

A critique of the Government's proposed legislation on 'extreme' pornography

Introduction

This paper considers the Government's case for its proposed ban on the possession of so-called extreme pornography, as argued in its consultation paper, *On the possession of extreme pornographic material*. Its contention is that the Government's case is not only flawed in its reasoning, but also profoundly mischaracterises the material under scrutiny, the sites that host it and the communities they serve. Also, that it misrepresents the degree to which the proposal intrudes on both private life and freedom of expression.

Before addressing these issues in detail, one point needs to be made very clearly, in view of the prominence the Government has given to the case of Graham Coutts:¹ there is *no excuse whatsoever* for what Coutts did. He took a life, and brought incalculable pain upon those who loved his victim. It is appropriate that he should remain in prison, and none of what follows is an attempt to defend his behaviour.

The Government's main arguments

The Government offers the following justifications for the proposed legislation:²

- 1) The material on these sites 'may encourage or reinforce interest in violent or aberrant sexual activity'. (Executive Summary, p.1; §27)³
- 2) An intention to break the cycle of supply and demand for this material. (Executive Summary, p.1)
- 3) An intention to protect those who might actually be harmed in the production of this material. (Executive Summary, p.2)
- 4) An intention to protect society in general from exposure to this material. (Executive Summary, p.2)
- 5) An intention to protect children in particular from exposure to this material. (Executive Summary, p.2)
- 6) That most people would find this material 'abhorrent'. (Foreword; Executive Summary, p.1; §11; §57)

Definition of the material under scrutiny

The Government defines the material under scrutiny in the following way: first, it must qualify as 'pornography' where this is defined as 'material that has been solely

¹ 'Particular concern has been raised recently about the accessibility of extreme pornographic material. This has been heightened by a recent tragic case where a young woman was murdered by a man who had been accessing such sites on the Internet. During the trial it was revealed that he had visited these sites prior to and after the victim's death.' §10

² Some of these justifications are clearly flagged in the consultation paper, e.g. (2)-(5), while others appear less prominently in the body of the text, e.g. (1) and (6). However, as we will see, (1) and (6) emerge as in many ways the most important arguments the Government deploys.

³ The reference to the Coutts case is clearly intended to support this claim.

or primarily produced for the purpose of sexual arousal’ (§37); second, it must contain ‘actual scenes or realistic depictions of:

- i) intercourse or oral sex with an animal;
- ii) sexual interference with a human corpse;
- iii) serious violence in a sexual context, and
- iv) serious sexual violence.’ (§39)

‘Serious violence’ is in turn defined as ‘violence in respect of which a prosecution of grievous bodily harm could be brought in England and Wales or in Scotland, assault to severe injury’ (§41). All such content is defined by the Government as involving only adults – not children.

This definition means that two pieces of material could be indistinguishable in themselves, yet one would be illegal to possess (if it qualified as pornography) while the other would not (if it were, for example, a scene from a mainstream horror film). This might seem counter-intuitive, but is not straightforwardly inconsistent. For the Government offers grounds for the differential treatment – namely (1)-(6) above. The question, therefore, is whether those justifications are sound.

The focus of this paper

This paper will be concerned primarily with issues relating to (a) consent and (b) the distinction between real and fictional acts. We will therefore not address the question of bestiality, since animals cannot clearly be said to consent and because of the difficulty of creating realistic depictions of bestiality without using real animals.

Obviously, there are differences between (ii)-(iv), but these differences do not capture the *moral* distinctions that we need to consider here. For example, everyone agrees that rape, murder and necrophilia are unacceptable. But the moral status of *simulations* of such acts, and of acts of lesser violence that people engage in with consent, is quite different. Therefore, we will use the term ‘violence’⁴ as a catch-all term to refer to the different kinds of act referred to in (ii)-(iv), and make the following distinctions between the kinds of act that can feature in pornographic material:

- I) real acts of non-consensual violence
- II) real acts of consensual violence
- III) fictional acts of non-consensual violence (performed consensually by actors)
- IV) fictional acts of consensual violence (performed consensually by actors)

Pornographic material showing real acts of non-consensual violence would be indefensible, as would be any sites that showed it. Almost all consumers of the other three kinds of material would agree with this. However, such acts are illegal in most, if not all countries, and any site that featured them would be offering clear evidence of the relevant crimes to prosecutors. So measures already exist to prevent the acts themselves. There is a case for also banning the possession of this kind of material, and an

⁴ It should be emphasised that many within the BDSM (bondage/domination, sadomasochism) community would object to using the term ‘violence’ to refer to their activities. However, that is the frame within which the Government has chosen to cast this debate. We will stay with that frame in order to criticise the Government’s arguments.

alternative formulation for such legislation will be proposed towards the end of this paper.

Whether (1)-(6) justify a ban on possessing the three other kinds of material will be examined below. As we will see, (1)-(6) apply to each in different ways. But we should first register a caveat about real acts of consensual violence: namely, that the degree of real violence to which adults can acceptably consent is itself arguable. Consider the following range of activities:

- mild spanking
- whipping
- bondage
- breath play
- injuries that penetrate the skin (as in the well-known ‘Spanner’ case)
- necrophilia
- killing (such as the recent case in Germany in which one person allegedly agreed to be eaten by another)

Presumably, almost no one would allow killing or necrophilia, while ‘most people’ (as understood by the Government) might well allow mild spanking. The activities in between (along with many others) are practised in varying degrees within the BDSM (bondage/ domination, sadomasochism) community, but would be plausible targets of the proposed legislation if captured on film or in photos. The question of where the line of acceptability should be drawn here has not thus far been adequately examined, but rather tested in the courts on an *ad hoc* basis, as in the Spanner case. Almost everyone, even within the BDSM community, would agree that there should be *some* limit. However, it would be both impractical and immoral to attempt to set that limit without consulting extensively within the BDSM community.

