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Criminalising the Possession of Extreme Pornography: Sword or Shield?

Susan Easton*

Abstract This article examines the reasons for the introduction of the extreme pornography provisions in s. 63 of the Criminal Justice and Immigration Act 2008, whether the provisions can be justified, whether they meet their goals and the problems they raise. It is argued that the provisions should be seen as an expression of benign perfectionism, grounded in respect for individuals, rather than repressive paternalism. The impact of the law is assessed with reference to recent cases and the author considers whether the fears expressed at the time the legislation was passed have been borne out in practice.

Keywords Extreme pornography; Harm; Consent; Perfectionism

The extreme pornography provisions in the Criminal Justice and Immigration Act 2008 (CJIA) were influenced by campaigns by women's groups and anti-pornography campaigners, and by relatives of victims of 'copycat' deaths where violent and abusive practices committed in pornographic films have been imitated on victims, most notably in the case of Jane Longhurst who was killed in 2003 by Graham Coutts,¹ who had viewed violent pornographic websites of women being strangled and raped, and of necrophilia, just hours before the murder. Jane Longhurst's mother had been campaigning for some time to put pressure on internet service providers to close down or filter such sites. Although there clearly exists a market for such material, the new provisions have been vigorously opposed by libertarians and by groups representing alternative sexualities.

The purpose of the extreme pornography provisions is to protect individuals involved in production, as well as society as a whole: 'banning possession is justified in order to meet the legitimate aim of protecting the individuals involved from participating in degrading activities'.² But the aim is also to prevent harm caused by *viewing* the material: 'Irrespective of how these images were made, banning their possession can be justified as sending a signal that such behaviour is not considered acceptable. Viewing such images voluntarily can desensitise the viewer to such degrading acts, and can reinforce the message that such behaviour is acceptable'.³ It is intended that these restrictions will protect 'children and vulnerable adults, from inadvertently coming into

* Reader in Law, Brunel Law School; e-mail: Susan.Easton@brunel.ac.uk.

1 See *R v Coutts* [2005] EWCA Crim 52. Coutts' initial conviction was quashed after an appeal to the House of Lords, but following a retrial in July 2007, Coutts was convicted and jailed for life.

2 Criminal Justice and Immigration Act 2008 Explanatory Notes, para. 804.

3 *Ibid.* at para. 805.

possession of this material, which is widespread on the internet'.⁴ Given these aims, the government argued that the measure was proportionate; it has 'the legitimate aim of breaking the supply and demand of this material which may be harmful to those who view it'.⁵

The CJIA provisions were the first substantial piece of legislation on adult pornography for over 40 years and came into force on 26 January 2009. The offence applies to England, Wales and Northern Ireland and similar but broader provisions have now been enacted in Scotland.

Section 63 of CJIA creates a new offence of possession of an extreme pornographic image (s. 63(1)). An image is an 'extreme pornographic image' if it is both pornographic and extreme (s. 63(2)). A definition of pornographic is given in s. 63(3): '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'. This is a matter for the magistrates or jury to decide and does not depend on the intention of the producer of the images.

An image is 'extreme' if it falls within s. 63(7) below and is 'grossly offensive, disgusting or otherwise of an obscene character' (s. 63(6)):

Section 63(7) states that an image falls within that subsection if it:

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 interference 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.

Under s. 63 an image is a 'moving or still image' or data which are capable of conversion into a moving or still image (s. 63(8)).

Proceedings under the CJIA may only be brought with the consent of the Director of Public Prosecutions (s. 63(10)). Section 63 does not apply to an excluded image, namely 'an image which forms part of a series of images contained in a recording of the whole or part of a classified work' (s. 64(2)). However, they would not be excluded if the image is extracted from the recording 'solely or principally for the purpose of sexual arousal' (s. 64(3)). A 'classified work' means 'a video work in respect of which a classification certificate has been issued by a designated authority' (s. 64(7)).

Defences for accidental possession, unsolicited material and legitimate reasons for possession are given in s. 65 and the burden is on the defence: 'Where a person is charged with an offence under section 63, it is a defence for the person to prove any of the matters mentioned in subsection (2)', namely:

⁴ Above n. 2 at para. 806.

⁵ *Ibid* at para. 805.

- (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 any 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. (s. 65(2))

The penalties for possession of extreme pornographic images are the maximum on summary conviction and on indictment a maximum of three years or fine or both and for possession of images of necrophilia or bestiality two years (s. 67).⁶

Section 63 is more radical than the Obscene Publications Act 1959 (OPA), because mere possession is sufficient for an offence to be committed whereas under the OPA it is necessary for an obscene article to be published and distributed. The Consultation Paper on Possession of Extreme Pornography in 2005, which preceded the Act, made clear it was not intended to cover text or cartoons although these may raise collateral issues of legitimisation of abuse.⁷ The focus on offensiveness in s. 63 seems to reflect concerns over public distaste and over public indecency, rather than physical harm, which has fuelled criticism of the provisions.

For an offence to be committed, the material would need to be pornographic, explicit and realistic, or appear to be real, and to include serious violence, sex with an animal, or sexual interference with a human corpse. All elements of the offence must be met. The test is what a reasonable person might think is real, so both this issue and whether it is produced for sexual arousal, are objective tests for the jury to consider.

⁶ Section 70 of the CJIA also increases the penalties for publication and distribution of an obscene article under the Obscene Publications Act 1959, s. 2(1) from three to five years.

⁷ Home Office, *Consultation: on the Possession of Extreme Pornographic Material* (Home Office/NOMS/Scottish Executive: London, August 2005) para. 38. However, possession of non-photographic images of children has now been criminalised by the Coroners and Justice Act 2009. In *Consultation on the Possession of Non-photographic Visual Depictions of Child Sexual Abuse* (Home Office: London, 2007) the Minister of Justice announced plans to create a new offence of possession of non-photographic pornographic images of children, which includes drawings, cartoons and computer-generated images of child sexual abuse, with a maximum sentence of three years. Sections 62–68 of the Coroners and Justice Act 2009 covers images produced by any means which focus solely or principally on the child's anal or genital region and depict a range of sexual acts. Often these images have been found by the police alongside indecent photographs, but sometimes only non-photographic images have been found. While the images are computer generated, they still contain depictions of abuse and reinforce the perception of children as sexual objects. But criminalising what are effectively comics or fantasies would be seen as a step too far by many defenders of free speech, as no depictions of real children are involved and the law is targeted at possessors of such images. Ost has argued that changes in the law should be based on real harms to real children, rather than on imaginary children and on legal moralism. See S. Ost, 'Criminalising Fabricated Images of Child Pornography: A Matter of Harm or Morality?' (2010) 30(2) *Legal Studies* 230.

