

Proposed legislation on ‘extreme’ pornography – why it’s wrong (quick reference)

Why is the proposal wrong?

In a nutshell, the proposal

- misrepresents the material under scrutiny
- fails to distinguish between morally distinguishable cases
- more generally suffers from inconsistency, occasional incoherence and a failure to base its claims on evidence
- will have unintended and problematic consequences

The Government’s justifications

The Government says it should be illegal to possess the material in question:

- 1) Because it may encourage violent behaviour.
- 2) To break the cycle of supply and demand.
- 3) To protect those who might be harmed in the production of the material.
- 4) To protect society in general from exposure to the material.
- 5) To protect children in particular from exposure to the material.
- 6) Because most people would find the material ‘abhorrent’.

Rebuttal of the Government’s justifications

A key clarification

The Government’s categories (i)-(iv) (see *Summary*) are *misleading*. They don’t capture the key *moral* distinctions here, i.e. between material featuring

- real vs fictional activity
- non-consensual vs consensual activity

A more accurate picture emerges if we use the following distinctions:

- (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)

Everyone would agree that (I) above is genuinely objectionable. But remember:

- if there is any such material, it is *already illegal* everywhere
- it’s not clear there *is* any such material

So, the argument here isn’t about this kind of material. It’s about whether material featuring (II)-(IV) is objectionable. That’s what the Government’s six justifications try to show.

An initial worry

Is the Government being inconsistent? Why not ban all violent material? Well, its justifications (1)-(6) are just meant to apply to ‘extreme’ pornography, so the question is whether *they* work.

Justification (1): Encouraging violent behaviour

The Government *admits* it lacks conclusive evidence for (1)! If so, *there is no reason to believe it*. (It’s irrational to admit this *and* argue for it.) In fact most recent research *undermines* the claim that pornography is ‘dangerous’.

More specific reasons to deny (1):

- Sites showing consensual and/or fictional violence *don’t* encourage the real thing – many explicitly *condemn* it.
- The material doesn’t *cause* the sexual orientation, but meets a *pre-existing* need.
- The material doesn’t ‘stimulate’ its audiences to real non-consensual violence.

So it’s dishonest to link the material to domestic violence and cases like Coutts.

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

The demand is a sexual orientation that is not created by the material. A ban would simply frustrate that demand, not reduce it.

As for supply, nearly all the material is hosted abroad, so legislation here wouldn’t affect it.

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

Physical harm: there’s *no* physical harm if it’s fictional, and it’s not objectionable if it’s consensual (within limits).

Any material in the web showing real non-consensual violence would be evidence for prosecutors. So those who might be thus harmed are *already protected*.

Psychological harm: why assume there’s psychological harm if everyone consents? You have to assume the situation is so exploitative that the participants can’t make choices. But just because a lot of people would find the material distasteful doesn’t mean the situation is exploitative. (Loose comparisons to sex traffickers and child pornography = more dishonesty.)

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

The Government simply doesn’t explain what we need protection from. It seems to be thinking of two things:

- actual harm – but we’ve just seen that this claim doesn’t stand up

- material people might find abhorrent – but ‘abhorrence’ in this context just boils down to squeamishness (see the section on Justification (6) below)

Also: the material is not widely available and has to be sought out. So those ‘protected’ here would mostly be people who want to see it.

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

Yes, but they shouldn’t be exposed to ‘normal’ pornography or certificate 18 films (which children can see much more easily) either. Why not ban them too?

Don’t forget: there are a number of ways parents can control what their children see on the internet.

Justification (6): Abhorrence

The Government gets into in a real muddle here. Plus, this point looks like its *primary motivation* for the legislation. There are two confusions:

Taste and morality: the Government talks about ‘abhorrence’, but this can mean two quite different things:

- a proper response to behaviour that is (genuinely) morally objectionable
- squeamishness – a sense of revulsion towards something that is morally neutral (e.g. a reaction to someone eating sheep’s eyes)

If material features people who are coerced, that’s (clearly) morally wrong. But the same can’t be said of material featuring fictional/consensual violence. So if people feel abhorrence, it’s just squeamishness. And squeamishness doesn’t justify curbing people’s freedoms. (Remember: until recently, a majority in this country believed homosexuality to be ‘clearly abhorrent’.)

Taste and harm: the Government admits that it has no actual evidence of the material causing harm. So instead we get a tortured attempt to characterise ‘what we need protection from’ in terms of morality (which it has already confused with taste), and references to the Obscene Publications Act (which makes the same mistake).

A ‘pragmatic’ argument

The Government says we have to ban fictional violence because, as with child pornography, prosecutors shouldn’t have to prove the activity took place.

But the analogy doesn’t work. Children shouldn’t feature in pornography, *whatever* acts are involved. But since adults can consent to feature in pornography, whether the violence is fictional or not makes all the difference.

Additional problems

Enforceability

Risk of ambiguity (I): realism

The Government intends to target ‘realistic depictions’. But who is to say what counts as realistic? Since that’s a subjective matter, neither the police nor individuals will be able to consistently say when the law was being broken – so it will be unenforceable. Unless, of course, we say realism is whatever the police say it is – which means the law will be very easy to *abuse*.

Risk of ambiguity (II): pornography

Much published material, and many recreational practices, depict or involve acts of violence. (See the *Summary* for examples.) The Government says it it’s only targeting *pornography* – i.e. ‘material produced for the purpose of sexual arousal’.

