</sup>

This is in contrast to those who browse images of child abuse. The Court of Appeal in *Smith and Jayson* held that, following *Bowden*,<sup>49</sup> “the act of voluntarily downloading an indecent image from a web page on to a computer screen is the act of making a photograph or pseudo-photograph”.<sup>50</sup> Although contentious,<sup>51</sup> this interpretation recognises the act of “just looking” for what it is: active participation in the abuse and sexual exploitation of children. Similar arguments can be made in relation to (some) extreme pornography (discussed further below). However, unlike in relation to child abuse images there is no corresponding “making” offence to catch the computer illiterate.<sup>52</sup> Thus, we would argue that “possession” should be interpreted broadly by the courts, and in line with the motivations of *Bowden*, to include images *unknowingly* stored in the defendant’s “cache”. These images remain in the “possession” of the defendant in that they are stored on their computer.

We recognise that our argument for a broad understanding of possession—to include those who are “just looking”—will mean that more people may be liable to prosecution under the extreme pornography measures. To the extent that this is unwarranted, the problem, and indeed remedy, lies not in the definition of “possession” but rather in what is considered an “extreme” pornographic image (which we would argue is in some respects too broad).

### **Excluded and extracted images**

The provisions on excluded and extracted images both limit the scope of the measures and extend them far beyond what might have been thought reasonable.

<sup>46</sup> *Atkins v DPP* [2000] 2 Cr. App. R. 248 DC.

<sup>47</sup> Ormerod, “Indecent Photograph of a Child” [2006] Crim. L.R. 748, 750.

<sup>48</sup> The Spanner Trust in its information leaflet about the new measures suggests that “just viewing an image or video on a web site does not constitute ‘possession’. So you can browse the Internet quite legally” (Spanner Trust, *Is Your Porn Collection Still Legal*, [http://www.spannertrust.org/documents/possession\\_of\\_extreme\\_pornography\\_share.pdf](http://www.spannertrust.org/documents/possession_of_extreme_pornography_share.pdf) [Accessed January 30, 2009]). The leaflet goes on to suggest that what remains in the individual’s cache “does not constitute possession”. As we have seen, this is not necessarily the case. Not least because reading the leaflet (and its guidelines on how to delete a computer’s hard drive) will, presumably, give the reader the requisite knowledge for the offence.

<sup>49</sup> *Bowden* [2001] 1 Cr. App. R. 438 CA (Crim Div).

<sup>50</sup> For the purposes of Protection of Children Act 1978 s.1(1)(a) (*Smith and Jayson* [2002] EWCA Crim 683; [2003] 1 Cr. App. R. 13 at [33]).

<sup>51</sup> The decision in *Bowden* means that, Akdeniz suggests, “prosecutors are more likely to opt for the more serious ‘making charge’ rather than the ‘simple possession charge’ [under s.160 of the Criminal Justice Act 1988] in cases where internet downloading is involved” (Akdeniz, “Possession and Dispossession” [2007] Crim. L.R. 274, 285–286).

<sup>52</sup> The OPA does not extend this far.

In terms of excluded images, s.64 provides that films classified by the British Board of Film Classification (BBFC) will be exempt. This means that images of, for example, necrophilia shown in a classified film will not constitute an extreme pornographic image. This is because in classifying the film, the BBFC will have made a determination that the nature of the image, in the overall context of the film, was not pornographic nor contravened the OPA. This is a sensible limit on the scope of the measures.

However, the provisions on extracted images take the measures off in wholly new and uncharted directions. An extract of a classified film may fall within the scope of the measures if it has been extracted for pornographic purposes.<sup>53</sup> Where the extract is one of a series of images the question of whether it is pornographic will be determined by reference to the image itself and the context within which the image appears. In other words, many classified films contain images which may depict life-threatening acts, or acts of necrophilia, for example, but which by virtue of being in a classified film are exempt from the extreme pornography provisions. However, when the particular image is extracted from the overall film, and particularly when placed alongside other such extracts, this exemption is lost and it may fall foul of the CJIA if the collection of extracted images is deemed to have been produced for the purposes of sexual arousal.

