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Rape pornography, cultural harm and criminalisation

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Abstract

In 2015 the offence of possessing extreme pornography (Criminal Justice and Immigration Act 2008, s 63) was extended to cover the possession of pornographic images of rape. Proponents of the legislation claim that rape pornography is 'culturally harmful', because it normalises and legitimates sexual violence. Critics have dismissed 'cultural harm' as poorly defined and lacking evidence. However, critical engagement with, and development of, this concept has been limited on both sides of the debate.

This article fills that gap through a sustained theoretical exposition of the concept of cultural harm and detailed analysis of its role in justifying the criminalisation of rape pornography. It makes the case that at least some rape pornography is culturally harmful, but nevertheless concludes that criminalisation of the possession of rape pornography is not an appropriate response to that harm.

Keywords: pornography; criminalisation; cultural harm; rape porn; sexual violence; possession offences.

Introduction

In February 2015 Parliament enacted provisions criminalising the possession of 'rape pornography'. Section 37 of the Criminal Justice and Courts Act 2015 (CJCA) extends the existing offence of possession of extreme pornographic images, contained within s 63 of the Criminal Justice and Immigration Act 2008 (CJIA) to cover images depicting non-consensual sexual penetration. The existing offence was introduced in response to 'increasing public concern' about the availability of 'extreme' pornography,[1] which was galvanised by the murder of Jane Longhurst by Graham Coutts, a man described as 'addicted' to violent pornography.[2] However, while the initial Home Office consultation in

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1 Home Office, *Consultation: On the Possession of Extreme Pornographic Material* (Home Office Communication Directorate 2005) 1.

2 Chris Summers, '"Extreme"' Porn Proposals Spark Row' *BBC News* (4 July 2007) <http://news.bbc.co.uk/1/hi/uk/6237226.stm>.

2005 proposed to criminalise possession of images of 'serious sexual violence',[3] the resulting offence was limited to pornographic material that portrays sexual interference with human corpses, intercourse or oral sex with animals, or acts which are life-threatening or likely to result in serious injury to a person's anus, breasts or genitals. Consequently, this offence was critiqued for being both over- and under-inclusive.

The offence in its original form has been viewed as over-inclusive because it criminalises possession of images of consensual bondage, domination, sadism and masochism (BDSM).[4] Many of the acts covered are legal to participate in, and even to film, but *possession* of that film is a criminal offence under s 63. Moreover, the focus on depictions of BDSM activities can be viewed as an attack on the rights of a sexual minority to participate in legitimate forms of sexual expression.[5] The offence was simultaneously criticised as under-inclusive, because it failed to deliver on the promise of criminalising depictions of sexual violence.[6] The extension to the offence brought about by s 37 CJCA was an attempt to remedy the latter of these perceived problems by criminalising possession of images depicting penetrative sexual assault.

Following the enactment of the CJIA, Clare McGlynn and Erika Rackley published a detailed critique focusing on its failure to include pornographic depictions of rape.[7] They argued that such images should be brought within the scope of the offence, and outlined a rationale for their inclusion termed 'cultural harm'.[8] Cultural harm is an indirect harm which consists of rape pornography's 'contribut[ion] to a climate in which sexual violence is not taken seriously' and in which it may be 'encouraged or legitimated'.[9] This concept has been extremely influential. McGlynn and Rackley acted as advisers to Rape Crisis South London's '#banrapeporn' campaign, which adopted cultural harm as its central rationale.[10] Their written evidence to the Public Bill Committee[11] and the Joint Committee on Human Rights[12] cites cultural harm as the primary justification for legal reform. Clearly, this formulation was persuasive. The government explicitly cited the influence of McGlynn and Rackley's work on its decision to extend the offence,[13] and the Joint Committee on Human Rights concluded its scrutiny of the proposed legislation by stating that 'the cultural harm of extreme pornography … provides a strong justification for legislative action'.[14]

3 Home Office (n 1).

4 Erika Rackley and Clare McGlynn, 'Prosecuting the Possession of Extreme Pornography: A Misunderstood and Mis-used Law' [2013] Criminal Law Review 400.

5 Eleanor Wilkinson, '"Extreme Pornography" and the Contested Spaces of Virtual Citizenship' (2011) 12 Social and Cultural Geography 493.

6 Clare McGlynn and Erika Rackley, 'Criminalising Extreme Pornography: A Lost Opportunity' [2009] Criminal Law Review 245.

7 Ibid.

8 Ibid 256–7.

9 Ibid 257.

10 Maria Garner and Fiona Elvines, *The Cultural Harm of Pornographic Depictions of Rape: Creating a Conducive Context for Violence against Women and Girls* (Rape Crisis South London 2014).

11 *Written Evidence submitted by Professor Clare McGlynn and Professor Erika Rackley at Durham Law School, Durham University* (CJC 12, Criminal Justice and Courts Bill Committee 2013–2014).

12 *Criminal Justice and Courts Bill 2014 Evidence submitted by Professor Clare McGlynn and Professor Erika Rackley* (Joint Committee on Human Rights 2014).

13 Joint Committee on Human Rights, *Legislative Scrutiny: (1) Criminal Justice and Courts Bill and (2) Deregulation Bill* (2013–1204, HL 189, HC 1293) 16.

