

## **The Ongoing Significance of Martin Barker's Work on Censorship and 'Media Effects'**

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### **Abstract**

This article examines two aspects of Martin Barker's work: its warnings about the dangers of political censorship of the media, and its critique of the conception of 'media effects' that frequently underlies such censorship, central to which is the notion that watching certain kinds of material is directly harmful to the viewer, and thence to the wider society. The article focusses on these aspects of his work in relation to the UK's Video Recordings Act 1984, and shows how remarkably prescient were his warnings about how it could result in political interference with the work of the British Board of Film Classification (BBFC), and thus with what video viewers were allowed to see within the privacy of their own homes. It concludes by examining aspects of the Online Safety Act 2023 in the light of Martin's work on 'harm' and censorship, as this, even after multiple revisions, still deploys some deeply problematic notions of harm and also gives the Secretary of State for Digital, Culture, Media and Sport (DCMS) a remarkable degree of power over a key part of our communications system.

**Keywords:** Martin Barker; 'media effects'; censorship; harm; Williams Committee; Video Recordings Act; British Board of Film Classification; Ofcom; Online Safety Bill; Home Office; Department for Digital, Culture, Media and Sport

## Introduction

There are many reasons why Martin Barker's work is so important, but for this writer two stand out in particular. One is its consistent stand against political censorship, and the other is its thoroughgoing critique of a conception of 'media effects' predicated on the idea that watching certain kinds of material is directly harmful to the viewer, and thence to the wider society. As the Online Safety Act 2023, which at the time of writing has just completed its parliamentary journey, gives the Secretary of State for Digital, Culture, Media and Sport (DCMS) quite an extraordinary degree of power over a key part of our communications system, and as much of it is premised on the notion that certain forms of online communication are directly harmful, this is a particularly opportune moment to revisit Martin's work on both political censorship and 'effects'. I will conclude by examining those aspects of the Online Safety legislation which illustrate why his concerns are as relevant now as they have ever been – indeed, if not more so.

### 'Potential State Political Censorship'

In 1984 Martin published his seminal book *The Video Nasties: Freedom and Censorship in the Media* as a result of the Video Recordings Bill which was then passing through Parliament and would shortly become a fully-fledged Act. As a result of floods of lurid stories in the press about the harm done by so-called 'video nasties', the government decided that videos would be brought within the ambit of the British Board of Film Censors (BBFC), which hitherto had been responsible only for the classification and censorship of films shown in cinemas. Furthermore, its video classifications, unlike its film classifications, would have statutory force. This meant that anyone distributing, renting or selling an unclassified video, or ignoring the age rating on a classified video, would be breaking the law and could face very significant penalties if found guilty.

Martin warned that the Bill represented 'the biggest growth of censorship in this country in many years ... For the first time in a very long time, parliament is taking powers for potential state political censorship' (Barker, 1984: 2). In particular, he was disturbed by the fact that 'the bill, by its own definitions and operations, gives frighteningly extensive powers to a Home Secretary who becomes, in effect, a simple state censor – but all cloaked under the respectability of a bill designed to "protect children"' (Barker, 1984: 18). Of course, such warnings by Martin and others were dismissed in government circles as paranoid fantasies, but the plain fact remains that the resultant Act<sup>1</sup> gives the Secretary of State the power to

designate any person as the authority responsible for making arrangements for determining for the purposes of this Act whether or not video works are suitable for classification certificates to be issued in respect of them, having

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<sup>1</sup> See Legislation.gov.uk (1984).

special regard to the likelihood of video works in respect of which such certificates have been issued being viewed in the home.

Furthermore, the Act makes it clear that 'the Secretary of State may at any time designate another person in place of any person designated under this section'.

The person designated was the President of the BBFC. As it happens, no *direct* political censorship of videos actually took place. But evidence which has come to light since *The Video Nasties* was published clearly demonstrates that the government was quite prepared at the time to interfere in the internal affairs of the BBFC in order to try to ensure that it employed senior staff who would be amenable to adopting policies of which the government approved. And it needs to be borne in mind that when the Video Recordings Bill was passing through Parliament, there were many in government, as well as outside it, such as Mary Whitehouse, who bitterly opposed the BBFC President being designated, as they thought that the Board had been far too liberal and 'permissive' in its judgements on cinema films.

## **Government Interference with the BBFC (1)**

In 1985, BBFC President Lord Harlech died suddenly.<sup>2</sup> Like his predecessors, he had been appointed by the film industry (with local authority participation since 1951). From the outset the Home Office had declined to be involved in the actual selection process for either the President or the Secretary of the BBFC, as it did not want to be thought to be *directly* involved in film censorship. However, it was understood by both sides that the Home Office could, in principle, exercise a veto before any appointment was publicly announced. But now the Video Recordings Act had effectively made the BBFC the government's designated video censorship and classification agency, and it also required it to have two Vice-Presidents. For the first time, then, the government possessed statutory authority for its involvement in BBFC affairs, but there was nothing in the Act to prescribe the method of appointing the BBFC's senior personnel. And even before the Act had finally been passed, BBFC Secretary James Ferman had informed Harlech that the Home Office had already proposed that the previous practice of the Home Secretary's informal ratification of BBFC senior office holders should now be placed on a formal basis. Ferman was opposed to this, not least because it ignored the fact that the BBFC was responsible for cinema films as well as home videos. With Harlech's agreement, he thus decided to sound out possible Vice-Presidents' willingness to allow their names to be put forward; he would then select two of these, gain the film industry's consent and only at that point provide the Home Office with the names.

Eventually Ferman decided upon Lord Birkett and Monica Sims, the former having excellent film industry credentials and the latter a distinguished administrative career in television. And after Harlech's death, Ferman rapidly put forward his choice for the new

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<sup>2</sup> The following account is indebted to Robertson (2006), which was made possible by access to the papers of the late James Ferman and by interviews with various senior BBFC personnel.

President: Lord Goodman, who was not only head of the BBFC's solicitors but also a prominent figure in the arts. However, the Home Office minister David Mellor proved evasive, preferring to explore the matter through what he termed the 'usual channels', which Ferman took to mean Home Secretary Leon Brittan and possibly also Prime Minister Margaret Thatcher. Mellor also insisted on adding to the shortlist of candidates for the Vice-Presidency Sir Ian Trethowan, a former BBC Director General and a known supporter of Mrs Thatcher. Indeed, by now Ferman had come to the distinct conclusion that Mellor wanted Trethowan to be Harlech's successor.

