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Pornography, Pragmatism and Proscription

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Abstract – The Criminal Justice and Immigration Act 2008 includes measures criminalizing the possession of extreme pornography, namely images of bestiality, necrophilia and life-threatening or serious violence. It provides the immediate context for this article which seeks to present a pragmatic liberal humanist critique of pornography regulation. It is argued that such a critique, derived in particular from the writings of Martha Nussbaum and Richard Rorty, presents an alternative case for regulation, one which eschews the visceral competing fundamentalisms which characterised the 'porn-wars' of the 1980s and 1990s. Whilst moral and epistemological philosophers squabble with radical feminists and radical libertarians, extreme pornography can nurture real injustice and ruin real lives. A pragmatic liberal humanism demands a pragmatic response to extreme pornography. The first part of this article will revisit the longer history of the 'porn-wars' and the fundamentalisms which characterised so much of the attendant debate. The second will then describe the parameters of a pragmatic liberal humanist critique, before examining, in the third part, the shorter history of pornography regulation which is written into the provisions now enacted in the 2008 Act.

The debate regarding the legal regulation of pornography has waxed and waned: burning fiercely for much of the 1980s, all but eclipsed for parts of the 1990s.[1] Today, this debate is beginning to sharpen once again, given an immediate impetus by the enactment of new provisions in the 2008 Criminal Justice and Immigration Act designed to criminalize the possession of images of 'extreme pornography'. Such regulation, as we shall see, is the subject of considerable vexation, one where the intellectual mist rapidly reddens. Of course, few claim that pornographic imagery should remain beyond any regulation. There is a line in the sand, a point at which the vast majority agree that something must be done; images of child abuse can be found at such a point. And once that line is drawn, then the question no longer becomes that of whether we should regulate, but simply what should be regulated, how it might be best regulated, and how such regulation might be most convincingly justified. The purpose of this article is to address, in particular, this latter question. In doing so, it will present a distinctive liberal humanist defence of pornography regulation, one which draws on the particular writings of Martha Nussbaum and Richard Rorty.

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[1] For an expression of this sense of weariness, see Alisa Carse, 'Pornography: an uncivil liberty?' (1995) 10 *Hypatia* 155.

1. Pornography: The Clash of Fundamentalisms

A liberal humanist perspective is presented as an alternative to the existing debate inherited from the so-called 'porn-wars' of the 1980s and early 1990s.[2] For reasons of better comprehension, this debate can be triangulated: a clash of three competing fundamentalisms, the moral conservative, the radical feminist, and the classical liberal.[3] We must revisit each in turn, before outlining a liberal humanist approach.

A. Moral Fundamentalism

The first fundamentalism, what Joel Feinberg termed 'moralistic paternalism', has tended to proclaim deep historical roots.[4] In the popular perception, it is often associated with Victorian 'values'; even though, as Lisa Sigel has recently confirmed, pornographic imagery was just as commonly found in the mid-nineteenth century gentleman's drawing room as it is today.[5] More often than not moral fundamentalism also imports a theological charge. Notably, many of the more strident contributions to the consultation process which accompanied the drafting of the extreme pornography provisions in the 2008 Act came from Christian interest groups. The Lawyers' Christian Fellowship, for example, suggested that 'all forms of pornographic material' were a 'serious problem' because it 'encourages a distorted and selfish view of sexuality' which 'divorces sex from love and tenderness'.[6] Familiar jurisprudential expressions of this theologically-grounded moralism can be found in texts such as Patrick Devlin's commentary on the 1957 Wolfenden Report, *The Enforcement of Morals*.[7] According to Devlin, English law was 'inextricably joined' to questions of morality and faith, so much so that 'without the help of Christian teaching the law will fail'. The purpose of criminal law is to address the ravages of 'sin', and in so doing maintain the authority of the 'right-minded man'. Respect for 'common morality', in sum, is the 'price' paid by a civilized society.[8] And sexual promiscuity, however it is displayed, represents a particular threat to such a society.[9] There was nothing shy about Devlin's invocation of what he perceived to be a distinctively English 'legal moralism', as Herbert Hart described it.[10]

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2 For an earlier plea to move beyond the 'stark dichotomous choice' which the porn-wars presented, see Emily Jackson, 'The Problem with Pornography: A Critical Survey of the Current Debate' (1995) 3 *Feminist Legal Studies* 49.

3 The same essential triangulation was noted by Jackson, above n 2, at 51-2. For the supposition that there is here a clash of 'fundamental' political and jurisprudential principles, see Ishani Maitra and Mary Kate McGowan, 'The Limits of Free Speech: Pornography and the Question of Coverage' (2007) 13 *Legal Theory* 42.

4 Joel Feinberg, 'Pornography and the Criminal Law', in David Copp and Susan Wendell (eds) *Pornography and Censorship* (New York: Prometheus, 1983), 133.

5 See Lisa Sigel, *Governing Pleasures: Pornography and Social Change in England 1815-1914*, (New Brunswick: Rutgers University Press, 2002) 1-13 and also Mary McIntosh, 'Liberalism and the contradictions of Sexual Politics', in Lynne Segal and Mary McIntosh (eds) *Sex Exposed: Sexuality and the Pornography Debate* (London: Virago, 1992) 165.

6 Quoted in Clare McGlynn and Erika Rackley, 'Striking a Balance: Arguments for the Criminal Regulation of Extreme Pornography' [2007] Sept *Criminal Law Review* 677, at 682.

7 Patrick Devlin, *The Enforcement of Morals*, (Oxford: Oxford University Press, 1968).

8 Devlin, above n 7, 4-5, 9, 23-5.

9 Devlin, above n 7, 62-3.

10 Herbert Hart, *Law, Liberty and Morality* (Oxford: Oxford University Press, 1968) 4-6.

This morality finds a more immediate juristic expression, of course, in the existing provisions of the 1959 Obscene Publications Act which, until the enactment of the 2008 Act, was the primary statutory mechanism for regulating adult pornography. Section 1 of the 1959 Act defines 'obscene' material as that which may tend to 'deprave or corrupt' the consumer. This specific terminology has a particular historical resonance, finding an original expression in Lord Cockburn's proscription of material which contained 'thoughts of the most impure and libidinous kind' in *Hicklin* in 1868.[11] A century later, as Susan Edwards has confirmed, English courts continue, in such cases, to presume that the test of obscenity is set by received perceptions of morality and immorality.[12] Consumers, as the court confirmed in the notorious *Whyte* case in 1972, must be protected from themselves.[13]

A generation after Devlin, conservative fundamentalism finds a more confident expression amongst communitarian theorists, particularly in the US. Amitai Etzioni's *The Spirit of Community* was intended to address the 'increasing moral confusion and social anarchy' which had taken possession of *fin-de-siecle* America.[14] Other communitarians such as Alasdair MacIntyre shied away from overt moralising. Etzioni did not. The future well-being of America, he declared, depended on the reassertion of private 'morality' and public 'moral voice'.[15] And like Devlin, Etzioni identified loose sexual morality, including the lax regulation of pornography, as a peculiar threat.[16] Likewise addressing the particular instance of pornography, a rather more cautious Michael Sandel could still argue that the cause of the 'common good' might justifiably demand enhanced regulation. There is nothing particularly noble, he confirmed, in a pointed rejoinder to liberal critics, in defending the offensive.[17]

In the UK, the transient advance of 'third way' politics represented a rather paler imitation. But if the advocacy of moral fundamentalism was here rather harder to discern, at least in academic circles, there was no such reticence amongst politicians, especially those who associated themselves with the crusading zeal of Blairite New Labour. In part this zeal was bred of a desire to detach 'new' Labour from the presumed stigma of association which aligned 'old' Labour and the 'permissive society'. In part, too, it could be identified as part of a more personal, and intensely theological, mission pursued by the leader of New Labour, Prime Minister Blair.[18]

Such moralism was apparent in government briefings which attended the passage of the 2008 Act. One Home Office minister simply declaimed images of extreme pornography to be 'extremely offensive to the vast majority of people'.[19] In

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11 *R v Hicklin* (1868) LR 3 QB 360, at 371.

12 See Susan Edwards, 'On the Contemporary Application of the Obscene Publications Act 1959' [1998] *Criminal Law Review* 849.

13 *Whyte v DPP* [1972] AC 849.

14 Amitai Etzioni, *The Spirit of Community: Rights, Responsibilities and the Communitarian Agenda*, (London: Fontana, 1995).

15 Etzioni, above n 14, ix-xi, 12.

16 Etzioni, above n 14, 198-9.

17 Michael Sandel, 'Morality and the Liberal Ideal' (1984) 190 *New Republic* May 15-17.

18 See generally Julian Petley, 'New Labour, Old Morality', *Index on Censorhip 02* 2007, 132-6.

19 Paul Goggins, quoted in Home Office Press Release, 'Crackdown on Violent Pornography', 31 August 2005, available at: http://press.homeoffice.gov.uk/press-releases/Crackdown_On_Violent_Pornography?version=1 [last visited 18 February 2009].

its response to the 2005 consultation paper, the Conservative Party likewise denounced the portrayal of sexual activity that was 'depraved and corrupting'.[20] The same tone could be clearly heard in parliamentary debate. Justice Secretary Jack Straw expressed himself repelled by such 'vile' imagery. Martin Salter MP railed against images that were 'obscene and disturbing', adding 'If people want to do weird things to each other, they still can, but I say "don't put it on the internet"'. Charles Walker MP weighed in with a personal dislike of 'nasty and unpleasant stuff'.[21] Parliament is, of course, the last place to look for nuanced intellectual debate. But the sentiment, all the same, was clearly audible. It was altogether more conservative than liberal, and in its invariable desire to promote particular norms of non-corrupting sexual behaviour, presumed a moral charge.

