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# ***R v Peacock: Landmark Trial Redefines Obscenity Law***

Alex Antoniou

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*The acquittal of Michael Peacock, who was charged with distributing DVDs featuring male fisting, urination and sado-masochism, has cast doubt on the English obscenity law. The 'deprave and corrupt' test under the Obscene Publications Act 1959 has been controversial since its inception in England and Wales. One of the strengths of the 1959 Act is its ability for juries to recognise changing moral standards in accordance with modern social values. While such content has been found in the past to be capable of debasing and destroying the moral purity of its likely audience, the question put before the jury in R v Peacock was if this is the case nowadays. For some, the not guilty verdict represents a victory for freedom of expression and the end of an era; for others, moral degeneration. This article provides a more perceptive view of the implications of the Peacock outcome. It argues that we have not seen the demise of obscenity yet. On the contrary, more insidious obscenity provisions have replaced the 'archaic' 1959 Act and more censorship laws with real teeth are likely to be just over the horizon.*

*Keywords: Obscenity, pornography, fisting, urination, sado-masochism*

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## **Introduction**

The Obscene Publications Act 1959 (OPA or the 1959 Act hereafter<sup>1</sup>) passed over half a century ago, was quite recently wielded against Michael Peacock, a male escort professionally known as 'sleazy Michael,' who had been accused of distributing obscene DVDs for gain. However, his determination to challenge this 'arcane and archaic legislation' (Richardson, cited in Solicitors Journal 2012) was vindicated

on 6 January 2012, when a unanimous jury in a landmark obscenity trial returned a not guilty verdict.

This paper builds on an interpretative and qualitative analysis of the principal legislation for the regulation of sexually explicit content of any kind in England and Wales with reference to primary and secondary sources. In light of notable cases in the past and the defendant's acquittal in the recent obscenity case of

*R v Peacock* (unreported, 6 January 2011, Southwark Crown Court, London, UK), the paper explores how the obscenity test has been applied and developed since its inception with respect to both written and visual material. Furthermore, the examination of the outcome in *Peacock* and its implications is complemented by a non-doctrinal approach, which relies on the interpretation of up-to-date quantitative data concerning the number of prosecutions in England and Wales under the Obscene Publications Act 1959 and its prospective successor (section 63 of the Criminal Justice and Immigration Act 2008), with a view to providing a more comprehensive and well-balanced insight into the true meaning of the verdict in *Peacock*.

### The Facts

The defendant in *Peacock* was charged on indictment with six counts under the 1959 Act for distributing allegedly obscene DVDs. The recordings at issue had been advertised for sale on the Internet and *Craigslist*. Mr. Peacock had been selling them from his flat in Brixton. Officers from SCD9, the Metropolitan Police unit investigating human exploitation and organised crime (the former Obscene Publications Squad of the Metropolitan Police), came across Mr. Peacock's services and made an undercover test purchase in January 2009. Six DVDs were deemed obscene and Mr Peacock was prosecuted.

### The Content of the Publications

The recordings at issue featured hardcore gay sexual activities: *First*, fisting, namely the practice of inserting the hand and arm into the vagina or anus. In *Peacock*, fisting involved the insertion of five fingers of the fist into the rectum of another male. Many people have difficulty in understanding fisting as a specific form of sexual intercourse. It is argued that, far from being perverse, this practice is from a psychoanalytic perspective 'erotically exciting in just the same way as other sexual practices are' (Denman 2003, 194).

Second, urolagnia [also called 'urophilia,' 'urophagia,' 'ondinism' and 'undinism' after *Undine*, a water nymph, from the Latin, *unda*, 'wave' (Money 1986)], namely the sexual arousal and interest in urine and the act of urination itself. The terms have been used to describe any erotic use of the urinary stream, which may or may not involve a partner (Milner et al. 2008, 395). Interest in urolagnia may take various forms, including watching others urinate, urinating on others, being urinated on (aka 'golden showers' or 'water sports') or even drinking urine (Greenberg et al. 2011, 506). This sexual variation is often associated with sadomasochistic activity and represents a form of domination (Steen and Price 1988, viii). In *Peacock*, the DVDs involved men urinating in their clothes, onto each others' bodies and drinking urine.

Third, the recordings also featured BDSM, the acronym for bond-

age, domination, submission and masochism, but can also mean the combination of two related pairs of the terms: 'bondage and discipline' and 'sadism and masochism.' In *Peacock*, BDSM practices involved hard whipping, the insertion of needles and urethral sounds, electrical 'torture,' staged kidnapping and rape, whipping, as well as smacking of saline-injected scrotums.