The Home Office arranged for Trethowan to visit the BBFC, and when he did so he acted as though he was already in office, informing Ferman that he would require his own permanent office because he anticipated working there for more than two days a week. When Ferman subsequently met Mellor, he was bluntly informed that Trethowan was prepared to accept the BBFC presidency, but at a non-negotiable salary more than double that of Harlech. Mellor also made it clear that the film industry was expected to endorse both the appointment and the salary. However, Ferman and the industry were equally opposed to the appointment because they feared that Trethowan would act as a government agent, while the method of his appointment would create an unwelcome precedent.

The Home Office then attempted to sideline Ferman in the matter of the Presidency by dealing directly with David Samuelson, the Chairman of the BBFC's Council of Management, and, as such, effectively the leader of the film industry side. But Samuelson allied himself with Ferman, writing to Mellor that it was unprecedented and unacceptable for the Home Office to impose a President upon the BBFC, and at a salary which the Board could not afford. A meeting between Mellor and Samuelson failed to resolve the stalemate, and Mellor implicitly threatened to establish a new agency for both film and video classification, and to exclude Ferman from participating in future appointments of Presidents and Vice-Presidents. Realising that this was probably a bluff, the BBFC stood its ground, and in place of Trethowan, Samuelson proposed the above-mentioned Lord Birkett, from a list of more than twenty names which included Lord Goodman, Lord Harewood, Roy Jenkins and Monica Sims.

By this time the delay in appointing Harlech's successor was beginning to attract negative comment in the trade press about government interference in the affairs of the BBFC. Samuelson again wrote to Mellor, repeating that Trethowan was not acceptable to the BBFC, and this time proposing Lord Harewood, whom Ferman had already approached and who had immediately indicated that he was willing to take on the job. Mellor expressed his surprise and stated that he would consult with Brittan. However, having failed to receive a prompt response from Mellor, Samuelson then wrote to him to say that he assumed that the Home Office had agreed to Harewood's appointment.

The Home Office unwillingly accepted its defeat over Trethowan, but the battle with the BBFC was far from over. Trethowan's removal from the fray did not necessarily signify that the Home Office would accept Harewood and, by extension, the principle of allowing the BBFC, the film industry and the local authorities to choose the BBFC President. On 1 April, Brittan and Mellor met Harewood and informed him that they would agree to his

appointment only under certain conditions. He was Managing Director of the English National Opera (although shortly due to retire) and had recently been appointed a BBC governor, and Brittan and Mellor made it very clear that he would have to accept a heavy personal commitment to the BBFC, including attendance there at least twice a week. Never before had the Home Office in effect interviewed a candidate for the BBFC Presidency, and Ferman certainly believed that it was trying to dissuade Harewood from taking the job. If so, it succeeded, because two days after the interview he informed Ferman that he would be turning down the appointment because it would be too time-consuming. Ferman, who by this time was actually beginning to doubt whether the BBFC would actually become the government's designated agency for video censorship, and had even gone so far as to have drawn up a survival plan for the BBFC in the event of that happening, wrote to Harewood reassuring him that the job would not be as onerous as Brittan and Mellor had made out, and Harewood changed his mind, taking up his role in June 1985.

## **Government Interference with the BBFC (2)**

The next time that the Home Office was to try to exert its power over the BBFC was shortly after the election of the Labour government in 1997. Those interested in a full account of this complex story are recommended Petley (2011: 129-157), but here I will simply outline the extent of the government's attempts to intervene in the process of video censorship – which was actually far more direct than in the case of the events outlined above. Again, Martin's original warnings about political censorship proved highly prescient.

In 1996 Lord Harewood decided to retire, and his job was advertised. On 23 May 1997 Ferman and the Chair of the BBFC's Council of Management, Dennis Kimbley, informed the Home Office that Lord Birkett, then a BBFC Vice-President, had been selected for the post from a shortlist of six applicants. According to James Robertson, Ferman was then told informally by a Home Office civil servant that

the Home Office would not accept Birkett without at least knowing the names of all the candidates and the reasons for the rejection of the unsuccessful five, as well as the details of the six shortlisted candidates, their brief *curricula vitae* and a summary of the selection committee's views on each of them. (Robertson, 2006: 324)

The Home Secretary, Jack Straw, and his minister, Lord Williams of Mostyn, also wanted to meet Birkett before his appointment could be confirmed, all of which was quite unprecedented. It should also be noted that press stories casting doubt on Ferman's future had begun to appear almost as soon as Labour came to power. These carried all the hallmarks of hostile Home Office briefings, and additionally, in the case of the *Mail*, were clearly part of

the fall-out from the humiliating failure of its strident campaign to try to intimidate the BBFC into banning David Cronenberg's *Crash* (1996) (Petley, 2011: 115-128).

Paradoxically, however, it was a hang-over from the previous Conservative era which really gave Straw the opportunity to flex his muscles over the BBFC.

In 1996, the Home Office and the Metropolitan Police, concerned about the growth of black market sex shops in London, suggested to the BBFC that it might be possible to relax the extremely strict guidelines covering 'R18' videos (which could be sold only in licensed sex shops), something which the BBFC had long wanted to do but had been prevented from doing by the hard-line manner in which the Obscene Publications Act had been enforced by the police, the Crown Prosecution Service and the courts. It was hoped that allowing stronger material to be sold in licensed sex shops would help to drive the illegal establishments out of business. The BBFC thus relaxed its guidelines somewhat, although these still excluded a great deal of material which would be perfectly legal in any other EU country except the Republic of Ireland.

Shortly after Labour came to power the following year, Straw accidentally discovered what the BBFC had done, and, being a known enemy of pornography of even the mildest kind, was absolutely furious. He ordered the reversal of the liberalisation process with immediate effect and summoned Birkett to appear before him, at which point considerably more than a mild rebuke was administered. The unfortunate Birkett, appearing on the BBC Panorama programme *Porn Wars*, 2 November 1998, described the atmosphere at the meeting as 'inquisitorial' and Straw as manifesting a 'genuine sense of outrage' (Petley, 2011: 139). The latter also released to the press a letter criticising Ferman 'in the strongest possible terms' for his 'unacceptable, unilateral decision to liberalise the law' (Petley, 2011: 140), and this was much quoted by censoriously-inclined papers such as the *Mail*, *Sun* and *Sunday Times* which, entirely characteristically, were far more concerned with criticising the BBFC for being overly liberal than the Home Office for being overbearing.

