The Reclassification of Extreme Pornographic Images

Andrew D Murray, London School of Economics and Political Science
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Abstract:

Legal controls over the importation and supply of pornographic imagery promulgated nearly half a century ago in the Obscene Publications Acts have proven to be inadequate to deal with the challenge of the internet age. With pornographic imagery more readily accessible in the UK than at any time in our history, legislators have been faced with the challenge of stemming the tide. One particular problem has been the ready accessibility of extreme images which mix sex and violence or which portray necrophilia or bestiality. This article examines the Government’s attempt to control the availability of such material through s.63 of the Criminal Justice and Immigration Act 2008, which criminalises possession of such images. It begins by examining the consultation process and concludes that an underlying public policy objective was the root of the new offence despite the lack of a clear mandate for such a policy. The article then examines whether this weakness in the foundations for the proposed new offence caused the proposal to be substantially amended during the Committee Stage of the Criminal Justice and Immigration Bill: to the extent that the final version of s.63 substantially fails to meet the original public policy objective. The article concludes by asking whether s.63 may have unintended consequences in that it fails to criminalise some of the more extreme examples of violent pornography while criminalising consensual BDSM images, and questions whether s.63 will be enforceable in any meaningful way.

A Background

On 14 March 2003 Jane Longhurst, a teacher from Brighton, was strangled by Graham Coutts with a pair of tights, apparently during sexual intercourse. Coutts was known to Miss Longhurst, but he was also a man with a dangerous obsession which became apparent following his arrest when an examination of his computer revealed it contained a series of violent images downloaded from a variety of internet sites containing portrayals of sexual asphyxiation, rape, torture and violent sex.¹ During his trial, the Crown Prosecution Service brought further evidence that Coutts’ consumption of violent internet pornography had been high on 13 March 2003, but had been markedly reduced between 14 March and 24 March.² Coutts was eventually convicted of Miss Longhurst’s murder,³ but the tragic events

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² Ibid at [41].
of 14 March 2003 were to signal the beginning of a campaign to ban possession of violent images (such as those held by Coutts) which reached fruition on 8 May 2008 with the promulgation of s.63 of the Criminal Justice and Immigration Act 2008.\(^4\)

Following the conviction of Coutts, Liz Longhurst, Miss Longhurst’s mother, began a campaign to criminalise possession of violent pornography: images portraying sexual asphyxia, necrophilia and rape. In an interview in 2006 Mrs. Longhurst gave her reasoning behind the campaign, which went much further than simply taking direct action against what many saw as the root cause of her daughter’s death. She said she believed that ‘the internet gives some kind of legitimacy to those who find sexual gratification in such images\(^5\) and that these images ‘could be seriously corrupting. But if you want to look at them now, you’re not breaking any law whatsoever.’\(^6\) Mrs. Longhurst acknowledged her campaign would be difficult: to pass such a law would not be ‘as easy as passing a law on child pornography, because you can always say the children couldn’t give their agreement. Well, my feeling is that a lot of the women who are used in these horrible videos, the trafficked women, have not agreed to it.’\(^7\) Despite these difficulties, Mrs. Longhurst found support for her campaign not only from the fifty-thousand signatories for her petition to criminalise possession of violent pornography, but also from the incumbent Home Secretary David Blunkett.\(^8\) With Mr. Blunkett’s support the Home Office and the Scottish Executive produced a joint

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\(^3\) Coutts was found guilty of murder at Lewes Crown Court on 3 February 2004, but he appealed on the grounds that the Jury were not offered a manslaughter alternative and that the Jury was inadequately directed on the internet evidence. It was dismissed by the Court of Appeal (\textit{Coutts n 1 above}), but on appeal the House of Lords overturned the murder conviction, ruling that the jury should have been presented with a possible manslaughter verdict (\textit{R. v Coutts [2006] 1 WLR 2154}). A new trial took place in June 2007 when Coutts was again convicted of murder and was sentenced to a life term (see H. Carter, ‘Teacher’s killer found guilty of sex murder on retrial’, \textit{The Guardian} 5 July 2007).

\(^4\) The Act received Royal Assent on this date. s.63 will be brought into force in January 2009 by Order of the Secretary of State (see n 61 below and accompanying text).

\(^5\) There is a similarity here with Sunstein’s ‘personalisation and democracy’ thesis found in C. Sunstein \textit{Republic.com} (Princeton NJ: Princeton UP, 2001), in particular his second effect of digital personalisation that ‘Without shared experiences, a heterogeneous society will have a much more difficult time in addressing social problems.’ (at 9).


\(^7\) \textit{Ibid}.

consultation paper: *Consultation: on the possession of extreme pornographic material* and the process to bring Mrs. Longhurst’s campaign to fruition had begun.⁹

**A Consultation**

The consultation process was open for twelve weeks and asked a series of complex questions. It began by noting the disruptive effects the processes of digitisation and computer networking were having on attempts to control the distribution of violent pornography. The consultation paper noted that: “The issue arises due to the wide range of extreme pornography available via the internet which cannot, in practice, be controlled by our existing laws. Extreme pornography featuring violent rape, sexual torture and other abusive non-consensual acts existed in various forms before the internet but the publication and supply could be controlled by the Obscene Publications Acts 1959 and 1964, the Civic Government (Scotland) Act 1982 and by Customs legislation (the Customs Consolidation Act 1876 and Customs and Excise Management Act 1979). Closing down sources of supply and distribution obviated the need for a possession offence. However, the global nature of the internet makes this approach much more difficult.”¹⁰ As a result the first question for consultation was: ‘Do you think that the challenge posed by the internet in this area requires the law to be strengthened?’¹¹ The consultation paper noted that a similar approach had been taken to the criminalisation of indecent images of children and pseudo-photographs of children. The primary purpose of this was to protect children both from direct abuse and from the continued circulation of images of their abuse. The consultation paper noted that: ‘downloading an image from the internet is regarded as a serious matter because to do so feeds the market for this kind of material, so increasing the likelihood of further abuse, to create further images. Although the arguments are less clear cut in respect of violent and abusive adult pornography, we believe that a possession offence will send a clear message about this material, will make it easier to combat it and may reduce demand for it.”¹² This is the argument referred to earlier that a correlation may be drawn between violent pornographic imagery and images of child abuse. This connection is though tenuous at best.