Of course, one critical feature of these utterances is immediately notable: their lack of precision. What is pornographic and what is not? The question is one which exercises anyone who engages with the subject, including, as we shall see, anti-pornography feminists.[22] But this critical indeterminacy tends to haunt moral fundamentalists all the more. Liberals argue against regulation, in part, because pornography cannot be defined, at least not absolutely. Richard Posner, a rather different liberal it must be admitted, makes precisely this argument.[23] On its face the argument has some strength. Should we seek to criminalise people who enjoy something we cannot even define? Justice Stevens's observations in the *Jacobellis* case are notorious. Declining to attempt a definition, because he 'could never succeed in intelligibly doing so', Stevens nevertheless concluded 'I know it when I see it'.[24] Practical perhaps; but not on its face terribly helpful, especially to a moral fundamentalist. It hardly helps the cause of proscription if no one can define for sure what it is they hope to proscribe. Ultimately, it is this indelible contingency, political, social and cultural, as well as textual, which fatally undermines the grander intellectual pretensions of moral fundamentalism.

B. Feminist Fundamentalism

The uncompromising tone of moral fundamentalism finds a resonance in the competing claims made by radical anti-pornography feminists. Andrea Dworkin articulated a famously categorical tone, suggesting that all pornography confirms that 'male pleasure is inextricably tied to victimizing, hurting, exploiting; that sexual fun and passion in the privacy of the male imagination are inseparable from the brutality of male history'.[25] Catharine MacKinnon agreed: pornography is a totem of endemic 'female sexual slavery'.[26] The potential reach of regulation imputed by this fundamentalism found an equally famous expression in the anti-pornography Ordinances crafted by Dworkin and MacKinnon.[27] The Ordinances intended to create

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20 Quoted in McGlynn and Rackley, above n 6, at 682.

21 See variously, Hansard, 8/10/2007, cols.60, 92-3, 113, 117.

22 See Jackson, above n 2, at 49, noting that a 'precise definition is difficult, perhaps even impossible'.

23 See his *Sex and Reason* (Cambridge, Mass: Harvard University Press, 1994) 381-2.

24 *Jacobellis v Ohio* (1964) 378 US, 197.

25 Andrea Dworkin, *Pornography: men possessing women* (London: Women's Press, 1981) 224.

26 Catharine MacKinnon, *Women's Lives: men's laws* (Cambridge, Mass: Harvard University Press, 2005) 301.

27 The Ordinance text can be found in MacKinnon, above n 26, at 493-7, with further details at 359-72. It can also be accessed at:

a civil claim for damages against producers and distributors of pornography. Whilst the Supreme Court eventually affirmed their unconstitutionality in *Hudnut*, as being contrary to the First Amendment, the strategic value of the proposed Ordinances was considerable; bringing to the fore of public debate the potential, intensely gendered, harms which pornographic images might promote.[28]

The evolution of feminist fundamentalism has a dual aspect; one associated with the vexed issue of causal harm, the other with conceptual notions of objectivity. In the case of the former, it is argued that pornographic images, especially those which portray sexualised violence, inspire men to commit acts of sexual assault. The Minneapolis hearings, which prefaced the Dworkin-MacKinnon Ordinance, heard much testimony which confirmed the possibility of a causal link between pornography and sexual violence. For the 'first time in history', MacKinnon insisted, women, more particularly those trapped in the sex industry, 'spoke to the harms done to them through pornography'. For those who had somehow 'survived pornography, the hearings were like coming up for air'. Central to MacKinnon's thesis is the asserted link between pornography and rape; 'porn is the theory, rape is the practice'.[29] The supposition clearly presumes a causal association, and finds support elsewhere. It was imputed in the conclusions to the Meese Commission, and has been more recently affirmed in a 2007 Home Office report on the subject which found 'evidence of some harmful effects from extreme pornography on some who access it'.[30]

However, the problem with the causation argument is that it remains difficult to prove; or at least easy for the liberal fundamentalist to reject.[31] The evidence might,

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http://www.nostatusquo.com/ACLU/dworkin/other/ordinance/newday/AppA.htm [last visited 17 February 2009].

[28] The Supreme Court agreeing that they breached the First Amendment. *American Booksellers v Hudnut* 771 F.2d.323 (7th Cir.1985) affirmed in *Hudnut v American Booksellers* 106 Sup.Ct.1172 (1986). The influence of the debates on US public opinion was considerable. It also spread across the border into Canada, exercising a notable influence on the crafting of Canadian obscenity legislation. See further Bret Boyce, 'Obscenity and Community Standards' (2008) 33 *Yale Journal of International Law* 299. In addition, the legacy of the MacKinnon/Dworkin approach to pornography can be seen in many of the feminist responses to the Government's 2005 consultation on extreme pornography, as discussed in McGlynn and Rackey, above n 6 at 681-682 and further below.

[29] Catharine MacKinnon , 'The Roar on the Other Side of Silence', in Catharine MacKinnon and Andrea Dworkin (eds) *In Harm's Way: The Pornography-Civil Rights Hearings* (Cambridge, Mass: Harvard University Press, 1997) 17.

[30] See, respectively, Attorney General's Commission on Pornography (Meese Commission) (1986), available at: http://www.porn-report.com/ and Catherine Itzin, Anne Taket and Liz Kelly, *The Evidence of Harm to Adults Relating to Exposure to Extreme Pornographic Material: a rapid evidence assessment*, (Ministry of Justice Research Series 10-07, 2007), at http://www.justice.gov.uk/docs/280907.pdf [both last visited 17 February 2009]. The Ministry of Justice report further confirmed that the effects were likely to be greater on 'men predisposed to aggression' or who have a 'history or sexual or other aggression' (at iii). The authors concluded that their research represented a 'significant step in clarifying the position in an area subject to previous academic dispute about the findings of specific studies' (at v).

[31] See, for example, James Weinstein, *Hate Speech, Pornography and the Radical Attack on Free Speech Doctrine* (Boulder: Westview Press, 1999) 132, asserting that data might incline towards a possible link, but as yet 'no confident conclusions can be drawn'. Posner also uses the same argument in his *Sex and Reason*, above n 23, at 370-1. An early and authoritative critique of the possibility of a sufficient causal link can be found in Joel Feinberg, above n 4, at 105-37. The broader jurisprudential debate regarding the possibilities of establishing causal harm in criminal law is vast. For recent expressions, see Andrew von Hirsch, 'Extending the Harm Principle: Remote Harms and Fair

at best, be 'suggestive', but it is not 'alone dispositive'.[32] For this reason, many feminists reject reliance on causation arguments. Karen Boyle, for example, argues that linking a feminist case against pornography to 'flawed effects research' has 'significantly damaged' the feminist anti-pornography argument.[33] Drucilla Cornell similarly questions the strategic value of alleging causal linkage. The impact of pornography, she observes, is anyway likely to be various, any harm as readily allusive as immediate.[34] For this reason, Robyn Eckersley advocates a reconceptualisation of the harm of pornography, conceiving of it as a 'signifying practice' which shares 'many characteristics with other more everyday representations of women'.[35] Such an approach, marrying textual sophistication with a more pragmatic concern with the varieties of women's experiences, reaches towards the kind of liberal humanism which we will advance shortly.

The second aspect of this radical feminist argument centres on 'objectification' and the constitutive capacity of pornography. Here pornography is an act, rather than mere speech; a series of 'institutions and practices' which 'constitute' rather than simply express 'the ideas they embody'.[36] The claim is that pornography enshrines a particular, degraded image of women; it defines them in a peculiarly sexualised way, and in doing so denies their humanity. Rae Langton makes this argument[37], though it finds original expression in MacKinnon, most strikingly in *Only Words*: 'Pornography is not restricted here because of what it says. It is restricted because of what it does'. [38] The harm is immediate, quite literally apparent, and in no need of anecdotal or other reinforcement. It is part of what critical legal scholars, echoing early twentieth century phenomenologists, term the 'lived experience' of being female.[39] Such an imposition, the construction of a particular image of women by pornography, it has been further argued, can itself be construed as an infringement of an alternative right to equality.[40] For obvious reasons, the resonance between the thesis presented in *Only Words* and the 'speech act' theories of Austin and Searle has

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Imputation', in Andrew Simester and ATH Smith (eds) *Harm and Culpability* (Oxford: Oxford University Press, 1996) 259-76; Andrew Simester and Andrew von Hirsch, 'Rethinking the Offence Principle' (2002) 8 *Legal Theory* 269 and Dennis Baker, 'The Moral Limits of Criminalizing Remote Harms' (2007) 10 *New Criminal Law Review* 370.