According to James Robertson, Straw met Kimbley in November 1997 and made it clear that he would de-designate the BBFC's President and Vice-Presidents as being responsible for enforcing the Video Recordings Act if the Home Office did not get its way over the appointment of a new President. He also interviewed Birkett, *Independent* co-founder Andreas Whittam Smith and one other candidate for the job. On 20 November he informed Kimbley of his preference for Whittam Smith, and demanded changes at the BBFC. As Robertson puts it:

The most important of these were that a senior Home Office civil servant should be present in future when the BBFC Council of Management interviewed short-listed candidates for the Presidency and Vice-Presidencies, and that the Home Secretary should be invited to comment on the shortlist to enable them to feed in their views before the Council selected a candidate. (Robertson, 2006: 327)

Faced with such brow-beating, Kimbley had little option but to offer the job to Whittam Smith who, however, turned out to be anything but Straw's patsy. The Home Office also let it be known that it was reviewing Ferman's position. This was the cue for yet more hostile press stories.

Nonetheless, this was not the end of the story. Put briefly, video distributors who had purchased the rights to certain films on the understanding that the BBFC had liberalised its 'R18' guidelines now found these videos being subject to cuts when submitted to the BBFC. They took their complaints to the Video Appeals Committee (VAC), an independent body established under the Video Recordings Act, and won. However, the Home Office refused point blank to allow the BBFC to re-liberalise its guidelines, insisting first of all that to do so would be to pass material which might contravene the Obscene Publications Act, and then that the material might contravene the 'harm' provisions of the Video Recordings Act (of which more below). More appeals followed, and these too were successful. And all the while, the public fiction was maintained that the BBFC was acting entirely off its own bat in seemingly arbitrarily and inconsistently changing its 'R18' guidelines back and forth, with the Home Office as absent from media accounts of this story as it was active behind the scenes. In the end, matters reached a peak of absurdity in August 1999 when the VAC decided that seven 'R18' videos which the BBFC had banned should be passed. The BBFC then applied for a judicial review of this decision on the grounds that it was

based on a definition of harm which is an incorrect interpretation of the Video Recordings Act. The VAC judgement, if allowed to stand, would have fundamental implications with regard to all the Board's decisions, including those turning upon questions of unacceptable levels of violence. (Quoted in Petley, 2011: 129-130)

The absurdity of the situation lies in the fact that the BBFC must in fact have agreed with the VAC's decision since it was entirely in line with the liberalised guidelines. One can only assume that the BBFC was required to follow this course of action by an obdurate Home Office. In the event, however, the application for judicial review was dismissed, and in September the Board published a new set of 'R18' guidelines which were far more liberal than those introduced in 1997 (although still pretty restrictive by continental European standards). And although the Home Office was furious, and received a good deal of supportive coverage in the censorious press, there was actually very little it could do without flushing its own leading role in the whole affair out into the open and also making it appear as if the government wanted to intervene *directly* in the censorship of individual films – something from which all previous Home Secretaries had recoiled.

It could perhaps be argued that the actions of Mellor, Brittan and Straw actually demonstrate the resilience of the BBFC in the face of governmental pressure and interference, but they also illustrate how activist and interventionist politicians have powers at their disposal to bring the BBFC to heel, powers which are still available to the Department

for Digital, Culture, Media and Sport. The fact that these three ultimately failed to bend the BBFC to their will makes the existence of those powers none the less disturbing.

In its concluding section, this article will examine how the present government intends to grant quite remarkably draconian powers over the online world to this self-same Department.

## **‘Harm to Potential Viewers’**

We now come on to the notion of ‘harm’ in the Video Recordings Act. Here it needs to be borne in mind that the original Act does not mention this at all. Section 4(1) originally began:

The Secretary of State may by notice under this section designate any person as the authority responsible for making arrangements (a) for determining for the purposes of this Act whether or not video works are suitable for classification certificates to be issued in respect of them, having special regard to the likelihood of video works in respect of which such certificates have been issued being viewed in the home.

However, in 1993 two-year-old James Bulger was murdered by two other children. In the course of his summing up at the conclusion of the ensuing trial, Mr Justice Morland made the entirely unwarranted remark that ‘I suspect that exposure to violent video films may in part have been an explanation’ (Petley 2011: 87) for the two boys’ actions, and politicians and sections of the press instantly re-ignited the ‘video nasty’ panic. There was immediate pressure to strengthen the Video Recordings Act – and indeed to create an absurd category of videos ‘not suitable for home viewing’ – and this was greatly increased by the publication in March 1994 of a report by a number of psychologists, psychiatrists and paediatricians who claimed that there was a definite link between viewing violent media and acting violently. This was nothing more than a rehash of previous and highly questionable research findings by members of these disciplines, who were far from being media experts, but it was catnip to papers such as the *Mail*, who gave it glowing front page treatment and devoted vast numbers of entirely uncritical column inches to it. It was this train of events that prompted Martin and me to put together the first edition of *Ill Effects* (Barker and Petley, 1997).

The original Section 4(1) was then amended to read:

The designated authority shall, in making any determination as to the suitability of a video work, have special regard (among the other relevant factors) to any harm that may be caused to potential viewers or, through their behaviour, to society by the manner in which the work deals with –

- (a) criminal behaviour;
- (b) illegal drugs;
- (c) violent behaviour or incidents;

- (d) horrific behaviour or incidents; or
- (e) human sexual activity.