Serious violence would cover acts threatening a person's life or likely to cause serious disabling injury and genital injuries. The original proposal of grievous bodily harm was amended to images which appear to be life-threatening, or are likely to result in serious injury because it was thought GBH was too vague. Examples of life-threatening could include, for example, depictions of hanging or suffocation. The burden is on the prosecution to show the material falls within the life-threatening category.⁸

The defence in s. 65 is intended to protect those who are involved in the criminal justice system as well as social workers working with sex offenders, war crimes investigators, and ancillary administrative staff, and those involved in regulatory agencies. The focus on sexual arousal is intended to protect artistic and political works, as well as material classified by the British Board of Film Classification (BBFC). An unaltered version of a work classified or certified by a designated authority such as the BBFC is excluded from the provisions. It would not cover mainstream material so it would not affect works classified as '18' by the BBFC. But material classified as R 18, that is restricted to sales in licensed sex shops, would not be excluded from the Act. Broadcasting such material on TV is already an offence under the OPA.

The provisions enacted in Scotland by s. 51A of the Criminal Justice and Licensing (Scotland) Act 2010 go further and deal with some of the omissions in the CJA, including rape. Section 51A(6) provides that:

An image is extreme if it depicts, in an explicit and realistic way any of the following—

- (a) an act which takes or threatens a person's life,
- (b) an act which results, or is likely to result, in a person's severe injury,
- (c) rape or other non-consensual penetrative sexual activity,
- (d) sexual activity involving (directly or indirectly) a human corpse,
- (e) an act which involves sexual activity between a person and an animal (or the carcase of an animal).

Was the legislation necessary?

The purpose of creating the new offence of possession of extreme or abusive pornography was explained in the 2005 Home Office Consultation Paper⁹ which preceded the Act: 'to try to break the demand/supply cycle and to discourage interest in this material which we consider may encourage or reinforce interest in violent and aberrant sexual activity'¹⁰ and to increase the disincentives for such use.

The framework of anti-pornography legislation in the UK was originally constructed around the printed word and photographs on sale in sex shops and obtainable through the post rather than electronically. Clearly a revision and modernisation of this area of law is long overdue as since the 1970s the expansion of the pornography market and the worldwide

⁸ Home Office, *Consultation on the Possession of Extreme Pornographic Material: Summary of Responses and Next Steps* (Home Office/NOMS 2006) para. 14.

⁹ Home Office, *Consultation: on the Possession of Extreme Pornographic Material* (Home Office/NOMS/Scottish Executive: London, August 2005).

¹⁰ *Ibid.* at 1.

relaxation of controls on pornography, combined with technological advances facilitating the privatisation and accessibility of pornography, have meant the law has struggled to keep pace with the pornography industry. As the mode of production has shifted to the internet, it has become harder to police as it is no longer possible to confiscate material physically, or to locate sources of material produced outside the jurisdiction. It has also become easier to access *extreme* material and for individuals to produce their own pornographic productions, but harder to control who views internet material and children and young people are the greatest users of the internet.

Limited resources have meant that police efforts have focused primarily on images of child sexual abuse but this, combined with the development of the internet as the prime location of pornography, has created a relatively safe space in which the demand for and supply of extreme pornography has flourished. It has also been easier to get a conviction under the Protection of Children Act 1978 (PCA) where possession and downloading an indecent image of a child is a criminal offence. The penalty for possession of an indecent image of a child is a maximum of five years and for the offences of taking, making and distributing indecent images was increased to a maximum of 10 years by the Sexual Offences Act 2003. There have been far fewer prosecutions under the Obscene Publications Act 1959 (OPA) where the offence consists of publication and distribution of obscene material, than under the PCA. In 2003 there were 39 prosecutions under the OPA compared with 309 in 1994, while there were 1,890 in 2003 under the PCA compared with 93 in 1994.¹¹ While police resources have been concentrated on child protection, the supply of and demand for violent adult pornography has flourished. The OPA was inadequate to deal with material downloaded from the internet, and often produced outside the UK. Moreover, illegal enterprises will often move from state to state to avoid detection. It is estimated that less than 1 per cent of the extreme material originates from the UK so targeting suppliers is no longer feasible. International cooperation is difficult as there is considerable variation in state regulatory practice, and international law enforcement is weak.

Demand for material to be viewed in real time has increased, and the available material has become more extreme. For example, in relation to images of child sexual abuse the Internet Watch Foundation has noted that there has been an increase in the severity of the content of online child abuse. The number of extreme images which show the most severe abuse, including sadistic sexual activity, as a proportion of the total images of child sexual abuse quadrupled from 2003 to 2006.¹² As the Internet Watch Foundation reports:

It remains the case that many of the children we see being sexually abused in images are young and are being subjected to severe levels of abuse. 72%

11 Home Office, *Consultation: on the Possession of Extreme Pornographic Material* (Home Office/NOMS/Scottish Executive: London, August 2005) para. 15.

12 Internet Watch Foundation, *2006 Annual and Charity Report*.

of child views appear to be between the ages of 0 and 10; 23% 6 years old or under; and 3% two years or under. 44% of images depict the rape or torture of the child.¹³

Increasingly the material is found on free hosting sites where users create their own websites. An example of the type of adult material to be covered by the new offence of possession of extreme pornography would be victims (usually women) restrained, stabbed, raped, and hanging on hooks, with plastic bags on their heads, being subjected to violence. Arguably the internet has not simply facilitated the supply of extreme material, but also allowed demand to flourish. Previously, the social stigma of visiting a sex shop or the risk of interception of material in the post may have deterred potential users.¹⁴

Matters of principle and policy

Debates on the CJIA provisions have centred on the possession of images of sexual violence and have raised the perennial question of where the boundaries of intervention should lie and whether harmful activities and practices enjoyed in private should receive protection from prosecution. The criminalisation of the possession of extreme pornography highlights the problems within liberal political thought of identifying harm, distinguishing direct and indirect harms, the problem of consent to harm and whether a society has the right to enforce its morality in the absence of proven harm.

Many of these issues have been debated in earlier trials, notably the *Lady Chatterley*¹⁵ and the *Little Red School Book* cases,¹⁶ and aired in the *Wolfenden*¹⁷ and the *Williams Reports*¹⁸ and in the debate between Hart¹⁹ and Devlin²⁰ and, of course, originally by Mill.²¹ More recently they were discussed in the debate in the early 1990s on consensual sado-masochistic practices in the light of *R v Brown, Laskey and Jaggard*²² where a group of individuals who committed violent acts on each other and exchanged pictures of their activities were convicted of causing actual and grievous bodily harm.

Regulation would be seen by libertarians as inherently repressive if the individual is aware of the consequences of his actions and controls are imposed simply because the moral majority think that restraint is

13 Internet Watch Foundation, *2009 Annual and Charity Report*, 18.

14 Under the Postal Services Act 2000, s. 85 and previously under the Postal Services Act 1953, s. 11.

15 *R v Penguin Books* [1961] Crim LR 176.

16 *Handyside v United Kingdom* (1976) 1 EHRR 737.

17 *Report of the Committee on Homosexual Offences and Prostitution*, Cmnd 247 (HMSO: London, 1957).

18 *Report of the Committee on Obscenity and Film Censorship*, Cmnd 7772 (HMSO: London, 1979).