For the purposes of discussing material showing real acts of consensual violence we need to assume that there is a limit on the degree of real violence to which adults can acceptably consent. Not to do so would be to allow, for example, material in which people consensually killed each other – which would be untenable. Therefore, let us assume that there is *a* limit, even if the work of setting it has not yet been done. Material featuring real acts of consensual violence that go beyond that limit would, like material showing real acts of non-consensual violence, count as objectionable.

The issue of possession

The Government’s intention is to outlaw possession of the material under scrutiny. However, its main arguments – (1)-(6) above – attack the material itself, rather than address the issue of possession directly. Indeed, the Government does not actually *argue* that the (alleged) objectionability of the material means its possession should be outlawed, appearing to assume that this step follows through a straightforward analogy with the case of child pornography.⁵

The case against possession therefore requires that (1)-(6) establish that the material *per se* is objectionable in (more or less) the same way that child pornography is – thus justifying similar measures. However, we will see that arguments (1)-(6) are unsound.

⁵ ‘The proposal will mirror the arrangements already in place in respect of indecent photographs of children, possession of which is already an offence.’ (Executive Summary, p.1)

So the case against possessing the contested material – that featuring real consensual acts within acceptable limits, and fictional acts – is unsuccessful.

The Government deploys a further, ‘pragmatic’ argument against the possession of material featuring fictional acts: that since it might (at least in some cases) be hard to distinguish from material featuring real acts, it should also be illegal to possess. This argument does not rely on (1)-(6), but on a second analogy with child pornography. We will see that the analogy, and therefore the argument, is unsound.

Finally: quite apart from whether the Government has proved its case, the possession offence would, if implemented, prove extremely difficult to enforce consistently. We will examine some of these problems below.

Arguments that the material is objectionable

Justification (1): encouragement of interest in violent or aberrant sexual activity

Two features of justification (1) are immediately worrying. First, to legislate against someone’s taking an interest in an activity looks like creating a category of thought-crime. Second, something’s being aberrant is not in itself obviously objectionable. Presumably, departures from the norm are unobjectionable unless they are harmful in some way. It is of course the Government’s contention that this material is harmful, but the formulation of (1) is symptomatic of an unfortunate tendency to conflate the two issues.⁶

Let’s recast (1) to make it more robust. Let’s say it claims that the material may encourage or reinforce violent sexual activity. On this formulation, the worry would be that the material could encourage both consensual BDSM activity and serious offences of the kind perpetrated by Graham Couetts.

To regard the encouragement of consensual BDSM activity (within acceptable limits) as in itself objectionable begs the question here. However, the claim that the material could encourage *non*-consensual violence, or consensual violence that exceeds acceptable limits, would constitute a legitimate worry if well founded. Let us therefore reformulate (1) again as follows: the material may encourage or reinforce non-consensual violent sexual activity, or consensual violent sexual activity that exceeds acceptable limits.

This would appear to make material showing fictional acts of non-consensual violence and/or fictional acts of consensual violence that exceeds acceptable limits the main target of (1) – indeed, sites showing this sort of material were the ones cited in the Couetts case. So our question is whether (1) is true of these cases. In the interests of brevity, the arguments in this section will be restricted to a discussion of fictional acts of non-consensual violence, but they can easily be modified to apply to fictional acts of consensual violence that exceeds acceptable limits.

One of the most striking things about (1) is that the consultation paper itself concedes that

‘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.’ (Executive Summary, p.1)

⁶ See the discussion of ‘abhorrence’ below.

In the context of this debate, this is an extraordinary admission. If it is true, what is the basis for the claim that the material may encourage or reinforce violent sexual activity? One has to conclude that the claim has *no* basis. Indeed, it is hard to see how making that claim *and* this admission is rational.

In addition to this, there are grounds to *deny* the claim.

First, although both the Government and the media have allowed this impression to be perpetuated, it is false to claim that sites showing fictional acts of non-consensual violence, and the communities they serve, offer moral support to individuals who might wish to commit real acts of violence. The intention appears to have been to draw a parallel with paedophiles: just as paedophile communities implicate themselves in an unequivocally immoral practice (sex acts involving children, or acquiring photos of such acts), so, it is suggested, do ‘extreme pornography’ communities (real acts of non-consensual violence). But while paedophile sites cannot show any material without being thus implicated, the sites under scrutiny can draw a clear moral distinction between the fictional scenes on their sites featuring consenting adult actors and real scenes involving non-consenting adult victims. People who enjoy fictionally non-consensual violent role play and material depicting fictional non-consensual violence do not in general approve of *real* non-consensual violence, and any site that encouraged it would almost certainly occasion protests (in fact, many sites explicitly and unreservedly *condemn* real non-consensual violence).⁷ Furthermore, webmasters have ample reason, both moral and practical (i.e. not being an accessory to a crime), not to encourage violence, nor allow such encouragement to be expressed on forums.