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¹⁰ *ibid* 1.

¹¹ *ibid* 9.

¹² *ibid*. 
The philosophical underpinning for the criminalisation of the possession of child abuse images is varied. Most commentators suggest we criminalise the possession of such content as it is the fruit of a serious criminal offence. The image is a photographic record of an act of child abuse and as such is the result of serious criminal activity: to possess it is therefore to support serious criminal activity. This approach, which we may categorise as the direct harm approach, is clearly set out in the language of the Convention on the Rights of the Child. This requires that ‘States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child’ and that ‘States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent the exploitative use of children in pornographic performances and materials.’ The criminalisation of the possession of child pornography under the direct harm approach is uncontroversial. Like the confiscation of the fruits of fraud or other criminal activities, he who possesses the fruits of criminal activity is tainted by them should he not immediately bring them to the attention of the relevant authorities.

The direct harm approach is considerably more difficult to apply to the criminalisation of extreme pornography. The consultation paper set out the Government’s intent to legislate to make it illegal to possess certain categories of extreme pornography: (i) bestiality (including oral intercourse with an animal); (ii) sexual interference with a human corpse; (iii) serious violence in a sexual context, and (iv) serious sexual violence. These terms were defined and qualified by the consultation paper. ‘Serious violence’ involves or appears to involve serious bodily harm in a context or setting which is sexual: for example, images of suffocation or hanging with sexual references in the way the scenes are presented.

15 ibid, Art 34(c).
16 Home Office/Scottish Executive, Consultation: on the possession of extreme pornographic material, above n 9 at para 39.
‘Serious sexual violence’ involves or appears to involve serious bodily harm where the violence is sexual.\(^\text{17}\) The direct harm approach cannot be justified in all cases listed here. Although there are no doubt cases where actual criminal activity is recorded in the making of extreme pornography, the definitions given in the consultation paper are too wide to justify the application of the direct harm principle across the board. Intercourse with an animal is illegal under s.69 of the Sexual Offences Act 2003, but this specifically does not criminalise oral sex with an animal. Equally although sexual penetration of a corpse is illegal under s.70 of the same Act, there is no wider offence of sexual interference with a corpse. The greatest problem though for the application of the direct harm principle is in the other proposed offences ‘serious violence in a sexual context’ and ‘serious sexual violence’. Again the underlying criminal offences are to be found in the Sexual Offences Act 2003. By s.1 the offence of rape is committed in the event that a person engages in sexual intercourse with another without the consent of that person, while the offence of sexual assault is defined in s.3 as intentionally touching another person in a sexual nature without their consent. These are markedly different from the extreme pornography offences proposed at consultation which proposed to prohibit the possession of pornographic images which contain ‘actual scenes or realistic depictions’ of serious violence in a sexual context or serious sexual violence. While it may be the case that the production of pornographic content of this nature may record an actual rape or serious assault or may, as suggested by Mrs. Longhurst, involve the illegal trafficking of women, much content of this type is also commercially produced, mostly in the United States or Japan, with the involvement of consenting professional performers.\(^\text{18}\) With these images there is no criminal act in the creation of the imagery, the material although clearly pornographic and obscene is not in all cases the fruit of a tainted tree in the same way that images of child abuse are. To ban possession of such images we must employ a different rationale. One possible rationale is the indirect harm approach already developed and applied to the criminalisation of the possession of pseudo-images of child abuse. Pseudo-images are

\(^{17}\)ibid, para 40.

digitally manipulated images which appear to portray an image of child abuse but which have been produced without direct harm to a child. Most commonly these are produced by ‘morphing’ commercially produced pornographic images using image manipulation software to make the adult participants appear under age. Obviously as the production of such pseudo-images does not involve the abuse of a child there is no direct harm; despite this possession of such pseudo-images is criminalised on the basis of indirect harm.\footnote{By s 160 of the Criminal Justice Act 1988, as amended by the Criminal Justice and Public Order Act 1994, it is an offence for a person to have any indecent photograph or pseudo-photograph of a child in his possession. A pseudo-photograph is defined in s.7(7) of the Protection of Children Act 1978 as ‘an image, whether made by computer-graphics or otherwise howsoever, which appears to be a photograph.’} This is most concisely elucidated in the Explanatory Report to the Council of Europe Convention on Cybercrime where it is noted: ‘It is widely believed that such material and on-line practices, such as the exchange of ideas, fantasies and advice among paedophiles, play a role in supporting, encouraging or facilitating sexual offences against children.’\footnote{Council of Europe, \textit{Explanatory Report to the Convention on Cybercrime}, para 93. Available from: \url{http://conventions.coe.int/Treaty/en/Reports/Html/185.htm} (visited 13 May 2008).} This is the indirect harm rationale in a nutshell: if one does not break the cycle of production and consumption of pseudo-imagery it increases substantially the risk that children will be harmed in the future.\footnote{See also Eneman, n 13 above at 33ff; N. Levy, ‘Virtual child pornography: the eroticisation of inequality’ (2002) \textit{4 Ethics and Information Technology} 319.} This occurs when a paedophile who has first encountered the eroticisation of children through pseudo-imagery progresses to the consumption of real abuse images, or even to commit abuse.\footnote{There is strong evidence to suggest that paedophiles are likely to cause indirect harm to children by their consumption of virtual pornography. See E. Quayle & M. Taylor, ‘Child pornography and the Internet: perpetuating a cycle of abuse’ (2002) \textit{23 Deviant Behavior} 331; M Seto, J. Cantor & R. Blanchard, ‘Child pornography offenses are a valid diagnostic indicator of pedophilia’ (2006) \textit{115 Journal of Abnormal Psychology} 610; M. Seto & A. Eke, ‘The Criminal Histories and Later Offending of Child Pornography Offenders’ (2005) \textit{17 Sexual Abuse} 201.} 

