

An Eliasian Perspective on the Intentional Actions and Unintended Consequences of the Criminalisation of 'Extreme Pornography'¹

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Abstract: Since 2009, the possession of 'extreme pornography' in England and Wales has been criminalised under the *Criminal Justice and Immigration Act (CJIA)* (2008). Introduced as an attempt to regulate the production and distribution of so-called 'extreme pornography' on the internet, the CJIA (2008) appears to be a specifically twenty-first century response to a twenty-first century problem that attempts to rise to the challenges posed by the rapid advances in communications technology. Drawing on Eliasian sociology this paper will argue that despite its apparent novelty the underlying assumptions of the CJIA (2008) have much longer lineages and irrespective of the intended aim to target a "limited category of extreme material featuring adults", its unintended consequences have been to reinforce and reproduce dominant constructions of sexuality. It rests on the assumption that sexuality is a private matter and that representations of sexuality in the public realm must be controlled or censored. Secondly, it rehearses and reinforces gendered constructions of female passivity and male activity. Finally, because of its focus on pornography depicting acts that appear to lead to serious injury or represent a threat to life, it pathologises individuals who fantasise about and engage in sexual practices that eroticise consensual power exchange.

Keywords: Elias, process sociology, extreme pornography, CJIA (2008).

Introduction

Under the provisions of the *Criminal Justice and Immigration Act (CJIA)* (2008) the possession of 'extreme pornography' constitutes a criminal offence in England and Wales and is punishable by up to three years imprisonment. Although the purview of the Act covers much of what is already illegal under existing provisions, it broadens criminal responsibility from the producers and distributors of 'extreme

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pornography' to its consumers. The roots of the CJIA (2008) can be traced back to 2003 and the case of Jane Longhurst, who was strangled to death by Graham Coutts. At Coutts' trial, it transpired that he regularly visited pornographic websites that depicted acts of sexual torture, rape and asphyxiation. Following his conviction for murder, Liz Longhurst, Jane's mother, launched a campaign, supported by a 50,000 strong petition, to bring an end to the kinds of websites and the sexual imagery therein that Coutts had consumed. Gaining the support of the then Home Secretary, Charles Clark, her campaign culminated with the publication by the Home Office of the *Consultation: On the possession of extreme pornographic material* in 2005, which referred specifically to the murder of Jane Longhurst and the "increasing public concern about the availability of this extreme material, highlighted by the case of a young woman who was murdered by a man who had been accessing extreme pornographic websites" (Home Office 2005: 1). Ostensibly, the CJIA (2008) was introduced as an attempt to update the existing legislation regulating pornography, which was seen as ineffective in controlling the production, distribution and consumption of so-called 'extreme pornography' on the internet. The foreword to the *Consultation: On the possession of extreme pornographic material* (2005: i), states whilst the "Internet has been the most spectacular communications development in the last 10 years [it] can also be misused", through, for example, the production, publication and dissemination of 'extreme pornographic' material. Further, although some of the imagery classed as extreme was already illegal under existing provisions, the Consultation document went on to suggest that "the global nature of the Internet means that it is very difficult to prosecute those responsible who are mostly operating from abroad ... [which] ... requires us to take a different approach if our controls on this kind of material are not to be undermined" (Home Office 2005: i). Quite simply, as pornographic websites are frequently hosted outside of the UK their regulation does not fall under the jurisdiction of existing law and, consequently, consumers are able to view images online that would be otherwise illegal to purchase or import in England and Wales. The numerous and explicit references throughout the consultation document to the 'dangers' posed by the 'Internet' and its facilitation in the dissemination of 'extreme pornography' would seem to suggest that its proposals and the subsequent passing of the CJIA (2008) are distinctly twenty-first century responses to a uniquely twenty-first century problem, in so far as they can be seen as attempts to rise to the challenges posed by the rapid advances in communications technology and "the wide range of extreme pornography that is now available on the internet which in practice cannot be controlled by our existing laws" (Home Office 2005: 5). However, despite the apparent originality of this legislation, the underlying assumptions about gender, sexuality and pornography have much longer lineages. Drawing on the process sociology of Norbert Elias, this article will argue that the CJIA (2008) has to be seen, not as the product of the twenty-first century, but, instead should be understood in the context of long-term social processes, as an example of the "continuous interweaving of the generations ... [that] links the past, present and future of human societies with each other" (Elias, van Krieken & Dunning 1998: 365–366). In so doing, we avoid, what Elias called process-reduction, which he saw as a result of "the sociologist's withdrawal to the present" (Elias 1987: xv), as a tendency in sociology to disregard the significance of history and present society

as static, fixed and unchanging. He argued that it was not possible to understand contemporary phenomena without reference to their formation and reformation over time. Therefore, from an Eliasian perspective, the CJIA (2008) should be interpreted as “an instant of the continuous process, which coming from the past, moves on through present times towards a future as yet unknown” (Elias 1987: xvi) and, in so doing, results in unplanned and unforeseen consequences. Further, despite being the outcome of a concerted campaign on the part of policy makers, activists and other key stakeholders and, which might, therefore, be seen as a victory for those in support of tighter controls of ‘extreme pornography’, the unintended consequences of the CJIA (2008) have been to reinforce and reproduce dominant, heteronormative constructions of gender and sexuality.