Second, is not plausible to suggest that the material could in itself generate the sort of sexual orientation to which it caters. For: (a) it is generally recognised by psy-

⁷ The degree to which the importance of consent and the distinction between real and fictional acts inform practices within the communities under scrutiny has been confirmed by various studies. For example:

Weinberg, Williams and Moser (‘The social constituents of sadomasochism’, *Social Problems*, 31, pg. 379-389) identify (among others) two key characteristics of BDSM interactions:

- Consensuality - a voluntary agreement to enter into SM ‘play’ (interaction) and to honour certain ‘limits’ (ground rules of how involved and in which direction the play can proceed).
- Role-playing - the participants assume roles either for the interaction or for the relationship that they recognize are not reality.

Gosselin and Wilson (*Sexual Variations*, Faber and Faber, 1980) note that a description of BDSM practices ‘could perhaps cause the uninitiated to regard the practitioners of sadomasochism as undesirable, dangerous and “sick”. However, it is our impression, based on our interviews and the research of others, that most sexual sadists have no wish to hurt their partners in their sex-games any more than is enjoyed or at least accepted by that partner. Equally well, a masochist has little wish to put his head on the block, figuratively or literally, and will only play that role with someone who understands the “rules of the game”,’ (pp. 50-51) In their conclusion, they note that ‘...it cannot be said that the broad mass of... sadomasochists that we have studied resemble the classic models of neurotic, psychotic and psychopath in anything more than imputation... We have learned that most sadomasochists are probably very much less dangerous than society believes them to be,’ (p.160).

Gini Scott (*Erotic Power*, Citadel Press 1983), observes that ‘unlike the psychiatrists and psychologists who deal primarily with psychologically troubled individuals who are also interested in D&S [Dominance and Submission], I did not find them to be psychologically troubled or socially inept; rather, a spirit of good humour and fun prevailed, and the participants appeared to be mostly attractive, quite ordinary-looking people who had ordinary relationships outside the D&S scene... A vast variety of people with a diverse range of erotic interests participate in sadomasochism. Their backgrounds, activities and attitudes are quite unlike the social stereotype that depicts sadomasochism as a form of violence, mischief, or mayhem perpetrated by the psychologically unstable who seek to hurt others or to be hurt themselves... At the core of the community are mostly sensible, rational respectable, otherwise quite ordinary people. Thus, quite unlike its public image, the community is a warm, close and supportive one,’ (p. x).

chologists that sexual orientation is established early on by the totality of a person's formative experience, not by a single element such as images encountered on the web – in fact, the causes need have nothing to do with such images; (b) this sort of material is not widely advertised – it has to be sought out – so someone who encountered it would most likely already have the relevant sexual orientation; (c) someone who was not already thus sexually oriented and came across this material by accident would almost certainly respond in the standard way: bafflement or abhorrence – indeed, this sort of material would be rather *less* likely to make violent sexual behaviour generally attractive than mainstream depictions of it.

Third, the claim that the material encourages violence through stimulation does not stand up to scrutiny. A proponent of justification (1) might accept that the sites do not morally endorse violent behaviour, and do not generate the original orientation, but nonetheless claim that the material shown on them 'fires up' their audiences in a way that disposes them to violent behaviour.⁸ But this version of (1) rests on a false assumption: that if someone takes pleasure in the representation of a thing, they must prefer the real thing (if not, they would rest content with the fictional material and (1) would be false).

On an unrestricted interpretation, the assumption is clearly false. There are of course cases in which someone who takes pleasure in a fiction would prefer the reality – many of us might feel that way about a feelgood rags-to-riches story. But there are obvious counter-examples too: many people can take pleasure in an action film, but would almost certainly take a different view if informed that the actors who died in the film really were killed in the production; the same can be said of those who participate in battle re-enactments. In fact, it would in general seem that we can only take pleasure in representations or enactments of serious harm *on the condition that they are fictional*.

It might then be replied that there is a difference between the cases just described and the one under scrutiny, i.e. that the pleasure derived from the representation of violence is sexual. Now, that is of course true. But the question is still whether such a person would prefer the reality to the fiction. So presumably, the principle now being invoked is something like this: if someone takes *sexual* pleasure in a fiction, they must prefer the reality.

But the assumption is no more true in the sexual case than the non-sexual case. One person may watch a 'normal' pornographic film featuring someone they find attractive, and wish they could actually have sex with that person. But there are many other kinds of activity where being fictional is essential to the pleasure one derives from it. In many such activities, consensually engaged in by adults, each partner adopts an essentially fictional (or fantasy) role. A sub-category of these are fantasies in which one partner adopts an explicitly powerful/dominant role, while the other adopts a role that is weak/submissive. The range of these activities is wide, extending from 'normal' sexual behaviour to acts of consensual violence and simulated acts of non-consensual violence (up to and including simulated killing and necrophilia), and the key question is this: when a sexual fantasy involves a simulated act that, if real, would be counted as criminally violent, are we to assume that the participants would prefer the reality to the simulation? To take one example: are we to assume that a woman who has a rape fantasy would prefer to be raped for real than to engage consensually with a partner in a simulation of that scenario? No. To fail to grasp this is fundamentally to misconceive the way that sexual fantasies actually work.

⁸ The Government implies, without saying so explicitly, that the material had this effect on Coutts.

It is similarly misconceived to believe that such fantasies express hatred or other negative feelings. It is sometimes said, for example, that they express hostility to women, but it is noteworthy that the corresponding point is rarely made when a male partner adopts the submissive role. In fact, a relationship within which such role play occurs can be as respectful and affectionate as any other. The role play does not express negative emotion towards the partner, precisely because it is fictional. Some fantasists may of course harbour negative feelings towards an individual or group, as may those who do not engage in role play of any kind. But engaging in fantasies, even fictionally violent ones, is in itself neither necessary nor sufficient for having such feelings.