32 Cass Sunstein, 'Pornography and the First Amendment' (1986) *Duke Law Journal* 589, at 600.

33 Karen Boyle, 'The Pornography Debates: beyond cause and effect' (2000) 23 *Women's Studies International Forum* 187, at 187.

34 Drucilla Cornell, *The Imaginary Domain* (London: Routledge, 1995) 101.

35 Robin Eckersley, 'Whither the Feminist Campaign: an evaluation of feminist critiques of pornography' (1987) 15 *International Journal of the Sociology of Law* 164.

36 Catharine MacKinnon, *Only Words* (Cambridge Mass: Harvard University Press, 1993) 11-13. For an overview of the broader argument, see Cynthia Stark, 'Is Pornography an Action? The Causal v the Conceptual View of Pornography's Harm' (1997) 23 *Social Theory and Practice* 277.

37 See Rae Langton, 'Speech acts and unspeakable acts' (1993) 22 *Philosophy and Public Affairs* 293.

38 See MacKinnon, above n 37, at 23, and see especially 3-6 for an eloquent expression of the essential thesis. For critical commentaries, see Laurie Shrage, 'Exposing the Fallacies of Anti-Porn Feminism' (2005) 6 *Feminist Theory* 45, at 46-51 and also Mary Kate McGowan, 'On Pornography: MacKinnon, Speech Acts and "False" Construction' (2005) 20 *Hypatia* 21.

39 See Clyde Willis, 'The Phenomenology of Pornography: A Comment on Catharine MacKinnon's *Only Words*' (1997) 16 *Law and Philosophy* 177, 181-5.

40 See here Rae Langton, 'Whose Right? Ronald Dworkin, Women, and Pornographers' (1990) 19 *Philosophy and Public Affairs* 311, at 337-49.

been frequently explored.[41] The possibility that a kind of speech can construct a harmful act, in a general as opposed to particular instance, however, remains hotly contested.[42] Further, as with causation arguments, it is ultimately futile in its attempts to persuade those in conflict with this fundamentalist position.

Nonetheless, while being fundamentalist, the radical feminist anti-pornography arguments 'reoriented' pornography debates, as Martha Nussbaum explains, away from 'alleged disgustingness' to 'issues of equality, subordination and associated harms and damages'.[43] In the short term, however, the coincidence of strategic interest between moral and feminist fundamentalism, which became apparent during the US Meese Commission hearings in the early 1980s, generated considerable disquiet. Conservatives, as Robin West noted, worry about God, virtue and maintaining the status quo; anti-pornography feminists about women being raped.[44] Violence is the key differential. For this reason, David Dyzenhaus suggests that feminists opposing the proliferation of pornography would find better 'allies' in those liberals who argue for a 'rich' conception of harm and equality.[45]

In the longer term, other feminists, in response to the fundamentalism of the radical anti-pornography approach, began to articulate a more nuanced approach to pornography. Robin West eloquently suggested that women's experiences of pornography are variable; much of it is regressive and degrading, but some may be positive, even 'life-affirming'.[46] Less inclined to embrace nuance was Wendy McElroy. Pornography, McElroy baldly affirmed, 'benefits women, both personally and politically'.[47] While this declaration has tendencies towards fundamentalism of its own, it highlights the divergence in feminist approaches to the regulation and consumption of pornography. For this reason, the instantiation of *a* feminist position against pornography, a feminist fundamentalism indeed, must be resisted.[48]

C. Liberal Fundamentalism

A third fundamentalism, ranged against both conservative and feminist alike, is rooted in classical liberal jurisprudence. Once again, it could be heard, albeit in often rather

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41 John L. Austin, *How to do Things with Words*, (Oxford: Clarendon Press, 1975) and John Searle, *Rediscovery of the Mind* (Cambridge, Mass: MIT Press, 1992).

42 For a critical view, see Jennifer Saul, 'Pornography, Speech Acts and Context' (2006) 106 *Proceedings of the Aristotelian Society* 227, at 229-48, concluding that a 'speech act' as understood by an Austinian only makes sense in particular contexts, and cannot be strategically deployed to bolster a more general, necessarily more abstract, argument. The 'best one can do', accordingly, 'is to claim that pornographic viewings are sometimes the subordination of women'. Similarly sceptical is Mary Kate McGowan, above n 38, 43-6.

43 Martha Nussbaum, *Cultivating Humanity: a classical defense of reform in liberal education* (Cambridge, Mass: Harvard University Press, 1997) 141.

44 Robin West, 'The Feminist-Conservative Anti-Pornography Alliance and the 1986 Attorney-General's Commission on Pornography Report' (1987) 12 *American Bar Foundation Research Journal* 681, at 700-7.

45 David Dyzenhaus, 'John Stuart Mill and the Harm of Pornography' (1992) 102 *Ethics* 534, at 551.

46 Above n 44, at 693 and 709-11.

47 Wendy McElroy, *XXX: a woman's right to pornography* (New York: St Martin's Press, 1995), p viii.

48 Drucilla Cornell made the same argument, for a more sensitive appreciation of differential experiences of pornography, in *The Imaginary Domain*, above n 34, particularly at 95-6 and 162-3. See also Shrage, above n 38.

corrupted form, in the months preceding the 2008 Act; most immediately in arresting aspersions of pending moral and intellectual despotism.[49] There is a rather more sober and more rigorous side to liberal fundamentalism of course; one that has enjoyed considerable intellectual influence over recent decades.[50] And it too often proclaims a historical root, most commonly invoking the canonical writings of John Stuart Mill, and latter Millians such as Isaiah Berlin.[51]

The bit of Mill that liberal fundamentalists like to cite is the so-called 'Harm Principle'. If finds famous expression in Mill's essay *On Liberty*: 'That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others'.[52] The liberal fundamentalist prefers a strict interpretation of Mill's Principle, proclaiming that, in the absence of clear evidence of physical, or perhaps even mental, harm, legislative regulation of individual behaviour is unwarranted. In fact, whilst a simplistic sequestration of the 'Harm Principle' might be deployed against the regulation of milder forms of sexual imagery, it is quite possible that the revered hero of liberal fundamentalism would have strode very happily through the government lobbies when it came to passing legislation criminalizing extreme pornography. A closer reading of *The Subjection of Women*, as David Dyzenhaus has suggested, reveals a Mill who would have been exercised in the extreme by the supposition that his essay 'on liberty' should be used to institutionalise the cultural degradation and jurisprudential inequality of women.[53]

The current champion of liberal fundamentalism is Ronald Dworkin. In a succession of essays on the subject, Dworkin has repeatedly argued against the principle of regulation. This is part of a broader defence of individual liberties against the temptations of intrusive government, cast strategically in terms of a corresponding enhancement of individual 'moral responsibility'.[54] Realising that the increasingly arcane tenets of moral fundamentalism might be swatted away with relative ease, Dworkin has focussed instead on the particular challenges of radical feminism.[55] To this end he has repeatedly argued two things. First, is the mantra that there is no

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[49] The Campaign Against Censorship, for example, insinuated that all manner of literary and textual canon might fall victim to the pending legislation, including *Leda the Swan* and *The Rape of Europa*: see McGlynn and Rackley, above n 6, at 684-5. Of course, such proscription was never possible, and indeed specifically excluded by the requirement for explicit and realistic depictions (see further below). But, as the pulses race, the temptations to exaggerate can be irresistible.

[50] For this influence, see Jackson, above n 2, at 53.

[51] For a strong anti-regulation statement, founded on what he terms the 'Millian principle', see Thomas Scanlon, 'A Theory of Freedom of Expression' (1972) 1 *Philosophy and Public Affairs* 204. For a comment on Mill's ubiquity in this context, see Susan Easton, *The Problem of Pornography: regulation and the right to free speech* (London: Routledge, 1994) 1-3.

[52] John Stuart Mill, *On Liberty* (London: Penguin, 1985) 68.

[53] See David Dyzenhaus, above n 45. Dyzenhaus's highly original supposition generated considerable critical comment. For a sceptical rejoinder, see Robert Skipper, 'Mill and Pornography' (1993) 103 *Ethics* 726. For a more supportive re-iteration, refuting the fundamentalist 'myth' of the Harm Principle, see Richard Vernon, 'John Stuart Mill and Pornography: Beyond the Harm Principle' (1996) 102 *Ethics* 621. The same argument is made by Susan Easton, above n 52, at 1-9 and also 52-7.

[54] For a crisp statement, see Ronald Dworkin, 'The Coming Battles Over Freedom of Speech', *New York Review of Books* 11/6/1992, 56-7.