This article will explore three areas of continuity in the discourses of sexuality that underpinned the debates over extreme pornography and, in so doing, illustrate that actions and outcomes are “relatively autonomous” (Elias 1970: 58) to each other. Firstly, it will be suggested that the CJIA (2008) and the consultation leading up to its passing, rest on the assumption that sexuality is a private matter and that representations of sexuality in the public realm must be controlled or censored. Secondly, it will consider the extent to which the criminalisation of possession of ‘extreme pornography’ rehearses and reinforces gendered constructions of sexuality and, in particular, notions of female passivity and male activity. Finally, it will argue that because of its focus on pornography depicting acts that appear to lead to serious injury or represent a threat to life, the CJIA (2008) conforms to recent legal developments and socio-legal trends that have served to pathologise those individuals who fantasise about, engage in and enjoy sexual practices based on the eroticisation of consensual power exchange.

Of course, it is important to acknowledge that the consultation on extreme pornography and the introduction of the CJIA (2008) has not been without criticism, particularly with regards to its assumptions about the effects of exposure to extreme pornography and the, unproven and inconclusive, evidence about the relationship between pornography and actual violence towards women. Concerns have also been raised about the extent to which the CJIA (2008) curtails individuals’ right to privacy and freedom of expression, thought and opinion, rights protected under the *Human Rights Act* (1998). From the outset, civil liberties groups, academics, opposition MPs and human rights lawyers have challenged attempts to criminalise the possession of extreme pornography on the grounds that such a law would curtail individual freedoms and breach the *European Convention on Human Rights*, especially the right to freedom of expression enshrined within it. In other words, those opposed to the proposals of the Consultation on the possession of extreme pornography clearly sought to make the Ministry of Justice “understand the possible unintended consequences of the proposals” (backlash-uk.org.uk 2008). Whether the Ministry of Justice and supporters of the proposals wilfully ignored or dismissed the arguments of these campaigners or genuinely believed that the criminalisation of the possession of ‘extreme pornography’ did not contravene the ECHR is open to debate. In response to the concerns raised at the time Lord Hunt, the Parliamentary Under-Secretary of State stated, “the very strong advice I’ve had is that it is entirely compatible with the ECHR so I don’t think there is a problem there [and there is] no intention for

restriction on political or personal expression or public interest matters or artistic expression” (cited in Reuben 2008). This seems to suggest that irrespective of whether the Ministry of Justice was actually cognisant of the potentially wide ranging consequences of the CJIA (2008), the expressed position was that there was a belief that it did not contravene ECHR nor infringe individuals’ freedom of expression and, by extension, that there would not be unforeseen and unintended consequences.

Norbert Elias – Understanding the Socio-Genesis of Social Life

With his process sociology Norbert Elias attempted to move beyond what he saw as the reifying tendencies in sociological thought. For him, dualities such as structure/agency and objectivism/subjectivism, individual/society or state/society had become unresolvable because they had been built into the very fabric of sociology (van Krieken 2003: 116). Therefore, it was necessary to not only transcend dichotomous and oppositional theories of social life but to dissolve them altogether. Elias rejected the structure/agency and objectivism/subjectivism dichotomies due to the fact that he adopted a relational and processual view of social life (van Krieken 2001).

His relationalism can be found in his assertion that human relations are relations of interdependency or, what he called, figurations. From a relational perspective, society should be understood not as the intentional outcome of individual action but rather as “processes and structures, the figurations formed by the actions of interdependent people” (Elias 1970: 103). Elias developed the concept of unplanned social processes or unplanned order to explain how choices exercised by one individual “becomes interwoven with those of others” (Elias 1991: 49–50). Indeed, one of the key principles of Elias’s sociology is that “although societies are composed of human beings who engage in intentional action, the outcome of the combination of human actions is generally unplanned and unintended” (van Krieken 2003: 117). In other words, there is little relationship between our planned and intentional actions and the consequences of them.

