

## EXTREME PORNOGRAPHY REGULATION IN THE UK: RECENT DEVELOPMENTS

by

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*Recently, the UK enacted prohibitions on the possession of extreme pornography with the passage of the Criminal Justice and Immigration Act of 2008. The law targets the possessor of material that is both violent and pornographic. This controversial measure has brought to the fore the questions of how, and why, this jurisdiction regulates offensive material. This paper will trace the recent developments in the UK, including the prosecutions that have resulted from the law, as well as potential conflicts that may arise. A further focus is on the motivations behind the law as well as the implications and efficacy of the regulations, additionally examining the freedom of expression implications of such measures.*

### KEYWORDS

*Extreme Pornography Regulation, Obscene Publications Act*

### 1. INTRODUCTION

In January 2012, the chorus was singing of the death of the Obscene Publications Act<sup>1</sup> (hereinafter referred to as “OPA” or the “Act”) after a jury acquitted a defendant of charges of distributing DVDs allegedly in violation of the Act. Critics and libertarians seemed to imply that the old Act had finally lost its ability to regulate obscene material. The DVDs in question dealt with such topics as, “...full-hand gay fisting, urination, staged kidnapping and rape, whipping, and smacking of saline-injected scrotum...”.<sup>2</sup> The distribut-

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<sup>1</sup> Hodgsons, N., *Michael Peacock's Acquittal Is A Victory For Sexual Freedom*, The Guardian, 6 January 2102, Available at <http://www.guardian.co.uk/commentisfree/libertycentral/2012/jan/06/michael-peacock-obscenity-trial?newsfeed=true>, (last accessed 15 January 2012).

<sup>2</sup> Cf. for example C-509/09 eDate Advertising GmbH v X [2011].

or catered to the tastes of certain individuals within the gay male community, and he argued that as these individuals would *specifically* request the material, there was not the danger that the material would “deprave” those who might see it.<sup>3</sup>

The Crown Prosecution Guidance has identified the material contained in the DVDs as material eligible for prosecution under the Act.<sup>4</sup> As solicitor and commentator Myles Jackman stated:

*“[T]he OPA has become an anachronism in the internet age... [pornography] is readily available to people of all genders, orientations and social classes. Hence this jury’s verdict - in the first contested obscenity trial in the digital age - seems to suggest “normal” members of the public accept that consensual adult pornography is an unremarkable facet of daily life.”<sup>5</sup>*

The jury may well have taken issue with the fact that the images involved were of activities that were not illegal between consenting adults. A conviction would have meant that while the action was legal, the portrayal was illegal. The impact of the ruling on the decision to prosecute using the Obscene Publications Act remains to be seen, but as a commentator from the Index on Censorship stated:

*“For over the years, the police have made extensive use of powers of seizure under the OPA to pick up material that they deemed to be obscene: to hold it for months, years even; and then, after giving serious consideration to the matter in hand, releasing it back to its owner. This was a tactic, possibly a slightly underhand tactic, designed to disrupt the trade in pornographic material and while police activity may have been legally questionable, most porn merchants did not have the inclination — or budget — to challenge the police...”<sup>6</sup>*

This verdict illustrated the frustration faced by government officials in the UK in their efforts to curb sexually explicit speech and, as a result of this frustration, the Parliament of the UK has taken a different approach than it had before.

In 2008, the Parliament enacted a statute banning *extreme pornography*. The law came about because of concerns that the tools available to fight

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<sup>3</sup> For a recent outline of the matter cf. Kuipers (2011), pp.1682 et seq..

<sup>4</sup> Cf. Recital 11 of the Brussels I Regulation.

<sup>5</sup> Ministry of Justice (2011), para.79.

