

## Porn, “Freedom” and the Law

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For some time, in both the UK and in the US there has been an unacknowledged consensus about the legal management of pornography. In the UK this consensus has rested upon public political support of the Obscene Publications Act, at the same time as legal acceptance that it is unenforceable.

UK porn law has effectively worked not to restrict the production and consumption of porn, but rather to protect the position of UK porn companies. This situation changed somewhat with the back-door legalisation of hardcore VHS and DVD, which opened up the market considerably. And more recently, the growth of the internet has profoundly changed the conditions through which porn can be accessed.

However, in the last couple of years this broad consensus about legal toleration of porn has been broken, in both the UK and the US.

- England & Wales: Criminal Justice & Immigration Bill, in force from Jan 09, introduced 2007; so-called “Dangerous Images Act”. Introduced in response to a campaign following the murder of Jane Longhurst by Graham Coutts in Brighton, 2003, and to claims that Coutts was inspired by and addicted to extreme online pornography. The Act criminalizes possession of representations of extreme sexual activity, defined as:
  - (a) an act which threatens or appears to threaten a person's life
  - (b) an act which results in or appears to result (or be likely to result) in serious injury to a person's anus, breasts or genitals
  - (c) an act which involves or appears to involve sexual interference with a human corpse
  - (d) a person performing or appearing to perform an act of intercourse or oral sex with an animal.
- USA: *Extreme Associates*; the most significant legal case against the porn industry for 10 years, not only because it represents the Bush administration's only notable attempt to make good on an offer it made prior to re-election in 2005, “to make the investigation and prosecution of obscenity one of [our] highest criminal enforcement priorities”. Prosecution cited 5 films (*Extreme Teen 24, Cocktails 2, Ass Clowns 3, 1001 Ways to Eat My Jizz, and Forced Entry*) and began Nov 2004. Case was dismissed in 2005. US Dep of Justice Appealed this decision and won. The new trial is due to begin March 2009.
- USA: Max Hardcore June 2008, found guilty in Federal Obscenity trial, sentenced to 4 years imprisonment (currently under appeal)

Both *Extreme Associates* and *Max Hardcore* make films at the extreme end of the hardcore market, and specialize in what Lauren Langman describes as “grotesque degradation” of women. It's worth noting that in general the newly emerging field of porn studies is largely failing to address the changing nature of the porn market and the increasing extremity of what now constitutes mainstream porn.

How are we to make sense of this apparent renewed interest in porn on the part of legislators? Is this a new era of porn regulation? What does it mean?

Critical commentary seems to offer 2 predominant ways of understanding current legal measures against porn...

1. These legal measures are an attempt to reinstate so-called Victorian sexual values and restriction of freedom.

- Tuppy Owens, Sexual Freedom Coalition: "banning porn means society is not free to make our own choices"
- Brian McNair: "It has been cultural capitalism that has propelled marginal subcultures into the mainstream" and effected "sexual democratization": thus restricting sexual culture thru legal means will inhibit the position of subcultures and sexual freedom
- Backlash: "free societies do not criminalise people on grounds of taste"

or, 2. These legal measures are an attempt to curb a frightening abundance of pornographic material and thus to free us from the tyranny of porn.

- As journalist Decca Aitkenhead notes: "unlimited porn is just a click away"
- Concerned Women for America, a right-wing evangelical group in the U.S: porn is an "epidemic" that "like a sexually transmitted cyber-disease...widely affects men, women and even children". This crisis is caused by "the instant availability of such obscenity and the lack of enforcement against it", which "entices viewers to consume more and more smut and to delve deeper and deeper into more graphic and obscene material", and which "destroys individuals, families and communities" (Barber, 2008).

I think that both approaches to understanding the law and pornography are problematic, for a number of reasons.

Here I want to explore issues that relate to the structural position of porn in relation to the economy and to political ideologies, in order to suggest that critical engagement with this new surge of legal interest rather misses the point.

This is because most discourse about porn tend to get very excited about the sex (in a "whoops! there go my bloomers" kind of way).

In order to make sense of porn law we have to step away from the sex and consider questions of production, consumption and the political conditions in which these take place.

1. Both Concerned Women for America and the UK Backlash Campaign against the Dangerous Images Act tend to overestimate the function of legal measures and underestimate the horizontal integration of porn into mainstream capital.