Connected to Elias’ relational perspective is his view of social life as dynamic, changing and processual. Quite simply, in order to understand and make sense of contemporary phenomena we must first examine its socio-genesis, for “current social relations are only one moment in a long-term process, which leads from the past through the present and beyond to the future” (Elias 1997: 357). From an Eliasian perspective, the regulation of sexuality in the 21st century has its roots in the mid 16th century and the concomitant changes in the way people related to and interacted with one another that emerged in that period as a result of the increased interdependency brought about by modernisation. Although Elias identified fundamental changes in sexual behaviour from the mid sixteenth century he argued that those changes did not exist in a social or time vacuum and must, instead, be seen within the context of long term social processes. In *The Civilising Process: History of Manners* (Vol. 1), (1939), Norbert Elias suggests that, in a highly differentiated society, with an interdependent division of labour, as “[t]he coercion exerted by people on one another increases, the demand for ‘good behaviour’ is raised more emphatically” (Elias 1939:

79, cited in Hawkes 1996: 20). In the more hierarchical society before modernisation, with fewer interdependencies, the legitimacy or illegitimacy of behaviour was judged by the extent to which it transgressed one's position in society. It was not the content of the behaviour per se that was significant but, rather, the social status of the actor and the social norms and expectations attached to that status. However, by the seventeenth century, the acceptability/unacceptability of behaviour came to be understood by the degree to which it caused offence to others and transgressed the limits of what had been deemed general or universal 'good behaviour' (Hawkes, 1996).

Another important development during the dawn of the modern age was the desire to distinguish 'human' from 'bestial' behaviour (Hawkes, 1996). Behaviours considered bestial in nature became increasingly taboo and were afforded less moral and emotional complexity than those considered human. Behaviours most closely related to bodily impulses and, therefore, most associated with 'bestial' tendencies, increasingly took place behind closed doors. Elias uses the example of sexual behaviour to illustrate these changes. For example, until the late sixteenth century, the bedroom was a public space, sex was an important part of social life, talking about sex was not prohibited and it was not an expectation that sex took place in private (Hawkes, 1996). In what he referred to as 'civilising processes', sex and sexuality became associated with shame and secrecy to such an extent that by the 19th century, "relations between the sexes are isolated, placed behind the walls in consciousness. An aura of embarrassment, the expression of a socio-genetic fear, surrounds this sphere of life" (Elias, 1939: 180 cited in Hawkes, 1996: 23). As a result, bodily instincts and drives, especially those pertaining to sex and sexuality were removed from public life and relegated to the private sphere. Of course, Elias did not suggest that the civilising process occurred in a universal or unidirectional way. At any given point during the civilising process it is possible to identify some variation in the regulation of social taboos, according to divisions including social class, gender and age. However, these differences are simply fluctuations in a general trend that resulted in the removal of instinctual and primordial drives from public life and their subsequent relegation to the private sphere. Elias argued that even when it appears that there has been a relaxation in the rules governing what is permitted in social life, it should be seen not as indicative of a loosening of social taboos but rather as "merely a very slight recession, one of the fluctuations that constantly arises from the complexity of the historical movement within each phase of the total process" (Elias, 1994: 157).

If, as some commentators have argued (see for example, Kipnis, 1996) pornography is defined, not simply by its content but by the extent to which it is seen as transgressive of social mores, these civilising processes, predicated as they are on notions of shame, taboo and repression might be seen as "preconditions of pornography" (Kipnis, 1996: 168) in so far as they instil in us notions of what is legitimate and appropriate with regards to sexual desire and expression. In this context, the appeal of pornography can be interpreted as its transgression and deconstruction of these socially constructed sexual norms or, in the words of Laura Kipnis (1996: 167): "Pornography's very specific, very calculated violations of these strict codes (...) make it the exciting and nerve-wracking thing that it is." Employing a processual view of social life in general, and of sexuality, in particular, means not viewing

the CJIA (2008) as an isolated and ahistorical occurrence but rather as a product of civilising processes and the socio-genesis of constructions of and attitudes towards sex, gender and sexuality developed over hundreds of years.

What is Extreme Pornography? Problems of Definition

It is well documented in academic literature that pornography is notoriously difficult and highly subjective to define (see, in particular Kendrick 1987). According to *The Criminal Justice and Immigration Act* (2008 s63. (3)), in order for an image to be classified as pornographic, it must be established that its primary aim is to elicit sexual arousal. Notwithstanding the difficulty of determining the intentions of film producers nor being able to predict sexual arousal on the part of the viewer, definitions are further complicated by the classification of pornography into genres and sub-genres and by the distinction between so-called ‘soft-core’ and ‘hard-core’ (Jones & Mowlabocus 2009); difficulties that are compounded by the introduction of another layer of classification, ‘extreme’. The failure to arrive at a consensus over what constitutes pornography should warn us against seeing it as an entity or thing that can be objectively identified, named and measured. Instead it should be understood as an “imaginary scenario of danger and rescue” (Kendrick 1987: xiii). According to Feona Attwood (2002: 95), the lack of agreement over what constitutes pornography “reveal[s] less about those texts than they do about the fears of their audiences’ susceptibility to be aroused, corrupted and deprived”, fears that were certainly articulated in the debate about extreme pornography.