<sup>6</sup> Ministry of Justice (2011), para. 80.

sexualized material (which is non-child pornographic yet still offensive), namely the Obscene Publication Act had become ineffective in curbing obscene material available on the Internet.<sup>7</sup> Parliament elected not to again amend the OPA but rather enact a new statute: the Criminal Justice and Immigration Act of 2008 (hereinafter referred to as “CJIA”). This Act differs from traditional obscenity legislation and enforcement. Drawing on theories of justification from the fight against child pornography and sharing some of the pitfalls of the old regime of common law crimes and prosecution, the CJIA signals a dangerous departure from the increasingly speech protective path that Great Britain has travelled down, especially in the last 50 years. This paper will examine the provisions of the new statute, examine the criticism that has been levelled against it, and attempt to assess its potential impact.

## 2. THE OBSCENE PUBLICATION ACT

The first significant codification of anti-obscenity law in Great Britain occurred in 1857 with the passage of the Obscene Publications Act of 1857. Prior to its passage, regulation and prosecution occurred by means of the common law crimes of libel: in particular, the crimes of obscene libel and blasphemous libel. Towards the middle of the Victorian Era, with the proliferation of print material, as well as the growth of literacy amongst the working classes, there was a push to *protect* the morality of the working class. While the common law crimes provided a means of prosecution, there was no means of seizure and destruction of materials found to be violative of the law. With the passage of the Obscene Publications Act in 1857, authorities could request a judicial order for the seizure of material, pending a determination of whether or not the material offended the common law crimes mentioned above.

In 1959, and again in 1964, the law was reformed. Most importantly, the structure of relying on the prosecution under the old common law crimes was completely abandoned. Instead, the new statute identified material, which was obscene as:

*“...of any one of its items is, if taken as a whole, such as to tend to deprave and corrupt persons who are likely, having regard to all rel-*

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<sup>7</sup> *Consultation: on the Possession of Extreme Pornographic Material*, Home Office (2005), at p.8. Available at [news.bbc.co.uk/2/.../30\\_08\\_05\\_porn\\_doc.pdf](http://news.bbc.co.uk/2/.../30_08_05_porn_doc.pdf) (last accessed 12 January 2012).

*evant circumstances, to read, see or hear the matter contained or embodied in it.*"<sup>8</sup>

Also significant was the inclusion of a defence of public good or worth:

*"...a person shall not be convicted of an offence against section two of this Act, and an order for forfeiture shall not be made under the foregoing section, if it is proved that publication of the article in question is justified as being for the public good on the ground that it is in the interests of science, literature, art or learning, or of other objects of general concern."*<sup>9</sup>

The public worth defence resulted in a far more speech protective legal regime. No longer were sexually explicit materials with a significant social value, vulnerable to prosecution. The inclusion of the defence did however make the already subjective standard of the Act more difficult for prosecutors to prove. The result has been that juries have been more and more reluctant to convict, and at times, if there is a conviction, appellate courts have been more and more reluctant to uphold the conviction.

The Act (in all of its incarnations) targets the *distribution* of material rather than the possession of it. As opposed to child pornography legislation which targets the producers, distributors, *and* possessors. This emphasis on distribution has proven problematic in the Internet age, as often distribution occurs far from the shores of the UK, rendering enforcement of the Act nearly impossible. Added to this is the increasing reluctance of juries to convict, as seen in the introduction of this paper. These factors coalesced to create calls for a new legal instrument to fight the battle of indecent material.

### **3. CRIMINAL JUSTICE AND IMMIGRATION ACT OF 2008**

Amidst these calls for action against violent pornography available on the Internet, Parliament passed the Criminal Justice and Immigration Act of 2008 (hereinafter "CJIA" or the "Act"), which came into force In January 2009. The Act reformed many aspects of the criminal law in the UK from sentencing guidelines to probation orders. Additionally, it prohibited strikes by prison guards<sup>10</sup>, abolished the common law crime of blasphemy<sup>11</sup>

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<sup>8</sup> The Obscene Publications Act of 1959, (1959 c. 66)

<sup>9</sup> Ibid.

<sup>10</sup> Criminal Justice and Immigration Act 2008 § 138 (2008 c 4).

