



WHOSE MORALS, EXACTLY? A CRITICAL EVALUATION OF THE UK LAW OF OBSCENITY THROUGH A HUMAN RIGHTS LENS

*Jake Aston**

Introduction

Pornographic websites currently have more traffic than Amazon, Netflix and Twitter combined.¹ In 2019 alone, Pornhub amassed 42 billion visits and platformed 1.36 million hours of new material.² Plainly, pornography is a worldwide phenomenon. If it is a problem, it is a serious one. However, the law in the area is plagued by numerous overlaps, inconsistencies, and notions of sexual morality, having developed in a piecemeal fashion over almost 250 years. In addressing these flaws following the black letter analysis in the first section, this article argues, above all, for the reformation of the UK's pornography law. To determine whether said reformation needs to incorporate tighter restrictions on pornography, utilising human rights law, it analyses the ongoing 'pornography debate' in depth.

There is a disparity in approach taken by the scholars writing this field. Many of those arguing for pornography's restriction are 'radical' feminists, who therefore take a political stance. In contrast, those arguing against it tend to take a more legal, or occasionally philosophical, approach. This contradistinction has manifested itself in a dichotomous body of literature, the two sides of which are impossible to amalgamate and consistently dismissive of each other's value. This was acknowledged early in the research process. So, the author of this work – referred to short handedly as 'the author' throughout – set impartiality as a critical aim in writing the piece. The primary way this has been attempted (it is never possible to totally avoid bias, after all) is through applying human rights law to both sides of the argument. As a result, the text presents legal arguments for both the circulation and prohibition of

* Jake graduated in 2023 with a First in LLB (Hons) Law

¹ Alexis Kleinman, 'Porn Sites Get More Visitors Each Month Than Netflix, Amazon and Twitter Combined' Huffington Post (7th December 2017) <https://www.huffingtonpost.co.uk/entry/internet-porn-stats_n_3187682> accessed 27th February 2023

² Pornhub Insights, 'The 2019 Year in Review' (December 11, 2019)

<<https://www.pornhub.com/insights/2019-year-in-review>> accessed 27th February 2023

pornography. The partial conclusions drawn throughout are mainly theoretical – a synthesis of different disciplines characterised by the step-by-step, socio-legal methodology adopted to grasp the nature of this complex and controversial topic. As such, the reader may find themselves persuaded either way throughout. The author welcomes this result.

1 UK Pornography Law

1.1 The history of ‘obscenity’ law in the UK

Throughout the eighteenth century, England saw developments in science and philosophy that led to profound changes in how people saw themselves.³ Desires for sexual privacy and pleasure grew,⁴ as did public displays of affection.⁵ Ultimately, life began resembling what we know it to be today – ‘urban, mobile, and sexually liberal’.⁶ By the late eighteenth century, London was ‘awash’ with pornography.⁷ The responsibility of addressing this issue was initially vested in the ecclesiastical courts. However, it was extended to the common law judiciary in 1727 in *Rex v Curl*.⁸ By this point, various non-governmental bodies were already imposing their standards of social discipline on Londoners.⁹ The Societies for the Reformation of Manners, for example, were concerned with the city’s moral state in the 1690s.¹⁰ The Society for the Suppression of Vice was no different. Its (primarily evangelical) members believed that ‘vice’ had advanced upon society with ‘unexampled rapidity’.¹¹ They denounced the judiciary’s failed attempts to ‘rid the book trade’ of obscene, unchristian literature. Subsequently, they lobbied Parliament, which enacted the Obscene Publications Act 1857 (‘the 1857 Act’) in response.¹²

³ Julia Peakman, *Mighty Lewd Books, The Development of Pornography in Eighteenth-Century England* (Palgrave Macmillan, 2003)

⁴ Lawrence Stone, *The family, Sex and Marriage in England 1500-1800* (Weidenfeld & Nicolson, 1977)

⁵ *ibid*

⁶ Eric Berkowitz, *Sex and Punishment: Four Thousand Years of Judging Desire* (The Westbourne Press, 2013)

⁷ Peakman (n3)

⁸ (1727) Str.788, 93 E.R 849 KBD

⁹ Michael James Roberts, ‘The Society for the Suppression of Vice and Its Early Critics, 1802-1812’ (1983) 26 *The Historical Journal* 159

¹⁰ Timothy Curtis and William Speck, ‘The societies for the reformation of manners: a case study in the theory and practice of moral reform’, (1976) 3 *Literature and History* 64; Karen Sonnelitter, ‘The Reformation of Manners Societies, the Monarchy, and the English State 1696–1714’ (2010) 72(3) *The Historian* 517

¹¹ *ibid*

¹² Berkowitz (n6)

The 1857 Act gave police and magistrates authority to seize ‘obscene’ material¹³ kept ‘for the purpose of sale, distribution, exhibition, hire, or publishing’.¹⁴ Lord Campbell, who introduced the bill to Parliament, emphasised the Act’s focus on materials ‘written for the single purpose of corrupting the morals of youth and of a nature calculated to shock the common feelings of decency in a well-regulated mind’.¹⁵ The Act had teeth – hundreds of shops were closed and swathes of material were seized,¹⁶ including a pamphlet exposing what a group of militant Protestants believed to be ‘errors of the church of Rome’ and the ‘immorality of the confessional’.¹⁷ The distributor, who somewhat ironically was a man of religious conviction, was prosecuted under the 1857 Act. In deliberating judgment, Lord Cockburn posed the following test for determining obscenity:

‘Whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall.’¹⁸

This set the stage for the current law.

1.2 The Obscene Publications Act 1959¹⁹

Under section 2 of the Obscene Publications Act 1959 (‘the 1959 Act’), a person who publishes an ‘obscene article’ commits an offence. The test for obscenity is derived from *Hicklin*. As such, it focuses on the effect of material rather than its content. Specifically, its potential to ‘deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it’.²⁰

In *R v Penguin Books Ltd*,²¹ Byrne J established that ‘to deprave means to make morally bad, to pervert, to debase or corrupt morally’ and that to corrupt means to ‘render morally unsound or rotten, to destroy moral purity or chastity, to pervert or ruin a good quality, to debase or defile’.²² The harm this test seeks to prevent is not violence, sexism, or offence; it

¹³ Obscene Publications Act 1857, s 1

¹⁴ *ibid*

¹⁵ Wayne Bartee and Alice Bartee, *Litigating Morality, American Legal Thought, and Its English Roots* (Praeger, 1992)

¹⁶ Berkowitz (n6)

¹⁷ *R v Hicklin* (1857)

¹⁸ *ibid*

¹⁹ As amended by the Obscene Publications Act 1964

²⁰ Obscene Publications Act 1959, s 1

²¹ (1961) Crim. L.R. 176

²² (1996) 1 Cr. App. R. 432

is moral harm.²³ *R v Elliott (Carleton John)*²⁴ affirmed this interpretation, in which Lord Wright also dismissed ‘the aversion argument’ (originating in *R v Calder & Boyars Ltd*),²⁵ according to which shocking and disgusting material could not be considered obscene because its effect would be to ‘discourage the audience from indulgence in the activities so repulsively portrayed’.²⁶ Expert evidence is also inadmissible regarding the potential impact of material on its ‘likely’ viewers, which is for the jury to decide.²⁷ It has been argued that the likely viewership of pornography is limited somewhat – to ‘dirty-minded men of middle age whose morals are already in a state of depravity and corruption’ (and thus not capable of being perverted by pornography) – but this defence was rejected by the House of Lords in *DPP v Whyte*.²⁸ The 1959 Act, they said, is equally concerned with protecting people from further corruption.²⁹ Moreover, as *R v Perrin*³⁰ and contemporary usage statistics make clear, when it comes to online pornography, the internet extends the title ‘likely viewer’ to everyone, including children.³¹

This is all that needs to be said regarding the 1959 Act’s precedential case law, as the vast majority is consigned to the twentieth century and with, by today’s standards, innocuous material composing its primary basis. The key takeaway here is the foundations of the current law, which originate from the religious moralism and 1857 Act discussed above.

1.3 The problem with the 1959 Act

Traditional analyses regarding the legal enforcement of morals provide an appropriate starting point for criticism of the 1959 Act. Lord Devlin stated the following regarding when he believed the law and morality should overlap:

*[The law] should confine itself to those activities which offend against public order and decency or expose the ordinary citizen to what is offensive or injurious’.*³²

²³ Andrew Koppelman, ‘Does Obscenity Cause Moral Harm?’ (2005) 105(5) *Columbia Law Review* 1635

²⁴ (1996) 1 Cr. App. R. 432

²⁵ (1969) 1 Q.B. 151

²⁶ *R v Elliot* (n24); *R v Anderson* (1972) 1 Q.B. 304

²⁷ *R v Anderson* (ibid); *DPP v Jordan* (1977) A.C. 699; *DPP v Clayton (Gordon Alistair)* (1963) 1 Q.B. 163; *DPP v Whyte* (1972) A.C. 849

²⁸ (1972) A.C. 849

²⁹ ibid

³⁰ (2002) EWCA Crim 747

³¹ *R v Perrin* (2002) EWCA Crim 747 [10], [26]

³² Patrick Baron Devlin, *The Enforcement of Morals* (Oxford University Press, 1965)

Harry Clor, who defended Devlin's position, argued that what is harmful to human beings is connected to what is good for them and that since good moral character is a component of well-being, moral harm is a sufficient basis for legislating.³³ Neither expanded on what constitutes immoral sexual practice outside of Devlin's remarks on the 'abhorrence' of homosexuality.³⁴ If one were to speculate, it may be that cogent with the 1959 Act's roots, religion is responsible for such moral theories becoming synonymous with the restriction of pornography.³⁵ St Augustine of Hippo, for example, believed that 'genital commotion' is only 'proper' when purposive to reproduction.³⁶ A corresponding distaste for masturbation is also present in most religious cultures, including Jewish, Christian and Taoism belief systems. Pornography – an aid to self-gratification depicting promiscuous sex – is incompatible with these beliefs and considered offensive or indecent by those that hold them. If one were to assume momentarily that these views are correct, and further, that pornography can in fact influence behaviours, it would be reasonable to say that it could 'deprave and corrupt' its audiences. Applying the logic of Devlin and Clor, this necessitates restriction. Indeed, it has been argued along similar, though not necessarily religious lines, that pornography should be outlawed because it reduces sex to a form of animal activity;³⁷ undermines it as a 'citadel of privacy';³⁸ and 'breaks down the shame necessary for the protection of love and self-restraint'.³⁹

The 1959 Act is the product of this type of reasoning, which is its flaw. It takes for granted pornography's supposed immorality when the focus should instead be on whether this is a justifiable reason for prohibition in the first place.⁴⁰ Of course, more often than otherwise, prohibited acts will be immoral, some straightforward examples being murder, rape, and theft. It does not follow, however, that prohibition must always supersede perceived immorality. This is particularly so when it comes to sexual morality, which at least in the UK, does not exist as a normative, substantive value. Britain is one of the most culturally diverse countries on the planet, after all, and it is one in which Evangelical Christians, swingers, conservative

³³ Harry Clor, *Public Morality and Liberal Society: Essays on Decency, Law, and Pornography* (University of Notre Dame Press, 1996)

³⁴ Devlin (n32)

³⁵ John Sommerville, *English Society, 1688–1832: Ideology, Social Structure and Political Practice during the Ancien Régime* (Cambridge University Press, 1985)

³⁶ St Augustine, *The City of God* (Unknown Publisher, 354-430 AD)

³⁷ Irving Kristol, 'Pornography, Obscenity and the Case for Censorship' *New York Times* (New York, 28 March 1971) <<https://www.nytimes.com/1971/03/28/archives/pornography-obscenity-and-the-case-for-censorship-pornography.html>> accessed 20th November 2022

³⁸ George Steiner, 'Night Words: High Pornography and Human Privacy' in Douglas Hughes (ed), *Perspectives on Pornography* (St. Martin's Press, 1970)

³⁹ Walter Bems, 'Pornography vs. Democracy: The Case for Censorship' (1971) 22 *The Public Interest* 3

⁴⁰ Richard Wasserstrom, 'Is Adultery Immoral?' (1974) 5(4) *Philosophical Forum* 513; Christopher Nowlin, 'The Protection of Morals under the European Convention for the Protection of Human Rights and Fundamental Freedoms (2002) 24(1) *Human Rights Quarterly* 264

Muslims and polyamorists rub shoulders on a daily basis. This renders a moral approach to sex-related laws unworkable.⁴¹ Yet, despite this, the 1959 Act remains true to its roots, bound as it is by its language to a moralistic interpretation according to which the subjective sexual morality of the jury will invariably dictate how they interpret and apply the law. This leaves it inconsistent and uncertain in turn. Indeed, a US Supreme Court Judge once said he cannot describe obscenity but 'knows it' when he sees it.⁴² This statement alone illustrates the problematic nature of grasping sexual behaviours as legal points of reference.⁴³

It is for these reasons that contemporary scholars interpret morality to be a paternalistic, opaque and 'wholly inadequate basis' for pornography law.⁴⁴ The Crown Prosecution Service, further, also acknowledges that notions of 'moral depravity' and 'corruption' do not provide for 'legal demarcation of sufficient precision to enable a citizen to regulate his or her conduct',⁴⁵ recommending instead that 'caution' be exercised when assessing the tendency of material to deprave and corrupt if it has a likely audience of over 18, does not involve 'serious harm', is not criminal, and is consensual.⁴⁶ Thus, there is also a discrepancy between the law and practice, further evidence of which may be found in the form of a steep decline in prosecutions under the Act and the more recent case of *R v Peacock*.⁴⁷ This case involved a man who sold pornography depicting a variety of reasonably extreme – though undoubtedly consensual – sex acts. These included urethral sounding, urophilia, double fisting, hard whipping and 'ballbusting' (ballbusting being the squeezing, tight binding, slapping, spanking, hitting, punching, kicking, or striking of the testicles, scrotum, or perineum using hands, feet, or torture aids).⁴⁸ Despite this, the jury delivered a unanimous not guilty verdict. Jackman believes this 'rearranged the boundaries of obscenity law' and

⁴¹ Helen Fenwick and Gavin Phillipson, *Media Freedom Under the Human Rights Act* (Oxford University Press, 2006); Walter Everaerd, Ellen Laan and Mark Spiering, 'Male Sexuality' in Lenore Szuchman and Frank Muscarella (eds), *Psychological perspectives on Human Sexuality* (John Wiley & Sons, Inc, 2000); Geneviève Martin, Maya Yampolsky and Judith Kotiuga, 'Adolescents' Perception of Their Sexual Self, Relational Capacities, 'Attitudes Towards Sexual Pleasure and Sexual Practices: a Descriptive Analysis' (2022) 51 *Journal of Youth and Adolescence* 486; Vern Bullough and Bonnie Bullough, *Sin sickness and sanity: A History of Sexual Attitudes* (Routledge, 2019); Lisa Orr, *Sexual Values, Opposing Viewpoints* (Greenhaven Press, 1989)

⁴² *Jacobellis v Ohio* (1964) 378 U.S. 184

⁴³ Dana-Sophia Valentiner, 'The Human Right to Sexual Autonomy' (2021) 22 *German Law Journal* (2021) 703

⁴⁴ Clare McGlynn and Erika Rackley, 'Criminalising extreme pornography: a lost opportunity' (2009) 4 *Criminal Law Review* 245; *Martha Nussbaum, Hiding from Humanity: Disgust, Shame, and the Law* (Princeton University Press; 2004)

⁴⁵ Crown Prosecution Service, 'Obscene Publications' (2019) <<https://www.cps.gov.uk/legal-guidance/obscene-publications>> accessed 20 October 2022

⁴⁶ *ibid*

⁴⁷ (unreported, 6 January 2011, Southwark Crown Court, London, UK)

⁴⁸ Rhiannon Beauregard, 'Introduction to Ballbusting and Cuntbusting: How to Do it Safely!' (Sex-Therapy Online, 2018) <<https://sextherapy-online.com/ballbusting-cuntbusting/>> accessed 27th January 2023

hammered the 'final nail' into the 1959 Act's coffin.⁴⁹ He was right in a way; as little as 50 years ago, depictions of oral sex were considered 'shocking' and 'wrong' and prosecuted under the Act.⁵⁰ He was, however, wrong to conclude that the Act is dead and buried. In fact, it is its ambiguity that has allowed it to catch offences outside the definition of 'extreme pornography' contained in the now more commonly prosecuted Criminal Justice and Immigration Act 2008 ('the 2008 Act'). For instance, in *R v GS*,⁵¹ a man was found guilty for merely describing child sexual abuse in an online chatroom; and in *Calder (John) Publishing v Powell*,⁵² the publishers of a pamphlet were indicted for advertising homosexuality and drug abuse in New York. This is not to advocate for the 1959 Act's function as a gap filler, only to show that it remains a smoking gun and represents, therefore, an unacceptable state to leave the law.