Confusion about the nature of sexual fantasies can also arise through an unfortunate ambiguity in the word 'fantasy'. On the one hand it can refer to a consensual act of role play, or the content of fictional material. But the word 'fantasy' also refers to a state of mind in which one savours the prospect of something one would like to do for real. One might fantasise about winning the lottery, for example; similarly, someone might fantasise about some criminal act, such as rape or murder. The two senses of the word are clearly quite different. But when the word is used to refer both to the content of the material under scrutiny (the first sense), and the state of mind of someone like Coutts (the second sense), it becomes all too easy to conflate the two. The assumption that taking sexual pleasure in a fiction implies a desire for the real thing is in fact undermined by a stark piece of empirical evidence. Of the thousands of people who have regularly visited sites of this kind, over a period of several years, there has been only one Graham Coutts (if there had been any similar cases, we would almost certainly have heard of them). Even if there had been a few cases among those thousands, that would still constitute an extremely weak basis for accepting the assumption – yet the Government asks us to accept it on the strength of just one case.

There is further evidence against the assumption, if anecdotal. People with violent sexual fantasies usually become aware of their sexual orientation in their early teens. They are confused and disturbed at an apparent need in themselves to commit acts that, not being psychopaths, they find appalling, and this is followed by feelings of moral self-disgust, isolation, fear and sexual repression. Some are able to discover that sexual role play is really what they seek, through exploring their fantasies with partners, but many are simply too frightened to mention them. Obviously, the existence of sites and supporting communities affords an opportunity to reach the same discovery, and the further discovery that there are others like them. (Communities can also teach the inexperienced how to engage in such fantasies *safely*.)

It should be remembered that we don't even know if justification (1) is true of Coutts, who obviously did seek the reality as opposed to the fiction. We know he visited certain sites before the murder, but it doesn't follow that this played an instrumental role in it. We know he wouldn't have received moral support from the relevant community, for reasons already discussed. We also know the material on the sites did not generate his sexual original orientation, which was established years earlier. We know that thousands regularly visit such sites without engaging in real violence.

So what can explain Coutts' behaviour? Here is one possibility: it is widely recognised by psychologists that all communities contain a tiny minority of psychopaths, i.e. individuals lacking the ability to empathise with other people and therefore see them as persons. It is because most of us have this ability that we can only enjoy representations or enactments of harm to other people (in either sexual or non-sexual contexts) on the condition that they are fictional. The absence of this ability in a psychopathic individual combines with their desires in such a way that they pursue them

without regard for the consequences for other people. This can occur with respect to any kind of desire, sexual or otherwise. In gangsters, it combines with a desire for power and material gain. In Coutts' case, it combined with his sexual orientation, blurring for him the distinction between harmless role play and real violence. By contrast, the thousands of others with similar sexual orientations who visit such sites retain the distinction and harm nobody. In which case, what is the more plausible instrumental factor – the psychopathic inability to distinguish between fantasy and reality, or the fact that he visited the sites?

To conclude: not only have years of research yielded no general conclusion on justification (1), as the Government's paper admits, but it also looks as if (a) the sites do not endorse real acts of violence, (b) the material on the sites does not create the sexual orientation to which they cater, (c) the audiences of the sites overwhelmingly would not wish to commit real acts of violence, and (d) it is not even plausible to suggest the sites were instrumental in the one case where someone did wish to do so. In the face of this, it is extremely hard to grant (1) any credibility.

Justification (2): breaking the cycle of supply and demand

Obviously, one can deter would-be users of the material under scrutiny by threatening to jail them. But this would only remove the demand if the material were responsible for creating it; and we have seen it is not. Consequently, all this would achieve is to leave that demand unsatisfied. Repressed sexual needs tend to fester, rather than evaporate. Indeed, this measure could have the opposite effect of its purported intention, in that without a source of gratification and a community to help them understand their needs, some individuals might turn to real violent behaviour – which they might otherwise have avoided.

Justification (3): protection of those who might be harmed in the production of the material

By definition, there is no need for protection from physical harm with material that is entirely fictional. Participants in material showing real acts of consensual violence would not need protection if that violence fell within acceptable limits.

That leaves real acts of non-consensual violence and consensual violence that falls outside acceptable limits. As we have seen above, if a site were to show such material, that would constitute evidence of a crime, which could be prosecuted under existing laws. So those who might be thus harmed are *already* protected.

The consultation paper mentions both physical and 'other' harm, which presumably means psychological harm. But, as long as performers participate consensually, why assume that psychological harm occurs? We should certainly not infer this simply from the fact that they do something many would find distasteful. In fact, there would only be clear grounds to do so if the performers in question were involved in so exploitative a relationship that their judgement had become impaired. Such relationships can exist in any sphere, whether or not it involves the production of pornographic material. But it does not follow simply from the fact that the material is of the type under scrutiny that the performer's relationship with the producer is exploitative. Sometimes the performers *are* the producers. And a scene of 'serious violence in a sexual context' may require no more of an actor than would be expected in, say, a mainstream

horror film. The work can therefore be easier – depending on the preferences of the performer – than having sex in a ‘normal’ pornographic film.