<sup>11</sup> Criminal Justice and Immigration Act 2008 § 79 (2008 c 4).

and criminalized hate crimes based on sexual orientation.<sup>12</sup> The Act's most controversial provisions however, have dealt with pornography. § 63<sup>13</sup> of this of the legislation represents a new chapter in obscenity regulation in the UK. The Act outlaws the possession of images, which; "...depict acts which threaten a person's life, acts which result in or are likely to result in serious injury to a person's anus, breasts or genitals, bestiality or necrophilia".<sup>14</sup> The Act provides that the prosecution must prove:

1. *That the image is pornographic;*
2. *That the image is grossly offensive, disgusting, or otherwise of an obscene character; and*
3. *That the image portrays in an explicit and realistic way, one of the following:*
  - a. *An act which threatens a person's life; this could include depictions of hanging, suffocation, or sexual assault involving a threat with a weapon.*
  - b. *An act which results in or is likely to result in serious injury to a person's anus, breast or genitals; this could include the insertion of sharp objects or the mutilation of breasts or genitals.*
  - c. *An act involving sexual interference with a human corpse; or*
  - d. *A person performing an act of intercourse or oral sex with an animal, and a reasonable person looking at the image would think that the animals and people portrayed were real.*<sup>15</sup>

#### 4. ANALYSIS AND CRITICISM

This statute is uncharacteristically specific for the UK in terms of speech regulation. It changes, in a fundamental way, the focus of pornography regulation in England and Wales, representing the first Act of a EU member state to ban the possession of adult pornography.<sup>16</sup>

No longer is the focus of the legislation the protection of minors who might view it and become corrupted,<sup>17</sup> rather the aim of the legislation ap-

<sup>12</sup> Criminal Justice and Immigration Act 2008 § 74 (2008 c 4).

<sup>13</sup> The §63 of the CJIA 2008 is available at <http://www.legislation.gov.uk/ukpga/2008/4/contents> (last accessed 8 May 2012)

<sup>14</sup> *Crown Prosecution Services: Extreme Pornography*. Available at [www.cps.gov.uk/legal/d\\_to\\_g/extreme\\_pornography](http://www.cps.gov.uk/legal/d_to_g/extreme_pornography), (last accessed 13 January 2012).

<sup>15</sup> Criminal Justice and Immigration Act of 2008 § 63.

<sup>16</sup> Johnson, P., 2010, *Law Morality and Disgust: The Regulation of Extreme Pornography in England and Wales*, Social and Legal Studies, Sage 19(2) 147-163 p. 148.

<sup>17</sup> Which might be argued to be the true and remaining focus of the OPA.

pears to be, at least in part, the protection of the individuals involved in making the material and greater concepts of dignity and protection of the publics regarding the perceived dangers of the material.<sup>18</sup>

The new statute changes the playing field: no longer must a prosecutor prove obscenity according to the standard of the 1959 Act. Now instead, the quality of the material must be shown to be “grossly offensive, disgusting or otherwise of an obscene character” according to a dictionary definition rather than an OPA definition.<sup>19</sup>

The Crown Prosecutor Service’s guidance for the new act indicates that prosecutions ought to take place under the OPA wherever possible, and that material found to violate the §63 would necessarily violate the OPA. This proposition might, in fact not, be the case for two reasons: Firstly, as mentioned above, the OPA targets *distribution* of material while the CJIA targets *possession*. § 63 is directed at the problem of material that is downloaded from the Internet, material which may be hosted in a foreign jurisdiction. Secondly, and potentially more significant, is § 63 (6)(b) which defines prohibited material as that which “...is grossly offensive, disgusting or otherwise of an obscene character.” Significantly, according to the Crown Prosecution Services:

“The words ‘grossly offensive’ and ‘disgusting’ are not alternatives to ‘obscene character’ but are examples of it. They are drawn from the ordinary dictionary definition of ‘obscene’. ... They are intended to convey a non-technical definition of that concept .... distinct from the technical definition contained in the OPA, that definition being specifically geared to the concept of publication.”<sup>20</sup>

Targeting possession rather than publication, the new law represents a shift in priority from producer to consumer, which was replicated in how the new law also increased the penalties for the consumers of prostitution as well. This shift in perspective was novel for a society that had theretofore