1.4 The Criminal Justice and Immigration Act 2008

In 2003, Jane Longhurst was murdered by Graham Coultts via asphyxiation.⁵³ He was obsessed with pornography and a frequent visitor of websites 'Deathbyasphyxia', 'Hanging Bitches' and 'Necrobabes'.⁵⁴ Jane's mother petitioned for a change in the law, and after receiving 50,000 signatures, section 63 of the Criminal Justice and Immigration Act 2008 ('2008 Act') was drafted.⁵⁵ According to this section, possessing an 'extreme pornographic image' is an offence.⁵⁶ Viewing such images online counts as possession because the material is stored in the computer's cache;⁵⁷ however, the prosecution must prove the defendant was aware of this.⁵⁸ An 'image' (including 'moving images')⁵⁹ will be pornographic if it can be reasonably assumed it was produced with the sole or principal purpose of sexual arousal.⁶⁰ Academics

⁴⁹ Alex Antoniou, 'R v Peacock: Landmark Trial Redefines Obscenity Law' (2012) (10(1) Graduate Journal of Social Science 85

⁵⁰ *R v Anderson* (n26)

⁵¹ (2012) EWCA Crim 398

⁵² (1965) 1 QB 509

⁵³ Anonymous, 'Man Murdered out of Perversion' (*BBC News*, June 2007)

<http://news.bbc.co.uk/1/hi/england/southern_counties/6744817.stm> accessed 23rd November 2022

⁵⁴ Liz Longhurst, 'Violent Online Porn Drove Pervert to Kill my Jane: Mother, 81, Believes Daughter Would Still be Alive if Internet Giants Had Listened to Her Calls to Ban Sick Websites' *The Daily Mail* (London, May 2013) <<https://www.dailymail.co.uk/news/article-2334115/Violent-online-porn-drove-pervert-kill-Jane-Mother-81-believes-daughter-alive-internet-giants-listened-calls-ban-sick-websites.html>> accessed 23 November 2022

⁵⁵ Anonymous, 'The Legacy of Jane Longhurst' (*The Guardian*, September 2006)

<<https://www.theguardian.com/uk/2006/sep/01/ukcrime.gender>> accessed 23 November 2022

⁵⁶ s 63(1)

⁵⁷ David Ormerod, 'Indecent Photograph of a Child' (2006) *Criminal Law Review* 748

⁵⁸ *Atkins v DPP* (2000) 2 Cr. App. R. 248

⁵⁹ Criminal Justice and Immigration Act 2008 s 63(8)(a)

⁶⁰ *ibid* s 63(3)

concur with this straightforward definition, and the author also considers it logical.⁶¹ An image will be 'extreme' if it depicts in an 'explicit and realistic way'⁶² an act which: threatens a person's life;⁶³ results or is likely to result in serious injuries to a person's anus, breasts or genitals;⁶⁴ involves sexual interference with a human corpse;⁶⁵ or involves intercourse or oral sex with an animal (whether dead or alive).⁶⁶ The 2008 Act was also amended in 2015 to include realistic depictions of non-consensual penetration of the mouth, vagina or anus with any body part or object.⁶⁷ This latter amendment is necessary to avoid disseminators of actual rape pornography arguing that the material shows someone only pretending to be raped.⁶⁸ Regarding threats to life, the explanatory notes indicate a focus on suffocation and hanging,⁶⁹ presumably due to the section's contextual background and the fact that asphyxiation is the most common cause of sex-related casualty, though there has been little more in terms of further elaboration.⁷⁰

Many of these provisions are sound simply because they pertain to acts that are criminal whether depicted in pornography or not. Regrettably, however, there are no further clarifications regarding what constitutes 'serious injury'. In theory, this could include much of the activity featured in Peacock, indicating an inconsistency between how the two Acts operate in practice. It is also odd that only actions likely to cause harm to the genitals are prohibited. 'Ballbusting' notwithstanding, could the hard whipping of someone's face not cause them 'serious' harm?

Undeniably, the 2008 Act does offer more clarity than the 1959 Act by specifying certain types of content. However, this is undermined by a further proviso: it must also be 'grossly offensive, disgusting or otherwise of an obscene character'.⁷¹ This qualification was added to create 'symmetry' between the two Acts. Still, as Lord Hunt has pointed out, it 'is drawn from the ordinary dictionary definition of obscene' rather than the legal term of art.⁷² This is

⁶¹ Joel Feinberg, 'Pornography and the Criminal Law in David Copp and Susan Wendell (eds), *Pornography and Censorship*, (Prometheus, 1983)

⁶² Criminal Justice and Immigration Act 2008 s 63(7)

⁶³ *ibid* s 63(7)(a)

⁶⁴ *ibid* s 63(7)(b)

⁶⁵ *ibid* s 63(7)(c)

⁶⁶ *ibid* s 63(7)(d)

⁶⁷ Criminal Justice and Courts Act 2015

⁶⁸ Criminal Justice and Immigration Act 2008 s 63(7a)

⁶⁹ Explanatory Note to the Criminal Justice and Immigration Act 2008, page [457]

⁷⁰ Lena Bunzel and Others, 'Non-Natural Death Associated with Sexual Activity: Results of a 25-Year Medicolegal Postmortem Study' (2019) 16(1) *The Journal of Sex Medicine* 1547; Anouk Schori, Christian Jackowski and Corinna A Schön, 'How safe is BDSM? A literature review on fatal outcome in BDSM play (2022) 136(1) *International Journal of Legal Medicine* 287

⁷¹ Criminal Justice and Immigration Act 2008 s 63(5a)

⁷² HL Deb 3 March 2008 vol 699 col 895

a lower standard than that articulated in *Penguin Books*, a distinction acknowledged in *R v Anderson*.⁷³ Clearly, the only 'symmetry' achieved between the two is their uncertainty. Indeed, this point was made by the NGO Liberty during the committee stage briefing for the bill when they said that 'extreme caution should be exercised when new criminal laws are imposed with the intention of imposing a subjective opinion of what is morally acceptable'.⁷⁴

1.5 The Communications Act 2003

Section 368E of the Communications Act 2003 ('2003 Act')⁷⁵ requires pornography produced in the UK to adhere to the same standards as the British Board of Film Classification.⁷⁶ This means it cannot include acts likely to cause serious physical harm; sexual threats; humiliation or abuse not forming part of a clearly consenting role playing game; penetration by any object likely to cause bodily harm; or any physical restraint preventing the withdrawal of consent.⁷⁷ Nor can it encourage an interest in 'sexually abusive' activity, such as adults role-playing as non-adults, although some allowance is made for 'non-abusive, consensual activity'.⁷⁸ Amia Srinivasan stated in her recent bestseller, *The Right To Sex*, that the passing of this legislation has resulted in the banning of a longer list of sex acts, including some associated with female pleasure, for example, facesitting or ejaculation. This is also mentioned in a few other media articles published in 2014.⁷⁹ However, the BBFC does not mention such a list, and it seems it does not exist outside these posts. An article written in 2019 indicates that the law was actually redacted a year later.⁸⁰ It is a shame this mistake was made, as Srinivasan's book makes for otherwise persuasive and enjoyable reading. Nonetheless, the 2003 Act represents significant restrictions on the production of UK pornography

⁷³ (1972) 1 QB 304

⁷⁴ Liberty's Committee Stage Briefing on the Criminal Justice and Immigration Bill in the House of Commons (2007) <<https://www.libertyhumanrights.org.uk/>> accessed 11 October 2022

⁷⁵ As amended by The Audio-visual Media Service Regulations 2014

⁷⁶ The Audiovisual Media Service Regulations 2014 s 2(a); s 2(b)

⁷⁷ BBFC, Classification Guidelines <<https://www.bbfc.co.uk/about-classification/classification-guidelines>> accessed 21 December 2022

⁷⁸ *ibid*

⁷⁹ Christopher Hooton 'A Long List of Sex Acts Just Got Banned in UK Porn' (*The Independent*, 2014) <<https://www.independent.co.uk/news/uk/a-long-list-of-sex-acts-just-got-banned-in-uk-porn-9897174.html>> Accessed 16th October 2022; Network Writers, 'UK Porn Ban: Facesitting, Spanking and Caning Among Sex Acts Prohibited from Homegrown Videos' (*News.com*, 2014) <<https://www.news.com.au/lifestyle/relationships/sex/uk-porn-ban-facesitting-spanking-and-caning-among-sex-acts-prohibited-from-homegrown-videos/news-story/4ac449f73b25fe501ff2a2bd0d524f01>> Accessed 18 October 2022; Helena Horton and Alex Hudson, 'Spanking BANNED From Porn Under New Government Law - What Else Isn't Allowed?' (*The Mirror*, 2014) <<https://www.mirror.co.uk/news/uk-news/spanking-banned-porn-under-new-4730732>> Accessed 13 October 2022.

⁸⁰ Matilda Long, 'Ban on Fetish Porn Including BDSM Overturned in England in Landmark Ruling' (*Yahoo News*, 2019) <<https://uk.news.yahoo.com/violent-porn-including-bdsm-no-longer-illegal-uk-long-performers-consenting-155930303.html>> Accessed 20 October 2022

unmentioned elsewhere, creating a disparity between what is legal to watch in the UK and what is legal to produce. This makes no sense.

1.6 A partial conclusion

The prudish, baked-in moralism of the current law is unsatisfactory for the reasons given. Furthermore, it is spread across five statutory instruments and three sets of non-statutory guidance. The layperson cannot be expected to cross-reference these to determine what is legal, especially given their inconsistencies. Nor can people be expected to determine what kind of harm is 'serious', what kind of physical restraints go too far, or what kind of role-play encourages 'abusive behaviour'. Reformation is, therefore, necessary to clarify the law. Given the ongoing pornography debate, the remainder of this work looks to the law of human rights and various academic theories to determine whether said reformation needs to incorporate tighter restrictions than those already in place.

2 The Convention And Pornography

2.1 The Convention, the ECtHR and UK domestic human rights law

As a regional human rights framework, the Convention affords citizens in any of the Council of Europe's 46 member nations a similar (although less expansive) set of rights to those contained in the Universal Declaration of Human Rights ('UDHR'). In 1959, the ECtHR was established, which is open to direct petition from citizens should they feel those rights have been violated.⁸¹ (Readers note: Protocol 11 of the Convention abolished the European Commission of Human Rights and replaced it with the ECtHR; however, decisions from both bodies are discussed in this article as those by the former still remain persuasive). Broadly, applications involve complaints that the state has either directly interfered with rights or failed to uphold them. The primary function of this system is redress; however, the determination of public policy issues has also been identified as its 'mission'.⁸² Because of this, the Convention system has become a stage for political movements to effect social and legal change⁸³ and destabilise 'unjust concentrations of political, social, economic and

⁸¹ Equality and Human Rights Commission 'What is the European Court of Human Rights?' (2016) <<https://www.equalityhumanrights.com/en/what-are-human-rights/how-are-your-rights-protected/what-european-court-human-rights>> accessed 24 January 2023

⁸² *Karner v Austria* App no 40016/98 (ECHR 24, July 2003)

⁸³ Loveday Hodson, *NGOs and the Struggle for Human Rights in Europe* (Hart Publishing, 2011)

technological power'.⁸⁴ It is therefore a suitable framework for assessing the implications of pornography.

The Human Rights Act 1998 ('HRA') incorporated the Convention into UK domestic law to make the rights it contains – which the domestic courts were already applying in several ways⁸⁵ – more accessible.⁸⁶ A fundamental way the HRA achieves this is through section 2(1), according to which UK courts must 'take into account' decisions of the ECtHR and the European Commission. The section is deliberately non-binding, although decisions remain highly influential when analysing certain issues, and so they are an appropriate place to start any assessment of potential human rights issues in the UK.⁸⁷ Convenient to mention here is how the persuasive authority of the ECtHR is lessened in a number of contexts, particularly when the subject matter of a claim engages a country's 'margin of appreciation'.

