



CRIMES OF TRANSGRESSION

Anthony Julius and Julian Petley discuss
obscenity and the limits of liberal tolerance

Julian Petley: It seems to have been generally assumed in recent years that prosecutions of the written word for obscenity were a thing of the past. Lady Chatterley's Lover was acquitted in 1960, and although Last Exit to Brooklyn was found guilty in 1966, the Court of Appeal overturned the verdict two years later. In 1976, the prosecution of Inside Linda Lovelace failed, and that seemed to be pretty much that. Now a written fantasy about the pop group Girls Aloud, published on the Internet, is being prosecuted. Do you think the salient factor is where it's been published, given the government's repeatedly stated desire to bring the Internet under greater control?

Anthony Julius: I think it's a combination of three factors. First of all, I think that you're right, the Internet is one of the reasons. Secondly, I think there is a re-moralisation of society taking place and it's a lesson to those of us who still, in however unreflective a way, take it for granted that things become only more liberal, that society moves in an ever upward arc towards greater social and personal freedom. But in reality it just doesn't work like that at all. On the contrary, we seem to judder from one period of relative repression to another with brief moments of liberating freedom in between. Those of us who grew up in nodding distance of the 1960s thought that they would just go on, and that it would colour every succeeding decade, and that every succeeding decade would add to or augment the achievements of the 1960s. Now we're all getting a nasty surprise. The third reason is related to the second: a generally censorious posture is being taken up in the context of a panic about public order issues relating to, for want of a better word, the transgressive, both in religious and non-religious terms. This is a distinct contributor to this drive towards a more censorious, interventionist policy from the police.

Julian Petley: Your book Transgressions: the Offences of Art sounds some very useful warnings about celebrating the transgressive in an uncritical way. But at moments like this, one rather wants to celebrate the transgressive for its own sake and simply proclaim: 'I have the right to offend.'

Anthony Julius: Absolutely. *Transgressions* takes for granted the achievements of the 1960s, indeed those of the 1860s as much as the 1960s, and if we now find ourselves in a different cultural and political conjuncture where those achievements can't be taken for granted, then certainly my position is stalwart in defence of the transgressive.

DEFINING OBSCENITY

Julian Petley: A good example of this creeping re-moralisation is the Criminal Justice and Immigration Act, which makes it a criminal offence even to possess what it calls 'extreme pornography'. Do you think this is an attempt to circumvent the Obscene Publications Act and to make it easier to prosecute material successfully of which the authorities disapprove?

Anthony Julius: There's no doubt of two things here. The first is that behind pornography there's pretty ugly exploitation, physical abuse and dishonesty, as well, of course, as the cognate crimes of prostitution and drug and human trafficking. One cannot simply separate off pornography, to use a simple term to describe a complex phenomenon, and treat it as in every respect isolable from these other phenomena. I think what the Act does is to insist upon the relationship between porn on the one hand and all those other factors on the other. It can, in that sense, be read as a piece of cultural criticism of what can be called the aesthetic alibi, the idea that images and words, in particular contexts, have a quality that protects them from any kind of legal attack. In that sense, then, I'm not altogether dismissive of, or hostile to, the Act. On the other hand, why it's a bad Act is that policemen are not cultural critics. So although the Act can be understood in terms of cultural criticism, cultural critics who wield truncheons are not people one wants in the classroom or anywhere else, for that matter, where art is being made and language is being used creatively. But what I also feel about the Act is that there is already enough law to deal with the abuses and vices in the pornography industry.

Julian Petley: It is of course true that behind a good deal of commercial porn there lies crime and exploitation. But not in every case, and certainly not in the case of non-commercial porn made within the BDSM [bondage, domination, sado-masochism] community, which clearly falls within the scope of the [Criminal Justice] Act.

Anthony Julius: I agree, that aspect of the Act is ludicrous. You read it and you think that this could only be written out of the fevered imagination of someone who's spent too long on the Internet himself. It's embarrassing to read, because it gives an insight into the legislative mind that one would rather do without.

Julian Petley: One of the main problems with the Act is that it gets itself into a tangle over the notion of the 'real'. Thus if an image portrays certain things



Sex for real: Baise-moi, 2002
Credit: BFI

'in an explicit and realistic way', and if a reasonable person looking at the images thinks that the people or animals shown in it are 'real', then it may be an offence to possess that image. But what on earth does it mean by 'realistic' and 'real'? Surely it's impossible to legislate on what are basically aesthetic, not to say ontological, matters?

Anthony Julius: Do you remember that film *Baise-moi*? That was one of the first times that the BBFC [British Board of Film Classification] allowed actual sex, by which I mean penetrative sex, on screen with an '18' classification.