Justification (4): protection of society from exposure to this material

The Government simply doesn’t explain what society needs protection from here. There seem to be two candidates:

- that the material might be harmful
- that people might find the material abhorrent

But we have seen that the claim that the contested material causes harm – either directly or by encouraging real non-consensual violence – doesn’t stand up to scrutiny. And whether abhorrence is a good enough reason to curtail the relevant liberties (uninhibited private life and freedom of expression) depends on how ‘abhorrence’ is interpreted. In fact, the Government gets itself into a muddle by conflating the questions of harm and abhorrence. These issues will be addressed in the section on ‘abhorrence’ below.

It is also worth bearing in mind that (as mentioned earlier), the material is not widely available and has to be sought out. So the members of society that would be ‘protected’ here would almost exclusively consist of those who want to see it.

Justification (5): protection of children from exposure to this material

Children should (of course) not be exposed to this sort of material. Nor should they be exposed to ‘normal’ pornography, or certificate 18 films – both of which are far more widely available, and therefore more likely to be encountered by children. Presumably, then, these should be banned too (along with *any* material that children should not see, but might).

A more constructive proposal would be a public information campaign on the many ways in which parents can control what their children see on the internet.

Justification (6): abhorrence

We need to distinguish between two kinds of abhorrence here. On the one hand it is a near-universal reaction to behaviour that intentionally causes suffering – a reaction that underpins almost all our moral thinking. On the other, it is a subjectively similar sense of revulsion towards something that is in fact morally neutral. Many might have this kind of feeling if they saw someone eating faeces, for example, or even sheep’s eyes.

We have a word for the second kind of abhorrence – squeamishness. This feeling is often occasioned by confrontation with a form of sexuality one does not share. It is as variable as the individuals whose taste it expresses. However, it is easily confused with the first kind of abhorrence, which is why homosexuality has so often been called morally objectionable.⁹

⁹ We are assuming it will be agreed that homosexuality is *not* morally objectionable.

Our question in this context is therefore this: does the abhorrence that many people would feel towards the material under scrutiny arise because it really is morally objectionable, or is it mere squeamishness?

We need to ask another question too: is the abhorrence cited by the Government applicable simply to filmed and photographic material, or to the activities themselves (i.e. real acts of consensual violence within acceptable limits and fictionally non-consensual violent role play)? Though the material might seem an easier target, the abhorrence must surely also apply to the activities. It should similarly apply to material made and kept privately by individuals. To find the material but not the practice abhorrent is straightforwardly inconsistent.

We will assume that pornographic material and sexual practices count as morally objectionable if they meet either or both of the following conditions: (a) they involve participants who are not adults of sound mind who freely consent; (b) they involve participants who sustain real physical harm beyond acceptable limits despite consenting. We can add a further condition that applies not to material/practices but to sites and communities: (c) they give moral support to real non-consensual violent behaviour, or consensual violent behaviour beyond acceptable limits.

The contested material – that featuring real consensual acts within acceptable limits, and fictional acts – does not meet either condition (a) or condition (b). As stated earlier, there are already laws to deal with material that does. We have also seen that the relevant sites and communities do not meet condition (c). (If there are any sites and communities that do meet condition (c), this paper does not defend them.)

It follows that the material, practices and communities in question are not morally objectionable. Therefore, the abhorrence many would feel is mere squeamishness.

The question now is whether squeamishness, even if felt by a majority, is a good enough reason to outlaw a practice or fictional representation. And the answer, in a liberal democracy, is surely ‘No’. To outlaw a minority practice out of mere majority squeamishness would be the kind of action that was rightly condemned by Mill as tyrannous. Indeed, if we need a reminder of how unreliable a guide to genuine moral objectionability this is, we have only to consider how recently a majority in this country believed homosexuality to be ‘clearly abhorrent’. If we think that couldn’t happen again, we should glance across the Atlantic, where attitudes towards gays and lesbians are turning decidedly ugly.

Alarmingly, given that we already have laws that forbid real violence, and given the weakness of the case for justification (1), it is hard not to see the invocation of abhorrence as the Government’s primary motivation for proposing this legislation. That would be in keeping with the preacherly tone of the paper, the Government’s track record in nannyism and the fact that the legislation is explicitly intended to replicate the function of the Obscene Publications Act – whose ‘deprave and corrupt’ test purports to ‘focus... on the effects or the harm done by the material in question’ (§13), yet is grounded not in an empirical evaluation of harm, but in ‘moral standards’ (§13) as interpreted by a jury’s ‘subjective judgements’ (§13). Indeed, this conflation of harm and a muddled ethics based on squeamishness only serves to discredit the OPA, as well as the proposed legislation.

The Government’s confusion regarding genuine harm and squeamishness is exemplified in this passage:

‘Option four, doing nothing, would risk sending a message that we considered accessing such material was harmless, or not worthy of attention. But although 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.’ (§52)

The Government implies here that the material is not harmless (therefore harmful) and then says that while this doesn’t mean it necessarily causes criminal activity, it is harmful in the sense that it warrants ‘a moral and public protection case’. But that still leaves it unclear what kind of harm we need protection from! The only clue we have is the word ‘moral’ which in this context would imply that the harm consists in exposure to abhorrent material – i.e. material about which people feel... squeamish.

Though dressed up as a common sense protection measure for which there is a genuine empirical need, this proposal is nothing less than an attempt to tell people how to have sex. In attempting to outlaw the material, but not the corresponding practices, the Government may seek to hide the degree of its intrusion into the sex life of private individuals. But the restriction is arbitrary, and – given the character of the Government’s motivation – could easily be lifted in subsequent legislation.