19 H. L. A. Hart, *Law Liberty and Morality* (Oxford University Press: Oxford, 1968).

20 P. Devlin, *The Enforcement of Morals* (Oxford University Press: Oxford, 1968).

21 J. S. Mill (1859) 'On Liberty', *Utilitarianism* (Collins: London, 1979).

22 [1994] 1 AC 212, [1993] 2 All ER 75.

best for the individual.²³ But if the CJIA provisions on extreme pornography relate to harms to others, they would by definition fall within the area of justified intervention on the harm principle. The provisions could also arguably be justified on perfectionist grounds insofar as the law is being used positively to promote autonomy and respect for individuals and to promote a range of good options. Moreover, there are elements of perfectionism within Mill's own work in *On Liberty*.²⁴ The use of coercive legal sanctions within perfectionism is usually used only where other measures have failed, and in that case may be justified if the measure promotes autonomy.²⁵ But the contrast between libertarianism, perfectionism and paternalism is not always so clear cut²⁶ as Mill himself accepts that coercive measures may be legitimate even in cases where choices are freely made, if the impact of that choice is to limit future choices. He gives the example of the person who freely sells himself into slavery and stresses that: 'The principle of freedom cannot require that he should be free not to be free. It is not freedom to be allowed to alienate his freedom'.²⁷ Rightly in most jurisdictions such a contract would be void and unenforceable 'by law or opinion'.²⁸ Maintaining future autonomy and the ability to make choices and decisions in the longer term takes precedence here over the short-term decision to abnegate freedom. Intervention here is justified to allow the individual the opportunity to make future choices and to maintain future freedoms. Similarly, extreme pornography could be seen as a way of expressing hatred and aggression towards women if pain and suffering are depicted as a source of gratification. If women are portrayed as welcoming their suffering and degradation, this does not negate the glorification of pain or make it acceptable because they choose to waive their autonomy.

The new provisions may be justified on perfectionist grounds, insofar as the prohibition is intended to promote human flourishing and a 'good' society rather than relying on offensiveness or paternalism. Rejecting the celebration of violence recognises the moral worth, value and dignity of all human beings. Criminalising possession of extreme material also treats users of sado-masochism (SM) respectfully as demanding dignity because the provisions are aimed at both participants and consumers whose activities may be undignified. It does not condemn the individuals who revel in the violence, but only their activity. A similar approach was taken by the Canadian Supreme Court in *R v Butler* who concluded that degrading and dehumanising pornographic

23 For a Devlinesque analysis of the provisions, see P. Johnson, 'Law, Morality and Disgust: The Relation of "Extreme Pornography" in England and Wales' (2010) 19(2) *Social and Legal Studies* 147.

24 Mill, above n. 21 at ch. 3; see also S. Easton, *The Problem of Pornography: Regulation and the Right to Free Speech* (Routledge: London, 1994).

25 J. Raz, *The Morality of Freedom* (Oxford, Clarendon Press: Oxford, 1986).

26 For discussions of perfectionist liberalism, see Raz, above n. 25, J. Finnis, 'Legal Enforcement of "Duties to Oneself": Kant v Neo-Kantians' (1987) 87 *Columbia Law Review* 433; R. George, *Making Men Moral: Civil Liberties and Public Morality* (Oxford University Press: Oxford, 2001).

27 Mill, above n. 21 at 236.

28 *Ibid.* at 235.

materials 'run against the principles of equality and dignity of all human beings'²⁹ and can justifiably be subject to regulation by the criminal law. Similarly the Consultation Paper argued that extreme material 'would be abhorrent to most people and has no place in UK society'³⁰ because it causes and celebrates suffering, pain and degradation, and the right to harm others is not protected by the free-speech principle. However, because images of rape *per se* were not included in the CJIA provisions unless they also cause physical injury, one of the key targets of the feminist critique of pornography, positive outcome rape, in which women are portrayed as first resisting and then enjoying rape, was excluded. However, the fact that the most extreme materials are included is still a significant change and, as we have seen, the Scottish provisions do include images of rape.

While a programme of regulation on perfectionist grounds is plausible, there is no corresponding perfectionist *defence* of extreme SM, necrophiliac or bestiality-based pornography on the ground that it contributes to human flourishing or human excellence. Indeed it is oxymoronic to describe pornography which extols dehumanisation and degradation as contributing to human flourishing. However, there are clearly groups and individuals who wish to defend the practice of retaining extreme SM pornography on the grounds that it affirms the legitimacy and value of their sexual practices, lifestyle and sexual preferences.

Adherents of bondage and discipline, dominance and submission, sadism and masochism (BDSM), and libertarians have been very critical of the changes. The provisions were opposed by groups representing alternative sexualities including SM Pride and the Spanner Trust, an organisation set up to raise money for the defendants in *Brown* and to lobby to change the law on consensual SM activity. The Consenting Adult Action Network (CAAN) has actively opposed the interference of the state in the sex lives of consenting adults.³¹ The umbrella group, the Sexual Freedom Coalition, has also brought together a range of groups promoting sexual freedom in opposition to the new law.³²

The creation of the new offence was welcomed, however, by the police, some religious groups and charities and campaign groups. For example, those working with survivors of sexual offences, domestic violence and sexual abuse, and in the field of child protection have welcomed the proposals. Rights of Women (ROW) supported the change on the grounds that extreme pornography does contribute to gender inequality through the normalisation of sexualised violence and degrades women.³³ There were 397 responses to the Consultation Paper and a petition opposing extreme pornographic sites and demanding change organised by Martin Salter MP and the Jane Longhurst Trust was

29 *R v Butler* [1992] 1 SCR 452.

30 Home Office, above n. 9 at 1.

31 See <http://www.caan.org.uk/>, accessed 31 July 2011.

32 See <http://www.sfc.org.uk/>, accessed 31 July 2011.

33 ROW, *Response to Possession of Extreme Pornography Consultation Paper* (London November 2005).

signed by 50,000 people. Most of the organisations who responded supported the proposals while the majority of individual respondents opposed them. Meetings were held with interested parties including the Internet Watch Foundation, BBC, Channel 4 and the British Board of Film Classification. Responses to the Consultation Paper and the Government's response were published in August 2006, and the Bill was introduced to the Commons on 26 June 2007.³⁴ The original proposals in the Consultation Paper were amended in the light of responses, and the threshold of violence and scope of the provisions were clarified.

Opponents to the Bill focused on the crucial significance of consent to distinguish SM from ordinary criminal assaults, while supporters have emphasised the way in which extreme pornography legitimates violent and abusive sex and redefines that abuse as normal. In *R v Coutts*,³⁵ the defendant argued that the victim had welcomed this rough sexual activity and consented to the risk. The issue of consent therefore will be considered in more detail.

Should consent be the key issue?

