Possession of "Extreme" Pornography: Where's the Harm?

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For decades, the traditional Western liberal approach to obscene material has been that while the availability of such material may be restricted, individuals are free to possess it so long as they do not distribute to others. Prior to the advent of the Internet, traditional means of control were effective in limiting the availability of such material. However, free of traditional restrictions the Internet allows easy access to a vast array of pornographic material, some of which challenges the most liberal of societies including images of child abuse, sexual violence, bestiality, and necrophilia. In 2008, the UK became one of the first Western countries to criminalize the possession of "extreme pornographic material." This article considers the rationales used to justify such an offence and in particular the parallels drawn with possession of child pornography. Although ostensibly justified by arguments based on the prevention of harm, the offence is more clearly explained as a reaction to the difficulty of enforcing existing obscenity laws. A person's right to read and view what they please in private is therefore sacrificed for the need to restrict the availability of online content. Such an approach may be applied to obscene material more generally, or any other prohibited online content such as terrorism-related material. It is argued that a more nuanced approach may allow the production and distribution of such material to be targeted, while allowing the sanctity of a person's library to remain untouched.

INTRODUCTION

In 1969, the United States Supreme Court considered the validity of a Georgia statute that criminalized the simple possession of obscene material.[1] At the time, the Court had already accepted an important state interest in regulating the production and distribution of such material.[2] It was, however, the first time the Court had considered whether that interest could extend to allow "state inquiry into the contents of. . .[a person's] library."[3] The Court held that it could

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1 *Stanley v. Georgia*, 394 U.S. 557 (1969) [*Stanley*]. "Simple possession" refers to an offence of possession that does not require proof of an additional fault element such as "with intent to distribute".

2 See the cases cited at n. 99.

3 *Stanley*, *supra* note 1 at 565.

not, finding the statute invalid for violating the right to free speech under the First Amendment.[4]

This view reflected the "traditional liberal approach" that was, and is, adopted in most Western countries.[5] That is, while it may be unlawful to produce or distribute obscene material, it is not an offence to possess it. Prior to the advent of the Internet, such an approach could effectively limit the availability of obscene material. However, the decentralized nature of modern communications bypasses traditional attempts at regulation, reigniting longstanding debates about censorship, morality, sexual freedom, and freedom of expression.[6]

> In pre-Internet days, individuals who wished to view this kind of material would need to seek it out, bring it into their home or have it delivered in physical form as magazines, videos, photographs etc, risking discovery and embarrassment at every stage. Now they are able to access it from their computers at home (or from their place of work) with relative ease.[7]

This lack of control allows access to material—including depictions of child abuse, sexual violence, bestiality, and necrophilia—that challenges even the most liberal of societies. While many jurisdictions moved to criminalize the simple possession of child pornography,[8] it remained lawful to possess other forms of obscene material. It was the murder of a British woman, Jane Longhurst, which ultimately led to a major reform of the law governing possession of obscene material in the United Kingdom.

On 19 April 2003, Jane's burning body was found on Wigginholt Common, West Sussex.[9] Graham Coutts, the boyfriend of one of Jane's friends, was subsequently convicted of her murder.[10] The prosecution had alleged that Coutts

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4 "Congress shall make no law. . .abridging the freedom of speech": U.S. Const. amend I. This issue is discussed in more detail below.

5 Lilian Edwards, "Pornography, Censorship and the Internet" in Lilian Edwards & Charlotte Waelde, eds, *Law and the Internet*, 3rd ed (Oxford: Hart Publishing, 2009) 623 at 633 [Edwards, "Pornography, Censorship and the Internet"].

6 Angus Hamilton, "The Net Out of Control—A New Moral Panic: Censorship and Sexuality" in Liberty, ed, *Liberating Cyberspace: Civil Liberties, Human Rights and the Internet* (London, U.K.: Pluto Press, 1999) 169.

7 U.K., Home Office & Scottish Executive, *Consultation: On the Possession of Extreme Pornographic Material* (London, U.K.: 2005) at 6, online: BBC <news.bbc.co.uk/2/shared/bsp/hi/pdfs/30_08_05_porn_doc.pdf>.

8 See below. Although the term "child pornography" is used widely, it has been criticized as inviting comparisons with adult pornography: Alisdair A. Gillespie, *Child Pornography: Law and Policy* (New York: Routledge, 2011) at 1-4 [Gillespie, *Law & Policy*]. It is, however, still the most common term used in the literature, legislation, and case law, and for convenience will be used in this article.

9 *R. v. Coutts (Graham James)*, [2005] 1 W.L.R. 1605 (Eng. C.A.) at p. 1607 [*Coutts*].

10 Coutts' appeal against conviction was allowed by the House of Lords and remitted to the Court of Appeal: *R. v. Coutts*, [2006] 4 All E.R. 353 (U.K. H.L.). His conviction was quashed and a retrial ordered; "Teacher murder conviction quashed," *BBC News* (19

had murdered Jane "in order to satisfy his macabre sexual fantasies. . .[involving] women who are helpless and being strangled."[11] Two juries[12] rejected the defence case that Jane had died accidentally during "consensual asphyxial sex."[13]

As part of the Crown's case, evidence was led that, leading up to the time of Jane's murder, Coutts had visited a number of websites containing images classified as "'genuine deceased appearance'; 'asphyxiation and strangulation'; 'rape torture and violent sex'; and 'general pornographic.'"[14] Although no expert evidence was led to support a causal link between Coutts viewing this material and the subsequent murder,[15] the evidence was held to be admissible to rebut the defence of accident.[16]

In the United Kingdom, this case became a focal point for reform of the law relating to the possession of violent pornography,[17] and was influential in the government proposal to criminalize the possession of so-called "extreme pornographic material."[18] Notwithstanding strongly divided responses to the government's proposal,[19] the possession of extreme pornography was criminalized by section 63 of the *Criminal Justice and Immigration Act 2008* (the *Act*). In doing so, the United Kingdom[20] became one of the only Western countries, and the first in Europe,[21] to criminalize the simple possession of obscene material.[22]

October 2006), online: <news.bbc.co.uk/2/hi/uk_news/england/southern_counties/6065140.stm>.

11 *Coutts*, *supra* note 9 at 1607.

12 Coutts was convicted of murder for a second time in 2007: "'Pervert' strangled music teacher," *BBC News* (4 July 2007), online: <news.bbc.co.uk/2/hi/uk_news/england/sussex/6265376.stm>.

13 *Coutts*, *supra* note 9 at 1607.

14 *Ibid* at 1614.

15 Paul Johnson, "Law, Morality and Disgust: The Regulation of 'Extreme Pornography' in England and Wales" (2010) 19:2 Soc. & Leg. Stud. 147 at 149.

16 *Coutts*, *supra* note 9 at 1627.

17 Andrew D. Murray, "The Reclassification of Extreme Pornographic Images" (2009) 72:1 Mod. L. Rev. 73 at 73-74.

18 Home Office & Scottish Executive, *supra* note 7 at 6.

19 See generally, U.K., Home Office, *Consultation on the Possession of Extreme Pornographic Material: Summary of Responses and Next Steps* (London, U.K.: Home Office, 2006), online: <www.spannertrust.org/documents/Gvt-response-extreme-porn.pdf>. For a summary of responses to the consultation process see Murray, *supra* note 17 at 78-79.

20 The provision applies only to England, Wales and Northern Ireland: *Criminal Justice and Immigration Act 2008* (U.K.), c. 4, s. 152(3)(c) [CJIA]. A similar provision was enacted in Scotland: *Criminal Justice and Licensing (Scotland) Act*, A.S.P. 2010, c. 13, s.42 [*CJIL*]. This provision is discussed further below.

21 Abhilash Nair, "'Caveat Viewer!': The Rationale of the Possession Offence" (2008) 22:1-2 Intl. Rev. L. Comp. & Tech. 157 at 161 [Nair, "Caveat Viewer"].

Not surprisingly, this reform was highly controversial and was extensively criticized.[23] Beyond the specific criticisms of the UK provision, such an offence raises broader issues about the criminalization of possession as a means of regulating content online—shifting the focus of enforcement from producers, distributors, and intermediaries to the end user.

This article begins with a discussion of the meaning and availability of extreme pornography, followed by a discussion of the traditional regulation of obscenity and its place within the regulation of free speech. Each of the specific rationales offered to justify criminalization of possession will then be analyzed, with a particular focus on child pornography laws which were offered as a precedent for such an offence. Finally, the utility of an offence of possession when applied to the digital context will be examined. Although focusing on the United Kingdom reforms, this article also draws upon the perspectives of cognate common law jurisdictions including Australia, Canada and the United States.

It will be argued that while rhetorically powerful, analogies with child pornography do not withstand close scrutiny. Although ostensibly justified by arguments based on the prevention of harm, the offence is more clearly explained as a reaction to the difficulty of enforcing existing obscenity laws. The offence of possession becomes a means to enforce the censorship of certain forms of obscene material which cannot be enforced using conventional means. A person's right to read and view what they please in private is therefore sacrificed for the need to restrict the availability of online content, the vast majority of which originates overseas and which is not subject to international agreement, let alone international enforcement.

It will be argued that if such material is to be criminalized, the true gravamen of the offence lies in bringing such material into the jurisdiction, conduct which is already prohibited. Rather than punishing possession, a more targeted offence of accessing, limited to the online environment, would allow such conduct to be criminalized while leaving the right of possession intact. Such an approach may be applied to obscene material more generally, or to any other prohibited online content, allowing the production and distribution of such material to be

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[22] The government was unaware of any Western jurisdiction which criminalized the simple possession of extreme material: Home Office & Scottish Executive, *supra* note 7 at 13. However, the simple possession of material that is "refused classification" is an offence in Western Australia: *Classification (Publications, Films and Computer Games) Enforcement Act 1996* (W.A.), ss. 62, 81, 89 [*CEA* (W.A.)].

[23] See generally Johnson, *supra* note 15; Murray, *supra* note 17; Nair, "Caveat Viewer," *supra* note 21; Jacob Rowbottom, "Obscenity Laws and the Internet: Targeting the Supply and Demand" [2006] Crim. L. Rev. 97. In support of such an offence, see generally Clare McGlynn & Erika Rackley, "Criminalising Extreme Pornography: A Lost Opportunity" (2009) 4 Crim. L. Rev. 245 [McGlynn & Rackley, "Criminalisation"; Clare McGlynn & Erika Rackley, "Striking a Balance: Arguments for the Criminal Regulation of Extreme Pornography" (2007) Crim. L. Rev. 677.

criminalized, while allowing the sanctity of a person's library to remain untouched.

I. DEFINING "EXTREME" PORNOGRAPHY: WOULD YOU KNOW IT IF YOU SAW IT?[24]

Digital technology has profoundly changed the way we access and distribute written and visual material. Digital images may be produced, copied, and distributed in large volumes, with minimal cost and relative anonymity. Convergence allows production, distribution, and access to occur seamlessly, while the global nature of the Internet means that material may be accessed from anywhere in the world. The amount of content available online is truly staggering. There is estimated to be in excess of one trillion web sites,[25] and over 300 hours of video are uploaded to YouTube every minute, with over 1 billion users.[26]

An area where this transformation has been keenly felt is access to pornography, which is both widely available and widely sought. In 2012 it was reported that XVideos, one of the largest pornographic websites, received over 4 billion page views per month—three times the page views of CNN and easily within the top 500 websites.[27] Another large adult site, YouPorn, hosted over 100 terabytes of pornography and served over 100 million page views per day.[28]

It has been estimated that of the one million most popular websites in 2010, about 4% were sex-related,[29] while approximately 13% of Internet searches were for erotic content.[30] A 2006 report into the effectiveness of Internet filters estimated that 1.1% of a random sample of webpages were "'adult entertainment.'"[31] Although a relatively small proportion of webpages, "'adult

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[24] Justice Stewart famously said, when referring to the difficulty of defining hard core pornography: "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it": *Jacobellis v. Ohio*, 378 U.S. 184 (1964) at p. 197 [*Jacobellis*].

[25] Austl., Commonwealth, Law Reform Commission, *Classification: Content Regulation and Convergent Media* (ALRC Report No. 118) (Sydney: Australian Law Reform Commission, 2012) at 25, online: <https://www.alrc.gov.au/sites/default/files/pdfs/publications/final_report_118_for_web.pdf> [ALRC, *Classification*].

[26] YouTube, *Statistics*, online: <http://www.youtube.com/yt/press/statistics.html>.

[27] Sebastian Anthony, "Just how big are porn sites?," *Extreme Tech* (4 April 2012), online: <www.extremetech.com/computing/123929-just-how-big-are-porn-sites>.

[28] *Ibid.*

[29] Julie Ruvolo, "How Much of the Internet is Actually for Porn?," *Forbes* (7 September 2011), online: <www.forbes.com/sites/julieruvolo/2011/09/07/how-much-of-the-internet-is-actually-for-porn>.