[55] See his comments, specifically directed at MacKinnon, in Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Oxford: Oxford University Press, 1996) 227-8.

compelling evidence of causal harm.[56] Second, is the collateral argument that, regardless of any possible utility, as a matter of policy, regulation of pornography can have a 'chilling effect' on the broader jurisprudential culture of free expression.[57]

For Dworkin, famously, rights are 'trumps' over moral and 'goal-based' arguments; no matter how great or loud the weight of popular opinion in their support.[58] A vague sense of 'disgust', even a strong sense of abhorrence, of the kind which is more overtly articulated by moral fundamentalists, but which, Dworkin infers, lurks behind the rhetoric of all pro-regulation anti-pornographers, is never enough to justify legislative intervention.[59] Two such rights are invariably presented; a right to freedom of expression and a right to privacy. The former, in particular, is 'valuable' not just 'in virtue of the consequences it has' but because it is an 'essential and constitutive feature of a just political society'.[60] The idea that pornography might inhibit the free participation of women in such a society is dismissed as 'instrumental' and derivative, a perversion of Berlin's idea of 'positive liberty', and its countenance in various jurisdictions 'ominous for liberty and for democracy', and suggesting of incipient 'tyranny'.[61] Of course, the realm of 'right' is not conceptually uncontested, just as the meaning of 'speech' remains a matter of some dispute.[62]

2. Pragmatism: A Liberal Humanist Critique

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[56] For a critique of the often rather scanty nature of this dismissal, see Langton, above n 41, at 327. For the strength of this view, and its hold on academic and popular opinion, see Easton, above n 52, at 32-3.

[57] For an invocation of this effect, see Dworkin, *A Matter of Principle* (Oxford: Oxford University Press, 1985) 348 and also *Freedom*, above n 55, at 221. The same fear is articulated by Feinberg, above n 4, at 112. For a sceptical dismissal of this rather simplistic leap of the juristic imagination, see Danny Scoccia, 'Can Liberals Support a Ban on Violent Pornography? (1996) 106 *Ethics* 776, at 797-8. Deploying a different metaphor, Susan Easton recasts the 'chilling effect' argument as the 'slippery slope' argument, see above n 51, at 65-78.

[58] See, for example, his comments in *Principle*, above n 57, particularly at 353-65, written in the immediate context of the Williams' Commission (Bernard Williams, *Report of the Committee on Obscenity and Film Censorship*, Cmnd 7772, London: HMSO, 1979) which entertained a variety of policy-based arguments for regulation. As we shall see in due course, in the final analysis, the Commission rejected virtually all such argumentation. But Dworkin remained critical of the Commission's willingness even to countenance such arguments in the first place.

[59] For an early dismissal of arguments from moral 'taste', see Ronald Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977) 257-8. For a re-assertion, see his comments in *Freedom*, above n 55, at 233-4 and also 238, concluding that 'we cannot count, among the kinds of interests that may be protected in this way, a right not to be insulted or damaged just by the fact that others have hostile or uncongenial tastes, or that they are free to express or indulge them in private'.

[60] Dworkin, *Freedom*, above n 55, at 200-1, citing Mill, once more, as an ultimate authority for this view.

[61] Dworkin, *Freedom*, above n 55, at 205-7, 219-23 and 239. Given his caustic criticism of MacKinnon for deploying rhetorical vaguery in the place of cogent argument, Dworkin's raising the spectre of pending 'tyranny' has its own ironies. For his accusation of 'breathtaking hyperbole', see Dworkin's review of *Only Words*, republished in *Freedom*, above n 55, at 230-1.

[62] See Langton, 'Whose Right?', above n 40, at 311-12, Sunstein, above n 32, at 625-6 and also Stark, above n 36, at 277 making this concession. Dworkin also readily concedes the need for 'exceptions', but determines to maintain a high-line in permitting such exceptions, and remains resolutely opposed, as a matter of principle, to the idea that pornography might be recognised as one. For a discussion of 'exceptions', see *Freedom*, above n 55, at 209-11.

Classical liberalism tends to pervade modern jurisprudence textbooks; think liberalism, think autonomy, think rights. It brooks no compromise. Neither, of course, do its rival fundamentalisms, the moral and the radical feminist. But such intransigence does few any favours and, for this simple reason, the case for crafting alternative approaches is compelling. The purpose of this section is to present such an alternative, one which, drawing most immediately on the writings of Martha Nussbaum and Richard Rorty, can be termed liberal humanist. Such a liberalism, driven primarily by a desire to craft a political morality that is both ethical in its conception and pragmatic in its application, will help us to make sense of the provisions recently enacted in the 2008 Act, whilst also perhaps reconciling us to their limitations. This idea of reconciliation, of accepting the virtue of contingency, and relishing it, is central to both aspirations of the liberal humanist; the desire to retrieve an ethics and the desire to make it credible. But before we focus more closely on this particular virtue, we must first take a closer look at what a liberal humanist ethics might look like.

Ethics lies at the heart of Nussbaum's intellectual enterprise; rather more so perhaps than Rorty who remained famously sceptical of the lure of 'comprehensive' theories. Nussbaum's desire to reaffirm a conception of the 'good', as an exercise in 'practical wisdom', is overtly Aristotelian.[63] We will explore the pragmatic implications of this conception in due course. Suffice to say, for Nussbaum a 'practical wisdom' is one that is devoted to particularity, to setting the parameters of the good in relation to the alternative interests of particular individuals. It is for this reason that Nussbaum is so anxious that a liberal humanist ethics should be driven by a concern for the fate of others. An 'intelligent' liberal citizenship, as she recommended in *Cultivating Humanity*:

> [M]eans the ability to think what it might be like to be in the shoes of a person different from oneself, to be an intelligent reader of that person's story, and to understand the emotions and wishes and desires that someone so placed might have.[64]

Such a conception of citizenship imports two other key characteristics. First, it is concerned with feelings, with the faculty of sensibility as much as the faculty of reason. Morality and emotion 'support and inform one another'.[65] The latter softens the edges of the former, instantiating a critical sense of the particular against the temptations of dogmatic fundamentalism. It is for this reason that a democratic society needs 'leaders', and it might be added jurists, 'whose hearts and imaginations acknowledge the humanity in human beings'.[66]

This same sentiment can be found in Rorty's description of the liberal 'ironist', as compared with the metaphysical:

> The liberal metaphysician wants our *wish to be kind* to be bolstered by an argument, one which entails a self-redescription which will highlight a common human essence, an essence which is something more than our shared ability to suffer humiliation. The liberal ironist just

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63 The ambition is strongly, and repeatedly, confirmed in Nussbaum's, *Love's Knowledge: Essays on Philosophy and Literature* (Oxford: Oxford University Press, 1990). For explicit affirmation, see 18, 36-44, 72-3.

64 Nussbaum, *Humanity*, above n 43, at 10-11.

65 Nussbaum, *Love's Knowledge*, above n 63, at 53.

66 Nussbaum, *Love's Knowledge*, above n 63, at 101.

> wants our *chances of being kind*, of avoiding the humiliation of others, to be expanded by redescription. She thinks that recognition of a common susceptibility to humiliation is the *only* social bond that is needed.[67]

Rorty's rejection of what he termed 'comprehensive' moral philosophy was, of course, notorious. The idea of a 'necessary truth' is merely a 'proposition' which enjoys a momentary 'hold' on our political imagination. There are instead merely various historically contingent 'attempts to solve problems'.[68] Rorty's is an ethics written 'without the ought'.[69] Of course, such an ethics asks considerable questions of liberal jurisprudence. According to Rorty, to say something is right or wrong, just or unjust, is merely to say that it does or does not conform to current social practice.[70] For this reason, in practical terms the cause of justice would be altogether better served if jurists worried less about abstract rights and rather more about real harm and suffering. Justice is a 'practical goal', not a piece of juristic whimsy, the construct of individuals addressing 'small contingent facts' rather than paying obeisance to 'large necessary truths'.[71] The dismissal of rights-theory as a debilitating distraction, the primary theme of his seminal 1993 Amnesty Lecture, attracted a splenetic response from liberal fundamentalists such as Ronald Dworkin.[72] But Rorty was unbowed. The aspiration of social justice, he later affirmed, will only be realised when 'talk of fraternity and usefulness has replaced talk of rights'.[73] Nussbaum is perhaps a little less abrasive, prepared to admit that a theory of rights may have a necessary role in a modern democracy.[74] But, like Rorty, she is not prepared to allow a wedded fetish for rights and reason to diminish the place of 'dignity', or the faculty of compassion, as a vital component of a liberal humanist ethics.[75] The implications for her more concentrated critique of pornography and legal regulation, to which we shall turn shortly, are considerable.

The second defining quality of a liberal humanist ethics is that it is literate. Here Nussbaum and Rorty are in close agreement. In her short essay on the relation of literature and law, *Poetic Justice*, Nussbaum opened with a defence of the 'literary imagination precisely because it seems to me an essential ingredient of an ethical stance that asks us to concern ourselves with the good of other people whose lives are

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67 Richard Rorty, *Contingency, Irony, and Solidarity* (Cambridge: Cambridge University Press, 1989) 91. Emphasis in original.

68 See Richard Rorty, *The Consequences of Pragmatism* (Brighton: Harvester, 1982) 16 and also *Philosophy and the Mirror of Nature* (Princeton: Princeton University Press, 1980) 157. For a commentary on this position, see Alan Malachowski, *Richard Rorty* (Chesham: Acumen, 2002) 3-6.