2.2 Margins of appreciation and European consensus

The margin of appreciation doctrine is not expressly mentioned in the travaux préparatoires of the Convention,⁸⁸ but it is a creation of the Strasbourg organs nonetheless.⁸⁹ Its genesis traces back to martial law and *Lawless v Ireland*;⁹⁰ however, a series of judgements following *Handyside v United Kingdom*⁹¹ have since extended its applicability to almost all Convention rights.⁹²

Margins of appreciation allow the ECtHR to consider the cultural conditions of member states and thereby grant them corresponding, albeit circumstantially dependent,⁹³ degrees of

⁸⁴ Upendra Baxi, *The Future of Human Rights* (Oxford University Press, 2002)

⁸⁵ Merris Amos, *Human Rights Law* (3rd edn, Hart Publishing, 2021)

⁸⁶ Secretary of State for the Home Department, *Rights Brought Home: The Human Rights Bill* (White Paper, cm 3782, 1997)

⁸⁷ David Bonner, Helen Fenwick and Sonia Harris-Short, 'Judicial Approaches to the Human Rights Act' (2003) 52(3) *The International and Comparative Law Quarterly* 549

⁸⁸ Howard C Yourow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence* (Martinus Nijhoff Publishers, 1996)

⁸⁹ Michael Hutchinson, 'The Margin of Appreciation Doctrine in the European Court of Human Rights' (1999) 48(3) *International & Comparative Law Quarterly* 638

⁹⁰ App no 332/57 (ECHR 1 July 1961)

⁹¹ (1979-80) 1 E.H.R.R. 737

⁹² Simon Paul, 'Governing from the Margins: The European Court of Human Rights' Margin of Appreciation Doctrine as a Tool of Global Governance' (2016) 12(1) *Croatian Yearbook of European Law and Policy* 81; Yourow (n88) *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence* (Martinus Nijhoff Publishers, 1996)

⁹³ *Rasmussen v Denmark* App No 8777/79, (ECtHR 28 November 1984) [40]; Mathew Saul, 'The European Court of Human Rights' Margin of Appreciation and the Processes of National Parliaments' (2015) 15 *Human Rights Law Review* 745; Yourow (n88); Jan Kratochwil, 'The Inflation of The Margin of Appreciation by The European Court Of Human Rights' (2011) 29 *Netherlands Quarterly of Human Rights* 324

latitude regarding how they uphold Convention rights.⁹⁴ The wider the margin of appreciation on an issue, the broader the states' discretion for resolving it. These 'width assessments' are conducted based on numerous factors. Andrew Legg splits these into first and second order reasons.⁹⁵ First-order reasons relate to the facts of the case and the right in question.⁹⁶ Second-order reasons include three external, merit-based factors to be considered when evaluating the first-order reasons.⁹⁷ These include: 'democratic legitimacy, the common practice of states, and expertise'.⁹⁸ The middle is referred to as 'European consensus'.⁹⁹ On any given issue, where there is little to no consensus amongst member states, the legislature's suitability in determining the issue at hand is strengthened relative to that of the ECtHR (ergo, they receive a wider margin of appreciation).¹⁰⁰ Analogously, a broader consensus will result in a narrower margin of appreciation.¹⁰¹

2.3 The protection of morals and ECtHR jurisprudence

Regarding sex-based rights, the 'personal freedoms' emboldened in Articles 8–11 of the Convention are particularly relevant. They are qualified, which means they may be interfered with so long as the interference is 'prescribed by law', 'in pursuit of a legitimate aim', and 'necessary in a democratic society'.¹⁰² Said interference cannot go beyond what is necessary to achieve the aim, a proviso known as the 'principle of proportionality'.¹⁰³ Laws will be considered necessary/legitimate if they protect particular public interests, one of which is the 'protection of morals'.¹⁰⁴ There is evidence in the case of *Glaserapp v Germany*¹⁰⁵ that Strasbourg considers this notion to be specific to pornography. However, despite morality appearing in various constitutional charters/covenants, for example, the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child, no

⁹⁴ Amos (n85)

⁹⁵ Andrew Legg, *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality* (Oxford University Press, 2012); Oddný Mjöll Arnardóttir, 'Rethinking the Two Margins of Appreciation' (2016) 12(01) *European Constitutional Law Review* 27

⁹⁶ *ibid*

⁹⁷ *ibid*

⁹⁸ *ibid*

⁹⁹ *ibid*

¹⁰⁰ Janneke Gerards, 'Pluralism, Deference and the Margin of Appreciation Doctrine' (2011) 17 *European Law Journal* 80; Eva Brems, 'The Margin of Appreciation Doctrine in the Case Law of the European Court of Human Rights' (1996) 56 *Zeitschrift für Ausländisches öffentliches Recht und Völkerrecht* 240

¹⁰¹ *Sunday Times v UK* (No.1) App no 6538/74 (ECtHR 26 April 1979); Tom Lewis, 'What not to Wear: Religious Rights, the European Court, and the Margin of Appreciation' (2007) 56(2) *International & Comparative Law Quarterly* 395

¹⁰² Human Rights Act 1998 sch 1

¹⁰³ *R (Daly) v Home Secretary* [2001] UKHL 26

¹⁰⁴ European Convention on Human Rights sch 6(1), 8(2), 9(2), 10(2) and 11(2)

¹⁰⁵ App no 9228/80 (ECmHR, 28 August 1986)

further elucidation as to what it entails has ever been provided. Articulating the reason for this begins with *Handyside*, in which the applicant purchased the rights to a book supposedly aimed at educating children about sex.¹⁰⁶ The House of Lords held that it had the potential to deprave and corrupt, so they banned it in accordance with the 1959 Act. In addressing whether this constituted a violation of the applicants freedom of expression, the ECtHR stated that ‘it is not possible to find in the domestic law of the various contracting states a uniform European conception of morals’.¹⁰⁷ The UK was afforded a wide margin of appreciation regarding their protection on this basis, so a violation was not found. This position has since been consistently reaffirmed.¹⁰⁸

As discussed above, there is no consensus regarding sexual morality in contemporary British society – a lineament compounded when all 47 states party to the Convention enter the equation. As evidenced by *Handyside*, this simple fact has sanctioned a highly attenuated form of review in this area by the ECtHR. Indeed, none of the applicants in *X Company v United Kingdom*,¹⁰⁹ *W and K v Switzerland*,¹¹⁰ *Reiss v Austria*,¹¹¹ and *Pay v the United Kingdom*¹¹² were successful in arguing that their rights had been breached by domestic pornography provisions, and outside of claims involving work of substantial political or artistic merit, nobody has.¹¹³ Truthfully, the degree of deference given to member states by Strasbourg concerning this issue renders any further discussion of the jurisprudence entirely pointless.

The Williams Committee stated in their report, commissioned by the Home Office in 1970, that adults should be free to read and watch pornography as they see fit.¹¹⁴ The argument for pornography, as this indicates, is primarily one of free expression. This right is enshrined in Article 10 of the Convention, and judges have stressed its importance more frequently than

¹⁰⁶ *Handyside* [32].

¹⁰⁷ *Handyside* at [48]

¹⁰⁸ *Akdaş v Turkey*, App no 41056/04, (ECtHR, 16 February 2010) [27]; *Open Door and Dublin Well Woman v Ireland*, App no 14235/88, (ECtHR, 29 October 1992) [68]; *Müller and Others v Switzerland*, App no 10737/84, (ECtHR, 24 May 1988) [35]; *Wingrove v United Kingdom*, App no 17419/90, (ECtHR, 25 November 1996) [58]; *Otto Preminger Institut v Austria*, App no 13470/87, (ECtHR, 20 September 1994) [50]; *Perrin v United Kingdom*, App no 5446/03, (ECtHR, 18 October 2005); *Stübing v Germany*, App no 43547/08 (ECtHR, 12 April 2012).

¹⁰⁹ Commission Decision number 9615/81 (1983)

¹¹⁰ (n108) 16564/90 (1991)

¹¹¹ (n108) 23953/94 (1995)

¹¹² (n108) 32792/05 (2008)

¹¹³ *Hoare v United Kingdom*, App no 31211/96 (1997)

¹¹⁴ Home Office, Report of the Committee on Obscenity and Film Censorship (Cmd 772, 1979)

any other.¹¹⁵ As Brooke LJ stated in *Douglas v Hello Ltd (No. 1)*,¹¹⁶ whilst it is 'not in every case the ace of trumps, it is a powerful card to which the courts of this country must always pay appropriate respect'.¹¹⁷ With this in mind, what follows identifies the deeper justifications for free expression with a view of analysing their applicability to pornography. This begins with determining whether it qualifies as expression ab initio.

3 The Case For Pornography

3.1 Pornography: expression?

The appropriate starting point for analysing whether or not something qualifies as 'expression' is its straightforward dictionary definition: 'showing how you feel or expressing ideas through action'.¹¹⁸ According to case law, 'action' in this context is not limited to the written/spoken word; it extends to web pages on the internet,¹¹⁹ photographs,¹²⁰ and videos.¹²¹ In connection therewith, a plausible argument may be made that pornography communicates ideas and thus qualifies as expression. Barendt, for example, has stated that pornography could say it is fun to be aroused whenever one desires or that sex need not be part of a permanent relationship.¹²² Paradoxically, this hypothesis is supported incidentally by the arguments of some feminists, who state, amongst other things, that pornography portrays women as objects.¹²³ This is an abhorrent idea, yes, but it is an idea nonetheless. Nothing in the case law of the ECtHR or any other international human rights text suggests that expression is the prerogative of the well-intentioned, nor that it must pertain to any public interest or be of any particular worth.¹²⁴ In legal terms, then, it is suggested here that pornography qualifies as expression. Recognising this fact does not, however, mean that pornography cannot be restricted, because freedom-based rights are qualificatory. The old axiom involving someone shouting 'FIRE' in a crowded theatre provides the simplest example of this. The purpose and subsequent illocution of this speech act would be panic, a

¹¹⁵ *R v Secretary of State for the Home Department, ex p. Simms* (1999) 3 W.L.R. 328 [337] (Lord Steyn); Merris Amos, 'Can We Speak Freely Now? Freedom of Expression Under the Human Rights Act' *European Human Rights Law Review* (2002) 6 *European Human Rights Law Review* 750

¹¹⁶ (2001) Q.B. 967

¹¹⁷ [94] (Brooke LJ)

¹¹⁸ Cambridge Dictionary <<https://dictionary.cambridge.org/dictionary/english/expression>> accessed 3 March 2023

¹¹⁹ *R v Perrin* (n31)

¹²⁰ *Douglas v Hello* (n116)

¹²¹ *O'Shea v MGN Ltd* (2001) E.M.L.R. 943; *Prolife Alliance v The British Broadcasting Corporation* (2002) 2 All E.R. 756

¹²² Eric Barendt, *Freedom of Speech* (2nd ed, Oxford University Press, 2005)

¹²³ Fenwick and Phillipson (n41)

¹²⁴ Barendt (n122).

stampede, and likely physical harm; thus, it would be awarded no protection under UK law. Indeed, for many feminists, harm is not merely incidental to pornography but its central point. Given this, any argument for pornography built upon free expression will fare better if strengthened by an account of why the positive qualities of expression may also pertain to pornography. In this respect, discussion is absent by English judges as to why the ability to express oneself is so important in the first place, owing perhaps to the rights previously limited status under the common law.¹²⁵ It was never even mentioned in William Blackstone's writing on personal liberty.¹²⁶ As Joseph Raz puts it, it is a 'liberal's puzzle', and one 'prized by liberal's for reasons they maybe do not understand'.¹²⁷ As such, the justifications for free expression tend to rely more on abstract political/philosophical reasoning. They shall now be analysed in turn in relation to pornography.

3.2 Expression is not harmful

Some argue that whilst an individual's interest in expressing themselves may sometimes be small, there is very little reason for limiting it because it cannot do actual harm.¹²⁸ 'Sticks and stones', as it were. The problem with this argument is that speech is not protected because it does not cause harm, but even though it does so. So-called 'trans-exclusionary radical feminists', for example, argue that biology is immutable when it comes to the categorisation of male and female.¹²⁹ This view is upsetting for some trans people, yet the right to express it is protected under UK law nonetheless. In *Forstater v CGD Europe*,¹³⁰ for example, the Employment tribunal established that gender-critical views are protected as a belief under the Equality Act 2010; and in *Katherine Scottow v Crown Prosecution Service*,¹³¹ a woman's conviction for referring to a trans woman as a 'pig in a wig' was overturned.¹³² Quite clearly, the argument that expression is not harmful is neither here nor there.

3.3 Participation in Democracy

¹²⁵ *ibid*

¹²⁶ William Blackstone, *Commentaries on the Laws of England* (Unknown Publisher, 1753)

¹²⁷ Joseph Raz, 'Free Expression and Personal Identification' (1991) 11(3) *Oxford Journal of Legal Studies* 303

¹²⁸ *ibid*

¹²⁹ Helen Joyce, *Trans: Gender Identity and the New Battle for Women's Rights* (Oneworld Publications, 2021); Ruth Pearce, Sonja Erikainen and Ben Vincent, 'TERF wars: An Introduction' (2020) 68(4) *The Sociological Review Monographs* 677

¹³⁰ [2022] 7 WLUK 106

¹³¹ (2020) EWHC 3421

¹³² Maya Forstater, 'Pile-ons and Censorship' (2021) 50(3) *Index on Censorship* 12

The premise of this argument is that expression is a crucial way elected governments, in accordance with democratic ideals, may obtain the information necessary for making informed policy decisions.¹³³ This applies to discourse of a social or political character capable of engaging the listener's intellect. The number one trending video on Pornhub at the time of writing is titled 'wanna remove condom? Oke, I'm a good whore, I'll let you cum inside'.¹³⁴ Prohibiting videos like this would not deny anyone an equal voice in the political process, so this argument should not apply here.¹³⁵

3.4 Realising truth and the marketplace of ideas

On one view, put forward most prominently by John Stuart Mill, expression should be protected because the unfettered dissemination of ideas is necessary for human progression.¹³⁶ This argument is connected to the 'marketplace of ideas', a metaphor based on economics and trade in the free market,¹³⁷ within which there are a variety of products accessible and we, as rational consumers, are free to select any of them after assessing their value.¹³⁸ Applying this to expression, Mill argues for the right to present ideas so they may be weighed against each other and determinations made regarding their respective merits. This process, he argues, is how the truth in human affairs is discovered.¹³⁹ His theory reflects the basic principle of liberalism that extreme minority views, however distasteful, are conducive to informed choice and rational debate.¹⁴⁰ As we have seen, whilst pornography bears no influence on explicitly political speech, it is capable of conveying ideas. Thus, on a straightforward application of this theory, pornography as a form of speech has inherent worth.

It is submitted that to make such an argument, whilst it would be coherent, would also be to

¹³³ Vincent Blasi, 'The Checking Value in First Amendment Theory' (1977) 2(3) *American Bar Foundation Research Journal* 521; Benedictus Spinoza, *Theological-Political Treatise* (Jan Rieuwertsz, 1670); John Trenchard & Thomas Gordon, *Cato's Letters: Essays on Liberty, Civil and Religious, and Other Important Subjects* (London, 1755); Alexander Meiklejohn, *Free Speech and its Relation to Self-Government* (Harper & Brothers, 1948); Alexander Meiklejohn, 'The First Amendment is an Absolute' (1961) 1961 *The Supreme Court Review* 245; Frederick Schauer, 'Free Speech and the Argument from Democracy' (1983) 25 *Liberal Democracy* 241

¹³⁴ Pornhub, 'hottest videos' <<https://www.pornhub.com/video?o=ht&cc=gb>> accessed 17 February 2023

¹³⁵ Ronald Dworkin, 'Is There a Right to Pornography' (1981) 1(2) *Oxford Journal of Legal Studies* 177

¹³⁶ John Stuart Mill, *On Liberty* (Unknown Publisher, 1859); David O. Brink, *Mill's Progressive Principles* (Oxford: Clarendon Press, 2013)

¹³⁷ Jill Gordon, 'John Stuart Mill and the "Marketplace of Ideas"' (1997) 23(2) *Social Theory and Practice* 235

¹³⁸ *Abrams v United States* 250 U.S. 616; *ibid*

¹³⁹ Mill (n136)

¹⁴⁰ Cheng Yien Ee, 'Pornography: Women Matter' (2002) 9 *UCL Jurisprudence Review* 144

over-intellectualise. Firstly, where truth is of particular importance, expression will often be subjected to additional regulations. Most academic journals, for instance, will not publish work containing misinformation, and the vast majority is peer-reviewed to avoid precisely that.¹⁴¹ Seemingly, then, much modern academic practice contradicts the truth argument.¹⁴² Moreover, the vast majority of pornography is non-cognitive. It is not concerned with finding the truth. Its motivations boil down to profit and arousal, and there is literature to support this verdict. John Finnis and Frederick Schauer, for example, have stated on separate occasions that the consumers of pornography are looking for ‘titillation’, not ‘intellectual content’; that the ‘prototypical pornographic item shares more of the characteristics of sexual activity than of communication’; and that pornography has an ability to convey ideas equivalent to that of a dildo.¹⁴³ The author is inclined to agree – any ideas it portrays are undoubtedly peripheral to these underlying purposes.¹⁴⁴ For these reasons, like the Williams Committee, they regard pornography as falling outside the truth arguments purview.¹⁴⁵

3.5 A Rights-based approach

Clearly, arguments for pornography built upon any alleged political/intellectual function will fail due to its lack of instrumental value. Potentially applicable is the harm principle, according to which actions causing harm only to oneself cannot be the legitimate source of prosecution. However, this is an immensely complex area of legal philosophy and one plagued with theoretical issues, for example, how we should define and categorise harm. Unfortunately, this complexity has placed the writing of a comprehensive argument built around the harm principle well outside the scope of this article. The reader is instead invited to explore the literature in the area themselves, of which there is a library’s worth.