[30] *Ibid.*

[31] Philip B. Stark, "The Effectiveness of Internet Content Filters" (2008) 4:2 I/S: J.L. & Policy for Information Society 411 at 422.

entertainment'" was defined strictly[32] and "[s]ince the indexed portion of the web contains tens of billions of pages, 1.1% amounts to hundreds of millions of adult webpages."[33]

Amongst this pornography is material which many would undoubtedly find shocking or disturbing.[34] However, prior to the enactment of section 63 of the *Act*, there was no legal category of "extreme pornography."[35] As with the term "pornography" itself, the concept of "extreme" pornography is, to some extent, in the eye of the beholder. Changing attitudes mean that once "obscene" depictions may become more "mainstream."[36] For example, it was estimated that "30% of all Canadian newsstand sales in the mid-1980s consisted of periodicals that would have been illegal 20 years before."[37] Nonetheless, certain categories of material may generically be described as "extreme"—as going beyond the ordinarily accepted limits of even "hard core" pornography. These typically fall into three categories: child pornography, sexual violence,[38] and fetishes and paraphilias such as necrophilia, bestiality, coprophilia, urolagnia, and fisting.[39]

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[32] Websites where there is "sexual content that is clearly adult entertainment, and that content must be visible without clicking anything": *ibid* at 420.

[33] *Ibid* at 422.

[34] See generally, Ogi Ogas & Sai Gaddam, *A Billion Wicked Thoughts: What the Internet Tells Us about Sexual Relationships* (New York: Plume, 2012); Murray Perkins, "Pornography, Policing and Censorship" in Paul Johnson & Derek Dalton, eds, *Policing Sex* (New York: Routledge, 2012) 85 at 90.

[35] In fact, in common with most jurisdictions the term "pornography" had no legal meaning, the regulation of such material being governed by the law relating to "obscenity": Parliamentary Information and Research Service, "The Evolution of Pornography Law in Canada," by Lyne Casavant & James R. Robertson (Ottawa: Library of Parliament, 2007) at 2, online: <www.parl.gc.ca/Content/LOP/Research-Publications/843-e.pdf> [Casavant & Robertson].

[36] Amy Adler, "All Porn All the Time" (2007) 31:4 N.Y.U. Rev. L. & Soc. Change 695 at 701-702. ALRC, *Classification*, *supra* note 25 at 28.

[37] Casavant & Robertson, *supra* note 35 at 2 [emphasis omitted]. It was not that long ago that obscenity prosecutions were brought in relation to descriptions/depictions of oral and anal sex: see, e.g., *R. v. Anderson (James)* (1971), [1972] 1 Q.B. 304 (Eng. C.A.). However, today proceedings are unlikely to be brought in relation to material depicting such acts: U.K., Crown Prosecution Service, *Obscene Publications*, online: <www.cps.gov.uk/legal/l_to_o/obscene_publications>.

[38] For example, Coutts was shown to have visited websites such as "necrobabes", "violentpleasure", "rapepassion", "hangingbitches" and "deathbyasphyxia": *Coutts*, *supra* note 9 at 1626. This category may also include violent images placed in a "sexual context": European Parliament, Committee on Women's Rights and Equal Opportunity, *Report on the Consequences of the Sex Industry in the European Union* (EP, 2004) at 16, online: <www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A5-2004-0274+0+DOC+PDF+V0//EN>.

[39] Home Office & Scottish Executive, *supra* note 7 at 13; Austl., Commonwealth, Office of Film and Literature Classification, *Guidelines for the Classification of Films and Computer Games* (2005) at 13, online: <https://www.comlaw.gov.au/Details/

Concern at the increasing prevalence of violent and degrading pornography had been expressed for some time,[40] including prior to the modern Internet.[41] Although one is unlikely to come across extreme pornography by accident, there is no reason to doubt that such material is indeed "widely available."[42] For those who wish to, it is "entirely straightforward to access, for free, without giving any personal details."[43]

Given the nature of the material, it is not surprising that data on its availability is limited. While at the time the offence was proposed there were said to be "hundreds of internet sites"[44] displaying such material, any assessment based on the traditional website model does not capture non-website based material such as peer-to-peer networks or so-called "darknets."[45] In any event, most websites are hosted overseas, with the Internet Watch Foundation reporting that of the 3,209 reports of allegedly obscene adult content in 2013, only 7 were assessed as criminally obscene and hosted in the UK.[46] Another possible measure, the number of prosecutions of obscene material, is significantly influenced by law enforcement priorities. For example, between 1994 and 2003, as child pornography prosecutions in the UK increased markedly (93 to 1,890), there was a commensurate decrease in obscenity prosecutions (309 to 39).[47]

While child pornography is already subject to a broad range of criminal offences, including possession,[48] other forms of extreme pornography are typically governed by obscenity laws, if at all. Unless possession of obscene material generally is to be criminalized, an option which was specifically rejected in the UK,[49] the first challenge is to define the scope of "extreme." Under section

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F2005L01286 > ; *R. v. Perrin (Stephane Laurent)*, [2002] EWCA Crim 747 (Eng. C.A.). For a general discussion of fetishes and paraphilias, see Martin P. Kafka, "The DSM Diagnostic Criteria for Fetishism" (2010) 39:2 Archives Sexual Behavior 357.

40 European Parliament, *supra* note 38 at 16.

41 See, e.g., Canada, *Pornography and Prostitution in Canada: Report of the Special Committee on Pornography and Prostitution: Summary* (Ottawa: Supply and Services Canada, 1985) at 23-24, online: < https://www.ncjrs.gov/pdffiles1/Digitization/131616NCJRS.pdf > [*Fraser Committee Report*]; U.S., Department of Justice, *Attorney General's Commission on Pornography: Final Report* (Washington, D.C.: United States Government Printing Office, 1986) at part 2, ch. 5.2, online: < www.porn-report.com/contents.htm > [U.S., *Pornography Commission Report*].

42 Home Office & Scottish Executive, *supra* note 7 at 5.

43 McGlynn & Rackley, "Criminalisation," *supra* note 23 at 249, n. 28.

44 Home Office & Scottish Executive, *supra* note 7 at 5.

45 Edwards, "Pornography, Censorship and the Internet," *supra* note 5 at 630.

46 Internet Watch Foundation, *Annual & Charity Report, 2013* (2013) at 16, online: *https://www.iwf.org.uk/assets/media/annual-reports/annual_report_2013.pdf.pdf > [IWF, 2013 Report]*.

47 Home Office & Scottish Executive, *supra* note 7 at 6. Similar statistics are found in the US where between 1992 and 2000 there was a fivefold increase in child pornography prosecutions while obscenity prosecutions more than halved: Adler, *supra* note 36 at 701.

48 See below.

63 of the *Act* an extreme pornographic image must depict specific conduct which, for the purposes of analysis, will be divided into images depicting actual or threatened harm to a person (Category 1) and images of sexual interference with corpses or animals (Category 2).[50]

> A Category 1 image is one which:
>
> portrays, in an explicit and realistic way. . .
>
> (a) an act which threatens a person's life, [or]
> (b) an act which results, or which is likely to result, in serious injury to a person's anus, breasts, or genitals,
>
> and a reasonable person looking at the image would think that any such person. . .was real.[51]
>
> A Category 2 image:
>
> portrays, in an explicit and realistic way. . .
>
> (c) an act which involves sexual interference with a human corpse, or
> (d) a person performing an act of intercourse or oral sex with an animal (whether dead or alive),
>
> and a reasonable person looking at the image would think that any such person or animal was real.[52]

The image[53] must be both "pornographic" and "extreme,"[54] and "[a]n 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."[55] An image is "extreme" if it falls within one of the above categories and is also "grossly offensive, disgusting or otherwise of an obscene character."[56] A range of defences apply where, for example, the person had a legitimate reason for being

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[49] Home Office & Scottish Executive, *supra* note 7 at 11-12. At least in Europe there appears to be little support more broadly for a general ban on pornography: see, e.g., Zack Whittaker, "EU votes to reject 'porn ban' proposals," *CNET* (12 March 2013), online: <news.cnet.com/8301-1023_3-57573771-93/eu-votes-to-reject-porn-ban-proposals>.

[50] The maximum penalty for these offences on indictment is 3 years for Category 1 images and 2 years for Category 2: *CJIA*, *supra* note 20, s. 67.

[51] *Ibid*, s. 63(7). References to parts of the body include references to surgically constructed parts, including through gender reassignment surgery: *ibid*, s. 63(9).

[52] *Ibid*, s. 63(7).

[53] Defined to mean "a moving or still image (produced by any means); or. . .data (stored by any means) which is capable of conversion into [a moving or still image]": *ibid*, s. 63(8).

[54] *Ibid*, s. 63(2).

[55] *Ibid*, s. 63(3). Where an image forms part of a series of images, whether that image is pornographic may be determined by reference to "the image itself," and "the context in which it occurs in the series of images": *ibid*, s. 63(4).

[56] *Ibid*, s. 63(6).

in possession, or had not requested and was unaware of the nature of the image.[57]

Finally, the offence is limited to explicit scenes or realistic depictions. "Explicit" is intended to mean "clearly seen and . . . not hidden, disguised or implied."[58] "Realistic" scenes are those which "appear to be real and are convincing, but which may be acted."[59] This is intended to exclude material such as text and cartoons,[60] but was also seen as necessary to facilitate enforcement by avoiding the need to prove that the activity actually took place.[61]

This was not the first time that a proposal had been made to differentiate forms of obscene material. In Canada, the 1985 Fraser Committee Report into Pornography had recommended three tiers of obscenity: pornography causing physical harm, sexually violent and degrading pornography, and visual pornographic material.[62] These were subject to differing restrictions, penalties, and defences, but none were punishable based on simple possession. Only child pornography was subject to such sweeping criminalization,[63] a measure which was seen as a serious but necessary step in deterring the further abuse of children.[64] Before considering the rationales used to justify criminalizing the possession of extreme pornography, it is necessary to review the law governing obscenity more generally.

II. OBSCENITY AND FREEDOM OF SPEECH

The principal objection to attempts to ban extreme pornography is that such censorship infringes the right to freedom of expression.[65] As an international human right, this freedom is contained in article 19 of the *International Covenant on Civil and Political Rights*.[66] Although existing at common law,[67] it now finds

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[57] *Ibid*, s. 65. In addition, the provision does not apply to "excluded images" that is, images which "form[. . .] part of a series of images contained in a recording of the whole or part of a classified work": *ibid*, ss. 64(1)-(2).

[58] Home Office & Scottish Executive, *supra* note 7 at 11.

[59] *Ibid*.

[60] The criminalization of cartoons depicting child sexual abuse is discussed below.

[61] See the discussion below.

[62] *Fraser Committee Report*, *supra* note 41 at 13, recommendation 7.

[63] *Ibid* at 45, recommendation 67.

[64] Casavant & Robertson, *supra* note 35 at 11. This issue is discussed further below.

[65] Also relevant is the right to respect for private and family life: see, e.g., *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 U.N.T.S. 221 art. 8 (entered into force 3 September 1953) [*ECHR*]. This issue is discussed further below.

[66] *International Covenant on Civil and Political Rights*, 16 December 1966, 999 U.N.T.S. 171 art. 19 (entered into force 23 March 1976) [*ICCPR*]. See also *Universal Declaration of Human Rights,* GA Res 217A (III), UN GAOR, 3rd sess, Supp. No. 13, U.N. Doc. A/180 (1948), art. 19.

expression in the UK under article 10 of the *ECHR*.[68] In countries such as Canada[69] and the US,[70] it enjoys constitutional protection.[71] Of particular relevance in the digital environment, the right includes the freedom to "seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."[72]

Although fundamental, the right is not absolute. At common law, "one proceeds 'upon an assumption of freedom of speech' and turns to the law 'to discover the established exceptions to it.'"[73] At the international level, the right is subject to "such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society."[74] That the state may restrict the availability of "obscene" material is well-established. The *ICCPR* itself provides that the right may be subject to legal restrictions which are necessary "[f]or the protection of. . .public health or morals."[75] In the European context, it has been held that the aim of UK obscenity laws—to protect morals in a democratic society—is a legitimate aim under article 10(2) of the *ECHR*.[76] In both Canada[77] and the US,[78] material which is obscene, as opposed to merely indecent, may fall outside the realms of protected speech.

What constitutes obscene material varies between jurisdictions, but typically invokes an appeal to community values.[79]For example, in the United States,

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67 *Bonnard v. Perryman*, [1891] 2 Ch. 269 (Eng. C.A.) at p. 284.

68 The *Human Rights Act 1998* (U.K.), c. 42, s. 12 incorporates *ECHR*, *supra* note 65, art. 10.

69 *Canadian Charter of Rights and Freedoms*, s. 2(b), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Canadian Charter*].

70 U.S. Const. amend I.

71 Australia has no constitutionally protected freedom of expression other than a limited right to political expression: *Lange v. Australian Broadcasting Corp.* (1997), 189 C.L.R. 520 (Australia H.C.) [*Lange*]. But note the *Charter of Human Rights and Responsibilities Act 2006* (Vic), s. 15 [*Victorian Charter*].