More specifically, the first clip, approximately 25 minutes long, consisted of a fisting scene, culminating with a foot being inserted into an anus and double fisting. The second one depicted a man in boxing gloves engaging in a threesome to the accompaniment of country music, some ballbusting (punching to the testicles and stomach), as well as simulated kidnapping. The third clip involved multiple participants engaging in fisting and anal play with the penetrator masturbating whilst spitting into one recipient's anus. The *fourth* commenced with a warning specifying that the video should not be viewed, unless the viewer is specifically interested in hardcore BDSM. The message of the clip also specified that mutual consent had been given and all participants were aged over 18.

In the first scene of the fourth clip, a man was being flogged on his back outdoors in the countryside. His hands and feet were restrained, while red welts rose. The second scene, set in a dungeon, showed a man being flogged on the chest and pinned against a wall. A

close up of the chest followed; the recipient says 'thank you Sir.' In the third scene, a man was hung upside down suspended from his feet and was whipped on the chest; then, he was tied upside down from a tree and his chest was hit with a riding crop. Furthermore, in the fourth scene, a man was flogged on a rack; his testicles were hoisted in a chain with his legs in a spreader bar. He was flogged on his chest and legs. The fifth scene moved outside again depicting a man who was bullwhipped on his back; some bleeding ensued. Finally, the sixth scene returned inside showing caning to the buttocks, needles and electrodes to nipples, as well as urethral sounds to the penis. The final shot showed clothes pegs attached in a row to the chest and nipples.

On the second day of the trial, two additional clips were shown in the courtroom: they included a man being tattooed in a chair, whilst being fisted and then penetrated with a dildo. Following scenes showed a fully clothed man in a chair receiving oral sex, whilst an unseen man behind them urinated into the mouth of the clothed man and over his body. His face was pushed into the urine, his penis gripped and his anus fingered. In the final scene, set in woodland, a skinhead was rolling a cigarette and urinated into another man's mouth.<sup>2</sup>

This is exactly the kind of material that the Crown Prosecution Service (CPS) and the police have long claimed was still considered

obscene by the jury. More precisely, the CPS has devised a list of 'material most commonly prosecuted' (CPS 2012) within the context of the English obscenity law. This is not an exhaustive list though. As the CPS states, 'it is impossible to define all types of activity which may be suitable for prosecution' (CPS 2012). The categories of material deemed obscene consist of:

1. Sexual acts with an animal.
2. Realistic portrayals of rape.
3. Sado-masochistic material which goes beyond trifling and transient infliction of injury.
4. Torture with instruments.
5. Bondage (especially where gags are used with no apparent means of withdrawing consent).
6. Dismemberment or graphic mutilation.
7. Activities involving perversion or degradation (such as drinking urine, urination or vomiting on to the body, or excretion or use of excreta).
8. Fisting.

The CPS will not normally initiate proceedings with respect to material portraying actual consensual sexual intercourse (vaginal or anal), oral sex, masturbation, mild bondage, simulated intercourse or buggery, fetishes which do not encourage physical abuse, unless any of the aforementioned factors are present in the case concerned.

It is noteworthy that the official CPS guidance refers not only to the depiction of acts that are necessar-

ily non-consensual, but also to a fair number of sexual activities that may be entirely consensual. Consent is a defence against criminal liability to a charge of assault. In the absence of some 'good reason' (*Attorney-General's Reference* (No. 6 of 1980) [1981] QB 715), for instance properly conducted games and sports, lawful chastisement or correction, reasonable surgical interference etc, an assault *cannot* be rendered lawful by virtue of consent, if it caused, or was intended to cause, actual bodily harm. Consent to the intentional infliction of actual or grievous bodily harm for satisfying sado-masochistic sexual desires does *not* constitute a 'good reason' and therefore, it will not be a valid defence for reasons of public policy: The House of Lords judgment in *R v Brown* [1994] 1 AC 212 established that a defendant may be convicted of unlawful wounding and assault occasioning actual bodily harm in the context of sado-masochistic activities that involve injuries which are greater than transient or trifling (essentially the drawing of blood), despite the fact that the acts were committed in private, that the participant on whom the injuries were inflicted consented to the acts in question and did not sustain any permanent injury.

In *Peacock*, no one contested the legitimacy of consenting to being fisted or punched in the testicles. More to the point was the question of who might see it happening, which in essence exposes the dis-

parity between what the law permits consenting adults to do and what it permits them to see, hear or read of others doing. In other words, what was on trial in *R v Peacock* was *not* sex, but rather the *depiction* of sex.

Many pornography producers have been reluctant thus far to challenge the presumption that practices involving fisting and urination are obscene. Arguably, this supposition has endured because the existing obscenity test, discussed below, is notoriously obscure, inviting a great degree of subjectivity. Retailers, publishers or pornographers are not in the position to know in advance with certainty whether an article is obscene or not, while most people charged under the OPA plead guilty, since a not guilty plea and a court case resulting in a guilty verdict could lead to a more severe sentence. Nevertheless, Michael Peacock's decision to pursue this case constituted the first test of the 1959 Act before a jury for many years, thereby challenging the so far uncontested views of the police and the CPS on what is obscene.