The consultation paper made it clear that the indirect harm rationale was employed to support the proposal to outlaw possession of extreme pornography.\footnote{‘We consider that it is possible to that such material may encourage or reinforce interest in violent and aberrant sexual activity to the detriment of society as a whole.’ Home Office/Scottish Executive, \textit{Consultation: on the possession of extreme pornographic material}, above n 9 at para 27.} The difficulty with making an indirect harm claim with respect to extreme pornography as opposed to pseudo-images of virtual child abuse is that the evidence to support claims that the consumption of
extreme pornography leads to increased offending is at best uncertain.24 This is acknowledged by the consultation paper which notes that: ‘given the many different approaches to conducting the research and framing the questions, as well as differences in the nature of the material examined, we are unable, at present, to draw any definite conclusions based on research as to the likely long term impact of this kind of material on individuals generally, or on those who may already be predisposed to violent or aberrant sexual behaviour.’25 Despite this the consultation paper concludes by asking the consultation question ‘In the absence of conclusive research results as to its possible negative effects, do you think that there is some pornographic material which is so degrading, violent or aberrant that it should not be tolerated?’ By taking this approach, the Government signaled a departure from its commitment to evidence based policymaking. This is clearly a divergence from the lawmaking process employed in child abuse and pseudo-images with which the consultation paper sought to draw similarities.

The consultation paper drew 397 responses.26 The summary of responses notes that: ‘[o]pinions were sharply divided: the vast majority of the responses to the proposals to strengthen the law to create a new offence of possession of a limited category of extreme pornography were either strongly supportive or strongly opposed. A majority of organisations responding were in favour: a majority of individuals responding opposed the proposals.’27 This bland statement hides the depth of the divide. 223 individual respondents opposed the creation of the new criminal offence while only 90 were in favour, a ratio of approximately 70:30. In contradistinction only 18 organisations objected while 53 were in favour, a ratio of approximately 25:75. Such a divergence in responses is partly explained by reviewing the list of respondents which gives some indication of the level of bias in favour of law enforcement authorities who are more organised and able to provide an institutional response over the less structured groups most likely to be affected by the new law. In

27 ibid.
examining the list of respondents we find twenty-three institutional respondents represented the police, intelligence services or prosecution services; twelve represented civil liberties or affected groups such as ‘SM Pride’; five were children’s charities; nine were internet industry groups or internet service providers; five were religious organisations; seven were pro-censorship groups and the remainder were a variety of media organisations and legal organisations. If we were to discount the biasing effect of the large number of respondents who represent the police, intelligence services or prosecution services we find that the ratio is reduced from 25:75 to 40:60, a much narrower margin in favour of criminalisation. With public opinion therefore split and with no clear justification under either the direct harm or indirect harm principle the Government was faced with making a decision whether to outlaw the possession of extreme pornography purely on public policy grounds.

As noted above the Government had laid the grounds for a public policy decision in the consultation paper. Firstly there was the traditional challenge, raised in all internet regulatory issues, of digitisation and network communication. In addition the consultation paper set out the belief that ‘there is a small category of pornographic material which is so repugnant that, in common with child abuse images, its possession should not be tolerated.’ Thus the public policy issue comes down to repugnancy and the protection of social values. In examining responses to this question the summary of responses notes that there was a clear split. Almost all respondents who had answered no to the question of should a new offence be created answered here in the negative also, noting that ‘beliefs held without evidence are not a sound basis for proposals to curtail civil liberties’. From the other perspective many respondents drew upon their personal experiences to suggest a need to curtail such material. The response from West Midlands Police noted that ‘although empirical data is poor… probation officers... who are part of the sexual rehabilitation program, see pornography, particularly of an extreme nature, as throwing “fuel on the

28 ‘Technological and social developments, including the widespread use of the internet, mean we can no longer rely on national norms of behaviour or understanding, or on border controls to limit the kinds of material consumed within the UK.’. Home Office/Scottish Executive, Consultation: on the possession of extreme pornographic material, above n 9 at para 32.
29 ibid para 33. Note though the discussion of direct and indirect harm above.
Having carefully considered all responses the Government decided that legislation to outlaw the possession of extreme pornography was in order noting: ‘[a]s the response to the consultation has demonstrated, the issue of taking action to tackle the circulation of extreme pornography, particularly via the internet, is one which arouses much debate. Creating an offence of possession of a category of material is a serious step and the Government has given further careful consideration to the proposal in the light of comments received. But the concern over this kind of extreme material, which is already illegal to publish or broadcast in this country, remains strong. Controls in place to prevent such extreme material from being available here are being circumvented by technological advances, weakening the protections which have existed, particularly for the young and vulnerable who may come into contact with it. Controlling the use of this extreme material is therefore more important. We therefore continue to believe that tightening up the law to cover possession of such material is justified.’