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<sup>18</sup> This concept was recently endorsed by the Council of Europe’s Parliamentary Assembly in Committee on Equal Opportunities for Women and Men’s report: *Violent and Extreme Pornography*, Doc. 12719 (19 September 2011) Available at [assembly.coe.int/Documents/.../EDOC12719.pdf](http://assembly.coe.int/Documents/.../EDOC12719.pdf) (last accessed 13 January 2012). See also Hornle, J., *Analysis of National Cybercrime Legislation*, Queen Mary University. Available at: [www.law.ed.ac.uk/bacl/files/Hornle.doc](http://www.law.ed.ac.uk/bacl/files/Hornle.doc).

<sup>19</sup> Ministry of Justice, *Further Information on the New Offence Oo Possession Of Extreme Pornographic Images*, (2009).

<sup>20</sup> Ministry of Justice circular No. 2009/01 at p. 3, available at [http://www.justice.gov.uk/publications/docs/circular-criminal-justice-01-2009\(1\).pdf](http://www.justice.gov.uk/publications/docs/circular-criminal-justice-01-2009(1).pdf). (last accessed 15 January 2012).

emphasized the criminality of the act of prostitution (and by the same token, publication) rather than patronage (and consumption):

*"...[T]he intention of the reforms is to make individuals more responsible about the images they possess and '... to reduce the demand for such material and to send a clear message that it has no place in our society'."*<sup>21</sup>

Precisely because this statute targets the consumer rather than the producer or distributor, there is no defence of public good as is contained in the OPA.<sup>22</sup> This may lead the UK right back to where it was prior to the adopting of the 1959 Act. The CJIA specifically deals with "images" as opposed to the written word, but this may also prove to be a dangerous path as well. What would happen in cases where cutting edge literature uses somewhat graphic images to portray a realistic occurrence or for that matter a real-life occurrence? As will be discussed further below, while rated films are not subject to the provisions of the Act because it targets possession rather than distribution, copies of such films, obtained outside of the UK and not edited according to the standards of the British Board of Film Classification (discussed below), would be actionable under the Act.

As is the case often when a legislature acts, the impetus for the new legislation was a tragic and horrible act. In 2003, Graham Coutts, a 39-year-old musician, strangled Jane Longhurst, a 31-year-old teacher, to death. At his trial he asserted that Ms. Longhurst's death had been a tragic accident during a sexual encounter and that the couple had been involved in erotic asphyxiation, whereby strangulation is used to accentuate sexual euphoria. The prosecution showed that in fact, Coutts was obsessed with violent pornography in general and strangulation pornography, in particular. The prosecution asserted that the defendant had watched violent pornography within 24 hours prior to the murder.<sup>23</sup> These videos included images of asphyxiation, rape and necrophilia.

<sup>21</sup> Carline, Anna, *Criminal Justice, Extreme Pornography And Prostitution: Protecting Women Or Promoting Morality? Sexualities*, June 2011 vol. 14 no. 3 312-333, at p. 317, quoting the Home Office consultation of 2008.

<sup>22</sup> § 4 of the OPA contains a defence for public good: "...a person shall not be convicted of an offence against section two of this Act, and an order for forfeiture shall not be made under the foregoing section, if it is proved that publication of the article in question is justified as being for the public good on the ground that it is in the interests of science, literature, art or learning, or of other objects of general concern." Available at <http://www.legislation.gov.uk/ukpga/Eliz2/7-8/66/section/4> (last accessed 1 December 2011).

<sup>23</sup> 'Pervert' Strangled Music Teacher, BBC article dated 4 July 2007, Available at, [http://news.bbc.co.uk/2/hi/uk\\_news/england/sussex/6265376.stm](http://news.bbc.co.uk/2/hi/uk_news/england/sussex/6265376.stm) (last accessed 30 November, 2011) also: [http://news.bbc.co.uk/2/hi/uk\\_news/england/southern\\_counties/3396291.stm](http://news.bbc.co.uk/2/hi/uk_news/england/southern_counties/3396291.stm).