### The Obscenity Test

The long title of the OPA provides that the purpose of the Act is 'to amend the law relating to the publication of obscene matter; to provide for the protection of literature; and to strengthen the law concerning pornography.' Despite the reference to pornography, depravity and corruption are not confined to matters of

sexual desire and sexual behaviour. The British courts have interpreted the statutory notion of obscenity so as to encompass the encouragement to take prohibited drugs or engage in brutal violence. In *Calder Ltd v Powell* [1965] 1 QB 509, Alex Trocchi's novel, *Cain's Book*, which described the life of a heroin addict in New York, was found to be obscene on the grounds that potential readers of the book might be tempted by the attractive descriptions of drug consumption to experiment with heroin. Thus, the width of the definition could theoretically embrace the fostering of attitudes which the court or the jury might find morally objectionable.

Section 1 features the contentious 'deprave and corrupt' test, according to which:

[...] an article shall be deemed to be obscene if its effect or (where the article comprises two or more distinct items) the effect of any one of its items is, if taken as a whole, such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it.

The statutory test is derived from Chief Justice Cockburn's judgment in the *Hicklin* case of 1868, which 'hung [...] like a London fog above every case of obscenity which has come before the courts ever since'



(Hansard, HC Deb 29 March 1957 vol 567 c 1492, Viscount Lambton). Until 1959, the publisher of a book containing any 'purple passage' that might have a tendency 'to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall' (*R v Hicklin* (1867–8) LR 3 QB 360, 452) was liable to imprisonment. Put in a word, the *Hicklin* test required a publisher to prove that his publication was an appropriate reading matter for an innocent schoolgirl.

To *deprave* means 'to make morally bad, to debase or to corrupt morally.'<sup>13</sup> To *corrupt* means 'to render morally unsound or rotten, to destroy the moral purity or chastity, to pervert or ruin a good quality; to debase; to defile.'<sup>14</sup> Whether the material under consideration would deprave and corrupt those who are likely to read, see or hear it is a question of fact for the jury to consider. The strength of the current obscenity test lies in the fact that it is flexible, allowing the jury to interpret it in line with shifting moral standards. Its weakness is the reverse of its strength. Its flexibility and the subjectivity inherent in jury verdicts constitute its major drawbacks.

It is the potential effect of the article on *its likely audience* that matters. An article cannot be inherently obscene in isolation from it. The publication in question does not have to be judged against the society as a whole or against particu-

larly impressionable people, unless they are part of the likely readers, viewers or listeners. It is incorrect to invoke the standards of the average man or woman. In other words, whether an article is obscene depends on what is being or is going to be done with it. Therefore, where a case is tried on indictment, the jury must put themselves in the shoes of the likely audience.

The CPS stated that it was in the public interest to prosecute Mr Peacock: 'The prosecution was not only about the content of the material, but the way in which it was being distributed to others, without checks being made as to the age or identity of recipients' (Green 2012b). They maintained that customers were not aware of the explicit content and the defendant paid no attention to the identity of his buyers.

The jury was not convinced though. People likely to see the DVDs at issue were gay men specifically looking for this type of material. The defendant stated that, in fact, customers asked him for specific titles and knew exactly what they were buying (Beaumont and Hodgson 2012). In essence, the jury had to decide whether knowledgeable customers with certain sexual proclivities, who had actually sought out and paid for DVDs featuring a specific niche of porn, would be depraved and corrupted by it.

It could be argued that the prosecution had been initiated by a desire to discipline (hetero)sexuality. The

structural heteronormativity embodied in the history of the enforcement of obscenity laws is manifest; from the 1928 orders for destruction of *The Well of Loneliness* because it 'would glorify the horrible tendency of lesbianism' (Brittain 1968, 91–2) to the prosecution of the publishers of Hubert Selby Jr's *Last Exit to Brooklyn* for its descriptions promoting 'homosexuality or other sexual perversions' (*R v Calder and Boyars Ltd* [1969] 1 QB 151, 172) and convictions relating to businesses concentrating on homosexual pornography (*R v Phillip James McGuigan* [1996] 2 Cr App R (S) 253) or obscene video tapes depicting homosexual activity (*R v Land* [1999] QB 65). However, after having watched large parts of the 'hard core' male-on-male DVDs over several hours during the trial and after having been carefully warned against sentencing out of any impulse of homophobic antipathy, the jury, who presumably had not been depraved and corrupted in the process, decided – in less than two hours – that the material at issue is unlikely to 'deprave and corrupt' the viewer. Interestingly enough, Nigel Richardson, the defendant's lawyer, commented that although the jurors were initially shocked, they looked quite bored very quickly (BBC 2012). They finally found Michael Peacock not guilty on all counts. Had the jury found the defendant guilty of distributing material capable of 'depraving and corrupting' its viewers, he could have

faced up to five years imprisonment.