Julian Petley: Albeit slightly cut . . .

Anthony Julius: I had to review it for the *Guardian*, which was an unbearable hour and a half of tedium. It was just a rubbish film. But the point I want to

DEFINING OBSCENITY

make is that in one of the early scenes, there's a very nasty rape. It's obvious that sex is taking place, but it's equally obvious that it's consensual sex between the actors, which is being *represented* as rape. Now at what point does that move from being enacted to being real?

Julian Petley: Exactly. Of course, in the case of images of children engaging in sexual behaviour this point doesn't really arise, as the images are records of a crime being committed, since children cannot give informed consent to engage in such behaviour. But is it right to criminalise the possession of such images?

Anthony Julius: Well, on the one hand it could be argued that the images are simply evidence of the crime and do not have independent standing as objects in themselves. In which case, to prosecute the viewer of the images is to operate in false ontologies, to put it rather pretentiously. On the other hand, you could argue that if you prosecute those possessing the record of the crime, then you discourage people from buying this kind of material, and by reducing demand you try to reduce supply. That's the difference between child porn and porn generally. With porn generally, you have the difficult question of whether, even if the product of consensual acts, its consumption encourages non-consensual acts by the consumer: the pornography-to-rape nexus. In relation to child pornography, you have the anterior question, which has an obvious answer, of whether the recording of the act is consensual. But clearly it cannot be consensual and therefore the question of the consumption-criminal action nexus does not arise, as the mere consumption itself is pernicious because it feeds the industry.

Julian Petley: Do you sense a desire on the government's part to bring to an end what they clearly see as an era in which not enough attention has been paid to the regulation of the Internet?

Anthony Julius: It's really hard to say. I come to this through the route of hate speech rather than through pornography, because of the work that I've been doing for the last few years in writing a history of English anti-Semitism. There is a lot of concern about some of the websites disseminating anti-Semitic discourse, and there is the feeling that something has to be done about that. My own view is that nothing needs to be done about it. But there's no doubt that it is there, and that, in political and

legislative terms, concern about it is running in parallel with, and maybe somewhat further ahead than, concerns about pornography, particularly in the case of certain Jewish, Christian and Muslim groups.

Julian Petley: It's notable that the Internet Watch Foundation [UK organisation that works to minimise access to child pornography] has added to its list of proscriptions 'incitement to racial hatred'. What do you feel about that?

Anthony Julius: I really am against it. My feeling is that the Americans have a much more sophisticated jurisprudence than we do; we are at least 100 years behind in terms of freedom of expression and jurisprudence. And in fact, we're getting further behind; it's not even as if we're on the same track and we just have to catch up – we're going in the other direction, with initiatives that result in greater proscription.

Julian Petley: When the government introduced the 'extreme pornography' clauses in the Criminal Justice and Immigration Act, it very much gave the impression that the Internet changes everything and that we must have new rules in order to regulate it.

Anthony Julius: I don't think that it does. All it does is redefine accessibility. And this is a class thing, which is the starting point for my next book, on the trials of *Lady Chatterley's Lover*. This was prosecuted first in America, and the court there reached a much better judgment, as it was a civil case and the judge decided that the book was fine. Then it was tried here in an utterly stupid prosecution, with a jury acquitting it without it being clear if the acquittal was based on the decision that the book was not pornographic, or if it was pornographic but had some redeeming merit. The prosecution's case was heavily class-based – the best example of this, but by no means the only one, being when the jurors were asked if they would be prepared to let servants and wives read the book. So the question of accessibility was formulated 48 years ago, many decades before the Internet. But it's exactly the same problem: then it was the mass market paperback, now it's the PC.

Julian Petley: Yes, the unwritten rubric in this country is that the more popular a cultural form, the more it has to be controlled. Do you think it's time that the Obscene Publications Act, with its famous 'deprave and corrupt' test, was simply abolished, as the Williams Committee suggested in 1979?

DEFINING OBSCENITY

Anthony Julius: I haven't thought hard about this enough yet, but my first position would be to repeal the Act. I think the formulation makes no real sense. I would also get rid of all offences that are super-structural, that don't actually address underlying criminal conduct, such as the harm that's done to people in the making of a work.

Julian Petley: So presumably you must also be concerned about the notion of indecency which has legal force but is extremely vague. Geoffrey Robertson in [his book] Media Law says that the courts have been unable to provide a meaningful definition of indecent short of 'offending against recognised standards of impropriety or shocking, disgusting and revolting ordinary people'. Isn't it very odd to have something on the statute book which is basically trying to police taste?

