**Obscene** **Performative Pornography: A Critical Reflection on *R v Peacock* [2012] and the Legal Construction of Gendered Identities’**

Dr Sarah Beresford\*

**Key words**: Pornography; Law; Discourse; Gender; Obscenity, Butler; Foucault.

**Abstract**:

How are the concepts of obscenity and (extreme) pornography ‘produced’ and who is the ‘producer’? The failed prosecution in *R* v *Peacock* 2012, (unreported), again exposes the law as being based upon (subjectively defined attempts) to protect both public and individual morality; ensuring that people do not become ‘depraved and corrupted’ by the pornography they see and hear. The Obscene Publications Acts of 1959 and 1964, and the Criminal Justice and Immigration Act 2008, base the idea of criminality upon normalised notions of ‘appropriate’ pornography and ‘appropriate’ sexual expression that continue to underpin current law.

A Foucaultian analysis would suggest that continuing to regulate pornography and obscenity through the lens of morality; it is the law itself which is the producer and creator of these concepts. If this is so, then law is exposed as continuing to perpetuate ideas of ‘acceptable’ identity expression. Using Michael Foucault’s ideas on ‘truth’ and ‘knowledge’ and Judith Butler’s theories of perfomativity, this article suggests that the decision to prosecute Peacock was in and of itself, an act of production, creation and ‘performativity’ (Butler) which contributes to the ‘regime of truth’ (Foucault) about pornography and obscenity.[[1]](#footnote-1)

\*Lecturer in law at Lancaster University

**Introduction**

This article engages with the notion of the power of legal discourse in shaping our understandings of acceptable sex and sexuality; ideas which are particularly current given the recent cases such as *R v Peacock* (Crown), unreported (2012)[[2]](#footnote-2); Part 5 of the Criminal Justice and Immigration Act 2008 (CJIA 2008) and the recent statements made by the current Government of the ‘dangers’ of pornography.[[3]](#footnote-3) This article therefore questions the extent to which legal discourse constructs pornography and explores how this construction is influenced and supported by perceptions of appropriate expressions of gendered and sexual identities. It will make use of some of the work of Michael Foucault to explore the extent to which law operates upon what Foucault terms a repressive model of power[[4]](#footnote-4), resorting to ‘yet more law’ in order to ‘solve’ the problem of pornography. I conclude by suggesting that quite the reverse happens – the ‘problem’ of pornography is *not* solved and that in seeking to solve a problem, law actually creates more of that which it seeks to repress and control. I will explore whether the decision to investigate and subsequently bring a prosecution in the *Peacock* case, constitutes what Foucault would terms a ‘regime of truth’ and by so doing, thereby sustains and perpetuates these social constructions of gendered and sexual identities.[[5]](#footnote-5) The idea that legal discourse creates pornography as a regime of truth will be further explored using Judith Butler’s formulation of the idea of ‘perfomativity’[[6]](#footnote-6) and ‘speech acts’[[7]](#footnote-7).

Thus, this article will question how concepts such as obscenity and (extreme) pornography are produced. It will explore the notion that the censorship and/or regulation of these concepts generate speech that matters and creates a regime of truth about the portrayal of which particular sexual acts are acceptable or not. In the context of extreme pornography, I will suggest that as the legal concept of ‘extreme’ pornography did not exist until introduced by The CJIA 2008; the law itself is the creator and producer of extreme pornography. A concept closely linked to pornography, is of course that of obscenity, and The Obscene Publications Acts of 1959 and 1964 (OPA) are similarly responsible for the creation and production of obscenity and the accompanying ‘truth(s)’ surrounding it. Although differing in focus, all three statutes interlink with one another and they continue to base the idea of criminality upon normalised notions of ‘appropriate’ sexual expression. The main differences between ‘pornography’ and ‘extreme pornography’, lie in the fact that the CJIA 2008 specifically targets those who possess or own extreme pornography[[8]](#footnote-8), whilst the Obscene Publications Act 1959 targets the publication of material regarded as obscene.[[9]](#footnote-9)

To what extent therefore do the laws relating to pornography (whether extreme or not), and the attendant notions of obscenity, continue to underpin and reinforce the socio-legal constructed concepts of gendered identities? Could it be that the failed prosecution in *R* v *Peacock* reveals law as a ‘producer’ of obscenity and/or (extreme) pornography?

**The Role of Discourse**

I start with the idea that in a Foucaultian sense, both law and pornography represent discourses that continually attempt to produce both ‘truth’ and ‘meaning’. These discourses, in turn, normalise and privilege particular constructions of gendered and sexual identities.[[10]](#footnote-10) Generally speaking, ‘law’ is about controlling behaviour(s); law seeks to promote; condemn; privilege; prohibit (and so forth), certain types of behaviours. Specifically, criminal law also seeks to control certain behaviours; it is a social normative system which operates by setting down ‘standards of conduct and by enforcing in distinctive ways, those substantive standards or norms.’[[11]](#footnote-11) Criminal law makes a ‘number of normative claims’,[[12]](#footnote-12) leading to a ‘troubling set of assumptions about male and female sexuality’.[[13]](#footnote-13) One implication of a morality based approach is that far from being a politically neutral framework, the criminal law and its processes ‘consolidate and reproduce aspects of social relations at a formal institutional level’ and that the criminal law and its related processes ‘need to be understood in the context of a network of actions, structures and ideologies which reinforce and reveal the nature of patriarchal relations’.[[14]](#footnote-14) Not only does law continue to consolidate and reproduce social relations generally, it does so with specific reference to material regarded as either ‘obscene’, ‘pornographic’, or both. Therefore law represents discourse which is more than ‘just’ language. As Foucault suggests, discourse can be viewed as a system of practices and institutions which define and shape both the physical world and the physical body.[[15]](#footnote-15) Any subsequent ‘meaning’ attributed to a physical body is therefore discursively and perhaps more importantly ever changing.

For Foucault, discourse ‘is a group of statements which provide a language for talking about a particular topic at a particular historical moment.’[[16]](#footnote-16) In other words, it is the discourse, which constructs the topic; the discourse defines and produces the objects of knowledge. Therefore subjects like ‘pornography’, or ‘obscenity’ only exist meaningfully within the discourses constructed about them. Thus pornography does not exist outside the ways in which it is already represented within socio-legal discourse – the ‘knowledge’ of it is produced and regulated by the discursive practices of socio-legal discourse. Simply talking ‘about’ pornography or obscenity brings these concepts into existence. In other words, as Weedon suggests, discourse is the myriad ways;

[Of] constituting knowledge, together with the social practices, forms of subjectivity and power relations which inhere in such knowledges and relations between them. Discourses are more than ways of thinking and producing meaning. They constitute the 'nature' of the body, unconscious and conscious mind and emotional life of the subjects they seek to govern.[[17]](#footnote-17)

Therefore pornography and obscenity be considered as discourse which constitutes the nature of the body. In addition, the legal regulation, laws and policies surrounding pornography and obscenity can *also* constitute discourse. Part of the discourse that creates a legally ‘acceptable’ body is arguably the existence of, and the discourse surrounding the notorious ‘Page 3’; sexist imagery in ‘ladsmags’; music videos and other areas of popular culture, which have the potential to impact on the way gender identities and acceptable sex are constructed. Yet the legal focus is on the ‘extreme’ end of the discourse, not the so-called ‘everyday’ mainstream discourse. The dangers of an exclusionary focus upon ‘extreme’ pornography indicate a failure to consider the potential wider impact of materials other than that which is considered to be pornographic. For example, in 2006, Tesco and WH Smith were forced to remove pole dancing kits[[18]](#footnote-18), from their web site. However, although Tesco stated that it would be removed from the Toys and Games section of their web site, it would remain on sale as a Fitness Accessory.[[19]](#footnote-19) There is still a consistent, systemic bias against women in the British press. Research conducted by several organisations (Object, Equality Now, Eaves and End Violence Against Women) found that this systematic bias against women and girls in the national press portrayed women and girls as one-dimensional sex objects. Their research monitored 11 national newspapers over two weeks in September 2012 and found that there was a persistent scrutiny of women's bodies and an increasing sexualisation of young girls.[[20]](#footnote-20) In highlighting these negative portrayals, I am not seeking to establish a ‘truth’ of whether ‘page 3’ etc. does or does not cause harm, rather I am seeking to establish that it forms part of the discourse of what is, and what is not, acceptable identity.