The Government therefore took the view following consultation that the possession of certain types of content was on balance contrary to public policy. With this decision made, the Summary concluded by stating the Government intended to bring forward legislation as soon as the Parliamentary timetable allowed.

A The Criminal Justice and Immigration Bill 2007

On 26 June 2007 the Government introduced the Criminal Justice and Immigration Bill. Little note was made at the time of cl.64 of the new Bill which made it an offence for a person to be in possession of an extreme pornographic image. By cl.64(3) an image was defined to be pornographic ‘if it appears to have been produced solely or principally for the purpose of sexual arousal’, and the definition of extreme was to be found in cl.64(6). This stated: ‘An “extreme image” is an image of any of the following: (a) an act which threatens or appears to threaten a person’s life, (b) an act which results in or appears to result (or be likely to result) in serious injury to a person’s anus, breasts or genitals, (c) an act which involves or appears to involve sexual interference with a human corpse, (d) a person performing or appearing to perform an act of intercourse or oral sex with an animal, where (in each case) any such act, person or animal depicted in the image is or appears to be real.’

31 ibid, Summary para 17.
32 ibid, Next Steps para.3.
33 Cl 64(1).
One group that did take note of cl.64 was Backlash, a group formed in response to the consultation paper by a wide variety of adult entertainment, fetish and anti-censorship groups to campaign against the proposal to outlaw possession of extreme pornographic images. They campaigned against cl.64 arguing that although violent and abusive behaviour is indefensible, the criminalisation of non-abusive activities engaged in by consenting adults is not justifiable, even if a majority find them distasteful. This, they argued, reflected the position the gay community found itself in before the legalisation of homosexual activity in 1967. They produced a series of responses to the Government’s claims and placed them on their website and commissioned leading QC Rabinder Singh to review the proposals with respect to the Government’s commitments under the Human Rights Act. Mr. Singh carried out a detailed and thorough review of the consultation process and found that in his opinion the proposals were not proportionate as required by the Act and the European Convention on Human Rights: ‘In my view, it is seriously arguable that the proposed measures go too far to strike a fair balance between the demands of the general interest of the community and the requirements of the protection of an individual’s fundamental rights. Put another way, I am not convinced that the reasons provided by the Government for the measures are sufficient to justify the extent of the interference in the individual’s freedoms.’ In particular Mr. Singh found the penalties disproportionate to the offence, noting that ‘a prosecution or the threat of a prosecution, with the potential penalty of three years imprisonment, for looking at adult pornography in private is a very serious interference in an individual’s right to respect for an intimate aspect of their private life under Article 8 and their freedom of expression under Article 10. It requires a powerful justification. Its justification must be stronger than that required to regulate the publication and distribution of pornography by commercial operators because the interference in the rights of the individual are so much more serious. There is no proof that the use of such images by individuals causes or induces violence. The enormous amount of research to which the Government refers has yielded no

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34 Backlash was formed by: Feminists against Censorship, Unfettered (a BDSM & fetish education and entertainment organisation), Ofwatch (which represents the viewers of adult entertainment on television), The Spanner Trust, The Libertarian Alliance, The Campaign against Censorship, The Sexual Freedom Coalition, The Society for Individual Freedom, SM Dykes Manchester and The International Union of Sex Workers.


clear results. It is difficult therefore to see why there is any need to prosecute individuals for looking at this material in the privacy of their own homes.\textsuperscript{37} Not all, of course, share Mr. Singh’s views. Professor Gavin Phillipson of Durham University while speaking at the Durham University/Socio-Legal Studies Association seminar ‘Positions on the Politics of Porn: a Debate on Government Plans to Criminalise the Possession of Extreme Pornography’ put forward the view that images of this type ‘are produced solely for the purpose of arousing the viewer and as such are not a legitimate use of freedom of expression,’\textsuperscript{38} while at the same seminar Professor Jill Radford of the University of Teesside argued that all pornography is a record of abuse. Therefore the arguments of these such as Backlash who were campaigning against cl.64 were ill-conceived and wrong.\textsuperscript{39} The divide between those supporting the clause and those opposing it was therefore every bit as clear as the divide between those who had supported the proposal in the consultation paper and those who had objected to it: the divide was not only clear in the country it was also clear in Westminster.

Following its first reading the Bill had a second reading in the House on 8 October 2007 before being sent to committee where the wording and impact of cl.64 was put under scrutiny. At Commons Committee two particular issues were raised. One was the lack of available evidence to support the proposition that individuals who possessed images of the type defined under the Bill as extreme pornography were a danger to society. As discussed earlier the consultation paper and summary of responses had acknowledged that evidence of indirect harm was at best uncertain. To attempt to shore up the indirect harm argument the Government produced a rapid evidence assessment in September 2007 (after first reading of the Bill). This was attacked in committee by Harry Cohen, who noted that the rapid assessment exercise failed to unearth any new or further evidence of a link between the consumption of such material and the risk of the commission of a further, more serious,

