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Sexualities 2011 14: 312

DOI: 10.1177/1363460711400810

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Criminal justice, extreme pornography and prostitution: Protecting women or promoting morality?

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Sexualities
14(3) 312–333
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DOI: 10.1177/1363460711400810
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Abstract

This article provides a critical analysis of recent official discourses in the UK regarding ‘extreme pornography’ and prostitution. More specifically, the discourses relating to the relevant law reforms contained within the Criminal Justice and Immigration Act 2008 and the Policing and Crime Act 2009 will be analysed. The article examines the extent to which the Labour Government justified increased criminalization and regulation of pornography and prostitution by drawing on radical feminist perspectives. However, it will be contended that on a closer reading, which draws upon the work of Judith Butler, the Labour Government was more concerned with issues of morality and appropriate expressions of sexuality than tackling concrete harms. In conclusion, I argue that the Labour Government used the vulnerability of women to promote a moral agenda.

Keywords

Judith Butler, criminal justice, morality, pornography, prostitution

Introduction

Two Acts have recently radically altered the legal landscape relating pornography and prostitution in the UK. S63 Criminal Justice and Immigration Act 2008 has introduced the first possession offence relating to adult pornography and S14 Policing and Crime Act 2009 for the first time criminalizes purchasing sexual services from adult prostitutes. These two criminal offences not only dramatically

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enhance the State's control of aspects of the adult sex industry but also criminalize the consumer as opposed to the producer/seller. Through a critical analysis of the reform process, specifically the relevant parliamentary debates, this article examines and challenges the discourses employed to justify increased criminalization. To this end it will demonstrate that a radical feminist perspective was adopted by the proponents of the legislation, however, analysis reveals that the radical feminist perspective was a smoke screen to push an undebated moral agenda that was illiberal and conformist. In order to support this latter argument, the article will engage in a close reading of the debates drawing upon queer theory demonstrating that the morality discourse prevalent in the debates silenced and othered non-conforming expressions of sexuality and that this silencing and othering promotes and perpetuates socially appropriate scripts of sexuality, particularly female sexuality.

The legal regulation of extreme pornography and prostitution

Prior to S63 Criminal Justice and Immigration Act 2008 it was not an offence to possess any forms of adult pornography. Rather, the law rendered it a criminal offence to produce or distribute material likely to deprave and corrupt the viewer.¹ Under S63 it is now also an offence to possess 'extreme pornography'. S63(3) defines pornographic images as those which are 'of such a nature that it must reasonably be assumed to have been produced solely or principally for the purpose of sexual arousal'. In order for the image to be extreme it must be:

- (a) grossly offensive, disgusting or otherwise of an obscene character; and portray in an explicit and realistic way, any of the following:
 - a. an act which threatens a person's life
 - b. an act which results in or is likely to result in serious injury to a person's anus, breasts or 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

and a reasonable person would think that any such person or animal was real.

With regards to prostitution, the law to date has focused on prostitution-related conduct as opposed to the act of (adult) prostitution itself. Whilst paying/being paid for sex is not an offence, it is an offence to solicit in a public place, run a brothel, or control or incite prostitution for the purposes of gain. Part 2 Policing and Crime Act 2009 significantly increases the legal regulation of prostitution. Provisions include: compulsory meetings for street sex workers, closure orders for premises used for prostitute-related activities and removal of the requirement of persistence in relation to kerb crawling and street solicitation activity. The key

focus of this article, however, is S14. S14 states:

- (1) A person (A) commits an offence if –
- a. A makes or promises payment for the sexual services of a prostitute (B),
 - b. A third person (C) has engaged in exploitative conduct of a kind likely to induce or encourage B to provide the sexual services . . . and,
 - c. C engaged in that conduct for or in expectation of gain for C or another person

Significantly, this is a strict liability offence, thus it is irrelevant whether the client knew or ought to have been aware that the prostitute was so exploited.

The key contention of this article is that the Labour Government (hereafter the Government) used radical feminist rhetoric in order to justify increased criminalization, yet on closer examination it is clear that the reforms are more concerned about morality. The problem of violence against women was used in unethical ways by Government in order to promote reforms which amount to an unacceptable delimiting of appropriate sexualities by the State.

Perspectives on pornography and prostitution: From radical feminists to sex-radicals

The disagreements of the ‘Sex Wars’ of the 1980s (Abrams, 1995) indicate the lack of consensus amongst feminists in relation to pornography and prostitution. At one end of the spectrum, radical feminists argue that the term ‘sex industry’ is simply a ‘euphemism for the sexual enslavement of women’ (Dworkin, 2004: 138). From this perspective, sex is linked to male power and is the cause of women’s oppression (Barry, 1996; Dworkin, 1981; MacKinnon, 1987, 1989; Millet, 1975). Women and their sexuality are commodified and objectified in a manner which supports the patriarchal oppression of women and nowhere is this exemplified as clearly as in pornography and prostitution (MacKinnon, 1989). Prostitution and pornography amount to ‘institutionalised sexual violence inseparable from racism and other forms of oppression’ (Stark, 2004: 279). From this perspective no woman can be said to consent truly to participate in the sex industry and any consent that is given is the product of an oppressive patriarchal society. Radical feminists argue that women and states must work towards eradicating prostitution and pornography, as opposed to developing strategies aimed at decriminalizing and legitimizing the sex industry. Those women who consider the sex industry to be legitimate are in the very least silenced or, more problematically, censured for being irresponsible and thus potentially damaging the women’s movement (McClintock, 1993: 7).

Sex-radicals, in contrast, adopt a postmodern perspective on sex and sexuality, which moves towards ‘a positive embrace of sexual non-conformism with the idea that changing ideas about sex can change sex itself and with it the balance of power in society’ (Sutherland, 2004: 144). Emphasis is placed on the existence of multiple and diverse perspectives on, and experiences of, sexuality; sex-radicals eschew the

notion that any particular sexual practice or activity, including pornography and prostitution, is always already exploitative and victimizing, but rather maintain that such activity may also be potentially subversive and empowering (Califia, 2000; Nagel, 1997; Pheterson, 1989; Sutherland, 2004; Vance, 1984). In relation to pornography, sex-radicals emphasize that it is important to acknowledge that '... women actively consume mainstream pornography – resisting, twisting, and sometimes subverting it' (Doyle and Lacombe, 1996: 199).