These discourses legitimise and authorise a mode of sexuality and sexual expression which is presented as discourse which is ‘just sex’, but can also be viewed as, amongst other things, rape, sexual harassment, and hate speech.[[21]](#footnote-21) It is clear then that pornography can constitute discourse in its own right, but pornography is also constituted by a myriad of discourses relating to social class, ethnicity, cultural social and political discourses and so forth. In other words, that which is depicted in pornographic films, books etc., not only constitutes discourse per se, but constitutes predictable stereotypical discourse. Much material that is either pornographic or obscene tends to typically depict women in ‘sexually submissive positions, in degrading circumstances, or as promiscuously wanton; it is produced primarily by men for men, constructing women’s bodies as objects for male use’.[[22]](#footnote-22)

These repeated depictions constitute a Foucaultian discourse of truth and knowledge, not only in terms of how bodies are supposed to sexually interact with each other, but also in terms of how the repeated portrayals constitute a discourse of the body itself. Thus the repeated portrayals of sexual acts and sexualised bodies ‘borders on an obsession with authenticity and the reality of the depiction. Care is taken to assure the consumer that ... everything [the viewer] might expect to be true of the women who appear in pornography is very true’.[[23]](#footnote-23) I am not of course suggesting that pornography ‘speaks the truth’, but if pornography can be thought of as presenting a Foucualtian regime of ‘truth’ about the nature of the body, it follows that the body in question is a body which is also constituted in very particular ways, most notably; it is constituted as a heterosexual body. That which is constituted as ‘acceptable’ pornography is pornography which is presented as heterosexual; pornography which is unacceptable pornography is presented as homosexual. Thus as Jackson rightly points out ‘ “real sex” is defined as a quintessentially heterosexual act, vaginal intercourse, and in which sexual activity is thought of in terms of an active subject and passive object’.[[24]](#footnote-24)

The rationale in using Foucault to analyse the legal regulation of pornography is not to seek to uncover any ‘truths’ about pornography, (I doubt there are any), but rather as Foucault puts it, to ‘account for the fact that it is spoken about, to discover who does the speaking, the positions and viewpoints from which they speak, the institutions which prompt people to speak about it and which store and distribute the things that are said.’[[25]](#footnote-25) In this sense, we as a society, continue to talk volumes about ‘it’, the pornography. However, the ‘it’ is a field of knowledge whose parameters have already been determined along fairly predictable lines, i.e. that of a heterosexual imperative. Further, the aim of the heterosexual imperative talking about pornography is neither to liberate the boundaries of the subject of pornography nor to question the subject of law. Rather, it is to control it, regulate it and to legislate (against) it. This is precisely what Foucault said of the discourse on sexuality in the 19th century, ‘what is peculiar to modern societies, in fact, is not that they consigned sex to a shadow existence, but that they dedicated themselves to speaking of it *ad infinitum*, while exploiting it as *the* secret.’ (Original emphasis).[[26]](#footnote-26) In this Foucaultian sense, the 21st century is arguably no too dissimilar from the 19th century. In many respects, pornography is ‘always’ being talked about – it is rarely out of the newspapers, portrayed or discussed on television and radio, and the internet.[[27]](#footnote-27) This ‘presence’ is itself a discourse which produces an accepted ‘truth’ about the subject. Thus, although we as society are ‘always’ talking about pornography, the discourse is highly regulated along pretty familiar lines as mentioned above. Therefore Foucault’s methodological analysis of modern society as one of increasing surveillance, discipline, and control through the operation of bio-power, is a convincing methodological tool for analysing how ‘meanings’ and fields of knowledge such as ‘deviant’ pornography and obscenity come to be legally constructed and regulated. A Foucaultian analysis suggests therefore that it is the ever present discourse surrounding the ‘pornography problem’, which brings the problem into existence. The question of whether pornography is a harm or is harmful is not under direct consideration in a Foucaultian analysis. However, for some authors[[28]](#footnote-28), not only does pornography does represent a harm, it perpetuates a ‘harm’ due to masculine dominance and feminine subordination.[[29]](#footnote-29) Under this reasoning, pornography is ‘about’ eroticising inequality of power. Consequently, pornography is the sexual exploitation of power relationships of dominance and subordination; its purpose is to pleasure the powerful and therefore, pornography in and of itself is powerful. Butler rejects this view of pornography as inherently powerful. Whilst acknowledging that there are some forms of hate speech that should be prevented, Butler argues that the legal regulation of pornography is a misdirected action as the ‘ritual chain of hate speech cannot be effectively countered by means of censorship’.[[30]](#footnote-30) Therefore although pornography can be thought of as hate speech, it’s ‘power’ stems from the repetition of established norms. Butler is not therefore, in absolute terms, against any and all forms of censorship so much as she is concerned about highlighting some of the dangers of State regulation and control of sexualised imagery. For Butler, pornography is ‘phantasmic’,[[31]](#footnote-31) and the ‘speech’ of pornography results in that which is ultimately unrealizable.[[32]](#footnote-32) This means that any legal limitation of pornography acts to propagate the very ‘problem’ it seeks to outlaw and is doomed to failure because;

[T]he very rhetoric by which certain erotic acts or relations are prohibited invariably eroticises that prohibition in the service of a fantasy.[[33]](#footnote-33)

Instead of seeking to impose yet more legal limits, Butler suggests that we should instead seek less legal regulation of pornography arguing that avoiding legal regulation and limits on pornography would be subversive because it would result in less repetition of accepted norms of sexual expression and representation and consequently, of gendered identities. To constantly ‘reiterate’ is to impliedly accept pre-conceived notions of feminine and masculine identity. With regard to pornography and obscenity, a Butlerian analysis would suggest therefore that the nature of performativity brings into being that which it names. Repeated attempts to control or legislate for extreme pornography bring extreme pornography into existence. At this point in the discussion, the question might be raised to the effect that if there is a repetition, was there an original iteration? I suggest that this question is a distraction. It does not further our understanding of the legal regulation of pornography to ask about the ‘first’ law on pornography. Whilst we might be able to point to the first statue which dealt with pornography or obscenity, that statute was still based upon notions of what the law considers as constitutive of ‘normalcy’ and ‘appropriateness’, and such a statute can be argued to be a repetition of existing constructions of appropriate sexual expression. Rather, it is the continuing iterations, recitation and performativity that constitute the production of identity. Butler’s conception of ‘performativity’ is the idea that the ‘it’ is created when the idea of it is repeatedly performed. In the context of this article, the ‘it’ is pornography and obscenity. If something is repeated and performed enough times, it acquires the status of ‘truth’. When the State focuses its attention on the ‘need’ to reform the law (yet again) relating to pornography, that ‘truth’ becomes a certain type of speech – ‘the speech of the law’[[34]](#footnote-34) The speech of law acts as a form of censorship, simultaneously constituting and constructing the subject, ‘producing subjects according to explicit and implicit norms’.[[35]](#footnote-35) Thus, the State ‘does not simply censor or limit speech; rather, in the moment of censorship or limitation, it generates the speech that matters legally’.[[36]](#footnote-36) If discourse can bring the problem of pornography into existence (Foucault), and a repetition of speech acts can result in repetition of accepted norms of feminine and masculine identity (Butler), what then, are some of the implications for the sexual expression of same-sex sexualities?

**Implications for same-sex pornography?**

As with the creation of the categories ‘pornography’ and ‘obscenity’, the categories of identities of ‘homosexual’ and ‘heterosexual’ are created by the very discourses that seek to regulate them. The idea of the ‘homosexual’ ‘as a specific kind of social subject was produced, and could only make its appearance, within the moral, legal, medical and psychiatric discourses, practices and institutional apparatuses of the late nineteenth century, with their particular theories of sexual perversity.’[[37]](#footnote-37)

Pornography which doesn’t represent heteropatriarchal hegemony has long been made the subject of legal regulation and control. For example, *The* *Well of Loneliness* (1928), by Radclyffe Hall was declared obscene under the (then) common law test for obscenity set out in *R* v *Hicklin* (1868)L.R. 3 Q.B. 360, and subsequently banned. The ‘Hicklin test’ stated that an object would be judged obscene if it had the tendency to;

[D]eprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort might fall.’[[38]](#footnote-38)

The (then) Attorney General, Sir Thomas Inskip, described the book as ‘propaganda for the practice which has long been known as Lesbianism… it is corrupting and obscene and its publication is a misdemeanour.’[[39]](#footnote-39) The resultant publicity which surrounded the publication of the book, led to the subject of lesbianism being talked about in a way which would most probably never have happened if there had been no publication. This was born out by a Home Office memo which stated that ‘It is notorious that the prosecution of *The Well of Loneliness* resulted in infinitely greater publicity about lesbianism than if there had been no prosecution.’ [[40]](#footnote-40) As pointed out by Robertson, the banning and/or prosecution of that which is deemed to be obscene, ‘provides a rich and comic tapestry about the futility of legal attempts to control sexual imagination’.[[41]](#footnote-41)

One of the many questions that legal regulation poses for same sex pornography is whether it can act as a site of resistance to the dominant heterosexual ideology or whether it merely repeats and imitates patriarchal heteronormativity. In *Excitable Speech*, Butler argues that there is the possibility that the speech acts concerned (in this case same sex pornography), have the potential to perform alternative meanings and that this may be a more productive way forward than more legislation.[[42]](#footnote-42) Other authors, such as Weeks, suggest that pornography can be empowering; that lesbian and gay pornography offers images of desire which a hostile society would deny, and therefore it offers a real encouragement for a positive sense of self.[[43]](#footnote-43) To a similar extent, Henderson agrees, arguing that lesbian pornography ‘may in and of themselves constitute acts of resistance against heteropatriarchal hegemony’ and can help lesbians to ‘affirm’ its legitimacy.[[44]](#footnote-44) Stoltenberg on the other hand, argues that pornography perpetuates the very subordination and domination that stand in the way of sexual justice.[[45]](#footnote-45) In this respect, he argues that all pornography whether heterosexual or homosexual is homophobic, imbued as it is by notions of patriarchal misogyny.[[46]](#footnote-46) Stychin takes a slightly different approach suggesting that some commentators seem unable to engage in any kind of reading of gay male pornography, other than through the lens of degradation; ‘Gay male porn is condemned because it represents a transgression to the laws of male power’.[[47]](#footnote-47) Could it be that the prosecution of Michael Peacock represents the heteropatriarchal desire to prosecute ‘alternative’ sexual orientations?