Although this was presented as a considerable victory by those advocating even stricter video censorship, it was actually a very clever piece of footwork by home secretary Michael Howard, shadow home secretary Tony Blair, and James Ferman (Petley, 2011: 90-96). Although the *BBFC Annual Report 1994-95* is careful not to dismiss the importance of the amendment, the President's introduction nonetheless gives the very strong impression that it required the Board merely to tighten up and refine its already-existing procedures:

The possibility of harm had always been at the heart of BBFC policy, so the new clause did not require a fundamental shift in examining practice. It did, however, clarify the test of suitability for viewing in the home by explaining why video standards should be stricter than film standards. It reinforced the deprave and corrupt test of British obscenity law by adding the simpler test of anti-social influence on behaviour. And it concentrated the mind on the extent to which a video was likely to attract the attention of children, so that the more probable this is, the less the Board may rely on the assumption that an '18' certificate will be adequate protection. Board policy has become more cautious since this was introduced. (BBFC, 1995: 1)

And as Ferman put it in the main body of the Report: 'These criteria represent not a break with former policy, but a confirmation of it, since they put on the face of legislation factors which the Board has been taking into account for many years' (BBFC, 1995: 3). On the other hand, the Report does reveal that more videos were rejected outright in 1994-5 than at any time since 1988.

A clear idea of how the BBFC currently conceptualises harm can be gained from its current *Guidelines*,<sup>3</sup> which define harm thus:

In relation to harm, we will consider whether the material, either on its own, or in combination with other content of a similar nature, may cause any harm at the category concerned. This includes not just any harm that may result from the behaviour of potential viewers, but also any moral or societal harm that may be caused by, for example, desensitising a potential viewer to the effects of violence, degrading a potential viewer's sense of empathy, encouraging a dehumanised view of others, encouraging anti-social attitudes, reinforcing unhealthy fantasies, or eroding a sense of moral responsibility. Especially with regard to children, harm may also include impairing social and

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<sup>3</sup> See BBFC (2019).

moral development, distorting a viewer's sense of right and wrong, and limiting their capacity for compassion. (BBFC, 2019: 7)

Clearly, then, the BBFC still feels that the legislation entitles it to interpret the 'harm' provisions of the Act pretty broadly.

In this respect it is worth noting the case of the video game *Manhunt 2*, whose initial banning by the BBFC in 2007 was overturned by the Video Appeals Committee. The BBFC successfully applied for a judicial review before the High Court of the Committee's decision, which was quashed. However, in the light of the court's directions on the Video Recordings Act, the VAC reconsidered the appeal by the distributor, Rockstar, but still decided that the game should be awarded an '18' certificate. Advised that there was no realistic basis for a further challenge to the VAC, the BBFC reluctantly complied. However, the reason why this case is important is that it produced a significant discussion in the High Court of what the Act meant by 'harm', the QC for Rockstar arguing that it meant actual harm, as opposed to potential or speculative harm, while the QC for the BBFC argued that it did indeed mean potential harm or risk of harm. Mr Justice Mitting agreed with the latter reading, which is why he quashed the VAC's decision. However, although the BBFC eventually lost this particular battle, it is clear that it agreed with Mitting's reading of the harm clause of the Act.<sup>4</sup>

In his work on 'effects' (for example, Barker, 1989: 92-116; Barker, 1995, 2004, 2011; Barker and Petley, 2001: 1-46) Martin only infrequently refers to harm as such, but it is perfectly clear that when he discusses 'effects' he is in fact referring to those 'effects' that legislators and press pundits deem to be harmful in one way or another. However, although his work in this area has been highly influential within media and cultural studies, it goes against the grain of both Conservative and Labour thinking on media policy, and thus has failed to inform any relevant media legislation. Not for nothing did Martin title the final chapter of the second edition of *Ill Effects* (2001) 'On the Problems of Being a "Trendy Travesty"' and draw attention there to 'the strong tradition of denigrating media and cultural studies in the UK' (Barker and Petley, 2001: 202), a tradition which is shared by governments of both stripes and loudly amplified by a national press whose profound ignorance of such studies is outweighed only by their extreme hostility to them.

Indeed, in recent years, the terms 'harm and offence' have come increasingly to replace 'taste and decency' in legislation governing media content, and politicians and regulators have tended to suggest that the former pairing denotes more 'objective' qualities of media content than does the latter. So, for example, in 2005, Richard Hooper, then chair of the Ofcom Content Board, suggested that the wording of the Communications Act 2003 'supports a move away from the more subjective approach of the past, based on an assessment of taste and decency in television and radio programmes, to a more objective

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<sup>4</sup> An outline of the case can be found at <https://www.5rb.com/case/r-on-the-application-of-british-board-of-film-classification-v-video-appeals-committee/>. The BBFC's own account of it is available here: <https://www.bbfc.co.uk/education/case-studies/manhunt-2>

analysis of the extent of harm to audiences' and is 'focussed on providing protection to those who need it most, particularly children and young people' (quoted in Millwood Hargrave and Livingstone, 2009: 27).

However, as Andrea Millwood Hargrave and Sonia Livingstone themselves point out in an extremely useful review of the whole subject: 'While norms of taste and decency can be tracked, with some reliability, through standard opinion measurement techniques, methods for assessing harm are much more contested and difficult' (2009: 25). *Pace Hooper*, the notion of harm, in this context, is no more 'objective' than are the notions of taste and decency, and it is hard to avoid the conclusion that, in practice, the notion of harm has largely been collapsed into the notion of offence so as to produce the composite harm-and-offence. It also needs to be pointed out that enshrining the notion of harm in laws governing media content does not make it any more intellectually coherent or philosophically cogent, it merely gives it legal force and, in so doing, is liable to pave the way for acts of censorship on frequently highly dubious and questionable grounds.

### **'Who Is to Judge?' The Williams Committee Critique of Harm**

As the Committee on Obscenity and Film Censorship, chaired by Bernard Williams, pointed out in 1979, there is a crucial difference between the harm undoubtedly done to the body by, for example, taking certain drugs, and the harm which some allege is done by reading certain books or watching certain films. This, they claim, can lead in real life to sexual crimes and other crimes of violence. Williams is in no doubt that such crimes are genuinely harmful, but sceptical about whether these are 'effects' of being exposed to the works in question. And beyond such crimes

there is a real question about 'who is to judge' what counts as harm; since it is a question of moral harm, there is room for disagreement about what such harms are, and there is a danger that the moral opinions of some group, presumably some rather conservative group, should be made authoritative for the moral health of readers. (Home Office, 1979: 58)

Williams noted that some of those who gave evidence to the Committee expressed concerns about people's behaviour being

modified or conditioned by what was read or seen in ways that were less specifically anti-social but which conflicted with perceived standards of morality or with the expectations of society. Some emphasised the aspects of pornography which degrade women in that much material is not only offensive but encourages a view of women as subservient and as properly the object of, or even desirous of, sexual subjugation or assault ... At a rather more general level, some people saw certain kinds of material, in presenting a

distorted view of human experience, as damaging to human relationships by hindering the full development of the human personality or corrupting the imagination. (Ibid)