The work of Judith Butler undoubtedly fits within, and is drawn upon by, sex-radical theory. Butler argues that, far from being innate and natural, gender is performative (Butler, 1990, 1999). Moreover, the gender identities we perform are produced and regulated through a regime of compulsory heterosexuality which constructs certain expressions of gender as culturally intelligible and others as abject (See Butler, 1993, 1999). Those performances that deviate from the ideal path of sex, gender, sexual practice and sexual desire are constructed as unintelligible and therefore cannot (socially) exist (Butler 1999: 23–24). Of particular relevance to this article is the manner in which the regime of compulsory heterosexuality produces and regulates performances of female and male sexuality. It is not simply the case that all heterosexual performances of sexuality are intelligible, as certain performances are idealized over others. A male–active/female–passive binary dominates the discourses of heterosexuality and thus appropriate expressions of female sexuality are those that are not only heterosexual but also passive, receptive and non-threatening (Edwards, 1981). As will be argued in further detail later, women who fail to conform to the idealized notion of female sexuality as always already passive are generally presented by the law with two options: adopt a victimized identity or face punishment.

Significantly, Butler is critical of those who idealize some performances of gender and sexuality over and above others. She states:

Feminism ought to be careful not to idealize certain expressions of gender that, in turn, produce forms of hierarchy and exclusion. In particular, I [oppose] those regimes of truth that stipulate that certain kinds of gendered expressions were found to be false or derivative and others, true and original. (Butler, 1999: viii)

From this perspective, radical feminism proves problematic as women are only ever considered to be victimized by pornography and prostitution. There is no scope to challenge the victimized script and argue that sex work may be a 'livable life' choice for some women (Butler, 2004: 39). Furthermore, the Government perpetuated and idealized the 'passive and victimized script' in their attempts to increase their regulation of sexuality.

The following reading of the consultation documents and the parliamentary debates adopts a Butlerian approach which involves a close and critical reading in order to uncover, examine, deconstruct and destabilize the constructions of identity and the presuppositions contained within (Butler, 2004: 215–216). The texts will be analysed in order to examine how identity categories, such as 'woman', 'prostitute', 'sex buyer' and so on, are constituted in order to censor

and exclude certain ways of performing identity and living. Identity categories and interpellations are not neutral and descriptive but rather concerned with producing and maintaining specific political, social and moral goals (Butler, 1993, 1997).

Extreme pornography, prostitution and violence against women

The Government contended that ‘extreme pornography’ and prostitution cause harm adopting a perspective akin to radical feminism, in that it argued that harm is gendered, involving men’s violence to and exploitation of women. This section will examine the arguments presented within the official documentation and debates and comment specifically on how the deaths of six women were used in an unethical manner to justify increased state control of sexuality. Furthermore, it will show that in constructing pornography and prostitution as completely separate issues, the State furtively and incrementally controls discourses on sexuality.

Consulting on harm – constructing harm

In relation to pornography, the original consultation document stated that law reform was required because technological advances and the growth of the internet meant that the Obscene Publication Acts 1959 and 1964 (hereafter OPA), with their emphasis on those who produce and distribute material, was easily evaded. Of particular concern was the perceived growth of ‘extreme material’ encompassing ‘material which is violent and abusive, featuring activities which are illegal in themselves and where, in some cases, participants may have been the victims of criminal offences’ material which it is believed that ‘most people would find . . . abhorrent’ (Home Office, 2005: i). Reform would:

1. 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 consented to take part*; [my emphasis]
2. protect society, particularly children, from exposure to such material . . . and which may encourage interest in violent or aberrant sexual activity. (Home Office, 2005: 2)

The consultation document stressed ‘there are hundreds of internet sites offering a wide range of material featuring the torture of (mostly female) victims’ (Home Office 2005: 5). Whilst the violence suffered may not be sexual *per se*, it is considered that ‘[t]hese acts are usually presented in a sexually explicit context so that it is clear that the purpose of the material is sexual gratification’ (Home Office, 2005: 5). The existence of sites featuring violent rape scenes was another cause for concern and such material ‘should have no place in our society’ (Home Office, 2005: 6). Furthermore, the document claimed evidence exists to suggest that the

consumption of extreme pornography may 'encourage or reinforce interest in violent and aberrant sexual activity to the detriment of society as a whole' (Home Office, 2005: 9). Although the Government acknowledged that such evidence was not conclusive, further reform was considered necessary on the basis that such material should not be tolerated.

Subsequent to the consultation, the Government engaged in a Rapid Evidence Assessment (hereafter REA), in order to address the issue of impact and causation (Itzin et al., 2007). Throughout the parliamentary debates, Government ministers referred to the REA in order to justify the creation of a possession offence. The extent to which the REA supports the contention that the consumption of extreme pornography has a causal effect is far from convincing, as discussed later.

In relation to prostitution, the provisions contained in the Policing and Crime Act 2009 are the culmination of a reform process which commenced in 2004. In contrast to other jurisdictions that have moved towards the decriminalization/legalization of prostitution, the Government aimed to 'challenge the view that prostitution is inevitable and here to stay' (Home Office, 2006b: 1). The Government justified a zero tolerance approach on the premise that 'prostitution can seriously damage the individuals involved, and the communities in which it takes place' and maintains that 'systematic abuse, violence and exploitation are endemic' (Home Office, 2006b: 7). Reform proposals were included in the initial Criminal Justice and Immigration Bill, but were eventually dropped to enable further research (HC Deb, 9 January 2008, cols 480–460).²

Following the failure of the proposals in the Criminal Justice and Immigration Bill, three ministers engaged in a six-month review of prostitution law during which they visited numerous different countries, in particular Finland, Sweden and the Netherlands, resulting in the Home Office's *Tackling the Demand for Prostitution: A Review* which argues that in order 'to truly tackle the problem of commercial sexual exploitation more needs to be done to target those who contribute to the demand, those that pay for sex' (Home Office, 2008: 9). This shift to focusing upon the consumer is also evident in relation to pornography where the claimed intention of the reforms is to make individuals more responsible about the images they possess and '...to reduce the demand for such material and to send a clear message that it has no place in our society' (Home Office, 2008: i).