**Prosecuting same sex pornography and Peacock**

Michael Peacock had been selling DVDs (‘gay, straight, bi and trans’), through his own website (which also promoted his services as a male escort), and in a London-based gay magazine called ‘*Boyz’*. A specialist branch of the London Metropolitan Police Service called the Human Exploitation and Organised Crime Command (SCD9)[[48]](#footnote-48), saw the advert and arranged (undercover) to visit Peacock’s London flat and buy five of the most popular fisting DVDs. After watching the DVDs, they arrested Peacock. In December 2009, Michael Peacock was charged under the Obscene Publications Act 1959 for allegedly distributing ‘obscene’ ‘gay’ DVDs, which, inter alia, featured fisting, urolagnia and BDSM. After a four-day trial at Southwark Crown Court, Peacock was unanimously acquitted by the jury in January 2012. The portrayal of these activities in DVDs was something that the Police and ultimately, the Crown Prosecution Service believed would ‘deprave or corrupt’ those individuals who saw them. In other words, homosexual pornography did not ‘fit’ within ‘[s]ociety’s view of appropriate behaviour for men and for women’[[49]](#footnote-49) as it did not conform to the ‘heterosexual complementarity of bodies’.[[50]](#footnote-50) A male heterosexual body must perform its masculinity in specific ways and engaging in any activity (whether sexual or not), that does not conform to socio-legal ideals of heterosexual masculinity render any such man as deviant or the ‘Other’[[51]](#footnote-51). As noted by Doherty and Anderson; ‘[t]he idealised heterosexual male is constructed as potent and non-permeable and “normal” sexual activity is strictly defined as penetration of the female body by the phallus.’[[52]](#footnote-52) Material which is regarded as either pornographic or obscene is made the subject of legal regulation and control as it contravenes notions of heteropatriarchal hegemony. The prosecution of Michael Peacock would ‘fit’ with this narrative, representing a ‘tradition’ of the prosecution of gay and lesbian pornography in which obscenity and pornography continue to be legally regulated along heteropatriarchal norms. Applying both a Foucaultian and Butlerian approach it becomes clear that same sex pornography has the potential to act as a site of resistance; ‘as soon as there’s a relation of power there’s a possibility of resistance.’[[53]](#footnote-53)

The question of what constitutes ‘appropriate’ expressions of sexuality was integral to the prosecution’s case in *R* v *Peacock.* I now turn therefore, to the question of how these issues play out in the legal understanging(s) of obscenity and pornography as they are currently defined. Such an examination will help to expose how current legal thinking constructs a particular discourse of ‘meaning’; ‘truth’ and ‘knowledge’ regarding what is, and what is not, acceptable. The case of *R v Peacock* [2012] was a Crown Court decision given in January 2012. Crown Court cases do not set precedents as a jury’s finding is a matter of a fact, not law. Despite this however; the case is never-the-less immensely significant in the context of the development of the legal discourse relating to both obscenity and pornography. The Peacock case was the first time for a number of years that the test for obscenity had been put before a jury and Michael Peacock is the only person in recent times to have pleaded *not* guilty to a charge under the Obscene Publications Act 1959 *and won*.[[54]](#footnote-54) A brief understanding of the test for obscenity has been given earlier on in this article, but it is worth repeating Section 1 of the Obscene Publications Act 1959 which states;

an article shall be deemed to be obscene if its effect or (where the article comprises two or more distinct items) the effect 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 relevant circumstances, to read, see or hear the matter contained or embodied in it.

According to *R* v *Penguin Books* [1961][[55]](#footnote-55), ‘deprave’ means ‘to make morally bad, to debase or to corrupt morally’, and ‘corrupt’ means ‘to render morally unsound or rotten, to destroy the moral purity or chastity, to pervert or ruin a good quality; to debase; to defile.’[[56]](#footnote-56) Importantly, what is required is to examine the *effect* of obscene articles on the mind. The Obscene Publications Act 1959 does not effectively define what constitutes ‘obscene’, relying instead on the common law understanding as devised in *Hicklin*.[[57]](#footnote-57)

Part of the prosecution’s case in *R* v *Peacock* was that the material could ‘deprave and corrupt’ those who came into contact with it; that Peacock had not concerned himself with the identity of his buyers and that a so called ‘innocent’ individual might buy one of the DVD’s ‘expecting something akin to Brokeback Mountain and instead find themselves inadvertently inspired to engage in a bout of fisting instead’.[[58]](#footnote-58) Although the Crown Prosecution Service (CPS) guidance states that it is impossible to define all types of activity which may be suitable for prosecution’, they never the less produced a revised, but still ‘curiously arbitrary list’[[59]](#footnote-59) in 2010 of material they most commonly prosecute[[60]](#footnote-60) including:

* sexual act with an animal;
* realistic portrayals of rape;
* sadomasochistic material which goes beyond trifling and transient infliction of injury;
* torture with instruments;
* bondage (especially where gags are used with no apparent means of withdrawing consent);
* dismemberment or graphic mutilation;
* activities involving perversion or degradation (such as drinking urine, urination or vomiting on to the body, or excretion or use of excreta);
* fisting.

The acquittal of Peacock is likely to mean that fisting and urination are likely to be removed from the above list and placed into the list of activities will, according to the CPS, will ‘not normally’ result in proceedings.[[61]](#footnote-61) In other words, the material criminalised by the OPA will now much more closely resemble the list of activities prohibited under s.63 of the CJIA 2008. These lists have still not been updated since peacock’s acquittal.

The actual conduct of the trial itself is a further illustration of how discourse produces a regime of truth. The trial consisted of many explicit explanations of various sexual techniques and positions – it had to, for the question of whether such acts were likely to deprave and corrupt and were therefore obscene were questions of fact and could only be answered by the jury. By bringing the prosecution, it was inevitable that such explicit discussions would take place in court – effectively engaging in a discussion of whether the particular representation was ‘normal’ or not, the State has inadvertently opened up a space where descriptions of these acts are compulsorily discussed in public. This is reminiscent of not only Foucault’s suggestion that the discourse in court produces a discourse of truth, but also Butler’s idea that repetitive performativity – the act of speaking brings it into existence. At some point during preparation for the trial, the CPS lawyers must have made an active choice as to which expert witnesses would be called (or not called); what material was brought in to court, and what would be shown to the judge and jury (or not as the case may be). For example, the jury and the public gallery were shown hours of footage from some of the DVD’s and given a glossary of sexual terms, including ‘experienced bottom’ (which had to be explained to the Recorder); and various ‘experts’ were called to explain some of the various sexual acts seen in the DVD’s.[[62]](#footnote-62) This included a detailed discussion of fisting and the legal significance of penetration to the wrist bone (four fingers or five). It is argued here that these active choices made by the CPS constitute ‘discourse’ and thus the prosecution was not ‘about’ ‘sex’, per se, but rather about the portrayal of certain types of (disapproved) sex acts, and the acceptability or otherwise of those depicted acts. In other words, that which is depicted is discourse. Thus it ‘would seem that the law cannot decide whether saying is doing, or doing is saying’[[63]](#footnote-63). This is exemplified by the fact that notwithstanding the fact that all of the sexual acts portrayed in the DVD’s were legal (including some BDSM activities), the prosecution was brought because the CPS considered that the *depiction* of those sexual acts was obscene and therefore illegal. A useful comparison to make here might be the prosecution in the case of *R v Brown* [1994] 1 AC 212. The facts of this case are well known. A group of gay men, engaging in consensual BDSM were charged and convicted under sections 47 and 20 of the Offences Against the Person Act 1861 for engaging in sado-masochistic practices. The House of Lords decided, by a three-to-two majority, that consent was not a valid defence to actual bodily harm incurred during BDSM sex.[[64]](#footnote-64) The judgment in *Brown* exemplifies what Rubin describes as the characterization of ‘sex acts according to a hierarchical system of sexual value’ in which BDSM sex constitutes a ‘despised sexual caste.’[[65]](#footnote-65) As a consequence she argues, those sex acts revealed by the House of Lords in *Brown* are constructed as ‘utterly repulsive and devoid of all emotional nuance ... a uniformly bad experience.’ This approach allows the House of Lords to dismiss the idea of consent as irrelevant; it ceases to be of overriding or even of primary importance; ‘some sex acts are considered to be so intrinsically vile that no one should be allowed under any circumstances to perform them’[[66]](#footnote-66), again reminiscent of not only the initial police investigation, but also the decision to prosecute and the decision taken by the CPS as to which evidence to show to the jury. It remains the case that there is no defence of consent to BDSM activities in England and Wales. Indeed the Government cited *Brown* as justification for criminalizing images of consensual acts, as part of its proposed criminalization of possession of extreme pornography.[[67]](#footnote-67)

**Differentiating between ‘obscenity’ and ‘pornography’**

Here, I feel it necessary to differentiate between the two understandings of ‘obscenity’ and ‘pornography’. It is important to remember that The OPA 1959 and 1964 were intended to regulate obscenity not pornography. It was not until the passing of s.63 CJIA 2008, that English and Welsh law defined a pornographic image as one which is of ‘such a nature that it must reasonably be assumed to have been produced solely or principally for the purpose of sexual arousal’.[[68]](#footnote-68) Although the concepts of obscenity and pornography have been substantially collapsed into one another, there is an historical distinction between the two, in other words, to be obscene the material did not necessarily have to be pornographic although it usually was. Under the test for obscenity under the OPA 1959 and 1964, the focus of the law is upon the *effect(s)* upon the viewer, not its content. In other words, the viewer must be likely to be depraved and corrupted by the material. This line of reasoning was drawn from the case of *R* v *Hicklin[[69]](#footnote-69)*, where the court stated that the test for obscenity was ‘whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall’.[[70]](#footnote-70) Thus the current legal framework requires that ‘acceptable’ sexual imagery ‘fit’ into existing moral categories of ‘harms’ or ‘wrongs’ in order to protect that particular individual’s moral values.