No real explanation of this provision has been given by the Government justifying its inclusion and it has been subject to severe criticism and ridicule, especially by those against the measures more generally.<sup>54</sup> Despite the Justice Minister Lord Hunt's confident assertion that this measure will not capture "mainstream films",<sup>55</sup> presumably because the extracted image is unlikely to be sufficiently "explicit" or "obscene", much will turn on what is understood by these terms. Broadly construed, it is feasible that it could capture extracts of scenes from BBFC films, widely available on YouTube and similar websites (assuming they were extracted for pornographic purposes). This may not be a bad thing. Context works both ways. Devoid of their original narrative, these scenes become a ubiquitous, possibly more acceptable, and certainly more accessible, parallel of images found on pornographic websites. As Martha Nussbaum argues, what matters is the "overall context of the human relationship".<sup>56</sup> The "salient issue" is the degree of "harm, humiliation and subordination".<sup>57</sup> It is precisely for this reason that we can accept depictions of female sexuality in texts such as Lawrence's *Lady Chatterley's Lover* or Henry James's *The Golden Bowl*, whilst expressing rather greater doubt about *rapedbitch.com*.<sup>58</sup>

<sup>53</sup> CJIA s.64(3).

<sup>54</sup> See, e.g. Liberty, *Liberty's Committee Stage Briefing on the Criminal Justice and Immigration Bill in the House of Commons* (2007), p.18; Julian Petley, "Something Must be Done" (Index on Censorship, 2008), <http://www.indexoncensorship.org/?p=435> [Accessed January 30, 2009].

<sup>55</sup> Lord Hunt, Letter to Rt Hon the Lord Kingsland, Q.C., <http://www.justice.gov.uk/docs/crim-justice-corres-gov-amends.pdf> [Accessed January 30, 2009].

<sup>56</sup> Martha Nussbaum, *Sex and Social Justice* (1999), p.227 and again at p.233.

<sup>57</sup> Nussbaum, *Hiding from Humanity* (2004), p.143.

<sup>58</sup> For Martha Nussbaum's particular discussion of Lawrence, James and *Playboy*, alongside Alan Hollinghurst's *The Swimming-Pool Library*, see *Sex and Social Justice* (1999), Ch.8, discussed in Clare McGlynn and Ian Ward, "Pornography, Pragmatism and Proscription", forthcoming.

### **Defences**

The defences for this new offence mirror those available in respect of child abuse images,<sup>59</sup>

- “(a) that the person had a legitimate reason for being in possession of the image concerned;
- (b) that the person had not seen the image concerned and did not know, nor had cause to suspect, it to be an extreme pornographic image;
- (c) that the person—
  - (i) was sent the image concerned without any prior request having been made by or on behalf of the person, and
  - (ii) did not keep it for an unreasonable time”.<sup>60</sup>

The “legitimate reason” defence is designed to protect the police and prosecutors from falling foul of these provisions when carrying out their duties. It will also likely cover organisations such as the Internet Watch Foundation which acts as a portal for the reporting of obscene material. While it will be a matter of fact for the magistrate or jury to determine whether there is a legitimate reason, the courts have generally looked sceptically upon the claims of the necessity of possession of child abuse images for “academic research”.<sup>61</sup> The “knowing possession” defence means what it says in that there can be no conviction if the defendant did not know, nor had cause to suspect, that the images were of the proscribed nature.<sup>62</sup> In relation to the unsolicited defence, the question of reasonableness is one for the jury or magistrate.

In addition, one new defence was added, as a last minute sop to the Bill’s objectors, covering “participation in consensual acts”.<sup>63</sup> This defence applies where the defendant participated in the acts depicted (excluding images of bestiality) and those acts did not involve infliction of any “non-consensual harm on any person” and that if the image is of a human corpse, that it was not in fact an actual corpse.<sup>64</sup> The relevant threshold here is that in *Brown* wherein it was held that an individual cannot lawfully consent to harm which constitutes actual bodily harm.<sup>65</sup> As a result, the defence will have a relatively narrow remit. While images of so-called “rape-play” or “vampirism” will be protected, it will not apply to other common images such as those involving sexual asphyxiation, or cutting (where the cut is minor but not superficial), severe whipping or beating.

### **Penalties**

Listening to the concerns of those who have campaigned against the measures, particularly from the sexual freedom organisations, it is possible to fear that

<sup>59</sup> Criminal Justice Act 1988 s.160(2).

<sup>60</sup> CJA s.65(2).

<sup>61</sup> *Atkins* [2000] 2 Cr. App. R. 248 DC discussed in Akdeniz, “Possession and Dispossession” [2007] Crim. L.R. 274, 278–279.

<sup>62</sup> Discussed in relation to child abuse images: *Atkins* [2000] 2 Cr. App. R. 248 DC.

<sup>63</sup> CJA s.66.

<sup>64</sup> CJA s.66(3).