What remains is a rights-based approach. To this effect, Ronald Dworkin¹⁴⁶ believed dignity and autonomy underpin free expression.¹⁴⁷ In addressing his view, it is necessary to outline

¹⁴¹ Jonathan Seglow and Matteo Bonotti, ‘Freedom of Expression’ (2021) 16(7) *Philosophy Compass*

¹⁴² Robert Simpson, ‘The Relation between Academic Freedom and Free Speech’ (2020) 130(3) *Ethics: An International Journal of Social, Political, and Legal Philosophy* 287; Robert Post, ‘Reconciling Theory and Doctrine in First Amendment Jurisprudence’ (2000) 88 *California Law Review* 2355; Larry Alexander, *Is There a Right to Freedom of Expression?* (Cambridge University Press, 2005)

¹⁴³ Frederick Schauer, ‘Free Speech: A Philosophical Enquiry’ (1984) 47(1) *The Modern Law Review* 129; John Finnis, ‘“Reason and Passion”: The Constitutional Dialectic of Free Speech and Obscenity’ (1967) 116 *University of Pennsylvania Law Review* 222

¹⁴⁴ Fenwick and Phillipson (n45)

¹⁴⁵ Home Office Report (n114)

¹⁴⁶ Bears no relation to Andrea Dworkin

¹⁴⁷ Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press, 1977)

dignity. Dignity is often considered synonymous with notions of honour, nobility, or pride.¹⁴⁸ To die in battle, for example. Adopting this interpretation of dignity is to take it as a matter of degree, a view once taken by the Catholic Church.¹⁴⁹ Contrary to this, however, is a secondary understanding of dignity, one advanced by one of the most influential philosophers in history:

That which constitutes the condition under which alone something can be an end in itself has not merely relative worth, that is, a price, but an inner worth, that is dignity... Hence morality, and humanity insofar as it is capable of morality, is that which alone has dignity.¹⁵⁰

What Kant is saying is that dignity refers to a transcendent baseline value belonging to all humans irrespective of other factors.¹⁵¹ Etymologically speaking, this is correct: the lexical roots of dignity trace back to the Latin 'dignitas', which, according to Jane Haddock and Oscar Schachter, refers to both the 'intrinsic worth' of human beings and their ability to recognise it.¹⁵² This interpretation has been adopted by numerous human rights law instruments, including the Charter of Fundamental Rights of the European Union and the UDHR; the latter of which states that 'the recognition of the inherent dignity and of equal and inalienable rights of all members of the human family is the foundation of freedom, justice, and peace'. The author has chosen to adopt this construction of dignity – an inherent baseline value belonging to all human beings – in the following analysis.

Dworkin believed that dignity meant having the ability to realise one's success and not allowing the imposition of moral values by others – as is the case with the current law.¹⁵³ His account bore many similarities with 'human flourishing', an Aristotelian concept according to which human beings should be viewed as developing objects.¹⁵⁴ The connection between the two has been emphasised frequently in academic literature. Pico Mirandola, for example, identified dignity in the human power of self-transformation, as in the capacity of humans to be whatever they wish to be. Likewise Rosemarie Parse found that dignity is the result of showing people respect, a human virtue manifested by facilitating the 'genuine unfolding of

¹⁴⁸ James Frey, *A Million Little Pieces* (John Murray, 2003)

¹⁴⁹ Ariel Zylberman, 'Human Dignity' (2016) 11(4) *Philosophy Compass* 177

¹⁵⁰ Immanuel Kant, *The Metaphysics of Morals* (Unknown Publisher, 1797)

¹⁵¹ Samuel Kerstein, *How to Treat Persons* (Oxford University Press, 2013)

¹⁵² Jane Haddock, 'Towards Further Clarification of the Concept "dignity"' (1996) 24 *Journal of Advanced Nursing* 924; Margareta Edlund and others, 'Concept Determination of Human Dignity' (2013) 20(8) *Nurse Ethics* 851; Oscar Schachter, 'Human Dignity as a Normative concept' (1983) 77(4) *The American Journal of International Law* 848

¹⁵³ Ronald Dworkin, *Is Democracy Possible Here? Principles for a New Political Debate* (Princeton University Press, 2006)

¹⁵⁴ Aristotle, *Nicomachean Ethics* (Unknown Publisher, 1566)

others'.¹⁵⁵ Indeed, in relation to life without parole, the case law of the ECtHR now places a negative obligation on the state to avoid interference with human flourishing that cuts so deep even child rapists and serial murderers must be allowed the opportunity to rehabilitate.¹⁵⁶ With this in mind, the reader is invited to consider freedom of expression as a mode of validating different ways of life. The self-esteem of homosexuals, for example, is reinforced by the widespread availability of gay literature.¹⁵⁷ Analogously, suppression of that material would be to authoritatively condemn it.¹⁵⁸ Such condemnation can have a number of negative consequences, including a loss of self-respect. The effect of this should not be underestimated. As Raz argues, 'without it nothing may seem worth doing'.¹⁵⁹ Understood this way, restrictions on what we can say, write, read, produce, and watch can inhibit one's enjoyment, self-exploration, growth, and therefore one's dignity.

This argument extends to discussions and comments on activities, beliefs and attitudes, responses to them, and most pertinently, it could be applied to pornography, which portrays a broad spectrum of sexual behaviour.¹⁶⁰ To provide a more specific example, to place a ban on bondage, dominance, sadism, and masochism ('BDSM') pornography would be to demonise the practice itself, to disparage its practitioners, to prevent them from understanding their sexuality as fully as they might have done, to potentially hinder their sexual exploration/pleasure, to diminish their dignity, and thus to circumvent their human rights. Indeed, Moser tells of the 'significant psychological consequences' associated with the denial or repression of sexual arousal.¹⁶¹ Likewise, Raz has argued that autonomy is defined by one's capacity to pursue certain activities.¹⁶² This connection – between dignity and the ability to watch/create the type of pornography one might wish to – may seem tenuous to some. Still, its existence remains plausible, and even a slight risk of a human rights breach without solid justifications should always be avoided. Integral to this line of reasoning is a belief in pluralism – in sexual attitudes that may be conflicting but that belong

¹⁵⁵ Pico Della Mirandola, *The Oration on the Dignity of Man* (Unknown Publisher, 1486); Rosemarie Parse, 'Human Dignity: A Human Becoming Ethical Phenomenon' (2010) 23(3) *Nursing Science Quarterly* 257; John Kleinig and Nicholas G. Evans, 'Human Flourishing, Human Dignity, and Human Rights' (2013) 32 *Law and Philosophy* 539 32

¹⁵⁶ Jake Aston, 'Human Dignity, Life Without Parole, and Article 3 of the European Convention on Human Rights' (2023) *Plymouth Law Review* 123; *Kafkaris v Cyprus* App No 21906/04 [2008] 49 E.H.R.R. 35; *Vinter v United Kingdom* (2016) 63 E.H.R.R.1.

¹⁵⁷ Barendt (n122)

¹⁵⁸ Raz (n127)

¹⁵⁹ John Rawls, *A Theory of Justice* (Oxford University Press, 2019); James Edwards, 'Harm Principles' (2014) 20 *Cambridge University Press* 253

¹⁶⁰ Raz (n127)

¹⁶¹ Charles Moser, 'Defining sexual orientation. Archives of Sexual Behaviours' (2016) 45 *The Official Publication of the International Academy of Sex Research* 505

¹⁶² Joseph Raz, *The Morality of Freedom* (Unknown Publisher, 1986)

to people who tolerate each other.¹⁶³ Indeed, the French Counsel Constitutional and the World Association for Sexual Health have both stated that free expression should be defended as conducive to tolerance; the latter declaring in 2019 that ‘sexual pleasure should be exercised within the context of sexual rights, particularly the rights to equality and non-discrimination, autonomy and bodily integrity, the right to the highest attainable standard of health and freedom of expression.’¹⁶⁴

It is submitted, for these reasons, that pornography should be considered not only a form of protected expression but one with potential, if not likely, value. It therefore falls on those advocating for the prohibition of pornography to put a convincing case forward.

4 The Case Against Pornography

4.1 The right in question

It has been argued that pornography breaches a number of human rights.¹⁶⁵ Whilst informed by various international treaties, this discussion is limited to what the author considers most applicable – the right to not be subjected to torture or to inhuman or degrading treatment or punishment – which is enshrined in Article 3 of the Convention; Article 5 of the Universal Declaration of Human Rights; and Article 4 of the Charter of Fundamental Rights of the European Union. As highlighted by *the Greek Case*,¹⁶⁶ ‘torture’ is synonymous with achieving a purpose, and punishment with penology. The following therefore focuses on notions of ‘treatment’. Treatment will be ‘inhuman’ if it causes unjustifiable, actual bodily injury or intense mental/physical suffering.¹⁶⁷ It will be ‘degrading’ if it debases an individual, ‘grossly humiliates them’,¹⁶⁸ or lowers them in ‘rank, reputation, or character’.¹⁶⁹ The right to not be treated as such has been referred to, ‘often emphatically’, as the most absolute right in

¹⁶³ *ibid*

¹⁶⁴ World Sexual Health Organisation, ‘Declaration on Sexual Pleasure’ (2019) <<https://worldsexualhealth.net/resources/declaration-on-sexual-pleasure/>> accessed 3rd March 2023

¹⁶⁵ European Centre for Law and Justice, *Pornography and Human Rights* (2019); Council of Europe Parliamentary Assembly, *Gender Aspects and Human Rights Implications of Pornography* (2019)

¹⁶⁶ App no 3321/67 (*Denmark v. Greece*), 3322/67 (*Norway v. Greece*), 3323/67 (*Sweden v. Greece*), 3344/67 (*Netherlands v. Greece*); Patrick Duffy, ‘Article 3 of the European Convention on Human rights’ (1983) 32(2) *The International and Comparative Law Quarterly* 316

¹⁶⁷ *Pretty v United Kingdom* App no 2346/02, [2002] 4 WLUK 606 [52]; *The Greek Case* (*ibid*); *Kudla v Poland* App no 30210/96 (ECtHR, 26th October 2000)

¹⁶⁸ *ibid*

¹⁶⁹ *East African Asians v United Kingdom* 3 E.H.R.R. 76 [189]; *Tyler v United Kingdom* (1979–80) 2 E.H.R.R. 1

existence,¹⁷⁰ albeit tempered in practice by the need to consider all case circumstances.¹⁷¹ For example, the victim's characteristics and the treatment's duration/effects are all relevant, so in some ways, the right is relative.¹⁷² It should also be noted that the threshold for engaging it is very high.¹⁷³

Obligations under Article 3 are primarily negative and typically evoked in cases involving mistreatment by the state.¹⁷⁴ One decision by the European Commission suggests that nations must take reasonable precautions to stop the general occurrence of the conduct it forbids;¹⁷⁵ however, aside from these, few attempts have been made to argue that Article 3 is relevant to cases involving the mistreatment of one private individual by another.¹⁷⁶ This presents a problem – any harm caused by pornography, ostensibly at least, will involve the sexual/physical abuse of private individuals by others, thus potentially making Article 3 inapplicable here.

4.2 International women's rights law – a solution?

Many feminists believe it is women who are harmed by mainstream pornography (the most notable of whom are Andrea Dworkin and Catherine MacKinnon). Multiple international instruments/organisations have the furtherance of women's rights as their objective.¹⁷⁷ The Convention on the Elimination of All Forms of Discrimination against Women ('CEDAW'), in particular, has been ratified by nearly 100 nations, including the UK,¹⁷⁸ and is the major UN treaty regarding women's rights.¹⁷⁹ According to Article 5, states must take appropriate measures to 'modify the social and cultural patterns that result in prejudice against

¹⁷⁰ Alistair Mowbray, 'A Study of the Principle of Fair Balance in the Jurisprudence of the European Court of Human Rights' (2010) 10 Human Rights Law Review 289; Hemme Battjes, 'In Search of a Fair Balance: The Absolute Character of the Prohibition of Refoulement under Article 3 ECHR Reassessed' (2009) 22 Leiden Journal of International Law 583; Natasa Mavronicola, 'Crime, Punishment and Article 3 ECHR: Puzzles and Prospects of Applying an Absolute Right in a Penal Context' (2015) 15(4) Human Rights Law Review 721; *Ireland v United Kingdom* (1979-80) 2 EHRR 25 [163]

¹⁷¹ Tyrer (n169); Duffy (n166)

¹⁷² Mowbray (n170)

¹⁷³ *Ireland v United Kingdom* (2018) 67 E.H.R.R. SE1 [162]; Battjes (n170); *Campbell and Cosans v United Kingdom* 4 E.H.R.R. 293 [30]; Council of Europe, 'Yearbook of the European Convention on Human Rights' volume 17; *X v Germany* App no 6181/73; Tyrer (n169)

¹⁷⁴ *Selmouni v France* App no 25803/94 (ECtHR, 28 July 1999)

¹⁷⁵ *Donnelly and Others v United Kingdom* App nos. 5577-5583/72 (ECHR, 1973)

¹⁷⁶ Duffy (n169)

¹⁷⁷ Convention on Political Rights of Women; Convention on Nationality of Married Women; UN Women

¹⁷⁸ United Nations Human rights, 'Status of ratification Interactive Dashboard' <<https://indicators.ohchr.org/>> accessed 4 Feb 2023

¹⁷⁹ Sally Engle Merry, 'Constructing a Global Law-Violence against Women and the Human Rights System' (2003) 28(4) Law & Social Inquiry 941

women'.¹⁸⁰ This places a positive obligation on the UK to protect women from mistreatment by state actors or private individuals. Of course, states cannot guarantee that discrimination against women will not occur; however, they can rightly be held responsible for implementing reasonable preventative measures.¹⁸¹ Disrupting patterns of discrimination takes time – especially considering the amount of socio-cultural factors at play – but this does not remove that responsibility.¹⁸² In terms of violence against women, which the ex-Secretary General of the UN considers contrary to Article 3, this might entail the decriminalisation of abortion or the amendment of rape law.¹⁸³ It would not be unrealistic to add the restriction of pornography to this list.