69 Richard Rorty, *Truth and Progress* (Cambridge: Cambridge University Press, 1998) 305.

70 Richard Rorty, *Philosophy as Cultural Politics*, (Cambridge: Cambridge University Press, 2007) 47.

71 Rorty, 'Contingency', above n 67, at 198.

72 The lecture, 'Human Rights, Rationality and Sentimentality', is republished as chapter 9 of *Truth and Progress*, above n 69. The critique of rights as a strategy of 'dehumanization' is at 177-80. For Dworkin's exchange with Rorty, see Ronald Dworkin, 'Pragmatism, Right Answers and True Banality', in Michael Brint and William Weaver (eds) *Pragmatism in Law and Society*, (Boulder: Westview, 1991), especially 360-1 and 366-9, and also Rorty, *Philosophy and Social Hope* (London: Penguin, 1999) 93-4.

73 Rorty, *Social Hope*, above n 72, at 248.

74 A view which she has projected into her writings on the global condition of women. See, for example, *Sex and Social Justice*, (Oxford: Oxford University Press, 1999) at 86-101, recasting the narrower conception of international human rights as 'capability' rights.

75 Nussbaum, *Humanity*, above n 43, at 215-21.

different from us'.[76] And it is not, as Nussbaum added, a new insight.[77] The best judge and the best lawyer is someone who recognises that their 'mission' is poetic; not just one of applying rules, but also of promoting a liberal jurisprudence of 'imagination, inclusion, sympathy and voice'.[78] In like tones, Rorty confirms that if morality 'is thought of neither as a matter of applying the moral law nor the acquisition of virtues, but as fellow feeling, the ability to sympathize with the plight of others', then it seems likely that 'the emergence of a human rights culture seems to owe nothing to increased moral knowledge, and everything to hearing sad and sentimental stories'.[79] Instead of seeking to proclaim something called the 'truth', the Rortian liberal humanist prefers to 'keep space open for the sense of wonder which poets can sometimes cause'.[80] She knows that 'redemption' will be found, not in the discerning of grand meta-narratives, but in widening the bounds of the 'human imagination'.[81]

Nussbaum's substantive critique of pornography and legal regulation is framed by this ethical vision, of deploying an ethics of compassion and trust, as opposed to a dogma of visceral 'rage' in order to address real experiences of injustice.[82] More particularly, a humanist jurisprudence, 'concerned' with nurturing a 'sympathetic understanding' of the 'real harms' suffered by women, is centrally concerned with the issues of 'dignity' and 'objectification'. Pornography can objectify, suggests Nussbaum. It can deny the essential respect for difference which a liberal humanist cherishes above all else.[83] Deploying a familiar Kantian conceptualisation, pornography habitually reduces women to means rather than 'ends-in-themselves', and the resultant harm, as Nussbaum is quick to affirm, is not merely cognitive but deeply emotional too.[84] Legal proscription, Nussbaum readily agrees, is always difficult for a liberal jurist. And the prospective proscription of pornography is no exception.[85] But it is here, at the point of systematic objectification and degradation, that the law must intervene, not as in the past in order to assuage a masculine fear of female sexuality, but because the failure to do so reinforces the

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76 Martha Nussbaum, *Poetic Justice: The Literary Imagination and Public Life* (Boston: Beacon Press, 1995), xvi.

77 It is for this reason that Nussbaum discusses Adam Smith's *A Theory of Moral Sentiments* in some depth in chapter 14 of *Love's Knowledge*, above n 63, arguing, quite rightly, that his determination to impress the place of emotions in liberal jurisprudence is rooted in the residual influence of an Aristotelian conception of the good. It is, as Nussbaum stresses, notable that the supposed champion of neo-liberal free market economics should have been so keen to impress the value of such a philosophy.

78 Nussbaum, *Poetic Justice*, above n 76, at 119-20.

79 See Rorty, *Truth*, above n 69, at 172 and also Rorty, *Social Hope*, above n 72, at 249, echoing the statement made in *Contingency*, above n 68, at xv.

80 Rorty, *Mirror*, above n 68, at 370 and 372.

81 Rirchard Rorty, *Philosophy as Cultural Politics* (Cambridge: Cambridge University Press, 2007) 94, and also 96, 1010-3. See also *Social Hope*, above n 72, at 262-3.

82 In chapter nine of *Sex*, above n 74, Nussbaum distinguishes 'prophets' from 'philosophers', on precisely these terms. The former prefers a violence of argument against the merits of reason. At 251, she explicitly decries the 'fire and brimstone' rhetoric which tends to pervade feminist fundamentalism, and which maintains 'no such space for reconciliation, no positive vision'. For the invocation of trust and sympathy as an alternative to rage, see *Sex*, above n 74, at 14.

83 Nussbaum, *Sex*, above n 74, at 62.

84 See Nussbaum, *Sex*, above n 74, at 57-8, 73-4, and 224-7. This Kantian anxiety has also been noted by Laurie Shrage, above n 38, at 45-51 in particular.

85 See *Sex*, above n 74, at 23 and again at 246.

species of 'cultural sadism' which, according to the likes of Susan Easton, is characteristic of so much liberal fundamentalist jurisprudence.[86]

The grand myth of liberal fundamentalism pretends that the interest of all lies in the maximum liberty of all. In reality, however, the liberty of some always shapes the subjection of others.[87] Fundamentalist conceptions of liberty, as Mill admitted, are easily 'deformed'.[88] Choices have to be proscribed, just as regulatory strategies must equally be context-specific. Objectification of the female body may well harm in certain contexts; in others it may not.[89] In some instances it may need to be proscribed; as most obviously in the case of child abuse images, or in principle at least, extreme violence. In others it may not. It is for this reason that we can accept depictions of female sexuality in texts such as Lawrence's *Lady Chatterley's Lover* or Henry James's *The Golden Bowl*, whilst expressing rather greater doubt as we turn the pages of *Playboy* or peruse *rapedbitch.com*.[90] Whilst the former, as Nussbaum argues, can be defended in terms of a capacity to liberate an erotic female experience, to promote emotional growth perhaps, the latter, which seeks merely to degrade and to silence, cannot.[91] In both text and reality, what matters is the 'overall context of the human relationship'.[92] The 'salient issue' is the degree of 'harm, humiliation and subordination'.[93] If the imagery prefers the infliction of violence on the powerless, the relationship is abusive. It seeks to deny the dignity and humanity of the violated, and should be proscribed regardless of notional rights of 'free' expression.[94] Legal regulation is here justified.[95] Indeed, in a liberal society which sets itself against the cultural defence of such abuse it is demanded.[96]

The concern with specificity is the third defining characteristic of a liberal humanism. The idea of 'practical wisdom', as we have already noted, is primarily

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86 See Easton, above n 51, at 25-7, and also Nussbaum, *Sex*, above n 74, at 56 and also *Hiding from Humanity: Disgust, Shame and the Law* (Princeton, NJ: Princeton University Press, 2004) 137-9.

87 For arguments along these lines, see Stephen Gardbaum, 'Why the Liberal State can Promote Moral Ideas After All' (1991) 104 *Harvard Law Review* 1350, Shrage, above n 39, especially at 58-64, and also, at a slight variance, Leslie Green, 'Pornographies' (2000) 8 *Journal of Political Philosophy* 27.

88 See Nussbaum, *Sex*, above n 74, at 149.

89 The same view, again based on a reading of Kant, is taken by Shrage, above n 38 at 54, 57-8.

90 For Nussbaum's particular discussion of Lawrence, James and *Playboy*, alongside Alan Hollinghurst's *The Swimming-Pool Library*, see *Sex*, above n 74, chapter 8. For reference to pornographic rape websites, see McGlynn and Rackley, above n 6 at 686.

91 Nussbaum, *Sex*, above n 74, at 223-4.

92 Nussbaum, *Sex*, above n 74, at 227 and again at 233.

93 Nussbaum, *Hiding*, above n 86, at 143.

94 Nussbaum, *Sex*, above n 74, at 238-9. For a critical commentary on Nussbaum's invocation of Kantian instrumentality, here, see Green, 'Pornographies', above n 87, at 44-5. Green suggests that Nussbaum is mistaken in assuming that there should always be a prohibition on treating people as means. 'What is forbidden', he argues, is 'to treat them merely as means'. This is correct. But it is also precisely what Nussbaum anyway argues, when she denies that instrumentality will always demand regulation.

95 In her more recent, *Hiding from Humanity*, above n 86, at 144-6, Nussbaum explicitly approves and recommends the recasting of German criminal law in terms of 'dignity, subordination and objectification'. This argument is strongly affirmed by Laurie Shrage, above n 38, at 59-64, for whom the promotion of 'real violence' is the key issue.