14 Ibid 18.

Given the persuasive force of cultural harm as a rationale for restricting the consumption of pornography, it is striking how little academic attention this concept has received. McGlynn and Rackley's writing advocating the criminalisation of rape pornography has been prolific, and demonstrates an admirable commitment to making their arguments widely accessible. Nevertheless, their theoretical exposition of the central concept, cultural harm itself, is limited. Perhaps more surprising is the almost total absence of critical commentary. The 'rape pornography' amendment sparked a considerable backlash from those who see it as a further erosion of sexual freedoms, as evidenced by a number of submissions to the relevant parliamentary committees. Several of these refer to 'cultural harm', but their engagement with this concept is necessarily brief, dismissing it as poorly defined, lacking evidence and therefore an inappropriate target for criminalisation.[15] Meanwhile almost none of the academic literature so far generated by the extreme pornography offences engages with cultural harm in any depth.[16]

It seems then that the (now enacted) proposals to criminalise possession of rape pornography on the basis of cultural harm generated two polarised responses: uncritical endorsement of cultural harm, or at least of the legislative change it underpins, and outright dismissal of cultural harm. Thus, despite the controversial nature of the extreme pornography legislation, critical engagement with its central rationale has so far been minimal. This article fills that gap through a sustained theoretical exploration of the concept of cultural harm and its role in justifying the criminalisation of rape pornography. The first part of the article makes the case for cultural harm. I develop a detailed account of cultural harm in general and in the specific case of rape pornography, concluding that at least some rape pornography is culturally harmful. The second part of the article conducts a rigorous analysis of the rape pornography offence, arguing that it is not an appropriate response to that harm.

Theorising cultural harm: a general account

Central to McGlynn and Rackley's cultural harm thesis is the claim that rape pornography normalises sexual violence.[17] If this is cultural harm in the specific case of rape pornography, a general concept of cultural harm could be defined as a type of harm which manifests in the normalisation of attitudes and practices deemed negative. I take normalisation in this context to refer to a process by which attitudes, practices and/or ways of being become accepted as routine, unremarkable or at least understandable aspects of everyday life.

The concept of cultural harm relies on the basic premise that our ideas about the world, and the ways we can and should interact with it, have a strong social dimension. This basic premise is widely accepted, and a vast body of theory is dedicated to describing the relationship between social forces and individual action. Prominent examples include Michel Foucault's concept of disciplinary power,[18] Anthony Giddens'

15 See e.g. evidence from Feona Attwood, Martin Barker and Clarissa Smith, Backlash, Sex and Censorship Campaign <http://services.parliament.uk/bills/2014-15/criminaljusticeandcourts/documents.html>. See also, Myles Jackman, 'Is the Rape Porn Cultural Harm Argument another Rape Myth?' <http://mylesjackman.com/index.php/my-blog/100-is-the-rape-porn-cultural-harm-argument-another-rape-myth>.

16 An exception being Alex Dymock, 'The Doubling of the Offence? "Extreme" Pornography, Murder, and "Cultural Harm"' in Avi Boukli and Justin Kotze (eds), *Zemiology: Reconnecting Crime and Social Harm* (Palgrave Macmillan, in press).

17 McGlynn and Rackley, 'A Lost Opportunity' (n 6); see also Garner and Elvines (n 10).

18 Michel Foucault, *Discipline and Punish* (Allen Lane 1977).

structuration theory,[19] and an extensive feminist literature on relational autonomy which emphasises the ways in which both our preferences and our options for pursuing those preferences are shaped by relations with others.[20] Each of these theories develops the idea that human action is shaped by, but not entirely determined by, the actor's cultural milieu. Particularly useful for present purposes are Ann Swidler's metaphor of the 'cultural toolkit' and Nicola Gavey's concept of 'cultural scaffolding'.

Swidler's 'cultural toolkit' conceives of culture as a set of skills or habits through which members of that culture are equipped to pursue particular courses of action.[21] For Swidler, the culture in which an individual is embedded provides templates for acting which guide individuals' day-to-day behaviour. These templates also help individuals make sense of the actions of others such that, even if person B chooses a course of action that person A would not choose, A can still assess whether that action is within the normal range of behaviour or a bizarre deviation.

Gavey developed the concept of 'the cultural scaffolding of rape' to describe those dynamics of normative sexual relationships that make rape easier to perpetrate and harder to address.[22] In Gavey's account this 'cultural scaffolding' consists of a variety of intersecting discourses and norms about sexuality; such as the popular belief that men have an almost overwhelming sex drive while women view sex as merely instrumental to maintaining relationships.[23] Gavey identifies a wide range of materials contributing to these discourses, including mainstream movies and relationship advice columns.[24] In combination, these cultural expectations about male and female needs and desires, and about the ways men and women should relate to each other, influence the ways individuals behave and how they interpret the behaviour of others. Gavey describes two broad categories of negative material consequences flowing from this. First, it supports the prevalence of rape by fostering attitudes that lead individual men to rape and by making it easier to deny and disguise rape as ordinary sex. Second, much consensual sexual activity that does not constitute criminal victimisation is nevertheless constrained by repressive social expectations and beliefs.

Gavey's work demonstrates the complex relationship between text, culture and action at the core of the cultural harm thesis. Put bluntly, no one was ever compelled to rape by reading *Men are from Mars, Women are from Venus*.[25] However, this text along with myriad other cultural artefacts does shape popular understandings of male and female behaviour, particularly in relation to sex and relationships. In turn, individuals respond to these ideas in a wide variety of ways. They may, for example, consciously reject them, or feel ashamed of their desires and discouraged from articulating them, or be emboldened to be more demanding and aggressive. The influence of culture on action is unpredictable and difficult, if not impossible, to measure. Nevertheless, while individual texts do not compel specific actions, they *do* contribute to the set of cultural resources that individuals draw upon when interacting with the world around them.

19 Anthony Giddens, *The Constitution of Society* (Polity 1984).

20 See e.g. Catriona Mackenzie and Natalie Stoljar (eds), *Relational Autonomy* (Oxford University Press 2000); Jennifer Nedelsky, *Law's Relations* (Oxford University Press 2011).

21 Ann Swidler, 'Culture in Action: Symbols and Strategies' (1986) 51 American Sociological Review 273.

22 Nicola Gavey, *Just Sex? The Cultural Scaffolding of Rape* (Psychology Press 2005).

23 Ibid 103–7.

24 Ibid 114–15.

25 John Gray's 'Mars and Venus' series is used by Gavey to exemplify the attitude to heterosexual sex that she sees as central to the cultural scaffolding of rape; ibid 2.

'Cultural harm' refers to the development of cultural resources which underpin harmful interactions with others.