As already stated, under the law in England and Wales, an image is deemed to be 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” (CJIA s63. (3)). The CJIA (2008) goes on to define an extreme pornographic image as one that can be classified as pornographic under existing legislation and, in addition, is:

grossly offensive, disgusting or otherwise of an obscene character ... [and] ... portrays, in an explicit and realistic way, any of the following –

- (a) an act which threatens a person’s life,
- (b) an act which results, or is likely to result, in serious injury to a person’s anus, breasts or genitals,
- (c) an act which involves sexual interference with a human corpse, or
- (d) a person performing an act of intercourse or oral sex with an animal (whether dead or alive), and a reasonable person looking at the image would think that any such person or animal was real. (CJIA 2008 s.63 (6–7))

Here, the CJIA (2008) is drawing on and making explicit links to the *Obscene Publications Act* (1959), which prior to 2009 was the main legislative tool in the regulation of pornography. Although the purview of OPA (1959) is not restricted to sexually explicit materials and, instead, extends to all materials deemed to be obscene, including, but not limited to, imagery depicting violence, the explicit links to the OPA (1959) in the CJIA (2008) illustrates continuities, rather than

discontinuities, in the regulation of pornographic images According to Section 1(1) of the OPA (1959), materials are deemed to be obscene if they have a tendency to “deprave and corrupt persons who are likely, (...) to read, see or hear the matter contained or embodied in it” (OPA (1959) s1(1) cited in Easton 1994: 125). The OPA (1959) has received considerable criticism over the years because of the vagueness of the terms ‘deprave’ and ‘corrupt’ and because of the overtly moral paternalistic and protectionist concerns about the corruption of the consumer. Rather than addressing these concerns and simplifying the law on pornography, the CJIA obfuscates it further by adding imprecise and subjective notions of ‘grossly offensive’ and ‘disgusting’ to the existing, equally imprecise and subjective, concepts of ‘deprave’ and ‘corrupt’. By making explicit reference to the terms of the OPA (1959), the CJIA (2008) demonstrates its continuity with earlier legislation and it can be seen as just one moment in a much longer trajectory of regulation. This is summed up by McGlynn and Rackley (2009) who suggest that the “measures in the CJIA are radical to an extent, for instance in the introduction of a possession offence, and yet, at the same time, antiquated in their reliance on the language of ‘disgust’ and ‘obscenity’” (McGlynn & Rackley 2009). Of course, the CJIA (2008) also differs from the OPA (1959) in significant ways. Where the OPA deems material to be obscene, and, therefore, illegal, on the basis of its tendency to deprave and corrupt its audience, which means that, at least in theory, material should be judged on a case by case basis, under the CJIA (2008) sexually explicit depictions are considered to be extreme *a priori* and, by extension “grossly offensive, disgusting or otherwise of an obscene character” (CJIA 2008 s.63 (6–7)). It is here, in the continuities and discontinuities of the CJIA (2008) that Norbert Elias’ process sociology can prove illuminating.

Maintaining the Public/Private Divide

As already suggested the rationale for the introduction of the CJIA (2008) was that existing law was ill equipped to control the nature, range and scale of pornographic images readily available on the internet. Without doubt, the easy accessibility of pornography that the internet affords has fundamentally changed the consumption of pornography, especially with regards to how it is consumed, where it is consumed and by whom, leading Paterson (2004: 119) to state that “[w]hat was previously a marginal behaviour is emerging as a mainstream practice”. How far the consumption of pornography represented a marginal behaviour before the arrival of the internet is debateable but what is less contentious is that the internet has made pornographic material available to a much wider audience. Whilst there has always been a relationship between advances in communication technologies and growth in the production and distribution of pornography, the increase in its availability through the internet is thought to present unique challenges to the very construction of sexuality and the separation of the private and public realms.