96 See her concluding comments, on the moral responsibility to address actions which engender 'rage' against injustice, in *Hiding*, above n 86, at 139 and again at 146-7.

geared by a desire to address real harms and injustices in a liberal community.[97] According to Nussbaum, therefore, a pragmatic feminist jurisprudence should be above all concerned with ensuring that women have enough to eat, that they can walk the streets in safety, and should not be compelled to suffer the agonies of genital mutilation.[98] Again, it is for this reason that Nussbaum is so keen to recommend a poetic jurisprudence. Literature thrives on human particularity, on 'complexity', the 'flawed and imperfect'.[99] It helps reconcile us to chance, 'to be bewildered' even, to 'wait and float and be actively passive'.[100] It encourages us to translate our 'narrative emotions' into our more immediately political or jurisprudential 'imagination'.[101] It also demands that we embrace a critical contingency in our politics; the appreciation

> that there is after all more joy in the kind of citizenship that questions than in the kind that simply applauds, more fascination in the study of human beings in all their real variety and complexity than in the zealous pursuit of superficial stereotypes, more genuine love and friendship in the life of questioning and self-government than in submission to authority.[102]

Such an embrace is, of course, just as central to Rorty's pragmatic politics. As he confirmed in his later *Philosophy and Social Hope*:

> [T]o us pragmatists moral struggle is continuous with the struggle for existence, and no sharp break divides the unjust from the imprudent, the evil from the inexpedient. What matters for pragmatists is devising ways of diminishing human suffering and increasing human equality, increasing the ability of all human children to start life with an equal chance of happiness. This goal is not written in the stars, and is no more an expression of what Kant called 'pure practical reason' than it is the will of God. It is a cause worth dying for, but it does not require backup from supernatural forces.[103]

Truth, understood as nothing more than a construct of 'shared convictions', is shaped only by the process of 'conversation' and the 'contingencies' of time and context.[104] Rorty repeatedly invoked a Deweyan idea of democratic 'solidarity', a determination to give priority to the pragmatics of 'helping people solve problems', and to broaden as far as possible our sense of who might be part of 'us'.[105]

In contrast with Nussbaum, Rorty only briefly touched on the issue of pornography as part of his broader critique of MacKinnon in his 1992 Tanner Lecture.[106] But it is not difficult to flesh out the position of a Rortian pragmatist. S/he

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97 Nussbaum, *Love's Knowledge*, above n 63, at 43-4 and 72-3, citing Aristotle, *Ethics*, 1141b8-16. Such wisdom is 'not concerned with universals only; it must also take cognizance of particulars, because it is concerned with conduct, and conduct has its sphere in particular circumstances', in Aristotle, *Ethics*, (London: Penguin, 976), 212.

98 Nussbaum, *Sex*, above n 74, at 5-6, 9-10, 20.

99 See Nussbaum, *Love's Knowledge*, above n 63, at 3, 148, 159, and also *Humanity*, above n 43, at 102-4.

100 Nussbaum, *Love's Knowledge*, above n 63, at 184.

101 Nussbaum, *Love's Knowledge*, above n 63, at 294-7.

102 Nussbaum, *Humanity*, above n 43, at 84.

103 Rorty, *Social Hope*, above n 72, at xxix and 178 and also in *Contingency*, above n 67, at 189.

104 See Rorty, *Contingency*, above n 67, at xv, 4-5, 84-5 and also *Consequences*, above n 68, at 165-6. Alan Malachowski puts it pithily: the liberal ironist is someone prepared to become 'firm friends' with chance. See his *Rorty*, above n 68, at 99.

105 See Rorty, *Consequences*, above n 68, at 53 and 60, and also *Contingency*, above n 67, at 192.

106 The Lecture, entitled 'Feminism and Pragmatism' is published as chapter 11 of *Truth and Progress*, above n 69.

will certainly have little time for those who peddle the insinuation that the proscription of pornography might have a 'chilling effect' on some sort of allusive 'right' of free speech. Neither will she fall prey to the juristic miasma of causal harm. The pragmatics of making life better should never be sacrificed on the altar of juristic abstraction. It was for this reason that Rorty, whilst wary of its fundamentalist tendencies, was so supportive of MacKinnon's work.[107] Urging a critical affinity, founded on their common contempt for 'representational accounts of knowledge', Rorty suggested that ironic pragmatists and radical feminists shared a common determination to engage real instances of injustice and suffering.[108] Approvingly, he concluded:

> We are not saying that the voice in which women will some day speak will be better at representing reality than present-day masculinist discourse… We are just trying to help women out of the traps men have constructed for them, help them get the power they presently do not have, and help them create a moral identity for women.[109]

The suggestion that women might 'only now' be in the 'process of achieving a moral identity as women' did not, of course, speak to some kind of epistemological discovery.[110] Rather, as a result of political strategies designed to generate public 'revulsion and rage' women are re-writing their historically prescribed social and moral condition.[111] Armed with the knowledge that no aspect of this condition is set in epistemological stone, those concerned with refining this narrative process should feel empowered to continue their argument against misogyny, degradation and de-humanization, whether or not expressed in pornographic form.[112] It is not, moreover, just a matter of having the confidence to do so. It is also a matter of having a responsibility to do so.[113] The regulation of pornography is subject to the same 'law' of history which Hegel uncovered; what one generation thinks is beyond argument, the next generation argues about, and the next generation to come, as often as not, re-writes.[114]

3. Proscription: Muddling Through

The pornography debate, of course, has a long history of writing and re-writing. Judicial pronouncements on the subject of obscenity can be found scattered across eighteenth century court reports. The Victorians were obsessed with pornography.

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107 Rorty, *Truth*, above n 69, at 215.

108 Rorty, *Truth*, above n 69, at 202-3, 206-7.

109 Rorty, *Truth*, above n 69, at 210.

110 Rorty, *Truth*, above n 69, at 219-20, emphasising that such a supposition is very much the product of historical contingency: 'For a woman to say that she finds her moral identity in being a woman would have sounded, until recently, as weird as for a slave to say that he found his moral identity in being a slave'.

111 Rorty, *Truth*, above n 69, at 204.

112 Rorty strongly argues for the 'narrative' form of this re-writing in the Tanner Lecture, in *Truth*, above n 69, at 221-2.

113 Rorty, *Truth*, above n 69, at 227.

114 Rorty, *Truth*, above n 69, at 223-4. It must be admitted that not all feminists were so sanguine about the prospects of history. As Joan Williams observed, such poetic optimism was all very nice. But it threatens a distraction not altogether dissimilar from that of the liberal fundamentalist fetish for rights. Too much whimsy can 'deflect' our 'gaze from ingrained patterns of gender, class and race inequities': quoted in Ian Ward, 'Bricolage and Low Cunning: Rorty on Pragmatism, Politics and Poetic Justice' (2008) 28 *Legal Studies* 281, at 301.

The successive Wolfenden and Williams Commissions during the latter decades of the twentieth century testified to a continuing political interest in such questions. The latter's Report on obscenity famously preferred a liberal fundamentalist position, deploying a crude version of Mill's Harm Principle, and presuming a utilitarian rationale for either recommending regulation or not. It concluded that those who worried about the impact of pornography on society had got the 'problem' out of 'proportion'.[115] For much of the two decades which followed, anti-pornography campaigns in the UK tended to be piecemeal, often the playthings of individual Members of Parliament or particular media outlets.[116]

But the debate also has a rather shorter history, covering the last four or five years, and one which provides the immediate impetus to revisit, and perhaps reconceptualise, the case for pornography regulation. Initiating this shorter history was the popular and political furore which surrounded the murder conviction of Graham Coutts and the subsequent enactment of the extreme pornography provisions in the Criminal Justice and Immigration Act 2008. Coutts, it transpired, was a devotee of extreme pornography, indulging his taste excessively in the days and hours before he murdered Jane Longhurst.[117] Following his conviction, Jane Longhurst's mother, Liz, campaigned long and hard for reform, gaining in the process not only the signatures of 50,000 supporters, but also the specific approbation of various senior government ministers.[118] The original Government consultation process, initiated in 2005, indeed made the link between the Longhurst murder and the Government's proposals explicit.[119]

In the beginning, the consultation process regarding the new proposals was notable both for its preparedness to countenance statutory prohibition on some forms of pornography, as distinct from existing provisions relating to obscenity and indecency, and for its justification on the basis of the possible harm of pornographic images of sexual violence. To this latter end, the Government's 2005 Consultation Paper objected to images of 'the torture of (mostly female) victims', explicitly referring to the need to proscribe 'sites featuring violent rape scenes'.[120] It expressed concern for those who 'participate in the creation of sexual material containing violence' and defended action on the basis that extreme pornography may 'encourage'

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115 *Report of the Committee on Obscenity and Film Censorship* (Chair: Bernard Williams) Cmnd 7772 (1979) at 95. In the end, the only form of regulation the Commission was prepared to recommend related to the zoning and display of sexually explicit material.

116 For overviews of developments during this period, see Catherine Itzin, 'Introduction', in Catherine Itzin (ed) *Pornography: women, violence and civil liberties – a radical new view* (Oxford: Oxford University Press, 1992) 1-23, and Lynne Segal, 'Introduction' in Segal and McIntosh, above n 5, at 1-11.

117 At trial it was alleged that Jane Longhurst had been 'deliberately murdered in order to satisfy' Coutts's 'macabre sexual fantasies and that the murder was the manifestation of his long-standing fixation for women who are helpless and being strangled': *R v Coutts* [2005] EWCA 52 (CA) and [2006] UKHL 39 (HL).