Williams also considers fears of 'harms of a less definite and more pervasive kind' which relate 'to general effects on society of pornography and violent publications and films, and which can best be summed up, perhaps, under the phrase used by several witnesses, "cultural pollution"'. Williams considers these seriously, but concludes that in the case of such concerns:

There is often a real difficulty in identifying what the harmful effect of the material is supposed to be, and whether indeed it is really an effect of the materials circulating that is in question, rather than the circulation itself which is regarded intrinsically an objectionable thing. (Home Office, 1979: 59)

He thus stresses the need for 'some independent test of whether a given activity produces harm' and the importance of 'the requirement, for legal purposes, that the causation of harm should lie "beyond reasonable doubt"' (Ibid), concluding that, on the basis of the available evidence, and specifically in the case of pornography, this requirement has not been met – with one exception.

This concerns the harm done to certain of those involved in the production of pornography – namely adults on whom actual harm was inflicted during the production, and children who, by virtue of their age, are simply unable to give informed consent to what are anyway illegal acts. In this case, in the Committee's view, the harm 'lay not only in the original act, which might already be caught by the existing law on sexual offences or on personal violence, but in the circulation of depictions of that act, because they both exploited that act and provided the motive for it' (Home Office, 1979: 131).

### **'Indescribably Vile Films'**

So far, so liberal, and largely prefiguring Martin's later strictures on 'effects'. However, it is all too often overlooked that Williams by no means adopted the same liberal attitude towards all forms of media. This was because 'the various media have a different impact and demand different treatment' as far as the law is concerned (Home Office, 1979: 133), and, in his view, 'the aim of treating all the media uniformly is misconceived; there is no reason why one solution should be expected to apply equally to a series of different problems' (Home Office, 1979: 144). According to Williams, film is

a uniquely powerful instrument: the close-up, fast cutting, the sophistication of modern makeup and special effects techniques, the heightening effect of

sound effects and music, all combine on the large screen to produce an impact which no other medium can create. (Home Office, 1979: 145)

This is particularly the case when it comes to films involving what he repeatedly refers to as 'extreme violence'. Thus, in the case of cinema films, the Committee actually proposed that the BBFC be replaced by a statutory film censorship body.

Particularly significantly for this article, one of the reasons for the Committee's support for statutory film censorship had a great deal to do with its encounter with the very films which were about to be labelled 'video nasties', although as home video was barely in its infancy when the research for the Report was being undertaken, and as several of these had been banned as cinema films by the BBFC, the latter very helpfully arranged screenings of them as part of its extremely detailed briefing of the Committee. Thus, the Report reveals that:

What clinched the argument for some of us at least was the sight of some of the films with which the censorship presently interferes. We feel it necessary to say to many people who express liberal sentiments about the principle of adult freedom to choose that we were totally unprepared for the sadistic material that some film makers are prepared to produce. (Home Office, 1979: 144)

Thanks to Committee member Professor Brian Simpson (1983: 25-26, 38) we know that one such film was *Ilsa - Harem Keeper of the Oil Sheiks* (1976) whilst fellow member Polly Toynbee in the *Guardian*, 19 May 2000, cited *Ilsa - She Wolf of the SS* (1975) as 'just one of the many indescribably vile films' which she saw and which she thought should be banned. And, warming to its theme, the Report pronounced:

It is not simply the extremity of the violence which concerns us: we found it extremely disturbing that highly explicit depictions of mutilation, savagery, menace and humiliation should be presented for the entertainment of an audience in a way that appeared to emphasise the pleasures of sadism. Indeed, some of the film sequences we saw seemed to have no purpose or justification other than to reinforce or sell the idea that it can be highly pleasurable to inflict injury, pain or humiliation (often in a sexual context) on others. (Home Office, 1979: 145)

Indeed, so distressed was the Committee by these films that it abandoned its insistence that, as in the case of pornography, the causation of harm should lie 'beyond reasonable doubt' and fell back simply on speculation and 'common sense'. Admitting that research had not 'demonstrated any convincing link between media violence and violence in society', the Report suggested that this was 'due in part at least to the weakness of experimental research

as a means of determining human motivations' (Home Office, 1979: 144), in spite of the fact that it had taken a highly sceptical view of such an argument when made in relation to pornography. However, nothing daunted, the Report argued that:

It may be that this very graphically presented sadistic material serves only as a vivid object of fantasy, and does no harm at all. There is certainly no conclusive evidence to the contrary. But there is no conclusive evidence in favour of that belief, either, and in this connection it seems entirely sensible to be cautious. (Home Office, 1979: 145)

Thus, a film would be banned outright if it 'contains material prohibited by law' or 'is unacceptable because of the manner in which it depicts violence, sexual activity or crime' (Home Office, 1979: 156).

Most of the Report's recommendations were never put into practice because they were far too liberal for the Conservative government of Mrs Thatcher which came to power in 1979, and also because of an absolutely ferocious campaign against it by Mary Whitehouse and censorious newspapers, the combination of which, even before the Report had been published, had terrified Parliament with the spectre of children being widely exposed to, and indeed even becoming involved in, pornography if its recommendations were accepted. What is particularly interesting in the present context, however, is that the committee's encounters with 'video nasties' *avant la lettre* should have produced a prescription that so clearly foreshadows the designation of the BBFC in 1984 as a statutory video censorship body.

## Setting a Pattern

It can convincingly be argued that the 'harm' clause in the Video Recordings Act, however problematic Martin and others may have found it, helped to set the pattern for elements of future media legislation. For example, the Communications Act 2003<sup>5</sup> charged the new regulator, Ofcom, which it created, with ensuring that 'generally accepted standards are applied to the contents of television and radio services so as to provide adequate protection for members of the public from the inclusion in such services of offensive and harmful material'. This formulation is repeated almost verbatim in Section 2.1 of Ofcom's *Broadcasting Code*,<sup>6</sup> which states that 'generally accepted standards must be applied to the contents of television and radio services and BBC ODPS [on demand programme services] so as to provide adequate protection for members of the public from the inclusion in such services of harmful and/or offensive material'. The problem is, however, that this effectively creates the above-mentioned catch-all composite category of harm-and-offence into which all sorts and kinds of broadcast content can be fitted, as can be seen from Ofcom's *Guidance*

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<sup>5</sup> See Legislation.gov.uk (2003).