After Coutts was convicted in 2007 and sentenced to life in prison, the victim's mother led a campaign to criminalize violent pornography. During the legislative process, references to rape were replaced with references to acts "...which [threaten] a person's life; this could include depictions of hanging, suffocation, or sexual assault involving a threat with a weapon."<sup>24</sup> Bestiality was also added as prohibited material. Like social reformers before her, Liz Longhurst changed the law on sexually explicit speech.

The Act has not been without its critics. There is an issue of legal certainty regarding the subsection 2's requirement that the prosecution prove that the material be, "...grossly offensive, disgusting, or otherwise of an obscene character."<sup>25</sup> While some theorists have welcomed the legislation because of its emphasis on dignity, other theorists including Clare McGlynn and Ian Ward have noted:

*"An immediate absurdity inherent in the new measures is that while the possession of pornographic images of intercourse or oral sex with animals is criminalized, this is not the case for all pornographic images of sexual violence. Most particularly ...pornographic rape images will not now come within the scope of the measures."*<sup>26</sup>

However, commentators, including University of Liverpool's Dr. Anna Carline, contend that the new law is more about *morality* than the protection of women:

*"It was frequently claimed that the proposals would only criminalize the possession of the most extreme images and that most members of the public would not disapprove (Maria Eagle, Labour, 16 October 2007, col 32). The difficulty with this perspective, however, is that it allows the majority to determine what are and are not appropriate expressions of sexuality. Minority sexualities remain othered and silenced. Furthermore, ...'abhorrent', 'degrading' and 'repugnant' demonstrate the moralistic tone of the offence."*<sup>27</sup>

It must be asked whether this Act represents a step backwards in reflection on its effect on the freedom of expression or whether this represents an

<sup>24</sup> *Mother's Violent Porn Ban Now Law*, BBC article, 27 January 2009, Available at: [http://news.bbc.co.uk/2/hi/uk\\_news/england/berkshire/7851346.stm](http://news.bbc.co.uk/2/hi/uk_news/england/berkshire/7851346.stm), (last accessed on 30 November 2011).

<sup>25</sup> § 63 (2) *infra* fn 10.

<sup>26</sup> McGlynn, C. and Ward, I., *Pornography, Pragmatism and Proscription*, *Journal of Law and Society*, 36 (3) (2009) pp. 327-351, at p. 346.

<sup>27</sup> Carline, Anna, *Criminal Justice, Extreme Pornography And Prostitution: Protecting Women Or Promoting Morality?* *Sexualities*, June 2011 vol. 14 no. 3 312-333, at p. 322.



evolutionary development in the law, especially when seen through the lens of protection of human dignity?<sup>28</sup>

The claim that the motivation of this Act is to protect human dignity is undermined in two ways. Firstly, the Act prohibits images of necrophilia and bestiality, which are arguably not in the realm of human dignity. Secondly, the Act contains a defence that the images were of the defendant, and that no one was hurt during the making of the images.<sup>29</sup> This defence undercuts a human dignity justification because if an image violates human dignity, then the fact that the defendant is a participant is irrelevant.

This might leave an observer with the impression that these images are banned because they offend society's moral standards. Paul Johnson, in his recent article, argues that this is a valid and legitimate purpose for the regulation and suggests that there should be no apologies in this regard.<sup>30</sup> This may be true, but it does ring of pornography regulation of the past- in particular when Lord Campbell assured his fellow Lords that the proposed Obscene Publication Act would never be used against art- only smut. It was then promptly used against art and political expression for nearly 150 years.<sup>31</sup>

<sup>28</sup> The Ministry of Justice ordered a Rapid Evidence Assessment (REA) study during the consultation period to determine the effect of extreme pornography on those who watch it and those who make the images. The REA found that some individuals who are predisposed to violence, or have already committed acts of sexual violence might be affected negatively by watching extreme pornography. The assessment further found that there was no research to show that the actors and actresses were affected. The methods of the study were criticized for its methodology and conclusions. See, Ministry of Justice Rapid Evidence Assessment: Evidence Of Harm To Adults Relating To Exposure To Extreme Pornographic Material, available at <http://webarchive.nationalarchives.gov.uk/+http://www.justice.gov.uk/publications/research280907.htm> (last accessed 13 January 2012).