The jury's verdict in the case at issue has a dual meaning. Readers, viewers or listeners who are already depraved and corrupted may become more so, according to case law. The defendant's bookshop in *DPP v Whyte* [1972] AC 849 sold pornographic books. The court found that the majority of the customers were middle-aged men and upwards. Having identified the likely audience, the court took the view that the pornographic material at issue was not capable of depraving and corrupting that readership, a significant proportion of which was 'inadequate, pathetic, dirty-minded men, seeking cheap thrills – addicts to this type of material, whose morals were already in a state of depravity and corruption' (*DPP v Whyte* [1972] AC 849, 862). However, the House of Lords rejected this approach. The 1959 Act does not necessarily centre only upon the corruption of the wholly innocent. According to Lord Wilberforce's opinion,

The Act's purpose is to prevent the depraving and corrupting of men's minds by certain types of writing: it could never have been intended to except from the legislative protection a large body of citizens merely because, in different degrees, they had previously been exposed, or exposed themselves, to the 'obscene' material. The Act is not merely concerned with the once for all corruption



of the wholly innocent; it equally protects the less innocent from further corruption, the addict from feeding or increasing his addiction (*DPP v Whyte* [1972] AC 849, 863).

Granted that section 8 of the Contempt of Court Act 1981 makes it a contempt to 'obtain, disclose or solicit any particulars of statements made, opinions expressed, arguments advanced or votes cast by members of a jury in the course of their deliberations in any legal proceedings,' for all we know, the jury found that pretty severe sado-masochistic practices, fisting and urination for sexual purposes *would* deprave and corrupt members of the public who have *not* viewed this kind of material before. However, those who have *already* been exposed or those likely to be exposed to it again, are already depraved and such content would not take them any further; hence, the jurors found it is not obscene. If they did consider this, then *Peacock* can be contrasted with *DPP v Whyte*.

What is bizarre and perhaps paradoxical about *Peacock* is that given how cautious the defendant was about distributing the DVDs at issue (his customers had to indicate some kind of interest, contact him and go to this home), the only people in the UK who saw the DVDs without being willing to, was the jury in the public gallery as a result of the police and CPS action.

### **The Significance of the Outcome: The Bright Side**

The outcome in *R v Peacock* has been warmly welcomed. The case hit the headlines and the media pronounced 6 January 2012 'a great day for English sexual liberties. [...] For gay rights campaigners and for every one of us that believes in social and sexual liberty, it's a day to make a five-digit victory sign' (Hodgson 2012). The defendant's solicitor, Myles Jackman, who provided support for the defence case, commented that: 'The jury's verdict – in the first contested obscenity trial in the digital age – seems to suggest "normal" members of the public accept that consensual adult pornography is an unremarkable facet of daily life' (Jackman 2012).

Moreover, Feona Attwood, Professor of Sex, Communication and Culture at Sheffield Hallam University, who attended the trial, asserted that the law has been overtaken by new understandings of how people think about sexuality and the portrayal of sex. She remarked:

I think the law does not make sense. All the evidence that was heard was about whether the material had the ability to harm and corrupt. The question now is, what does that actually mean? What is significant is that the jury understood [the issues at stake] (quoted in Beaumont and Hodgson 2012).

David Allen Green, solicitor and *New Statesman* legal blogger also welcomed the verdict and commented that:

[...] obscenity is a curious criminal offence, and many would say that it now has no place in a modern liberal society, especially when all that is being portrayed in any 'obscene material' are the consensual (if unusual) sexual acts between adults (Green 2012a).

Describing the idea that depictions of consenting adult sexual activity can be deemed obscene as 'a throwback to an earlier age,' Jerry Barnett, Chairman of the Adult Industry Trade Association (AITA), observed:

The adult industry continues to develop and adopt technologies that prevent children from accessing sexual content. We see no need for adults to be protected from it – a free society should protect the rights of adults to participate in any consenting sexual act they choose (International Union of Sex Workers 2012).

In addition, Hazel Eracleous, Chair of Backlash, the umbrella organisation that provides academic, legal and campaigning resources in defence of freedom of sexual expression, also remarked:

Backlash is delighted that a jury

decided it is no longer appropriate to prosecute people based on consensual adult sexual activity. We support the rights of adults to participate in all consensual sexual activities and to watch, read and create any fictional interpretation of such in any media (International Union of Sex Workers 2012).