72 *ICCPR*, *supra* note 66, art. 19(2); see also *ECHR*, *supra* note 65, art. 10(1).

73 *Lange*, *supra* note 71 at 564, citing *Attorney General v. Guardian Newspaper Ltd. (No. 2)* (1988), [1990] 1 A.C. 109 (U.K. H.L.) at p. 283.

74 *ECHR*, *supra* note 65, art. 10(2); see also *ICCPR*, *supra* note 66, art. 19(3). Similarly, the *Canadian Charter*, *supra* note 69, s. 1 guarantees the rights and freedoms set out in it "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." See also *Victorian Charter*, *supra* note 71, s. 7.

75 *ICCPR*, *supra* note 66, art. 19(3)(b).

76 *Handyside v. United Kingdom (A/24)* (1976), (1979-80) 1 E.H.R.R. 737 (Eur. Ct. H.R.).

77 *R. v. Butler*, 1992 CarswellMan 100, 1992 CarswellMan 220, EYB 1992-67139, [1992] 1 S.C.R. 452, [1992] S.C.J. No. 14 (S.C.C.), reconsideration / rehearing refused [1993] 2 W.W.R. lxi (S.C.C.) [*Butler* cited to S.C.R.].

78 *Miller v. California*, 413 U.S. 15 (1973) at pp. 23-24 [*Miller*].

79 The focus of this chapter is on the principle obscenity statutes (see, e.g., *Obscene Publications Act, 1959* (U.K.) 7 & 8 Eliz II, c. 66 [*OPA*]; *Criminal Code*, R.S.C. 1985, c. C-

obscene material is material which depicts or describes sexual conduct and which "taken as a whole, appeal[s] to the prurient interest in sex, which portray[s] sexual conduct in a patently offensive way, and which, taken as a whole, do[es] not have serious literary, artistic, political, or scientific value."[80] In Canada, material is obscene if its "dominant characteristic. . .is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, horror, cruelty and violence."[81] The equivalent under Australian law, materials which are "refused classification," are materials that:

> [D]escribe, depict, express or otherwise deal with matters of sex, drug misuse or addiction, crime, cruelty, violence or revolting or abhorrent phenomena in such a way that they offend against the standards of morality, decency and propriety generally accepted by reasonable adults to the extent that they should not be classified.[82]

In contrast, the test of obscenity in the UK looks to the impact on the likely viewer whereby material is obscene if, taken as a whole, its effect is "such as to tend 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."[83]

In the context of extreme pornography, the issue is not so much whether such material is obscene. It is at least arguable that the vast majority of material defined as such could be prosecuted under existing definitions of obscenity.[84] Such material is certainly outside the realm of material which would ordinarily be viewed in the mainstream media or even in designated "sex shops."[85] It is the decision to punish simple possession of such material that is the most significant in terms of Internet regulation.

46, s. 163 [*Criminal Code* (Can.)]; 18 U.S.C. § 1460-1470) although these are usually supplemented by related provisions concerned with postal services and customs. Australia has a cooperative scheme based on the *Classification (Publications, Films and Computer Games) Act 1995* (Cth.) with complementary state and territory enforcement legislation (see, e.g., *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995* (Vic.) [*CEA* (Vic.)]). Online content is regulated by the *Broadcasting Services Act 1992* (Cth.). There are also some specific state laws: see, e.g., *Crimes Act 1900* (N.S.W.), s. 578C; *Summary Offences Act 1953* (S.A.), s. 33.

80 *Miller*, *supra* note 78 at 24.

81 *Criminal Code* (Can.), *supra* note 79, s. 163(8).

82 *National Classification Code 2005* (Cth.), s. 2(1)(a) [*NCC*]. It further includes child pornography and materials that "promote, incite or instruct in matters of crime or violence": *ibid*, s. 2(1)(c). See generally, Austl., N.S.W., NSW Parliamentary Library Research Service, *Censorship in Australia: Regulating the Internet and Other Recent Developments* (Briefing Paper No. 4/02) by Gareth Griffith (NSW Parliamentary Library Research Service, 2002).

83 *OPA*, *supra* note 79, s. 1(1). This is based on the common law test set out in *R. v. Hicklin* (1868), (1867-68) L.R. 3 Q.B. 360 (Eng. Q.B.).

84 Home Office & Scottish Executive, *supra* note 7 at 5.

85 *Ibid*.

(a) Possessing Obscenity

"[A]dults should be able to read, hear and see what they want."[86]

Since the 1970s, most Western countries have moved away from direct government censorship towards a system of classification which governs the availability of certain material and informs consumer choice.[87] This is reflected in restrictions being placed on the production and/or distribution of obscene material, but not its possession.[88] For example, under section 2 of the *Obscene Publications Act 1959* (*OPA*), while it is an offence to publish an obscene article, possession is only an offence if it is for the purpose of publication for gain.[89] A similar approach is taken in Australia,[90] Canada,[91] and the US,[92] and extends to other forms of restricted material such as hate speech,[93] and suicide-related[94] and terrorism-related material.[95]The central tenet of this approach is the individual's right "to read or observe what he pleases—the right to satisfy his intellectual and emotional needs in the privacy of his own home."[96]

The issue of possession and freedom of speech was considered, in pre-Internet days, by the US Supreme Court in *Stanley v. Georgia*.[97] The State argued that, as obscene material is not protected speech, the states should be free to regulate possession of such material to protect their citizens from harm: "[i]f the State can protect the body of a citizen, may it not. . .protect his mind?"[98]

The Court rejected this argument. Although obscene material did not receive First Amendment protection, these decisions were made in the context of public distribution or dissemination of obscene materials.[99] Public distribution of such material gives rise to other concerns, such that it might "fall into the hands of children. . .[or] intrude upon the sensibilities or privacy of the general public."[100]

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86 *NCC*, *supra* note 82, s. 1(a).

87 See, e.g., ALRC, *Classification*, *supra* note 25 at 49.

88 Edwards, "Pornography, Censorship and the Internet," *supra* note 5 at 633.

89 *OPA*, *supra* note 79, s. 2(1).

90 See, e.g., *CEA* (Vic.), *supra* note 79.

91 *Criminal Code* (Can.), *supra* note 79, s. 163.

92 18 U.S.C. § 1460-1470.

93 *Public Order Act 1986* (U.K.), c. 64, Part 3; *Racial and Religious Tolerance Act 2001* (Vic.), ss. 24, 25.

94 *Criminal Code Act 1995* (Cth.), ss. 474.29A, 474.29B [*Criminal Code* (Austl.); *Coroners and Justice Act 2009* (U.K.), c. 25, s. 61, Schedule 12 [*CJA*].

95 *Terrorism Act 2006* (U.K.), c. 11, s. 2; *Criminal Code* (Austl.), *supra* note 94, s. 101.4.

96 *Stanley*, *supra* note 1 at 565.

97 *Ibid.*

98 *Ibid* at 560.

99 *Ibid* at 560-561, citing *Roth v. United States*, 354 U.S. 476 (1957); *Smith v. California*, 361 U.S. 147 (1959); *Jacobellis*, *supra* note 24; *Ginsberg v. New York*, 390 U.S. 629 (1968).

100 *Stanley*, *supra* note 1 at 567.

It does not follow that a similar interest applies to mere private possession.[101] To infringe the individual's fundamental "right to be free from state inquiry into the contents of his library"[102] requires greater justification than to say that the material is "obscene."[103]

Similar arguments were made in relation to possession of extreme pornography:

> Whilst many people may find the material morally offensive, this alone is not sufficient to justify outlawing its possession. Given the particularly intrusive nature of the proposed offence on an intimate aspect of an individual's private life (his or her sexual conduct), weighty reasons are required to justify prosecuting people for possessing and viewing these images privately.[104]

Prior to section 63, the only form of pornography which it was illegal to possess was child pornography, an example that was specifically drawn upon as justifying the criminalization of possession of extreme pornography.[105]

(b) A Special Case: Child Pornography

It was not until the 1970s that child pornography was regulated separately from other forms of obscene material.[106] Even then, a distinction was often drawn between simple possession, which was not an offence, and production and distribution, which were.[107] While in the majority of cases child pornography would also be obscene, the question of whether an image was or was not obscene "bears no connection to the issue of whether a child has been physically or psychologically harmed in the production of the work."[108] Accordingly, in the landmark decision of *New York v. Ferber*,[109] the US Supreme Court held that child pornography which involves the use of actual children is not constitutionally protected because the "prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing

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[101] *Ibid* at 568-569.

[102] *Ibid* at 565.

[103] *Ibid.*

[104] U.K., Joint Committee on Human Rights, *Legislative Scrutiny*, 15th Report (2008) at para 2.16, online: <www.publications.parliament.uk/pa/jt200708/jtselect/jtrights/81/8105.htm>.

[105] Home Office & Scottish Executive, *supra* note 7 at 8.

[106] Alisdair Gillespie, "Legal Definitions of Child Pornography" (2010) 16:1 J. Sexual Aggression 19.

[107] Austl., Commonwealth, Law Reform Commission, *Film and Literature Censorship Procedure* (ALRC Report No. 55) (Sydney: Australian Law Reform Commission, 1991) at 5.16, online: <https://www.alrc.gov.au/sites/default/files/pdfs/publications/ALRC55.pdf>.

[108] *New York v. Ferber*, 458 U.S. 747 (1982) at p. 761 [*Ferber*].

[109] *Ibid.*

importance."[110] Following similar reasoning, most jurisdictions have now removed the obscenity standard entirely from their child pornography laws where the sexual activity depicted is "explicit,"[111] "indecent,"[112] "lascivious"[113] or the "dominant characteristic" is for a "sexual purpose."[114]

However, this is merely to say that images of child abuse are not protected speech independently of the test of obscenity. It does not follow that possession of child pornography must be an offence. In the United States, although the *Child Protection Act of 1984* first removed obscenity requirements following *Ferber*,[115] it was several years before the *Child Protection Restoration and Penalties Enhancement Act of 1990* penalized simple possession following *Osborne v. Ohio*.[116] Similarly, simple possession of child pornography was not an offence in England and Wales until the enactment of section 160 of the *Criminal Justice Act 1988*.[117] As will be discussed below, the primary rationale for criminalizing possession was to help stop the market for child pornography and the abuse of children which underpins it.[118] Against this background, we now turn to consider the arguments used to justify criminalizing the possession of extreme pornography.

III. CRIMINALIZING POSSESSION OF EXTREME PORNOGRAPHY

> [A] prosecution or the threat of a prosecution. . .for looking at adult pornography in private is a very serious interference in an individual's right to respect for an intimate aspect of their private life. . .and their freedom of expression. . ..Its justification must be stronger than that required to regulate the publication and distribution of pornography by commercial operators because the interference in the rights of the individual are so much more serious.[119]

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[110] *Ibid* at 757.

[111] *Criminal Code* (Can.), *supra* note 79, s. 163.1(1)(a)(i).

[112] *Protection of Children Act 1978* (U.K.), c. 37, s 1 [*PCA*]; *Criminal Justice Act 1988* (U.K.), c. 33, s. 160.

[113] 18 U.S.C. § 2256(2)(v).

[114] *Criminal Code* (Austl.), *supra* note 94, s. 473.1; *Criminal Code* (Can.), *supra* note 79, s. 163.1(1)(a)(ii).

[115] *Ferber*, *supra* note 108.

[116] *Osborne v. Ohio*, 495 U.S. 103 (1990) [*Osborne*].

[117] The earlier offence of possession under *PCA*, *supra* note 112, s. 1(c) applied only to possession with intent to distribute. Provisions similar to the 1988 UK act are found in other jurisdictions: *Criminal Code* (Can.), *supra* note 79, s. 163.1(4); *Crimes Act 1958* (Vic.), s. 70 [*Crimes Act* (Vic.)].

[118] See the discussion below.

[119] Rabinder Singh, "In the Matter of the Consultation Paper on the Possession of Extreme Pornographic Material," *Backlash* (18 November 2005) at para 29, online: < www.backlash-uk.org.uk/wp/?page_id = 148 > .

An offence of possession of extreme pornography impacts a broad range of interests including:

> [F]reedom of speech, protection of the vulnerable, the impact of the Internet on the consumption of violent pornography and wider moral questions about whether some material is so violent, degrading and potentially harmful that its possession should be controlled.[120]

It therefore requires a range of justifications. To some extent these were reminiscent of the so-called "'porn wars'" of the 80s and 90s, with the "triangulated" clash of "three competing fundamentalisms, the moral conservative, the radical feminist, and the classical liberal."[121] However a new addition to the debate, and a direct result of new technology, was the concern that existing obscenity laws could not be enforced.