The 2016 EU referendum provides the context for a recent example of this type of harm. Various texts connected to the Leave campaign (including speeches, campaign posters, newspaper columns etc.) served to normalise racist and anti-immigrant attitudes through the messages conveyed. These messages are communicated through substantive claims, as well as through visual and linguistic imagery.[26] Specifically, these texts depict white working-class Britons as victims, and migrants as both an economic threat and a security threat.[27] Britons of colour are erased from this narrative entirely.[28] While it is not possible to empirically measure the impact of any individual text on public attitudes, it can be confidently asserted that texts which perpetuate the narrative of white Britons suffering hardship as a result of mass immigration contribute to a climate which validates racist and anti-immigrant sentiments.[29] Moreover, the portrayal of these attitudes as understandable and reasonable responses to deprivation – i.e. as familiar resources in the 'cultural toolkit' – discourages others from challenging expressions of racism. Cumulatively, these texts contribute to the cultural scaffolding which supports the manifestation of racism and xenophobia in material harms such as discrimination and hate crime.[30]

Thus far, I have outlined what I believe to be a relatively modest and uncontroversial set of claims: first, that our attitudes and behaviour are shaped by the cultures in which we are embedded. Second, these cultures are partly constituted by texts (broadly defined) and other cultural artefacts. Third, some of our cultural resources shape our attitudes and behaviour in negative and/or harmful ways. It is submitted that these three claims form the foundation upon which cultural harm is based. In the following section I explore how this concept has been operationalised in the specific case of objections to rape pornography.

The cultural harm of rape pornography

Moving from the basic concept of cultural harm to its use as a rationale for the criminalisation of possession of rape pornography requires the acceptance of an additional, and more contentious, claim: that 'rape pornography' is a distinct, identifiable category of material that makes a sufficiently significant and harmful contribution to the cultural climate to justify criminalising its possession. As stated above, the central claim made by proponents of extending the CJIA to cover images of rape is that this material normalises sexual violence. It is purported to do so by conveying various messages about

26 Notable examples include the use of terms such as 'swarm' and 'flock' to dehumanise migrants, and UKIP's 'Breaking Point' poster which depicted a queue of refugees, predominantly people of colour, crossing the Croatia–Slovenia border.

27 Akwugo Emejulu, 'On the Hideous Whiteness of Brexit' Verso Blog (28 June 2016) <www.versobooks.com/blogs/2733-on-the-hideous-whiteness-of-brexit-let-us-be-honest-about-our-past-and-our-present-if-we-truly-seek-to-dismantle-white-supremacy>. Satnam Virdee and Brendan McGeever, 'Racism, Crisis, Brexit' (2017) Ethnic and Racial Studies <https://doi.org/10.1080/01419870.2017.1361544>. I have deliberately used the term 'Britons' here to reflect the Leave campaign's own emphasis on 'Britishness'.

28 Emejulu (n 27).

29 Virdee and McGeever (n 27); Priska Komaromi and Karissa Singh, *Post-referendum Racism and Xenophobia: The Role of Social Media Activism in Challenging the Normalisation of Xeno-racist Narratives* (#PostRefRacism 2016) <https://postrefracism.co.uk/report/>; Komaromi and Singh (n 29).

30 "'Record Hate Crimes" after EU Referendum' *BBC News* (15 February 2017) <www.bbc.co.uk/news/uk-38976087>.

rape and sexual violence: that it is arousing, entertaining, not seriously harmful, and that it is a legitimate form of sexual expression. This section scrutinises the messages embodied in rape pornography, arguing that there is a strong case that at least some of this material is culturally harmful.

Texts' messages

One way in which rape pornography is said to legitimate sexual violence is by presenting rape as a form of entertainment, which downplays the severity of sexual violence.[31] Images that portray coercion as a route to pleasure could plausibly be read as condoning and minimising sexual violence. There is, however, a disconnect between this claim, and the specific examples of rape pornography that proponents of the offence focus on. Campaigners primarily target material which is explicitly advertised as rape pornography, hosted at websites titled 'brutal rape', 'savage rape' and the like.[32] The relevant images, as described by Holly Dustin and Fiona Elvines, commonly depict physical violence and visible signs of distress and pain.[33] These texts do not easily lend themselves to a reading of rape as not serious harm. Quite the opposite in fact: pornographic depictions of rape advertised with descriptions such as, 'innocent teen girls face their worst sex related nightmare', and, 'all the girls are violently raped, they cry and resist without any mercy from the rapist', portray rape as highly destructive.[34] Indeed, revelling in the infliction of serious harm appears to be a central theme, and one with which proponents of the offence are also concerned.

According to campaigners, rape pornography does cultural harm by glorifying and eroticising sexual violence.[35] On the face of it, this appears to be a fairly straightforward claim: if pornography consists of texts that are designed to arouse, then rape pornography presents rape as a source of sexual arousal and pleasure. Moreover, images which depict women ultimately enjoying pain and coercion present rape as pleasurable for both rapist *and* victim.[36] McGlynn and Rackley assert that image descriptions further glorify sexual violence, citing as an example, 'see what happens when men lose control and don't give a f*ck whether she says yes or no. Damn, in fact, the guys enjoy a "no" more'.[37] This text portrays the violation of another person's sexual boundaries as something to be enjoyed and celebrated, and implies that the victims do not matter. The claim that all rape pornography inherently 'valorises forced sex'[38] is not, however, beyond dispute.

31 Garner and Elvines (n 10); McGlynn and Rackley, 'A Lost Opportunity' (n 6) 258; Clare McGlynn and Erika Rackley, 'Striking a Balance: Arguments for the Criminal Regulation of Extreme Pornography' (2007) Criminal Law Review 677, 678.