The majority of previous prosecutions under the OPA in relation to *written* material ended in failure. Penguin Books were unsuccessfully prosecuted in 1960 under the same statute for publishing DH Lawrence's *Lady Chatterley's Lover* after its acquittal on an obscenity charge in the USA. The parade of distinguished figures of English intellectual life to provide expert evidence rendered the case *a cause célèbre* in England. The obscenity law has been marked by seminal cases since: Hubert Selby Jr's prosecution in 1968 for his frank portrayals of drug use, street violence, gang rape and homosexuality in his 1964 novel *Last Exit to Brooklyn*, the *Oz* magazine trials in 1971, the *Inside Linda Lovelace* trial in 1977 and the trial of D. Britton's novel *Lord Horror* in 1989.

What do these cases have in common? They were all subject to failed prosecutions (the convictions in *Lovelace*, *Oz* and *Lord Horror* were overturned on appeal). After the Court of Appeal overturned the conviction in *Inside Linda Lovelace*,

the Metropolitan police were reported as saying that if that work was not obscene, then nothing was. Therefore, there had grown an assumption that the written word fell outside the scope of the 1959 Act.

There are two exceptions to this rule: the *Little Red Schoolbook* in the early seventies, which contained chapters on sexual intercourse, masturbation and abortion and was found to be obscene, as well as the more recent *Girls (Scream) Aloud* case, which in the summer of 2009 provoked much comment about the CPS abandonment shortly before trial of the prosecution of Darryn Walker, who had been charged with publishing a 'popslash' fantasy on a blog involving the mutilation, rape and murder of each member of the girl band by their coach driver. In both cases, the key factor that prompted the prosecution was that the likely audience was likely to be people of impressionable age and thus more vulnerable to being depraved and corrupted.

*Peacock* clearly demonstrates that the public opinion in 2012 has moved on considerably with respect to supposedly obscene *visual* material as well. The case under consideration clarified the law in respect of fisting and urination pornography and the CPS abovementioned list needs to be reviewed in light of this latest judgment. Overall, the history of the 1959 Act appears to be littered with cases like this, revolv-

ing around who can be corrupted and who cannot. The outcome in *Peacock* rearranged the boundaries of the English obscenity law and could be 'the final nail in the coffin for the Obscene Publications Act in the digital age' (Jackman quoted in BBC 2012).

Furthermore, it may be argued that the unanimous 'not guilty' verdict in *R v Peacock* indicates that society has become more comfortable with the idea of consent in sexual activities and less condemnatory as far as unusual sexual predilections are concerned. *Peacock* shows that the general public, along with appropriate guidance, is able to distinguish between real corruption or actual harm and what consenting adults opt for. Note for example the 'thank you Sir' offered by one punishment-recipient in the second scene of the fourth clip mentioned above. Failure to differentiate between consensual and nonconsensual sexual activities is something that must be addressed, so as to shape the debate about sex issues in a way that is more reasonable and less antiquated.

The obscenity test in England and Wales, as presently constructed, has attracted much censure for being out-of-date, 'puritanical' and 'unworkable' (Edwards 2002, 125). It was effective at the time when there was a consensus on sexual values enforced by religious teaching (Orr 1989) but, nowadays, sexual attitudes are so diverse that the

concept of a common set of values is not viable. Moreover, the current test is not based on the offensiveness of the material in question, but on the effect it has on its potential audience. The most offensive material may not be considered as obscene, because it might repulse its audience, rather than 'deprave and corrupt' it (the 'aversion' defence, *R v Calder and Boyars Ltd* [1968] 3 All ER 644, 647, Salmon LJ). Hence, it is argued that the test is 'paternalistic – it robs the viewer of their rational status. [...] [it is] one from a different era that offends our most basic personal autonomy' (Glenister 2012). The definition of obscenity depends on the inescapable subjectivity and cultural relativity of vague terms. How many of us would consider *Lady Chatterley's Lover* a threat to public morals now? Its consequence is that sexual subcultures are criticised for the employment of practices which are essentially outside the average person's experience and that individuals' private choices are regulated by what the police, the CPS and 'twelve shopkeepers'<sup>5</sup> (Dicey 1959, 246) consider as tolerable.

Last but not least, certain 'torture' scenes included in the clips described above are practically what the 'extreme porn' law seeks to outlaw. The new offence of possession of extreme pornographic images (sections 63–7 of the Criminal Justice and Immigration Act 2008, CJIA 2008 hereafter) came into ef-

fect on 26 January 2009. It has been more than three years in the making and involved a considerable degree of Parliamentary scrutiny, as well as thorough media analysis and public debate.

Prior to the CJIA 2008, it was not an offence merely to possess obscene material, but under the OPA it is a criminal offence in England and Wales to possess an obscene article for publication *for gain*. During the sixties, it was possible to control the circulation of prohibited material in the form of photographs, books, videos or films and DVDs by taking action against publishers within the UK. In addition, the Customs Consolidation Act 1876 and the Customs and Excise Management Act 1979 tackled the problem of physical importation of obscene material from abroad by empowering Customs' officers to seize it. However, the global nature of the Internet makes it very difficult to prosecute those operating from abroad. Thus, the new legal provisions were put forward as a response to the ineffectiveness of the existing regulation in controlling a certain category of pornographic images, which is produced outside of, but procured by Internet users within England and Wales.