In broad terms, the government offered three rationales. First, to "protect those who participate in the creation of sexual material containing violence, cruelty or degradation."[122] Second, "to protect society, particularly children, from exposure to such material."[123] Third, the difficulty of enforcing existing restrictions on obscene material.[124]

(a) Protecting the Vulnerable

The clearest response to libertarian objections to an offence of possession is to demonstrate the harm caused by the proscribed conduct.[125] Unfortunately, demonstrating the harm caused by possessing extreme pornography is far from straightforward. Such harm may be direct or indirect.[126] "Direct harm" refers to harm to "those who participate in the creation of sexual material containing violence, cruelty or degradation, who may be the victims of crime in the making of the material."[127] "Indirect harm" refers to the negative impact such material may have, not on the participants, but on the viewer.[128]

(i) Direct Harm

To the extent that extreme pornography depicts unlawful harm, it may be argued that it should be banned in order to protect those who are involved in its

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[120] Home Office & Scottish Executive, *supra* note 7 at 5.

[121] Clare McGlynn & Ian Ward, "Pornography, Pragmatism, and Proscription" (2009) 36:3 J.L. & Soc'y 327 at 328.

[122] Home Office & Scottish Executive, *supra* note 7 at 11.

[123] *Ibid.*

[124] *Ibid.*

[125] "That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.": John Stuart Mill, *On Liberty* (London, U.K.: J.W. Parker & Son, 1959) at 22.

[126] Murray, *supra* note 17 at 75-78.

[127] Home Office & Scottish Executive, *supra* note 7 at 11.

[128] *Ibid* at 8.

production.[129] As discussed above, such arguments were accepted as denying child pornography the status of protected speech, and similar arguments may be made in the context of extreme pornography. However, to say that such material may be restricted does not tell us why it should not be possessed. While those participating in the original offence should be prosecuted, and further distribution may be restricted, punishing the person who views a record of that offence does nothing to prevent the harm already caused to the person depicted in the image. It may nonetheless help to prevent future harm in two ways.

First, criminalizing possession can help to address the harm to victims that may result from the "continued circulation of images of their abuse."[130] As was stated in the context of child pornography, the materials produced are a permanent record of the abuse of that child, and "the harm to the child is exacerbated by their circulation."[131] An offence of possession may therefore encourage the possessor to destroy such images.[132]

Second, and more powerfully, criminalizing possession may stem the market for such material, which will in turn help to prevent future harm to those who may participate in its production.[133] This rationale is widely accepted as justifying the criminalization of possession of child pornography:

> Production of child pornography is fueled by the market for it, and the market in turn is fueled by those who seek to possess it. Criminalizing possession may reduce the market for child pornography and the abuse of children it often involves.[134]

This rationale is particularly significant in the online environment where material may easily be accessed from anywhere in the world. It is therefore argued that criminalizing possession of such images may help break the "demand/supply/demand cycle."[135]

In the context of extreme pornography, this rationale is most clearly reflected in Category 1 material where the image depicts actual as opposed to simulated harm. This is the most persuasive argument based on direct harm, with even

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[129] *Ibid* at 10.

[130] *Ibid* at 9.

[131] *Ferber*, *supra* note 108 at 759. See also *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002) at p. 249 [*Ashcroft*].

[132] *Osborne*, *supra* note 116 at 111.

[133] Home Office & Scottish Executive, *supra* note 7 at 8.

[134] *R. v. Sharpe*, 2001 SCC 2, 2001 CarswellBC 82, 2001 CarswellBC 83, REJB 2001-22168, [2001] 1 S.C.R. 45, [2001] S.C.J. No. 3 (S.C.C.) at para. 92 [*Sharpe*]. See also *Osborne*, *supra* note 116 at 109-110; *R. v. Land (Michael)* (1997), [1999] Q.B. 65 (Eng. C.A.) at p. 70; *R. v. Coffey*, [2003] VSCA 155, 6 V.R. 543 (Vic. S.C.) at p. 552. Maxwell Taylor & Ethel Quayle, *Child Pornography: An Internet Crime* (Hove, U.K.: Brunner-Routledge, 2003) at 23-26; Gillespie, *Law & Policy*, *supra* note 8 at 33-34, 37-38.

[135] Home Office & Scottish Executive, *supra* note 7 at 9.

those generally opposed to the provisions accepting that it would be defensible to target material which involved non-consensual physical harm.[136] However, the force of this argument is weakened by the broad scope of the provision, which manages both to incorporate material which is not harmful and exclude material that is.

First, the relevant conduct must be life threatening or involve injury to the breasts, anus (not buttocks), or genitals. It therefore requires a higher level of violence than the physical aggression which is increasingly common in popular pornography.[137] However, the provision also extends beyond actual harm to include the "likely" infliction of serious injury. Therefore, images of actual physical harm other than to the designated areas would be permissible. Conversely, images of consensual conduct which does not cause harm would nonetheless be prohibited if "likely" to cause serious injury. The challenges in applying this provision are well-illustrated by a case in which the defendant was acquitted in respect of images of anal fisting and urethral sounding,[138] the defence having argued that the images did not depict conduct which would or was likely to result in serious injury.[139]

Further, the provision extends to "explicit and realistic" depictions of harm. This brings within the provision conduct which may be simulated and/or consensual such as consensual sadomasochistic activity,[140] or websites featuring "staged scenes performed by consenting actors."[141]

The government also referred to the fact that participants may be the victims of crime, "whether or not they notionally or genuinely consent to taking part."[142]

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[136] Backlash, "'Extreme' Pornography Proposals: Ill-Conceived and Wrong" in Clare McGlynn, Erika Rackley & Nicole Westmarland, eds, *Positions on the Politics of Porn: A Debate on Government Plans to Criminalise the Possession of Extreme Pornography* (Durham, U.K.: Durham University, 2007) 9 at 13.

[137] Mark Huppin & Neil Malamuth, "The Obscenity Conundrum, Contingent Harms, and Constitutional Consistency" (2012) 23:1 Stan. L. & Pol'y Rev 31 at 80. See generally Ana J. Bridges, Robert Wosnitzer, Erica Scharrer, Chyng Sun & Rachael Liberman, "Aggression and Sexual Behavior in Best-Selling Pornography Videos: A Content Analysis Update" (2010) 16:10 Violence against Women 1065.

[138] Urethral sounding is "[w]here medical rods are inserted into the urethra in order to stimulate the prostate for sexual pleasure": Erika Rackley & Clare McGlynn, "Prosecuting the Possession of Extreme Pornography: A Misunderstood and Misused Law" (2013) 5 Crim. L. Rev. 400 at 403, n. 10.

[139] Caroline Davies, "Former Boris Johnson aide cleared of possession of 'extreme pornography,'" *The Guardian* (8 August 2012), online: < www.guardian.co.uk/uk/2012/aug/08/boris-johnson-aide-extreme-pornography-cleared > . Of course, the jury's reasons for acquitting "'can be no more than conjecture'": Rackley & McGlynn, *supra* note 138 at 402, citing correspondence with the trial judge in *R. v. Walsh* (August 8, 2010), Kingston (Crown Ct.).

[140] Backlash, *supra* note 136 at 10-12.

[141] *Ibid* at 10. See also Avedon Carol & Feminists against Censorship, "Reflections on the Positions on the Politics of Pornography Conference" in McGlynn, Rackley & Westmarland, *supra* note 136, 15.

The notion of consent is therefore dismissed,[143] notwithstanding the law allows for a certain level of consensual harm.[144] Although a defence was belatedly added where the defendant directly participated in conduct which did not involve the infliction of non-consensual harm,[145] this does not assist the non-participant who wishes to watch material which is consensual.

Second, the requirement that the material be "pornographic" significantly limits the application of the provision. Although intended to ensure that the provision did not apply to, for example, news or documentary footage,[146] it ensures that material depicting extreme violence without sexual overtones must be prosecuted, if at all, under obscenity laws and therefore be lawful to possess.[147]

There are numerous examples of non-pornographic material which is produced for distribution on the Internet where actual harm, including death, is caused to participants. For example, terrorist images of torture and beheadings as well as the perversely termed "happy slapping"[148]—that is, the visual recording of criminal acts "ranging from basic intimidation, robbery and beating to rape and murder."[149] Such material provides a much more direct link between physical harm to victims and the demand for such material to be filmed and distributed. In contrast to most of the material currently covered by the provision, it is also arguably more likely to encourage the commission of criminal offences within the jurisdiction.

It may therefore be argued that the direct harm rationale should extend to criminalize the possession of images of extreme violence, subject to defences, regardless of whether they were produced for a sexual purpose. While obscenity laws are commonly linked with depictions of sex,[150] it is not necessarily the case.[151] For example, the categories of material that may be "refused classification" under Australian law include materials that "describe, depict, express or otherwise deal with matters of. . .crime, cruelty, [or] violence."[152] In

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[142] Home Office & Scottish Executive, *supra* note 7 at 11.

[143] Backlash, *supra* note 136 at 10, 13.

[144] See generally *R. v. Brown*, [1993] 2 All E.R. 75 (U.K. H.L.); *Laskey v. United Kingdom* (1997), 24 E.H.R.R. 39 (Eur. Ct. H.R.).

[145] "Non-consensual" harm is either harm that "is of such a nature that the person cannot, in law, consent to it being inflicted on himself or herself" or "where the person can, in law, consent to it being so inflicted, the person does not in fact consent to it being so inflicted": *CJIA*, *supra* note 20, s. 66(3).

[146] Home Office & Scottish Executive, *supra* note 7 at 20.

[147] *Ibid* at 12.

[148] Mike Ball, "Documenting Acts of Cruelty: The Practice of Violent Criminals Making Visual Records of Their Crimes" (2012) 25:5 Visual Anthropology 421 at 42.

[149] *Ibid*.

[150] Casavant & Robertson, *supra* note 35 at 5.

[151] Ian Walden, *Computer Crimes and Digital Investigations* (New York: Oxford University Press, 2007) at 131-132.

the context of children, in addition to child pornography, Australian federal law extends to "child abuse material"—that is, material in which a child is tortured or subject to cruelty or physical abuse.[153]

The argument in relation to direct harm is arguably more tenuous in the context of Category 2 material. In the case of animals, not only does sexual interference not necessarily cause physical harm to an animal, non-sexual animal cruelty is excluded because of the requirement that it be pornographic. Therefore, while videos of bear baiting, cock fighting, and other examples of animal cruelty are readily available, possession of images of sexual interference with an animal is an offence.[154] Similarly, in the case of corpses, images of desecration may be possessed, so long as they are not produced for a sexual purpose.

Although bestiality and necrophilia are illegal in the UK[155] and many other countries,[156] that fact alone cannot justify an offence of possession. Otherwise, the argument could be made to criminalize the possession of images depicting a range of unlawful conduct. In addition, the definitions of extreme pornography are in some instances broader than the corresponding offence. For example, while sexual penetration of a corpse is illegal under section 70 of the *Sexual Offences Act 2003*, sexual interference with a corpse more broadly is not. Similarly, while sexual intercourse with an animal is illegal, oral intercourse is not.[157] This gives rise to the situation that it would be an offence to possess an image of lawful conduct. Of course, given that most of the material is sourced from overseas, it may be impossible to know whether it depicts conduct which is lawful in the jurisdiction in which it was produced.

(ii) Indirect Harm

An additional justification for criminalizing possession is the possibility that "such material may encourage or reinforce interest in violent and aberrant sexual activity to the detriment of society as a whole."[158] Although such arguments may be made in relation to images of actual harm, they assume particular significance in relation to "explicit and realistic" depictions of harm, as in such cases the rationale for criminalizing possession lies not in the harm caused to participants, but in the impact such material may have on the viewer. This justification was

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[152] *NCC*, *supra* note 82, s. 2(1)(a).

[153] *Criminal Code* (Austl.), *supra* note 94, s. 473.1.

[154] Although see offences relating to "animal crush videos" in 18 U.S.C. § 48, considered in *U.S. v. Stevens*, 559 U.S. 460 (2010). See also *U.S. v. Richards*, 755 F.3d 269 (5th Cir., 2014).

[155] *Sexual Offences Act 2003* (U.K.), c. 42, ss. 69, 70 [*SOA*].

[156] On bestiality see, e.g., *Crimes Act* (Vic.), *supra* note 117, s.59; *Criminal Code* (Can.), *supra* note 79, s. 160. On necrophilia see, e.g., *Crimes Act* (Vic.), *supra* note 117, s. 34B(1)(a); *Criminal Code* (Can.), *supra* note 79, s. 182.

[157] *SOA*, *supra* note 155, s. 69.

[158] Home Office & Scottish Executive, *supra* note 7 at 9.

also used in relation to child pornography, producing divergent responses from the Supreme Courts of Canada and the United States.

In *R. v. Sharpe*,[159] the Supreme Court of Canada referred to several studies which suggested that child pornography may fuel fantasies and provoke certain people to offend.[160] Although acknowledging that the evidence was "not strong,"[161] it was accepted that child pornography may promote cognitive distortions such that it may normalize sexual activity with children in the mind of the possessor, weakening inhibitions and potentially leading to actual abuse.[162] The Court further held that this rationale could apply equally to material where no child was involved in its production[163]e.g., "pseudo pornography," which involves digitally manipulated images of real people, and "virtual pornography," which includes computer generated images, cartoons, and the like.[164] Such material could also promote cognitive distortions in the viewer, potentially leading to child abuse, or be used to groom children for sexual activity.[165] Banning such materials was therefore in accordance with Parliament's intention to criminalize the possession of material that "poses a reasoned risk of harm to children."[166]

Similar arguments were also used in the UK to justify an offence of possessing a "prohibited image of a child,"[167] which includes "non-photographic visual depictions of child sexual abuse," including cartoons.[168] While it was acknowledged that there was no specific research looking at a direct link between possession of such material and the sexual abuse of children,[169] there was concern that such material might "fuel abuse of real children by reinforcing potential abusers' inappropriate feelings towards children."[170]

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[159] *Sharpe*, *supra* note 134 at para 88.