<sup>29</sup> Specifically, §66 provides:  
 "(2) It is a defence for D to prove -  
 (a) that D directly participated in the act or any of the acts portrayed, and  
 (b) that the act or acts did not involve the infliction of any non-consensual harm ..., and  
 (c) if the image portrays... as a human corpse was not in fact a corpse.  
 (3)... harm inflicted on a person is "non-consensual" harm if—  
 (a) the harm is of such a nature that the person cannot, in law, consent to it being inflicted on himself or herself; or  
 (b) where the person can, in law, consent to it being so inflicted, the person does not in fact consent to it being so inflicted.

<sup>30</sup> Johnson, P., 2010, *Law Morality and Disgust: The Regulation of Extreme Pornography in England and Wales*, Social and Legal Studies, Sage (2010) 19(2) 147-163 p. 148.

<sup>31</sup> Travis, A., *Bound and Gagged*, Profile Books, (2000) London, pp 5-6. The Obscene Publications Act of 1857 was amended in 1959 and again in 1964.

## 5. PROSECUTIONS AND POTENTIAL

There have not to date, been many successful prosecutions under the new Act.<sup>32</sup> Many of the prosecutions involved other acts- such as pirating plus extreme images, or child pornography plus extreme images. Significantly, according to prosecution records, early prosecutions have mainly targeted images concerning bestiality.<sup>33</sup> One Magistrate has pled guilty to possessing extreme materials and received a probationary sentence.<sup>34</sup> One prison warden received a six-month jail sentence after images were discovered on his home computer. The sentencing judge stated that significant was the defendant's installation of sharing software on his computer which exposed the warden in the judge's view to extortion, given his position. This justified the jail sentence.<sup>35</sup>

One unsuccessful prosecution is significant. A man was charged with possession of an extreme image involving a woman having sex with a tiger. It was a short clip. Prosecutors had to withdraw the charges once the defence suggested that the police should have listened to the sound track that was part of the image. The tiger (in an apparent voice-over) turns to the camera and says that the act certainly is better than selling cereal- a reference to the advertising campaign of a popular brand of corn flakes. The sound track took the clip out of the realm of outrageous and into the realm of humour. The prosecution subsequently discontinued the case.<sup>36</sup>

It is important to note that the law has not been tested against Article 10 of the Human Right's Act of 2008 or the European Convention on Human Rights and it seems doubtful that a court, either in Britain or Strasbourg would hold the measure incompatible with Article 10.<sup>37</sup>

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<sup>32</sup> For examples of unsuccessful prosecutions, see, Stafford jury acquits fantasy porn defendant; 19 January 2011, Available at <http://cyberlaw.org.uk/2011/01/19/stafford-jury-acquits-fantasy-porn-defendant/>. (last accessed 30 November 2011).

<sup>33</sup> *Statistics Regarding Prosecutions Under Section 63 Of The Criminal Justice And Immigration Act 2008*, Crown Prosecution Services, Disclosure Reference 02/2012, available at [www.cps.gov.uk](http://www.cps.gov.uk) (last accessed 10 May 2012).

<sup>34</sup> *Dinnington Magistrate Had Images Of Extreme Porn*, The Guardian, 10 March 2011, Available at: [http://www.dinningtontoday.co.uk/news/localnews/magistrate\\_had\\_images\\_of\\_extreme\\_porn\\_1\\_3165697](http://www.dinningtontoday.co.uk/news/localnews/magistrate_had_images_of_extreme_porn_1_3165697)(last accessed 30 November 2011).

<sup>35</sup> *Images of Extreme Porn Land Ex Prison Boss in Jail*, Yorkshire Post, 19 November 2011, Available at: [http://www.yorkshirepost.co.uk/news/at-a-glance/main-section/images\\_of\\_extreme\\_porn\\_land\\_ex\\_prison\\_boss\\_in\\_jail\\_1\\_3984439](http://www.yorkshirepost.co.uk/news/at-a-glance/main-section/images_of_extreme_porn_land_ex_prison_boss_in_jail_1_3984439) (last accessed 30 November 2011).