<sup>6</sup> See Ofcom (2020).

*Notes*<sup>7</sup> to Section 2 of its Code. This includes subjects as disparate as ‘claims or advice in programmes about viewers’ and listeners’ health or wealth’, ‘misleading material in relation to the representation of factual issues’, ‘offensive language’, ‘violent, dangerous or seriously anti-social behaviour’, ‘suicide and self-harm’, ‘exorcism, the occult and the paranormal’ and so on.

As Graham Smith (2019) has pointed out, in 2003, the year that the Communications Act was passed:

The legislators did not have to understand what the vague term 'harm' meant because they gave Ofcom the power to decide. It is no surprise if Ofcom has had little difficulty, since it is in reality not 'working out what harm means' but deciding on its own meanings. It is, in effect, performing a delegated legislative function.

The problem here is that the very vagueness of the original legislation handed Ofcom a great deal of power to make its own regulations regarding broadcast content that it considered harmful, or, as Smith puts it, provided it with a canvas on which it could paint at will. And this is precisely the problem caused by introducing the notion of ‘harm’ into laws regulating media content without making it clear what ‘harm’ means in specific contexts, exactly as Martin pointed out in relation to ‘video nasties’ and the amended Video Recordings Act.

## **Legislative Overkill: The Online Safety Bill**

This Mention of Ofcom brings us on, in conclusion, to the Online Safety Bill. Significantly this measure’s origins lie in a document entitled the *Online Harms White Paper*.<sup>8</sup> The Bill was published in draft form in May 2021,<sup>9</sup> and condemned by groups such as Index on Censorship (2021), Big Brother Watch (2022), the Open Rights Group (ORG) and Article 19 (2021) as a thoroughly dangerous exercise in legislative overkill. For example, Big Brother Watch claimed that:

No piece of legislation has posed a greater threat to freedom of expression in living memory than the Online Safety Bill. The Bill is nothing short of an assault on the rights to free speech and privacy and would fundamentally reconfigure how expression is policed in the UK. (2022)

(For an authoritative guide to the Bill’s pre-history, see Woodhouse, 2022a).

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<sup>7</sup> See Ofcom (2017).

<sup>8</sup> See HM Government (2019).

<sup>9</sup> See Gov.uk (2021).

The Bill itself was introduced to Parliament on 17 March 2022.<sup>10</sup> Since then it has gone through extensive revisions,<sup>11</sup> exploration of which are far beyond the scope of this article (a detailed account can be found in Woodhouse, 2023) but what is of particular interest in the present context are the conceptions of harm which informed the original, and also the mechanisms contained within it which will enable the government of the day to engage, directly and indirectly, in controlling what British denizens of the online world will be able to access. Some of the Bill's original harm provisions have been modified in the course of its parliamentary journey, but it is nonetheless worth examining what was in the original for the light which it sheds on official thinking on the subject of media harm.

Few would deny that there are some extremely unpleasant and dangerous aspects of the online world which do indeed need regulating, but many have argued that even in the Bill's revised form, much of what the government has proposed is unworkable, authoritarian, economically damaging and runs counter to the human rights of internet users, whether producers or users of online content. The original certainly represented a quite remarkably wide-ranging attempt to regulate what children and adults in the UK would be able to access online in future (for an extremely useful guide see Woodhouse, 2022b). A dauntingly complex measure, running to some 225 pages with twenty-six pages of Explanatory Notes,<sup>12</sup> it imposed a new statutory duty of care on internet companies, including social media platforms. The new framework will be overseen and enforced by Ofcom, whose role will include issuing codes of practice and setting out what companies will need to do in order to comply with the duty of care laid upon them. In particular they would be required to remove:

- Illegal content, including terrorism; CSEA (child sexual exploitation and abuse) material; encouraging or assisting suicide; offences relating to sexual images, including revenge and extreme pornography; incitement to and threats of violence; hate crime; public order offences, harassment and stalking; drug-related offences; weapons and firearms offences; fraud and financial crime; money laundering; exploiting prostitutes for gain; organised immigration offences.<sup>13</sup>
- Content that is harmful to children. To include pornography, which will require websites providing pornography to install age-verification mechanisms.<sup>14</sup>
- Content that is legal but harmful to adults.

This is the culmination of a train of events which dates back virtually to the moment that the World Wide Web became available to the public in August 1991, something that Martin and

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<sup>10</sup> See Online Safety Bill (2022a).

<sup>11</sup> See UK Parliament (n.d.).

<sup>12</sup> See Online Safety Bill (2022b).

<sup>13</sup> See UK Parliament – Hansard (2022a).

<sup>14</sup> See UK Parliament – Hansard (2022b).

I were determined to track in the second edition of *Ill Effects*. As I note in the chapter titled 'Invasion of the Internet Abusers', in February 1994 the Home Affairs Committee published its first report on computer pornography, which opened with the words: 'Computer pornography is a new horror'. Such fears were assiduously fanned by the right-wing national press, partly because in the Web it espied a potentially economically damaging competitor for both readers and advertising revenue, and partly because the default response of such newspapers to all new forms of communication is unhesitatingly to highlight their alleged dangers and to demand that they are censored. Thus, as early as 9 June 1996, John Naughton could write in the *Observer* that 'to judge from British coverage of the subject, there are basically only three Internet stories: "Cyberporn invades Britain", "Police crack Internet sex pervert ring", and "Net addicts lead sad virtual lives"'. This has remained the case ever since, except with the addition of 'Net is hive of hate' and 'Terrorist plot hatched online'. And every British government since the 1990s has required internet companies to censor themselves in one way or another and made it clear that if they fail to do so, statutory action will follow. However, nothing as elaborate and all-encompassing has ever been proposed as the arrangements now contained in the Online Safety Act.