\textsuperscript{37} Ibid.  
\textsuperscript{39} Ibid.
offence on the part of the user. In reply on behalf of the Government, Maria Eagle, Parliamentary Under-Secretary of State for Justice, noted that the exercise did find that ‘there were some harmful effects on some of those who viewed it [extreme pornography], particularly men who were predisposed to aggression or had a history of sexual aggression.’ Although she did admit this was ‘no doubt, a smallish number of the population who might be susceptible to their behaviour being affected by viewing extreme pornography.’ She went on in her reply though to make clear that despite the assessment the Government were primarily relying on a public policy argument in support of cl.64: ‘We must remember that when we are talking about extreme pornography, we are talking about images at the very top end of what most people would consider viewable. We are not talking about the common or garden porn, of which there is much on the internet and that it is perfectly lawful for people to possess or make under current domestic law. The proposal would make it illegal to download and possess images that it is already illegal to publish in this country, rather than extend the definition of what ought to be caught by the law.’ Mr. Cohen then introduced his second concern that material need not be pornographic in nature to be contrary to public policy or to be a risk to society through indirect harm: ‘some of those people who were used in the evidence that the Government have given include those who could have got violent images of a non-sexual nature, and those might have stimulated them to kill. There are thousands and thousands of horror films that show people being cut up, so why does this legislation concentrate on material of a sexual nature?’ Miss Eagles responded that regulation of horror movies was under the purview of the BBFC and as such a regulatory and legislative scheme was in place to ensure standards of decency were met. She expanded upon this by stating that the BBFC refuse certification, even at R18 level, for ‘explicit and extreme pornographic material produced for the purposes of sexual arousal that also includes real or very realistic violence’. This, she explained, was the material in issue. It is material which is unclassifiable in the United Kingdom, but which via the internet is readily available from overseas. Despite this robust defence of cl.64 though Mr. Cohen had begun a

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41 ibid.
42 ibid.
43 ibid col 32.
44 ibid.
debate which was to colour much of the progress of the clause through both Commons and Lords Committees.

A  The ‘Casino Royale’ Debate

Mr. Cohen’s initial question in committee on the morning of 16 October was taken up by Charles Walker, in the afternoon session. He developed Mr. Cohen’s question with reference to a well known TV programme *Wire in the Blood* and a well known Hollywood movie *Hostel 2*. He asked Jan Berry, Chairman of the Police Federation of England and Wales, ‘if someone were to take stills from “Hostel 2” and have them on their computer, it could be deemed to be a criminal offence, because a court might decide that they were purely for the purposes of arousal. However, the same things, as part of a film that has been passed, would not be in contravention of this proposal. I see problems and contradictions there and was wondering if you did too.’

Although Miss Berry replied that she felt it was appropriate for the Criminal Law to set standards for society, the issue of a divergence between ‘mainstream’ and ‘pornographic’ content was now clearly a matter for debate in committee. This debate became known as the Casino Royale debate when Gareth Crossman, Policy Director of Liberty appeared in the afternoon of 18 October. He introduced into the debate the discussion as to whether possession of series of extracted images from the mainstream movie *Casino Royale* which was given a ‘12’ certificate from the BBFC meaning that the movie was certified as suitable for a 12 year old child when accompanied by an adult could be defined as extreme pornography under cl.64. He asserted that the scenes in question in which James Bond is being tortured by the villain of the piece Le Chiffre would fall under the definition of extreme pornography as found in cl.64(6)(b): ‘an act which results in or appears to result...in serious injury to a person’s anus, breasts or genitals’ and that if it were extracted from the movie itself it would lose the protection offered to classified movies under cl.65 as cl.65(3) removes this protection if the image is extracted from the whole and it appears to have been done so ‘solely or principally for the purpose of sexual arousal’. Mr. Crossman questioned the validity of the law as drafted as it would potentially criminalise

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46 Criminal Justice and Immigration Bill 2007, cl.65(3)(b). Now s.64(3)(b) of the Criminal Justice and Immigration Act 2008.
activity where you are dealing with something that, in itself, is perfectly legal - a film that has been censored and given a 12 certificate. A part might be extracted for the purpose of sexual arousal and the possession of that extract becomes a crime.\footnote{HC Public Bill Committee, Criminal Justice and Immigration Bill, 18 October 2007, col 124. Available from \url{http://www.publications.parliament.uk/pa/cm200607/cmpublic/criminal/071018/pn71018s01.htm} (visited 20 May 2008).} Edward Garnier countered that the problem was more widespread and was to be found in the unclear definitions in the Bill. ‘If one looks at clause 64(3), there is a huge degree of uncertainty and subjectivity. It provides: “if it appears to have been produced solely or principally for the purpose of sexual arousal.” Who is to decide whether it so “appears”? Is it the judge, the policeman, the viewer or the maker?\footnote{ibid col 124-5.}’ David Burrowes questioned whether the Bill even regulated the possession of material which appeared to portray rape, as was clearly the intent of the Bill. Mr. Crossman concluded that as he understood it images portraying rape would only be covered by the extreme pornography definition if they were images of ‘violent rape’ that is they were covered by cl.64(3)(6)(a) ‘an act which threatens or appears to threaten a person’s life’. He noted: ‘if you are talking about a depiction of rape in a film, that is something that will have occurred in many classified films, but it is not rape because it is acted. If it is actually rape, that is non-consensual; someone has been coerced into something against their will. Therefore it is appropriate to make it a criminal offence to possess such material. That is why the element of coercion is so important in how you can properly draw the offence.’\footnote{ibid col 125.}

This led Mr. Garnier to note: ‘the depiction of rape may constitute an extreme image, but it must fit within the rest of the clause to become an offence. Until we understand what clause 64(3) means, we are not much further forward. I can think of any number of extreme images which are disgusting and unattractive to look at, but the prosecution will have to prove that an image appears to some unknown person to have been produced solely or principally for the purposes of sexual arousal.\footnote{ibid.}

