

JOINT COMMITTEE ON HUMAN RIGHTS

Criminal Justice and Courts Bill 2014

Evidence submitted by [Professor Clare McGlynn](#) and [Professor Erika Rackley](#)

Durham Law School, Durham University, 27 March 2014

1.0 Introduction

- 1.1 We welcome the Government's intent to extend the extreme pornography offence at section 63 of the Criminal Justice and Immigration Act 2008 (CJIA) to cover the possession of extreme images that depict rape and assault by penetration.
- 1.2 We are professors in the Law School at Durham University. We have particular expertise in the legal regulation of pornography, rape law and gender equality.¹ Our scholarship has shaped public debates on the legal regulation of pornography law,² and we are regular commentators in the broadcast and print media on these issues.³ In 2009, during discussions of the Scottish 'extreme pornography' provisions, the Scottish Justice Committee endorsed our argument that the use of the term 'obscenity' should be reviewed and that greater consideration should be given to the 'cultural harm' of extreme pornography.⁴
- 1.3 We outlined the basis on which we welcome the Government's proposals in our evidence to the House of Commons Public Bills Committee. We made five key recommendations in order to ensure both the effectiveness of the new law and that it targets culturally harmful material:
 - 1.3.1 We recommend the inclusion of a provision stating clearly that the 'realistic' portrayal of the act/s in question refers to both real and simulated images.
 - 1.3.2 We recommend the inclusion of a provision requiring reference to be made to the context - description, sounds, narrative – of the image when determining whether or not it is one of 'rape'.

¹ See further; Clare McGlynn: <https://www.dur.ac.uk/law/staff/?id=429>; Erika Rackley: <https://www.dur.ac.uk/law/staff/?id=3607>.

² 'Striking a Balance: Arguments for the Criminal Regulation of Extreme Pornography' (2007) *Criminal Law Review* 677-690; 'Criminalising Extreme Pornography: A Lost Opportunity' (2009) *Criminal Law Review* 245-260; and 'Prosecuting the Possession of Extreme Pornography: A Misunderstood and Misused Law' (2013) *Criminal Law Review* 400-405.

³ See, for example: McGlynn & Rackley, 'Why Criminalise the Possession of Rape Pornography?' *New Statesman*, 12 February 2014, available at: <http://www.newstatesman.com/politics/2014/02/why-criminalise-possession-rape-pornography> and BBC Radio 4 Woman's Hour: 'Extreme Pornography - should the laws be reformed?' 8 May 2013, available at: <http://www.bbc.co.uk/programmes/p018rdr5>.

⁴ Scottish Justice Committee Report, SP334, 18th Report (2009) Stage 1 Report, [292-294; 310].

- 1.3.3 We recommend clarifying the defence of ‘participation in consensual acts’.
- 1.3.4 We recommend the inclusion of a public good defence.
- 1.3.5 We recommend the removal of the requirement that the image be ‘grossly offensive, disgusting or otherwise of an obscene character’.⁵

2.0 The current legal position in England & Wales

- 2.1 In our view, the proposed reform of the current law to cover the possession of extreme images that depict rape and assault by penetration rightly addresses the failure of the current law to take a strong stand against the normalisation of sexual violence.
- 2.2 The current law criminalises the possession of material which depicts in ‘an explicit and realistic way’ a) an act which threatens a person’s life; b) an act which results, or is likely to result, in serious injury to a person’s anus, breasts or genitals; c) an act which involves sexual interference with a human corpse; and d) a person performing an act of intercourse or oral sex with an animal (whether dead or alive).⁶
- 2.3 This excludes the vast majority of pornographic images of rape. Such images would only be covered, for example, they depicted ‘life threatening injury’ (eg some images of rape involving a weapon) or ‘serious injury to anus, breasts or genitals’ (eg some images of rape involving multiple penetration).
- 2.4 This is at odds with Scots law regulating extreme pornography which explicitly includes pornographic images of ‘rape and other non-consensual penetrative sexual activity’.⁷

3.0 Justification for action: human rights enhancing

- 3.1 Legislative action can be justified on the basis that it is human-rights enhancing. The United Kingdom’s strongly held beliefs in equality and dignity are directly challenged by much violent pornography, particularly ‘rape pornography’. The proliferation and easy availability of such material can impact broadly on many women’s ability to exercise both freedom of expression and their right to private life by restricting their autonomy and freedom of choice.

⁵ See further, Written evidence submitted by Professor Clare McGlynn and Professor Erika Rackley at Durham Law School, Durham University (CJC 12): <http://www.publications.parliament.uk/pa/cm201314/cmpublic/criminaljustice/memo/cjc12.htm>.

⁶ Criminal Justice and Immigration Act 2008 s63.

⁷ Civic Government (Scotland) Act s51A(6)(c).

3.2 The State has a positive obligation to ensure that it takes appropriate action to protect human rights including, in this context, Articles 2, 3 and 8. Preventative and protective measures are required to ensure the free exercise of autonomy in sexual activity and expression, to challenge and change the societal context in which sexual violence is endemic and breaches the human rights of thousands of women and men.

4.0 Justification for action: the cultural harm of extreme pornography

4.1 Criminalising the possession of extreme pornography is a serious matter. Legislative action, and any potential restriction of an individual's Article 8 and 10 rights, must only be taken if we are certain that there is sufficient justification.

4.2 Typically drawing on John Stuart Mill, the standard liberal position is to resist legislative action on the basis that there is no direct causal connection between the viewing of extreme pornography and sexual violence. It is then suggested that in the absence of direct harm, there can be no regulation.