32 Rape Crisis South London, *Proposed Amendment to Part 5 of CJIA 2008* <www.rasasc.org.uk/wp/wp-content/uploads/2013/11/FAQ.pdf>; Holly Dustin and Fiona Elvines, 'Ending Simulations of Rape, Incest and Childhood Sexual Abuse in/as Pornography' *Inherently Human* (24 May 2013) <https://inherentlyhuman.wordpress.com/2013/05/24/criminalising-extreme-pornography-five-years-on-dustin-and-elvines-on-ending-simulations-of-rape-incest-and-childhood-sexual-abuse-inas-pornography>; Clare McGlynn and Erika Rackley, *Information on Pornographic Rape Web Sites* <www.dur.ac.uk/resources/glad/GLADFactsheet.pdf>.

33 Dustin and Elvines (n 32).

34 Ibid.

35 Clare McGlynn and Erika Rackley, *Why Criminalise the Possession of Extreme Pornography?* <www.evaw.org.uk/wp-content/uploads/McGlynnRackleyRapePrnFeb14.pdf>; Garner and Elvines (n 10).

36 McGlynn and Rackley, *Written Evidence CJC 12* (n 11) para 3.5; see also US Attorney General's Commission on Pornography (1986) para 5.2.1 (Meese Report), cited in McGlynn and Rackley 'A Lost Opportunity' (n 6).

37 McGlynn and Rackley, *Written Evidence CJC 12* (n 11) para 5.1..

38 McGlynn and Rackley, 'A Lost Opportunity' (n 6) 249.

Feona Attwood and Clarissa Smith note that simply presenting this claim as fact obscures 'particular assumptions about the ways in which these sites may be meaningful to those who view them'.[39] They raise two overlapping criticisms of the assertion that rape pornography necessarily valorises rape. First, it assumes texts have singular identifiable meanings, and second, it overlooks the role of fantasy in viewers' engagements with pornography. McGlynn and Rackley do, in fact, acknowledge that the process through which rape pornography conveys messages and shapes attitudes is not straightforward or linear. Not everyone who views rape pornography will respond to it in the same way, and rape pornography is only one element in a constellation of cultural artefacts that influence views about sex and sexual violation.[40] Nevertheless, the assertion repeated throughout the cultural harm literature that rape pornography normalises, legitimates and eroticises sexual violence does paint a somewhat rigid picture of static meanings located in individual texts. By contrast, critiques of the extreme pornography legislation have emphasised the 'disparate' 'meanings and significances' of this imagery, and the diverse motivations of consumers.[41]

There is consensus across the debate that pornography, like any text, is open to multiple interpretations and meanings, and that this process of meaning-making is shaped by the context – the social structures and hierarchies of power – in which the text is produced and consumed.[42] It is also shaped by 'the ability of both producers and audience members to make certain interpretations and meanings more possible than others'.[43] Indeed, if we understand meaning-making as interactive, then something must come from the text; the viewer is not equally free or able to make *any* interpretation. Thus, while any given text may be capable of embodying a multiplicity of meanings, some interpretations will be considerably more plausible than others. If we accept that individuals interpret, use and are affected by rape pornography in a variety of ways then we must surely accept that for a decent proportion of viewers their reading of the images hosted on rape porn websites is as simple as 'rape is sexy'. It is also tolerably clear that this interpretation is encouraged by the content of the images and the way they are marketed. When this is understood, the attribution of specific, seemingly static meanings to rape pornography becomes more persuasive. People of all genders can and do interact with pornographic images of rape in a number of ways, but surely one of the most obvious and straightforward readings of the images targeted by the campaign is that they celebrate sexual violence and present it as a source of sexual pleasure.

Attwood and Smith also highlight the role of fantasy in the consumption of pornography. Arguably, there is a difference between presenting *simulated* rape as something which it is pleasurable to watch and *actual* rape as something which is pleasurable to do (or be subjected to). Replace rape pornography with action movies – the type with minimal plot or character development but lots of stunts and special effects – and this becomes easier to grasp. These films are clearly designed around the

39 Feona Attwood and Clarissa Smith, 'Extreme Concern: Regulating "Dangerous Pictures" in the United Kingdom' (2010) 37 Journal of Law and Society 171, 180.

40 Erika Rackley and Clare McGlynn, 'The Cultural Harm of Rape Pornography' Free Speech Debate (22 May 2015) <http://freespeechdebate.com/en/discuss/the-cultural-harm-of-rape-pornography>.

41 *Written Evidence submitted by Feona Attwood (Professor, Middlesex University), Martin Barker (Emeritus Professor, University of Aberystwyth) and Clarissa Smith (Professor, University of Sunderland)* (CJC 06) Criminal Justice and Courts Bill Committee (2013–2014).

42 Rebecca Sullivan and Alan McKee, *Pornography* (Polity 2015); Karen Boyle, 'The Pornography Debates: Beyond Cause and Effect' (2000) 23 Women's Studies International Forum 187.

43 Linda Duits and Liesbet Van Zoonen, 'Coming to Terms with Sexualization' (2011) European Journal of Cultural Studies 491, 492.

idea that *watching* shootouts, explosions and elaborate fight sequences *acted out* is enjoyable and exciting, but it would be a leap to assert that they present real life violence as something that is enjoyable to see or experience, or that viewers typically interpret action movies in this way. Similarly, knowledge that a rape scene is simulated by performers who are, in fact, consenting, is crucial to the enjoyment of some viewers of pornography.[44]

Not all pornography consumers are particularly concerned about performers' consent, however.[45] Moreover, conscious awareness that a text depicts fantasy does not prevent it from influencing our ideas about the world or about how to relate to each other. When Hollywood movies depict fantasy, that should not stop us being concerned about any racist, misogynist or homophobic tropes they perpetuate. At the other end of the scale, the fictional worlds of film and television are often credited with raising awareness and positively shaping attitudes towards real world phenomena.[46] I argue, therefore, that acknowledging the twin roles of fantasy and viewer agency in the consumption of pornography is not fatal to the cultural harm thesis. Viewers interact with images in complex ways to produce a range of meanings. Nevertheless, this should not blind us to the fact that the text itself contributes something to that process and to the wider cultural milieu. In the case of much rape pornography, that contribution includes the idea that rape is a source of sexual arousal.