<sup>65</sup> *Brown* [1993] 2 All E.R. 75 HL.

large numbers of people will suddenly be made criminals.<sup>66</sup> In practice, this seems unlikely. Proceedings for an offence may not be instituted without the consent of the DPP,<sup>67</sup> as is the current position under the OPA and other similar forms of legislation. While in the case of prosecutions of child abuse images this requirement has not halted large numbers of such actions, there is a different climate surrounding such images which makes it more acceptable for public prosecution. The same cannot be said at this time over images of adult pornography. Indeed, the Government's regulatory impact assessment suggested that the measures would cost little, largely because there would be so few prosecutions.<sup>68</sup> The effect (if any) of the measures may ultimately prove to be more symbolic than real.

Nonetheless, for those who are prosecuted, the maximum prison term following conviction on indictment for possessing images which portray acts that are life-threatening acts or serious injury is three years and/or a fine.<sup>69</sup> This decreases to two years in relation to images of bestiality and necrophilia and, at least initially, to six months in England and Wales in relation to all images covered by s.63 of the CJIA upon conviction by a magistrate. Sentencing guidelines will be published in due course which we hope will mirror the sentencing regime in relation to child abuse images<sup>70</sup> and differentiate between the possession of images of real acts of violence and those which are staged.

#### **Justifying action: cultural harm, direct harm and disgust**

The Government lacked clarity in its attempts to justify its actions. Three different, and somewhat contradictory, arguments were offered by the Government during the legislative process: the cultural context of sexual violence, arguments of direct harm, and those grounded in disgust. We suggest that as the Government came under pressure, it lost sight of the nature of the harm it was seeking to legislate against and reverted to the weakest possible justification for action, disgust. This has important effects not just in how the legislation is received, but also led to the last-minute introduction of problematic clauses and will affect enforcement and interpretation.

When first introducing the proposals to criminalise the possession of extreme pornography in 2005, the Government appeared keen to emphasise that extreme pornography may contribute to a cultural context in which violent sexual activity is encouraged or legitimated, what we would call a form of "cultural harm". Thus, at this stage, it was not making a claim that there was a direct link between viewing extreme pornography and committing acts of sexual violence. Indeed, it was upfront

<sup>66</sup> The number could run to "millions" according to backlash, "Extreme Pornography Provisions: ill-conceived and wrong" in Clare McGlynn, Erika Rackley and Nicole Westmarland (eds), *Positions on the Politics of Porn* (2007), pp.9–14, at p.9, <http://www.dur.ac.uk/resources/law/research/politicsofporn/PositionsonthePoliticsofPorn.pdf> [Accessed January 30, 2009].

<sup>67</sup> CJIA s.63(10).

<sup>68</sup> *Criminal Justice and Immigration Bill: Regulatory Impact Assessments*, <http://www.justice.gov.uk/docs/regulatory-impact-assess-1.pdf> [Accessed January 30, 2009].

<sup>69</sup> CJIA s.67. Offenders who are sentenced to two or more years' imprisonment will also be subject to notification requirements if they are 18 or over (SOA 2003 pt II). (As confirmed by the Ministry of Justice in a letter to backlash at <http://www.backlash-uk.org.uk/ruddell.html> [Accessed January 30, 2009]).

<sup>70</sup> *Oliver* [2002] EWCA Crim 2766; [2003] 1 Cr. App. R. 463.

in noting that no “definite conclusions” could be reached as to the “likely long term impact of such material on individuals generally”.<sup>71</sup> Rather its argument was that extreme pornography “may encourage” an interest in “violent or aberrant sexual activity”<sup>72</sup> and, in so doing, contribute to a climate in which sexual violence is not taken seriously. This was closely aligned with other justifications offered at the time including a concern over images of “the torture of (mostly female) victims who are tied to some kind of apparatus or restrained in some other ways and stabbed with knives, hooks and other implements” presented in a “sexually explicit context”<sup>73</sup> as well as “material contain[ing] sexualized images of women hanging by their necks from meat hooks, some with plastic bags over their heads”.<sup>74</sup> Further, the Government was also keen to “protect those who participate in the creation of sexual material containing violence, cruelty or degradation, who may be the victim of crime in the making of the material whether or not they notionally or genuinely consent to take part”.<sup>75</sup>