Regardless of whether the publisher or the possessor is targeted by the legislation, what is clear, is that the CJIA 2008 and the OPA 1959 target the possession and/or publication of certain kinds of ‘unacceptable’ sexual imagery and activities. Furthermore, in so doing, not only are the legislators and the courts engaging in a Foucaultian creation of a regime of truth, they do so because they see themselves as the guardians of public morality in society with courts having the power to ‘enforce the supreme and fundamental purpose of the law, to conserve not only the safety and order but also the moral welfare of the State’ (*Shaw* v *DPP*).[[71]](#footnote-71) In addition, it is not a merely that the legislators and courts set themselves up as moral guardians, but that they do so with (often) unquestioned reference to subjective morality which then subsequently justifies the criminalisation of those individuals who possess and/or publish the kinds of imagery portraying sexual activity falling outside of the heterosexual paradigm. As pointed out by Attwood and Smith;

As some images and practices previously associated with porn and obscenity become recategorized as chic, cool or unremarkable, others are relegated to the realm of the taboo. And increasingly, obscenity is refigured. ... [I]t is now imagined in relation to perversity.[[72]](#footnote-72)

Arguably therefore, legal provisions have a disproportionately negative impact on those who engage with ‘alternative’ forms of sexual expression, thus continuing to reinforce morality-based, rather than harm-based, standards in the legal responses to pornography. The CJIA 2008 for example, attempted to re-focus the legal gaze upon those who access ‘extreme’ materials. It is of course, impossible to know how many people actually access this material, but to date, there have been relatively few prosecutions. The government had originally stated that the legislation would impact on an extremely small number of individuals, estimating about 30 a year.[[73]](#footnote-73) However, the actual number has been significantly higher than this. Between July 2008 and November 2011 there were 2,236 cases of possession of extreme pornography (which reached a hearing). The vast majority of these charges related to possession of pornographic images of bestiality and in 2011 alone there were 1,337 prosecutions under the 2008 Act.[[74]](#footnote-74) This legal refocusing upon the ‘extreme’ is at the expense of a focus upon the majority of normalised sexualised imagery formed from a Foucaultian ‘regime of truth’. However, as explored earlier, extreme pornography does not by any means, constitute ‘all’ of the discourse surrounding our understandings of acceptable sex and sexuality. The possession of images considered to be ‘extreme’, forms only part of a complex composite picture of discursive identity production. In other words, images which are considered to be ‘extreme pornography’ or ‘obscene’ or indeed, a ‘ladsmag’; do form part of the Foucaultian conception of a regime of truth and results in a Butlerian reiterative discourse of repetition of ‘acceptable’ norms of sexual expression.

The legal focus in the 2008 CJIA on ‘extreme pornography’ and in the OPA on obscenity ignores the potentiality of sexual violence and in turn therefore, ignores its own contribution to normalisation of gendered identities. For example, research undertaken in America on the prevalence of physical and verbal aggression in pornographic films found that;

Of the 304 scenes analyzed, 88.2% contained physical aggression, principally spanking, gagging, and slapping, while 48.7% of scenes contained verbal aggression, primarily name-calling. Perpetrators of aggression were usually male, whereas targets of aggression were overwhelmingly female. Targets most often showed pleasure or responded neutrally to the aggression.[[75]](#footnote-75)

The presentations of these acts do not currently constitute images which fall within the remit of either ‘obscene character’[[76]](#footnote-76) or ‘extreme’, yet the prevalence and repetitive nature of these violent actions do contribute towards the normalisation of sexual and gendered identities.

**Why was s.63 of the CJIA 2008 passed?**

It was the murder of Jane Longhurst by Graham Coutts in 2003 which provided the initial impetus for the passing of the legislation. Coutts’ trial drew national interest[[77]](#footnote-77) and of particular interest was the evidence presented by the prosecution that Coutts possessed and watched a lot of internet violent pornography, particularly pornography which showed necrophilia and asphyxiation. The Government’s first response, in 2005, was to propose that it should be a criminal offence to possess extreme pornography depicting pornographic images of rape and ‘serious sexual violence and other obscene material’, including images of bestiality and necrophilia.[[78]](#footnote-78) The Government’s justification was to ‘send a message’ that those materials have no place in society as they might exacerbate problems of sexual violence.[[79]](#footnote-79) The Criminal Justice and Immigration Bill received Royal Assent on the 8th May 2008.[[80]](#footnote-80)

As mentioned, whilst the OPA 1959 and 1964 did not attempt to define pornography, the CJIA 2008 did define an ‘extreme pornographic image’ under s 63(2) as an image which is ‘both (a) pornographic, and (b) an extreme image’. The definition of the term ‘pornographic’ is set out in s 63(3) of the 2008 Act as one which must ‘reasonably be assumed to have been produced solely or principally for the purpose of sexual arousal’. Section 63(1) states: ‘It is an offence for a person to be in possession of an extreme pornographic image’. The term ‘extreme’ is defined in s 63(6) as ‘grossly offensive, disgusting or otherwise of an obscene character’. The definition of an extreme pornographic image in s 6(6)(b) is supplemented by s 63(6)(a) which requires that the image in question must also fall foul of s 63(7). In addition, as pointed out by McGlynn and Rackley, the phrase ‘obscene character’ is definitively reminiscent of the wording contained in the OPA 1959 Act.[[81]](#footnote-81) Significantly, for the first time, *the consumer* as opposed to *the producer* is criminalised.[[82]](#footnote-82) In other words, the CJIA 2008 outlaws the possession of a limited range of extreme pornographic material, whereas the OPA 1959 (as amended), made it an offence to publish any content whose effect will tend to deprave and corrupt its likely audience. It is irrelevant that the person into whose hands the publication may fall may already be corrupted; rather the aim of OPA 1959 is to ‘protect the less innocent from further corruption, the addict from feeding or increasing his addiction’ (See *DPP* v *Whyte*).[[83]](#footnote-83) The CJIA 2008 makes it clear that just because an image has a sexual dimension to it does not mean that it could reasonably be assumed to have been produced solely or principally for that purpose. Whether this particular threshold has been met will be an issue for the magistrate or jury to determine simply by looking at the image. It is not a question of the intentions of those who produced the image, nor is it a question of the sexual arousal of the defendant. Where an individual image is held in a person’s possession as part of a larger series of images, the question of whether it is pornographic will be determined by reference both to the image itself and also the context in which it appears in the larger series of images.

The original justification for the passing of s.63 CJIA 2008 was that watching extreme pornography may ‘encourage or reinforce interest in violent and aberrant sexual activity to the detriment of society as a whole’.[[84]](#footnote-84) This was despite the fact that the Government’s own consultation document had stated that there was no evidence of a link between violent pornography and sexual crime.[[85]](#footnote-85) Indeed, in the original consultation, the question asked by the government acknowledged this by asking; ‘In the absence of conclusive research results as to its possible negative effects, do you think that there is some pornographic material which is so degrading, violent or aberrant that it should not be tolerated?’[[86]](#footnote-86) This, as pointed out by Murray meant that the ‘Government signalled a departure from its commitment to evidence based policymaking’.[[87]](#footnote-87) In addition to a lack of causal evidence, arguments linking violent pornography and sexual crime deny responsibility to the perpetrators of sexual violence and simply offer them excuses. This leaves the perpetrators neither responsible nor accountable for their choice to use violence; removes their agency and their blameworthiness.[[88]](#footnote-88)

Further, to argue a causal link between the consumption of extreme pornography and the commission of violent acts is to argue that if extreme pornography did not exist, then sexual violence would simply disappear; an argument which is simplistic and naive. The added dimension to this point is Foucault’s regime of truth. As Foucault suggests, there is no absolute truth about a particular subject. Instead, there is what he termed a ‘regime of truth’.[[89]](#footnote-89) Thus, it may, or may not be ‘true’, that watching extreme pornography causes individuals to commit sexual crime, but if everyone believes this to be the case, and legislates against, and punishes those who produce/possess it, the consequences of this will produce a self-fulfilling prophecy – it will become ‘true’ for that society. Thus as Foucault argues;