It is questionable, however, whether *all* pornographic depictions of rape can be said to promote this idea. Advocates of the legislation appear to have some doubts about this. As noted above, the campaign concentrated on a particular subset of rape pornography – that which is hosted on so-called 'pro-rape' websites, featuring rape scenes which 'are often presented as real'.[47] McGlynn and Rackley distinguish this material from 'consensual BDSM imagery'.[48] Similarly Dustin and Elvines explicitly differentiate 'rape pornography' and 'BDSM porn videos', noting 'discernible stylistic differences between the two', despite the fact that both ultimately contain simulated scenes of non-consensual sex.[49] It is unclear what criteria were used to define these two categories in order to carry out the comparison.

These attempts to delineate sub-categories of rape images call into question whether rape pornography is a clearly identifiable category of material after all, and whether everything within that category necessarily 'valorises' rape. Attwood and Smith view this 'division of the imaginative realm into "harmful" and "harmless"' as masking a moralistic distinction between appropriate and inappropriate sexual fantasies,[50] exemplified for them by McGlynn and Rackley's assertion that 'these rape sites are poles apart from the "rape" fantasies of women in books such as Nancy Friday's *My Secret*

44 See e.g. Rose, 'Rape Porn: Rapists by Proxy?' Musings of a Rose (10 June 2013) <http://musingsofemilyrose.blogspot.co.uk/2013/06/rape-porn-rapists-by-proxy.html?zx=ad0b0decf62562eb>.

45 Karen Boyle, 'Producing Abuse: Selling the Harms of Pornography' (2011) 34 Women's Studies International Forum 593.

46 E.g. Victoria Ward, 'Domestic Violence Plot in the Archers Prompts Rise in Calls to Charity Helpline' *The Telegraph* (London, 18 March 2016) <www.telegraph.co.uk/news/bbc/12196965/Domestic-violence-plot-in-The-Archers-prompts-rise-in-calls-to-charity-helpline.html>.

47 McGlynn and Rackley, 'A Lost Opportunity' (n 6) 250.

48 McGlynn and Rackley, *Why Criminalise?* (n 35).

49 Dustin and Elvines (n 32).

50 Attwood and Smith (n 39) 180.

Garden'.[51] I am rather more sympathetic to the idea that some pornographic depictions of rape may genuinely be more harmful (and/or less redeemable) than others. However, the differences between categories of content, and the significance thereof, must be carefully articulated. This is particularly so if they are to form the basis for criminal intervention, as I explore in the final section of this article.

According to the cultural harm thesis, criminalisation is justified not solely because rape pornography sends undesirable messages, but because the absorption of these messages into the cultural environment in turn facilitates various material harms. In the following section I explore the material harms that have been linked to rape pornography in the cultural harm literature and the nature of this connection.

Rape pornography as cultural scaffolding

I argued above that the concept of cultural harm has many parallels with what Nicola Gavey refers to as the 'cultural scaffolding' of rape.[52] The metaphor of scaffolding is used to describe the structural support that enables and facilitates the commission of sexual violence. It consists of a set of norms, shared expectations and understandings about how people can and should relate to one another. Gavey also argues that this cultural scaffolding supports lower-level injustices and inequalities, that it shapes our day-to-day sexual interactions in limiting and negative ways.[53] Proponents of the rape pornography legislation, while not adopting Gavey's terminology, effectively view rape pornography as a significant component of the cultural scaffolding of rape. From a cultural harm perspective, rape pornography plays a role in facilitating sexual assaults, obstructing their successful prosecution, and more broadly influencing (hetero)sexual interactions and contributing to the devalued status of women in society.

The claim that rape pornography facilitates or supports the commission of rape is not a claim that viewing this material directly causes individuals to commit rape.[54] The cultural harm thesis is not premised on a 'texts and effects' model in which individual texts have measurable effects on individual brains. This model underpins many feminist objections to pornography, but has been extensively critiqued due to its flawed methods and inconclusive results.[55] Moreover, as Karen Boyle argues, many of the premises on which effects research is based are at odds with the theory and epistemology of anti-pornography feminism.[56] By contrast, cultural harm posits an indirect, diffuse, cumulative contribution of rape pornography, alongside myriad other cultural artefacts, to shared social attitudes and values. This relationship is more complex than a claim of direct harm and contains an additional mediating step: rather than individual texts (step 1) directly influencing the behaviour of viewers (step 2); individual texts (step 1) contribute to a cultural climate (step 2) which shapes the behaviour of individuals (step 3). The cultural harm literature provides limited detail about the process by which the cultural climate shapes the behaviour of individual perpetrators of rape. Nevertheless, my analysis of this literature reveals two aspects to the process: The cultural climate imbued with rape pornography shapes the sexual preferences of individuals, and it removes barriers to committing rape.

51 McGlynn and Rackley, cited in Attwood and Smith, ibid 180.

52 Gavey (n 22).

53 Ibid.

54 McGlynn and Rackley, 'A Lost Opportunity' (n 6) 256 and 'Striking a Balance' (n 31) 687.

55 For an overview see Boyle, 'The Pornography Debates' (n 42) and Attwood and Smith (n 39).

56 Boyle, 'The Pornography Debates' (n 42).

Indicative of the notion that a culture imbued with rape pornography shapes sexual preferences, McGlynn and Rackley quote with approval the then government position that 'extreme pornography "may encourage" an interest in "violent or aberrant sexual activity"'.[57] On first reading this seems very close to a claim that 'extreme' pornography causes people to rape, or at least to want to rape. However, the authors' stated concern is with the wider cultural impact – that this may 'contribute to a climate in which sexual violence is not taken seriously'[58] – rather than with effects on individual viewers. Moreover, the cautious assertion that pornography may encourage an interest in particular sexual acts is in line with the conclusions of several critics of the legislation. Attwood et al cite one reason for viewing pornography as the 'exploration of the possibilities and opportunities for sexual feeling; finding out about what interests and arouses and excites'.[59] Beyond this specific debate, pornography has been celebrated as a tool for exploring and developing sexual subjectivity and resisting normative sexual expectations.[60] It therefore seems naive to deny that pornography may also influence some problematic developments in individual sexual preferences, such as a sense of entitlement to others' bodies or a desire to inflict pain. Nevertheless, any impact on individual sexual preferences is at best marginal to the cultural harm thesis.