An image must come within the terms of all three elements of the offence before it can fall foul of it: (i) *Pornographic*: An image is deemed pornographic, if it is of such a nature that it must reasonably be assumed

to have been produced solely or principally for the purpose of sexual arousal. This is a question for the magistrate or jury to consider by personally examining the material at issue. (ii) The image *is grossly offensive, disgusting or otherwise of an obscene character*. (iii) The image must portray in an explicit and realistic way one of the following:

1. An act which threatens a person's life.
2. An act which results, or is likely to result, in serious injury to a person's anus, breasts or genitals.
3. An act which involves sexual interference with a human corpse.
4. A person performing an act of intercourse or oral sex with an animal (whether dead or alive), and a reasonable person looking at the image would think that the animals and people portrayed were real.

It should be noted that 'explicit and realistic' means that graphic and convincing scenes will be caught. Thus, the offence is not limited to photographs or films of real criminal offences; even staged sexual activities may be covered by the law.

Given that the new criminal offence is intended to catch 'only material that would be caught by the OPA were it to be published in this country' (Hansard HL vol 699 col 895, 3 March 2008, Lord Hunt), it may be argued that *Peacock* clarifies what types of material it is legal to possess under the extreme pornography provisions in the CJA

2008, under section 63(7)(b) of which fisting may be considered 'an act which results, or is likely to result, in serious injury to a person's anus, breasts or genitals.'

### **Not Much Scope for Celebration: The Dark Side**

The Metropolitan Police has pledged to meet with the CPS and the British Board of Film Classification (BBFC) to review the current guidelines on obscenity. There is also potentially scope for a Law Commission review of the law on assault regarding sexual consent. The BBFC, the statutory authority for age rating videos under the Video Recordings Act 1984, has been rejecting works citing the current interpretation of the OPA and has repeatedly considered whether cutting a work might address obscenity issues. On which basis do they order the editing of a certain work? They simply take into consideration the police and CPS above-mentioned guidance on what they believe members of a jury would find obscene. This prevents the publication of certain kinds of images by filmmakers, since the Board gives high priority to the CPS interpretation of what would be covered by the 1959 Act.

*Peacock* questions the entire edifice of film classification, since the BBFC position thus far has been that the CPS has a good idea of what would be considered as obscene by a jury. Certain prohibitions

can now be dropped, but it remains to be seen how the BBFC will take *Peacock* on board, since it is still entitled to order re-editing of a film based on its own guidelines.

Currently, *fisting* is restricted to the ‘four finger’ rule, which irrationally means that depictions of fisting are legitimate as long as the thumb is not inserted into a participant’s anus. Following *Peacock*, some allowances may be made for fisting under the proviso that it does not cause any discomfort to participants and forms part of a ‘moderate, non-abusive, consensual activity’ (BBFC 2009, 31). However, ‘strong physical [...] abuse, even if consensual, is unlikely to be acceptable’ (BBFC 2009, 31), while the infliction of pain or acts in a sexual context which may cause lasting physical harm, whether real or simulated, won’t be tolerated. As far as BDSM scenes are concerned, it may be argued that *Peacock* will not significantly impact on the BBFC policy, since *R v Brown* [1994] 1 AC 212 (aka the ‘Spanner’ case, discussed above) remains effective law.

Moreover, although consumers would expect that urolagnia may now be generally allowed, the BBFC still believes that licking urine could ‘deprave and corrupt’ R18 viewers; hence, changes may be required as a condition of classification, if a submitted work raises concerns over its degrading content. Following the resounding *Peacock* case, in which the jury found urolagnia not to be

obscene, the Board published its decision to make compulsory cuts to the R18 adult DVD entitled *The Best of Lucy Law* in order to remove the depiction of a woman licking urine from another. ‘Cuts were made in line with current interpretation of the Obscene Publications Act 1959, BBFC Guidelines and policy and the Video Recording Act 1984,’ the Board explains (BBFC 2012). Likewise, a cut of 20 seconds was required to remove from *Slam It! In A Slut 2* sight of a female performer expelling urine directly onto a man underneath her in order to obtain the R18 category (BBFC 2012). Therefore, it appears that the OPA still exerts a fair influence over the policy of organizations such as the BBFC and it is unlikely that the UK film industry will see the implementation of more liberal classification standards:

The role of the BBFC is not to decide the law but to enforce it and in this we will be guided by the law enforcement agencies. In relation to this [Peacock], the CPS have stated that the fact that a jury has acquitted someone does not mean that the guidance is incorrect. There are no current plans to revise our Guidelines.<sup>6</sup>