One of the original Bill's most disturbing constructs was the notion of 'legal but harmful' material. Firstly, this raises the question why, if certain material is considered to be genuinely harmful, it has not already been made illegal. And second, it creates a category of material that is legal offline but not online, thereby completely inverting the conventional dictum that what is illegal offline should be illegal online and flying in the face of UN and Council of Europe policy on freedom of expression online. Such material, as far as adults are concerned, included issues such as abuse, harassment or exposure to content encouraging self-harm or eating disorders. Section 187(2) of the original Bill states that "'harm" means physical or psychological harm', and section 187(4) refers to harm arising in circumstances where, as a result of encountering certain forms of online content, individuals 'act in a way that results in harm to themselves or that increases the likelihood of harm to themselves' or 'do or say something to another individual that results in harm to that other individual or that increases the likelihood of such harm'. As was pointed out by many of the Bill's critics at the time, such notions of harm are extremely vague, and carry with them the distinct danger that, for the purposes of this measure, 'harm' would come to be conceived simply as 'harm to the most easily upset or offended person'.

During the course of the Bill's lengthy legislative journey, its harm provisions did in fact come under a good deal of scrutiny both inside and outside Parliament, and in November 2022 Michelle Donelan, DCMS minister, announced that she would

table a number of amendments in the Commons to remove 'legal but harmful' from the Bill in relation to adults, and replace it with a fairer, simpler and we believe more effective mechanism called the Triple Shield, which will focus on user choice, consumer rights and accountability whilst protecting freedom of expression. (Donelan, 2022)

With regard to the Triple Shield, Donelan explained that:

Rather than tech giants' algorithms alone deciding what users engage with, users themselves should have the option to decide. Adults should be empowered to choose whether or not to engage with legal forms of abuse and hatred if the platform they are using allows such content. So the 'Third Shield' puts a duty on platforms to provide their users with the functionality to control their exposure to unsolicited content that falls into this category. These functions will, under no circumstances, limit discussion, robust debate or support groups' ability to speak about any of these issues freely. (Donelan, 2022)

Criticism was also voiced over the Bill's proposed introduction of a harmful communications offence. This would have been committed if a person sends a message, and, at the time of sending it, there was a 'real and substantial risk that it would cause harm to a likely audience', with harm defined as 'psychological harm amounting to at least serious distress'; if the person intended to cause harm to a likely audience; and if the person had no reasonable excuse for sending the message. Donelan agreed to drop the proposed offence on the grounds of its 'potential to produce unintended consequences on freedom of expression' in that it could 'criminalize legal and legitimate speech on the basis that it has caused someone offence'. She also argued that 'platforms can, and in most cases do, already have terms of service that relate to such content and so would be captured as part of the "triple shield"'. Had the new offence been created, the government would have repealed elements of the Malicious Communications Act 1988 and Section 127(1) of the Communications Act 2003, which are intended to protect people from harmful communications, including racist, sexist and misogynistic abuse. These were now retained. On the other hand, Donelan confirmed that:

The other new offences on false and threatening communications will remain in the Bill. The false communications offence will protect individuals from any communications where the sender intended to cause harm by sending something knowingly false, while the threatening communications offence will capture communications which convey a threat of serious harm, such as grievous bodily harm or rape.<sup>15</sup>

Sections 53-5 of the original Bill gave the Secretary of State executive powers to designate, in secondary legislation, specific categories of content that would meet its worryingly broad definitions of 'harm', and platforms would need to moderate accordingly the content that they carry. The danger here, as Robert Sharp (2021a) of ORG pointed out, is that:

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<sup>15</sup> See Gov.uk (2022).

The power of the Secretary of State to make regulations means that ‘harmful’ becomes whatever the Minister says it means. The Minister is required to meet with OFCOM before making regulations, but there is no provision for wider consultation. Nor is there any requirement for an evidence base ... The extent of the Secretary of State’s power is deeply worrying. Anything designated ‘harmful’ must be closely moderated by the social media companies. Algorithmic takedowns will be the inevitable result. The link between designation and content removal might be a staged and circuitous process, but it is nevertheless a form of censorship. Such a potent power should only ever be the subject of primary legislation. It is not an appropriate power to be wielded by statutory instruments.

It does need to be pointed out, however, that the attacks on the Bill’s harm provisions came from at least two different, and indeed diametrically opposed, ideological directions. On the one hand were those who argued that if certain forms of expression were to be restricted because they were harmful, then the harms in question had to be both serious and clearly specified in law. Furthermore, any restrictions imposed on these harmful communications had to be compatible with the right to freedom of expression contained in Article 10 of the European Convention on Human Rights and Article 19 of the Universal Declaration of Human Rights. Such harms could include, for example, reputation-damaging defamation, invasion of personal privacy, online threats to personal safety, the stirring up of racial hatred, and so on. On the other were those such as the so-called Free Speech Union, various ‘libertarian’ Tory MPs and right-wing newspapers, all of whom uttered dire warnings that the Bill would simply play into the hands of those who wanted to ‘cancel’ ideas of which they disapproved. Such people claim loudly to be in favour of free speech, but are in fact advocates of consequence-free speech. As Nesrine Malik has put it, these are the forces which have constructed the myth of a free speech crisis, whose purpose is

to normalise hate speech or shut down legitimate responses to it ... It is not to secure freedom of speech, that is, the right to express one’s opinions without censorship, restraint or legal penalty. The purpose is to secure the licence to speak with impunity; not freedom of expression, but rather freedom from the consequences of that expression. (Malik, 2020: 98).

Further discussion of this topic is beyond the scope of this article, but suffice it to say that it is a testament to the very vagueness of the notion of harm that still animates so much of the Act, and all its earlier incarnations, that it has managed to attract so much criticism from such opposing forces.

Turning back to the question of the involvement of the state in the censorship process, one should note that the Bill gives the Secretary of State considerable powers to direct and influence the work of Ofcom, and therefore to interfere with how social media companies

operate their services. Thus Sections 37 – 44 of the original Bill grant the Secretary of State very considerable oversight of the Codes of Practice which Ofcom will be required to draw up for service providers. For example, Section 40(1) states that they may direct OFCOM to modify a draft of a code of practice if they believe that ‘modifications are required (a) for reasons of public policy, or (b) in the case of a terrorism or CSEA [Child Sexual Exploitation and Abuse] code of practice, for reasons of national security or public safety’. And while the Secretary of State must have the Codes of Conduct approved by Parliament, the fear is that in practice this would amount to no more than a rubber-stamping of the government’s approach.