More compelling is the notion that the messages conveyed by rape pornography to the culture at large break down barriers that would otherwise inhibit the commission of rape. The central claim of the cultural harm thesis is that it normalises and legitimates sexual violence. Prohibiting this material is advocated as a means to communicate that sexual violence is unacceptable.[61] The argument is that the 'proliferation and tolerance'[62] of rape pornography enables would-be rapists to believe that their desires are widely shared, and that they will not be judged or sanctioned if they commit sexual assault. This echoes much bystander intervention work, in which a primary tactic for challenging violence and bigotry is to demonstrate that the perpetrator's views and actions are not endorsed by the general public.[63] From a cultural harm perspective then, the issue is that rapists may come to believe that their actions are widely endorsed.

A cultural harm approach is not limited to considering the influence of rape pornography on potential rapists, however. It is concerned with the attitudes and responses of a much wider collection of actors. These include the police, lawyers, judges and jurors who must decide whether a given incident constituted rape in law; the peers with the potential to challenge misogynistic, violent or insensitive behaviour and remarks; the friends, partners and families in whom a victim may confide; and the victim-survivors coming to terms with their experiences. This broad focus clearly sets it apart from simplistic direct harm approaches. Maria Garner and Fiona Elvines argue that a culture saturated with rape pornography makes it more difficult for victim-survivors to disclose,[64] while McGlynn and Rackley state that it 'leads to a society where, at the very

57 McGlynn and Rackley 'A Lost Opportunity' (n 6) 257 citing Home Office (n 1) para 27.

58 McGlynn and Rackley 'A Lost Opportunity' (n 6) 257.

59 Attwood et al (n 41) para 20.

60 See e.g. Patrick Califia, *Public Sex* (Cleiss 1994); Drucilla Cornell, *The Imaginary Domain* (Routledge 1995); Brian McNair, *Striptease Culture* (Routledge 2002).

61 McGlynn and Rackley, *Why Criminalise?* (n 35).

62 Ibid.

63 Alan Berkowitz, *The Social Norms Approach to Violence Prevention* <www.alanberkowitz.com/articles/BPI.pdf>; Rachel Fenton, Helen Mott, Kieran McCartan and Phil Rumney, *A Review of Evidence for Bystander Intervention to Prevent Sexual and Domestic Violence in Universities* (Public Health England 2016).

64 Garner and Elvines (n 10).

least, rape is less likely to be recognized as rape . . . where it is less likely to be investigated, where rape myths are harder to challenge'.[65] Thus, the cultural harm argument is not simply that rape pornography encourages individuals to commit rape, but rather that it exacerbates harm to victim-survivors and facilitates the commission of rape by making it more difficult to effectively censure and punish.

Frustratingly little detail is given, however, about why this might be the case. The barriers to disclosure for rape victims are complex, and include shame, stigma, desire to protect relationships, fear of not being believed or taken seriously, as well as first-hand experience of that fear being realised. The argument that the existence of rape pornography impacts these barriers is asserted without any explanation as to how it does so, or why its impact might be particularly significant. After all, consciousness of the woefully high attrition rate, or horror stories about the investigation and trial process are also likely to discourage disclosure.[66] Similarly, the argument that the existence of rape pornography makes it harder for police, juries and even victims to recognise rape when they see or experience it is not explored in any depth. This claim might have more weight if the campaign focused on pornographic images which portray coercion as a standard aspect of sexual activity. Instead, it targets scenes specifically described and marketed as *rape* scenes, leaving little room for doubt that the behaviours depicted would be criminal if carried out for real.

An alternative way in which rape pornography can be read as legitimating sexual violence is through the reification of gender and sexual roles. Garner and Elvines cite rape pornography as an influence on the everyday practices of 'doing gender'.[67] In other words, it influences viewers' ideas about appropriate masculine and feminine behaviour. Specifically, pornography that portrays the sexual coercion of women by men provides a template for how men can relate to women in a sexual context, for what we might call 'doing heterosexuality'. Such images construct masculinity as aggressive, and male sexuality as acquisitive, dominating and violent. Meanwhile female sexuality is portrayed as either non-existent (the women in the films are represented as sexual objects rather than sexual subjects) or masochistic (the women are depicted enjoying force, pain and humiliation).[68] Sexual violence against the women is thus presented as acceptable, either because they enjoy it, or because they and their wishes simply do not count.

The claim that rape pornography shapes practices of 'doing gender' and 'doing heterosexuality' is complicated by the fact that pornographic depictions of sexual violence are not limited to images that portray men as aggressors and women as victims. This has led some critics to take issue with the emphasis on violence against women in the campaign against rape pornography. Myles Jackman argues that 'fram[ing] the debate in terms of violence against women . . . excludes the experiences of male and transsexual rape survivors'.[69] I share Jackman's concern that discourses and policy frameworks which locate rape as a form of male violence against women can serve to marginalise

65 Rackley and McGlynn (n 40).

66 Liz Kelly, Jo Lovett and Linda Regan, *A Gap or a Chasm? Attrition in Reported Rape Cases* (Home Office Research Study 293 2005) 43.

67 Garner and Elvines (n 10); see Candace West and Don Zimmerman, 'Doing Gender' (1987) 1 Gender and Society 125 for the original exposition of this concept.

68 See further Boyle, 'Producing Abuse' (n 45), on the construction of female desire by the pornography industry.

69 Jackman (n 15).

male, non-binary and trans[70] victim-survivors, as well as those victimised by female perpetrators. Acknowledging and addressing the ways that gender structures experiences of sexual violence without reducing all sexual violation to one homogeneous narrative is an ongoing challenge. In this case, however, the focus on violence against women appears to be a deliberate choice based on the content of the material rather than a careless elision of sexual violence with violence against women.