Indeed, the Government shows its true colours in its discussion of human rights. It says (§57) that the reason the proposal is compatible with the European Convention on Human Rights is that will not affect the following:

- political expression
- public interest matters
- artistic expression
- legitimate reporting for news purposes
- information gathering for documentary programmes in the public interest

But this list ignores the protection afforded by Article 8 to private life and limits without justification the range of expression protected by Article 10. The degree to which the proposal is incompatible with the ECHR, and therefore the Human Rights Act, will doubtless receive due attention from legal minds. But what is striking here is the Government’s ignorance or dismissal of these considerations, citing (again) majority ‘abhorrence’. A Government that holds these protections in such low esteem should worry everyone.

The Government has picked an easy target with this proposal. It knows that members of a sexual minority who publicly speak up in their own defence will have to surrender their privacy, and then endure ridicule and vilification driven by squeamishness. It knows that politicians will have little to gain from opposing the proposal. For all that, however, it remains the case that this proposal will bring fear and misery to a harmless sexual minority for no good reason. To take it further would be profoundly immoral.

Interim conclusion

We saw earlier that the case against possession requires that (1)-(6) establish that the material *per se* is genuinely objectionable, thus justifying measures similar to child pornography legislation. However, we have seen that arguments (1)-(6) are unsound. So the case against possessing the contested material – that featuring real consensual acts within acceptable limits, and fictional acts – is unsuccessful.

We have also seen that the proposed legislation would, if implemented, constitute a radical and unjustified intrusion on the part of the state into private life and freedom of expression. Consequently, it should be rejected.

The ‘pragmatic’ argument

As mentioned above, the Government deploys a further ‘pragmatic’ argument against possessing ‘extreme’ pornography featuring only fictional acts. Here it is:

‘By realistic depictions we intend to capture those scenes which appear to be real and are convincing, but which may be acted. This follows the precedent of the child pornography legislation and is in part necessary to avoid the need to prove the activity actually took place, as this would be an insuperable hurdle for the prosecution.’¹⁰ (§38)

Interpreted generally, the principle that prosecutors should be relieved of the burden of proving their cases would be indefensible (though the Government has on many occasions exhibited an impatience with due process).¹¹ So the idea here must be that the principle is in this case supported by analogy with child pornography.

But the analogy does not hold. Children cannot by definition consent to participate in pornographic material; to feature them in material intended for sexual arousal exploits them *whether or not this involves real sex acts*. Consequently, while material featuring real sex acts would obviously be more serious than material that did not, the *mere presence* of children in the material is sufficient to make it objectionable. So the issue of waiving the requirement of proof is not the key issue. By contrast, since adults can consent, their mere presence in pornographic material featuring fictionally violent acts is not analogously objectionable. Therefore, the material would only be objectionable if the acts were real, in which case there is every reason *not* to waive the requirement of proof.¹² It follows that the equivalent treatment of real and fictional material cannot be justified by analogy with child pornography.

¹⁰ Though aimed at material featuring fictionally non-consensual acts, this argument applies equally to material featuring consensual acts (whether real or fictional). For it would be possible to argue that although those who featured in it might appear to consent, they might equally have been coerced into appearing to do so.

¹¹ Examples include ASBOs, the attempt to remove the right to trial by jury in some cases and the introduction of previous offences in trials. Tony Blair is on the record as saying that he thinks the justice system needs to be ‘rebalanced in favour of the victim’, which is a sneaky and misleading attempt to reverse the principle that it is preferable for the guilty to go free than for the innocent to be convicted.

¹² It is worth noting that even with respect to child pornography, the US Supreme Court took precisely the opposite view from the kind of position that the Government is defending. Ruling on the issue of ‘virtual’ or computer-generated child pornography, it said: ‘The First Amendment is turned upside down by the argument that, because it is difficult to distinguish between images made using real children and those produced by computer imaging, both kinds of images must be prohibited. The overbreadth doctrine prohibits the Government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process.’ *Ashcroft, Attorney General, et al. v. Free Speech Coalition et al. Certiorari to the United States Court Of Appeals for the Ninth Circuit. No. 00—795. Argued October 30, 2001—Decided April 16, 2002.*

Enforceability

Risk of ambiguity (I): realism

As we have just seen, the Government intends to target ‘realistic depictions’ in fictional material, where this means ‘scenes which appear to be real and are convincing, but which may be acted’ (§38).

But who is to judge what is realistic? Suppose a torture or murder scene is directed and acted in a *grand guignol*, melodramatic style. One person might conclude that it is not very realistic because it is over-acted and directed; another person might consider it extremely realistic for precisely the same reason!

This is not an academic question – people need to know when they are breaking the law and the police need to be able to apply it consistently. But the ‘realism’ criterion is wide open to the vagaries of subjective judgement. It is hard to see how a law based on such a criterion could be applied consistently – and, therefore, be enforceable.