Bestiality and necrophilia

As we have seen, the new proposals also focus on necrophilia and bestiality although these changes have been less controversial as the use of corpses and animals is clearly non-consensual. Bestiality also raises animal welfare and rights issues as it shows a failure to treat animals with respect, although this might be less significant than intensive farming and animal experimentation, in terms of the numbers involved and the harms caused. Depictions of bestiality are arguably degrading not just because animals are incapable of consenting, but because it is inherently degrading to both humans and animals to commit those acts. If an animal actively pursued a human for sexual purposes, it would not follow that a film of this liaison is something which should be protected as a cornerstone of free speech. Similarly, necrophilia is degrading irrespective of the consent issue. Even if individuals made a living will giving permission for their corpse to be used in pornographic productions after their death, this is unlikely to persuade people that the act or the depiction of it is acceptable, any more than we would tolerate any other act of treating a body disrespectfully, even with the owner's consent. For example, in the German cannibal case the defendant, Armin Miewes, argued in his defence to a charge of murder that the victim, Bernd-Jurgen Brandes, had volunteered to take part and had consented to be killed and eaten by Miewes. The victim had responded to an advertisement on the internet for precisely this activity and Miewes was apprehended only after a second advertisement for another 'volunteer' was brought to the attention of the police. Not surprisingly this consent defence failed, and in 2004 Miewes was convicted of manslaughter and sentenced to eight years in prison.

34 Home Office, *Consultation on the Possession of Extreme Pornographic Material, Summary of Responses and Next Steps* (London, NOMS, August 2006).

35 *R v Coutts* [2005] EWCA Crim 52.

A person commits the offence of intercourse with an animal under s. 69 of the Sexual Offences Act 2003 if he intentionally performs an act of penetration with his penis and what is penetrated is the vagina or anus of a living animal and he knows or is reckless as to whether that is what is penetrated. An offence is also committed where the perpetrator allows or causes her vagina or his or her anus to be penetrated by the penis of a living animal and the perpetrator is reckless as to whether that is what he or she is being penetrated by. The maximum penalty is six months' imprisonment or a maximum fine in the magistrates' courts, and a maximum two years on indictment. The Sexual Offences Act 2003 also created a new offence of sexual penetration of a corpse punishable by two years' imprisonment.³⁶ An offence is committed if a person intentionally performs an act of penetration with a part of his body or anything else, and what is penetrated is a part of a body of a dead person, he knows or is reckless as to whether that is what is penetrated and the penetration is sexual. Because the person being penetrated must be dead, this would not apply to the presumably rare cases where a person dies during sex, or where it is not known that the person is dead. But the penalties for the substantive offences of intercourse with a live animal and sexual penetration of a corpse carry the same sentences as possession of images of these acts under the CJIA. It seems odd to treat them as being of equal gravity and raises the question of whether this undermines the potential deterrent effect of the more serious offence.

If bestiality and necrophilia and inflicting grievous bodily harm are crimes, then does filming such material necessarily involve criminal acts to obtain the material? We know from mainstream cinema that such acts may be realistically simulated. But even if simulated, or depicted through computer-generated imagery or animatronics, such material would arguably still be problematic if it constitutes a celebration of extreme sexual violence which may legitimate that violence and thereby increase the demand for such material.

Interpersonal violence

The examples of extreme sexual violence envisaged falling within the offence created by the CJIA would be acts likely to cause death or serious injury rather than transient or trifling. Consent is insufficient to negate a charge of actual or grievous bodily harm, as the House of Lords made clear in *R v Brown, Laskey and Jaggard*.³⁷ The existence of consent to extreme violence for the purpose of sexual gratification and to the recording of the violence for sexual or commercial purposes does not negate the fact that the behaviour is physically harmful as well as degrading. But the provisions in the CJIA extend to realistic *images* or depictions of violence which critics see as particularly oppressive. Of course, even if the violence is simulated, this still constitutes a glorification of violence and as such may be seen as inhuman and degrading for

³⁶ Sexual Offences Act 2003, s. 70. Prior to the Act the only protection for the dead was a provision preventing exhumation of a corpse without lawful authority.

³⁷ [1993] 2 All ER 75, [1994] 1 AC 212.

participants and impact on the wider society, but indirect harm would be seen by critics as too remote to justify controls.

The aim of the new provisions is to protect participants whether or not they 'notionally or genuinely consent'.³⁸ But the failure to include a consent defence in the new provision has attracted criticism from sexual libertarians who argue that resources should be focused on policing material involving children, but not adults. It has been widely held since Wolfenden that the private sexual moralities of consenting adults are not a matter for government interference. The issue of consent lies at the heart of libertarian objections to the law, despite increasing awareness of the existence of coercion at the heart of the sex industry in Europe and worldwide.³⁹ The inability to consent to acts of violence is well established in the criminal law.⁴⁰ If the activities covered by the Act are themselves unlawful, it is not possible to consent to those activities, so by definition engaging in them means committing a criminal offence.⁴¹ In *R v Brown, Laskey and Jaggard*,⁴² where the defendants were convicted for causing actual and grievous bodily harm, or what might be defined as torture, consent did not render lawful the acts, which included the nailing of a penis to a bench and dripping hot wax into a participant's penis, lawful, even though they did not cause permanent harm and were solely for purposes of sexual gratification. The majority of the House of Lords affirmed that where these injuries were intentionally inflicted, consent is an insufficient basis for a special defence. Lord Templeman argued that if people were permitted to indulge in what is essentially consensual torture, then this may well lead to non-consensual torture. Society is entitled, he argued, to protect itself against a cult of violence which is morally corrupting. The minority opinion was that such activities might be undesirable, but if the injuries were not serious, then the law should be tolerant unless the public interest is threatened. However, the European Court of Human Rights deemed the government's response proportionate given the extreme nature of the activities.⁴³ The Law Commission has also argued that people should have the right to consent to any injury falling short of serious disablement. But if the person intentionally or recklessly causes serious disabling injury, this should remain a criminal offence even if a person consents to injury or risk.⁴⁴

While the House of Lords in *Brown, Laskey and Jaggard* stressed the issue was not the fact that the defendants were gay, but that the practices

38 See Home Office, above n. 9 at para. 34.

39 A consent defence was also excluded from earlier attempts to control extreme material in the US in the Indianapolis Ordinance drafted by MacKinnon and Dworkin: see C. Mackinnon *Feminism Unmodified* (Harvard University Press: Cambridge MA, 1984).

40 *R v Donovan* [1934] 2 KB 498.

41 Criminal Justice and Immigration Act 2008 Explanatory Notes, para. 803.

42 [1994] 1 AC 212, [1993] 2 All ER 75.

43 See *Laskey, Jaggard, and Brown v United Kingdom* (1997) 24 EHRR 39.

44 Law Commission, *Consent in the Criminal Law*, Law Com. Consultation Paper No. 139 (1995).

were so extreme,⁴⁵ the decision was widely perceived by the BDSM community as homophobic and that a consent defence in the case of consenting heterosexual couples would have been treated differently. For example, in *R v Wilson*,⁴⁶ where a husband branded his initials on his wife's buttocks, a consent defence succeeded.