Each society has its regime of truth, its “general politics” of truth: that is, the types of discourse which it accepts and makes function as true; the mechanisms and instances which enable one to distinguish true and false statements, the means by which each is sanctioned; the techniques and procedures accorded value in the acquisition of truth; the status of those who are charged with saying what counts as true’.[[90]](#footnote-90)

Arguably there, the Government in ignoring empirical evidence about the causal link between ‘watching’ and ‘doing’, created its own regime of truth. It would appear that the government *wanted* there to be a causal link between consumption of extreme pornography and the commission of sexually violent acts and introducing a piece of legislation based upon that assumption is to actively participate in the creation of a Foucaultian regime of truth. Research commissioned by the Home Office (termed the ‘Rapid Evidence Assessment’), found only a tenuous link between watching extreme pornography and sexually violent acts. However, it was clear that the ‘desire to censor extreme pornography was clearly premised on notions of taste.’[[91]](#footnote-91) The problem with notions of taste of course is that they demonstrate that the government were more concerned with legislating for what they thought of as ‘appropriate expressions of sexuality than with harm against women.’[[92]](#footnote-92) Again, echoing McGlynn and Rackley, images of sexual violence against women are unlikely to form the basis of a prosecution under the OPA 1959 and 1964 given the result of the Peacock case. In this limited sense, therefore, images of sexual violence against women do not currently constitute images which are of an ‘obscene character’.[[93]](#footnote-93) However, it is still open for the CPS to bring further prosecutions if they believe that they can convince a jury such images are likely to deprave and corrupt.[[94]](#footnote-94)

It is suggested here that the CJIA 2008 was not designed to prevent harms against women and even if it was, banning extreme pornography would not protect women from harm or violence. Addressing the violence done to women in a meaningful way would entail addressing ‘the particular structural factors and material realities which contribute to women’s risk of violent attack and men’s propensities to violence’.[[95]](#footnote-95) As stated earlier, between July 2008 and November 2011 there were 2,236 cases of possession of extreme pornography (which reached a hearing). The vast majority of these charges related to possession of pornographic images of bestiality,[[96]](#footnote-96) not to violence against women or rape, suggesting that the law has significantly lost sight of what McGlynn and Rackley argue should be the focus of the law on extreme pornography, raising ‘significant questions about the aim and scope of the new measures’.[[97]](#footnote-97) The original stated aims of the CJIA 2008 of censoring any pornography that depicts ‘serious violence towards women and men’[[98]](#footnote-98) has not been upheld as evidenced by the failed prosecution of Simon Walsh in 2012.[[99]](#footnote-99) Walsh’s prosecution came after Peacock’s acquittal. Simon Walsh was a successful barrister; a City of London alderman, a magistrate and one of Boris Johnson's appointees on the London Fire Authority. His prosecution under s.63 of the CJIA 2008 Act is believed to be the first to address whether images of anal fisting, a sexual practice which is legal, and urethral sounding, are extreme pornography. He was charged with five charges of being in possession of extreme pornography. The jury found him unanimously found not guilty, in 90 minutes, at Kingston Crown Court in August 2012.[[100]](#footnote-100) The rationale for bringing the prosecution was, as stated by the CPS as follows;

This case was not about the practice itself, but was based on the evidence of medical experts who said the way the acts were performed was likely to cause serious injury or harm.[[101]](#footnote-101)

The reason given in the Walsh case has clearly nothing to do with the original stated aims of the CJIA 2008 of censoring any pornography that depicts ‘serious violence towards women and men’.[[102]](#footnote-102) Thus by ‘inventing’ and then prosecuting the category of extreme pornography, the State is not only creating a ‘regime of truth’ about ‘excluded and delegitimated “sex” ‘[[103]](#footnote-103) but it is also, by implication, creating a regime of truth about what constitutes ‘non-extreme’ pornography – i.e. that which is acceptable, permitted and ‘normal’.

**Some conclusions**

Both the OPA 1959/1964 and the CJIA 2008, make claims to truth regarding ‘acceptable’ sexual activity per se and the portrayal of sexual activity. The repeated attempts by law to control or legislate that which is obscene or (extremely) pornographic, results in a Butlerian notion of performativity; it brings the notions of obscenity and extreme pornography into existence. I suggest that both statutes were never ‘fit for purpose’, even when ‘brand new’. The unsuccessful prosecution of Michael Peacock and Simon Walsh exposed yet again that the legislation surrounding both obscenity and pornography is unnecessary, out of date and completely ill-equipped to address the problem(s) it set out to address. It is notable that there appears to be a complete unawareness on the part of the legislators that legislation concerning obscenity and pornography is discourse and as such, it brings into existence the very problem they are attempting to address. Further, it fails to acknowledge other significant issues such as the potentiality for ‘cultural harm’ present in the portrayals of sexual violence against women.[[104]](#footnote-104) With regard to the OPA 1959/1964, I would suggest that this is largely because it makes a crime of publishing material which features sexual acts which are not illegal in themselves. This view was also taken by Myles Jackman, the solicitor who acted for Peacock, stated after the trial that;

This could be the final nail in the coffin for the Obscene Publications Act in the digital age because the jury's verdict shows that normal people view consensual adult pornography as a part of everyday life and are no longer shocked, depraved or corrupted by it.[[105]](#footnote-105)

However, the problem goes further than just a question of whether the OPA 1959/1964 and the CJIA 2008 are fit for purpose. The ‘norms’ contained within these statutes as to what constitutes acceptable pornography (heterosexual) and unacceptable (homosexual) can be seen in the decision to prosecute Peacock and Walsh – both gay men. The decision to prosecute was arguably not so much a matter of overt homophobia on the part of the police and the CPS, but rather a matter of heteronormative compliance. Thus the CPS and the police are not only active participants in constituting the ‘regime of truth’ of certain sexual acts by the decisions they take, they also sustain and perpetuate these social constructions.[[106]](#footnote-106) Ashford makes a similar point, but emphasises that the decisions taken by the police cannot simply be viewed as ‘pro heterosexual’ or ‘anti homosexual’, rather, that they should be viewed as being made through the lens of heterosexual ‘normality’.[[107]](#footnote-107) Therefore, in taking the decision to prosecute Michael Peacock, the CPS, in the guise of the State, imposed a ‘further violence of its own. And if the court begins to decide what and what is not violating ..., that decision runs the risk of constituting the most binding of violations’.[[108]](#footnote-108) Whilst it maybe a ‘good thing’ that the OPA may be reformed, the question of what might replace it should receive careful consideration. Whilst it might be attractive to use a ‘harm based’ test, this is not without its problems. The application of the harm test in Canada has shown that the heterosexual hegemony may very well seek to prosecute only ‘alternative’ sexual orientations. See for example the ramifications of the Canadian case of *R* v *Butler* [1992] 1 S.C.R for the targeting of lesbian and gay pornography in the *Little Sisters Bookshop and Art Emporium* v *Canada (Minister for Justice)* [2000][[109]](#footnote-109). In *R* v *Butler* the court applied MacKinnon’s theory that pornography is a form of hate speech and therefore sex discrimination in agreeing that pornography is exploitation and that pornography inflicts harm on women. Although Mackinnon distanced herself from future applications and interpretations of the *Butler* decision, stating that there should be no distinction between gay and heterosexual pornography, it would appear that gay and lesbian pornography has indeed been the focus of the law’s attention. In the *Little Sisters* case, the court acknowledged that Canadian Customs officials had been discriminatory in their application of the custom rules in confiscating what they considered to be obscene pornography. It was gay pornography which was seized and confiscated rather than straight pornography.

This is not to suggest however, that reforming current law or introducing new law would ‘fix’ the problem. I would suggest that such an approach would be naive. A Foucaultian approach suggests that as law operates upon a repressive model of power,[[110]](#footnote-110) resorting to ‘more law’ in order to solve the problem of pornography will quite possibly be counter-productive. However, within these narrow lines, I would suggest that some approaches to law reform are more desirable than others. If it is decided by the government to reform the OPA 1959 and the CJIA 2008, what is likely to replace it? Any legislative reform will probably be based upon morality, whether overtly or otherwise. To paraphrase Butler, by focusing the State’s attention on the ‘need’ to reform the law (yet again) on pornography, hate speech only becomes hate speech by yet another act of speech - the speech of the law’.[[111]](#footnote-111) Arguably, it is the so called ‘everyday’ sexualised images which are productive not only in terms of the ‘norms’ surrounding sex and sexuality but also of the regimes of truth. These are the images that are seen every day, hundreds of times by most of the population. So called ‘extreme’ pornography and ‘obscene’ imagery are not viewed by people in quite the same numbers as say, the likes of the infamous ‘Page 3’. When legal discourse continues to regulate pornography and obscenity through the overt or covert lens of morality; it is the law itself which becomes the producer and creator of obscenity and ‘extreme’ pornography.