In addition, section 3 of the OPA is still active: this allows the CPS and the police to seize and bring supposedly obscene material before a magistrate, who can in turn



issue an order for its destruction. This is usually the preferred option for the majority of defendants, since charges under section 3 are brought against the material in question rather than its publisher or distributor. Furthermore, Customs and Excise take into account a long and comprehensive list of prohibited images, which proscribes the importation of images depicting: 'anal fisting, analingus, bestiality, bondage, buggery, coprophilia, cunnilingus, defaecation [sic], domination, ejaculation, enemas, fellatio, insertion of an object, intercourse, masturbation, necrophilia, paedophilia, sado-masochism, scatophagy, troilism, urination (urolagnia) and vaginal fisting.'<sup>7</sup> Officers are empowered to seize this kind of material, place it before local magistrates and request that it be destroyed.

Does *Peacock* really usher in a new epoch of sexual liberation? Although the verdict in *Peacock* heralded the end of an era for proponents of greater freedom of expression in the erotic arena, the political prognosis for the current obscenity law is rather pessimistic in the long run, 'just as the death of one evil and malignant creature in the Wizard of Oz heralded an even nastier arrival, in the form of the Wicked Witch of the West' (Fae 2012b).

Not everyone is delighted with the not guilty verdict. The CPS stated that it respected the jury's verdict, yet they stood by their deci-

sion to prosecute. *Mediawatch-UK*, the organisation which campaigns against violent, sexually explicit and obscene material in the media, maintained that *Peacock* calls for the strengthening of obscenity law rather than its abolition. For them, the not guilty verdict is actually a red flag of the malfunction of the current law. Commenting on the trial outcome, the director of the organisation, Vivienne Pattinson, pointed to the lack of concrete guidance as to what constitutes obscene and the difficulties in obtaining a conviction. 'As a society we are moving to a place where porn is considered as kind of fun between consenting adults, but porn is damaging,' Pattinson asserted (BBC 2012). The Recorder in *Peacock*, James Dingemans QC, also remarked in his summing up that 'in a civilised society, lines must be drawn' (Jackman 2012).

Additionally, latest figures indicate a substantial fall in the number of prosecutions under the OPA 1959: the volume of offences in which a prosecution commenced in magistrates' courts in 2008–9 was 152, compared to 82 in 2009–10 and 71 in 2010–11 nationwide (CPS 2011, 50). Ironically, it is just after this that prosecutions under the new sections introduced in January 2009 (sections 63–7 of the CJIA 2008) related to extreme pornographic images have dramatically increased in the last two years: according to the Crown Prosecution Service, in 2009–10 prosecutions were

brought in respect of 213 offences, whereas in 2010–11 the number of offences reached 995 (CPA 2011, 50). It is noteworthy that these latest figures relate only to possession of images portraying bestiality. In fact, between 2009 and 2010, a total number of 1,977 offences under sections 63–7 of the CJIA 2008 reached a first hearing in the magistrates' court.<sup>8</sup> Thus, it may be argued that the CJIA 2008 seems to be substantively replacing the 1959 Act *sub silentio*.

The truth is in numbers. Anti-censorship advocates need to stay alert: a meticulous review of obscenity law might ensue after *Peacock*, but in the current climate of sexualisation anxiety (Papadopoulos 2010) it is likely that we will see not the end of obscenity, but the widening and strengthening of existing laws, such as the provisions criminalising the mere possession of extreme pornographic images.

The UK Parliament legislated in the CJIA 2008 despite the absence of conclusive evidence as to whether objectionable material online normalises distorted views of sexuality and sexual pleasure. Simultaneously, the experimental and criminological evidence base as regards the relationship between the consumption of pornography and sexual offending is 'patchy and inconsistent' (Millwood Hargrave and Livingstone 2009, 245) and a consensus on this empirical question has not yet emerged. Additionally,

by criminalising mere possession, the fundamentally intrusive offence has shifted criminal responsibility from the producer (who is in principle more likely to access appropriate legal advice) to the consumer. The 'grossly offensive, disgusting or otherwise of an obscene character' threshold also renders the new law unworkable and extends government powers to censor consensual adult conduct simply on the grounds that some people find it unpleasant or repugnant. In light of this, it is submitted that the OPA has functioned or could function as a bulwark against more draconian and repressive regulation.

### **Concluding Remarks: Obscenity Law is Not Dead; At Least, Not Yet.**

The result in *Peacock* does not set any precedent. It is not binding upon other courts and may be overturned by a higher court. Theoretically, it is possible for the police to arrest and charge someone under exactly the same circumstances, over exactly the same recordings now.