Due to parliamentary sovereignty, the CEDAW does not have the power to 'punish' the UK should it breach its provisions. That said, perusal of its modus operandi reveals a requirement for ratifying states to prepare periodic reports for its oversight committee. Pertinent to this work is a recent report produced by the UK government detailing the action it has taken against 'revenge pornography'.¹⁸⁴ Reports such as this, along with the statements of principle and policy often made by the CEDAW on 'prestigious' global forums, define issues in human rights language.¹⁸⁵ This discourse resonates with the values of global modernity¹⁸⁶ and fosters 'new cultural understandings of gender and violence'.¹⁸⁷ The potential shame and exposure of failing to appeal to these standards puts pressure on states to meet them.¹⁸⁸

As observed on many occasions and by multiple human rights bodies, the Convention is a

¹⁸⁰ The Convention on the Elimination of All Forms of Discrimination against Women Article 5; Article 2

¹⁸¹ Rebecca Cook, 'State Responsibility for Violations of Women's Human Rights' (1994) 7 *Harvard Human Rights Journal* 125; Committee on the Elimination of Discrimination against Women, 'General recommendation No. 28' (16th December 2010) <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G10/472/60/PDF/G1047260.pdf?OpenElement>> accessed 4 February 2023

¹⁸² Sara De Vido, *Violence Against Women's Health in International Law* (Manchester University Press, 2020)

¹⁸³ United Nations, 'In-depth study on all forms of violence against women' (2006) <<https://digitallibrary.un.org/record/563147>> accessed 4th Feb 2023; Committee on the Elimination of Discrimination Against Women, 'General recommendation No. 19' (1991)

¹⁸⁴ Engle Merry (n179); UK Government, 'United Nations Convention on the Elimination of All Forms of Discrimination Against Women Eighth Periodic Report (2011-2017)' <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/698249/UN_convention_on_the_elimination_of_all_forms_of_discrimination_against_women_8th.pdf> accessed 5 February 2023

¹⁸⁵ Engle Merry (ibid)

¹⁸⁶ ibid

¹⁸⁷ ibid

¹⁸⁸ ibid; Margaret Keck and Kathryn Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics* (Cornell University Press, 1998), Sally Engle Merry, *Getting Justice and Getting Even: Legal Consciousness among Working-class Americans* (University of Chicago Press, 1990); Patricia Ewick and Susan Silbey, *The Common Place of Law: Stories from Everyday Life* (University of Chicago Press, 1998)

'dynamic and evolutive'¹⁸⁹ vehicle for innovation that must be 'interpreted and applied taking into account the circumstances of contemporary society'.¹⁹⁰ Even a cursory examination of the Convention's jurisprudence reveals that the obligations placed on its contracting states have expanded,¹⁹¹ and the rights within it applied in a broadening range of contexts.¹⁹² On this basis, and against the international legal background provided by CEDAW, it is suggested here that Article 3 offers scope for an evolution of rights to place the UK under a positive obligation to safeguard women from the potential abuse/discrimination caused by mainstream pornography, similar to that observed in *M C v Bulgaria*,¹⁹³ in which the ECtHR stated that contracting nations are under a positive obligation to enact adequate rape laws.¹⁹⁴ Given the nature of the Human Rights Act, this new obligation would carry the full force of domestic, constitutional law.¹⁹⁵ This may prove difficult given Article 3's threshold, but it is viable, especially in a political climate in which both the European Centre for Law and Justice and the European Commission have already made recommendations for the stricter regulation of pornography on the basis that it is 'degrading and harmful to women's dignity and their status in society'.¹⁹⁶ The following assesses the strength of two key (predominantly feminist) arguments for the censorship of pornography relative to this hypothetical obligation.

4.3 The act argument

'I was under oath when asked whether, in my opinion, pornography is a cause of violence against women. I hate that question, because pornography is violence against women: the women used in pornography'.¹⁹⁷

This excerpt typifies 'the act argument', for which so-called 'radical' feminists are responsible. In essence, it states that 'pornography' is not the depiction of sex but rather a way patriarchal

¹⁸⁹ Nicolas Bratza, 'Living Instrument or Dead Letter – The Future of the European Convention on Human Rights' (2014) 2 *European Human Rights Law Review* 116

¹⁹⁰ *Stafford v United Kingdom* (1996) 22 E.H.R.R. 123; *Selmouni v France* (n174); *Tyrer v United Kingdom* (n169)

¹⁹¹ Mowbray (n180)

¹⁹² *Christine Goodwin v United Kingdom* App no 28957/95 (ECtHR 1st July 2002); *Hatton and Others v United Kingdom* App no 36022/97 (ECtHR 8 July 2003)

¹⁹³ App no 39272/98 (ECtHR, 3rd December 2003)

¹⁹⁴ Valentiner (n43)

¹⁹⁵ The Constitution Society, 'The UK Constitution' <<https://consoc.org.uk/the-constitution-explained/the-uk-constitution/#Is-the-constitution-of-the-united-kingdom-written-down>> accessed 5th Feb 2023

¹⁹⁶ (n165)

¹⁹⁷ Katherine MacKinnon, 'X-Underrated: Living in a World the Pornographers Have Made' in Melinda Tankard Reist and Abigail Bray (eds) *Big Porn: Exposing the Harms of the Global Pornography Industry* (Spinefex Press, 2012)

society has sexualised hierarchy.¹⁹⁸ The erotic, representations of sex in literature or film, or any such euphemism, it suggests, are distinct.

As the act argument centres around the allegedly abusive nature of acts themselves – women being bound, gagged, whipped, spanked, and urinated on, for example – it seems reasonable to infer that its proponents would also oppose the general practice of said acts in private, whether recorded or not. This happens to be the case. A considerable body of feminist literature – a large portion of which targets BDSM – suggests, among other things, that the lifelong learning of socially constructed gender norms has led to the association by women of sex with submission and subordination to men;¹⁹⁹ that men have purposefully ‘woven submissive fantasies’ into the fabric of society;²⁰⁰ and that to enjoy kneeling during sex constitutes a form of internalised misogyny.²⁰¹ The most extreme contention in this collection of work is that the giving of consent by women to any and all forms of sexual subordination is a product of patriarchy and thus illegitimate – a notion embodied in another statement by MacKinnon, in which she says that ‘paying a woman to appear to resist and then surrender does not make the sex consensual’.²⁰² This is a serious charge. Consent draws the sharp line, after all, distinguishing sex from rape.²⁰³ In this section, the author begins by addressing this position as a whole. It is therefore concerned with sexual degradation both in pornography and in private, and starts by addressing whether it should be considered problematic solely because it is a product of patriarchy.

Two preliminary, yet central, points must be made here. First, one cannot understand things

¹⁹⁸ Robert Jensen, *Stories of a Rape Culture: Pornography as Propaganda* in Tankard Reist and Bray (eds) *ibid*; Tracey Nicholls, *Dismantling Rape Culture, the Peacebuilding Power of ‘Me Too’*, (Routledge, 2021); MacKinnon (*ibid*); Dworkin (*ibid*); Yien Ee (n140)

¹⁹⁹ Alice Eagly, *Sex Differences in Social Behaviour: A Social-Role Interpretation* (Routledge, 1987); Julie Shulman and Sharon Horne, ‘Guilty or not? A Path Model of Women’s Sexual Force Fantasies’ (2006) 43(4) *Journal of Sex Research* 368; Megan Yost and Eileen Zurbriggen, ‘Gender Differences in the Enactment of Sociosexuality: An Examination of Implicit Social Motives, Sexual Fantasies, Coercive Sexual Attitudes, and Aggressive Sexual Behavior’ (2006) 43(2) *The Journal of Sex Research* 163; Beth Schneider and Peter Nardi, ‘John Gagnon and William Simon’s Sexual Conduct: The Social Sources of Human Sexuality: A 25th Anniversary Retrospective by the Authors’ (1999) 2(1) *Sexualities* 113; Diana Sanchez and others, ‘The Gender Role Motivation Model of Women’s Sexually Submissive Behavior and Satisfaction in Heterosexual Couples’ (2011) 38(4) *Personality and Social Psychology Bulletin* 528

²⁰⁰ Susan Brownmiller, *Against Our Will* (Simon & Schuster, 1957)

²⁰¹ Jensen (n198)

²⁰² Catherine MacKinnon, *Only Words* (Harvard University Press, 1993)

²⁰³ Staci Newmahr, *Playing on the Edge: Sadomasochism, Risk, and Intimacy* (Indiana University Press, 2011); David Ortman and Richard Sprott, *Sexual Outsiders: Understanding BDSM Sexualities and Communities* (Rowman & Littlefield Publishers, 2012); Gary Taylor and Jane Ussher, ‘Making Sense of S&M: A Discourse Analytic Account’ 4 (2001) *Sexualities* 293; Patricia Cross and Kim Matheson, ‘Understanding sadomasochism: An Empirical Examination of Four Perspectives’ (2006) 50(2-3) *Journal of Homosexuality* 133; Megan Yost, ‘Development and Validation of the Attitudes about Sadomasochism Scale’ (2010) 47(1) *Journal of Sex Research* 79

like sexual pathology/preference without science. Concomitantly, one cannot rely only on science. Now for an example: a man and a woman are engaged in intercourse. The man, having obtained consent to do so beforehand, slaps the woman across the face ('the act'). Both enjoy it. Why? According to Robert Sapolsky, the first category of explanation should be a neurobiological one – what happened in the two lovers' brains a second before the act occurred? From here, one should consider slightly earlier – what smell, sound, sight, or touch made the act happen? Next, what hormones provoked the man's response to this sensory stimulus, and how did it trigger his nervous system to produce the act? Eventually, one would move on from short-term endocrinology and increase one's field of view to encompass not only the couple's environment but also external factors – for example, how 'culture' shaped the behaviour of the society in which they live. As it happens, the broader literature surrounding BDSM has traversed all such categories of explanation, demonstrating that preferences for sexual submission may be the result of many things, including although not limited to: the nervous system and how endorphins are released,²⁰⁴ one's personal history,²⁰⁵ chronic illness,²⁰⁶ manifestations of evolutionary mating strategies,²⁰⁷ or even the foetal environment, wherein genes, prenatal hormones, and brain neuroanatomy influence our later preferences for sex-typical or sex-atypical activities.²⁰⁸

It is challenging to process all these factors. As a result, humans tend to think categorically by placing reasons for behaviour into clearly demarcated boxes. Naturally, these boxes align with our areas of expertise, for example, feminism. The drawback of this way of thinking, however, is that it is detrimental to our ability to think holistically about behaviours. Sapolsky

²⁰⁴ Geoff Mains, 'The Molecular Anatomy of Leather' in Mark Thompson (ed) *Leatherfolk: Radical Sex, People, Politics, and Practice* (Daedalus, 2004).

²⁰⁵ William Damon, 'Patterns of Power: A Test of Two Approaches to Understanding Sadomasochistic Sexual Behaviour in Heterosexual Men' (Unpublished thesis) (2001) <https://figshare.com/articles/thesis/Patterns_of_power_A_test_of_two_approaches_to_understanding_sadomasochistic_sexual_behavior_in_heterosexual_men_/10926338/1> accessed 3 March 2023; Eva Jozifkova, 'Consensual Sadomasochistic Sex (BDSM): The Roots, the Risks, and the Distinctions Between BDSM and Violence' E. (2013) 15(9) *Current Psychiatry Reports*; Tina Portillo, I Get Real: Celebrating my Sadomasochistic Soul in Thompson (n204); Gina Scott, Scott, *Erotic power: Exploring the world of BDSM* (Citadel Press, 1985); Hicks Leitenberg and others, 'Sexual Fantasy' (1995) 117(3) *Psychological Bulletin* 469; Midori, *The Seductive Art of Japanese Bondage* (Greenery Press, 2001).

²⁰⁶ Megan Yost and L E Hunter, 'BDSM Practitioners' Understandings of Their Initial Attraction to BDSM Sexuality: Essentialist and Constructionist Narratives' (2012) 3 *Psychology & Sexuality* 244; Edward Laumann and others, *The Social Organization of Sexuality: Sexual Practices in the United States* (University of Chicago Press, 2000)

²⁰⁷ Jozifkova (n205); Eva Jozifkova and others, 'Why Do Some Women Prefer Submissive Men? Hierarchically Disparate Couples Reach Higher Reproductive Success in European Urban Humans' (2012) 35(7) *Neuroendocrinology* 594

²⁰⁸ Daryl Bem, 'Exotic Becomes Erotic: A Developmental Theory of Sexual Orientation' (1996) 103(2) *Psychological Review* 320

illustrates this in the following passage by using the colour spectrum as a metaphor:

'The visual spectrum is a continuum of wavelengths from violet to red, and it is arbitrary where boundaries are put for different colour names (for example, where we see a transition from 'blue' to 'green'); [...] when you think categorically, you have trouble seeing how similar or different two different things are. If you pay a lot of attention to where boundaries are, you pay less attention to complete pictures'.

In other words, the factors influencing a woman's desire to engage in BDSM are intertwined, and it is not possible to identify a single reason for it in any given instance, whether on a screen or not. This includes patriarchy. In fact, the female desire to submit sexually has remained consistent throughout the past century despite significant socio-cultural advancements in terms of gender equality, suggesting a lack of causal relationship between the two.²⁰⁹ Truthfully, it could just as easily be put forward that pornography has merely been tailored after the fact to our pre-existing sexual preferences in order to maximise sales. Indeed, women are more likely to enjoy sexual submission and degradation than men, who prefer dominating,²¹⁰ which remains true in both the general and the BDSM populations.²¹¹ Most ironically, during a protest led by Andrea Dworkin herself, in which pornographic images of women submitting were shown on a screen, some of the protestors later admitted to being aroused by the material.²¹²

With the above in mind, it makes no sense to consider consent to sexual submission vitiated in all circumstances merely because in some unidentifiable circumstances, patriarchy may have played a potential role in it being given. For this reason, the author dismisses patriarchy as an element of the act argument. What is left to consider, is whether the acts depicted in pornography, patriarchal or not, should be regarded as abuse, or, as Mackinnon put it above, 'violence against women'. The best way to approach this question is by looking at content

²⁰⁹ Amia Srinivasan, *The Right to Sex* (Bloomsbury, 2021)

²¹⁰ David Puts and others, 'Men's Masculinity and Attractiveness Predict Their Female Partners' Reported Orgasm Frequency and Timing' (2012) 33(1) *Evolution and Human Behaviour* 1; Eva Jozifkova, 'Sexual arousal by dominance and submissiveness in the general population: How many, how strongly, and why?' (2018) 39(9) *Deviant Behaviour* 1229; Frédérique Labrecque and others, 'What Is So Appealing About Being Spanked, Flogged, Dominated, or Restrained? Answers from Practitioners of Sexual Masochism/Submission' (2021) 58(4) *Journal of Sex Research* 409; Christian Joyal, Amélie Cossette and Vanessa Lapierre, 'What Exactly Is an Unusual Sexual Fantasy?' (2015) 12(2) *Journal of Sexual Medicine* 328; Christian Joyal and Julie Carpentier, 'The Prevalence of Paraphilic Interests and Behaviours in the General Population: A Provincial Survey' (2017) 54(2) *Journal of Sex Research* 161; Crystal Mundy and Jan Cioe, 'Exploring the Relationship Between Paraphilic Interests, Sex, and Sexual and Life Satisfaction in Non-clinical Samples' (2019) 28(3) *The Canadian Journal of Human Sexuality* 1