Dustin and Elvines found that rape pornography is a prevalent genre on pornographic websites, and that it overwhelmingly depicts men as perpetrators and women as victims.[71] Thus, it is the pornography itself that reduces sexual violence to a homogeneous narrative of male violence against women, rather than the campaigners. This homogeneity is central to understanding the operation of cultural harm. It is through systematic repetition and accumulation that a given attitude, practice or mode of being takes shape and gains significance among the constellation of available cultural resources. Thus, the impact of each individual image may be negligible in isolation, but the cumulative effect of widespread repetition of the image of male (hetero)sexuality as domineering and violent is to solidify this way of performing masculinity as one resource in the cultural toolkit.

This argument nevertheless leaves a number of issues unresolved. First, Attwood et al have questioned whether rape pornography is as pervasive as the campaign suggests. They note that it is unclear whether Dustin and Elvines analysed pornographic images or just their titles and descriptions, and question whether the content itself ever actually existed.[72] Second, the claim that rape pornography disproportionately portrays male perpetrators and female victims is also contentious. Dustin and Elvines analysed the top fifty freely accessible 'rape porn' sites, i.e. websites which explicitly describe their content as rape pornography. They found that on these sites, 100 per cent of those depicted being assaulted were female, while 98 per cent of those taking the role of perpetrator were male.[73] Yet this assumes that pornographic depictions of rape are limited to content which expressly markets itself in those terms, and returns us to the question I raised above: what counts as rape pornography? Third, irrespective of what proportion of the 'rape pornography' category they constitute, what are we to make of images which fall outside the male perpetrator/female victim paradigm? Do they also normalise sexual violence? Could they subvert or challenge gender norms or are they just more of the same? The answers to these questions have implications for the appropriate scope of any criminal offence.

I have established that at least some rape pornography conveys a message that sexual violence is a legitimate source of sexual pleasure, notwithstanding the fact that not all viewers will passively absorb this message. In light of this, I caution against simply dismissing the idea of cultural harm. Those of us with an interest in tackling sexual violence should take seriously the cultural harm of rape pornography and pay attention to possible strategies for combatting that harm. With this in mind, the final section of this article considers the specific strategy that was advocated by proponents of the cultural harm thesis and adopted by Parliament in 2015: the criminalisation of possession of pornographic images of rape.

70 Whilst 'violence against women' should, by definition, include violence against trans *women*, in reality it often does not.

71 Dustin and Elvines (n 32).

72 Attwood et al (n 41).

73 Dustin and Elvines (n 32).

Criminalising rape pornography

Critiques of the criminalisation of rape pornography have primarily focused on the lack of evidence that it causes harm.[74] By contrast, I have argued above that (some) rape pornography *is* culturally harmful. My concern is with how that harm should be addressed, specifically whether criminalisation of possession is an appropriate response. Paradoxically, some of the most compelling claims of the cultural harm thesis undermine the case for criminal intervention.

First, cultural harm is cumulative in nature. Individual texts do not directly lead to harm, rather the proliferation of similar images has a combined effect of reifying and normalising particular behaviours and ways of being sexual. The systematic repetition of themes, such as the male perpetrator–female victim configuration highlighted by Dustin and Elvines,[75] points to inequalities at a structural level. This suggests individual consumers may be the wrong target.[76] Second, the cultural harm of rape pornography shares some similarities with the normalisation of racism and homophobia through texts such as news articles, political campaign speeches and fictional representations.[77] Indeed, I have argued above that these are also forms of cultural harm. Yet English law criminalises the expression of hatred or bigotry only in very limited circumstances,[78] and takes an even more restrictive approach to criminalising the possession of materials expressing or endorsing such views.[79] Third, the cultural harm thesis identifies rape pornography as one among 'any number of factors' which normalise sexual violence.[80] Thus a justification is needed as to why this factor should be criminalised but not others.

The cultural harm thesis identifies a particular wrong, and has been used to advocate for the criminalisation of possession of rape pornography as a manifestation of that wrong. However, if some manifestations of this wrong are to be criminalised but not others, this needs to be done on an explicit, clear and principled basis. With this in mind, the final sections of this article scrutinise the specific provisions that criminalise the possession of rape pornography, through the lens of cultural harm.

Possession: perpetrators and victims

Section 63 of the CJIA is unique in that it criminalises the possession of various categories of pornographic material. The rationale for targeting possession was that, while the production and distribution of these images is prohibited by the Obscene Publications Act 1959 (OPA), this Act does not apply to content produced and hosted on websites outside of England and Wales. Criminalising possession has therefore been framed as the closure of a legal loophole created by the development of internet technology. This framing implicitly accepts that criminalising the production and dissemination of rape pornography is justified, an issue which there is not scope to address here. Nevertheless, even if there were consensus that the dissemination of certain forms of pornography should be prohibited, it cannot be assumed that the rationale can be straightforwardly transposed to the criminalisation of possession.

74 Attwood and Smith (n 39); Jackman (n 15).

75 Dustin and Elvines (n 32).

76 Dymock (n 16).

77 Garner and Elvines (n 10).

78 Public Order Act 1986, ss 4A and 5.

79 Ibid s 23.

80 Rackley and McGlynn (n 40).

Under the cultural harm framework set out above, the contribution of producers and distributors is straightforward: they perpetrate cultural harm by facilitating the spread of the harmful messages contained within rape pornography. The role of consumers is less obvious. One way in which it could be said that the possession of rape pornography is a form of culturally harmful conduct is that possessors expose themselves to harmful material, and in so doing allow themselves to be influenced by its themes. This way of understanding the wrongfulness of possession echoes the OPA's much critiqued emphasis on the tendency to 'deprave or corrupt',[81] and as Alex Dymock notes, forms part of a broader trend of criminalising dangerousness rather than harm itself.[82] Indeed, McGlynn and Rackley openly acknowledge that the offence targets the risk of harm.[83] McGlynn and Ian Ward have argued that this is entirely consistent with J S Mill's formulation of his harm principle, so often relied upon to challenge the criminalisation of pornography.[84]