Anthony Julius: Of course it is, and it assumes a degree of homogeneity which can no longer be assumed, and probably couldn't ever be assumed, and most certainly not after the sixties and seventies. But there are two more fundamental points to make about this. The first is that we clearly live in an indecent society. A society in which respect, in the fundamental sense of a proper acknowledgment of the autonomy of human beings, and the respect that one must show them, is routinely withheld. That seems to me to be an indecency. My second point is that you cannot achieve respect by piecemeal legislative interventions that are driven not by a concern for the integrity and moral worth of individuals, but rather by a concern with merely symptomatic aspects like pornography, hate speech, and all the rest of it. I mean, look at the Baby P case [17-month-old child who died in August 2007 after enduring months of assault]. That truly is an indication of an indecent society. The indifference to the sufferings of a child, that is something that we should most certainly be concerned about. In that sense of indecency, we're rotten with it. But concern with obscenity and indecency laws has nothing to with this. Indeed, it's a distraction from it.

Julian Petley: Getting away from actual laws, what do you think about the work of self-regulatory bodies such as the Internet Watch Foundation, which operates a 'notice and takedown' service to alert service providers of criminal content found on their servers? This is concerned mainly with images of child sex abuse, but as they take these to include 'images depicting erotic posing but with no sexual activity' doesn't this spread the net alarmingly wide?

Anthony Julius: I think this cuts both ways. On the one hand, there's the saying among lawyers that hard cases make bad law. Plainly, even very good laws can, at the edges and in particular cases, work injustice. That's why there's always a policy element in enforcing the law, so that prosecutors will have discretion over whether to enforce a particular law and to see whether or not a particular case is in the public interest. If they decide it's not in the public interest, there won't be a prosecution, even though a crime may have been committed. Non-lawyers often don't appreciate that there's this additional level; they think that if a crime is on the statute book, then there will be a prosecution. I think that some of those difficulties can be addressed, and indeed should properly be addressed, at the policy level. On the other hand, these kind of pseudo-legislative regulations, as operated by the Internet Watch Foundation, which do not have the benefit of passing through various stages of policy and parliamentary consideration, are often enforced arbitrarily and create a culture of conformism that is repressive and stifling.

Julian Petley: Aren't we talking about a form of privatised censorship here?

Anthony Julius: Yes, and if there's going to be censorship I'd much rather it was by the state than by private agencies. So, perhaps as well as scrapping the Obscene Publications Act, we should pass a short, two-section Act which bans all private censoring initiatives and gives to the state itself, and state bodies, the exclusive right to regulate images and words.

Julian Petley: At least that would be honest, and we could see where the power really lies. From everything you've said, would it be fair to say that your position is that law in these matters should be a last resort and that policy is what's really important?

Anthony Julius: Yes, I don't like hobnailed boots trampling on other people's freedoms.

Julian Petley: Isn't self-censorship one of the greatest threats to freedom of expression today?

Anthony Julius: Yes. For example, in 2005 Tate Britain put on a retrospective of John Latham, and one of the works that was originally scheduled to be displayed involved pages from the Quran, the Talmud and the New

DEFINING OBSCENITY

Testament which had been torn and stabbed and treated in other not entirely friendly ways. Anyway, the gallery withdrew it because it was worried about visitors doing violence to it or creating a disturbance. And then, in that classic British way, it held a conference to discuss whether what it had done was cowardly. I was on the panel, and Latham was in the audience, it was one of his last appearances before he died. And my position was that it was a really inferior piece of work, but that it was the responsibility of the gallery to ensure that visitors could see it in conditions of security. If they couldn't discharge that responsibility, then they should just close down altogether, because not to be able to guarantee the safety of gallery visitors seems to me to be an admission of complete incompetence. And as it happens, the threat was imaginary anyway; it was just a collective failure of nerve. All too often the attitude these days is, we don't need the trouble, and anyway we're not sure intellectually of our ground for defending this or that work, it doesn't seem to be of particular merit, so let's avoid the hassle factor. The attitude of the British press to the Danish cartoons was a very good example of that. On occasions when real courage is required, it's not shown, but instead there's this rhetoric of courage in other contexts, which simply feeds into a kind of preening complacency on the part of newspapers, which I find rather dismaying. □

DOI: 10.1080/03064220802712209

Anthony Julius is a lawyer and writer. His books include *TS Eliot, Anti-Semitism and Literary Form* (Thames & Hudson) and *Transgressions: the Offences of Art* (Thames & Hudson)

Julian Petley is professor of film and television in the School of Arts at Brunel University. His most recent book (co-authored with Philip French) is *Censoring the Moving Image* (Seagull Books)