The outcome of the charged session was that extreme pressure was laid at the door of the Ministry of Justice to (a) clarify further the definition of pornographic as found in cl.64(3), (b) redefine the definition of ‘extreme image’ as found in cl.64(6) and (c) ensure mainstream movie content was not criminalised by cl.64 when removed from its original
content. With Commons time running short the Ministry agreed that all these issues would be considered while the Bill was before the Lords\textsuperscript{51} and on 9 January 2008, with all debates still raging, the Bill was introduced in the Lords. Through a reordering of the sections, cl.64 was now cl.113 but the key sections remained unchanged. The definition of ‘pornographic’, now found in c.113(3) remained ‘it appears to have been produced solely or principally for the purpose of sexual arousal’, while the definition of extreme, found in cl.113(6) also remained unaltered. The Bill had its first and second readings and was sent to Committee on 5 February 2008. The majority of the discussion of cl.113 took place in the session on the afternoon of 3 March 2008.

The first major amendment was tabled by Lord Hunt of King’s Heath, Parliamentary Under-Secretary of State in the Ministry of Justice. He sought to narrow and clarify the definition of pornography in the Bill by moving amendment 122B which sought to replace the original wording of cl.113(3): ‘it appears to have been produced solely or principally for the purpose of sexual arousal’ with ‘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.’ He went on to explain that the reasoning behind this amendment was driven by the concerns raised in Commons Committee that the original wording relied upon a subjective evaluation of the intent of the producer of the material in question rather than an objective evaluation of the material itself.\textsuperscript{52} He then moved two further amendments both found in amendment 125B. The first change introduced was to bring about a major change in the definition of ‘extreme image’. From each of the previous definitions (as set out below) it struck out the term ‘or appears to’. The change in the wording is set out in table A.

<table>
<thead>
<tr>
<th>Original cl.113(6)</th>
<th>Reworded cl.113(6)</th>
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<tbody>
<tr>
<td>An “extreme image” is an image of any of the following:</td>
<td>An image falls within this subsection if it portrays, in an explicit and realistic way, any of the following:</td>
</tr>
<tr>
<td>(a) an act which threatens or appears to</td>
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</tbody>
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\textsuperscript{51} In a letter from David Hanson, Minister of State at the Ministry of Justice to Edward Garnier, dated 19 December 2007 Mr. Hanson undertook that ‘following the concerns raised in Committee about the ambit of the new offence of possession of extreme pornographic images, we are continuing to examine how best to clarify the offence so that it is clear that it is limited to extreme and explicit pornographic images. If it does not prove possible to table amendments in time for Report stage in the Commons we will seek to return to this provision in the Lords’. Copy on file with the author.

\textsuperscript{52} Hansard. HL Deb vol 699 col 894 3 March 2008.
threaten a person’s life,
(b) an act which results in or appears to result (or be likely to result) in serious injury to a person’s anus, breasts or genitals,
(c) an act which involves or appears to involve sexual interference with a human corpse,
(d) a person performing or appearing to perform an act of intercourse or oral sex with an animal,

where (in each case) any such act, person or animal depicted in the image is or appears to be real.

Table A: Changes to cl.113(6)

This was explained by Lord Hunt thus: ‘We have removed all occurrences of the words “appears to”, which was a particular concern raised in another place, and indeed by the noble Baroness, Lady Miller, and the noble Lord, Lord Wallace. We have provided that the acts depicted must be “explicit and realistic”. The consequence is that only graphic and convincing scenes will be caught. The offence is thus not limited to photographs and film of real criminal offences which, as my honourable friend explained in another place, would make the offence unworkable and of limited effect.’

The second change introduced by Amendment 125B sought to prevent the ‘Casino Royale’ situation by introducing a new provision that to be an extreme image it must be ‘grossly offensive, disgusting or otherwise of an obscene character’. Lord Hunt explained that ‘it is not our intention to criminalise material that it would be legal to publish. While we have not sought to import the language of or build directly on the Obscene Publications Act, essentially because it is constructed around the concept of publication, not possession, and covers a much broader range of material, we have sought to create symmetry between the two. The, “grossly offensive, disgusting or otherwise of an obscene character”, test is drawn from the ordinary dictionary definition of “obscene”. When taken in conjunction with the existing elements of the offence, it will ensure that this offence catches only material that would be caught by the Obscene Publications Act were it to be published in this country.’

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53 *ibid.*, col.895.
54 *ibid.*
Despite considerable debate in Committee throughout the remainder of the session as to whether these amendments were appropriate, proportionate and met fully the concerns expressed in the Commons these amendments were eventually passed. \(^{55}\) To meet the concerns raised in Commons Committee the Government had chosen to define pornography in a more objective manner with the intent this would alleviate the concerns raised by Mr. Garnier. By taking a more objective stance it brings the test more in line with those found in the Obscene Publications Acts. This amendment seems sensible. Equally sensible is the amendment introduced to deal with the ‘Casino Royale’ situation. Again the addition of the new wording brings the definition of extreme pornography in line with the language of the Obscene Publications Acts. It may be argued though that the amendment to the definition of ‘extreme images’ is less successful. It had been noted in Commons Committee by Harry Cohen that ‘it is not just the activity itself which is covered, but also when it “appears to”. That would presumably be ritualised or acted out. I think that Ministers would probably argue that not having “appears to” would open up a huge loophole’ \(^{56}\) Yet here is a Minister moving an amendment which strikes out that very phrase, has this left a loophole as predicted by Mr. Cohen?