The criminal law has not always been consistent on the issue of consent,⁴⁷ allowing some exceptions for sports such as boxing, even though the physical damage may be permanent and severe, and also for tattooing and cosmetic surgery which are also potentially dangerous and in some cases have had catastrophic effects, but individuals' rights here may trump the public's concerns or distaste. But these exceptions are very limited, and the activities in question are highly regulated. The decision in *Brown, Laskey and Jaggard* simply reflects, as Wilson argues, the 'social taboo against the infliction of injury on another'.⁴⁸ This taboo, he stresses, is a key building block in UK society and to reduce it simply to an issue of consent misses what is at issue here which is our 'humanity'.⁴⁹ 'Even a tolerant pluralistic society', he argues, 'must enforce one fundamental residual moral value', namely that hurting people is wrong.⁵⁰ Like the prohibitions on necrophilia or incest, these are key symbols of a society's self-perception. Where to draw the line may be difficult in some cases, but sexual motivation is not a sufficient marker.

Realistic depictions of more extreme violence may be seen as unacceptable because they embody a glorification of violence, rather than simply because we may find them offensive or distasteful. Although the debate has been defined by critics of the new law as one between libertarianism and paternalism or moral authoritarianism, this misconstrues the division. The provisions are not based on paternalistic grounds—to stop people hurting themselves for their own benefit—as this would be irrelevant to simulated harm, but rather may be justified on perfectionist grounds, as making a statement about the type of society in which individuals want to live, namely one which promotes autonomy and respect for individuals. Sanctioning a free market in extreme materials would run counter to these values. Even if a violent encounter is simulated, by definition it fails to treat individuals with dignity and respect and it would be hard to defend for that reason. Defenders of SM see the use of such material as valuable in exploring alternative sexualities and as a key element of their freedom of sexual expression, just as some practitioners of self-flagellation, for example, may see it as part of their religious expression. But if recipients of

45 Similarly the court in *Max Mosley v News Group Newspapers Ltd* [2008] EWHC 177, a privacy case, described the activities in *R v Brown, Laskey and Jaggard* as 'extremely dangerous' (at [116]).

46 (1996) 2 Cr App R 241.

47 See C. Elliott and C. de Than, 'The Case for a Rational Reconstruction of Consent in the Criminal Law' (2007) 70 MLR 225.

48 W. Wilson, 'Is Hurting People Wrong?' (1992) 5 *Journal of Social Welfare and Family Law* 388 at 395.

49 *Ibid.*

50 *Ibid.* at 393.

violence are portrayed as *enjoying* their abuse and degradation, this represents an even more negative depiction of human values and human worth. As the Canadian Supreme Court observed in *R v Butler*:

In the appreciation of whether material is degrading or dehumanizing, the appearance of consent is not necessarily determinative. Consent cannot save materials that otherwise contain degrading or dehumanizing scenes. Sometimes the very appearance of consent makes the depicted acts even more degrading or dehumanizing.⁵¹

In *Brown, Laskey and Jaggard*, the violence included activities which would normally be described as torture if committed by state officials in the context of interrogation and widely and rightly condemned, yet the right to torture in the private sphere was defended by the appellants.

However, while consent cannot render unlawful practices lawful, consent is relevant to the issue of law enforcement. While SM itself is illegal if the harm is more than trivial, it is unlikely to come to the attention of the police unless there is a visual record of the activity so SM devotees will be able for the most part to continue with their activities and lifestyle. It may be difficult to police SM in the absence of complaints, and in *Brown, Laskey and Jaggard* the activities came to the attention of the police when one of the defendants was questioned on another matter and the police found a video-recording of the group's activities. It was the existence of the recording which brought the acts to their attention and provided evidence to support a prosecution. But, as we shall see, the police are not actively seeking out depictions of consensual SM material although knowing that material may come to their attention could have a chilling effect on individuals and groups.

Criminalising law-abiding citizens?

There is also a concern that the provisions are overbroad and may criminalise and stigmatise law-abiding citizens, namely individuals who take photos of themselves and their partners for their own purposes, and with the consent of all parties. This issue was raised at the consultation stage by Liberty, Justice and by representatives of the BDSM community, who point out that couples who record consensual sado-masochistic acts could be committing an offence if they leave those images on a digital camera.⁵² A petition against the Bill received 1,800 signatures. The campaign against the Bill was supported by anti-censorship groups and civil libertarians. Critics argued that SM participants see themselves as active contributors rather than passive victims who need protection.⁵³ The BDSM community also wanted an exception for educational material using a public good defence, as they provide safety advice and

51 *R v Butler* [1992] 1 SCR 452.

52 See Liberty, *Response to Second Reading on the Criminal Justice and Immigration Bill 2007* (2007); E. Metcalfe and S. Ireland, *Criminal Justice and Immigration Bill: Briefing for House of Lords Second Reading* (JUSTICE: London, January 2008) para. 12.

53 See <http://www.backlash-uk.org.uk/>, accessed 31 July 2011.

training, including workshops, designed to show how to practise safe SM precisely because these may be high-risk activities and SM practices have been implicated in some accidental and unexplained deaths.

Concerns that those who innocently come across the material⁵⁴ or who encounter it in the course of their work would be caught by the provisions have been addressed by the defences of accidental possession of unsolicited material and of a legitimate reason in the course of one's work in s. 65. The requirement to obtain the consent of the DPP to prosecute will also act as a further restraint on inappropriate prosecution. However, proving the absence of intent to obtain or retain the material in other cases may be difficult. Liberty⁵⁵ wanted the burden on the prosecution to prove deliberate access, but in the CJIA the burden is expressly on the defence (s. 65(1)) and it may be difficult for the defendant to prove he did not intend to keep it. Usually deletion of an unsolicited image is sufficient to protect the individual, but this could depend on whether the person had the skill to retrieve it after deletion.⁵⁶ Liberty⁵⁷ questioned whether the provisions were justified or sufficiently certain. But if restrictions are justified, it argued, they must be proportionate and not overbroad.

The analogy has frequently been drawn between those who practise SM and the position of homosexuals before the decriminalisation of homosexuality, when not only were their sexual preferences criminalised, but the policing and prosecution of homosexuals presented them as an object of revulsion to the public. While sexual orientation is now a characteristic protected by equality law, BDSM, it has been argued, remains the target of repressive laws, and its adherents are presented as following a morally repugnant lifestyle. If people find it objectionable because they personally find it distasteful, then mere revulsion or distaste on the part of the majority who practise what the BDSM community describe as 'vanilla sex' cannot justify the repression of a minority.⁵⁸ Moreover, if practitioners of SM are not sure if they are committing an offence, this would have a chilling effect, encourage sexual repression and feelings of guilt over their sexuality akin, argues Backlash, to the position of gays prior to 1967. Criminalising such activities may also expose individuals to the risk of blackmail and invasion of their privacy by lurid press reporting especially if they are well known to the public as in the *Mosley* case.⁵⁹

Backlash also questions whether the violence in SM productions is real, as one would expect to see the injured attracting the attention of the police. They criticise the lack of evidence to support the assumption

54 For example, Rights of Women, although supporting change were concerned about this but saw a provision similar to s. 160(2) of the Criminal Justice Act 1988 as addressing this problem.