Risk of ambiguity (II): pornography

Much published material, and many recreational practices, depict or involve acts of violence. Here, corresponding to our four categories, are some uncontroversial examples:

Type of activity/material	Examples
Type (I): real acts of non-consensual violence	<ul style="list-style-type: none">• News/documentaries• Histories of war• Art using film or photos of real events
Type (II): real acts of consensual violence (within acceptable limits)	<ul style="list-style-type: none">• Sports such as rugby and boxing• Japanese game shows• Tattooing• News/documentaries
Type (III): fictional acts of non-consensual violence (performed consensually by actors)	<ul style="list-style-type: none">• Mainstream/arthouse films – e.g. horror films/thrillers• Battle re-enactments
Type (IV): fictional acts of consensual violence (performed consensually by actors)	<ul style="list-style-type: none">• Mainstream/arthouse films – e.g. <i>In the Realm of the Senses</i> (Nagisa Oshima, 1976), <i>Matador</i> (Pedro Amaldivar, 1986)

The Government says that it does not intend to target such examples with its legislation. As we saw earlier, it distinguishes them from the material whose possession it intends to outlaw – despite the possibility that examples of each may closely resemble the other – by applying the following criterion: does a given example qualify as *pornography*?¹³

In using this criterion, the Government does not appear to have considered the possibility that there could be confusion over whether some piece of material is pornographic. In fact, though, this is eminently possible. With sexual fetishes in general, sexual arousal can occur as a result of material that is not explicitly sexual. So, in a case of ‘extreme’ pornography, the material need not depict a sex act, but could show a (fictional or consensual) violent act instead. That makes it genuinely hard to distinguish a pornographic scene of types (II)-(IV) above from a non-pornographic scene.

¹³ I.e. ‘material that has been solely or primarily produced for the purpose of sexual arousal’ (§37).

For example, an instance of pornographic material featuring fictionally non-consensual violence might be indistinguishable from a scene in a mainstream horror film or thriller. Indeed, consumers of such material might be sexually aroused by films that would count as *non*-pornographic, in that they were not *produced* for the purpose of sexual arousal. Similarly, someone who enjoyed material featuring real consensual violence might be sexually aroused by a film about the body-piercing practices of African tribes.

Obviously, some cases would be more ambiguous than others. It would be difficult to claim plausibly that clear examples of news, documentaries and histories showing violent behaviour were pornographic. However, there might well be a risk of ambiguity with material that does not clearly fall into those categories, and with art and fictional material.

The only way to tell if the material really was pornographic in the Government's sense would be to trace the material to a source that clearly did produce pornography, but this would in many cases be impossible. Consequently, the only way to successfully enforce the law would be to make a circumstantial case about the intentions of the person who originally produced the material (and, in practice, the intentions of the person who acquired it). Given the potential for ambiguity just discussed, this would almost certainly result in subjective, inconsistent judgements on the part of those attempting to enforce the law.

The wrong criterion

This seems to leave us with a problem. We have just seen that we cannot, in at least some cases, distinguish 'extreme' pornography from non-pornographic violent material in a principled way – in which case, the proposed law would be unenforceable. Yet we need such a law – or something like it – to deal with the possibility of genuinely objectionable material.

We allowed earlier that pornographic material would count as genuinely objectionable (as opposed to something people happen to feel squeamish about) if it met either or both of the following conditions:

- (a) it involved participants who were not adults of sound mind who freely consent
- (b) it involved participants who sustained real physical harm beyond acceptable limits despite consenting

If such material exists, it would be desirable to curb the traffic of it – just as it is desirable to curb the traffic of child pornography. The argument that an offence of simple possession can help curb the traffic of objectionable material is as follows:

'Merely downloading an image from the Internet is regarded as a serious matter because to do so feeds the market for this kind of material, so increasing the likelihood of further abuse, to create further images.' (§26)

In fact, the offence requires more than mere possession: it specifically targets those who knowingly acquire objectionable material (thus perpetuating the market for it), rather than those who do so inadvertently or in the course of legitimate work.¹⁴

If we accept this argument,¹⁵ then there is a need for a possession offence to curb any potential traffic in the kind of objectionable material just described – but we have just seen that in the case of pornography featuring violent acts the possession offence would be unenforceable!

Is this a genuine dilemma? No. It only *appears* to be a dilemma because of the criterion of illegality that the Government has chosen to use.

Consider a genuinely objectionable case: suppose some person or group subjected another person to real acts of non-consensual violence, in order to capture those acts in pornographic material. Obviously, such acts would be objectionable (indeed, they would be crimes). But how much does it matter that the material in which they feature is *pornographic*? Would a non-pornographic case be any less objectionable – for example, material in which racial or sexual minorities were tortured or killed for the (non-sexual) gratification of the relevant kind of bigot? If the injuries suffered by the victims are similar, it is hard to see why. Conversely, there doesn't seem to be anything objectionable (except to those who object to *all* pornography) about pornography that does *not* feature such acts. Consequently, it would seem that being pornographic is not the essential ground of objectionability in our case.¹⁶

Indeed, the Government's use of the 'pornography' criterion results in an altogether unstable and inconsistent position. Consider two problems:

First, the Government defines pornography as 'material that has been solely or primarily produced for the purpose of sexual arousal', but why focus only on the *producer's* intentions? Surely the consumer's intentions should be equally objectionable. In which case, why should it not also be illegal to possess, for the purposes of sexual arousal, violent material even if it was not *produced* for those purposes – e.g. mainstream horror films or documentaries about the body-piercing practices of African tribes? Not only would this extra step make the Government's position more consistent, it would also have a practical value: it would close a loophole in which producers could claim their films were, for example, not 'extreme' pornography, but mainstream (if low-budget) horror films or documentaries.¹⁷

Second, given the failure of justifications (1)-(6), all the worries about the consistency of singling out violent pornography, but not other violent material become pressing. For example, we saw that the Government seeks to treat real and fictional material in the same way on the grounds that, in some cases, they might be hard to distinguish from each other. But why restrict this measure to pornography? Why not

¹⁴ 'It is not our intention to penalise anyone who accidentally stumbles across the material specified in the proposal, or who has it sent to them without their consent, or has a legitimate reason (such as law enforcement) for dealing with it.' (Executive Summary, p.2)

It is worth remembering, however, that it is easier to acquire electronic material inadvertently than is widely appreciated, and that it can be extremely difficult to determine whether material has been acquired inadvertently or not. This leaves individuals open to considerable risk of false accusation (and even conviction), and all the damage this can entail.