[160] *Ibid* at paras 89, 103, 185, 202.

[161] *Ibid* at para 88.

[162] Ibid at paras 86-88, 103, 165, 200.

[163] *Ibid* at paras 216-217.

[164] Abhilash Nair, "Real Porn and Pseudo Porn: The Regulatory Road" (2010) 24:3 Intl. Rev. L. Comp. & Tech. 223 at 224 [Nair, "Regulatory Road"].

[165] *Sharpe*, *supra* note 134 at paras 205, 207.

[166] *Ibid* at para 38.

[167] *CJA*, *supra* note 94, s. 62(1). Punishable by up to 3 years imprisonment on indictment: *ibid*, s. 66.

[168] See generally U.K., Home Office, Scottish Executive & Northern Ireland Office, *Consultation on Possession of Non-Photographic Visual Depictions of Child Sexual Abuse* (London, U.K.: 2007) at 15, online: <www.gov.scot/Resource/Doc/1099/0048474.pdf>.

[169] *Ibid* at 6.

[170] *Ibid* at 5. This was also the rationale for the Australian federal provisions applying to cartoons or animations: Austl., Commonwealth, *Crimes Legislation Amendment (Telecommunications Offences and other Measures) Bill (No. 2)*, 2002-2004 Sess., 2004, Explanatory Memorandum at 6, online: <parlinfo.aph.gov.au/parlInfo/down-

In contrast, the US Supreme Court struck down the relevant federal provision to the extent that it applied to material which was not obscene, and which did not involve the abuse of children in its production: "the causal link is contingent and indirect. The harm does not necessarily follow from the speech, but depends upon some unquantified potential for subsequent criminal acts."[171] Further, the fact that such material may "whet the appetite of child molesters,"[172] and encourage them to engage in offending behaviour is not sufficient. Speech may be restricted if it is "'directed to inciting or producing imminent lawless action and is likely to incite or produce such action.'"[173] In this case, the government had shown "no more than a remote connection between speech that might encourage thoughts or impulses and any resulting child abuse."[174]

In the context of extreme pornography, the difficulty lies not so much in the rationale, but in the evidence that supports it. In *Stanley*, the Court rejected the State's argument that exposure to obscene material may lead to deviant sexual behaviour or crimes of sexual violence,[175] finding that "[t]here appears to be little empirical basis for that assertion."[176]

Even in the case of child pornography, the impact of viewing on the risk of contact offending is complex and unresolved.[177] Despite numerous studies into the effects of adult pornography,[178] its impact on behaviour remains a hotly contested issue.[179] Far from offering new evidence in support of this argument, the government simply acknowledged that no definite conclusions could be drawn as to the likely long term impact of extreme pornography on behaviour.[180]

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load/legislation/ems/r2131_ems_c79a0bd1-87a4-42e4-be65-485ba6850273/upload_pdf/66344.pdf;fileType=application%2Fpdf>. For an Australian example of a prosecution for possession of such material, see *McEwen v. Simmons* (2008), 73 NSWLR 10 (N.S.W. S.C.).

171 *Ashcroft*, *supra* note 131 at 250.

172 *Ibid* at 263.

173 *Ibid* at 253, citing *Brandenburg v. Ohio*, 395 U.S. 444 (1969) at p. 447.

174 *Ashcroft*, *supra* note 131 at 253.

175 *Stanley*, *supra* note 1 at 566.

176 *Ibid*.

177 See, e.g., Kelly M. Babchishin, R. Karl Hanson & Chantal A. Hermann, "The Characteristics of Online Sex Offenders: A Meta-Analysis" (2011) 23:1 Sexual Abuse: J. Research & Treatment 92.

178 Home Office & Scottish Executive, *supra* note 7 at 9.

179 Casavant & Robertson, *supra* note 35 at 3-4. Similar challenges are faced in relation to the impact of violent imagery on behaviour: Austl., Commonwealth, Attorney-General's Department, *Literature Review on the Impact of Playing Violent Video Games on* Aggression (Barton, A.C.T.: Attorney-General's Department, 2010), online: <www.classification.gov.au/Public/Resources/Pages/Other%20Resources/Literature%20review%20on%20the%20impact%20of%20playing%20violent%20video%20games%20on%20aggression.pdf>.

It was only after the Bill was introduced that a Rapid Evidence Assessment[181] was provided.[182] The REA, which was based on five meta-analyses and 32 additional studies,[183] concluded that the existing research "supports the existence of some harmful effects from extreme pornography on some who access it. These included increased risk of developing pro-rape attitudes, beliefs and behaviours, and committing sexual offences."[184] While it was acknowledged that this was also true of non-extreme pornography, "it showed that the effects of extreme pornography were more serious."[185] Further, it concluded that "[m]en who are predisposed to aggression, or have a history of sexual and other aggression were more susceptible to the influence of extreme pornographic material."[186]

The government's REA was strongly criticized.[187] Not only were the assessors "known for their anti-pornography views,"[188] one was the author of some of the research papers relied upon.[189] More fundamentally, it was argued that the study did not address the limitations of "effects research" in determining a causal connection between viewing certain material and violent behaviour.[190] Much of the research on which the assessment was based was carried out prior to the advent of the Internet,[191] and broad assumptions were made that the material utilized in previous studies fell within the legislative definition of "extreme pornographic material."[192] No mention was made of simulated material and its

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[180] Home Office & Scottish Executive, *supra* note 7 at 9.

[181] A "Rapid Evidence Assessment" (REA) is a "[q]uick overview of existing research on a (constrained) topic and a synthesis of the evidence provided by these studies to answer the REA question": U.K., Civil Service, online: <www.civilservice.gov.uk/networks/gsr/resources-and-guidance/rapid-evidence-assessment/what-is>.

[182] U.K., Ministry of Justice, *The Evidence of Harm to Adults Relating to Exposure to Extreme Pornographic Material: A Rapid Evidence Assessment (REA)* (Ministry of Justice Research Series 11/07) by Catherine Itzin, Ann Taket & Liz Kelly (2007), online: <www.melonfarmers.co.uk/pdfs/rapid_evidence_assessment_280907.pdf> [Itzin, Taket & Kelly].

[183] *Ibid* at 6.

[184] *Ibid* at iii.

[185] *Ibid*.

[186] *Ibid*. See also Huppin & Malamuth, *supra* note 137 at 92-93.

[187] See, for example, Feona Attwood & Clarissa Smith, "Extreme Concern: Regulating 'Dangerous Pictures' in the United Kingdom" (2010) 37:1 J.L. & Soc'y 171. See also Julian Petley, "Pornography, Panopticism and the Criminal Justice and Immigration Act 2008" (2009) 3:3 Sociology Compass 417 at 423-424.

[188] Attwood & Smith, *supra* note 187 at 174-175.

[189] U.K., H.L., *Hansard*, vol. 700, col. 1361 (21 April 2008) (Lord Hunt of Kings Heath) [*Hansard*, 21 April 2008].

[190] Attwood & Smith, *supra* note 187 at 174-177. See also Petley, *supra* note 188 at 423-424; Casavant & Robertson, *supra* note 35 at 3-4.

[191] *Hansard*, 21 April 2008, *supra* note 189.

[192] Attwood & Smith, *supra* note 187 at 176.

impact on viewers' attitudes. "A possession offence based on outdated research methods analysing data in other jurisdictions and only concluding that *some* negative impact may be had on *some* viewers does not amount to evidence-based policy making."[193]

An alternative view is that the question of whether pornography "causes" sexual violence is "an unanswerable distraction" that "assumes a deterministic model of human nature," when in reality "there are complex links between pornography and violence against women and children."[194] Such material is said to cause "cultural harm,"[195] thus avoiding the need to prove direct harm and focusing instead on the indirect harm that pornography may cause in relation to attitudes of equal worth and equal protection.[196] Such language was echoed in the government's proposal,[197] and has been recognized in the US[198] and Canada.[199] As the Supreme Court of Canada stated in *R. v. Butler*:

> The effect of this type of material is to reinforce male-female stereotypes to the detriment of both sexes. It attempts to make degradation, humiliation, victimization, and violence in human relationships appear normal and acceptable. A society which holds that egalitarianism, non-violence, consensualism, and mutuality are basic to any human interaction, whether sexual or other, is clearly justified in controlling and prohibiting any medium of depiction, description or advocacy which violates these principles.[200]

For example, in *Butler* it was held that the "overriding objective of [the obscenity provision] is not moral disapprobation but the avoidance of harm to society."[201] Although acknowledging that "a direct link between obscenity and harm to society may be difficult to establish,"[202] the criminalization of such material "demonstrates our community's disapproval of the dissemination of materials which potentially victimize women and restricts the negative influence which such materials have on changes in attitudes and behaviour."[203] Further, in the context of material which is degrading or dehumanizing, "the appearance of

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[193] Anna Carline, "Criminal Justice, Extreme Pornography and Prostitution: Protecting Women or Protecting Morality?" (2011) 14:3 Sexualities 312 at 321.

[194] Jill Radford, "The Politics of Pornography: A Feminist Perspective" in McGlynn, Rackley & Westmarland, *supra* note 136, 5 at 6. See also Clare Phillipson, "The Reality of Pornography" in McGlynn, Rackley & Westmarland, *supra* note 136, 20.

[195] McGlynn & Rackley, "Criminalisation," *supra* note 23 at 256-257.

[196] *Ibid* at 258; Casavant & Robertson, *supra* note 35 at 4.

[197] Home Office & Scottish Executive, *supra* note 7 at 8.

[198] U.S., *Pornography Commission Report*, *supra* note 41 at part 2, ch. 5.2.1.

[199] *Fraser Committee Report*, *supra* note 41 at 10.

[200] *Butler*, *supra* note 77 at 493-494.

[201] *Ibid* at 493.

[202] *Ibid* at 455.

[203] *Ibid*.

consent is not necessarily determinative. . ..Sometimes the very appearance of consent makes the depicted acts even more degrading or dehumanizing."[204]

It is notable, however, that in no jurisdiction other than the United Kingdom has the view been taken that this would justify the criminalization of possession of such material. Because the harm arises from members of the public being exposed to such material, "[t]his type of harm can arise only if members of the public may be exposed to the conduct or material in question."[205] Even in Canada, where such harm is explicitly recognized, the proposed prohibition only applied to public distribution and exhibition.[206]

While some argued that the government's language may, at times, have had something in common with a "radical feminist perspective,"[207] the final form of the legislation "eschewed any vaguely 'feminist' idea that regulating pornography was part of a programme to achieve equality for women."[208] The difficulty for the government was that in the absence of a blanket ban on pornography, it was necessary to define the "'wrong'" form of pornography,[209] thus highlighting the difficulty in identifying material which causes cultural harm and that which does not. For example, images must depict acts that are life threatening or which result in, or are likely to result in, serious injury to a person's anus, breasts, or genitals. Therefore, it does not encompass images of rape that do not meet these criteria. Paradoxically, this meant that the legislation would most likely not extend to many of the pro-rape websites which were part of the initial impetus for the legislation.[210] This may be contrasted with the equivalent Scottish provision, which extends to "explicit and realistic" depictions of "rape or other non-consensual penetrative sexual activity."[211]

This situation changed with the commencement of the *Criminal Justice and Courts Act 2015*,[212] section 37 of which inserted a new section 63(7A) into the

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[204] *Ibid* at 479. See also *R. c. Labaye*, 2005 SCC 80, 2005 CarswellQue 11495, 2005 CarswellQue 11496, [2005] 3 S.C.R. 728, [2005] S.C.J. No. 83 (S.C.C.) at para. 132 [*Labaye*].

[205] *Labaye*, *supra* note 204 at para 48. See also *Fraser Committee Report*, *supra* note 41 at 13, recommendation 7.

[206] *Butler*, *supra* note 77 at 506-507.

[207] Carline, *supra* note 193 at 313.

[208] McGlynn & Rackley, "Criminalisation," *supra* note 23 at 259.

[209] Petley, *supra* note 187 at 420.

[210] McGlynn & Rackley, "Criminalisation," *supra* note 23 at 249-250; Murray, *supra* note 17 at 88.

[211] *Civic Government (Scotland) Act 1982* (U.K.), c. 45, s. 51A(6)(c) as amended by the *CJIL*, *supra* note 20, s. 42. This was introduced on the basis that the definition in England and Wales was "insufficiently broad": S.P. Bill 24, Criminal Justice and Licensing (Scotland) Bill, Policy Memorandum, 2009 at para 162, online: <www.scottish.parliament.uk/S3_Bills/Criminal%20Justice%20and%20Licensing%20(Scotland)%20Bill/b24s3-introd-pm.pdf>.