Death and harm in the parliamentary debates

In addition to highlighting concerns relating to sexual violence, during the parliamentary debates the unfortunate deaths of six women were utilized as proof of the necessity for increased criminalization. The case of Jane Longhurst was used to demonstrate the harms of extreme pornography. Jane Longhurst was strangled to death by Graham Coutts, who argued that her death occurred during a consensual asphyxial sexual encounter that went wrong. During his trial and later appeal against the murder conviction, evidence of his visits to 'extreme pornographic'

websites was used to show that he had a predilection for violence and macabre sexual fantasies. The day before Jane Longhurst died, Coutts viewed a website entitled 'death by asphyxia'.³ These sites included images of 'rape, torture and violent sex', 'asphyxiation and strangulation' and 'genuine deceased appearance'. Throughout the debates the death of Jane Longhurst was presented as evidence that consumption of extreme pornography has exceptionally dangerous effects (see Martin Salter Labour, 8 October 2007, cols 111–114). The campaign led by the victim's mother Liz Longhurst was very influential in the shaping of the legislation and Mrs Longhurst's opinion that her daughter would still be alive today if it had not been 'for the corrupting effect of extreme internet sites' (HC Deb, 8 October 2007, col 113) was extensively reported.

Whilst the death of Jane Longhurst is undoubtedly tragic and violence against women is unacceptable, to maintain that the websites had causal influence gives too much power to such material and also removes the agency and, arguably, the blameworthiness of Coutts. To demonstrate the need for censorship Jane Longhurst's death was presented as unusual. Yet the law has, for many years, excused men who kill their partners – some walking out of court with a suspended sentence after successfully pleading provocation (see McColgan, 2000). Femicide is far from uncommon and unusual, with statistics demonstrating that on average two women a week are killed by a partner or ex-partner (Povey, 2009: 21). Moreover asphyxiation or strangulation is the second most common method of killing women (Povey, 2009: 11). Thus to construct this murder, as tragic as it is, as an unusual event caused by the impact of extreme pornography is problematic, and its supposed remedy – censoring extreme pornography – will do little to prevent the deaths of women in domestic settings. What is needed is not only a well thought out campaign to deal with violence against women but also the recognition that the law has generally been complicit in male violence against women.

In relation to prostitution, the murders of the five women in Ipswich were presented by Fiona Mactaggart Labour MP, as requiring further state intervention. She said:

The harm prostitution does is mostly to the women who are for sale. Our duty is to protect them, because of the murders in Ipswich of Gemma Adams, Anneli Alderton, Paula Clennell, Annette Nicholls and Tania Nicol in 2006 were not as exceptional as we would wish. Prostitute women are 40 times more likely to die a violent death. We need to reduce the exploitation and violence. (HC Deb, 19 January 2009, col 546)⁴

As with extreme pornography, the deaths of women are used to justify increasing criminalization of the consumer. Again, a problematic move which failed to make clear how the reforms would have prevented the deaths of the five women in Ipswich. Indeed, research indicates that increased criminalization actually increases the likelihood of violence and exploitation (Kinnell, 2008).

Throughout the debates, those who favoured increased regulation and criminalization drew upon discourses reflecting the radical feminist perspective that prostitution is *per se* violence against women. For example, Mactaggart stated:

Let us be clear: those who oppose the measure (the strict liability offence) have exposed themselves as people who are more concerned about the right of men to purchase women's bodies than about protecting those women from the exploitation inherent in every single occasion of purchasing and of prostitution. (HC Deb, 19 January 2009, col 549)

Prostitution was invariably constructed as an 'unlivable life' choice (Butler, 2004: 39), something which no woman would freely consent to. For example, Nadine Dorries (Conservative) stated 'It is not a matter of career choice; boys and girls do not say when they grow up "I would like to be a prostitute"' (HC Deb, 19 January 2009, col 571). Women's participation in prostitution, so it was contended, is by force, from traffickers or a result of poverty or drug addiction.

Separate or related issue? Pornography, prostitution and female sexuality

In contrast, there was no detailed discussion of the reasons why women might participate in pornography although one or two MPs argued that some extreme pornography involves real acts of violence towards women (see Salter, HC Deb, 8 October 2007, col 112). Throughout the reform process the two practices were treated as completely separate issues. Nevertheless, similarities abound. Both prostitution and pornography involve individuals, women in particular, being paid to engage in sexual activities. However, while being paid for sexual services as a prostitute was described as dehumanizing and, in the words of MacTaggart as 'destroy[ing] human relations and creat[ing] a grossly unequal society' (HC Deb, 19 May 2009, col 1431), no such claims were made in relation to pornography. In contrast to academic discussions, the reform process did not recognize that prostitution and pornography share any commonalities. One could, perhaps, argue that this is due to the fact that the two practices engage different legal issues: whereas for pornography the main concern tends to be freedom of expression, prostitution is generally constructed as a public nuisance and/or public health issue. Nevertheless similarities exist, as, until the present reforms, it was not considered justified to legally restrict the right of adults to engage in or consume pornography or sexual services. Both sets of reforms ostensibly restrict the rights of adults to engage in consensual, private, sexual activities; activities which tend to contravene expressions of normative sexuality. However, whilst Article 8 of the European Convention on Human Rights – the right to a private life – is mentioned in both sets of debates, there is no explicit consideration of how the two practices overlap.