<sup>36</sup> *Man Cleared Of Porn Charge After Tiger Sex Image Found To Be Joke*, Telegraph, 31 December 2009, Available at <http://www.telegraph.co.uk/news/uknews/6918001/Man-cleared-of-porn-charge-after-tiger-sex-image-found-to-be-joke.html> (last accessed 10 May 2012).

What remains to be seen is how a very likely scenario might play out: How will the law be applied to rated movies that push the boundaries of acceptability?

Under § 64 of the Act, films rated by the British Board of Film Classification (BBFC)<sup>38</sup> are exempt from application of the extreme pornography provisions of law.<sup>39</sup> In 2009, director Tom Sixx released the horror film *The Human Centipede First Sequence*.<sup>40</sup> The Dutch film chronicled the story of a mad scientist who surgically attached three victims together anus to mouth to create a human centipede. When release in the UK, the film received an "18" rating from the BBFC. In justifying this rating, the BBFC stated:

*"Although the concept of the film was undoubtedly tasteless and disgusting it was a relatively traditional and conventional horror film and the Board concluded that it was not in breach of our Guidelines at '18'."*<sup>41</sup>

In 2011, the director sought to push boundaries a bit further with the release of *The Human Centipede II: Full Sequence*<sup>42</sup>, directly onto DVD. Initially the BBFC refused to issue a licence to the film at all, stating:

<sup>37</sup> For justification on this point see, Council of Europe's Parliamentary Assembly in Committee on Equal Opportunities for Women and Men's report: *Violent and Extreme Pornography*, Doc. 12719 (19 September 2011) Available at [assembly.coe.int/Documents/.../EDOC12719.pdf](http://assembly.coe.int/Documents/.../EDOC12719.pdf) (last accessed 13 January 2012).

<sup>38</sup> The British Board of Film Classification is the non-governmental agency charged with the duty to rate films in the UK, and is described briefly, yet in more detail below.

<sup>39</sup> The Ministry of Justice's Further information on the new offence of Possession of Extreme Pornographic Images, (2009) provides guidance to insight as to how the law might be applied to rated films:

"15. Section 64 of the Act provides an exclusion from the scope of the offence of possession of extreme pornographic images for classified films. The intention of this section is to give certainty to members of the public that they will not be at risk of prosecution if they possess a video recording of a film which has been classified by the British Board of Film Classification (BBFC), even if the film contains an image or images, considered by the Board to be justified by the context of the work as a whole, which nevertheless fall foul of the offence in Section 63 (see paragraphs 4). The fact that the images are held as part of a BBFC classified film takes them outside the scope of the offence."

16. However the exclusion does not apply in respect of an image or images contained within extracts from classified films which must reasonably be assumed to have been extracted solely or principally for the purposes of sexual arousal.

17. The offence covers the deliberate extraction of images because the benefit of context can be lost once an image is removed and held either on its own or with other images."

<sup>40</sup> *The Human Centipede (First Sequence)*, [www.imdb.com/title/tt1467304/](http://www.imdb.com/title/tt1467304/) (last accessed 10 May 2012).

<sup>41</sup> See BBFC's website press release regarding the rejection of the Human Centipede II, Available at <http://www.bbfc.co.uk/newsreleases/2011/06/bbfc-rejects-the-human-centipede-ii-full-sequence/> (last accessed on 20 November 2011).

<sup>42</sup> *The Human Centipede (Full Sequence)*, <http://www.imdb.com/title/tt1530509/> (last accessed 10 May 2012).