This is the basis on which we would justify taking action in this field. It is a concept of harm which moves beyond arguments of immediate cause and effect and develops Martha Nussbaum’s declaration that much pornography “directly conflicts with the ideas of equal worth and equal protection that are basic to a liberal social order”.<sup>76</sup> It also considers again the classic liberal idea of harm taken from John Stuart Mill’s work, deploying instead his *Subjection of Women*, which David Dyzenhaus argues shows us that “Mill would have been surprisingly sympathetic to the pro-censorship feminist case”.<sup>77</sup> These arguments reflect on the harm which extreme pornography may cause indirectly, as suggested by the 1986 US Attorney General’s commission which concluded that,

“... substantial exposure to sexually violent material leads to a greater acceptance of ‘rape myth’ in its broader sense—that women enjoy being coerced into sexual activity, that they enjoy being physically hurt in a sexual context, and that as a result a man who forces himself on a woman sexually is in fact merely acceding to the ‘real’ wishes of the woman, regardless of the extent to which she seems to be resisting”.<sup>78</sup>

They continued that, accordingly, they had “little trouble concluding that this attitude is both pervasive and profoundly harmful, and that any stimulus reinforcing or increasing the incidence of this attitude is for that reason alone properly designated as harmful”.<sup>79</sup> Cass Sunstein describes this type of harm as harms to society through social conditioning which foster discrimination and other unlawful

<sup>71</sup> Consultation: *On the Possession of Extreme Pornographic Material* (2005), para.31.

<sup>72</sup> Consultation: *On the Possession of Extreme Pornographic Material* (2005), para.27.

<sup>73</sup> Consultation: *On the Possession of Extreme Pornographic Material* (2005), para.5.

<sup>74</sup> Consultation: *On the Possession of Extreme Pornographic Material* (2005), para.5.

<sup>75</sup> Consultation: *On the Possession of Extreme Pornographic Material* (2005), p.2 and para.34.

<sup>76</sup> *Hiding from Humanity—Disgust, Shame and the Law* (2004), p.139

<sup>77</sup> David Dyzenhaus, “John Stuart Mill and the Harm of Pornography” (1992) 102 *Ethics* 534, 537.

<sup>78</sup> US Attorney General’s Commission on Pornography (the Meese Report) (July 1986), para.5.2.1, <http://www.porn-report.com/> [Accessed January 30, 2009].

<sup>79</sup> Meese Report, para.5.2.1.

activities.<sup>80</sup> It is these types of harm which the extreme pornography provisions should be seeking to reduce.

However, in the face of sustained criticisms of its proposals by arch-liberals demanding evidence of physical harm and direct, causal links, the Government retreated from the argument about cultural harm to one of direct harm. Just prior to the Bill being published in the summer of 2007, the Government published *The Evidence of Harm to Adults Relating to Exposure to Extreme Pornographic Material: a Rapid Evidence Assessment* (REA), which investigated the possible causal connection between viewing extreme pornography and committing acts of sexual violence.<sup>81</sup> This research found “evidence of some harmful effects from extreme pornography on some who access it”<sup>82</sup> including “increased risk of developing pro-rape attitudes, beliefs and behaviours and committing sexual offences” which were more significant for “men predisposed to aggression, or [who] have a history of sexual or other aggression”.<sup>83</sup> The REA, and the material on which it is based its conclusions, has been subject to much academic debate. Indeed, the whole premise of there ever being a research method that could reveal “direct” links is disputed by those both for and against the regulation of pornography. Nonetheless, the Government did utilise this research on a few occasions to justify its proposals.<sup>84</sup> To us, what this reveals is the Government’s lack of belief in its purpose which should be about changing the cultural and social environment in which sexual violence is marginalised, in which rape conviction rates are at an all time low and in which pornography is becoming (if possible) even more ubiquitous. The Government was succumbing to the arguments of arch-liberals that the only form of harm to justify criminal action is that which, to use Vanessa Munro’s phraseology, is concerned with “specifying a particular injury, typically inflicted upon the body, which can be identified independently of both the context in which it takes place and the understanding of the experience from the point of view of the people involved”.<sup>85</sup> Further, arguments about privacy and free speech can equally be met with arguments about the freedom of expression of women which may be circumscribed in a society which condones extreme pornography and in which their privacy is invaded by unwanted sexual violence or objectification.<sup>86</sup>

Ultimately however the Government fell back on the easy tradition of the conservative-moralistic and disgust-based arguments which consume the OPA. This was nascent in the 2005 consultation, with references to “aberrant” sexuality, but was arguably not a primary plank of the Government’s justifications.

<sup>80</sup> Cass Sunstein, “Pornography, sex discrimination and free speech” in Larry Gostin (ed.), *Civil Liberties in Conflict* (1988), pp.152–169.

<sup>81</sup> REA, p.iii.