Constructing pornography and prostitution as completely unrelated problematically enables the law to incrementally control the discourses around appropriate

expressions of sexuality without a wider debate as to whether or not such increased state control is acceptable. This is particularly so with regards to the construction of female sexuality. Without a doubt women are over-represented within, and disproportionately affected by, both practices. Pornography, extreme or otherwise, and prostitution are not only overwhelmingly heteronormative but also almost always concerned with male desire. The satisfaction of male heterosexual desire tends to be central to both practices. Whilst there is without a doubt also a sizeable sex market for gay men, the same cannot be said in relation to women, whether straight, bisexual or lesbian.

Problematically, the only way women were presented in the debates was as victims. Constructing extreme pornography and prostitution as always already involving harm to women maintains and perpetuates moralistic and stereotypical constructions of female sexuality and female desire. Appropriate performances of female sexuality do not include women who actively engage in prostitution or the acts portrayed in extreme pornography. Female sexuality is constructed as passive and vanilla. Any expression not fitting within this framework was constructed as harmful to women – no woman would ever consent to engaging in such activity or watching and/or participating in such movies – and thus she who does must be a victim. Moreover, the law punishes and attempts to reform those women who fail to acknowledge their victim status, as seen by the introduction of ‘compulsory meetings’ for street sex workers.

The introduction of new legislation to deal with the problematic of prostitution and pornography arguably presented an opportunity for a more detailed and open debate with regards to the construction of and perspectives relating to female sexuality. Stereotypical perceptions of appropriate expressions of female sexuality continue to pervade the legal system and discourses within society. Women constantly fight against such scripts and are ‘punished’ when they fail to comply as evidenced, for example, when a woman’s testimony is treated with disbelief during a rape trial and/or she is blamed for any assault which occurred (see Ellison and Munro, 2009; Finch and Munro, 2007). State discourses that problematically perpetuate scripts of female sexuality as being passive and demure do little to prevent violence against women. What is needed is a more open and frank debate about the complexities of female sexuality.

Proving harm – Evidence based legislation?

During the reform process, the Government claimed that evidence exists to support the contention examined in the last section: that both extreme pornography and prostitution cause harm to women. The following section examines this proposition and argues that the evidence the reforms are based upon is not only unconvincing but also fails to demonstrate the effectiveness of increased criminalization and regulation in reducing violence against women. Consequently, it will be argued that the reforms are more concerned with issues of morality and appropriate expressions of sexuality.

Extreme pornography – the causation conundrum

The extent to which pornography causes harm to women has been a controversial issue for many years. This causation argument has been critiqued not only in relation to pornography (see, for example, Attwood and Smith, 2010), but also with regard to violent movies and video games (Barker and Petley, 2001), demonstrating that a causal link cannot be conclusively proven. Despite this, throughout the reform process the Government maintained that evidence supported their contention that extreme pornography causes harm to women.

In its consultation document, the Government acknowledged that evidence of causation is by no means conclusive (Home office, 2005: 10). Subsequently the Home Office commissioned a Rapid Evidence Assessment to survey existing research on the impacts of extreme pornography on those who view it and whether or not a relationship exists ‘between exposure to extreme pornographic material and subsequent commission of sexual and violent offences’ (Itzin et al., 2007: iii). The REA suggested that some level of relationship exists:

The REA supports the existence of some harmful effects from extreme pornography on some who access it. These included increased risk of developing pro-rape attitudes, beliefs and behaviours, and committing sexual offences. (Itzin et al., 2007: iii)

Interestingly, the REA also acknowledged that the same was ‘also true of some pornography which did not meet the extreme pornography threshold’. It was also noted that those men who ‘are more predisposed to aggression, or have a history of sexual and other aggression were more susceptible to the influence of extreme pornographic material’ (Itzin et al., 2007: iii).

The Government drew upon these findings during the debates in order to support the need for a possession offence. However, during the debates it became clear that the conclusions were flimsy and their findings were challenged in both Houses. Of particular interest are the comments made by Baroness Miller in the House of Lords. The Baroness commented on the REA’s reliance on ‘largely discredited’ research originating from ‘particular psychology and sociology traditions once favoured in America’ and thus did not deal with the British context. Moreover, not only was the majority of the research conducted ‘before the internet was even widely available . . . one of the assessors was one of those who wrote some of the research papers’ (HL Deb, 21 April 2008, col 131). The findings of the REA were by no means objective nor applicable (see also Attwood and Smith, 2010; Petley, 2009: 423–424).

A possession offence based on outdated research methods analysing data in other jurisdictions and only concluding that *some* negative impact may be had on *some* viewers does not amount to evidence-based policy making (the stated objective of an REA). Furthermore, if other forms of pornography may have a similar impact and those most likely to be affected are those who already have a violent nature, one has to wonder what comes first – the tendency or the

pornography? Violence against women is rife within society. One in four women suffers some form of domestic violence and/or sexual abuse (Council of Europe, 2002). Opposing increased censorship does not mean that one is, in the words of Baroness Miller, 'an apologist for people who commit . . . offences against women' (HL Deb, 21 April 2008, col 1360), but rather adopts the position that increased censorship does little to further the battle to stop violence against women (Butler, 1997: 69), it simply criminalizes many individuals who wish to view such material but do not cause harm to others.

The desire to censor extreme pornography was clearly premised on notions of taste. From the outset, extreme pornography was described as 'horrible, nasty and unpleasant' (Charles Walker, Conservative, HC Deb 8 October 2007, col 117) and analogies made with paedophilia (see Sir Paul Beresford, Conservative, HC Deb, 8 October 2007, col 83). The underpinnings of taste and morals were more apparent in the House of Lords. In response to the question whether the aim of the offence was to outlaw images 'most people would find abhorrent' or to deal with 'something which will create a public nuisance', Lord Hunt stated: 'undoubtedly the aim is what most people would find abhorrent' (HL Deb, 3 March 2008, col 908). His Lordship went on, 'it is appalling that this material is available and we have to do something about it' (HL Deb, 21 April 2008, col 1359). It was frequently claimed that the proposals would only criminalize the possession of the most extreme images and that most members of the public would not disapprove (Maria Eagle, Labour, 16 October 2007, col 32). The difficulty with this perspective, however, is that it allows the majority to determine what are and are not appropriate expressions of sexuality. Minority sexualities remain othered and silenced. Furthermore, as Petley notes, words such as 'abhorrent', 'degrading' and 'repugnant' demonstrate the moralistic tone of the offence (Petley, 2009: 423).