[212] *Criminal Justice and Courts Act 2015* (U.K.), c.2.

CJIA. This section, which commenced operation on 13 April 2015,[213] applies only to England and Wales[214] and extends the definition of "extreme image" to include an image which portrays either:

(a) 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
(b) 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,

and a reasonable person looking at the image would think that the persons were real.

The depiction must, however, be "explicit and realistic." Therefore, some depictions of rape may continue to fall outside the legislation. For example, one of the sites viewed by Coutts, "Necrobabes," apparently depicts the murder of women by men, "clearly and not especially realistically, staged in a studio setting."[215]

(b) Legal Moralism

> We are targeting that material not on account of offences which may or may not have been committed in the production of the material, but because the material itself, which depicts extreme violence and often appears to be non-consensual, is to be deplored.[216]

With an acknowledgement that such material should be banned regardless of harm, the government moved to arguments based in repugnance and the protection of social values.[217] Certainly, language such as "'abhorrent,' 'degrading' and 'repugnant'"[218] brought an "openly moral quality"[219] to debates about material that "should have no place in our society."[220] In legal terms, this is most clearly reflected in the incorporation of an obscenity standard—that is, the image possessed must be "grossly offensive, disgusting or

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[213] *Ibid*, *Criminal Justice and Courts Act 2015 (Commencement No. 1, Savings and Transitional Provisions) Order 2015*, S.I. 2015/778, Schedule 1. However, this provision does not have retrospective effect; *ibid*, Schedule 2.

[214] Although section 63 of the *CJIA*, *supra* note 20 generally applies to England, Wales and Northern Ireland, the new section 63(5A) provides that the extended categories of "extreme image" defined in the new section 63(7A) apply only to England and Wales. Therefore, the meaning of "extreme image" in Northern Ireland will remain defined by s 63(7) alone.

[215] Attwood & Smith, *supra* note 187 at 178.

[216] *Hansard*, 21 April 2008, *supra* note 189 at col. 1358 (Lord Hunt of Kings Heath).

[217] Murray, *supra* note 17 at 79; McGlynn & Rackley, "Criminalisation," *supra* note 23 at 252; Carline, *supra* note 193 at 322.

[218] Petley, *supra* note 187 at 423 [citations omitted].

[219] Attwood & Smith, *supra* note 187 at 179.

[220] Home Office & Scottish Executive, *supra* note 7 at 6. See also Johnson, *supra* note 15 at 150.

otherwise of an obscene character."[221] By linking the offence to notions of obscenity, the government therefore moved towards a moralistic rationale, based in notions of disgust, rather than one based in harm.[222]

Such a requirement was not included in the original proposal, but was added during the final stages of the parliamentary process,[223] apparently to ensure that the new provision would not criminalize the possession of material which it would be lawful to publish under the *OPA*.[224] It was not, however, intended to "import the language of or build directly on the Obscene Publications Act"[225] because there would be "difficulties in squaring the purpose of the OPA with a simple possession offence."[226]

This may initially seem a strange argument, given that one of the objectives of the *OPA* is "to strengthen the law concerning pornography."[227] Surely it would be more consistent to simply ban the possession of all obscene material, particularly as the government's own research indicated that non-extreme pornography also produced harmful effects, though to a less serious degree.[228] However, concern about alignment with the *OPA* pre-dated the insertion of an obscenity requirement. At that time, it arguably made sense to restrict the offence of possession only to extreme pornography, given that the *OPA* covered a much broader range of material.[229]

Apparently based on the ordinary dictionary definition of "obscene,"[230] the terms "grossly offensive" and "disgusting" were to be understood as examples of obscenity, rather than alternatives. Their addition did, nonetheless, create a test which is broader in scope than the tendency "to deprave and corrupt" standard found in the *OPA*.[231] Rather than focusing solely on the impact on those likely to see the material, it is sufficient that the material is "grossly offensive" or "disgusting" according to the standards of the "'average'" or "'reasonable'" person.[232] The difference in emphasis may be illustrated by the case of Michael Peacock who was acquitted of six counts under the *OPA* in respect of images of lawful sexual conduct including urination, anal fisting, staged kidnapping and rape and sado-masochistic practices.[233] While jurors apparently were not

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[221] *CJIA*, *supra* note 20, s. 63(6)(b).

[222] McGlynn & Rackley, "Criminalisation," *supra* note 23 at 246.

[223] *Ibid* at 251.

[224] U.K., H.L., *Hansard*, vol. 699, col. 895 (3 March 2008) (Lord Hunt of Kings Heath) [*Hansard*, 3 March 2008]

[225] *Hansard*, 3 March 2008, *supra* note 224.

[226] Home Office & Scottish Executive, *supra* note 7 at 12.

[227] *OPA*, *supra* note 79, Introductory Text.

[228] Itzin, Taket & Kelly, *supra* note 182 at iii.

[229] Home Office & Scottish Executive, *supra* note 7 at 11.

[230] *Hansard*, 3 March 2008, *supra* note 224.

[231] *OPA*, *supra* note 79, s. 1.

[232] Petley, *supra* note 187 at 421.

satisfied that the material was obscene, it is conceivable that a jury might nonetheless find such material "grossly offensive or disgusting."

The fact that the material must be grossly offensive or disgusting suggests that it is directed at "offence to others."[234] Applying the "offense principle," such conduct may arguably be criminalized where it "would probably be an effective way of preventing serious offense (as opposed to injury or harm) to persons other than the actor, and that it is probably a necessary means to that end."[235] However, even if it were accepted that some extreme pornography might cause "profound offense,"[236] the offence of possession relates only to the defendant. Given that the offence principle is directed towards "offending which violates the rights of those who are offended,"[237] if the person in possession is not offended, then where is the harm? As the government itself acknowledged: "[t]he primary purpose of the obscenity Acts is to tackle the spread of the material and the possible corruption of individuals by it. That is why we do not penalise simple possession."[238]

By seeking to criminalize a private act, the offence lacks the sense of being a "public" wrong generally seen as necessary to justify criminalization.[239] It is an illustration of what Feinberg terms "bare knowledge"—that is, "[t]he offended party experiences moral shock, revulsion, and indignation, not on his own behalf . . .but on behalf of his moral principles."[240] Such an offence is not justified on a liberal offence principle since that principle requires the conduct to be a violation of the offended party's rights.[241] As repulsive as extreme pornography may be, "even the offended party himself will not claim that his own rights have been necessarily violated by any unobserved conduct that he thinks of as morally odious."[242]

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[233] Nichi Hodgson, "Michael Peacock's acquittal is a victory for sexual freedom," *The Guardian* (6 January 2012), online: < www.guardian.co.uk/commentisfree/libertycentral/2012/jan/06/michael-peacock-obscenity-trial > .

[234] *Ibid.*

[235] Joel Feinberg, *Offense to Others: The Moral Limits of the Criminal Law*, vol 2 (New York: Oxford University Press, 1985) at 1 [emphasis in original].

[236] *Ibid* at 58-59. Some "offended states of mind. . .have a felt character. . .for which the term '"nuisance"' seems too pallid even when they are not difficult to avoid or escape": *ibid* at 50.

[237] Suzanne Ost, "Criminalising Fabricated Images of Child Pornography: A Matter of Harm or Morality?" (2010) 30:2 L.S. 230 at 236.

[238] U.K., H.C. *Hansard*, vol. 421, col. 190WH (18 May 2004) (Paul Goggins).

[239] R.A. Duff & S.E. Marshall, "How Offensive Can You Get?" in Andrew von Hirsch & A.P. Simester, eds, *Incivilities: Regulating Offensive Behaviour* (Oxford: Hart Publishing, 2006) 57 at 76.

[240] Feinberg, *supra* note 235 at 67-68.

[241] *Ibid* at 68.

[242] *Ibid.*

Further, criminal offences based on the "[o]ffence [p]rinciple" are inherently communicative in nature.[243] As von Hirsch and Simester stated, "[t]he reason for not criminalising 'offensive' conduct that is wholly segregated from public view is not that it is avoidable, but that, since offence is a communicative wrong, there is no wrongdoing."[244] In the case of a possession offence, the relevant conduct is not that which is depicted in the images—it is the fact that the defendant is in possession of such images (ironically, a fact which would ordinarily be unknown unless the person is charged). If possession is to be seen as offensive, it must be on the basis that it violates a relevant standard[245] or is in itself wrongful and therefore deserving of censure.[246] However, as possession occurs in private it does not intrude upon the rights of others.[247] It is not even that people do not like the conduct—which they do not observe—it is that they do not like the *idea* of the conduct. If "I don't like it" is never a sufficient justification for criminalization,[248] then surely "I don't like the idea of it" is even closer to Hart's assertion that "attribution of value to mere conforming behaviour. . .belongs not to morality but to taboo."[249]

Some advocate, along the lines of Devlin, that "disgust" is an appropriate measure of whether the private possession of certain images is harmful to the moral values of society.[250] Apart from obvious objections as to inconsistent responses from jurors, and whether jurors can in fact be said to reflect broader notions of social morality,[251] this is not the question the legislation asks. It merely asks jurors whether the image is grossly offensive or disgusting. If it is, then assuming the other requirements are satisfied, its private possession is presumed to be "so threatening to society that it is worth turning people into criminals and sending them to jail."[252]

If moral harm were indeed the target of the offence, the question for the jury could more appropriately be phrased as a variation on the earlier Canadian "community standards" test which was concerned "not with what Canadians would not tolerate being exposed to themselves, but what they would not tolerate *other* Canadians being exposed to."[253] That is, jurors could be asked whether the

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[243] A.P. Simester, J.R. Spencer, G.R. Sullivan & G.J. Virgo, *Simester and Sulllivan's Criminal Law: Theory and Doctrine*, 4th ed (Oxford: Hart Publishing, 2010) at 647.

[244] Andrew von Hirsch & A.P. Simester, "Penalising Offensive Behaviour: Constitutive and Mediating Principles" in von Hirsch & Simester, *Incivilities*, *supra* note 239, 115 at 127.

[245] Duff & Marshall, *supra* note 239 at 127.

[246] Simester, Spencer, Sullivan & Virgo, *supra* note 243 at 646.

[247] *Ibid.*

[248] *Ibid.*

[249] H.L.A. Hart, *Law, Liberty and Morality* (London, U.K.: Oxford University Press, 1963) at 57.

[250] Johnson, *supra* note 15 at 154-155.

[251] See *ibid* at 155.

[252] *Hansard*, 21 April 2008, *supra* note 189 at col. 1354 (Lord Faulkner of Worcester].

material is so grossly offensive or disgusting that it should not be possessed in private by anyone. This would make the moral assessment explicit, rather than implicit in notions of offence or disgust.

Further, by only banning possession of certain obscene material, it is implicit that people have a right to possess obscene material which would fall under the *OPA*, but not section 63. That is, some material is more obscene than others. Once arguments based in harm are found wanting, it is difficult to see why or how a coherent distinction should be drawn between some material which is grossly offensive or disgusting and others. For example, a person may be jailed for possession of images of bestiality,[254] but not "activities involving perversion or degradation (such as drinking urine, urination or vomiting on to the body, or excretion or use of excreta)."[255] Both may be obscene, pornographic, degrading and repugnant, but only one is totally banned.[256]

If such reactions are to be the basis of a criminal offence, then it must be on the basis of "legal moralism which enforces moral conviction and gives effect to moral outrage even when there are no violated rights, and in general no persons to 'protect.'"[257] Such a view is not only directly contrary to the liberal view that the harm principle must relate to harm to others,[258] it also takes the moral harm argument to the extreme position that "criminalisation is necessary on the ground that an individual should be prevented from depraving and corrupting *himself*."[259] While it is clearly accepted that "offence" may be a legitimate basis for restricting the publication or distribution of material, prior to section 63 it had never been regarded as a sufficient basis for criminalizing possession.[260] As

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[253] *Butler*, *supra* note 77 at 478 [emphasis in original]. Although the Supreme Court has clarified that the test of obscenity in Canada is based in harm, rather than on community standards; *Labaye*, *supra* note 204 at paras 20-21.

[254] See, for example, *R. v. Wilson (Neil)*, [2013] EWCA Crim 2544 (Eng. C.A.); *R. v. Livesey*, [2013] EWCA Crim 1600 (Eng. C.A.). In fact, it appears that the majority of prosecutions under the Act have involved images of bestiality rather than the violent pornography which was the primary justification for reform of the law: Rackley & McGlynn, *supra* note 138.

[255] U.K., Crown Prosecution Service, *Obscene Publications* (Crown Prosecution Service), online: <www.cps.gov.uk/legal/l_to_o/obscene_publications>. Although there were those in law enforcement who advocated for such material to be included within the provision: Attwood & Smith, *supra* note 187 at 173-174.