*“The principal focus of The Human Centipede II ...is the sexual arousal of the central character at both the idea and the spectacle of the total degradation, humiliation, mutilation, torture, and murder of his naked victims. Examples of this include a scene early in the film in which he masturbates whilst he watches a DVD of the original Human Centipede film, with sandpaper wrapped around his penis ...There is little attempt to portray any of the victims in the film as anything other than objects to be brutalised, degraded and mutilated for the amusement and arousal of the central character, ... There is a strong focus throughout on the link between sexual arousal and sexual violence and a clear association between pain, perversity and sexual pleasure. It is the Board’s conclusion that the explicit presentation of the central character’s obsessive sexually violent fantasies is in breach of its Classification Guidelines and poses a real, as opposed to a fanciful, risk that harm is likely to be caused to potential viewers.”<sup>43</sup>*

The Director of the BBFC further stated:

“The Board ...seeks to avoid classifying material that may be in breach of the ...OPA.... The OPA prohibits the publication of works that have a tendency to deprave or corrupt a significant proportion of those likely to see them. In order to avoid classifying potentially obscene material, the Board engages in regular discussions with the relevant enforcement agencies, including the CPS, the police, and the Ministry of Justice. It is the Board’s view that there is a genuine risk that this video work, The Human Centipede II (Full Sequence), may be considered obscene within the terms of the OPA, for the reasons given above... The Board considered whether its concerns could be dealt with through cuts. However, given that the unacceptable content runs throughout the work, cuts are not a viable option in this case and the work is therefore refused a classification.”<sup>44</sup>

Five days later, the BBFC announced that the film could be released with an “18” rating provided that the film was cut of 2:37 of objectionable material, stating:

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<sup>43</sup> BBFC Rejects The Human Centipede II Full Sequence. Available at <http://www.bbfc.co.uk/newsreleases/2011/06/bbfc-rejects-the-human-centipede-ii-full-sequence/> (last accessed 20 November 2011).

<sup>44</sup> Ibid.

*"Company was required to make 32 individual cuts to scenes of sexual and sexualised violence, sadistic violence and humiliation, and a child presented in an abusive and violent context."*<sup>45</sup>

It appears very likely that an *uncut* version of the movie, possibly available from the United States, could still run afoul of the public prosecutor, because in effect, the objectionable scenes would still be included and the copy would not be protected by §64 of the Act. It should also be noted that whereas the first *Centipede* movie received poor ratings, the second was seen by many critics to be innovative and ironic in the genre of horror films, much in the same way that works such as *Lady Chatterley's Lover* and *Ulysses* were seen by many as obscene, and others as art, when they were first written. It remains to be seen what will become of this type of regulation as well as the status afforded (by the law as well as society) to this type of material.

## 6. IMPACT ON EXPRESSION

As the UK attempts to regulate violent, sexually explicit speech that originates on foreign shores, the Parliament has abandoned a mechanism that has been relied upon for over 50 years. In doing so, the nation has embarked upon a new voyage in the odyssey of speech regulation. The history of prosecutions under the Obscene Publications Act is in itself a chequered one, as the Act was used at times to curtail political and unpopular speech as well as material that might be dangerous to the young and impressionable, but through the years of trial and appellate litigation, a balance has been struck wherein material which has social value is protected from sanction. The danger that exists is that without that jurisprudence to balance the act and its potential abuses, unpopular speech may get smothered. Such speech may be offensive, but might be worthy of protection in the same manner that works by Emile Zola, James Joyce or D.H. Lawrence should have been granted.

Quite possibly, the reluctance juries have shown towards convicting the production of images of acts that are legal will apply as well to prosecutions of possession of material under the new Act. Perhaps juries will thus build in a defence of social good that they might apply when deliberating in cases

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<sup>45</sup> See British Board of Film Classification, press release 10 June 2011, Available at: <http://www.bbfc.co.uk/CVV278459/> (last accessed 30 November 2011) also Best for Film, *Human Centipede II is Passed for UK Release*, Available at: <http://bestforfilm.com/film-news/the-human-centipede-ii-is-passed-for-uk-release/> (last accessed 10 November 2011).

brought under the OPA. It is too early to tell. Perhaps as well the existence of the new Act reflects a change in the priorities of society as manifested in Law. Perhaps human dignity has replaced the protection of the morals of those easily corrupted. It remains to be seen.

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