118 Introducing the proposals in the 2007 Criminal Justice and Immigration Bill, Home Secretary Jacqui Smith noted that the 'campaigning of Liz Longhurst' had 'brought the issue to the fore and applied the necessary pressure to bring about legislative changes'. Justice Secretary, Jack Straw, was likewise quick to pay tribute to Liz Longhurst during Parliamentary debates. He hoped that the government proposals would 'go at least some way to meeting her concerns'. For Straw's comments, see Hansard 8/10/2007, col.60. For Smith's see 9/7/2008, col.1179.

119 See McGlynn and Rackley, above n 6, at 679.

120 See McGlynn and Rackley, above n 6, at 679.

interest in violent sexual activity.[121] To meet these concerns, the Government proposed a new offence criminalizing the possession of images of 'extreme pornography', a term designed to encompass bestiality, necrophilia and 'serious sexual violence and serious violence in a sexual context'. This new offence would supplement the existing Obscene Publications Act 1959 which only criminalises the production and dissemination of 'obscene' materials.

Instantly, the fundamentalist flames were fanned. Liberal fundamentalists immediately challenged the proposals, raising the spectre of an 'Orwellian victimless crime enforced by Thought Police'.[122] Moreover, these 'thought police' were going to be very busy, criminalising the 'millions' who use the pornographic material to be covered.[123] The Bar Council worried that those who perused images of anal rape in video recordings of Howard Brenton's *Romans in Britain* might find themselves up before the Bench.[124] Of course, such a recording would never come within the scope of the measures, not being explicit, or pornographic or involving life-threatening or serious injury.[125] But as the debate heated up, common-sense melted away. Julian Petley lamented the prevalence of 'over-heated language', the fact that in these debates 'sheer assertion takes the place of rational argument'. The fault was obvious: anti-pornography feminists are 'not exactly people with open minds on the subject of pornography'.[126] The proposed legislation, Petley advised, 'puts nanny firmly into jackboots'. And the Government, clearly, is 'happy' to align itself with the regimes of 'Saudi Arabia, China and South Korea', he concluded portentously; overcome at the last, it seemed, by the irresistible urge to 'sheer', and ever more absurd, 'assertion'.[127]

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[121] Home Office, *Consultation: On the Possession of Extreme Pornographic Material* (London: Home Office, 2005), at 2 and paras 34 and 27.

[122] The Campaign Against Censorship, quoted in McGlynn and Rackley, above n 6 at 677-678. The vast majority of responses to the 2005 consultation are available at: http://www.dur.ac.uk/law/research/politicsofporn/responses/ [last visited 26 February 2009].

[123] As suggested by the group 'backlash' which was formed to fight the proposals. See http://www.backlash-uk.org.uk/dhDurham.html [last visited 26 February 2009].

[124] Bar Council, above n 122, and discussed in McGlynn and Rackley, above n 6 at 684-685.

[125] The (mis)use of similar examples can already been seen in the Scottish debates over similar measures, with one Scottish MSP dissembling about images of Shakespeare being threatened. (Such images would not be covered as they would not be explicit or pornographic.) See David Mattox, 'Art will suffer under porn ban, warns MSP', *The Scotsman*, 20 January 2009, available at http://news.scotsman.com/politics/Art-will-suffer-under-.4892027.jp [last visited 26 February 2009]. See also Michael Howie, 'Jail for Downloading Extreme Pornography', *The Scotsman*, 19 January 2009, available at: http://news.scotsman.com/latestnews/Jail-for-downloading-39extreme39-sex.4888459.jp [last visited 26 February 2009].

[126] See Julian Petley, 'Extreme Ignorance', *Index on Censorship* 26 June 2007, available at: http://www.indexoncensorship.org/2007/06/26/extreme-ignorance/ and 'Britain: matters of decency', *Index on Censorship*, 18 January 2008, available at: http://www.indexoncensorship.org/2008/01/18/britain-matters-of-decency/ [both last visited 26 February 2009]. He went on to describe the proposals' supporters as 'apocalyptic (individuals), dogmatic and intellectually dubious (certain women's groups) and downright authoritarian (the police)'. This was in apparent contrast to the 'extraordinarily well-informed and cogently argued' responses against the proposals: see http://www.spiked-online.com/index.php?/site/article/3556/ [last visited 28 February 2009].

[127] See Julian Petley, 'Legislating in Haste', *Index on Censorship*, 11 March 2008, http://www.indexoncensorship.org/2008/03/11/legislating-in-haste/ and 'Extreme Ignorance', *Index on Censorship*, 26 June 2007, available at: http://www.indexoncensorship.org/2007/06/26/extreme-ignorance/ and 'Britain: matters of decency', *Index on Censorship*, 18 January 2008, available at: http://www.indexoncensorship.org/2008/01/18/britain-matters-of-decency/ [all last visited 26 February 2009].

Perhaps unsurprisingly, feminist responses to the Government proposals were rather more supportive, even if many bemoaned their restricted scope.[128] Justice for Women quoted Andrea Dworkin's argument that 'pornography is violence against women, violence which pervades and distorts every aspect of our culture'.[129] Pressing a more radical alternative, one feminist group explicitly advocated the adoption of the MacKinnon/Dworkin Ordinances, whilst another suggested that the definition of pornography be based around the idea of 'subordinating' material.[130] A determination to progress beyond the aspirant proscriptions of 1980s/1990s feminist was striking. The organisation Lilith, supported by the Women's National Commission, proposed a definition of 'extreme pornography' which included any material depicting women's 'bodies being abused in any way', extending to images which are 'hostile to women by showing them in passive roles in sexual activity or being dominated' and 'any material which features naked women for the sole purpose of sexual gratification'.[131] Such an expansive definition reaches far beyond MacKinnon and Dworkin's 'sexually explicit subordination of women'; to include images for the purposes of sexual arousal of *any* naked women. Another feminist group advocated inclusion of 'the written text as well as visual imagery'.[132]

Moral fundamentalists reacted just as strongly to the proposals. Mediawatch-uk reaffirmed that all pornography, because of its 'casual, immoral and responsibility-free approach to sexuality, contributes significantly to the social problems of sexual dysfunction, the continually rising rates of sexually transmitted infections, the increasing rate of marital breakdown and the annually rising sexual crime rate'. It also 'encourages a distorted attitude to human sexuality'.[133] The Conservative Party expressed its concern over images which are 'deeply depraved and corrupting'.[134] The Lawyers' Christian Fellowship maintained that all pornography 'encourages a distorted and selfish view of sexuality' which 'divorces sex from love and tenderness' and demanded sex education which focuses on 'sex in a positive way, emphasising that it finds it proper and most fulfilling place within a marriage between a man and a woman'.[135] A number of police forces responded in similar fashion. The Kent constabulary argued for an extension to cover written material, whilst their colleagues in the West Midlands voiced a peculiar concern about images which might depict the 'eating of faeces or urine'.[136]

It was readily apparent that tempers would again be high, that argument would veer toward the extremes and that easy accommodation would be impossible. Perhaps not surprisingly, the Government's amended proposals presented in 2006 evidenced a

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128 Feminists Against Censorship, equally unsurprisingly, represented the only significant feminist exception to the broadly supportive reception.

129 Justice for Women, above n 122.

130 Respectively, Justice for Women and the pressure group Object, above n 122

131 Lilith, above n 122.

132 Wearside Women in Need, above n 122.

133 Mediawatch-uk, response available at: http://www.mediawatchuk.org.uk/index.php?option=com_content&task=view&id=238&Itemid=124 [last visited 26 February 2009].

134 Conservative Party, above n 122.

135 Lawyers' Christian Fellowship, above n 122.

136 Both responses available at n 122.

growing temerity.[137] The idea of criminalizing images of sexual violence was superseded by a concern with pornographic acts of 'serious violence' alone. Such 'serious' images, it was now proposed, would have to 'appear to be life threatening' or 'likely to result in serious, disabling injury'. Such stipulations, most obviously the insertion of a criterion of apparent 'injury', were clearly intended to lend a little definitional veracity. But they were also limiting. Rape referents were erased; even though independently commissioned research for the Ministry of Justice concluded that the link between pornography and rape was demonstrable.[138] By the time the draft Bill was published a year later, the provisions were further restricted in scope, now only covering images of an act which 'threatens or appears to threaten a person's life' or 'an act which results in or appears to result (or be likely to result) in serious injury to a person's anus, breasts or genitals'.[139] By the time the legislation received Royal Assent, yet another threshold had been inserted, namely that the 'extreme image' must also be one which is 'grossly offensive, disgusting or otherwise of an obscene character'.[140] Much had changed in three years.[141]

Clearly the ferocity of the debate caught the Government by surprise. Liberty castigated the 'carelessly drafted, over-broad' language of the statute; the sort of criticisms which can only explain the Government's oddly precise physiological enunciation of 'anus, breasts or genitals'.[142] Moral fundamentalists were to be sated with the statutory instantiation of the terms 'disgusting', 'obscene' and 'grossly offensive'; a new target for creative debate and interpretation. Least effective in the fight over statutory language, it appears, were the anti-pornography feminists. 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, to all intents and purposes, pornographic rape images will not now come within the scope of the measures.[143] The failure to include such paradigmatic images of sexual violence

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137 Home Office, *Consultation on the Possession of Extreme Pornographic Material – summary of responses and next steps* (London: Home Office, 2006).