The Secretary of State will also issue statements of priorities for the regulator, as laid down originally in Section 143. Such statements are described as ‘strategic’: they are supposed to be issued once every five years and to secure parliamentary approval. However, the Secretary of State can amend the statement within the five-year period if a General Election has taken place in the interim or if ‘there has been a significant change in the policy of Her Majesty’s government affecting online safety matters’.

Thus, as Sharp (2021b) argues, there are numerous ways in which the measure will incentivise a Secretary of State to intervene in the work of the regulator whenever a specific issue arises. It allows the Secretary of State to announce an amendment to OFCOM’s priorities without the need for parliamentary approval. The mechanism is thus a ‘quick fix’ that can be deployed in response to complaints in the media or from pressure groups that ‘something must be done’ about a particular online phenomenon.

Again, Martin’s warnings of the powers granted to the government by the Video Recordings Act spring immediately to mind, and the possibilities for re-runs of the online equivalents of episodes in the ‘video nasties’ panic, in which press campaigns played an absolutely crucial role, as both Martin and I have pointed out at length, are all too likely. Indeed, as noted above, 30 years of the demonisation of elements of the online world by sections of the press have played a key role in paving the way for the Online Safety Bill in the first place.

However, even if Ministers choose not to pull the many levers that the Act puts at their disposal, the mere existence of these powers will undoubtedly influence the way that social media companies operate.<sup>16</sup> As this article has made clear, successive governments have repeatedly stressed that if media companies, be they video distributors or internet service providers, do not put their own houses in order, according to official standards, then laws will be introduced that will require them to do so. And similar pressure has been applied

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<sup>16</sup> The manner in which fear of legal sanction can lead to self-censorship is illustrated by the original distributor of *Cannibal Holocaust* (1979) putting a pre-cut version of the video into circulation even before the Video Recordings Act came into being – presumably in the vain hope of not falling foul of the Obscene Publications Act. And, in a classic example of what one might call ‘anticipatory compliance’, the distributor of the video of *Videodrome* (1983) cut it by three minutes before submitting it to the BBFC in 1987 – and this in spite of the fact that the Board had taken a very liberal view of Cronenberg’s earlier works.

to a media regulatory body, namely the BBFC, which, as we have seen, has been threatened on more than one occasion with de-designation.<sup>17</sup> As Sharp (2021b) puts it:

Ministerial influence will loom large in the minds of those running social media platforms. Policy within the tech companies will be driven by attempts to divine the whims and foibles of whoever happens to be Secretary of State, rather than by the strategic purpose. The effect will be an erratic and inconsistent approach to content moderation, with an associated chill on digital rights.

This is, in fact, very much in line with how regulation, including media regulation, works in the modern world. As Des Freedman has explained:

The preferred mechanisms of contemporary governance regimes are, increasingly, self-regulation, where industry modifies its behaviour in response to a set of agreed codes, and co-regulation, where industry works in partnership with the state to design and enforce adherence to rules. (Freedman, 2016: 122)

What, however, needs to be stressed here is that the codes and regulations which co-regulatory and self-regulatory bodies devise and enforce have their origins in the laws of the land. Thus, although the government will delegate internet regulation to Ofcom, which will in turn work with powerful corporate intermediaries, it will still exercise a significant degree of control over online material via legislation – in this case both the Online Safety Act itself and the various laws which specify what kinds of content are illegal.

## Conclusion

However, further consideration of contemporary forms of governance is beyond the scope of this article, which has been concerned to show the continuing relevance of Martin's work on media censorship and the critique of 'harm' which underlies his strictures on it. Some of this predates the coming of the World Wide Web, but what his work on 'video nasties' so clearly demonstrates is that a technology which some thought that, by its domestic nature, was safe

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<sup>17</sup> Note, for example, the abolition of the Independent Broadcasting Authority (IBA) shortly after its refusal to ban the Thames Television documentary *Death on the Rock* (1988) in the face of extreme government pressure to do so. As Paul Bonner argues (in Bonner and Aston, 1998: 69-79) argues, one should avoid positing a direct causal link here, but he also quotes the then managing Director of Thames, Richard Dunn, as stating that it contributed significantly to the government losing confidence in and mistrusting the IBA, and wanting to disband it. What effect this had on subsequent decisions taken by the successor body, the Independent Television Commission (ITC), is a matter for conjecture.

from censorship readily fell within the censors' grasp thanks to a government quite prepared to intervene in the private sphere to an extent which might well be thought overly intrusive in a democratic society. It also shows just how potent is a certain conception of 'harm' in legitimising such a drastic intervention, particularly when loudly reinforced and amplified by cheerleading from significant sections of the national press. Exactly the same considerations apply to the Web.

This too was once thought censor-proof, but as the example of countries such as China, Russia, Turkey, Iran and Saudi Arabia all too clearly shows, even though it may not be possible to censor the *contents* of the Web wholesale on a global basis, it is most certainly possible for individual governments to deny their *subjects* the ability to access certain kinds of online material. This is normally thought to happen only in non-democratic societies but, again, a democratic government that is prepared to act in ways that are normally thought to be the preserve of autocratic regimes has numerous means at its disposal. And yet again, if it has press allies – in this case, ones motivated by brute economic self-interest as well as an authoritarian ideological stance – ready, willing and able to bang the 'harm' drum, this makes its task a great deal easier. It may have taken over twenty years for the prospect of internet censorship in Britain to be finally realised, whereas the Video Recordings Act was achieved in a mere three, but the forces which have brought this about, and the methods which they have employed in order to do so, are remarkably similar.

Martin's work stands as a dire warning against the creeping extension of media censorship into ever new areas, and as a rigorous critique of one of the most significant means whereby this has been justified and legitimised. Many have taken this warning to heart – but not, inevitably, those within the press/government nexus, who have chosen either to ridicule or simply ignore it. The policies of successive governments, both on media and education (and especially media literacy) are greatly poorer for it. But, of course, that's what comes of being a 'trendy travesty'.

## **Biographical Note**

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## **Filmography**

*Crash* (David Cronenberg, 1996)

*Cannibal Holocaust* (1979, Ruggero Deodato)

*Ilsa - Harem Keeper of the Oil Sheiks* (Don Edmonds, 1976)

*Ilsa - She Wolf of the SS* (Don Edmonds, 1975)

*Videodrome* (1983, David Cronenberg)

## **Television**

*Death on the Rock* (ITV, 28 April, 1988)

*Porn Wars* (BBC, 2 November, 1998)