Under the OPA (1959), criminal liability for obscenity rests with the producers and distributors of material. Whilst what is now classified as extreme pornography

has not suddenly emerged with the development of the internet, its production and circulation was restricted by “[c]losing down sources of supply and distribution” (Murray 2009: 75). Even materials that were not deemed to be obscene under the OPA (1959) and, therefore, granted approval for distribution, were only accessible via licensed and, therefore, legitimate sex shops and porn cinemas and, consequently, only available to a restricted audience of, predominantly men over the age of eighteen. These commercial venues existed and were contained within ‘ghettoised’ sex zones, semi-public spaces (Evans 1995) that came under constant regulation and surveillance. In this way, the public/private divide is maintained, knowledge about sex and its representation in the public sphere is controlled and restricted and sexual minorities, in this case individuals who consume pornography, remain on the margins of society, “excluded from public view” (Hubbard 2001: 52). However, with the development of the internet, “Pornography has gone truly public” (Zillmann & Bryant 1989: xii) and, arguably, the boundaries between the public and private are being transformed. The proliferation of pornographic images that can be directly downloaded by the consumer; the blurring of the boundaries between consumer and producer, evidenced for example in the growth of amateur and interactive pornography on the internet and; the exposure to new subjectivities, new sexual stories and new ways of being sexual mean that sex can no longer be regulated and confined to the private sphere nor can who has access to sexual knowledge and who has the authority to speak about sex (Weeks 2007) in the public sphere be easily controlled. Of course the relationship between sexual knowledge and empowerment is a complex one and the role that pornography plays within it is contested but, nevertheless, technological advances have resulted in an increasing number of people making and distributing pornography to a wider audience.

Whilst the CJIA (2008) is focused specifically on ‘extreme pornography’, its expressed and explicit concern over the internet highlights broader fears over sexuality and the blurring of the public/private divide that internet pornography represents. Nowhere was this more evident than in the comments made by Martin Salter, MP, during the consultation stage of the bill. He stated, “No-one is stopping people doing weird stuff to each other but they would be strongly advised not to put it on the internet” (cited in Attwood & Smith 2010: 179). Such concerns over the maintenance of the public and private divide and the characterisation of sexuality as private have not emerged simply as a response to the difficulties posed by internet pornography; they are the socio-genesis of much longer traditions. For example, Martin Slater’s statement is reminiscent of the, now famous quote, attributed to Mrs Patrick Campbell (1865–1940), who is reported to have said “Does it really matter what these affectionate people do – so long as they don’t do it in the streets and frighten the horses.” Indeed, during one of the Bill’s readings in the House of Lords, Lord Henley referred to this quote directly, adding “I think that most, or all, of us would agree with that. Our only problem is the definition of what frightens horses and what goes slightly too far” (Lord Henley 2008).

There are also clear parallels between the CJIA (2008), which continues to perpetuate a view of sexuality as private with only limited and regulated manifestations deemed legitimate in the public domain and the *Sexual Offences Act* (1967), under which homosexual activity between two men over the age of twenty one years was

partially decriminalised. From an Eliasian perspective, this, once again, illustrates the processual nature of the regulation of sexuality. The 1967 Act was based on a minority, liberal rights approach, and did not represent an acceptance of homosexuality as a legitimate lifestyle. It merely stated that, except under certain conditions, the State had no business to intervene in the private life of its citizens. Just as the SOA (1967) reinforced the liberal ideology of a public/private dichotomy, whereby gay men were to be tolerated as long as they remained within the private boundaries of the divide (Richardson 1998), the clear message in the CJIA (2008) encapsulated in Martin Salter's comments is that the State will not intervene in the "weird things" that people do consensually as long as they do not transgress the bounds of the private realm by recording and uploading it on to the internet and, in so doing, outrage public decency. It would appear therefore that it is not necessarily the acts themselves that are the focus of concern but rather their documentation and representation in the public domain. However, and somewhat paradoxically, whilst the measures of the CJIA (2008) undoubtedly reinforce the public/private divide, by regulating, controlling and criminalising the consumption of so-called 'extreme pornography' in the privacy of one's home, this legislation simultaneously blurs and, in some cases collapses, the distinction between public and private. It is clearly predicated on the assumption that, under certain conditions, the privacy of some aspects of private behaviour should no longer be respected and, instead, should come under public surveillance from the State. Once again, there are parallels here with the *Sexual Offences Act* (1967). The SOA (1967) decriminalised male homosexuality between two men over the age of twenty one on the condition that it took place in private but it defined 'private' in such an "absurdly restricted" (Weeks 1990: 176) way as to allow the continued surveillance of some gay men, despite the measures of the Act. Under the Act, privacy was limited to the presence of two men. The presence or possible presence of a third party was a sufficient condition to constitute a public space. According to Leslie Moran (1996: 55), the definitions of private and public under the SOA (1967) meant that the "mere possibility of display of the male genital body in juxtaposition with another male body will render those bodies capable of total visibility in law". Just as the SOA (1967) allowed for some 'private' acts to continue to be regulated by the State, by prohibiting the possession and consumption of some types of pornography, irrespective of whether it is restricted to the privacy of one's own home, the CJIA (2008) brings the possession and consumption of some forms of pornography under the full visibility of the law.