²¹¹ Patricia Hawley and William Hensley, 'Social Dominance and Forceful Submission Fantasies: Feminine Pathology or Power?' (2009) 46(6) *The Journal of Sex Research* 568

²¹² Jozifkova (n205)

analyses, which focus on the number of videos featuring violence. The following studies coded 'violence' in the following percentages:

- McKee: 1.9%²¹³
- Barron and Kimmel: 14%²¹⁴
- Duncan: 14%²¹⁵
- Cowen and Campbell: 23%²¹⁶
- Palys: 36%²¹⁷
- Bridges and others: 88.2%²¹⁸

Clearly, there is a vast discrepancy in the data.²¹⁹ This is because violence is context sensitive. For example, if you smack someone on the back, it is battery. If you are congratulating a friend on their success, however, it is not. Likewise, consent is the epithet of BDSM and what distinguishes it as an enjoyable sexual practice from abuse. However, this mutually clear line, despite being both effortlessly and precisely observable in practice, has been ignored in five of the six studies above. Only McKee limited his study to acts of dominance met with resistance and that were intended to cause injury, thus excluding BDSM,²²⁰ an approach consistent with the views of Edward Donnerstein, who believes that violence in pornography should only be categorised as such when the person on the receiving end wishes to avoid it.²²¹ To this effect, a more recent 2020 study also distinguishing consensual yet painful acts from extreme acts of violence and rape found that the latter two featured in 1–3% and 0–6% of videos, respectively – an unfortunate yet comparatively small percentage already captured by the criminal law.²²² Despite this, it is the study by Bridges and her colleagues that is frequently cited as an absolute authority on pornography's violent

²¹³ Andy McKee, 'The Objectification of Women in Mainstream Pornographic Videos in Australia' (2005) 42 *Journal of Sex Research* 277

²¹⁴ Martin Barron and Michael Kimmel, 'Sexual Violence in Three Pornographic Media: Toward a Sociological Explanation' (2000) (37(2) *Journal of Sex Research* 161

²¹⁵ David Duncan, 'Violence and Degradation as Themes in Adult Videos' (1991) 69 *Psychological Reports* 23

²¹⁶ Gloria Cowen and Robin Campbell, 'Racism and Sexism in Interracial Pornography: A Content Analyses' (1994) 18(3) *Psychology of Women Quarterly* 323

²¹⁷ Ted Palys, 'Testing the Common Wisdom: The Social Content of Video Pornography' (1986) 27 *Canadian Psychology* 22; Edward Donnerstein and others, 'The Findings and Recommendations of the Attorney General's Commission on Pornography: Do the Psychological "facts" Fit the Political Fury?' (1987) 42(10) *American Psychologist* 946

²¹⁸ Ana Bridges and others, 'Aggression and Sexual Behaviour in Best-selling Pornography Videos: A Content Analysis Update' (2010) 16(10) *Violence Against Women* 1065

²¹⁹ Robi Sonderegger, 'Neurotica: Modern Day Sexual Repression' in Reist and Bray (n197); Gail Dines, *Pornland, 'Pornography, How Pornography Has Hijacked Our Society'* (Beacon Press, 2010); European Centre for Law and Justice (n165); Jensen (n198)

²²⁰ McKee (n211)

²²¹ Donnerstein and others (n215)

²²² Elise Carrotte, 'Sexual Behaviours and Violence in Pornography: Systematic Review and Narrative Synthesis of Video Content Analyses' (2020) 22(5) *Journal of Medical Internet Research* 1602

content, despite it being a clear outlier.²²³ Without providing a reason as to why, the authors chose as part of their methodology to code vanilla acts like consensual spanking as violent. Conceivably, this is what led them to drastically misrepresent the nature of pornographic material, which highlights the first issue with content analyses – and moreover the more general argument that pornography constitutes violence against women – they are entirely subjective and thus vulnerable to bias. It is possible for anyone supporting pornography's restriction to code/condemn an array of consensual behaviours as violent/violence. This is behaviour that, as emphasised, is definable only by context. A meaningful empirical and conceptual framework cannot be built on such an inconsistent basis.

Furthermore, more fundamentally, 'women' are not a monolith. It cannot be correct to see them as a collection of victims in need of protection from their preferences and incapable of giving consent, rather than rational individuals with sexual agency of their own.²²⁴ It should be up to them to consent to whatever kind of sexual practice they like, recorded or not, and speculation regarding patriarchy or naturalised violence as potential influences therein cannot ever undermine this right. However, the act argument purports exactly this, falling foul as it does of what seems to be a general tendency to conflate sex with sexism. Indeed, we are rightfully minded that 'no means no', yet, for some feminists, saying yes is meaningless.²²⁵ Nothing could degrade women more than this perspective. Accordingly, the author considers the act argument an unpersuasive basis for evoking Article 3.

4.4 The crime argument

The crime argument is not exclusive to feminism; however, the feminist interpretation offers its most precise explication. They argue that the necessary elements of relationships – respect, care, empathy, responsibility, etc. – are purposefully left out of pornography and that in their place, 'alternative flatteries and reassurances' are 'subliminally implanted' into its viewership. These 'toy with the masculine mind', and present women as objects.²²⁶ The result, they submit, is a world in which consent is diluted, male pleasure is prioritised, and women are abused. This is an alarming thought, particularly given that the yearly rates of sexual abuse perpetrated against women and girls over 13 currently sit at roughly 55,000 –

²²³ Michael Castleman, 'How Much of Porn Depicts Violence Against Women?' (*Psychology Today*, June 2016) <<https://www.psychologytoday.com/us/blog/all-about-sex/201606/how-much-porn-depicts-violence-against-women>> accessed 27 February 2023

²²⁴ Jean Cohen, 'Personal Autonomy and the Law: Sexual Harassment and the Dilemma of Regulating "Intimacy"' (2000) 21(2) *Tocqueville Review* 57

²²⁵ Wendy McElroy, 'Banning Pornography Harms Women' <<http://www.wendymcelroy.com/isil.htm>> accessed 10 March 2023

²²⁶ *ibid*

five times that committed against men.²²⁷ Nevertheless, unlike the act argument, for which there would be visible evidence at the tap of a screen, the crime argument hinges on empirical studies.

Much of the literature asserting the connection between pornography and sexual misconduct draws parallels with script theory.²²⁸ As the name implies, behavioural scripts are a collection of stereotyped expectations and behavioural reactions acquired over time, determining what is or is not acceptable in specific situations.²²⁹ When one goes to a restaurant, for example, the 'script' might be to sit and wait for the menu or wait until everyone has their food before eating. In this sense, it is supposed that how we behave is somewhat predetermined. This psychology extends to sexual scenarios,²³⁰ as evidenced by the ordinary human intuition to initiate sex with a kiss or an intimate touch.²³¹ Allegedly, pornography leads to the development of new scripts and neurological habits pertaining to ambiguous communication ('no means yes') and increased sexual risk, which then have downstream effects on rates of sexual violence.²³² Some studies support this notion, linking pornography to the perpetration

²²⁷ Office For National Statistics, 'Crime in England and Wales: Appendix Tables' (2022) <<https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/datasets/crimeinenglandandwalesappendixtables>> accessed 11th March 2023

Silvan Tomkins, *Consciousness* (Springer, 1962); Rae Carlson, 'Studies in Script Theory: Adult Analogs of a Childhood Nuclear Scene (1981) 40(3) *Journal of Personality and Social Psychology* 501; Roger Schank and Robert Abelson, *Scripts, Plans, Goals and Understanding: An Inquiry Into Human Knowledge Structures* (Lawrence Erlbaum, 1977); William Simon and John Gagnon, *Sexual Conduct: The Social Sources of Human Sexuality* (Aldine Transaction, 1973)

²²⁹ Lenore T. Szuchman and Frank Muscarella (n41); Rowell Huesmann, 'The Role of Social Information Processing and Cognitive Schema in the Acquisition and Maintenance of Habitual Aggressive Behaviour' in Edward Donnerstein and Russell Green (eds) *Human Aggression Theories, Research, and Implications for Social Policy* (Elsevier Science, 1998)

²³⁰ Lynne Wagner David Sea and Anke Ehrhardt, 'Close Emotional Relationships with Women versus Men: A Qualitative Study of 56 Heterosexual Men Living in an Inner-City Neighborhood' (2016) 9(2) *The Journal of Men's Studies* 243

²³¹ Ellen Scott, 'These are the Most Popular Ways for Men and Women to Initiate Sex' *Metro* (2020) <<https://metro.co.uk/2020/11/11/these-are-the-most-popular-ways-for-men-and-women-to-initiate-sex-13577362/>> accessed 28 January 2023

²³² Isabell Schuster, Paulina Tomaszewska and Barbara Krahe, 'Low Sexual Self-Esteem, Perception of Pornography, and Acceptance of Sexual Coercion' 2022 37(3-4) *Journal of Interpersonal Violence* 1377; Lylla D'Abreu and Barbara Krahe, 'Predicting sexual aggression in male college students in Brazil' (2014) 15 *Psychology of Men and Masculinity* 152; Isabell Schuster and Barbara Krahe, 'Predicting Sexual Victimization Among College Students in Chile and Turkey: A Cross-Cultural Analysis' (2019) 48(8) *Archive of Sexual Behaviour* 2565; Paulina Tomaszewska and Barbara Krahe, 'Predictors of Sexual Aggression Victimization and Perpetration Among Polish University Students: A Longitudinal Study' 2018 47(2) *Archive of Sexual Behaviour* 493; Schuster, Tomaszewska and Krahe at (n232); Sarah Coyne, 'Contributions of Mainstream Sexual Media Exposure to Sexual Attitudes, Perceived Peer Norms, and Sexual Behaviour: A Meta-analysis' (2019) 64 *The Journal of Adolescent Health* 430; Anne Rodenhizer and Kate Edwards, 'The Impacts of Sexual Media Exposure on Adolescent and Emerging Adults' Dating and Sexual Violence Attitudes and Behaviours: A Critical Review of the Literature' (2019) 20 *Trauma, Violence, & Abuse* 439; William Struthers, *Wired for intimacy: How Pornography Hijacks the Male Brain* (IVP Books, 2009)

of 'sexual aggression and violence against women';²³³ an increased acceptance of 'sexual coercion' and 'various rape myths';²³⁴ the overestimation of the base rates of 'nonnormative sexual behaviour';²³⁵ and 'sympathising with rapists'.²³⁶

It is tempting upon reading these studies to regard the issue as clear cut, because, of course, sexual abuse engages Article 3. However, one must first be mindful of the methodological issues associated with monitoring sexual behaviour. Firstly, as with most preparadigmatic fields of science, there is little consistency in how it is assessed.²³⁷ Secondly, it may be that men already predisposed to harming women are more likely to view pornography rather than vice versa. Thirdly, questionnaires regarding sexual fantasies, behaviours or beliefs may be adversely affected by what the participant believes is socially acceptable to report or their inability to remember previous thought processes.²³⁸ Consider finally a study by Leonard Berkowitz and Donnerstein, in which a group of men were shown various stimuli and then offered the opportunity to administer varying levels of electric shock.²³⁹ Those exposed to violent pornography administered elevated levels. The study is often cited as authority for pornography as a 'cause' of violence.²⁴⁰ What goes unmentioned is how participants need not worry about the legal or physical consequences of their actions in controlled lab settings. Yes, lab studies are important, but one should acknowledge these drawbacks when presenting them in an argument.

Most importantly, these studies prove only correlation. Whilst this is a constituent of causation, the two are different. Even if we accept only the research advantageous to the crime argument, causation is still not proven, whereas evidence of reverse-correlation/non-

²³³ Paul Wright, Robert Tokunaga, Ashley Kraus, 'A Meta-Analysis of Pornography Consumption and Actual Acts of Sexual Aggression in General Population Studies' (2016) 66(1) *Journal of Communication* 183; Gert Martin Hald, Neil Malamuth and Carlin Yuen, 'Pornography and Attitudes Supporting Violence Against Women: Revisiting the Relationship in Nonexperimental Studies' (2010) 36(1) *Aggressive Behaviour* 14; U.S Department of Justice, 'Attorney General's Commission on Pornography: Final Report' (July 1986) <<https://www.ojp.gov/ncjrs/virtual-library/abstracts/attorney-generals-commission-pornography-final-report>> accessed 1 March 2023

²³⁴ Schuster, Tomaszewska and Krahe (n232); David D'Ettore and others, 'Explorative Survey on the Level of Online Sexual Activities and Sexual Paraphilias' (2008) 17(1) *Sexologies* 15; Max Waltman, 'Rethinking Democracy: Pornography and Sex Inequality' [2008] *University of Michigan Law School* 1; William Marshall, 'Revisiting the Use of Pornography by Sexual Offenders: Implications for Theory and Practice' (2000) 6(1-2) *Journal of Sexual Aggression* 67

²³⁵ Dolf Zillmann and Jennings Bryant, *Selective Exposure to Communication* (Routledge, 1986)

²³⁶ Dolf Zillmann and Jennings Bryant, 'Effects of Massive Exposure to Pornography' [1984] *Pornography and Sexual Aggression* 115

²³⁷ Szuchman and Muscarella (n41)

²³⁸ Szuchman and Muscarella (n41)

²³⁹ Leonard Berkowitz and Edward Donnerstein, 'Victim Reactions in Aggressive Erotic Films as a Factor in Violence Against Women' (1981) 41(4) *Journal of Personal and Social Psychology* 710

²⁴⁰ Tankard Reist and Bray (n197)

correlation is more than likely fatal to findings of causation.²⁴¹ In this respect, the studies demonstrating that pornography is not a cause of violence are equally as voluminous.²⁴² The sad fact is that men have and will always rape women regardless of pornography's circulation. Various longitudinal studies conducted over extended periods in Japan, Sweden, Germany and Denmark show no increase in sexual crime despite the decriminalisation and increased availability of pornography.²⁴³ In fact, the data shows that rates of sexual violence are lower in places where pornography is more frequently consumed.²⁴⁴ This is because rape is the result of a myriad of factors. The reader is directed in this respect to the work of William McKibbin and others, who approach this point from the perspective of evolutionary psychology,²⁴⁵ and that of Martin Lalumière and others, who discuss the impact of socio-economic factors in this regard.²⁴⁶ It follows that if one is to approach the issue of causation *deterministically* – that is to say that whenever A occurs, B will always follow – pornography cannot be said to cause violence against women. That said, such a mechanical conception of cause and effect fails to capture the essence of the crime argument, which describes the way pornography contributes to an atmosphere in which sexual assault is more likely.²⁴⁷ To state this is to endorse a *probabilistic* approach to causation, according to which a causal relationship will exist 'insofar as the putative cause increases the incidence of the effect'.²⁴⁸

²⁴¹ Mike Allen and others, 'Exposure to Pornography and Acceptance of Rape Myths' 45(1) *Journal of Communication* 5; David O'Malley, 'Pornography and Violence to Women: Telling the Difference' (2002) 9 *UCL jurisprudence review* 175