A  **The Criminal Justice and Immigration Act 2008: s.63 a short commentary**

The Criminal Justice and Immigration Bill completed its passage through both Houses on 7 May 2008 and received its Royal Assent the following day. The final version of cl.113 became s.63 of the Criminal Justice and Immigration Act 2008. By s.63(1) it is an offence for a person to be in possession of an extreme pornographic image. \(^{57}\) An image is deemed obscene 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,’ \(^{58}\) while to be extreme it must be ‘is grossly offensive, disgusting or otherwise of an obscene character’ \(^{59}\) and must portray in an explicit and realistic way one of the following: (a) an act which threatens a person’s life, (b) an act which results, or is likely to result, in serious injury to a person’s anus, breasts or

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55 The full debate may be followed at cols 895-911 of Hansard. HL Deb vol 699 3 March 2008.
56 HC Public Bill Committee, Criminal Justice and Immigration Bill, 18 October 2007, above n.47, col.122.
57 Punishable by up to three years imprisonment where the images portrays an act which threatens a person’s life or an act which results, or is likely to result, in serious injury to a person’s anus, breasts or genitals; and up to two years imprisonment where the image portrays an act which involves sexual interference with a human corpse, or a person performing an act of intercourse or oral sex with an animal, s.67.
58 s.63(3).
59 s.63(6)(b).
genitals, (c) an act which involves sexual interference with a human corpse, or (d) 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 any such person or animal was real.\textsuperscript{60} Although not yet in force it has been confirmed by the Criminal Law Policy Unit that s.63 is likely to be brought into force in January 2009.\textsuperscript{61} The question remains, when s.63 is brought into force will it fulfill its policy objectives? Further should the campaigners against s.63 see the final text of the Act as a defeat of their campaign?

Section 63 is the culmination of a long campaign began by Liz Longhurst, backed by Government Ministers such as David Blunkett and campaign groups such as Wearside Women in Need and Mediamarch. Has s.63 proven to be a satisfactory outcome for groups and individuals such as these? In an interview with the \textit{Bracknell Forest Standard} Liz Longhurst was philosophical. She said ‘I am very delighted it is due to be passed, but I don’t think it is a magic bullet. The law is the start of good things, but I think it will be difficult to enforce. But I want the legislation on the books even though it might be difficult to enforce.’\textsuperscript{62} She went on to say ‘if we can reduce some peoples’ temptation to watch violent images, including rape and mutilation, then that is a good thing.’\textsuperscript{63} Despite this it is not clear that s.63 achieves either what Mrs. Longhurst sought in her long campaign or what the Home Office sought to achieve when they published the initial consultation paper in August 2005. Then, the Home Office and the Scottish Executive stated they were consulting on this issue because of ‘the wide range of extreme pornography available via the internet which cannot, in practice, be controlled by our existing laws.’\textsuperscript{64} However the removal of the term ‘appears to’ from the definition of ‘extreme’ at the House of Lords Committee stage may have undermined attempts to criminalise possession of rape fetish pornography in all but the most serious of cases. While the original wording of cl.64(6)(a) prohibited possession of an image which portrayed ‘an act which threatens or appears to threaten a person’s life’, and cl.64(6)(b) prohibited possession of an image which portrayed ‘an act which results in or appears to result

\textsuperscript{60} S.63(7).
\textsuperscript{63} \textit{ibid}.
\textsuperscript{64} Above n 9.
(or be likely to result) in serious injury to a person’s anus, breasts or genitals where (in each case) any such act or person depicted in the image is or appears to be real’, the final wording of s.63(7) is very different. The Act in its final form will criminalise possession of an image which portrays, ‘in an explicit and realistic way an act which threatens a person’s life or an act which results, or is likely to result, in serious injury to a person’s anus, breasts or genitals, and a reasonable person looking at the image would think that any such person was real.’ This change in the language was introduced as we have seen to head off the challenge of the Casino Royale critique which saw members of both Houses express concerns that images taken out of context from mainstream sources may be inadvertently criminalised.

The amendments made at that time though failed to take account of the comments of David Burrowes at the Commons Committee stage where he questioned whether the Bill, as then constructed would cover rape fetish material. It now seems clear that with the amendments made in the Lords s.63 does not cover possession of such material, unless that material is of a particularly violent nature. Thus, whether it is by the intent of the Ministry of Justice or not, possession of a large proportion of currently available online rape fetish material will not be criminalised by the Act. Commercially produced rape fetish images and videos will not be caught. The only material caught by this provision is material of a nature where the ‘actors’ appear to be threatened with deadly force, where they are in a realistic way portrayed as victims of torture or abuse where they appear to be victims of sexual asphyxiation or strangulation. This is an interesting divide: why outlaw some forms of violent sexual imagery but not images which appear to portray rape in a realistic way but which fall short of the threat to life standard? There appears to be no good reason for this. In the consultation paper the Home Office/Scottish Executive had laid out two foundations on which they made their proposals. These were: (1) a desire to protect those who participate in the creation of sexual material containing violence, cruelty or degradation, who may be the victim of crime in the making of the material, whether or not they notionally or genuinely consent to take part and (2) a desire to protect society, particularly children, from exposure to such material, to which access can no longer be reliably controlled through legislation dealing with publication and distribution, and which may encourage interest in violent or