138 Above n 30. The report itself has been subject to detailed criticism for its methodology and conclusions. The principal point here, however, is the dissonance between the Government's use of this report to justify its proposals which by and large exclude images of rape, and the fact that the report largely relies on studies considering the effect of pornographic images of rape to reach its conclusions.

139 It further sought to criminalize images of necrophilia and of sexual activity with animals. For a brief discussion of the proposals in the 2007 Bill, see Clare McGlynn and Erika Rackley, 'The Politics of Porn' (2007) *New Law Journal* 1142-1143.

140 Section 63(6)(b) of the 2008 Act.

141 For a detailed analysis of the measures as enacted, see Clare McGlynn and Erika Rackley, 'Criminalising Extreme Pornography: A Lost Opportunity' [2009] *Criminal Law Review* 245.

142 Liberty, *Liberty's Second Reading Briefing on the Criminal Justice and Immigration Bill in the House of Lords*, January 2008, para 25, available at: http://www.liberty-human-rights.org.uk/publications/pdfs/criminal-justice-and-immigration-bill-2nd-reading-lords.pdf [last visited 26 February 2009]. The specification of 'anus, breasts or genitals' evidences the lack of understanding that the harm of extreme pornography is not simply that of violence against specific body parts.

143 Depictions of rape which are life-threatening or which involve serious injury to the anus or genitals will fall within the scope of the measures, but this excludes all other, indeed the vast majority, of rapes. See further McGlynn and Rackley, 'Lost Opportunity', above n 141, at 249-250. This is a lacuna set to be rectified in the Scottish measures on extreme pornography which, as currently proposed, are to include images of 'rape and other non- consensual penetrative sexual activity, whether violent or otherwise': see Scottish Executive, *Revitalising Justice - Proposals To Modernise And Improve The Criminal Justice System*, 25 September 2008, available at: http://www.scotland.gov.uk/Publications/2008/09/24132838/0 [last visited 26 February 2009].

says much about the progress of debate and negotiation. It further confirms that, for all the Government's warm words in the initial consultation, it feared the disapprobation of the liberal and moral fundamentalists rather more than that of the anti-pornography feminists.

At this point, the liberal humanist may be disappointed, but not too surprised. The disappointment is rooted in the knowledge that the existence of internet sites which trade under the nomenclature *rapepassion.com* or *rapedbitch.com* add nothing to the cause of human dignity, or indeed make our society a kinder, more compassionate or more human place. It is confirmed by the realisation that the new provisions will add little to the regulation of such sites, or the posting or downloading of images of a violent sexual nature, that they fall well short of the kind of proscription which might have been reasonably expected, at least in a society which presumes to set itself against the glorification of misogyny. And s/he will wonder why. There is no pretension to art here, no attempt to explore the deeper emotional reaches of human engagement. It is hardly likely that internet providers would have successfully pressed a Convention right. And to suggest that criminalizing the possession of such images might have a 'chilling' effect on so-called 'rights' of free expression stretches credence. No such absolute rights exist in practice; at least not in the real world. And to repeat Stanley Fish's famous aside, to which the liberal humanist would nod vigorously, it is a good thing too.[144] As Cass Sunstein rightly argued long ago, some speech is 'high-value' and some is 'low-value'.[145] The screams of pain and misery which tend to accompany images of extreme pornography fall into the latter category.

The concern for practicality, for addressing real harms and real injustices, will confirm this sense of regret. Not only would little to be lost by the closer proscription of sites such as *rapedbitch.com*, or any of the others which the likes of Graham Coutts find so addictive, but so too would there be much to be gained. Regulation of such forms of 'expression' does not need to satisfy the more esoteric demands of moral epistemology or abstract jurisprudence. Sense, understood as an expression of practical reason, and human sensitivity, the twin constituents of what Nussbaum terms an 'intelligent' liberalism, is enough.[146] The 'harms' of extreme pornography are not located in any comprehensive theory; and they do not need to be. They are, instead, expressed in a violence that is politically constructed and culturally embedded.[147] A society that really aspires to be compassionate, that wishes to do more than simply pay lip-service to the idea of justice, will address such harms undeterred by the abstruse distractions of the liberal fundamentalist.

At the same time, this pragmatic bent of the liberal humanist furnishes at least some consolation, even reconciliation, from the inroads that have been made. The sheer existence and prevalence of extreme pornography is now a part of public

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144 See, Stanley Fish, *There's No Such Thing as Free Speech, and Its a Good Thing Too* (Oxford: Oxford University Press, 1994), particularly 111-15.

145 The importance of liberals recognising the pragmatic necessity of distinguishing 'low-value' and 'high-value' speech is strongly made by Sunstein, above n 32, at 602-9 and also 616-18. For similar observations see also Scoccia, above n 57, at 795-9.

146 See Nussbaum, *Humanity*, above n 43, at 10-11, and Rorty, *Contingency*, above n 67, at 176-7. Susan Easton urges a similar justification, above n 51, at 16-17.

147 For more on the concept of 'cultural harm' as a justification for pornography regulation, see McGlynn and Rackley, 'Lost Opportunity', above n 141, at 256-259.

knowledge, and public debate. The use of such materials has been challenged; responsibility has been broadened to include not only those who produce and disseminate extreme pornography, but also those who access and use it, who feed the trade. Some may be deterred, some may be prosecuted. Perhaps more importantly public consciousness about the cultural harm of extreme pornography will be raised.

And so, leaving the bickering fundamentalists to their endless squabbles, the statutory drafters to their agonies of imprecision, and the politicians to their wild oscillations between rhetorical rage and legislative temerity, the liberal humanist simply moves on. Rather than trying to make people more virtuous, or better aware of their supposed rights, or possessed of a more acute perception of the difference between eroticism and pornography, s/he prefers to get on with the business of addressing the various little 'contingencies' that make the lives of those with whom s/he lives that little bit more, or that little bit less, edifying.[148] The primary responsibility here, as both Nussbaum and Rorty repeatedly urge, is to 'help' real people resolve 'real problems'.[149] The continued existence of internet sites such as *rapedbitch.com* is a problem. The violence inflicted upon women such as Jane Longhurst is all too real. There is much still to be done. And much that can be done. The liberal humanist jurist knows that law is anyway a limited instrument; often useful, rarely sufficient.[150] Exorcising extreme pornography will require complementary economic and cultural strategies, perhaps punitive tax regimes or civil ordinances indeed, educational programs certainly. It will take time.

And more debate, much more; for the liberal humanist also knows that the conversation will continue, as it always does. And s/he cherishes this thought; not least because it further leavens the immediate sense of disappointment. Of course the measures which finally crept onto the statute book in the 2008 Act disappoint, a pale imitation of the original draft provisions presented three years ago. In their present form they will probably not save the next Jane Longhurst, anymore than they will deter the next Graham Coutts. But they represent another stage in a particular history that is constantly in the writing.[151] This is how a liberal democracy operates, inherently agonistic, the construct of myriad conversations and debates, all organic, all ongoing.[152] It makes progress by 'muddling through', and is happy to do so, not because it is preferable to any other mode of operation, but because it is the only mode of operation.[153] Progress, it might be said of the 2008 provisions, has been

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148 See Rorty, *Consequences*, above n 68, at 165-6, 189, discussing the idea of a politics as a matter of resolving 'contingencies', and also *Mirror*, above n 68, at 370-2, for the liberal pragmatist's primary responsibility for enhancing that which 'edifies' our lives.

149 See Rorty, *Philosophy as Cultural Politics,* above n 68, at 79 and also Nussbaum, *Sex*, above n 74, at 5-6, 9-10, explicitly recommending the greater need to address the 'real' harms that women suffer in their daily lives.

150 Nussbaum, *Poetic Justice*, above n 76, at 119-20. For an acute appreciation of the need to remain aware of law's limitations, see also Jackson, above n 2, at 68-9, hazarding the thought: 'Perhaps the time has come to admit that the law cannot reverse a cultural obsession with sex by addressing one extreme means by which this obsession is expressed'.

151 Rorty, *Philosophy as Cultural Politics,* above n 68, at ix.

152 See Richard Rorty, *Achieving Our Country* (Cambridge, Mass.: Harvard University Press, 1998) 24-5 and 30, discussing democratic politics as a 'poetic agon, in which jarring dialectical discords' will be 'resolved in previously unheard harmonies'.

153 Richard Rorty, *Objectivity, Relativism and Truth*, (Cambridge: Cambridge University Press, 1990) 43. For a fuller discussion as to the consequences of Rorty's concession here, see Ward, above n 114, at 302-3.

slight. But progress there is all the same. And next time, we might do that little bit better still; maybe even a lot better. In the meantime we can try to conceive of ways to make the lives of the Graham Coutts of the world that little bit harder, and in so doing make the lives of the countless of thousands of women upon whom they prey that little bit happier perhaps, and that little bit safer.