²⁴² David Burton, George Leibowitz and Alan Howard, 'Comparison by Crime Type of Juvenile Delinquents on Pornography Exposure: the Absence of Relationships Between Exposure to Pornography and Sexual Offense Characteristics' (2010) 6(3) *Journal of Forensic Nursing* 121; Emily Mellor and Simon Duff, 'A Quantitative Analysis of Attitudes Toward Pornography Use in Secure Hospitals: Sexual, Violent and Non-offenders' [2019] *Journal of Forensic Practice* n/a; William Fisher and Guy Grenier, 'Violent Pornography, Antiwoman Thoughts, and Antiwoman Acts: in search of reliable effects' (1994) 31 *Journal of Sex Research* 23; William Fisher and Azy Barak, 'Internet Pornography: A Social Psychological Perspective on Internet Psychology' (2001) 38(4) *The Journal of Sex Research* 312; Dennis Howitt and Guy Cumberbatch, *Mass Media, Violence and Society* (Wiley, 1975)

²⁴³ Milton Diamond and Ayako Uchiyama, 'Pornography, Rape, and Sex Crimes in Japan' (1999) 22(1) *International Journal of Law and Psychiatry* 1; Berl Kutchinsky, 'Pornography and Rape: Theory and Practice? Evidence From Crime Data in Four Countries Where Pornography is Easily Available' (1991) 14(1-2) *International Journal of Law and Psychiatry* 47

²⁴⁴ David Ley, *Ethical Porn for Dicks: A Man's Guide to Responsible Viewing Pleasure* (Stone Bridge Press, 2016)

²⁴⁵ William McKibbin and others, 'Why Do Men Rape? An Evolutionary Psychological Perspective' (2008) 12(1) *Review of General Psychology* 86; See also Randy Thornhill and Nancy Thornhill, 'Human rape: An evolutionary analysis' (1983) 4(3) *Ethology and Sociobiology* 137

²⁴⁶ Martin Lalumière and others, 'Sexual Deviance, Antisociality, Mating Effort, and the Use of Sexually Coercive Behaviours' (1996) 21 *Personality and Individual Differences* 33; See also SC Kalichman and others, 'Sexual Coercion, Domestic Violence, and Negotiating Condom Use Among Low-income African American Women' (1998) 7(3) *Journal of Women's Health* 371

²⁴⁷ Jensen (n198)

²⁴⁸ Frederick Schauer, 'Causation Theory and the Causes of Sexual Violence' (1987) 12(4) *American Bar Foundation Research Journal* 737; Anne W Eaton, 'A Sensible Anti-Porn Feminism' (2007) 117 *Ethics* 674

Unfortunately, this question is unanswerable in this context, though its existence has led some courts to conclude that supposition is appropriate. In the *Canadian case Paris Adult Theatre v Slaton*,²⁴⁹ for example, Burger CJ deemed it reasonable for the legislature to act on the assumption that a correlation between obscene material and crime existed despite its existence being 'arguable'. The Canadian Supreme Court in *R v Butler* took a similar approach, in the leading judgement of which it was stated that 'while a direct link between obscenity and harm to society may be difficult, if not impossible, to establish, it is reasonable to presume that exposure to images bears a causal relationship to changes in attitudes and beliefs'.²⁵⁰

This seems like common sense. Indeed, the blunt application of social learning or cultivation theories – which state among other things that people model the behaviour that they have seen and been exposed to – would lead most to the conclusion that pornography has probably influenced at least one incident, somewhere.²⁵¹ Slippery slopes notwithstanding, the main problem with this logic is that it would have serious implications for all other forms of media, including videogames, books and television, which numerous studies have shown may also increase the likelihood of aggressive behaviour and desensitisation to violence²⁵² (although they yield the same, inconsistent and contested results).²⁵³ Obviously, no successful argument has been made that we should ban all media, simply because it would be both unrealistic and paternalistic to shield the entire UK population from all depictions of negative behaviour solely because a fraction of said population lacks the regulatory controls to consume them safely.²⁵⁴ Moreover, whilst the aforementioned psychological theories show

²⁴⁹ 413 U.S. 49, 93 S. Ct. 2628 (1973)

²⁵⁰ [1992] 1 S.C.R. 452

²⁵¹ Emily Mellor and Simon Duff, 'The Use of Pornography and the Relationship Between Pornography Exposure and Sexual Offending in Males: A Systematic Review' (2019) 46 *Aggression and Violent Behaviour* 116; Sharon Mihalic, and Elliott Delbert, 'A Social Learning Theory Model of Marital Violence' (1997) 12 *Journal of Family Violence* (1997) 21; Elissa Benedek and C Brown, 'No Excuses: Televised Pornography Harms children' (1999) 7(4) *Harvard review of psychiatry* 236; James Potter, 'A Critical Analysis of Cultivation Theory', (2014) 64(6) *Journal of Communication* 1015

²⁵² Craig Anderson and others, 'The Influence of Media Violence on Youth' (2003) 4(3) *Psychological Science in the Public Interest* 81; Craig Anderson and others, 'SPSSI Research Summary on Media Violence (2015) 15(1) *Analyses of Social Issues and Public* 4; Mark Applebaum, 'American Psychological Association Task Force on Violent Media Technical Report on the Review of the Violent Video Game Literature' (2015) 72(2) *American Psychological Association American Psychologist* 126; Elizabeth Handsley and Wayne Warburton, 'Material Likely to Harm or Disturb Them': Testing the Alignment Between Film and Game Classification Decisions and Psychological Research Evidence (2022) 29(1) *Psychiatry, Psychology and Law* 68

²⁵³ Karen Boyle, 'The pornography debates: Beyond cause and effect' (2000) 23(2) *Women's Studies International Forum* 187

<<http://abcnews.go.com/Blotter/aurora-dark-knight-suspect-joker-cops/story?id=16822251>> accessed 1st March 2023; Benjamin Hayward, 'Tort, Cinema and Violent Crime, and Australian Perspective' (2013) 34(4) *Alternative Law Journal* 255

²⁵⁴ Boyle (ibid)

that people are often influenced by what they see/hear, it is far from a universal human tendency to imitate whatever is seen on a screen.²⁵⁵ To argue as much would be to engender a 'monkey see, monkey do' conception of media effects²⁵⁶ and to deny that human beings rely on cognition to define and interpret events.²⁵⁷ Ostensibly, therefore, there seems to be little sense in singling out pornography as particularly problematic.

4.5 Another partial conclusion

In summary, whilst Article 3 offers a solid legal basis upon which a case may be made for the restriction of harmful pornography, as it stands, the literature does not provide sufficient impetus for so doing.

5 Further Studies And Final Points Of Consideration

5.1 Health implications

There is an array of literature discussing pornography's health implications. Those stating the detrimental relationship between pornography and sexual gratification are amongst the most well-known. Users of pornography have been found to have lower levels of satisfaction with their intimate partners' sexual performance and their appearance, for example.²⁵⁸ However, for every study presenting these issues, some studies demonstrate the opposite. Very recently, for instance, pornography has been found to have no impact on psychosocial factors, including mental well-being and sexual health.²⁵⁹ 'No negative effects' is the most

²⁵⁵ Potter (n251)

²⁵⁶ William Fisher and Azy Barak, 'Pornography, erotica, and behaviour: More questions than answers' (1991) 14(1-2) *International Journal of Law and Psychiatry* 65

²⁵⁷ Szuchman and Muscarella (n41)

²⁵⁸ Dolf Zillmann and Jennings Bryant, 'Pornography's Impact on Sexual Satisfaction' (1988) 18(5) *Journal of Applied Social Psychology* 438; Dan Miller and others, 'Pornography, Preference for Porn-like sex, Masturbation, and Men's Sexual and Relationship Satisfaction (2019) 26(1) *Personal Relationships* 93; Aleksandra Dwulit and Piotr Rzymiski, 'The Potential Associations of Pornography Use with Sexual Dysfunctions: An Integrative Literature Review of Observational Studies' (2019) 8(7) *Journal of Clinical Medicine* 914

²⁵⁹ Ruth Charig, 'A Lack of Association Between Online Pornography Exposure, Sexual Functioning, and Mental Well-being' (2020) 35 *Sexual and Relationship Therapy* 258; Paula Reavey and J Binnie, 'Development and Implications of Pornography Use: A Narrative Review (2020) 35(2) *Sexual and Relationship Therapy* 178

common finding in research analysing the health implications of pornography.²⁶⁰

As to addiction, brain scanning offers the best insight. In brief, event-related potentials ('ERPs') – which refer to the brain's direct, measured response to specific sensory, cognitive, or motor events – are a method of measuring the brain's response to specific cues that have previously been able to predict genital responses to stimuli.²⁶¹ Late positive potentials ('LPPs') are scalp-recorded events that operate in studies as a neural marker for emotional regulation and reflect facilitated attention to emotional stimuli and cue reactions relating to substance addiction.²⁶² People with substance use disorders demonstrate increased LPPs when presented with stimuli relevant to their addiction. This is true for cocaine²⁶³ and gambling.²⁶⁴ The pattern is so consistent that LPP measurements are considered a highly accurate biomarker for addiction.²⁶⁵ A study by Nicole Prause and others conducted an ERP study of people identifying as 'porn addicts'.²⁶⁶ However, the subjects exhibited lower LPP when shown pornographic images. This showed that pornography addiction, if it exists, is different to other forms of substance abuse.

Due to this lack of support in neuroscience, anti-pornography literature asserting its addictive qualities leans on rhetoric, inference, and unrelated studies for proof. For example, the European Centre for Law and Justice report aforementioned states that the brain releases

²⁶⁰ Taylor Kohut and others, 'Perceived Effects of Pornography on the Couple Relationship: Initial Findings of Open-ended, Participant-informed, "Bottom-up" Research (2017) 46(2) Archives of Sexual Behaviour 585

²⁶¹ Jorge Ponseti and others, 'Brain potentials related to the human penile erection' (2009) 21(5) International Journal of Impotence Research 292; Colin Drummond, 'What Does Cue-Reactivity Have to Offer Clinical Research?' (2000) 95 Addiction 129

²⁶² Harald Schupp, 'Emotion and Attention: Event-related Brain Potential Studies' (2006) 156 Progress in Brain Research 31; Tracy Dennis and Greg Hajcak, 'The Late Positive Potential: A Neurophysiological Marker for Emotion Regulation in Children' (2009) 50(11) Journal of Child Psychology and Psychiatry 1373

²⁶³ Jonathan Dunning and others, 'Motivated Attention to Cocaine and Emotional Cues in Abstinent and Current Cocaine Users - An ERP study' (2011) 33(9) European Journal of Neuroscience 1716; Ingmar Franken and Peter Muris, 'Gray's Impulsivity Dimension: A Distinction Between Reward Sensitivity Versus Rash Impulsiveness' (2006) 40(7) Personality and Individual Differences 1337

²⁶⁴ Klaus Wölfling and others, 'To Gamble or Not to Gamble: At Risk for Craving and Relapse-learned Motivated Attention in Pathological Gambling' (2011) 87(2) Biological Psychology 275

²⁶⁵ Nicole Prause and others, 'Modulation of Late Positive Potentials by Sexual Images in Problem Users and Controls Inconsistent With "Porn Addiction" (2015) 109 Biological Psychology 192; Scott Moeller and others, 'Psychophysiological Prediction of Choice: Relevance to Insight and Drug Addiction' (2012) 135(11) Brain: a Journal of Neurology 3481; Franken and others, 'Neurophysiological Evidence for Abnormal Cognitive Processing of Drug Cues in Heroin Dependence (2003) 170(2) Psychopharmacology 205; Nicotine: Marianne Littel and Ingmar Franken, 'The Effects of Prolonged Abstinence on the Processing of Smoking Cues: An ERP Study Among Smokers, Ex-smokers and Never-smokers (2007) 21(8) Journal of Psychopharmacology 873; Ralf Thalemann, Klaus Wölfling and S M Grüsser, 'Specific Cue Reactivity on Computer Game-related Cues in Excessive Gamers' 121 (3) (2007) Behavioural Neuroscience 614

²⁶⁶ Prause and others (n265)-

dopamine in response to 'something rewarding'; that pleasurable activities activate the 'wanting' and 'reward' systems; and that this can lead to 'chronic overstimulation', a 'shrinkage of the brain's reward centre', 'desensitisation', and finally a 'need to seek out more hardcore material'.²⁶⁷ The same could be said of McDonald's. Of the three sources cited in support, only one mentions pornography – a book on neuroplasticity in which the author reports, anecdotally, that the removal of pornography from his patients reversed problems with sexual arousal.²⁶⁸ The other two sources discuss addiction in general²⁶⁹ and obesity.²⁷⁰ Likewise, the Council of Europe and Robert Weiss – who has acted as a professional advisor for the BBC²⁷¹ – have stated that pornography addiction has a similar effect on the brain to gambling²⁷² and that it is like 'cocaine on the brain'.²⁷³ As shown, this is patently untrue. Drawing inferences like this is disingenuous.

There are also significant methodological problems with measuring addiction. People who disapprove of pornography morally, for example, are more likely to label themselves as addicts because they associate it with the negative connotations of addiction.²⁷⁴ Moreover, as behaviour coincides with identity, the label 'porn addict' may be a maintaining factor for some.²⁷⁵ For these reasons, the author concludes that pornography cannot conclusively be described as bad for one's health.²⁷⁶

5.2 Effects on people under 18 – education vs restriction

Famous porn star Lisa Ann says children as young as twelve now approach her asking if

²⁶⁷ European Centre for Law and Justice (n165)

²⁶⁸ Norman Doidge, *The Brain That Changes Itself: Stories of Personal Triumph from the Frontiers of Brain Science* (Penguin, 2008)

²⁶⁹ Daniel Angres and Kathy Bettinardi-Angres, 'The Disease of Addiction: Origins, Treatment, and Recovery' (2008) 54(10) *Disease a Month* 696

²⁷⁰ Paul J Kenny, George Voren and Paul Johnson, 'Dopamine D2 Receptors and Striatopallidal Transmission in Addiction and Obesity' (2013) 4 *Current Opinion in Neurobiology* 535

²⁷¹ 'Dr Weiss in Media' <<https://sexandrelationshiphealing.com/media/>> accessed 28 February 2023

²⁷² Council of Europe Parliamentary Assembly (n165)

²⁷³ Stanford, 'Online Porn and Sex Addiction

<<https://cs.stanford.edu/people/eroberts/cs201/projects/pornography/addiction.htm>> accessed 28 February 2023

²⁷⁴ Fred Volk and others, 'The Moderating Role of the Tendency to Blame others in the Development of Perceived Addiction, Shame, and Depression in Pornography Users' (2019) 26(3-4) *Sexual Addiction & Compulsivity* 239

²⁷⁵ Silva Neves, *Compulsive Sexual Behaviours: a Psycho-sexual Treatment Guide for Clinicians* (Routledge, 2021); Nathan D. Leonhardt, Dean M. Busby and Brian J. Willoughby, *Do You Feel in Control? Sexual Desire, Sexual Passion Expression, and Associations with Perceived Compulsivity to Pornography and Pornography Use Frequency* (Faculty Publications, 2020)