A Gendered Reading of the Criminalisation of Extreme Pornography

Not only do the discourses that underpin and justify the criminalisation of extreme pornography serve to reinforce the public/private dichotomy, they also perpetuate essentialist and gendered understandings of heteronormative sexuality. The assumption both implied and explicitly stated throughout the consultation and reading of

the Bill, is that the viewers of extreme pornography are males who eroticise and are aroused by images of female submission. Through consumption of 'extreme pornography', said males will normalise female subordination and become desensitised to the victimisation of women. Indeed, such is the power of 'extreme pornography' that all those exposed to it are seen as vulnerable to its reach. During the consultation stage, prior to the introduction of the *Criminal Justice and Immigration Bill*, the Home Office commissioned a Rapid Evidence Assessment (REA), whose remit was to "examine the possibility of the relationship between exposure to extreme pornographic material and subsequent commission of sexual and violent offending" (Itzen, Tacket & Kelly 2007: iii). The authors of the REA justified their decision not to provide explicit descriptions of 'extreme pornographic' material for fear that it may produce "sexual arousal and orgasm" (Itzin *et al.*, cited in Attwood & Smith 2010: 176). In other words, such is the extreme nature of these images that their mere description in written form is something we need to be protected from. This view is, in part, based on unfounded and unproven assumptions about the relationship between pornography and violence towards women, but it is also based on a medico-moral view of sexuality that sees sexual arousal itself as potentially dangerous and, especially, its presence in men. This is reminiscent of nineteenth century sexological discourses of sexuality and, in Eliasian terms, illustrates the processual nature of the construction and regulation of sexuality over generations. The founders of sexology sought to classify sexual behaviour and did so along gender lines. For example, Richard von Krafft-Ebing, considered to be the pioneer of sexology, saw sexual desire as an innate, biological process, which he believed manifested itself differently in men and women. He likened male sexuality to a volcano, as powerful and difficult to control, whereas female sexuality, whilst biologically determined, only develops when she is introduced into the company of men and is, therefore, passive and dependent. Writing at the same time as Krafft-Ebing, Havelock Ellis, the first British sexologist characterised 'normal' heterosexual sex not only as biologically determined but also as predicated on notions of male domination and female submission.

The CJIA (2008) rests on the assumption that pornography causes harm to women, both directly and indirectly. With regards to direct harm, the Consultation clearly expressed the Government's commitment to "protect those who participate in the creation of sexual material containing violence, cruelty or degradation, who may be the victim of crime in the making of the material, whether or not they notionally or genuinely consent to take part" (Home Office 2005: 2). To conflate consensual and non-consensual participation and to offer protection irrespective of whether consent has been given is deeply problematic, although it is not the first time that the law has been used to disregard and negate consent in sexual matters. In 1990, in a landmark legal case known as the Spanner case, fifteen gay men were prosecuted and convicted for engaging in consensual sadomasochism, despite the fact that all activities took place in private. Their prosecution and conviction was underpinned by the assumption that one cannot consent to the deliberate infliction of harm on one's body. Given that consent to participate in potentially dangerous sports like boxing and rugby, and consent to body modification in the form of tattoos and body piercing are legally sanctioned, the logical conclusion of the Spanner case is that it is the sexual nature of the activities involved that legitimated legal intervention. The

men were prosecuted under the 1861 *Offences Against the Persons Act*, which, once again highlights the importance of viewing contemporary attitudes towards sexuality as the product of long term social processes, rooted in the past as much as they are in the present. Although the convicted men appealed against the ruling and took their case to the European Commission of Human Rights, the UK government maintained that it was “entitled to punish acts of violence that could not be considered of a trifling or transient nature, irrespective of consent [and did not] have an obligation to tolerate acts of torture because they are committed in the context of a consenting sexual relationship” (Green 2001: 546).

The long term consequences of the legal ruling in the Spanner case cannot be underestimated and its legacy can clearly be seen in the Consultation on extreme pornography. To suggest that participants in pornography, extreme or otherwise, do not have the ability to consent is to deny them agency in sexual decision making. In other words, whilst the stated intentional action of the consultation on the possession of extreme pornography and the subsequent CJIA (2008) is to protect those individuals who are harmed in the creation of such material, the unintentional outcome has been to reinforce a “concept of sexual consent [that] is stripped of wilful and willing participation, agency and autonomy and reduced to a measurement of partial engagement in an unequal sexual contract” (Moore & Reynolds 2004: 29).