Prostitution – victimized prostitutes and ignorant sex buyers

Regarding prostitution, the Government argued the pressing need to deter purchasers of sex resulted from the 'exponential' growth of the sex market and the perception that the vast majority of sex workers are either trafficked or otherwise forced into prostitution. The Government argued that 80,000 individuals are involved in prostitution and that around 4000 women are trafficked into the UK every year (Home Office, 2008: 6). However, the debates revealed that the statistics were by no means accurate. At one extreme, it was suggested that 80 per cent of those involved in prostitution are victims of trafficking (HC Deb, 27 January 2009, col 24), but others argued that approximately 70 per cent of women engaged in prostitution are mothers who do so in order to support their families (Niki Adams, English Collective of Prostitutes, HC Deb, 27 January 2009, col 24). Furthermore, others argued that the assumption that the vast majority of foreign prostitutes must have been unwillingly trafficked was flawed (see Baroness Miller, HL Deb, 1 July 2009, col 263). Clearly the evidence with regard to the numbers involved in trafficking was, at best, 'flimsy' (Paul Holmes Lib Dem, HC Deb, 10 February 2009,

col 291). Recent research on migrants in the sex industry also indicates that many are from 'relatively privileged backgrounds' and had 'employed traffickers to help them come to this country' to improve their living conditions (Baroness Miller, HL Deb, 1 July 2009, col 263; Mai, 2009). Overall, as Hilary Kinnell noted, the contention that 'the vast majority of women involved in the sex industry were coerced into it or coerced at an early age' was not supported by evidence (HC Deb, 27 January 2009 col 32).

Alongside difficulties in assessing the scale of trafficking and coercion within prostitution, problems surfaced in relation to claims that the proposals will be effective in reducing demand. The Home Office argued that the proposals were premised upon 'a firm evidence base on the nature of the demand for prostitution' and also research into the 'motivational and characteristics of sex buyers' (Home Office, 2008: 14). Unfortunately, no such evidence was provided. Although the Government did commission a Rapid Evidence Assessment, they chose, at that time, not to publish it. Vernon Coaker (Labour) suggested that 'we should not read too much into the fact that the evidence has not been published' (HC Deb, 29 January 2009, col 113). But the lack of evidence is disturbing. Why was the evidence not published – was it because it failed to support the proposals?

Thus, far from being based on verifiable evidence, the proposals relied upon conjecture and problematic constructions. The sex buyer is constructed throughout the reform process in a monolithic manner as misogynistic, uncaring and ignorant: a perspective drawing heavily upon radical feminist rhetoric. For example, Coaker argued that many men simply think: "I'll purchase the sex." They do not think "Is this somebody who is exploited?" (HC Deb, 29 January 2009, col 110). However, empirical research shows a rather different picture. Sex buyers are by no means a homogenous group and whilst some may be misogynistic, many others care for and are respectful of sex workers (Sanders, 2008). If the desire is to target a certain group of individuals it is important that the construction of that group is based upon real evidence. If not, people will not recognize themselves as being part of said group and fail to alter their actions.

Moreover, not only is the offence premised upon stereotypical constructions of the client, it was merely assumed, without substantiation, that regulation would provide an effective deterrent, for example, Alan Campbell (Labour) opined:

People who are serving on this Committee will look back on the measure in the future, when strict liability is working, when we would have reduced the demand for prostitution, helped women out of prostitution and helped to tackle some of the worst examples of exploitation and trafficking, and be proud of the work that they have done on the Bill. (HC Deb, 10 February 2009, col. 304)

In contrast, evidence indicates that increased criminalization only causes more difficulties for those involved in prostitution (Kinnell, 2008). Research amply indicates that criminalizing the sex buyer tends to lead to an increase in violence, as transactions are increasingly conducted in more secluded areas (see Niki Adams,

English Collective of Prostitutes, HC Deb 27 January 2009, col 33). Furthermore it is misconceived to assume that the main threat of violence comes from the paying client, rather the threat tends to come from ‘those who think that, because someone has been paid by others, they are entitled to attack them’ (Hilary Kinnell, HC Deb, 27 January 2009, col 36).

An effective response to reducing trafficking and forced prostitution needs to be based upon a detailed understanding of the sex industry and the dynamics of demand and supply. The notion of deterrence and the relationship between demand and supply is woefully under-theorized: it is simply assumed that the demand for sexual services not only increases the numbers of those who enter the sex industry willingly but also those who are trafficked or otherwise forced. Moreover, in relation to deterrence, research indicates that it is the fear of being apprehended which reduces offending as opposed to the mere existence of a law (von Hirsch et al., 1999). Significantly, the enforceability of the offence was questioned by a range of bodies, including the Metropolitan Police (Holmes, HC Deb, 5 February 2009, col 294).

Overall, the Government’s evidence base for the necessity for further criminalization and regulation of extreme pornography and prostitution was risible. It is disconcerting that the Government argued a need to restrict consensual adult sexual activity but failed to adequately substantiate this contention. Moreover, it was unethical to argue that the reforms were necessary to prevent violence to women when the evidence suggests that such results are unlikely. The vulnerability of women was used by the Government to promote an undebated moral agenda.

Statutory definitions – revealing the real agenda

Analysis of the definitions contained within the reforms further supports the contention that the new laws on extreme pornography and prostitution are more concerned with issue of morality and idealized scripts of sexuality. The definitions of the offences belie the stated aims of the reforms.