*R* v *Peacock* was concerned with questions of morality and the idea that some people need protecting from certain visual images of certain sex acts. Clearly the jury decided in this case that the acts portrayed in the DVD’s were not obscene and therefore no one’s morals needed protection. Whilst there are disadvantages to the harm based approach as highlighted by the Canadian *Little Sisters* case, it is a better approach than that taken by the current morality based approach. It is to be hoped that the drafters of any future possible legislation agree with the jury in *R* v *Peacock*.

**Bibliography**

* Ashford, C., (2012) ‘Heterosexuality, Public Places, and Policing’, in Johnson, P., and Dalton, D., (eds) (2012) *Policing Sex*. London: Routledge.
* Attwood, F., and Smith, C., (2010) ‘Extreme Concern: Regulating ‘Dangerous Pictures’ in the United Kingdom, *Journal of Law and Society*, Volume 37, Number 1, March 2010.
* Bridgeman, J., Millns, S., (1998) *Feminist Perspectives on Law: Law's Engagement with the Female Body*. London: Sweet and Maxwell
* Butler, J., (1993) *Bodies that Matter: On the Discursive Limits of Sex*. New York: Routledge.
* Butler, J., (1997) *Excitable Speech: A Politics of the Performative*. London: Routledge.
* Butler, J., (1990) ‘The force of fantasy: Feminism, Mapplethorpe, and discursive excess’. *Difference: A Journal of Feminist Cultural Studies* 2(2): 105.
* Carline, A., (2011) ‘Criminal justice, extreme pornography and prostitution: Protecting women or promoting morality?’, *Sexualities*, 14: 312.
* Cline, S., (1998). *Radclyffe Hall: A Woman Called John*. Woodstock & New York: The Overlook Press.
* Duff, B., (2010) ‘Confession, sexuality and pornography as sacred language’, *Sexualities* 13(6).
* Dworkin and Mackinnon (1994) ‘Regarding Canadian Customs and Legal Approaches to Pornography’. Available at:

<http://www.nostatusquo.com/ACLU/dworkin/OrdinanceCanada.html>.

Easton, S., (1995) “Pornography as Incitement to Sexual Hatred” 3 *Feminist Legal Studies* 185.

* Edwards, S., (1996) *Sex, Gender and the Legal Process*.
* Fishwick, E., (1988) ‘Sexual Assault and Criminal Justice: A Comparative Perspective on Legislation, Policing and Research’, in Findlay, M., and Hogg, R., (eds) *Understanding Crime and Criminal Justice* (Sydney: Law Book Co.).
* Foucault, M., (1978) *The History of Sexuality: An Introduction* (New York: Vintage). Trans. Robert Hurley.
* Foucault, M., (1991) *Discipline and Punish: the birth of a prison*. London, Penguin.
* Foucault, M., (1994) Truth and Power, in *Essential Works*, Vol. 3.
* Hall, S., (1997) ‘The Work of Representation’, in S. Hall (ed.) *Representation: cultural representations and signifying practices*. London Sage in association with the Open University.
* Home Office (2005) *Consultation: on the Possession of Extreme Pornography*. London: Home Office.
* Henderson, Lisa, ‘Lesbian Pornography: Cultural Transgression and Sexual Demystification,’ in *New Lesbian Criticism: Literary and Cultural Readings*, ed. Sally Munt (New York: Columbia University Press, 1992)
* Jackson, E., (1995) “The Problem with Pornography: A Critical Survey of the Current Debate”, 3 *Feminist Legal Studie*s 47.
* Jackson, S. (1996) ‘Sexual Skirmishes and Feminist Factions: Twenty-Five Years of Debate on Women and Sexuality’, in S. Jackson and S. Scott (eds) *Feminism and Sexuality a Reader*. Edinburgh: Edinburgh University Press.
* Jeffreys, S., (2004) ‘Prostitution as a Harmful Cultural Practice’ in Whisant, R., and Stark, C., *Not for Sale: Feminists resisting Prostitution and Pornography*. Melbourne: Spinifex Press.
* Lacey, N., (2007) ‘Legal constructions of crime’, In Maguire, Mike, Morgan, Rod and Reiner, Robert, (eds.) *The Oxford handbook of criminology* (Oxford University Press, London).
* Lloyd, M., (2007) *Judith Butler: From Norms to Politics*, Polity Press
* MacKinnon, C., (1991) *Towards a Feminist Theory of the State*. Cambridge, Massachusetts: Harvard University Press.
* MacKinnon, C.A., (1984). "Francis Biddle's sister: pornography, civil rights, and speech". *Feminism Unmodified: Discourses on Life and Law*. Harvard University Press. (1987).
* MacKinnon, C., ‘Turning Rape into Pornography: Postmodern Genocide.’ In *Mass Rape: The War Against Women in Bosnia-Herzegovina*, edited by A. Stiglmayer. Lincoln: Univ. of Nebraska Press, 1994.
* McGlynn, C., and Rackley, E., (2007) ‘Striking a Balance: arguments for the criminal regulation of extreme pornography,’ *Criminal Law Review* 677.
* McGlynn, C., and Rackley, E., (2009) ‘Criminalising extreme pornography: a lost opportunity’, 4 *Criminal Law Review* 245.
* Murray, A.D., (2009) ‘The Reclassification of Extreme Pornographic Images’, *The Modern Law Review*, 72(1)
* O’Donovan, K., (1985) ‘Transsexual Troubles: The Discrepancy between Legal and Social Categories’, in Susan Edwards, S., *Gender, Sex and the Law* (Croom Helm).
* Robertson, G., (1993) *Freedom, the Individual and the Law* 9th Edn, Penguin.
* Salih, S., (2002) Judith Butler (Routledge Critical Thinkers).
* Smart, C., (2000) *Feminism and the Power of Law*.
* Stoltenberg, J., (1990) *Refusing to be a Man: Essays on Sex and Justice*, Routledge; 2nd edition.
* Stychin, C.F., (1995) *Law’s Desire: Sexuality and the Limits of Justice*. Routledge: London.
* Taylor, C., (2009) ‘Pornographic Confessions? Sex Work and Scientia Sexualis in Foucault and Linda Williams’, *Foucault Studies*, No. 7, pp18-44.
* Walby, K., and Smith, A., (2012) ‘Sex and Sexuality under Surveillance: Lenses and Binary Frames’, in Johnson, P., and Dalton, D., (eds) (2012) *Policing Sex*. London: Routledge.
* Weedon, C., (1987) Feminist Practice and Poststructuralist Theory, Oxford: Blackwell.
* Wells, C., and Quick O., (2010) Reconstructing Criminal Law, Text and Materials, 4th edn, Cambridge: Cambridge University Press.
* Wosnitzer, R., and Bridges (2007), ‘Aggression and sexual behavior in best-selling pornography: A content analysis update’. Paper presented at the 57th Annual Meeting of the International Communication Association, San Francisco, CA.
1. K. Walby and A. Smith, (2012) “Sex and Sexuality under Surveillance: Lenses and Binary Frames”, in P. Johnson and D. Dalton, (eds) *Policing Sex.* (London: Routledge 2012) 53. [↑](#footnote-ref-1)
2. ‘Law, Justice and Journalism, January 13th 2012. “R v Peacock: landmark trial redefines obscenity law,” ‘ < <http://lawjusticejournalism.org/2012/01/13/r-v-peacock-landmark-trial-redefines-obscenity-law/>> last accessed 7th June 2013. See also The Guardian 6th January 2012 ‘Obscenity trial: the law is not suitable for a digital age’. [↑](#footnote-ref-2)
3. See for example, BBC News, 22nd July 2013, ‘Online pornography to be blocked by default, PM announces’; *The Telegraph* 22nd July 2013 ‘Online porn: David Cameron declares war’, *The Guardian* 21st July 2013 ‘Cameron cracks down on 'corroding influence' of online pornography’. [↑](#footnote-ref-3)
4. C. Taylor, ‘Pornographic Confessions? Sex Work and Scientia Sexualis in Foucault and Linda Williams’, *Foucault Studies*, No. 7, (2009) pp18-44, 19. [↑](#footnote-ref-4)
5. K. Walby and A. Smith, “Sex and Sexuality under Surveillance: Lenses and Binary Frames”, in P. Johnson and D. Dalton, (eds) (2012) *Policing Sex.* (London: Routledge), 53. [↑](#footnote-ref-5)
6. First formulated in *Gender Trouble* (London: Routledge 1999). [↑](#footnote-ref-6)
7. J. Butler, *Excitable Speech: A Politics of the Performative, (*London:Routledge, 1997) [↑](#footnote-ref-7)
8. Under s63 of the Criminal Justice and Immigration Act 2008. [↑](#footnote-ref-8)
9. C. McGlynn and E. Rackley (2013) ‘Criminalising Extreme Pornography: Five Years On’, Inherently Human <http://inherentlyhuman.wordpress.com/2013/05/21/criminalising-extreme-pornography-five-years-on-mcglynn-and-rackley-on-the-extreme-pornography-provisions-a-misunderstood-and-misused-law/> [↑](#footnote-ref-9)
10. M. Foucault, *Discipline and Punish: the birth of a prison*. (London: Penguin 1991). [↑](#footnote-ref-10)
11. C. Wells, and O. Quick, *Reconstructing Criminal Law, Text and Materials*, 4th edn, (Cambridge: Cambridge University Press 2010) 5. [↑](#footnote-ref-11)
12. N. Lacey, (2007) ‘Legal constructions of crime’, In Maguire, Mike, Morgan, Rod and Reiner, Robert, (eds.) *The Oxford handbook of criminology* (Oxford University Press, London), at page 193. [↑](#footnote-ref-12)
13. N. Lacey, (2007) ‘Legal constructions of crime’, In Maguire, Mike, Morgan, Rod and Reiner, Robert, (eds.) *The Oxford handbook of criminology* (Oxford University Press, London), at page 196. [↑](#footnote-ref-13)
14. E. Fishwick, (1988) ‘Sexual Assault and Criminal Justice: A Comparative Perspective on Legislation, Policing and Research’, in Findlay, M., and Hogg, R., (eds) *Understanding Crime and Criminal Justice* (Sydney: Law Book Co.), at page 170. [↑](#footnote-ref-14)
15. M. Foucault *The History of Sexuality: An Introduction* (New York: Vintage 1978) 101. [↑](#footnote-ref-15)
16. S. Hall, ‘The West and the Rest: discourse and power in S. Hall and B. Gieben (eds) *Formations of Modernity*, (Cambridge Open University Press, 1992), 291. [↑](#footnote-ref-16)
17. C. Weedon *Feminist Practice and Poststructuralist Theory* (Oxford: Blackwell 1987) 108. [↑](#footnote-ref-17)
18. The £49.97 ‘Peekaboo’ Pole Dancing kit included an eight foot long pole; frilly garter; a DVD to demonstrate dance moves; fake money and thongs. [↑](#footnote-ref-18)
19. *The Daily Telegraph*, 6th April 2011, ‘Jack Wills 'sexual' catalogue: how sex pushes the boundaries in retail’. [↑](#footnote-ref-19)
20. ‘Just the Women’ (2012) Object, Equality Now, Eaves and End Violence Against Women, submission to the Leveson Inquiry. [↑](#footnote-ref-20)
21. C.A. MacKinnon (1984). "Francis Biddle's sister: pornography, civil rights, and speech". Feminism Unmodified: Discourses on Life and Law. (Harvard: Harvard University Press 1987). [↑](#footnote-ref-21)
22. J. Fedler (1996), ‘A feminist critique of pornography.’ In J. Duncan (ed.), *Between Speech and Silence*, Ch. 2. S. Africa: Freedom Expression Institute. [↑](#footnote-ref-22)
23. B. Duff, (2010) ‘Confession, sexuality and pornography as sacred language’, *Sexualities* 13(6) 690. [↑](#footnote-ref-23)
24. S. Jackson, (1996) ‘Sexual Skirmishes and Feminist Factions: Twenty-Five Years of Debate on Women and Sexuality’, 23 [↑](#footnote-ref-24)
25. M. Foucault, *The History of Sexuality: An Introduction* (New York: Vintage 1978). Trans. Robert Hurley, 11. [↑](#footnote-ref-25)
26. M. Foucault, *The History of Sexuality: An Introduction* (New York: Vintag, 1978). Trans. Robert Hurley, 35. [↑](#footnote-ref-26)
27. See for example, *‘Pornography addiction leads to same brain activity as alcoholism or drug abuse, study shows’*, *The Independent* 22nd September 2013; *‘Ofcom staff make thousands of attempts to access online pornography’*, *The Telegraph* 29th September 2013; *‘PM's porn filters plan 'ridiculous‘,* BBC News 3rd August 2013. [↑](#footnote-ref-27)
28. For example Dworkin and Mackinnon. [↑](#footnote-ref-28)
29. A. Dworkin, and C.A. Mackinnon, (1994) ‘Regarding Canadian Customs and Legal Approaches to Pornography’. Available at:

<http://www.nostatusquo.com/ACLU/dworkin/OrdinanceCanada.html>. [↑](#footnote-ref-29)
30. J. Butler, *Excitable Speech: A Politics of the Performative*. (London 1997) 102. [↑](#footnote-ref-30)
31. J. Butler, *Bodies that Matter,* 93. [↑](#footnote-ref-31)
32. J. Butler, *Bodies that Matter,* 93. [↑](#footnote-ref-32)
33. J. Butler, “The force of fantasy: Feminism, Mapplethorpe, and discursive excess” (1990) *Difference: A Journal of Feminist Cultural Studies* 2(2): 105, 111. [↑](#footnote-ref-33)
34. J. Butler, *Excitable Speech,* 96. [↑](#footnote-ref-34)
35. J. Butler, *Excitable Speech,* 113. [↑](#footnote-ref-35)
36. M. Lloyd, *Judith Butler: From Norms to Politics*, (Chichester: Polity Press 2007), 129. [↑](#footnote-ref-36)
37. S. Hall, “The Work of Representation”, (1997) in S. Hall (ed.) *Representation: cultural representations and signifying practices.* (London: Sage, in association with the Open University) 74. [↑](#footnote-ref-37)
38. Per Cockburn CJ at page 369. [↑](#footnote-ref-38)
39. Cited in S. Cline, *Radclyffe Hall: A Woman Called John*. (Woodstock & New York: The Overlook Press 1998) 265. [↑](#footnote-ref-39)
40. A decision which appears to have been taken by a Home Office Official called J. F. Henderson, in papers released by the National Archive in October 2005. See ‘Lesbian fears over banned books’, BBC News Sunday, 2 October 2005. [↑](#footnote-ref-40)
41. G. Robertson, *Freedom, the Individual and the Law* 7th Edn, (Penguin, 1993) 213. [↑](#footnote-ref-41)
42. J. Butler, *Excitable Speech,*  97. [↑](#footnote-ref-42)
43. J. Weeks, 1985, 325. [↑](#footnote-ref-43)
44. L. Henderson, “Lesbian Pornography: Cultural Transgression and Sexual Demystification,” in *New Lesbian Criticism: Literary and Cultural Readings*, ed. Sally Munt (New York: Columbia University Press 1992) 178. [↑](#footnote-ref-44)
45. J. Stoltenberg, *Refusing to be a Man: Essays on Sex and Justice*, (London: Routledge 1990) 2nd edition,113. [↑](#footnote-ref-45)
46. J. Stoltenberg, *Refusing to be a Man: Essays on Sex and Justice*, (London: Routledge 1990) 2nd edn 113. [↑](#footnote-ref-46)
47. C. Stychin, *Law’s Desire: Sexuality and the Limits of Justice*. (London: Routledge 1995) 90. [↑](#footnote-ref-47)
48. SCD9 investigate, inter alia, human trafficking; obscene publications, nightclubs and vice. [↑](#footnote-ref-48)
49. K. O’Donovan, *Transsexual Troubles: The Discrepancy between Legal and Social Categories* (1985) cited in Susan Edwards, *Gender, Sex and the Law* (Croom Helm) 11. [↑](#footnote-ref-49)
50. J. Butler, *Gender Trouble: Feminism and the Subversion of Identity* (Routledge Classics 2006) xxiv, xxv [↑](#footnote-ref-50)
51. For example, it was not until the introduction of the Criminal Justice and Public Order Act 1994 that male rape was recognised as a crime in the UK. [↑](#footnote-ref-51)
52. Ussher (1997), Wood (2000) cited in K. Doherty, and I. Anderson, (2004) “Making Sense of Male Rape: Constructions of Gender, Sexuality and Experience of Rape Victims” *Journal of Community and Applied Social Psychology*, 2004, 14, 85, 95. [↑](#footnote-ref-52)
53. M. Foucault, (1978) 13. [↑](#footnote-ref-53)
54. Other examples might include *R* v *Penguin Books Ltd* [1961] *Criminal Law Review* 176, where the defendants were charged with publishing an obscene article (in the guise of *Lady Chatterley’s Lover*) and pleaded not guilty; they were ultimately acquitted. There are other instances where defendants have pleaded not guilty - see for example *R v Calder and Boyars* (1969) 1 QB 151 where the Court of Appeal quashed the conviction against the publishers of the book *Last Exit to Brooklyn* due to the absence of proper trial directions by the judge at first instance. See also the prosecution of the publishers of *Oz* magazine in case of *R v Anderson, Neville, Dennis and Oz* (1972) 1 QB 304, where on appeal, the convictions were overturned after the Court of Appeal found that the trial judge, Argyle J, had misdirected the jury. [↑](#footnote-ref-54)
55. *Criminal Law Review* 176. [↑](#footnote-ref-55)
56. *R* v *Penguin Books* [1961] *Criminal Law Review* 176, Bryne J at page 224. [↑](#footnote-ref-56)
57. See above at page 7. [↑](#footnote-ref-57)
58. C. Ashford, ‘Making a Fist of it’, <http://www.freedominapuritanage.co.uk/making-a-fist-of-it-the-law-and-obscenity/>. (2012) Last accessed 10th December 2013. [↑](#footnote-ref-58)
59. C. Ashford, ‘Making a Fist of it’, <http://www.freedominapuritanage.co.uk/making-a-fist-of-it-the-law-and-obscenity/>. (2012) Last accessed 10th December 2013. [↑](#footnote-ref-59)
60. Legal guidance on Obscene Publications for Crown Prosecutors <http://www.cps.gov.uk/legal/l_to_o/obscene_publications/> last accessed on 4th March 2014. [↑](#footnote-ref-60)
61. The list is as follows; actual consensual sexual intercourse (vaginal or anal); oral sex; masturbation; mild bondage; simulated intercourse or buggery and fetishes which do not encourage physical abuse. [↑](#footnote-ref-61)
62. ‘Michael Peacock's acquittal is a victory for sexual freedom’, *The Guardian*, 6 January 2012. [↑](#footnote-ref-62)
63. S. Salih, *Judith Butler (Routledge Critical Thinkers).* (2002) 110. [↑](#footnote-ref-63)
64. Their conviction was upheld by the European Court of Human Rights, see *Laskey* v *UK* (1997) 24 E.H.R.R. 39. [↑](#footnote-ref-64)
65. G. Rubin ‘Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality’, in C.S. Vance, ed.,