It is perhaps the concern over the indirect harm of extreme pornography that was most explicitly articulated during the consultation stage (Murray 2009; Nair 2008), evidenced, for example, in the terms of reference of the Rapid Evidence Assessment. In keeping with the arguments of anti-porn feminists like Dworkin (1981, 1998), McKinnon (1989, 1998) and Russell (1993; 1998), the indirect harm rationale posits that extreme pornography does not just cause harm to women, it *is* harm to women because, it is argued, it legitimates and perpetuates violence towards women. If we were to accept the indirect harm theory about the relationship between representations of sexualised violence and the prevalence of actual violence towards women, the logical, if impractical, response would be the criminalisation of a good deal of what constitutes mainstream entertainment. What is perhaps more problematic about a reading of extreme pornography that positions the viewer as always and necessarily male is that it leaves very limited scope for women to be able to consume and enjoy such material, rendering them “incomplete readers of pornography” (Attwood & Smith 2010: 181). It silences women who fantasise about erotic power play and are aroused by its representation in pornography.

It is ironic that some of the material that falls under the CJIA (2008) and its means of distribution have provided women with an easy access to pornography and a new medium through which to explore their sexuality and their sexual desires (see Wilkinson 2009; Juffer 1998; Ciclitira 2004). In so doing, they are able to challenge, to some extent, heteropatriarchal constructions of female passivity and sexual dependency. Women are able to access and consume pornography in their own home and the growth of amateur porn sites has allowed them to produce their own pornography on their own terms. The internet has provided women with “an anonymous, private space (...) to explore their sexual fantasies without fear of shame or reproach” (Wilkinson 2009: 190), including their fantasies of sexual subordination and domination, sadism and masochism. It is here, in the ‘extreme pornography’ that

eroticises SM that there is space for women to reject the narrowly proscribed sexual roles they have been given. Not only do some women fantasise about sexual submission, others fantasise about the sexual domination of others. SM, both as a practice and as representation, in pornography can transgress socially constructed categories of gender and sexuality and position women in a dominant role. This is something that the CJIA (2008) has paid scant attention to because it has employed, uncritically, heteronormative constructions of sexuality premised on restrictive and limiting gender roles and grounded in centuries old medico-moral discourses and, especially, nineteenth century sexology. In the words of Linda Williams (1990: 205), “activity and passivity have been too rigorously assigned to separate gendered spectator positions with little examination of the male and female spectators’ adoption of one or the other subject position and participation in the (perverse) pleasures of both”.

Insider/Outsider and the Pathologisation of SM

Where the consultation leading up to the CJIA (2008) centred on gender, violence and ‘extreme pornography’ as harmful, especially to women, the final legislation focused on sexuality and, in particular, the premise that representations of some sexual behaviour are so extreme that there is no justification for their production, reproduction and distribution. Indeed, so extreme are they thought to be that mere possession of such images and consumption thereof, even in the privacy of one’s home are not to be tolerated. In their support of the legislation, McGlynn and Ward (2009: 349) suggest that extreme pornography “add[s] nothing to the cause of human dignity or (...) make[s] our society a kinder, more compassionate or more human place”.

The implicit assumption underpinning the CJIA (2008) is that it is not just the content of ‘extreme pornography’ that needs regulation but so too do the desires and fantasies of consumers of such pornography, which has led some opposition campaigners to claim that the CJIA (2008) creates a new category of victimless thought crime (see, for example, Backlash.org). Under the provisions of the Act, ‘extreme’ material includes depictions of consensual SM. In other words, it conflates and treats as equally serious non-consensual acts of violence and abuse with consensual SM. In so doing, it delegitimises SM as a fantasy, practice and identity; “in condemning the representation, you condemn the reality” (Wilkinson 2009: 192). As such, the binaries of insider/outsider, civilised/uncivilised are maintained. Those individuals who engage in, or even fantasise about SM are portrayed as dangerous, unrestrained and, therefore, outside the bounds of civilised society. Once again, these constructions of ‘uncivilised’ sexuality should not be seen as isolated and ahistoric. The pathologisation and criminalisation of SM that is represented in the CJIA (2008) has to be seen as a continuation of long term social processes dating back to the nineteenth century and the pseudo-scientific discipline of sexology, which presented sadism and masochism as hereditary and degenerative (Bristow 1997). The construction of some forms of sexual behaviour as uncivilised and barbaric was also clearly evident in the Spanner Case, most clearly articulated by the presiding judge in the case, Judge Rant, who stated that it was the role of the law to uphold ‘the line between what is

acceptable in a civilized society and what is not' (Judge Rant, cited in Landridge 2006: 374). The characterisation of SM as uncivilized conforms to Elias' notion of established/outsider relations, which he conceptualised as the dynamic whereby "the more powerful groups look upon themselves as the 'better' people (...) with a specific virtue shared by all its members and lacked by others" (Elias & Scotson 1994: xvi). In other words, powerful groups exercise power through the perpetuation of stigmatising discourses which construct 'outsiders' as "containing all that threatens to undermine civilisation" (van Krieken 1998: 152).