Defining extreme pornography – sexual arousal and realistic acts

The possession offence is set down in S63–67 Criminal Justice and Immigration Act 2008. The final wording reflects the amendments introduced on behalf of the Government by Lord Hunt in the House of Lords. The Government recognized that the original drafting lacked clarity, due to the use of the phrase ‘appears to’. Appearances were everything. Did the image appear to have been produced for the purposes of sexual arousal? Did it threaten or appear to threaten a person’s life and so on. This wording was criticized as far too subjective, as Edward Garnier (Conservative) questioned: ‘to whom must it have appeared to have been produced solely or principally for the purposes of sexual arousal?’ (HC Deb, 22 November 2007, col 521). In its final form, three questions must be satisfied before the offence is committed. Firstly, is the image of such a nature that it must reasonably be

assumed to have been produced solely or principally for the purpose of sexual arousal? Secondly, is the image 'grossly offensive, disgusting or otherwise obscene' and finally, does it portray one of the proscribed acts in an 'explicit and realistic way'.

These definitions indicate that the offence is more concerned with appropriate expressions of sexuality than it is with harm against women. Firstly, even as reworded by the House of Lords, the image does not have to depict real violence. Images only have to be 'explicit and realistic.' This could lead to a rather obscure situation in which it is not illegal to participate in the acts, nor produce the images, but yet it is a criminal offence to possess such material. Whilst the House of Lords eventually introduced a defence that permits an individual to possess an image of a lawful act which they consensually participated in (S66), third parties would not be permitted to possess such material.

Throughout the debates the Government rejected any attempts to restrict the offence to images of non-consensual and coercive activities, arguing that this would render the offence unworkable as it would be difficult to prove that a criminal activity took place, especially if the image was produced overseas. Furthermore, Maria Eagle (Labour) argued that a key concern was the 'impact of the images, not the circumstances of their production' stating that 'providing the defence that the image was made by consenting couples or groups does not deal with the fact that we are trying to catch the harm caused by the images themselves and their impact on those who view them, rather than the impact on the participants' (HC Deb, 22 November 2007, col 530). This contradicted other statements that suggested that a concern to protect participants was a key factor (see HL Deb, 22 January 2008, col 169). Controversially, Eagle maintained that the consent of the individuals involved would not affect the impact of an image (HC Deb, 22 November 2008, col 528). But as media research has shown viewers make sophisticated delineations between watching a real act of violence and watching staged activity. The particularities of modalities of viewing and their relationship to reality and fantasy is beyond the scope of this article, but Eagle's conflation of reality and fantasy into a singular mode of effect and affect is, at the least, problematic (See for example Barker and Brooks, 1998; Hodge and Tripp, 1987).

This problem is further compounded if we consider the ways in which legally certificated films might come under the remit of the law. As Walker noted, the proposals lead to a rather contradictory position whereby a film may be given an 18 classification by the BBFC, yet under S63 it could be illegal to possess images from that film (HC Deb, 8 October 2007, col 117). He developed this argument in relation to the film *Hostel II* in order to argue for increased censorship of any violent imagery, but I maintain that the contradictions expose the reforms' concern to promote an undebated morality. *Hostel II* is a horror movie in which young tourists in Slovakia are captured in order to be tortured to death by very rich American men who pay for the pleasure to do so. The film's images are without doubt 'explicit and realistic', however, contrary to Eagle's contention, if the violence were footage of actual events I suggest that the impact of such a film would be

tremendously different (notwithstanding the fact that such a movie would not be on general release). Fantasy has a place within society: individuals watch horror movies for many reasons and their responses are undoubtedly complex and diverse (Clover, 1992). To claim that whether or not the act is real is irrelevant in relation to impact is to construct viewers as sociopathic.

With regard to imagery that is 'explicit and realistic', whilst it would be legal to watch a movie such as *Hostel II*, it would be an offence to possess an image which was extracted from the film solely or principally for the purposes of sexual arousal. This begs the questions, why is the perceived intention behind the creation of an image so significant? Moreover, if any causation does exist between violent imagery and harm to others, why is this limited to pornographic materials? (David Heath Lib Dem, 22 November 2007, col 518). Eagle argues that as the offence is dealing with personal freedoms a line had to be drawn somewhere. However, why is it appropriate to restrict images produced for sexual arousal? Although Eagle asserted the 'purposes for which the image is produce are significant' (HC Deb, 22 November 2007, col 529), she gave no further explanation. Introducing a possession offence in relation only to extreme images produced solely or principally for the purposes of sexual arousal clearly indicates that pornography is judged through a different lens, a lens drawing upon moralistic assumptions about appropriate expressions of sexuality. Whilst we are permitted to watch and potentially be excited by horror movies, when it comes to sexual enjoyment our viewing must be restricted to non-violent pornography.

From a postmodern perspective, the intentions of the author/producer are irrelevant (Barthes, 1993) they cannot control the meaning for, or impact on, the viewer. Some may find the movie *Hostel II* sexually arousing, some may not. Sexuality is diverse and people may find images that are not intended to be pornographic sexually arousing and vice versa. Eagle's arguments were contradictory – consent of those participating in pornography is irrelevant, but the producer's intentions were given significance. Meanings are excitable and can be twisted and subverted (Butler, 1997). To assume that an image is always effective at conveying that which the producer intends is to give too much power to pornography (Butler 1990, 1997: 65–69). In the light of this, I suggest the reforms are simplistic and naive.

Finally, the image must also be 'grossly offensive, disgusting or otherwise of an obscene character' and show one of the proscribed acts detailed in S63(7). As McGlynn and Rackley discuss, the definition of the proscribed acts will fail to capture what may be considered to be the most worrisome forms of pornography – pro-rape websites (McGlynn and Rackley, 2009). Although the wording is a compromise (as initially worded the offence was overly broad and unclear), the exclusion of pro-rape images indicates that the real concern is with performances of BDSM sexuality as opposed to harm against women. The phrase 'grossly offensive, disgusting or otherwise of an obscene character' was introduced in the House of Lords in order not only to limit the scope of the offence but also to make connections with the OPA (Lord Hunt HL Deb, 3 March 2008, col 894). The debates

maintained that the category of imagery captured by the offence is no wider than that that would be illegal to publish under the OPA (see for example Eagle, HC Deb, 22 November 2007, col 523). But, as the case of *Hostel II* indicates (as well as arguments relating to *Casino Royale* [Murray, 2009]), this is simply not true. Those opposed to the offence suggest that if the law needs to be updated in order to deal with technological advances, then the OPA should be amended. Singling out pornography and constructing a new offence with alternative definitions to the existing law again supports the suspicion that morality lies behind the reforms.