[256] For an interesting discussion of community attitudes to such material, see Austl., Commonwealth, Law Reform Commission, *Community Attitudes to Higher Level Media Content: Community and Reference Group Forums Conducted for the Australian Law Reform Commission* (Final Report) by Urbis Social Policy Team (Sydney: Australian Law Reform Commission, 2011), online: <www.alrc.gov.au/sites/default/files/pdfs/publications/alrc_report_urbis__final_9_december_2.pdf>.

[257] Feinberg, *supra* note 235 at 68-69. See also Patrick Devlin, *The Enforcement of Morals* (London, U.K.: Oxford University Press, 1965) at 17.

[258] "His own good, either physical or moral, is not a sufficient warrant": Mill, *supra* note 125 at 22.

[259] Ost, *supra* note 237 at 239 [emphasis in original].

stated by the US Supreme Court: "[w]hatever the power of the state to control public dissemination of ideas inimical to the public morality, it cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts."[261]

(c) Facilitating Enforcement

> "We . . . require the individual to take greater responsibility if we are to maintain our controls on illegal material."[262]

The rationale which differentiates this from previous debates is the role of the Internet whereby "access can no longer be reliably controlled through legislation dealing with publication and distribution."[263] Historically, greater restrictions have been placed on media which is seen as more public, such as films and television, compared to the more private such as books and magazines.[264] Convergence has blurred that distinction,[265] and the relatively strict demarcation between possessor and producer/publisher no longer applies.[266] The question then arises whether:

> [I]t is ethically "better", or practically more efficient, in terms of maintaining the balance between free speech and protection of the public, for the state to turn its enforcement efforts towards those who *originate* potentially harmful content (authors); those who *read or access* it (Internet users); or those who participate in *publishing and distributing* it (ISPs, hosts, aggregators and search engines).[267]

In seeking to limit or at least regulate online content, a range of measures may be taken including content warnings, age-verification systems, take-down notices, ISP filtering, or search engine restrictions.[268] Certainly in the UK such an approach appears to be quite successful in limiting the amount of material *hosted* locally.[269] For example, "the proportion of child sexual abuse content . . .

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[260] *Ibid* at 252.

[261] *Stanley*, *supra* note 1 at 566.

[262] Home Office & Scottish Executive, *supra* note 7 at 1, 9.

[263] *Ibid* at 2, 11.

[264] ALRC, *Classification*, *supra* note 25 at 73.

[265] *Ibid* at 64.

[266] Home Office & Scottish Executive, *supra* note 7 at 19.

[267] Edwards, "Pornography, Censorship and the Internet," *supra* note 5 at 628 [emphasis in original].

[268] See generally Lilian Edwards, "The Fall and Rise of Intermediary Liability Online" in Edwards & Waelde, *supra* note 5, 47.

[269] Home Office & Scottish Executive, *supra* note 7 at 7. In Australia, a take-down system is administered by the Australian Communication and Media Authority: ALRC, *Classification*, *supra* note 25 at 51-52.

hosted in the UK has reduced from 18% in 1997 [(the year after the IWF commenced operations)] to less than 1% since 2003."[270]

However, such measures are often of limited effectiveness and politically very difficult to implement.[271] They do not capture material distributed via peer-to-peer networks and the like, and can generally be easily circumvented.[272] As most originators, and many intermediaries, remain outside the jurisdiction, these measures have limited impact on the accessibility of such material. An offence of possession was therefore employed because existing means of control were ineffective, shifting the focus of criminal liability from producer/distributor to consumer.[273] In essence, the sanctity of a person's "library" is only respected to the extent that we can control what he or she puts in that library.

Such arguments have been raised before. In *Stanley*, the Court rejected the argument that it is necessary to prosecute possession of obscene materials because of difficulties associated with proving distribution or an intention to distribute.[274] Even were such difficulties to exist, freedom of expression is so fundamental that "its restriction may not be justified by the need to ease the administration of otherwise valid criminal laws."[275] This may be contrasted with child pornography where the need to stem the market for material depicting actual child abuse was the sort of compelling reason,[276] which could be used to justify criminalizing mere possession.[277]

Similarly, in *Sharpe* it was argued that prohibiting the possession of child pornography assists law enforcement efforts to reduce the production, distribution, and use of child pornography that result in direct harm to children.[278] Although a "positive side-effect of the law,"[279] this rationale could not be the sole justification for abridging a *Charter* right.[280]

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[270] Internet Watch Foundation, *2009 Annual and Charity Report* (2009) at 10, online: <https://www.iwf.org.uk/assets/media/annual-reports/IWF%202009%20Annual%20and%20Charity%20Report.pdf>. In 2013, the proportion of UK hosted child abuse content remained less than 1%; see IWF, *2013 Report*, *supra* note 46 at 7.

[271] See, e.g., the prolonged attempts in the US to regulate access to pornography by minors: Adler, *supra* note 36 at 697-698; and the recently abandoned steps to implement mandatory Internet filtering in Australia: Austl., Minister for Broadband, Communications and the Digital Economy, Media Release, "Child abuse material blocked online, removing need for legislation" (9 November 2012), online: <parlinfo.aph.gov.au/parlInfo/download/media/pressrel/2033876/upload_binary/2033876.pdf;fileType=application%2Fpdf#search=%22media/pressrel/2033876%22>.

[272] Lyria Bennett Moses, "Creating Parallels in the Regulation of Content: Moving from Offline to Online" (2010) 33:2 U.N.S.W.L.J. 581 at 602.

[273] Nair, "Regulatory Road," *supra* note 188 at 224.

[274] *Stanley*, *supra* note 1 at 567-568.

[275] *Ibid* at 568.

[276] *Ibid* at 572.

[277] *Osborne*, *supra* note 116 at 110.

[278] *Sharpe*, *supra* note 134 at para 86.

A related argument is that it is necessary to include depictions of harm as being "in part necessary to avoid the need to prove the activity actually took place, as this would be an insuperable hurdle for the prosecution, particularly if the material comes from abroad."[281] Such an argument was rejected by the US Supreme Court in relation to virtual child pornography as it effectively "turns the First Amendment upside down" by arguing that protected speech may be banned as a means to ban unprotected speech.[282]

If the concern is that the possessor may distribute the material, this would to be to punish a "remote harm" in that it depends upon a future decision to distribute the material.[283] It is surely preferable to utilize existing offences to punish the act of distribution, rather than punish all possession in the anticipation that some material may be distributed. As a general principle, conduct which is not of itself harmful should not be criminalized "unless it is accompanied by an intention to encourage, assist, or commit a substantive offence."[284]

Apart from the philosophical, such an approach faces practical objections. In particular, any attempt to limit the market in extreme pornography is likely to fail without international agreement. The analogy with child pornography provides a stark contrast, its criminalization being supported by international agreement[285] and international cooperation.[286] However, even in the case of child pornography, differences arise between jurisdictions. For example, under the Council of Europe's *Convention on Cybercrime*,[287] parties can reserve the right not to punish simple possession, may elect the relevant age to be as low 16,

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[279] *Ibid* at para 90.

[280] *Ibid* at para 90; see also Taylor & Quayle, *supra* note 134 at 24-26.

[281] Home Office & Scottish Executive, *supra* note 7 at 11.

[282] *Ashcroft*, *supra* note 131 at 255.

[283] Andrew von Hirsch, "Extending the Harm Principle: 'Remote' Harms and Fair Imputation" in A.P. Simester and A.T.H Smith, eds, *Harm and Culpability* (Oxford: Clarendon Press, 1996) 259 at 263-264.

[284] Andrew Ashworth & Jeremy Horder, *Principles of Criminal Law*, 7th ed (Oxford: Oxford University Press, 2009) at 39.

[285] See, e.g., the *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*, 25 May 2000, 2171 U.N.T.S. 227 (entered into force 18 January 2002); E.C., *Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA*. [2011] O.J., L 335.

[286] See, e.g., the Virtual Global Taskforce and Interpol: Virtual Global Taskforce, "What We Do," online: <www.virtualglobaltaskforce.com>; INTERPOL, "Crimes against Children," online: <www.interpol.int/Crime-areas/Crimes-against-children/Crimes-against-children2>.

[287] Council of Europe, Committee of Ministers, *Convention on Cybercrime*, 23 November 2001, 2001 C.E.T.S. 185, art. 25(1), online: <conventions.coe.int/Treaty/EN/Treaties/Html/185.htm> [*Convention on Cybercrime*].

and can choose not to apply the offence to realistic depictions of children.[288] The difficulty in securing international agreement on such issues is illustrated by the fact that child pornography is the only content-related offence contained within the *Convention on Cybercrime*.[289] In contrast, issues of "hate speech" are addressed in an Additional Protocol to the Convention.[290]

Given the broad range of material covered by the term "extreme pornography," there is little prospect of achieving an effective international agreement.[291] Without such agreement, there is little prospect of effective international cooperation.[292] Even if the production/distribution of such material is banned in other countries, in most other countries its possession will be lawful.[293] It is not clear that extreme pornography will see the same level of prosecutorial attention as child pornography.[294] Those prosecutions that do occur may be where the material is found inadvertently,[295] or in connection with child pornography[296] or other offending against children.[297] In the United States, between 2000 and 2005 there were fewer than 20 prosecutions for obscenity which did not involve child pornography or other charges concerning minors.[298] Although the prosecution of obscenity laws may be receiving greater attention,[299] this is typically in the context of distribution, not possession. In contrast, early prosecution statistics in the UK showed 1,165 possession offences charged and reaching first hearing in the Magistrates' Court for the year 2010-

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[288] *Ibid*, art. 9(4).

[289] *Ibid*, art. 9.

[290] Council of Europe, Committee of Ministers, Additional Protocol to the *Convention on Cybercrime Concerning the Criminalisation of Acts of a Racist and Xenophobic Nature Committed through Computer Systems* (Strasbourg: 28 January 2003), online: <conventions.coe.int/Treaty/EN/Treaties/Html/189.htm>.

[291] So much was acknowledged by the government: Home Office & Scottish Executive, *supra* note 7 at 13.

[292] *Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*, 169 F.Supp.2d 1181 (N.D.Cal., 2001).

[293] Petley, *supra* note 187 at 420.

[294] Such prosecutions require the consent of the Director of Public Prosecutions: *CJIA*, *supra* note 20, s. 63(10).

[295] See, e.g., *Haynes v. Hughes*, [2001] WASCA 397 (W.A. S.C.); *U.S. v. Whorley*, 550 F.3d 326 (4th Cir., 2008) [*Whorley*].

[296] See, e.g., *R. v. Horn (Stephen)*, [2014] EWCA Crim 653 (Eng. C.A.); *R. v. Wakeling (Derek Arnold)*, [2010] EWCA Crim 2210 (Eng. C.A.); *Bounds v. The Queen*, [2006] HCA 39, 228 A.L.R. 190 (H.C.A.).

[297] *R. v. KA*, [2013] EWCA Crim 1264 (Eng. C.A.); *R. v. Smith (Robert)*, [2013] EWCA Crim 167 (Eng. C.A.); *Wilson*, *supra* note 254; *R. v. Burinskas (Gintas)*, [2014] EWCA Crim 334 (Eng. C.A.). Also see Susan Easton, "Criminalising the Possession of Extreme Pornography: Sword or Shield?" (2011) 75:5 J. Crim. L. 391 at 410-412.

[298] *American Civil Liberties Union v. Gonzales*, 478 F.Supp.2d 775 (E.D.Pa., 2007) at p. 799.

[299] Adler, *supra* note 36 at 705-706.

2011.[300] Predictions that the number of prosecutions would be few may have been misplaced.[301]

IV. AN INTERNET SPECIFIC CRIME? POSSESSION VERSUS PROCURING

Far from being the first step in a concerted effort to stem the worldwide trade in extreme pornography, section 63 of the Act was an effort to enforce obscenity laws which had become unenforceable due to technological change. If the Internet provides the circumstances in which such an offence is necessary, it may be asked: why should such an offence not be limited to the online environment?

In general terms, regulation should ideally be technologically neutral—i.e., relating to content, not platform.[302] Further, there is often said to be a general "principle" of "online/offline consistency"—that is, so far as possible, conduct which is criminal offline should also be criminal online. If conduct is not criminal offline, it should not be criminalized online without clear justification.[303] However, such principles are not absolute, and in some circumstances distinct regulation of the online environment may be justifiable. In this context, "consistency" is more about consistency of outcome than purpose.[304] "According to this logic, content regulation ought to be crafted to increase the extent to which it is equally difficult to access illegal or restricted content whatever medium is employed."[305] It may therefore be necessary to "treat different technologies differently" in order to achieve similar outcomes.[306]

In the context of extreme pornography, it was simply stated, without elaboration, that the offence would equally apply to offline material.[307] Therefore conduct which had not been an offence offline was to be criminalized in order that online conduct could be criminalized. While it is clearly possible to be prosecuted for possession of a digital file, concepts of

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[300] Up from only two in the first year of operation: U.K., Crown Prosecution Service, *Statistics Regarding Prosecutions under Section 63 of the Criminal Justice and Immigration Act 2008* (London, U.K.: Crown Prosecution Service, 2012), online: <www.cps.gov.uk/publications/docs/foi_disclosures/2012/disclosure_2.pdf>. By category type, the charges were: 2009-2010 Category 1(a) (5), Category 1(b) (52), Category 2(a) (0) and Category 2(b) (213). For 2010-2011 the respective figures were 38, 132, 0 and 995, while for the 2011-2012 period up to 21 November 2011, it was 22, 61, 4 and 712.