4.3 We suggest that liberalism can be used to justify legislative action against pornography.⁸ John Stuart Mill, for example, was far more receptive to radical legislative intervention that is often assumed.⁹ Our liberal democracy champions the values of equality and dignity which are directly challenged by much violent pornography, especially rape pornography, thus demanding regulatory action. We further argue that the law has a precautionary role; to anticipate, preclude and counter the risk of harm to society and to individuals. As John Stuart Mill himself said: 'It is the business of the law to prevent wrongdoing, and not simply to patch up the consequences of it when it has been committed'.

4.4 We consider that the demand for evidence of direct, causal links between pornography and sexual violence is over-simplistic. Understanding the drivers which lead to the commission of sexual offences is extremely complex and cannot be reduced to simple explanations. Challenging and seeking to prevent sexual violence will require a multi-faceted approach, including challenging the normalisation of sexual violence through pornography.

4.5 To reiterate therefore, our argument is not that the person who views extreme pornography, such as pornographic images of rape, will then go on to commit rape. Rather, as we have [argued elsewhere](#),

⁸ McGlynn and Ward, 'Pornography, pragmatism and proscription' (2009) 36 *Journal of Law and Society* 327-351.

⁹ McGlynn and Ward, 'Would John Stuart Mill have Regulated Pornography?' (2014) *Journal of Law and Society* forthcoming.

‘the proliferation and tolerance of such websites and images, and the messages they convey, contributes to a climate in which sexual violence is condoned, and seen as a form of entertainment’.¹⁰ Rape pornography sustains a culture in which a ‘no’ to sexual activity is not taken seriously. It promotes the myth that women enjoy being coerced into sexual activity, and that they enjoy violent, non-consensual sexual activity.

4.6 In our view, therefore, a strong justification for legislative action, and for the proportionate restriction of an individual’s rights, is the cultural harm posed by such depictions. The proliferation and tolerance of such websites and images, and the messages they convey, contributes to a climate in which sexual violence is condoned, and seen as a form of entertainment.¹¹

4.7 This was recognised in the United Nations Fourth World Conference on Women Report which refers specifically to depictions of rape as contributing to the context of continuing violence against women. It states

“Images in the media of violence against women, in particular those that depict rape or sexual slavery as well as the use of women and girls as sex objects, including pornography, are factors to the continued prevalence of such violence, adversely influencing the community at large, in particular children and young people”.¹²

4.8 This is also a culture in which, as [research for the Children’s Commissioner suggests](#), young people are turning to pornography for guidance on sex, are engaging in riskier behaviour as a result of viewing pornography, are uncertain as to what consent means, and develop harmful attitudes towards women and girls.¹³

4.9 Rape pornography, therefore, generates cultural harm and it is this cultural harm which justifies legislative action. Our argument of cultural harm provides an alternative liberal justification for legislative action against pornography.¹⁴ The law has a precautionary role to anticipate, preclude and counter the risk of harm to society and to individuals. As John Stuart Mill stated: ‘It is the

¹⁰ McGlynn and Rackley ‘Why Criminalise the Possession of Extreme Pornography?’ Durham Law School Briefing Paper (Feb 2014), available at: <https://www.dur.ac.uk/resources/law/research/RapePrnFeb14.pdf>.

¹¹ McGlynn and Rackley ‘Why Criminalise the Possession of Extreme Pornography?’ Durham Law School Briefing Paper (Feb 2014), available at: <https://www.dur.ac.uk/resources/law/research/RapePrnFeb14.pdf>.

¹² The Report of the United Nations Fourth World Conference on Women, Beijing September 1995 [118], available at: <http://www.un.org/womenwatch/daw/beijing/pdf/Beijing%20full%20report%20E.pdf>.

¹³ Office of the Children’s Commissioner, ‘Basically ... porn is everywhere’, 2013, available at: http://www.childrenscommissioner.gov.uk/content/press_release/content_505.

¹⁴ McGlynn and Ward, ‘Pornography, pragmatism and proscription’ (2009) 36 *Journal of Law and Society* 327-351.

business of the law to prevent wrongdoing, and not simply to patch up the consequences of it when it has been committed'.¹⁵

5.0 Relevant publications

- 5.1 McGlynn, C. and Rackley, E. 'Criminalising Extreme Pornography: A Lost Opportunity' (2009) *Criminal Law Review*, 245-260. Available at: <http://dro.dur.ac.uk/8111/1/8111.pdf?DDC117+DDC72+DDC71+DDD19+dla4jap+dla0cmm+dul4eg>
- 5.2 McGlynn, C., and Rackley, E. 'Why Criminalise the Possession of Extreme Pornography' *New Statesman*, 12 February 2014. Available at: <http://www.newstatesman.com/politics/2014/02/why-criminalise-possession-rape-pornography>.
- 5.3 Rackley, E. and McGlynn, C. 'Prosecuting the Possession of Extreme Pornography: A Misunderstood and Misused Law' (2013) *Criminal Law Review* 400-405.
- 5.4 McGlynn, C. and Rackley, E. 'Striking a Balance: Arguments for the Criminal Regulation of Extreme Pornography' (2007) *Criminal Law Review* 677-690.
- 5.5 McGlynn, C. and Rackley, E. 'The Politics of Porn' (2007) *New Law Journal* 1142. Available at: <http://www.newlawjournal.co.uk/nlj/content/politics-porn>
- 5.6 McGlynn, C. and Ward, I., 'Pornography, pragmatism and proscription' (2009) 36 *Journal of Law and Society* 327-351.
- 5.7 McGlynn, C and Ward, I, 'Would John Stuart Mill have Regulated Pornography?' (2014) *Journal of Law and Society* forthcoming.

Professor Clare McGlynn: clare.mcglynn@durham.ac.uk

Professor Erika Rackley: Erika.rackley@durham.ac.uk

¹⁵ McGlynn and Ward, 'Would John Stuart Mill have Regulated Pornography?' (2014) *Journal of Law and Society* forthcoming.