55 Liberty, above n. 52 at para. 77

56 See *R v Porter* [2006] EWCA Crim 560, [2006] 1 WLR 2633

57 Liberty, above n. 52.

58 For a discussion of the role of disgust in shaping these provisions, see Johnson, above n. 23.

59 *Max Mosley v News Group Newspapers Ltd* [2008] EWHC 177 at [152], although Mosley successfully sued for that invasion of privacy.

that the films incorporate genuine abuse and find it absurd to criminalise possession of material where injuries are 'staged'.⁶⁰ The new law, they argue, criminalises sexual fantasies which may be part of individuals' self-expression and their relationships.

The focus on realistic and explicit depiction is intended to avoid having to prove the actual activity occurred, which would be impossible as much of the material originates outside the UK, or the source may be unknown. Similarly, it is also difficult to prove in such cases whether or not the activity is consensual. These problems might be dealt with by a statement on websites, that the parties consented,⁶¹ or the violence was simulated not real, or a note on the file that it contains material of consenting adults filming their own acts for their own use and that the participants are adults over 18, but it is difficult to see how the truth of these statements could be verified.

Backlash⁶² argues that if legislation is necessary, it should be limited to material which involves abused and non-consenting participants so those who participate in staged and otherwise non-abusive productions are excluded. They also distinguish between participants who enjoy viewing material which reflects their own sexual identities and those who view such material because they enjoy seeing an individual being raped or abused and for whom pain is essential to the sexual gratification. But again it is difficult to see how a jury might apply such a distinction in practice.

Down the slippery slope: the threat to free speech

However, there are also concerns that these provisions, combined with other recent provisions criminalising speech over recent years, are part of a slippery slope which may lead to political and artistic speech being threatened.⁶³ If what is being criminalised is a mere depiction of violence—rather than real violence—then the attack on free speech is even more damaging. A person could run the risk of a three-year sentence for looking at a picture of someone who appears to be dead or injured, but is not. But these fears may be misplaced. The free-standing offence of possession of abusive and violent pornography in the CJIA is intended to cover works produced solely or primarily for the purposes of sexual arousal, but it would not catch news items broadcast in the public interest, artistic work or scientific research. Extreme violence is frequently found in news coverage of violent events and conflicts around the world and the results of torture and abuse are often reported and shown in this context, but this is clearly distinguished by the fact that this material is not intended for sexual arousal.

60 Backlash, 'Misleading Claims', available at <http://www.backlash.org.uk>, accessed 31 July 2011.

61 This suggestion was made by the Bar Council in its response to the Consultation Paper in which it advocated a consent defence.

62 Backlash, above n. 60.

63 See, e.g., Cyber-Rights and Cyber-Liberties, a group which protects the free speech interest of internet users. See *Possession of Extreme Pornography Consultation: Cyber.Rights.Org response* (1 December 2005).

But critics might argue that the mere existence of the provisions could have a chilling effect on filmmakers. There could also be some inconsistency if, for example, a violent scene in an artistic production was lawful, but possession of the same scene for sexual gratification would be unlawful. So a user would have to consider what the intent of the producer of the image was, whether it was intended for sexual arousal or some other purpose. The BBFC, in its response to the Consultation Paper, supported the aims of the proposals although it was concerned over the definitions used and the implications of the changes although works classified by the BBFC under the Video Recordings Act 1984 are excluded from the extreme pornography offences in the CJIA. Many films now given a BBFC 18 certificate contain realistic depictions of violence, often within a sexual context. Material classified as R18 (Restricted) can be shown only in special licensed cinemas or sex shops to persons not younger than 18. However, the exclusions from the R18 classification include material showing the infliction of pain or acts which may cause lasting physical harm, whether real or (in a sexual context) simulated.⁶⁴

In some cases artistic merit may be strengthened by the fact that violence is presented in a realistic manner. The opening scenes of Spielberg's *Saving Private Ryan*, for example, are widely praised by survivors and film critics, for their accuracy in capturing the reality of the D-Day landings. The dividing point between artistic endeavour and sadism may not always be clear, for example, in the discussion over the filming of a dog tied up and starving to death by the artist, Guillermo Vargas, condemned by animal rights activists.

But limits on speech to prevent crime and to protect public morals are well established. The determination of appropriate limits to speech involves considering whether the free-speech rights of consumers should be given priority over the rights of the 'subjects/objects' portrayed in that material. The traditional justifications of free speech in Anglo-American jurisprudence have focused primarily on its importance as part of individual autonomy, facilitating a range of ideas which contribute to social progress and human diversity, and promoting participation in the political life of a democracy. For this reason, opinions on matters of politics, religion and ways of organising society have been highly prized and protected, so the First Amendment, for example, was intended primarily to deal with political speech.⁶⁵ Pornography in most jurisdictions has not been weighted as deserving the strongest free-speech protection.⁶⁶

Any restraints on free speech must be proportionate, linked to a legitimate goal to prevent crime, and use the least restrictive means available. There must be a nexus between the goal and the means to achieve it for the proportionality principle to be satisfied.⁶⁷ But to some

⁶⁴ See <http://www.bbfc.co.uk/>.

⁶⁵ *Young v American Mini-Theatres* 427 US 50 (1976) at 70.

⁶⁶ See *R v Butler* [1992] 1 SCR 452 in the Canadian Supreme Court, European Convention jurisprudence.

⁶⁷ *R v Keegstra* [1990] 3 SCR 697; *Lingens v Austria* (1986) 8 EHRR 103.

the provisions seem excessive. Criticism of the CJIA has come from organisations such as JUSTICE⁶⁸ who argue the provisions are over-broad and as such amount to a disproportionate interference with the right to freedom of expression under Article 10 of the European Convention on Human Rights, as well as from groups representing alternative sexualities. There are concerns that the provisions violate key Convention rights, including freedom of expression under Article 10 and the right to private life under Article 8, so Rabinder Singh has expressed concern over potential breaches of Articles 8 and 10 and also possibly Article 14, and the need to strike the right balance between the interests of the community and the individual's private rights.⁶⁹

The Parliamentary Joint Committee on Human Rights was also concerned over whether it satisfied the criterion of proportionality and was sufficiently precise and went beyond what was necessary to achieve the objective. The provisions arguably strike at the right to privacy as it covers consumption in one's own home.⁷⁰

But these rights to privacy and freedom of expression may conflict with the rights of participants under Article 3, the right not to be subjected to inhuman and degrading treatment. There is a duty on states to protect individuals from this, as well as to protect the right to life under Article 2, which may arise in relation to very dangerous practices and rights under Articles 2 and 3 would usually take precedence over rights under Articles 8 and 10 when they come into conflict.⁷¹

While the extreme pornography provisions may *prima facie* infringe Articles 8 and 10, in the view of the UK government, they fall within the qualifications in Articles 8(2) and 10(2)⁷² as they are in accordance with the law, and necessary in a democratic society for the prevention of crime, for the protection of morals and for the protection of the rights and freedoms of others and are therefore Convention compliant. The European Court of Human Rights has given states a wide margin of appreciation on matters affecting public morals. It is also clear from Article 10 jurisprudence that political and artistic speech are given a higher weighting than commercial speech by the European Court of Human Rights and the domestic courts, so pornography may command less protection.⁷³ However, there is still the question of whether less restrictive measures could be used. If the rationale for controls on internet pornography is to prevent children being exposed to this material especially as young people are the largest users of the internet,

68 Metcalfe and Ireland, above n. 52 at para. 12.

69 Opinion for the Spanner Trust and Backlash, November 2005, see <http://www.backlash-uk.org.uk/>, accessed 31 July 2011.