Moreover, although it was argued that the inclusion of the phrase would further restrict the offence, it renders the offence even more subjective. What one person finds distasteful, another might not, leading, potentially, to inconsistent jury decisions (see Evan Harris Lib Dem, citing Liberty, 16 October 2007 col 125) and rendering it difficult, if not impossible, for a person to determine whether or not an image is proscribed. As Lord Faulkner noted, this could lead to people being criminalized even though they do not consider the image distasteful (HL Deb, 21 April 2008, col 1354). Without a doubt, the offence permits judgments to be made on matters of taste and sexuality.

Prostitution – from controlled for gain to exploitation

As with the possession offence, S14 Policing and Crime Act 2009 was, when originally drafted, overly broad. Drawing upon S53 Sexual Offences Act 2003, under the initial wording, it would be a criminal offence to purchase sexual services from a prostitute who had been ‘controlled for the purposes of gain’. The phrase was chosen in order to emphasize that the offence is not only concerned with trafficked victims, but also with other prostitutes who have been subject to exploitation and coercion. The notion of ‘controlled for gain’ and the judgment of *R v Massey*⁵ was subjected to considerable scrutiny during the parliamentary debates. The Court of Appeal in *Massey* asserted that the word ‘control’ encompassed, but was not restricted ‘to one who forces another to carry out the relevant activity’⁶ and further that ‘it is certainly enough if a defendant instructs or directs the other person to carry out the relevant activity.’⁷ This definition clearly illustrates that coercion, force and exploitation are not necessarily required in order for a sex worker to be controlled for the purposes of gain.

Those who opposed the new offence argued that the phrase ‘controlled for gain’ would capture a wider range of sex workers than is justified, including those who choose to work in brothels with two or three other women (a collective) or those whose activities are to some extent organized by another woman, referred to as a ‘madam’ (see for example the discussion at HC Deb, 29 January 2009 cols 22–23 and HC Deb, 5 February 2009 cols 248–276). Although those in favour of the offence contended that the definition would not encompass the majority of sex workers this author is not convinced. Indeed the English Collective of Prostitutes provided evidence that the police have threatened to charge receptionists in Soho with ‘controlling for the purposes of gain’ (HC Deb, 10 February 2009, col 296).

Furthermore, in *Tackling Demand* it is noted that S53 was used against the owner of an escort agency employing 40–45 individuals (Home Office, 2008: 8) despite there being no suggestion that the escorts supplying their services via the agency were acting involuntarily.

The initial wording of S14 led some witnesses to query whether the real aim of the offence was to ban all forms of prostitution (HC Deb, 29 January 2009, cols 81, 92). Coaker strenuously denied this allegation, stating that it was not the Government's intention to bring in a ban by the back door (HC Deb, 29 January 2009, col 94). However, the remarks of the English Collective of Prostitutes and the potential impact of the other provisions, in particular the closure orders (introduced by S21) directly challenge this.⁸ The Government introduced amendments rephrasing S14 to focus on situations where a third party uses 'force, deception or threats' 'of a kind likely to induce or encourage B to provide sexual services' (HC Deb, 19 May 2009, cols 1399–1400). The House of Lords further amended the clause so that 'force, deception and threats' are explicitly referred to as forms of exploitation. In addition, they included the phrase 'any form of coercion' (HL Deb, 1 July 2009, col 276). These latter amendments are interesting as they aim to define exploitation, the meaning of which is frequently and mistakenly assumed to be straightforward (Munro, 2008). Nevertheless, what amounts to 'coercion' was not discussed and this may be used to further expand the reach of the section. While S14 is not as wide as it was when originally drafted, the phrase 'controlled for gain' still pertains in relation to the closure orders.

Provisions relating to closure orders permit the police to close premises when they have reasonable grounds to believe they are being used for 'prostitute related offences' which includes S53–54 Sexual Offences Act 2009. As Lord Brett noted in the House of Lords, the phrasing of section 14 was changed to acknowledge that the original wording was too wide and 'could go beyond the exploitative and coercive circumstances that the offence was intended to cover' (HL Deb, 1 July 2009, col 271). This contradicts the statements made by both Alan Campbell and Vernon Coaker that the closures orders would be used in relation to premises in which 'trafficked women are being exploited' as opposed to those brothels which amount to a 'collective' or are run by a 'madam' (HC Deb, 10 February 2009, cols 341–346). Moreover, we should note the police do not have to believe that a relevant offence has been or will be committed, they only have to have reasonable grounds to believe that the premises are to be used for 'prostitute related offences'.

Because of the closure orders, a sex worker faces further criminalization as she will either be forced to work on the streets or breach the order, which is a criminal offence. The continued criminalization of the sex worker indicates that a moralistic attitude pertains as opposed to the notion that prostitutes are victims who need protecting. Whilst the Government rhetoric continually maintains that the desire is to enable women to exit prostitution and enter 'legitimate' forms of employment, the desire to increasingly criminalize sex workers paints a rather different picture as

criminal records ‘institutionalize women in prostitution’ (Niki Adams, 27 January 2009, col 26).

This section has provided a critical reading of the definitions relating to the new criminal offences pertaining to extreme pornography and prostitution. It has argued that whilst the Government indicates that the aim of the offences is to prevent harm to women, the wording and definitions used belie this contention. In contrast it is suggested that the offences indicate a desire to further the State’s control of sexuality and, in particular, the aim to exclude and outlaw performances of sexuality that contravene social and moral scripts of approved expressions of compulsory heterosexuality.