On the one hand, notwithstanding the lack of judicial determination of precedential force, it may be argued that the obscenity law in England and Wales is at a turning point. *Peacock* has the potential to whittle the CPS list down to half of the 'likely to be found guilty' representations of adult consensual behaviour and thus, the verdict might discourage the CPS from future

prosecutions. To put it bluntly, we should expect more fisting and urination in porn films hereafter.

On the other hand, with a dedicated 'extreme pornography' squad (the London Metropolitan Police's Abusive and Extreme Images Unit) and many previous defendants pleading guilty rather than having their fetishes publicized during court proceedings, it appears that *Peacock* was merely another episode in the ongoing saga of unnecessary, expensive and unsuccessful obscenity prosecutions. Because of the absence of determination and budget to challenge the authorities, the fear of prosecution hangs over filmmakers' heads like the proverbial sword of Damocles. In practice, there would be no difference, if the OPA is sidelined, but the BBFC does not liberalise its approach.

Obscenity is a focal point where constructive political and moral debates intersect. It is important to illuminate the issues at stake, since otherwise misconceptions flourish, on which knee-jerk legislation is then built. The obscenity law, more than ever, calls for radical amendments, not for simplistic legislative changes by adding more unworkable and fundamentally intrusive offences, such as the newly introduced extreme porn provisions. However, the Ministry of Justice (MoJ) has no plans to amend the legislation and the law on assault regarding sexual consent. As Myles Jackman, a solicitor with a special interest in obscen-

ity law, pointed out in an interview on the BBC Radio 4 PM programme regarding the implications of the verdict in *R v Peacock*:

[...] the MoJ, along with the BBFC, the police and the CPS are perfectly happy to shift the burden on to juries, instead of actually saying we need to re-evaluate what is obscene and what is not. They are saying, no, defendants, like Michael Peacock, *they* must go to court, *they* must go through the trauma of the process of thinking they may go to prison as a consequence of that and that is clearly not a desirable state.

The stressful, excruciating and expensive vagaries of the process should not be neglected: the police raids on homes and offices; the uncomfortable moment of arrest; the never-ending meetings with lawyers; revelations about an individual's privacy and names publicly dragged through the mire. The disappointing conclusion must be that one of the areas of law in urgent need of reform is less likely to receive it.

Finally, the verdict in *Peacock* probably suggests that 'the British stereotype of being prudish and conservative may not be completely true' (Glenister 2012). While many commentators rushed to hang the flags of sexual freedom out and rejoice over the fact that the Obscene Publications Act 1959 is 'on its last legs' (Beaumont and

Hodgson 2012), the case heard before Southwark Crown Court has implications far beyond Michael Peacock's acquittal. Its true significance will emerge in the long run. It has re-ignited the debate concerning the abolition of obscenity laws just like blasphemy law in 2008, which was treated as a similar legal anachronism, and has initiated a major discussion with two potential consequences. *Peacock* might lead to the OPA being dispensed with on the basis that it is no longer applicable in modern day Britain. Nevertheless, one must be careful what they wish for. Wishing away the 1959 Act might lead to a more conservative approach. *Peacock* may lead to a consultation and eventually result in new legal provisions that will replace the old OPA (presumably with a stricter one) or even in the expansion of the existing list in the extreme pornography law. In a nutshell, we can celebrate the outcome in *R v Peacock*, but we can certainly not remain quiescent and complacent.

## Endnotes

- <sup>1</sup> According to section 5(3) of the OPA, the 1959 Act does not extend to Scotland or to Northern Ireland.
- <sup>2</sup> The description of the clips shown was obtained through live tweeting. The content of the clips shown on the first day of the trial (Tuesday 3 January 2011) is summarised by *Backlash* and can be found here: <http://www.backlash-uk.org.uk/wp/?p=1024> [Accessed 4 January 2012].
- <sup>3</sup> As defined by Byrne J in *R v Penguin*

*Books Ltd* [1961] Crim LR 176 (aka the *Lady Chatterley's Lover* case).

- <sup>4</sup> Ibid.
- <sup>5</sup> 'Freedom of discussion is, then, in England, little else than the right to write or say anything which a jury, consisting of twelve shopkeepers, thinks it expedient should be said or written' (Dicey 1959, 246).
- <sup>6</sup> Email communication with the BBFC Chief Assistant (Policy), JL Green, published on the *Melonfarmers.co.uk* anti-censorship campaigning website. Available at <[http://www.melonfarmers.co.uk/bw.htm#Depraved\\_Thinking\\_at\\_the\\_BBFC\\_8465](http://www.melonfarmers.co.uk/bw.htm#Depraved_Thinking_at_the_BBFC_8465)> [Accessed 25 January 2012].
- <sup>7</sup> HM Customs and Excise, Volume C4: Import prohibitions and restrictions, Part 34: Indecent or obscene material, Appendix F.
- <sup>8</sup> Evidence acquired through personal communication with the CPS Principal Researcher on 20 June 2011.

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