70 As affirmed by the US Supreme Court in *Stanley v Georgia* 394 US 597 (1969).

71 Article 8 has also superseded Article 10 in privacy cases, e.g., *Campbell v MGN Ltd* [2004] 2 AC 457, *Douglas v Hello Ltd* [2001] QB 167, *Mosley v News Group Newspapers Ltd* [2008] EWHC 177 (QB).

72 Home Office, *Consultation: on the Possession of Extreme Pornographic Material* (Home Office/NOMS/Scottish Executive: London, August 2005), para. 57.

73 See *Jameel (Mohammed) v Wall Street Journal Europe Sprl* [2007] 1 AC 359 at [147], *Wingrove v United Kingdom* (1997) 24 EHRR 1 and *Lingens v Austria* (1986) 8 EHRR 103.

this could be addressed by less restrictive measures such as software filters as the US Supreme Court concluded in *Ashcroft v ACLU*.⁷⁴ But this would not address the problem of harm to participants.

Speculative or proven harm?

A key issue in the debate is finding conclusive empirical evidence on the link between viewing material and committing criminal acts. This was acknowledged in the 2005 Home Office Consultation Paper and for this reason many might see the provisions in the CJIA as disproportionate, in criminalising the sexual preferences of otherwise law-abiding citizens simply on the basis of speculation on the adverse effects of possession, rather than on conclusive evidence of a causal connection. So a form of expression is crushed on the basis of content which cannot be justified for libertarians.

The Consultation Paper stated: 'We do not yet have sufficient evidence from which to draw any definite conclusions as to the likely long term impact of this kind of material on individuals generally, or on those who may already be predisposed to violent or aberrant sexual behaviour.'⁷⁵ But it was clear that the question raised was whether the material, which is the object of the offence, is 'so violent, degrading and potentially harmful that its possession should be controlled'.⁷⁶ It acknowledged that there are few large-scale studies to examine the links between liberalisation and sexual offending rates and that there would be ethical problems in conducting an appropriate study, or to replicate material:

Given the many different approaches to conducting the research and framing the questions, as well as differences in the nature of the material examined, we are unable, at present, to draw any definite conclusions based on research as to the likely long term impact of this kind of material on individuals generally, or those who may already be predisposed to violent or aberrant sexual behaviour.⁷⁷

It also said that while 'we recognise that accessing such material does not necessarily cause criminal activity, we consider the moral and public protection case against allowing this kind of material sufficiently strong to make this option unattractive'.⁷⁸ It noted that:

We believe from the observations of the police and others who investigate it, that the material may cause serious physical and other harm to those involved in making it; in some cases the participants are clearly the victims of criminal offences. We consider that it is possible that such material may encourage or reinforce interest in violent and aberrant sexual activity to the detriment of society as a whole.⁷⁹

74 542 US 656 (2004).

75 Home Office, above n. 9 at 1.

76 *Ibid.* at para. 2.

77 *Ibid.* at para. 31.

78 *Ibid.* at para. 52.

79 *Ibid.* at para. 27.

It also drew attention to the fact that: 'There is a substantial body of research which explores the effects of pornography on attitudes, beliefs and behaviour'.⁸⁰

But there is some evidence on the impact of extreme pornography. There have been many studies examining the impact of mainstream and sexually violent pornography on individuals and society conducted since the 1970s and 1980s, that is, during the period of liberalisation of the pornography market, as well as attitudinal studies and empirical work. We also have experimental research on the impact of material on 'normal adults',⁸¹ conducted in laboratory conditions. Research on the impact of extreme material raises ethical as well as methodological problems, so, for example, it would be unethical to circulate extreme materials to see if they lead to an increase in sexual offences. A rapid evidence assessment was conducted by Itzin *et al.*⁸² for the Home Office/ Department of Health, which reviewed relevant primary and qualitative research studies, to see whether there was any evidence of adverse effects. It concluded that the available research evidence 'supports the existence of some harmful effects from extreme pornography on some who access it. These included the increased risk of developing pro-rape attitudes, beliefs and behaviours, and committing sexual offences'.⁸³ While these effects also resulted from some non-extreme pornography, the effects were most negative from those viewing violent and extreme pornography and bestiality. Men predisposed to aggression were more susceptible than others to these effects from extreme pornographic material and this was corroborated by a number of studies. The review found that sex offenders are more aroused by explicit material especially if the content matches their crimes. Extreme material may affect those already predisposed to violent and other sexually offending behaviour as pornographic material may be used by sex offenders to validate their activities.⁸⁴

Itzin *et al.* could find no available evidence on the effects of viewing pornographic material containing scenes of necrophilia and no formal research studies of the effects on participants of extreme pornography. However, we do have documentary evidence and testimony in legal proceedings, including from the Minneapolis hearings,⁸⁵ which testifies to the harms to participants. The reviewers also note that not enough is known enough about the effect of victims of extreme pornography or on the attitudes of young people or the links between prostitution and pornography.⁸⁶ However, some defenders of pornography have pointed

80 Above n. 75 at para 28.

81 D. Zillman and J. Bryant, 'Pornography, Sexual Callousness and the Trivialization of Rape' (1982) 32(4) *Journal of Communication* 10.

82 See C. Itzin, A. Taket and L. Kelly, *The Evidence of Harm to Adults Relating to Exposure to Extreme Pornographic Material: A Rapid Evidence Assessment (REA)*, Ministry of Justice Research Series 11/07 (September 2007).

83 *Ibid.* at iii.

84 See D. Howitt and K. Sheldon, *Sex Offenders and the Internet* (Wiley: Chichester, 2007) for a review of the literature on the use of the internet by sex offenders.

85 See C. MacKinnon and A. Dworkin (eds), *In Harm's Way: The Pornography Civil Rights Hearings* (Harvard University Press: Cambridge MA, 1998).

86 Above n. 82 at 7.

to its benefits in preventing crimes of violence, including providing an outlet for sexual tensions.

In any event the case for criminalising possession does not rest solely on conclusive proof of imitative crimes, even though there may be cases where there is a striking similarity between events depicted and subsequent criminal acts, notably in the *Coutts* case. Viewing and enjoying images of torture and abuse is arguably inherently degrading to viewers as well as participants. The justification here is perfectionist rather than paternalist. Because of the problems of proof, most critics are more concerned with the wider cultural climate and the message the material conveys in treating women as less worthy of respect. This was clearly enunciated by the Canadian Supreme Court in *R v Butler*.⁸⁷

Critics have also challenged the fact that the new provisions treat adult pornography akin to pornography containing images of child sexual abuse, by using the regulation of the latter as a model for s. 63, and argue that material on adults and children raise quite different issues. Children obviously cannot be deemed to consent to participation in pornographic enterprises and such pornography records what is clearly a criminal offence and constitutes a permanent record of abuse and exploitation.