There are two problems with this:

- (a) You could get examples of very similar material, with only one produced for sexual arousal. So the only difference is the producer’s intentions. If that’s what makes possession of it criminal, this is a *thought crime*.
- (b) With sexual fetishes in general, arousal can occur as a result of material that is not explicitly sexual; with ‘extreme’ pornography, the material need not depict a sex act, but could show a (fictional and/or consensual) violent act instead. So who’s to tell what counts as pornographic and what isn’t? Once again, the criterion be-comes subjective – therefore unenforceable, and/or easily abused.

Effect on respect for the law and policing

Good policing requires clear law, and this is anything but. Likely problems:

- Police officers define vague terms as they see fit.
- The investigation itself becomes punitive (computer equipment held for long periods, names leaked to the media without substantial evidence).
- Large numbers of people criminalised. Some affected groups: BDSM community (estimated 4m people), Goth community, horror film enthusiasts.
- Sex Offenders Register no longer lists only paedophiles and genuinely dangerous sex offenders, so its importance is diluted.
- Police resources diverted from matters that involve proven harm to matters that do not.
- Likely conflicts with the European Convention on Human Rights (and therefore the Human Rights Act).

Effect on the BDSM community

This is the most obviously threatened constituency. The Government says it is not targeting ‘milder forms of bondage and humiliation’, but this ignores the fact that many BDSM activities (e.g. ‘less mild forms of bondage and humiliation’, and role play of non-consensual scenarios) fall outside this category.

The irony is that the community is well known to lay considerable emphasis on

- the importance of consent, and of being clear about giving it
- maintaining a clear distinction between fantasy (fiction, role play) and reality
- safe practice

Pornography tends to be produced for enthusiasts by enthusiasts (of either sex), for little commercial gain, and in line with the above principles. This contrasts with the Government’s ‘exploitation’ characterisation.

The legislation will drive people back into the closet, thus undermining an ethical, self-policing community, and creating a gap which will inevitably be filled by criminals. This will *create* a problem that the Government says it is trying to address – safeguarding individuals involved in production.

Better legislation

The wrong criterion

We’ve seen that a law based on the ‘pornography’ criterion would be unenforceable – in which case, how to curb the traffic of genuinely objectionable material (i.e. pornography featuring *real* acts of *non-consensual* violence)?

A dilemma? No. The problem is making *pornography* the focus here. This misses the point because

- what matters is the *acts* people suffer in making the material (these would be just as bad in *non-pornographic* material – e.g. bigots torturing minorities)
- there isn’t anything objectionable about pornography which *doesn’t* feature such acts (unless you’re against *all* pornography)

So *being pornographic* isn’t what matters here. In which case, it’s hardly a good basis for a law which would in any case be unenforceable.

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 to knowingly 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:

- it aligns the law with the moral considerations that motivate it

- it disposes of the problems of enforceability described earlier

Prosecutors would have to show beyond reasonable doubt that

- the acts depicted in the material were real
- that the possessor of the material knew that
 - they were real
 - they were perpetrated to produce the material
 - in acquiring them he/she was helping to perpetuate the market for such material

This is a higher but fairer burden of proof – indeed it is in line with the Government’s stated intention to target only those who knowingly seek this sort of material, rather than those who acquire it inadvertently.

A study in hypocrisy

It’s worth noting, just as a measure of how ill-considered and unfair this proposal is, the degree of hypocrisy in its assumptions and claims:

<p>‘It should be illegal to possess extreme pornography.’</p>	<p>Why just pornography?</p> <ul style="list-style-type: none"> ▪ Given that the Government’s specific reasons (i.e. justifications 1-6) for singling out pornography don’t work, it’s inconsistent not to ban <i>all</i> violent material (e.g. mainstream horror films). ▪ It’s also inconsistent not to ban the <i>practices</i> that correspond to the pornography – i.e. consensually violent sexual activities and fictionally non-consensual role play. <p>Why the inconsistency? Because the Government’s basically telling people how to have sex, but pornography’s an easier target.</p>
<p>‘Violent material should be illegal to possess if it was produced primarily for the purpose of sexual arousal.’</p>	<p>Why not also make it illegal to possess violent material if it is <i>owned</i> primarily for the purpose of sexual arousal (regardless of why it was produced)? I.e. if someone is aroused by watching mainstream horror films, why not make that illegal too?</p> <p>Again, pornography’s an easier target.</p>
<p>‘Extreme pornography might be seen by children.’</p>	<p>But so might</p> <ul style="list-style-type: none"> ▪ normal pornography ▪ certificate 18 films
<p>‘Extreme pornography causes violent behaviour.’</p>	<ul style="list-style-type: none"> ▪ But there’s a much better case for saying the same of religious practices and materials ▪ alcohol

Conclusions

- The proposal is a gross infringement of private life and freedom of expression
- The Government's justifications don't stand up to scrutiny.
- The proposed law would be unenforceable and easily open to abuse.
- Alternative proposals can be formulated that would avoid these problems and specifically target genuinely objectionable material – i.e. that featuring real acts of non-consensual violence (pornographic or not).
- The Government's position is shot through with hypocrisy.
- The Government appears more concerned with sounding 'tough' for the tabloids than addressing the issue in a rational and evidence-based fashion.
- Therefore, the Government's proposal should be rejected.