Conclusion – *Actus non facit reum nisi mens sit rea?*

In relation to extreme pornography legislation, Petley has argued that the measures relate to ‘New Labour’s much remarked-upon attempts to micromanage people’s lives and to intrude the law into spheres generally marked out as private in a liberal polity’ (Petley, 2009: 430). He further argues that: ‘New Labour . . . has been all too happy to pass numerous laws regulating individual behaviour and responsibilities, and to make public moral judgements on individual lifestyles’ (Petley, 2009: 430). The same can be applied to the prostitution provisions contained in the Policing and Crime Act 2009. Taken together, the reforms culminate in increasing the State’s control and regulation of sexuality. Whilst throughout the debates the word morality is not used by the governmental ministers who support the reforms, the discourses drawn upon and the effect of the provisions, I argue, demonstrate that morality is the key motivating factor. As Baroness Miller in the House of Lords comments, the introduction of ‘compulsory meetings’ for street sex workers ‘smacks of the State’s wish to exert some sort of moral disapproval of prostitution while simultaneously recognising that it will not go away’ (Baroness Miller, HL Deb, 1 July 2009 col 316). From a Butlerian perspective, the Government provisions simultaneously construct and exclude expressions of sexuality that contravene the matrix of compulsory heterosexuality. Not all performances of heterosexuality are considered to be culturally intelligible, rather the State idealizes certain expressions of heterosexuality. Engaging in prostitution or enjoying ‘extreme pornography’ falls outside the State’s construction of appropriate behaviour and must therefore be punished and censored. To this end, the State is involved in promoting a moral agenda through its law reform. In conclusion, I turn to one of the most worrying aspects of the new offences which demonstrates that the real concern is to control sexuality – the irrelevance of mal intent on behalf of the consumer.

Under both S63 and S14 it is not only irrelevant whether the consumer realized that he was committing an offence but, in many cases, whether the law has been contravened will only be clear once a case has reached court. Thus the law and the State *produces* extreme pornography and exploited prostitutes (Butler, 1997: 77). This enables the State and the law to maintain control of discourses of sexuality, and particularly female sexuality (Butler, 1997: 97). Moreover, the opinions of

those women who participate in either pornography and sex work are silenced as the legal system will determine whether or not a harm as been committed.

One of the most fundamental principles within criminal law is that individuals must have known that they were committing an offence before they can be found guilty: *actus non facit reum nisi mens sit rea*. However, in both S63 and S14 the Government has ignored this fundamental principle. In relation to extreme pornography, this occurs because the law does not require the viewer to intentionally or recklessly be aware that the material he is viewing is proscribed. Although he may be aware that the image is one that shows, for example, explicit and realistic injury to a woman's breast, he might not consider such material to be 'grossly offensive, disgusting or otherwise of an obscene character'. The legislation places a consumer in the untenable position of not only trying to decide whether or not the material is permitted but also finding him guilty if a jury happens to disagree with him. Although the Government claims that an individual would have 'no difficulty in recognising extreme pornography' (see HL Deb, 22 January 2008, col 151) this cannot be claimed with certainty, as the words 'grossly offensive' and so forth are entirely subjective. As noted by the Joint Committee on Human Rights, an individual cannot know with any certainty whether or not he is engaged in any wrongdoing (JCHR, 2008: para 1.50).

In relation to prostitution, S14 is strict liability. It matters not whether the sex buyer was aware that the woman he purchases services from has been exploited by a third party for the purposes of gain. As with S63, an individual will be criminalized even if they were not aware that they were committing an offence. The Government argues that a strict liability offence is necessary in order for the offence to be effective as knowledge of circumstances, even on an objective level, would be too difficult to prove (See for example Mactaggart, HC Deb 19 January 2009, col 486). However, as in many cases it may be difficult to objectively verify the circumstances of a prostitute, the sex buyer will not be able to ascertain whether or not they are committing an offence and it will be the magistrates who determine whether or not the prostitute in question was subject to exploitation.

Furthermore, because S14 is a strict liability offence, the maximum penalty is £1000 (S14(4) Policing and Crime Act 2009) but the maximum penalty for the possessing an extreme pornographic image is a three year custodial sentence and a fine (S64 Criminal Justice and Immigration Act 2008). The discrepancies are outstanding. A person engaging in sexual intercourse with a woman forcibly trafficked will be fined £1000 however, if the same person downloaded an extracted image from a contemporary horror film such as *Hostel II* for sexual arousal he could face up to three years in prison and a fine.

The Government claims extreme pornography and prostitution causes real harm to women and that increased criminalization is justified in order to deal with this harm. However, on a closer analysis it is clear that the real driving force behind the reforms is a desire to promote a moralistic agenda regarding appropriate performances of sexuality, particularly female sexuality. The Government has failed to

produce a realistic and effective policy to deal with violence against women, instead it has ploughed ahead with an unethical mobilization of the vulnerability of women to promote an undebated moral agenda.

Acknowledgements

I would like to thank Clarissa Smith for her very helpful comments and suggestions. An earlier version of this article was presented in the Gender, Sexuality and Law Stream at the 2009 Annual SLSA Conference. Thanks also to Chris Ashford for accepting the article and also editing this special edition.

Notes

1. See Obscene Publications Acts 1959 and 1964.
2. All the debates in relation to the Criminal Justice and Immigration Act 2008 are available online <http://services.parliament.uk/bills/2007-08/criminaljusticeandimmigration.html> (CJIA, 2008).
3. *R v Coutts* [2005] EWCA Crim 52 para 40.
4. All the debates in relation to the Policing and Crime Act 2009 are available online: <http://services.parliament.uk/bills/2008-09/policingandcrime.html> (PCA, 2009).
5. [2008] 1 W.L.R 937.
6. [2008] 1 W.L.R 937 at para 20.
7. [2008] 1 W.L.R 937 at para 20.
8. S21 gives provision to Schedule 2 Policing and Crime Act 2008, which amends the Sexual Offences Act 2003 to include S136A on closure orders.

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