Eleanor Wilkinson (2009) has suggested that against these pathologising discourses and a culture where, paradoxically, representations of SM are becoming increasingly mainstream, albeit it in a sanitised, desexualised and commodified form, the internet is an important medium for SMers. The internet provides community sites dedicated to the celebration of the SM lifestyle, educational sites that provide information and advice on how to do SM safely, as well as the space to share pornography that has been made by and for SMers. Whilst such pornography may depict acts that fall under the jurisdiction of the CJIA (2008) they should not be mistaken for or conflated with material that portrays actual abuse. Although section 66 of the CJIA (2008) does provide a defence for the possession of 'extreme pornography' where it can be proved beyond reasonable doubt that the acts portrayed involve consenting adults consensual SMers would still find themselves in precarious legal situation (This defence does not extend to acts of bestiality or acts of necrophilia involving a real corpse, both of which are illegal under the *Sexual Offences Act 2003*). Under the act, whilst participants might have given consent to the activities depicted, if the harm inflicted "is of such a nature that the person cannot, in law, consent to it being inflicted on himself or herself" (CJIA s66(3)) it will be determined to be non-consensual, which, in turn, invalidates the defence claim. Here the CJIA (2008) is making clear and explicit links to the Spanner case which ruled that consensual sexual activities that result in injuries that are more than 'transient or trifling' are deemed unlawful and, once again, warns us against viewing it in isolation from its broader and longer social, cultural and legal contexts.

The internet can also act as a space within which the sexual stories of SMers are told, shared and consumed. According to Ken Plummer (1995, 2003) telling sexual stories are central to the development of intimate citizenship, which he defines as "*the control (or not) over one's body, feelings, relationships: access (or not) to representations, relationships, public spaces, etc: and socially grounded choices (or not) about gender identities*" (Plummer 1995: 151, italics in original). Plummer (1995) argues that there has been a proliferation of sexual stories since the mid to late twentieth century and, for him, their significance lies in the fact that they challenge who has the authority to speak about sex. Telling sexual stories, the making public of hitherto private and intimate details of one's life, serves two separate, but interlinked, functions. Firstly, sexual stories should be understood as symbolic interactions, in so far as they are narrated, given meaning and consumed through social interaction. The second function of telling sexual stories is a political one. The ability (or not) to tell one's sexual story involves the exercise (or not) of power. To have control over how to tell one's story, first to the self and then to others, under conditions of one's own making, is seen as a powerful and empowering process. Conversely, to

be silenced, unable to speak out, is thought of as “damaging, and it signposts a relative powerlessness” (Plummer 1995: 57). Denying SMers the control over how to tell their story and criminalising the production and possession of consensual acts of SM is to silence them and render them invisible. As Eleanor Wilkinson (2009: 194) argued, “SM pornography becomes inseparable from its wider history of oppression; it becomes political as well as sexual speech”. Whilst the internet should not be viewed as inherently positive nor the opportunities it presents be uncritically accepted as democratising, it does offer the means of challenging, or at least beginning to challenge, dominant constructions of sexuality. The internet “opens up questions of autonomy and choice and points to new forms of exploitation” (Weeks 2007: 160). Focusing only on the potential for exploitation through extreme pornography prevents any consideration of its liberatory potential.

Conclusion

This article should not be read as a defence of ‘extreme pornography’ or as adopting an anti-censorship position. Instead, it has argued that the CJIA (2008) has to be understood in the context of long-term social processes and that “[p]lanned actions in the form of government decisions may have unanticipated, unintended consequences” (Elias 1970: 146). Despite the fact that, as yet, there have been very few prosecutions for the possession of ‘extreme pornography’ under CJIA (2008), and even fewer stand alone possession offences, its symbolic significance cannot be underestimated. Far from being a new response to the challenges posed by advances in communication technology, the CJIA (2008) rehearses and reproduces heteronormative sexuality and maintains the public/private divide. From an Eliasian perspective, the importance of understanding the socio-genesis of CJIA (2008) lies in the argument that it is only by analysing long-term social processes that we are able to “decide whether short-term practical measures intended to remedy damage and disadvantage do not in the longer term produce even greater damage and disadvantage” (Elias 1998: 370). It might be argued that the short term practical measure in the form of the CJIA (2008), intended to remedy the apparent damage and disadvantage brought about by so-called ‘extreme pornography’ has, even in the short term, (re) produced disadvantage and, in so doing, reinforced and reproduced heteronormative constructions of sexuality.

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