But the divide between extreme adult pornography and material recording child sexual abuse is not as great as many libertarians assume. Both record and incorporate sexual abuse and both contribute to a cultural climate in which women and children lack dignity, respect and humanity, and are seen as legitimate objects of violence and abuse. Adult pornography may also be used to encourage and groom children to participate in sexual activities. For this reason agencies working with vulnerable adults and young people, including Barnardos, have supported the changes in the CJIA. The role of adult pornography in child abuse is also recognised in the Sexual Offences Act 2003, which creates a new offence of causing a child to watch a sexual act, committed if the perpetrator for the purposes of sexual gratification intentionally causes a person under 16 to watch a third person engaging in an activity or to look at an image of any person engaging in an activity and the activity is sexual.⁸⁸ As we shall see, several of those convicted under the CJIA extreme pornography provisions have also been convicted of possessing images of child sexual abuse.

The impact of the provisions

Since the provisions came into force in January 2009 there have been relatively few prosecutions. At that time, an ACPO representative made clear that the police would not actively seek out users of the material, but would pursue those instances they come across, although the police

⁸⁷ (1992) 1 SCR 452.

⁸⁸ Sexual Offences Act 2003, s. 12.

were criticised by women's groups for not proactively targeting offenders.⁸⁹ Clearly the policing of images involving children remains the priority for the police. The Ministry of Justice said that it anticipated 30 cases a year of whom 10 would go to prison for an average of six months.⁹⁰ Despite the concern expressed by sexual libertarians when the law was passed of thousands of law-abiding people being taken before the courts, there have been relatively few prosecutions.⁹¹ The offence is triable either way and because some of the cases have appeared before the magistrates' courts, they may be unreported. However, anti-censorship and sexual libertarian groups have been trawling local newspapers and reports for information.

The pattern which is emerging is that prosecutions are usually combined with prosecutions for other, often more serious offences, and that the extreme material targeted often involves sex with animals. A review by *The Register*, an online anti-censorship group, of the first year of the CJIA found 26 cases of which 24 were 'add-on crimes' and two concerned only extreme pornography.⁹² In the first case to be heard in the magistrates' court, the 20-year-old defendant received an 18-month supervision order and 24 hours' attendance at an attendance centre for possession of images including women and animals.⁹³ The magistrate said the individual had low social skills and the material was only for his own use. The first person sentenced under the CJIA was given to Stephen Sinclair in Newcastle Crown Court in September 2009; he was sentenced to six months for possession of extreme pornographic images of bestiality in addition to seven-and-a-half years' imprisonment for drugs offences.

John Ridley was convicted for possession of 50 images of extreme pornography and over 30 indecent images. The material included pseudo images of sexual activity with gorillas and dogs. He was given a three-year community order, a sexual offences prevention order and ordered to undergo sex-offender treatment.⁹⁴ Neil Bowyer was sentenced to two years by Newcastle Crown Court for a range of offences, including making an indecent photo of a child and possession of extreme pornography.⁹⁵ A Bournemouth dentist, David Hill, escaped a prison sentence after being convicted of possession of extreme images involving bondage and infliction of pain, and was given a two-year community order and a three-month curfew.⁹⁶ Darren Halliwell was convicted in 2011 at Southampton Crown Court of possession of extreme pornographic images involving a dog, as well as possessing 5,000

89 See R. Williams, 'Police will not target offenders against law on violent pornography', *Guardian*, 26 January 2009.

90 *Ibid.*

91 'How many tens or hundreds or thousands of people are going to be dragged into a police station, have their homes turned upside down, their computers stolen and their neighbours suspecting them of all sorts?': Deborah Hyde, from *Backlash*, reported in *BBC News Magazine*, 29 April 2008.

92 See <http://www.theregister.co.uk/>, accessed 31 July 2011.

93 Reported in *St Helen's Star*, 18 June 2009.

94 *Northampton Chronicle*, 10 February 2010.

95 *Evening Chronicle*, 13 November 2010.

96 *Bournemouth Echo*, 23 August 2010.

indecent photographs of children and given a three-year community order with a supervision requirement, required to undergo a sexual offenders' treatment programme and to carry out 100 hours' unpaid work.⁹⁷

The first person to be convicted of possession of an extreme pornographic image in Northern Ireland was Alan Moore in July 2010. He was sentenced by Belfast Crown Court to a minimum of five years in January 2011 on charges including the indecent assault of a girl of 15 and taking photographs of the girl. It was noted by the judge at his trial that pornographic images had been used for the grooming of the girl.⁹⁸ However, a case against Michael Silk was discontinued by the CPS because it could not be established that the accused, who was an old-age pensioner, had viewed the images. The prosecution offered no further evidence and the judge directed an acquittal.⁹⁹ In another case, the animal in the material was found to be the Frosties tiger and as such clearly not a realistic image, and the case was discontinued.¹⁰⁰

So far in 2011, there have been few reported cases, but the most notorious was Colin Blanchard who was found to be at the centre of a paedophile ring. Blanchard faced 17 child pornography charges involving indecent images of children, but also possession of extreme pornographic images, including sexual acts with his pet dog. He was given an indeterminate sentence with a minimum of five years.¹⁰¹ In the magistrates' court, Stuart Nelson was convicted at Oxford Magistrates' Court of possession of indecent photos/pseudo photos of children and three counts of extreme pornography involving acts with an animal and given a one-year supervision order.¹⁰² He was also placed on the Sex Offender Register for five years. While it is difficult to generalise from a few cases, the fact that there are only a few reported cases and prosecutions suggests that fears of numerous over-zealous prosecutions are misplaced. The fact that sex with animals predominates in the images in the above prosecutions may reflect the popularity of bestiality as a pornographic genre or possibly that the police focus on it because it is much clearer cut, so there is less room for argument about the levels of violence involved as might occur in relation to interpersonal sex.

Conclusion

The fact that there are relatively few prosecutions would not reassure those who see the law as flawed as a matter of principle and who think that the mere existence of the law may still have a chilling effect on potential users and couples. However, despite the problems discussed above, the provisions arguably do strike a balance between the rights of individuals and preventing harms to others and have not resulted in

⁹⁷ *Southern Daily Echo*, 16 July 2011.

⁹⁸ *Belfast Telegraph*, 25 January 2011.

⁹⁹ *Kent Online*, 15 June 2010.

¹⁰⁰ The accused Michael Holland is currently facing a retrial on other charges.

¹⁰¹ *Liverpool Echo*, 11 January 2011.

¹⁰² *Oxford Times*, 14 February 2011.

excessive intervention in individuals' private lives. Even if s. 63 of the CJIA has led to few convictions, the threat of proceedings may deter potential users and protect participants. The new law reasserts the key values of the right not to be subjected to degrading treatment and the promotion of human flourishing.