\[65\] s.63(7)(a).
\[66\] s.63(7)(b).
aberrant sexual activity.\textsuperscript{67} On both grounds it is clear that ‘realistic’ rape fetish imagery should be dealt with on a par with more directly violent sexual imagery. With the production of such content rife among the adult entertainment industry in the United States, and with a former adult entertainment actress testifying to the California State Assembly that the industry is rife with drug use, coercion, prostitution and rape,\textsuperscript{68} it would appear incumbent upon the UK Parliament to ban possession of such content under heading one, the desire to protect those in the production of such material. Under heading two, the protection of children from such material the argument seems even more clear cut. Such content can be extremely damaging to someone at an impressionable point of sexual and emotional maturity. The likelihood of a thirteen year old boy being able to differentiate the subtle clues which reveal this is a commercially produced entertainment product in which the actor in question is not actually being raped in the same way the victim of a mainstream horror movie is not actually killed are few. As a result commercially produced rape fetish imagery is potentially harmful to the sexual development and maturation of minors, yet it appears that if a degree of sexual violence or harm is not attached to said image or video it is not affected by s.63. As a final aside on rape imagery and s.63 it appears, rather absurdly, that if an actual rape is recorded and that that recording does not fall within the parameters of s.63(7)(a) or (b), then possession of that image will not be illegal even though there is clearly a direct harm. Thus possession of an image which portrays a staged event of an actress being violently raped (within the parameters of s.63(7)(a) or (b)) will be illegal and punishable with up to three years in prison, even if all parties consented to the production of said image while possession of an image recording an actual rape may not be. Should this analysis prove correct once the courts begin interpreting s.63 this would be most perverse.

Across the divide from the Government and pressure groups such as Mediamarch we have seen a string of civil liberties groups take a stance against the provisions of s.63. This has most clearly coalesced in the creation of Backlash. Backlash has campaigned tirelessly against s.63 arguing that it is contravenes both Articles 8 and 10 of the ECHR, and

\textsuperscript{67} Home Office/Scottish Executive, \textit{Consultation: on the possession of extreme pornographic material}, August 2005, above n 9, 2.

that it has the unintended consequence that large numbers of law-abiding people who pose no threat to society may be criminalised, including members of the BDSM community (who Backlash estimate may be as many as four million people in the UK), members of the Goth community, who may enjoy material featuring depictions of death that could easily be counted as pornographic and people who produce low-budget thrillers/horror films not intended for commercial release.\(^{69}\) It was the activity of Backlash and others like them that led to many of the amendments tabled in the Lords. The addition of s.63(6)(b) which requires that an extreme image be ‘grossly offensive, disgusting or otherwise of an obscene character’ was added to attempt to protect in particular those in the BDSM community as was the addition of the s.66 ‘participation in consensual acts’ defence which gives a defence to a person charged under s.63 if he can demonstrate he directly participated in the act or any of the acts portrayed, and that the act or acts did not involve the infliction of any non-consensual harm on any person. Despite their successes at having these specific amendments introduced Backlash still feel the Act criminalises activities and actions which should not fall within the ambit of the criminal law. They argue the criminalisation of the possession of images of BDSM is inconsistent unless one also bans the practices that correspond to the images, i.e. consensually violent sexual activities and consensual role play of non-consensual activities.\(^{70}\) As they point out, to do so would clearly be in breach of Article 8 of the ECHR so the authorities, in the view of Backlash, chose to attack the soft underbelly of pornographic imagery which is an easier target. Despite their efforts to introduce an amendment which would only have criminalised material involving non-consenting participants, while excluding material featuring consenting participants in staged and otherwise non-abusive productions, the final text of s.63 clearly retains the potential to allow law enforcement authorities to prosecute possession of BDSM content produced in the situation where all parties consent but where one or more parties suffers injury or appears to suffer a threat to their life as a result of their sexual preference.\(^{71}\)

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\(^{71}\) It is recognised that of course consent is not a bar to application of the criminal law in such cases as was established in *R. v Brown* [1994] 1 AC 212.
The outcome of the lawmaking process seems to have left both sides dissatisfied. This law has been more than three years in the making and has involved a considerable degree of public participation, Parliamentary scrutiny and media analysis, yet despite all this neither side is fully satisfied that the law has achieved its aims or that their concerns have been met in the lawmaking process. Those who support a strong legal response to the challenge of extreme pornography are disappointed that in the Lords Committee stage key concessions were made which appear to have diluted the applicability of the new law to all but the clearest examples of harm, violence or threat. Rape fetish images appear to have escaped the attentions of s.63 except in their most severe form, while images of sexual violence, torture or threat to life must now pass a number of hurdles including that they are grossly offensive, disgusting or otherwise of an obscene character, and that they must portray in an explicit and realistic way the illegal act in question. These seem substantial hurdles for the prosecution to surmount when the first cases come to trial. From the alternate point of view there remains real concern that s.63 will be used as a proxy to crack down on the activities of fetish communities. Following the ‘Spanner’ decision,\(^2\) it has been within the authority of the police to charge participants in BDSM activity with a variety of offences including assault occasioning actual bodily harm. The number of such actions remains though extremely low as to do so involves usually the Police having to enter a private property while the activity is ongoing: a challenge of both logistics and Article 8 of the ECHR. The fear is that as trading in sadomasochistic pornography is the soft underbelly of the BDSM community; police will use s.63 as a Trojan Horse to regulate the underlying activity. Whether s.63 is a success of the lawmaking process in providing a settlement between two polarised views: the result of the democratic process in action or the failure of Parliament and the Government to grasp the nettle of this difficult and divisive issue will probably only become apparent once courts and jurors are asked to rule on and apply its terms.

\(^2\) Brown, ibid.