The resolution of what is known as the feminist porn wars of the 80s and 90s was brought about not as a function of feminist activism, but of economic and technological shifts within capitalism: the deregulation of financial markets and the recession of state economic control, the deregulation of the media, the globalization of capital, and the technological proliferation of media forms, most notably the internet, but also satellite, cable and digital TV, smart phones, etc.

As a consequence, the range of financial and corporate institutions with interests in porn has grown considerably. Since the introduction of the domestic VHS, porn has been a substantial and growing force in the media and entertainment sectors, quick to take advantage of new forms and modes of distribution, and integrated into the business plans and revenue streams of mainstream corporations (Maddison, 2004).

Porn companies pioneered models of online commerce and for much of the 1990s were the only sectors of online media that were making money from charging for online content.

In 1998 confidence in the profitability of porn was such that the editors of *The Economist* argued for locating “the greater part of the sex business where it ultimately belongs - as just another branch of the global entertainment industry” (14 February 1998, no author attributed).

Porn companies made significant investments in research and development for security and payment software which they marketed to the rest of the industry, and it seemed that pornography was indeed “the handmaiden of new technology” (BBC News, 2003).

Effectively, the economic power of porn and state governments abdication of responsibility to the market, makes both sets of arguments irrelevant. As many critics have noted, porn, and hardcore especially, has become mainstream, both in terms of its influence and visibility in popular culture, and its position economically.

Bush offered a crackdown on porn, but once he got re-elected, these plans were largely mothballed.

From this point of view, the prosecutions of Extreme Associates and Max Hardcore are marginal attacks on the most extreme edges of the industry, designed to appease conservative constituencies, and not a full-scale assault on sexual freedom.

Following Max Hardcore's conviction, porn industry lawyers advised their clients that the best way to avoid legal trouble was to “Run a good business. That way, no one will have a reason to bring you to court” (Preston, 2008).

2. Both positions tend to underestimate the extent to which porn is already regulated.

The state is increasing its power and facility to intervene into the private lives of its citizens. But the issue here isn't a particular interest in our sexual lives and tastes, but rather an increasing tendency towards total information awareness and a need to produce compliance with neoliberal conditions, which may have implications for sexual freedom, and which may give moral crusading constituencies opportunities to pursue their cause – but that isn't the point.

As the Lords report on surveillance society suggested in Feb 09:

“The huge rise in surveillance and data collection by the state risks undermining the long-standing traditions of privacy and individual freedom which are vital for democracy.” (cited in Henry Porter, ‘MPs fiddle while parliamentary democracy burns’, *The Observer*, 15/2/09)

Conservative groups speak about porn, and especially child porn, as if it is not only freely available, but countenanced by apparently libertarian govts. When in fact, the trend is towards increasing surveillance and regulation of our online activities. The state is increasing its power and facility to intervene into the private lives of its citizens. But here the issue isn't large-scale porn prosecutions, but a plethora of security-related and copyright-related policy and legislation.

Here, the issue is not whether we should be regulating porn, but that State governments are using the threat of porn, and especially child porn, as a way of licensing increasing levels of surveillance and infringement of civil liberties. Of course, counter-terrorism remains the biggest issue here, but it is alarming how often porn is cited as justification for extension of state authority.

In 2006 the EU passed the Data Retention Directive, to be implemented by all member states by August 2007. It stipulates that telecommunications companies and ISPs should keep records of all communications for 24 months.

In the U.S, the Supreme Court has consistently upheld legislation that requires all publicly funded institutions such as libraries and schools to filter sexually explicit material. ...The implementation of such legislation has had the effect of blocking access to information about women's health issues, gay and lesbian rights groups and sexual education for teenagers (The Citizen Lab, 2007).

3. Both positions mythicise pornography in ways that reinforce neoliberal ideology.  
Barthes: myth depoliticizes speech.

#### Neoliberalism

An economic model that prioritises free markets, promotes privatization, reduction of state control of the economy and social provision, deregulation in the name of fostering competition, 'marketisation' of public sector, and cultural life

Promotes "government-at-a-distance".

Nikolas Rose suggests that neoliberalism constitutes us as "active individuals seeking to 'enterprise themselves', to maximize their quality of life through acts of choice"

Neoliberalism advocates a rolling back of the responsibility of the state, and "privatizes" individuals – makes us take increasing amounts of responsibility. An irony of neoliberalism is that whilst it advocates reduction of state authority it also produces new ways of disciplining individuals.