²⁷⁶ Neves (ibid)

they can ‘fuck’.²⁷⁷ This is unsurprising. Studies have shown that 49% of the American male college students interviewed reported their first encounter with pornography as happening before the age of 13.²⁷⁸ Others demonstrate that the word ‘porn’ is the fourth most popular search word on the internet for children under the age of 7 and the fifth for those under 18.²⁷⁹ Another study found that 90% of the 13-14 year-old children surveyed had used pornography, including 35% who had used it ‘too many times to count’.²⁸⁰

As a result of this exposure, pornography has played a role in defining young people’s ideas about sexuality and personal relationships.²⁸¹ Here is what one student, who was interviewed as part of a study by the UK Office of the Children’s Commissioner, had to say about pornography:

*‘You learn how to have sex; you’re learning new moves. You get to see the way it’s done, and the way people do it. You have a kind of idea of how you might be able to do it’.*²⁸²

Another survey found that 45% of men under 18 agree with the premise of this statement.²⁸³ The lessons children might get from pornography include ‘my penis should be 10 inches long’, ‘all women like being choked’, ‘vulvas should be hairless’, and so on.²⁸⁴ Previously, the process of discovering one’s sexuality has taken place at age-appropriate stages. Now, this process is accelerated and distorted.²⁸⁵ This leaves children not only vulnerable to sexual/relational problems but ‘confused, changed, and damaged’.²⁸⁶ The further consequences of this are shocking.²⁸⁷ Studies indicate that boys who regularly watch pornography may be more likely to believe it is acceptable to force girls to have sex with

²⁷⁷ Jon Ronson, Interview with Lisa Ann (Audible, 24th October 2017)

<https://www.audible.co.uk/pd/The-Butterfly-Effect-Podcast/B08DDC8DNH?qid=1665591961&sr=1-4&ref=a_search_c3_lProduct_1_4&pf_rd_p=c6e316b8-14da-418d-8f91-b3cad83c5183&pf_rd_r=Z7R37K9HWK6J7S040G0E> Accessed 28 February 2023

²⁷⁸ Chyng Sun and others, ‘Pornography and the Male Sexual Script: An Analysis of Consumption and Sexual Relations’ (2016) 45(4) Archives of Sexual Behavior 983

²⁷⁹ Maggie Hamilton, ‘Groomed to Consume Porn: How Sexualized Marketing Targeting Children’ in Reist and Bray (eds) (n197)

²⁸⁰ (Robi Sonderegger, ‘Neurotica: Modern Day Sexual Repression’ in Melinda Tankard Reist and Abigail Bray (eds) at n(197); Srinivasan (n209)

²⁸¹ Council of Europe (n165)

²⁸² Maddy Coy and others, “‘Sex Without Consent, I Suppose That is Rape’” How Young People in England Understand Sexual Consent: A Report Commissioned for The Office of the Children’s Commissioner’s Inquiry into Child Sexual Exploitation in Gangs and Groups’ (2013, Office of the Children’s Commissioner)

²⁸³ Srinivasan (n209)

²⁸⁴ *ibid*

²⁸⁵ Hamilton (n279)

²⁸⁶ *ibid*

²⁸⁷ *ibid*

them,²⁸⁸ particularly if they ‘flirted’ with them beforehand.²⁸⁹

On this basis, a widespread and justified consensus regarding the need to protect children from viewing sexually explicit materials has developed.²⁹⁰ However, if this is possible without legislating in a way that prevents adults from accessing pornography, legislative instruments doing so may breach the principle of proportionality. Indeed, it was found by the US Supreme Court in *Reno v American Civil Liberties Union*²⁹¹ that legislation against pornography to protect children could not be enacted if the result would be that adults would no longer be able to watch the material. It has been argued that education is the best tool for the job, and the UK government has acknowledged this. As of September 2020, the British mandatory curriculum includes lessons on sexual assault and pornography, which now cannot be opted out of once the child has reached 15.²⁹² Notwithstanding this, only 41% of British teachers believe they have received adequate training in respect of providing sex education,²⁹³ and only 25% of students believe theirs was ‘good’ or ‘very good’.²⁹⁴ Clearly, there is still room for improvement.

What is needed is more sex education, not a ban on pornography. In accordance with recommendations by the World Association for Sexual Health, this should be based on scientific evidence and grounded in human rights and gender equality.²⁹⁵ Rather than being a single lesson conducted by the biology teacher unlucky enough to draw the short straw, multiple lessons regarding consent should begin as early as primary school, extending into a standalone high school short-course conducted by a qualified and experienced sex educator, teaching teenagers about the sociology and psychology of sex, sexuality, sexual health, sexual expression, and sexual pleasure. A recent example would be the French platform ‘C’est pas pour moi, c’est pour un ami’, which deconstructs stereotypes perpetuated by the pornography industry, including hair removal, and allows young people to ask health professionals anonymous questions via an online form or Iceland’s awareness raising project ‘Get a Yes’. This approach would work well in tandem with the new Online Safety Bill, which,

²⁸⁸ Sally Wellard, ‘Cause and Effect’ (2001) *Community Care* 26

²⁸⁹ Michael Flood and Lara Fergus, *An Assault on Our Future: The Impact of Violence on Young People and Their Relationships* (2008, White Ribbon)

²⁹⁰ Fenwick (n45)

²⁹¹ [1996] 521 U.S. 844

²⁹² Srinivasan (n209)

²⁹³ Sex Education Forum, ‘Statutory RSE - are teachers in England prepared?’ (2018)

<<https://www.sexeducationforum.org.uk/resources/evidence/statutory-rse-are-teachers-england-prepared>> accessed 4 March 2023

²⁹⁴ Sex Education Forum, ‘SRE The Evidence’ (2015) <[sexeducationforum.org.uk/resources/evidence/sre-evidence](https://www.sexeducationforum.org.uk/resources/evidence/sre-evidence)> accessed 4 March 2023

²⁹⁵ Jessie Ford and others, ‘The World Association for Sexual Health’s Declaration on Sexual Pleasure: A Technical Guide’ (2022) 33(4) *International Journal of Sexual health* 612

whilst acknowledging the value of free expression, places search browsers under a duty of care to ensure additional protective measures are taken to safeguard children.²⁹⁶

5.3 The sexualisation of children

Pseudo-child pornography ('PCP') refers to pornographic, computer-generated images of children.²⁹⁷ It is criminalised in the UK under the Criminal Justice and Public Order Act 1994²⁹⁸ and the Coroners and Justice Act 2009.²⁹⁹ The latter was passed following a Home Office consultation whereby concerns were raised that such images – which are often discovered alongside images of actual abuse – were being used for grooming.³⁰⁰ The conclusion reached was that PCP reinforces 'inappropriate views and feelings towards children'.³⁰¹ These assertions correspond with the views of the Canadian Supreme Court, which has stated that the mere existence of pornographic representations of children, whether real or not, violates their dignity and equality rights.³⁰² Presumably, similar feelings prompted the UK government to criminalise the production of material featuring 'adults role-playing as non-adults' in the 2003 Act.

Across the pond, a more lenient approach has been adopted. Following lobbying by the Free Speech Coalition in 2002, the US amended their child pornography laws to legalise pornography depicting people who 'appear' to be underage.³⁰³ This propelled categories such as 'barely legal', 'schoolgirl' and 'teen' into the mainstream, which have since become popular with the British consumer. This genre typically features short, skinny, small-breasted, and makeup-free women. Whilst not problematic *prima facie*, these attributes are used in tandem with props to create the impression of adolescence. Amongst the most common are pigtails, ribbons, and button-flat shoes with lace ankle socks – the type primary school girls wear.³⁰⁴ Titles like 'Fuck Me First Daddy', 'Cuties', 'Cumming of Age', 'Good Little Girl' and

²⁹⁶ Online Safety Bill s 10(1); Markus Trengrove and others, 'A Critical Review of the Online Safety Bill (2022) 3(8) Patterns 1

²⁹⁷ Abhilash Nair, 'Real Porn and Pseudo Porn: The Regulatory Road' (2010) 24(3) *International Review of Law, Computers & Technology* 223

²⁹⁸ Criminal Justice and Public Order Act 1994 s 84

²⁹⁹ Coroners and Justice Act 2009 s 62

³⁰⁰ Ministry of Justice, 'Consultation on the Possession of Non-photographic Visual Depictions of Child Sexual Abuse', <www.justice.gov.uk/consultations/non-photographic-depictions.htm> accessed 28 February 2023; Nair (n297)

³⁰¹ *ibid*

³⁰² *R v Sharpe* (2001) 1 S.C.R 45

³⁰³ Child Pornography Prevention Act 1996; Gail Dines, 'The New Lolita: Pornography and the Sexualisation of Childhood' in Reist and Bray (eds) (n197)

³⁰⁴ Dines (*ibid*)

'Bang My Braces' serve to punctuate this youthfulness.³⁰⁵ Indeed, it is not unusual to see a young woman masturbating with a dildo whilst wearing a school uniform, sucking a lollipop and cuddling a teddy bear before 'seducing' their 'stepfathers'.³⁰⁶ In these videos, the line between being attracted to childlike women and children is blurred, and the societal values that condemn such behaviour as repulsive and pathological are manifestly absent.³⁰⁷ It is therefore difficult to harmonise their circulation not only with the government's justifications for prohibiting the production of such material; but also with international law, for example, the European Council Framework Decision of 22 December 2003 on combating the sexual exploitation of children and child pornography, which criminalised pornography featuring an adult 'appearing to be a child', or 'realistic images' of a child involved or engaged in sexually explicit conduct.³⁰⁸

Unfortunately, videos like these are mixed in with others throughout all standard pornographic websites. Thus, perusing standard content can result in the user stumbling upon them incidentally. This makes them impossible to legislate against without placing a total ban on all pornographic websites. Given the argument presented in section 3, it is suggested that doing so to prevent the circulation of just one category would incur proportionality issues. On the face of it, the ban on production in the UK, put in place via the 2003 Act, is the best option.

Conclusion And Recommendations

In conclusion, the UK's law of obscenity needs reformation, at the very least, to resolve the issues presented in the first section. A model statute is presented below (Appendix A) that the author believes may help achieve clarification and consolidation.

To determine whether this model should incorporate further restrictions on pornography, this article has adopted a human rights lens. As such, it began by analysing the jurisprudence of the ECtHR, finding it wanting. It then applied human rights principles to both sides of the pornography debate to assess their relative strengths. In doing so, it put forward two arguments. The first stated that a right to both consume and produce pornography exists

³⁰⁵ See Brazzers, 'Piper Perri' at <<https://www.brazzers.com/pornstar/6819/piper-perri>> accessed on 28 February; The author may search for these videos on the internet by title if they so desire, however the author has chosen to not link them directly in the work.

³⁰⁶ Dines (n303)

³⁰⁷ Pamela Paul, *Pornified: How Pornography Is Transforming Our Lives, Our Relationships, and Our Families* (Henry Holt and Company, 2007); See also Resolution 2119 and Recommendation 2092 of the Council of Europe

³⁰⁸ 2004/68/JHA OJL13

under freedom of expression, a position further supported by the virtues of pluralism, sexual autonomy, and human dignity. The second, contended that within the current political/legal climate, Article 3 offers scope for an evolution of rights, according to which states may be placed under a positive obligation to enact laws that adequately protect citizens from the potential harms of pornography. However, upon analysing a broad range of literature in various research fields, it was found that the UK would comply with this obligation if it allowed the current legal material to continue circulating.

In view of these findings, the model statute does not allude to any further restrictions on pornography. The reader will note that it adopts much from the current law – primarily the 2008 Act. The most significant alteration is the substitution of the ‘serious harm’ test for acts constituting wounding or grievous bodily harm under sections 18 and 20 of the Offences Against the Persons Act 1861. Whilst the minutiae of sexual practice under the law of assault is outside the scope of this article, it is suggested that this offers a potential route towards providing juries with a consistent legal test for deciding the nature of content and bringing the law in line with cases like *Peacock*. All traces of the ‘obscene’ are omitted for the reasons given in section one. The provisions of the 2003 Act UK prohibiting pornography in which adults role play as non-adults remain for the reasons given in section 5. However, the others are removed because the other provisions in the model will catch all problematic material.

Given the potential harm pornography causes children, the model is designed to work in conjunction with the Online Safety Bill, the recommended changes to education, and a public awareness campaign designed to stigmatise the sexualisation of adolescence. A periodic review by the Home Office of recent studies surrounding pornography is also recommended. The model pertains to a complete amendment of section 63 of the 2008 Act and would require repeal of the 1959 Act and section 368E of the 2003 Act.

Appendix A – model status

63 Possession of extreme pornographic images

- (1) It is an offence for a person to be in possession of an extreme pornographic image.
- (2) An “extreme pornographic image” is an image which is both -
 - (a) pornographic, and
 - (b) an extreme image.
- (3) An image is “pornographic” if it is of such a nature that it must reasonably be assumed to have been produced solely or principally for the purpose of sexual arousal.
- (4) Where (as found in the person’s possession) an image forms part of a series of images, the question whether the image is of such a nature as is mentioned in subsection (3) is to be determined by reference to -
 - (a) the image itself, and
 - (b) (if the series of images is such as to be capable of providing a context for the image) the context in which it occurs in the series of images.
- (5) So, for example, where -
 - (a) an image forms an integral part of a narrative constituted by a series of images, and
 - (b) having regard to those images as a whole, they are not of such a nature that they must reasonably be assumed to have been produced solely or principally for the purpose of sexual arousal, the image may, by virtue of being part of that narrative, be found not to be pornographic, even though it might have been found to be pornographic if taken by itself.
- (6) In relation to possession of an image in England and Wales, an “extreme image” is an image which -
 - (a) falls within subsection (8)
- (7) In relation to possession of an image in Northern Ireland, an “extreme image” is an image which -
 - (a) falls within subsection (8)
- (8) In relation to possession of an image in England and Wales, an “extreme image” is an image which portrays, in an explicit and realistic way, any of the following -
 - (a) an act which threatens a person’s life, or
 - (b) an act which involves sexual interference with a human corpse, or
 - (c) a person performing an act of intercourse or oral sex with an animal (whether dead or alive), or
 - (d) an act which involves the non-consensual penetration of a person’s vagina, anus or mouth by another with the other person’s penis, or
 - (e) an act which involves the non-consensual sexual penetration of a person’s vagina or anus by another with a part of the other person’s body or anything else, or
 - (f) an act constituting wounding with intent or assault occasioning grievous bodily harm under the Offences Against the Persons Act 1861 and a reasonable person looking at the image would think that any such person or animal was real.
- (8A) For the purposes of subsection (8) -
 - (a) penetration is a continuing act from entry to withdrawal;
 - (b) “vagina” includes vulva.

(9) A pornographic image produced in the United Kingdom must not feature the use of props if a reasonable person looking at the image would believe the use of those props was intended principally to create the appearance of adolescence.

(10) In this section “image” means -

- (a) a moving or still image (produced by any means); or
- (b) data (stored by any means) which is capable of conversion into an image within paragraph (a).

(11) In this section references to a part of the body include references to a part surgically constructed (in particular through gender reassignment surgery).

(12) Proceedings for an offence under this section may not be instituted-

- (a) in England and Wales, except by or with the consent of the Director of Public Prosecutions;
- or
- (b) in Northern Ireland, except by or with the consent of the Director of Public Prosecutions for Northern Ireland.