<sup>82</sup> REA, p.iii.

<sup>83</sup> REA, p.iii.

<sup>84</sup> Maria Eagle MP, Parliamentary Under Secretary of State Criminal Justice and Immigration Bill Committee, col.31 (October 16, 2007), <http://www.publications.parliament.uk/pa/cm200607/cmpublic/criminal/071016/am/71016s01.htm> [Accessed January 30, 2009]; Lord Hunt, *Hansard*, HL Vol.699, col.907 (March 3, 2008).

<sup>85</sup> Vanessa Munro, “Dev’l-in Disguise? Harm, Privacy and the Sexual Offences Act 2003” in Vanessa Munro and Carl Stychin (eds), *Sexuality and the Law—feminist engagements* (2007), pp.12–13.

<sup>86</sup> For similar arguments, see Cass Sunstein, “Pornography and the First Amendment” [1996] *Duke Law Journal* 589.

Regrettably, however, it came to the fore as the legislative process wore on.<sup>87</sup> When introducing the Bill, Secretary of State for Justice Jack Straw referred to the “vile material” which the measures were seeking to address.<sup>88</sup> Others speaking in support of the measures referred to “obscene and disturbing material”,<sup>89</sup> “nasty, horrible and unpleasant stuff”,<sup>90</sup> and to material that “most people find abhorrent”.<sup>91</sup> The Government appealed to exactly those sentiments underpinning the OPA and eschewed any vaguely “feminist” idea that regulating pornography was part of a programme to achieve equality for women.

### Conclusion

Catharine MacKinnon has remarked that in the US porn debates, “discussion has increasingly regressed to its old right/left, morality/freedom rut, making sexual violence against women once again irrelevant and invisible”.<sup>92</sup> This is precisely what happened during the parliamentary debates over extreme pornography in the United Kingdom. This was, as least in part, due to a failure of the Government to specify exactly where the harm lies in extreme pornography and, as a result, parliamentary debate became mired in assumed Millian ideas of harm and paternalistic standards of morality.<sup>93</sup> Aside from a few references by the Government to the REA, debate in Parliament failed to consider the broader arguments of harm, extreme pornography and sexual violence and to specify exactly where the harm lies in extreme pornography. As a result, the CJIA provisions on extreme pornography are both over- and under-inclusive. In allowing for a retreat to the moralistic and disgust-based justifications of the OPA, they include much within their scope which—though perhaps distasteful to many—is not harmful (and not even unlawful to perform), while, at the same time, failing to recognise and address material which contributes to cultural harms in our society which contribute to the prevalence and maintenance of sexual violence.

The final Act is therefore a lost opportunity to have taken bolder steps towards proscribing extreme pornography which has at its core a concern with the valorisation and legitimisation of cultural harms, particularly to women. It is a lost opportunity to make a break from the moralistic and paternalistic concerns of the OPA, though the measures should have included a public good defence along the lines of that in the obscenity legislation. It also represents a lost opportunity to reflect on the regulatory regime for pornography more generally. There is now, more than ever, an urgent need to review all legislation and practice regarding pornography

<sup>87</sup> See, e.g. Explanatory Notes to Criminal Justice and Immigration Bill, para.803, <http://www.publications.parliament.uk/pa/cm/200607/cmbills/130/en/2007130en.pdf> [Accessed January 30, 2009].

<sup>88</sup> The Secretary of State for Justice and Lord Chancellor, Jack Straw, *Hansard*, HC Vol.464, col.60 (October 8, 2007).

<sup>89</sup> Martin Salter MP, *Hansard*, HC Vol.464, col.93 (October 8, 2007). He continued: “If people want to do weird things to each other they still can, but I say ‘Don’t put it on the internet’” (col.113).

<sup>90</sup> Charles Walker MP, *Hansard*, HC Vol.464, col.117 (October 8, 2007).

<sup>91</sup> Lord Hunt, *Hansard*, HL Vol.699, col.908 (March 3, 2008).

<sup>92</sup> Catharine MacKinnon, *Women’s Lives, Men’s Laws* (2005), p.369.

<sup>93</sup> For a similar argument in respect of the SOA, see Vanessa Munro, “Dev’l-in Disguise?” (2007).



and child abuse images, both in terms of the ever-advancing technology and the ubiquity of the images. The fact that the Government specifically wishes to retain the OPA, largely due to its “flexibility”, and has indeed strengthened it by means of these measures, demonstrates a profound lack of understanding about pornography, its harms and the need for clarity in the criminal law.