*Pleasure and Danger: Exploring Female Sexuality (*Boston: Routledge & Kegan Paul 1984) 267 at

Page 279. [↑](#footnote-ref-65)
66. G. Rubin ‘Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality’, in C.S. Vance, ed.,

*Pleasure and Danger: Exploring Female Sexuality (*Boston: Routledge & Kegan Paul 1984) 267 at

Page 291. [↑](#footnote-ref-66)
67. See C. McGlynn, and E. Rackley ‘The politics of porn’, 2007 *The New Law Journal*. [↑](#footnote-ref-67)
68. See also s.62 of the Coroners and Justice Act 2009, which states that an image is ‘pornographic’ if it is of such a nature that it must reasonably be assumed to have been produced solely or principally for the purpose of sexual arousal. [↑](#footnote-ref-68)
69. (1868) QB 360. [↑](#footnote-ref-69)
70. Per Cockburn at 371. [↑](#footnote-ref-70)
71. [1961] AC 220. [↑](#footnote-ref-71)
72. F. Attwood and C. Smith ‘Extreme Concern: Regulating ‘Dangerous Pictures’ in the United Kingdom, (2010) *Journal of Law and Society*, Volume 37, Number 1, March 2010, 186. [↑](#footnote-ref-72)
73. The Ministry of Justice quoted in *The Guardian* 26th January 2009 ‘Police will not target offenders against law on violent porn’. [↑](#footnote-ref-73)
74. CPS statistics regarding prosecutions under Section 63 of the CJIA 2008 available at <http://www.cps.gov.uk/publications/docs/foi_disclosures/2012/disclosure_2.pdf> last accessed 20th March 2014. [↑](#footnote-ref-74)
75. A.J. Bridges, R. Wosnitzer, E. Scharrer, C. Sun, and R. Liberman, ‘Aggression and sexual behavior in best-selling pornography: A content analysis update’, (2010) *Violence Against Women*, 16(10). [↑](#footnote-ref-75)
76. C. McGlynn E. Rackley, “Criminalising extreme pornography: a lost opportunity” (2009) 4 *Criminal Law Review* 245, (2009) 252. [↑](#footnote-ref-76)
77. See for example BBC News 4th July 2007 ' ‘Pervert' strangled music teacher’; *The Telegraph* 5th February 2004 ‘30 years jail for killer necrophiliac’; *The Guardian* 5th February 2004 ‘Killer was obsessed by porn websites’. [↑](#footnote-ref-77)
78. Home Office (2005) Consultation: on the Possession of Extreme Pornography. London: Home Office, paragraphs 37-39. [↑](#footnote-ref-78)
79. Home Office (2005) Consultation: on the Possession of Extreme Pornography. London: Home Office, paragraphs 34. [↑](#footnote-ref-79)
80. S.63 came into force on 26th January 2009. [↑](#footnote-ref-80)
81. C. McGlynn E. Rackley, “Criminalising extreme pornography: a lost opportunity” (2009) 4 *Criminal Law Review* 245, (2009) 252. [↑](#footnote-ref-81)
82. Although not in the context of child pornography. [↑](#footnote-ref-82)
83. [1972] 3 All ER 12. [↑](#footnote-ref-83)
84. Home Office (2005) Consultation: on the Possession of Extreme Pornography. London: Home Office, at para 9. [↑](#footnote-ref-84)
85. This was repeated again in the criminalisation of non-photographic pornographic images of children in the Coroners and Justice Act 2009. [↑](#footnote-ref-85)
86. Home Office (2005) Consultation: on the possession of extreme pornographic material, at para 31. [↑](#footnote-ref-86)
87. A.D. Murray, ‘The Reclassification of Extreme Pornographic Images’, (2009) *The Modern Law Review*, 72(1) 73-90. [↑](#footnote-ref-87)
88. A. Carline, ‘Criminal justice, extreme pornography and prostitution: Protecting women or promoting morality?’, (2011) *Sexualities* 14:312 318. [↑](#footnote-ref-88)
89. M. Foucault, ‘Truth and Power’, (1994) in *Essential Works*, Vol. 3 131. [↑](#footnote-ref-89)
90. M. Foucault, 1980, 131. [↑](#footnote-ref-90)
91. A. Carline, ‘Criminal justice, extreme pornography and prostitution: Protecting women or promoting morality?’ (2011) *Sexualities* 14:312 322. [↑](#footnote-ref-91)
92. A. Carline, ‘Criminal justice, extreme pornography and prostitution: Protecting women or promoting morality?’ (2011) *Sexualities* 14:312 325. [↑](#footnote-ref-92)
93. C. McGlynn E. Rackley, “Criminalising extreme pornography: a lost opportunity” (2009) 4 *Criminal Law Review* 245, 252. [↑](#footnote-ref-93)
94. The Department for Culture Media and Sport announced on 30th July 2013 that the government intend to amend the CJIA 2008 to make it a criminal offence to possess extreme pornography that depicts rape, see ‘Connectivity, Content and Consumers’. [↑](#footnote-ref-94)
95. Attwood, F., and Smith, C., ‘Extreme Concern: Regulating ‘Dangerous Pictures’ in the United Kingdom, (2010) *Journal of Law and Society*, Volume 37, Number 1, March 2010, 188. [↑](#footnote-ref-95)
96. Crown Prosecution Service figures, 2012. [↑](#footnote-ref-96)
97. C. McGlynn E. Rackley, “Criminalising extreme pornography: a lost opportunity” (2009) 4 *Criminal Law Review* 245, 250. Contrast this approach with the Scottish extreme pornography provisions which explicitly include 'rape/other non-consensual penetrative sexual activity', suggesting that the Scottish provisions are more focused on the harm of violence against women. [↑](#footnote-ref-97)
98. Home Office 2005: 5. [↑](#footnote-ref-98)
99. *The Guardian* 12th August 2012, ‘Simon Walsh: the vindictive persecution of an innocent man’ [↑](#footnote-ref-99)
100. Had he been found guilty he would have faced three years in custody and inclusion on the sex offenders' register. [↑](#footnote-ref-100)
101. Crown Prosecution Service spokesperson quoted in *The New Statesman*, ‘The shameful and nasty prosecution of Simon Walsh’, 8th August 2012. [↑](#footnote-ref-101)
102. Home Office 2005: 5. [↑](#footnote-ref-102)
103. J. Butler, *Bodies that Matter: On the Discursive Limits of Sex. (*New York: Routledge 1993) 15–16. [↑](#footnote-ref-103)
104. C. McGlynn, and E. Rackley, ‘Criminalising Extreme Pornography: A Lost Opportunity’ (2009) 4 *Criminal Law Review* 245-260, 256. However, contained within the Criminal Justice and Courts Bill 2014, is a proposal to extend the law on extreme pornography making the possession of pornographic images of rape a criminal offence. [↑](#footnote-ref-104)
105. BBC News, ‘Not guilty verdict in DVD obscenity trial’, 6th January 2012. [↑](#footnote-ref-105)
106. K. Walby, and A. Smith, “Sex and Sexuality under Surveillance: Lenses and Binary Frames”, in P. Johnson, and D. Dalton, (eds) (2012) *Policing Sex.* (London: Routledge 2012) 53. [↑](#footnote-ref-106)
107. C. Ashford ‘Heterosexuality, Public Places, and Policing’, in P. Johnson, and D. Dalton, (eds) (2012) *Policing Sex.* (London: Routledge 2012) 41. [↑](#footnote-ref-107)
108. J. Butler, *Excitable Speech: A Politics of the Performative*. (London: Routledge, 1997) 65. [↑](#footnote-ref-108)
109. 2 S.C.R 1120. [↑](#footnote-ref-109)
110. C. Taylor, ‘Pornographic Confessions? Sex Work and Scientia Sexualis in Foucault and Linda Williams’, (2009) *Foucault Studies*, No. 7, pp18-44, 19. [↑](#footnote-ref-110)
111. J. Butler, *Excitable Speech: A Politics of the Performative*. (London: Routledge, 1997) 96. [↑](#footnote-ref-111)