In terms of sexuality, effects of neoliberalism include:

- postfeminist ideologies equate consumer choice with the emancipation of women.  
The power of this ideology can be seen in the extraordinary popularity of texts such as *Sex and the City* (1998-2004), and to a lesser extent *Bridget Jones's Diary*. Rather than emancipating women, *Sex and the City* offers the fantasy of sexual fulfillment as a palliative for having to deal with heterosexual men, through an aspiration to "bourgeois bohemia" (Attwood, 2007: 6) and through the "freedom" of shopping, as a rational lifestyle choice. Here, freedom is divorced from material realities, and becomes imaginable only through the acquisition of new skills and responsibilities in relation to the exercise of sexual techniques and of fashion taste
- legalization of civil partnership for gay and lesbian couples in the UK. Entitlement to equality with heterosexual couples is framed by the protection of lesbian and gay consumer power and by their exclusion from the full legal status of marriage. Civil partnerships enable the protection of financial assets, but in 2006 UK courts ruled that barring queers from marriage was justifiable discrimination in order to protect the notion of marriage "as a union between a man and a woman primarily with the aim of producing children". Here, access to the limited "rights" of civil partnership depends upon understanding the limits of those rights as defining access to pension and inheritance benefits.
- the supposed rejuvenation of sexual activity offered by a new sexual pharmacology represents a search for new products at the expense of treating life threatening epidemics in the developing world, often

also enshrining ideals of female passivity, (Marshall, 2002; Marshall, 2006; Maddison, 2007)

Backlash, Owens, and other porn defenders/advocates rest their opposition to legal regulation on the grounds of choice and the maintenance of sexual freedom. Julian Petley, a Backlash supporter, articulates this in historical terms: in the UK, since the Wolfenden report of 1957, there has apparently been a consensus about the right of individuals to make 'taste' choices in their private life, independent of government stricture. For him, the Dangerous Images Act ends this consensus.

What is problematic about this is not the desire of Backlash and others for sexual freedom – woohoo! – nor their point that increased legal restriction of sexuality is a bad thing, but that the terms in which they argue for sexual freedom confirm neoliberal values and defend an industry defined NOT by choice and plenitude – this is a myth – but by rigorously standardized sexual choices (“teen sluts”, “painful anal”, “Asian whores”, “bareback twinks” etc.). Thus, these abundant, but rigorously standardized, sexual “choices” discipline the sexual self. What is ultimately troubling about The Dangerous Images Act is not that it attempts to censure some acts of porn consumption, but that it affirms the extent to which sexual pleasure, experimentation and intimacy have become functions of market niches that distinguish taste choices and work to satisfy them: in identifying some unacceptable choices the Act sanctions others, and the very rationality of “choice” itself. The Dangerous Images Act is not the vanguard of a new sexual conservatism, but of a continuing sexual liberalism offering choices and opportunities, but also entailing responsibilities and regulation. The shift from criminalizing producers and distributors to criminalizing consumers accords with a wider trend in neoliberal governmentality: it abdicates State responsibility for the regulation of obscenity.

And of course, whilst conservative groups oppose porn they do so by mythicising child porn, effectively masking not only REAL harm to children, but the economic conditions that enslave us: evidence suggests that children are much more at risk of abuse and ill-treatment by their own families, or likely to be injured in road accidents than they are by stranger paedophiles or internet pornographers. Here myths of child porn, pornographic danger and childhood innocence work to displace critical awareness of the political of the role of the nuclear family and children in consumer society.

Project Safe Childhood is a recent initiative of the US Department of Justice that suggests that the “danger of the production, distribution, and possession of child pornography is...dramatic and disturbing” and that the “response to these growing problems...must ... guarantee to future generations the opportunities of the American dream.”

There are problems with porn – god knows – but the answer to these is to address the dominance of neoliberalism, and not advocate greater legal intrusion by the state. We need to be very careful about assessing the effects of legal discourse on already marginal and less powerful social groups, as well as being critical about the fetishistic effect of promised legal crackdowns – they rarely offer us the kinds of limits we may want on exploitative representations.

Becoming less privatized and alienated, and less dependent on consumerism, may allow us to develop more life-enhancing, experimental and liberated forms of sexuality.