¹⁵ Some do not, but we will assume here that it is sound.

¹⁶ In the face of this, it is natural to ask why the Government has made being pornographic the criterion by which possession of material of types (I)-(IV) counts as illegal. It may, again, have relied on its unsound analogy with child pornography: it may have reasoned that since any material that is both pornographic and features children is objectionable, any material that is both pornographic and features violence is objectionable.

¹⁷ Similar strategies were deployed by producers of 'normal' pornography in the 1970s.

ban the publication and possession of *any* material depicting purportedly fictional violence on the ground that the violence might have been real? If it is replied that such doubts would not arise in the case of ‘mainstream’ material, the question is then: what counts as mainstream? Why would short films and low-budget features be any less subject to doubt? Conversely, if it could be *proved* that the violence in pornographic material was not real, what objection would there be to allowing its possession (or publication)? Similarly, why assume violent pornography is any more likely to influence behaviour than other violent material?

In all of these cases, the Government takes a position on pornography that it appears reluctant to apply consistently. We have encountered this issue already: recall that the Government is trying to ban the possession of ‘extreme’ pornography, but not, inconsistently, the practices on which it is based (i.e. real acts of consensual violence within acceptable limits and fictionally violent role play). The pattern is clear: the principles that the Government is applying to pornography have profound implications for the state’s capacity to interfere with private life and freedom of expression. It seeks to disguise this by arbitrarily restricting the application of those principles to an easy target.

So: we have seen that being pornographic is *not* what makes the material under scrutiny objectionable, and that using this as the criterion for the illegality of possession (a) creates problems of enforceability and (b) makes for a morally incoherent and dishonest position. We should therefore reject that criterion.

A better criterion

So much for the problem. The solution is to apply a better criterion of illegality. Here is one possibility: *it should be illegal knowingly to acquire material (pornographic or not) featuring real acts of non-consensual violence (or acts of consensual violence that exceeds acceptable limits), where those acts were perpetrated in order to produce the material, and where the acquisition helps perpetuate the market for such material.* This approach has two virtues:

- the criterion of illegality is clearly aligned with the criterion of moral objectionability
- it disposes of the problems of enforceability and coherence just described

Prosecutors would have to show beyond reasonable doubt that the acts depicted in the material were real, and that the possessor of the material knew that (a) they were real, (b) they were perpetrated to produce the material and (c) in acquiring them he/she was helping to perpetuate the market for such material. This is a higher burden of proof than that envisaged by the Government, but one which respects both the need to curb the traffic of genuinely objectionable material and the principle that the innocent should not be penalised in the pursuit of the guilty.¹⁸

However, this burden of proof would only apply in respect of possession. We should remind ourselves, again, that existing laws already outlaw the acts themselves, and that in such cases the material itself would be evidence for prosecutors in the relevant jurisdictions.

¹⁸ Indeed, this formulation precisely enshrines the Government’s own intention to target those who knowingly and deliberately seek this sort of material, rather than those who acquire it inadvertently.

Conclusion

Our conclusions are as follows:

- arguments (1)-(6) are unsound
- the ‘pragmatic’ argument is unsound
- the proposed legislation would be unenforceable
- the proposed legislation would constitute a radical and unjustified intrusion on the part of the state into private life and freedom of expression, and reflects a morally incoherent and dishonest position
- therefore, possession of pornographic material featuring real acts of consensual violence within acceptable limits, and fictionally violent acts (consensual or not) should not be made illegal
- the need to curb the traffic of genuinely objectionable material (real acts of non-consensual violence, or real acts of consensual violence beyond acceptable limits) can be met through better formulated legislation

Therefore, the proposed legislation should be rejected.

Practical suggestions

While the proposed legislation has been rejected, the following initiatives might well address some important concerns:

- Formulate better legislation along the lines just recommended.
- Set up a helpline for anyone who feels they have an inclination towards sexual violence. The aim would be to help them understand whether their need is for fictionally non-consensual violent role play, or real consensual violent activity, and then direct them to appropriate resources within the BDSM community. In the event that someone sincerely believed they were about to commit a real act of non-consensual violence, the aim would be to persuade them to get help. Such a helpline might prevent a rape or murder.
- Regulate the production and publication of this and all pornography. An example of compliance would be a requirement on producers/publishers to display an agreed message emphasising the importance of consent and the difference between fantasy and reality. Another would be a requirement on producers to provide release statements from performers indicating that they have consented. Consumers would be able to avoid sites that did not meet approval from the relevant regulatory body. The framework for such regulation is to some extent already in place in the US, where producers have to provide proof that performers are of legal age.
- Organise a public information campaign on how parents can control what their children see on the internet. This would include information on software tools that block sites and provide surfing records, and also practical tips.

- Organise a Kinsey-style research program into the relevant kinds of sexual practice.