[301] McGlynn & Rackley, "Criminalisation," *supra* note 23 at 256.

[302] ALRC, *Classification*, *supra* note 25 at 24.

[303] U.K., Law Commission, *Computer Misuse* (Working Paper No. 209) (London, U.K.: Her Majesty's Stationery Office, 1988) at para 1.6, online: <www.lawcom.gov.uk/wp-content/uploads/2015/06/No.110-Computer-Misuse.pdf>; Neal Kumar Katyal, "Criminal Law in Cyberspace" (2001) 149:4 U. Pa. L. Rev. 1003 at 1005-1007.

[304] Moses, *supra* note 272 at 591-592.

[305] *Ibid* at 592.

[306] *Ibid*.

[307] Home Office & Scottish Executive, *supra* note 7 at 11.

possession developed largely in relation to tangible items such as drugs and firearms.[308] The application of such principles to intangible data may give rise to complications which unnecessarily hamper prosecutions—for example, possession of deleted files,[309] the defendant's knowledge of the existence of the file,[310] and questions of whether viewing an image online can constitute possession.[311]

More fundamentally, it is arguable that the term "possession" does not adequately describe the conduct which is sought to be punished. Unless self-produced, an image is not possessed unless it has been acquired. It is this which creates the market for abuse material which is "fueled by those who seek to possess it."[312] As the vast majority of extreme pornography is sourced from outside the jurisdiction, such an offence may be seen as analogous to importation.[313] While the concept of importation can be applied to digital content,[314] more modern provisions may be employed to criminalize the importation of prohibited digital material into the jurisdiction.

In the context of child pornography, such conduct falls under the heading of "procuring," which is intended to encompass a person who actively obtains child pornography—for example, by downloading it, whether for himself or another.[315] As with other offences, the rationale for punishing the act of procuring is that it increases market demand for child pornography.[316] Courts in the United States have clearly rejected any suggestion that procuring offences should not apply where the material is received only for "personal use."[317] Accordingly, in the context of child pornography, a number of jurisdictions have enacted specific offences of "accessing."[318]

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[308] See generally Jonathan Clough, "Now You See it, Now You Don't: Digital Images and the Meaning of 'Possession'" (2008) 19:2 Crim. L.F. 205.

[309] *R. v. Porter (Ross Warwick)* (2006), [2007] 2 All E.R. 625 (Eng. C.A.).

[310] *Atkins v. DPP*, [2000] 2 All E.R. 425 (D.C.).

[311] *R. v. Morelli*, 2010 SCC 8, 2010 CarswellSask 150, 2010 CarswellSask 151, [2010] 1 S.C.R. 253, [2010] S.C.J. No. 8 (S.C.C.) [*Morelli*].

[312] *Sharpe*, *supra* note 134 at para 92.

[313] See *Customs Consolidation Act, 1876* (U.K.), 39 & 40 Vict I, c. 36, s. 42; *Customs Act 1901* (Cth.), *Customs (Prohibited Imports) Regulations 1956* (Cth.), s. 4a; Canada, *Customs Tariff 2013*, Tariff Item 9899.00.00 00, online: < www.cbsa-asfc.gc.ca/trade-commerce/tariff-tarif/2013/01-99/ch98-2013-eng.pdf >; 18 U.S.C. § 1462.

[314] *R. v. Daniels*, 2004 NLSCTD 27, 2004 CarswellNfld 62 (N.L. T.D.) at para. 22, affirmed 2004 CarswellNfld 363 (N.L. C.A.).

[315] *Convention on Cybercrime*, *supra* note 287, art. 9(1)(d). See also *ibid*, Explanatory Report at para 97.

[316] *U.S. v. Barevich*, 445 F.3d 956 (7th Cir., 2006) at p. 959; *U.S. v. Richardson*, 238 F.3d 837 (7th Cir., 2001) at p. 839.

[317] *U.S. v. Ellison*, 113 F.3d 77 (7th Cir., 1997) at p. 81. See also *U.S. v. Moore*, 916 F.2d 1131 (6th Cir., 1990) at p. 1137; *U.S. v. Watzman*, 486 F.3d 1004 (7th Cir., 2007) at p. 1010.

[318] Such an offence has also been proposed by the European Commission; E.C., Report on

For example, in Australia it is an offence for a person to intentionally use a carriage service to access material, being reckless as to whether that material is child pornography or child abuse material.[319] Similarly, in Canada it is an offence to "access" child pornography, where "accesses" means "knowingly causes child pornography to be viewed by. . .himself or herself."[320] Similar principles may be applied to obscene material, as in the United States where it is an offence to knowingly import or receive, including by use of an interactive computer service, obscene material.[321]

In the online context, charges of procuring and possession may be based on the same conduct, and may be justified on precisely the same bases.[322] However, the distinction between possession and procuring has important ramifications. In particular, it highlights the way in which technology has, to some extent, "disturbed" the distinction between public and private spaces.[323] For example, it may be argued that the private possession of extreme pornography is only "'theoretically'" private as the procurement of the images requires social interaction.[324] However, this is largely because we no longer need to venture out in order to view material in private. Except in scale, it is arguably no different from receiving material in the mail. It is, however, much harder to regulate and it is this factor which has seen the criminal law move from the public space into personal and private possession.[325]

That there is a valid distinction between receiving and possessing was accepted by the US Supreme Court in *U.S. v. Whorley*.[326] In that case, the

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the *Proposal for a Directive of the European Parliament and of the Council on Combating the Sexual Abuse, Sexual Exploitation of Children and Child pornography, Repealing Framework Decision 2004/68/JHA* (Brussels: 2011), (6g), online: <www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A7-2011-0294+0+DOC+PDF+V0//EN>.

[319] *Criminal Code* (Austl.), *supra* note 94, ss. 474.19(1)(a)(i),(ii), 474.19(2)(b), 474.22(1)(a)(i),(ii), 474.22(2)(b).

[320] *Criminal Code* (Can.), *supra* note 79, s. 163.1(4.1),(4.2). Under US federal law it is an offence where a person "knowingly accesses with intent to view"; 18 U.S.C. § 2252(a)(4)(A)-(B), 2252A(a)(5)(A)-(B).

[321] 18 U.S.C. § 1462. Similarly, in Western Australia it is an offence to obtain possession or request the transmission of objectionable material: *CEA* (W.A.), *supra* note 22, ss. 101(1)(b),(e).

[322] *Morelli*, *supra* note 311 at para 26.

[323] Johnson, *supra* note 15 at 156.

[324] *Ibid.*

[325] Lindsay Farmer, "Disgust, Respect, and the Criminalization of Offence" in Rowan Cruft, Matthew H. Kramer & Mark R. Reiff, eds, *Crime, Punishment, and Responsibility: The Jurisprudence of Antony Duff* (Oxford: Oxford University Press, 2011) 273 at 283-284.

[326] *Whorley*, *supra* note 295. Rehearing and Rehearing en Banc hearing denied**:** *U.S. v. Whorley*, 569 F.3d 211 (4th Cir., 2009). Certiorari denied: *Whorley v. U.S.*, 130 S.Ct. 1052 (U.S., 2010).

defendant was convicted of various offences in relation to Japanese anime cartoons which had been found in his email account. The images contained graphic depictions of children engaged in sexual acts with adults, some of it coerced.[327] He was convicted, inter alia, of knowingly receiving obscene cartoons in interstate and foreign commerce and of sending or receiving in interstate commerce obscene e-mails.[328]

The Court rejected the argument that 18 U.S.C. § 1462 was unconstitutional because it made "'no exception for the private receipt, possession, or viewing.'"[329] Since *Stanley*, courts have repeatedly rejected the argument that because the possession of obscene materials is protected, there must also be a right to receive such materials.[330] Of particular relevance in the online context, the fact that "the private user. . . may not be prosecuted for possession of obscenity in his home does not mean that he is entitled to import it from abroad."[331] Because § 1462 focuses on the movement of such material in interstate commerce, and not on simple possession, the prohibition was constitutional.[332]

The US courts therefore recognize a limited private sphere in which possession of obscene material is lawful. This is based as much on the right to privacy under the Fourth Amendment as it is on freedom of expression under the First.[333] There is, however, "no right to receive or possess obscene materials that have been moved in interstate commerce."[334] Such a view is entirely consistent with the prevailing view that existed prior to section 63, and that remains the case in relation to all obscene material other than that which falls within the provision. That is, while the government may restrict the movement of such material, its possession remains lawful.

It may therefore be argued that the government's objective of restricting access to extreme pornography is more appropriately achieved via an offence of procuring. Such an offence could be limited to online access—for example, to conduct which involves the use of a "carriage service."[335] This would specifically target that conduct which is seen as problematic, bringing extreme pornography into the jurisdiction via the Internet. While further distribution could be

[327] *Whorley*, *supra* note 295 at 331.

[328] 18 U.S.C. § 1462.

[329] *Whorley*, *supra* note 295 at 332.

[330] *Ibid*. See, e.g., *U.S. v. Reidel*, 402 U.S. 351 (1971) at p. 354; *Smith v. U. S.*, 431 U.S. 291 (1977) at p. 307; *U.S. v. Orito*, 413 U.S. 139 (1973) at pp. 141-142; *United States v. Thirty-seven (37) Photographs*, 402 U.S. 363 (1971) at p. 376.

[331] *Ibid* at 376, cited in *Whorley*, *supra* note 295 at 332-333.

[332] *Whorley*, *supra* note 295 at 333.

[333] *U.S. v. Handley*, 564 F.Supp.2d 996 (S.D. Iowa, 2008) at p. 1000 [*Handley*]. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search and seizures, shall not be violated. . .": U.S. Const. amend IV.

[334] *Handley*, *supra* note 333 at 1001.

[335] See, e.g., the Australian provisions at n. 319.

prosecuted under existing laws, it would not extend to material which has been obtained or created other than via the Internet or similar means. Further, the long established right to private possession would remain intact. This is particularly significant in the modern era when a person's ability to self-produce (lawful) sexual material is greatly enhanced. Criminalizing possession of self-produced images may extend to "visual expressions of thought and imagination, even in the exceedingly private realm of solitary creation and enjoyment."[336] If such images disclose unlawful conduct, then the creators may be prosecuted for that conduct. Otherwise, an offence of possession "trenches heavily on freedom of expression while adding little to the protection the law provides."[337]

V. CONCLUSION

Obscenity laws arose in response to the proliferation of sexual images and literature in the mid-nineteenth century, and concern as to the effect the display of such material might have on "respectable members of society."[338] Over the course of the following century, a distinction was drawn between the public display and distribution of obscene material, and its private possession. The role of the state came to be seen as limiting the availability of such material, while a person's right to read or view what he or she wishes in private was preserved.

One can only imagine what our Victorian forebears would have made of the situation in the current century, whereby all manner of pornographic material is easily and freely available in the comfort of one's home. While such material is not new, its ready availability makes it easy to understand a desire to regulate further the more extreme forms of pornography. While it is tempting to blame things on "the Internet", providing a coherent rationale for an offence of simple possession, except perhaps in some limited cases, proves to be very difficult. Arguments which are initially based in harm quickly give way to arguments based in morality and repugnance. Comparisons with child pornography, while rhetorically powerful, do not withstand close scrutiny. Although such justifications can and are used to place limits on the distribution of obscene material, they have not previously been seen as sufficient to justify an offence of simple possession. It seems that the real difference between this and previous censorship debates is more prosaic—the realization that the state has limited ability to control access to such material, the vast majority of which originates overseas.

The impotence of government to control such access is seen in the response of punishing the user rather than the originator or distributor. The right to private possession is therefore sacrificed in favour of ease of enforcement over those who are within the jurisdiction, as opposed to those who produce and distribute such material from "outside." More fundamentally, to punish

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[336] *Sharpe*, *supra* note 134 at para 39.

[337] *Ibid* at para 110.

[338] Farmer, *supra* note 325 at 283.

possession is arguably to miss the true gravamen of the conduct—the bringing of such material into the jurisdiction. Rather than utilizing an offence of possession, such conduct can be specifically targeted via an offence of procuring. This is arguably consistent with the state's role in limiting the movement and availability of such material via public networks, while leaving the right to simple possession intact. The fact that a person has a right to possess certain obscene material, "does not create a correlative right to force the [government] to allow the mails or the channels of interstate or foreign commerce to be used for the purpose of sending obscene material."[339]

This is not necessarily to advocate for such a position, but rather to highlight that the use of an offence of possession, whatever the content, provides a sweeping ban on conduct which was not previously criminalized. In contrast, a targeted offence of procuring retains the individual's right to simple possession, while restricting his or her ability to access certain material.

[339] *Smith v. U. S.*, 431 U.S. 291 (1977) at p. 307.