I agree that the criminalisation of risk is sometimes appropriate; I argue, however, that two threshold conditions must be met: first, that the harm risked is of a type and level of severity that would warrant criminalisation were it to materialise; second, that there is a sufficiently close link between the activity to be criminalised and the harm risked by engaging in that activity. Possession of rape pornography fails to meet both these conditions. According to the cultural harm thesis, the risk associated with the possession of rape pornography is that the act of possession fosters a set of troubling attitudes about sex and sexual violence, and that these attitudes can manifest in conduct that is harmful; for instance, insensitive responses to disclosures of sexual violence, jokes or dismissive comments about rape, and decisions not to report, charge, prosecute or convict when rape takes place. However, holding these attitudes is not in itself a crime, nor is expressing them or acting on them in the ways described. If these attitudes and behaviours are not worthy of criminalisation (i.e. they do not clear the threshold of being sufficiently harmful), it cannot be appropriate to criminalise a person who merely exposes themself to the risk of developing such attitudes.

There is a further stage in the cultural harm thesis, as detailed above: these attitudes and behaviours encouraged by rape pornography in turn lead to more rapes and sexual assaults taking place. This meets the first criterion: rape and sexual assault are clearly harms of a type and severity that justifies criminalisation. But here the second criterion is not met. The nexus between possession of rape pornography and the commission of rape (by either the possessor or a third party) is not sufficiently strong to justify criminalising the possessor on the basis that they risk contributing to the proliferation of rape in society. Compare the criminalisation of drink-driving. Drink-driving offences criminalise the risk of harm rather than harm itself. But were that risk to materialise in injury to persons or damage to property there would be a clear, direct link between the driver's conduct and the harm caused. By contrast, when the risk of possessing rape pornography materialises in the form of a rape taking place, there is no such direct link. Rape pornography contributes to the commission of rape by fostering attitudes and behaviours that, alongside numerous other factors, normalise and legitimate sexual violence. The diffuse, indirect nature of the relationship between rape pornography and incidents of rape is central to the concept of cultural harm and is precisely what

81 OPA 1959, s1(1).

82 Dymock (n 16).

83 McGlynn and Rackley, *Evidence to Joint Committee on Human Rights* (n 12) para 4.3.

84 Clare McGlynn and Ian Ward, 'Would John Stuart Mill Have Regulated Pornography?' (2014) 41 Journal of Law and Society 500.

distinguishes it from the heavily contested claim that viewing pornography directly causes individuals to commit rape. However, the remoteness of this relationship between the conduct and the relevant potential harm makes criminalisation an inappropriate response.

The wrong of possession can alternatively be framed in terms of creating a demand for pornographic images of rape. However, this formulation merely increases the remoteness between the offender's action and the ultimate harm: the prohibited conduct carries a risk of encouraging the production of materials that send messages that may contribute to the shaping of attitudes and behaviours that may, indirectly and in conjunction with numerous other factors, contribute to an increase in the prevalence of rape. Moreover, encouraging the commission of an offence by a third party is already prohibited under ss 44–46 of the Serious Crime Act 2007.

Criminalising possession on the basis of risk also raises questions about who poses a risk to whom. Dymock argues that locating the risk of cultural harm within specific individual consumers of pornography, through criminal prohibition, sits in tension with the framing of cultural harm as a systemic problem.[85] She identifies a logic of deviance underpinning the construction of viewers as exceptional and therefore dangerous.[86] At the same time, an important strand of the anti-(rape) pornography discourse constructs consumers themselves – specifically children and vulnerable adults – as *at risk*. Protection of children is a key framework through which concerns about pornography are expressed.[87] In the campaign against rape pornography this is exemplified through appeals to research for the Children's Commissioner which found that young people are 'engaging in riskier sexual behaviour as a result of viewing pornography, are uncertain as to what consent means and develop harmful attitudes towards women and girls'.[88] Yet prohibiting possession offers no additional protection for children and instead provides a means to criminalise them.

My concern with the criminalisation of possession then is not that there is no harm to be addressed. Rather, the very nature of cultural harm means that there is an insufficiently strong nexus between individual conduct and the manifestation of harm to justify criminalisation. In addition, it runs the risk of criminalising some of the victims of cultural harm. Just as the diffuse nature of cultural harm makes it difficult to identify individuals as specifically responsible for that harm, it also presents challenges for identifying specific forms of media or categories of content that are exceptionally harmful. It is to these difficulties that I now turn.

Dangerous pictures

The offence in question does not prohibit depictions of rape in all forms of media, it applies only to pornographic images. Section 63(3) CJIA defines 'pornographic' as 'of such a nature that it must reasonably be assumed to have been produced solely or principally for the purpose of sexual arousal'. The Act, therefore, distinguishes between verbal and visual, and between pornographic and non-pornographic depictions of rape.

85 Dymock (n 16).

86 Ibid.

87 Maddy Coy and Maria Garner, 'Definitions, Discourses and Dilemmas: Policy and Academic Engagement with the Sexualisation of Popular Culture' (2012) 24 Gender and Education 285; Sullivan and McKee (n 42) 54–6.

88 McGlynn and Rackley, *Evidence to Joint Committee on Human Rights* (n 12) para 4.8, citing Office of the Children's Commissioner, B*asically… Porn is Everywhere* (Office of the Children's Commissioner 2013).

In addition, images covered by the Act must be 'explicit' and the persons depicted must appear real to the reasonable person,[89] meaning that animated pornography is exempt. In this section I argue that the cultural harm framework does not provide a justification for these inconsistencies. Furthermore, there are potential negative consequences of singling out pornographic images.

A key strength of the cultural harm thesis is its recognition that social attitudes and practices are shaped by a wide range of media and other cultural artefacts, and the interplay between them. Yet s 63 specifically singles out pornographic images, implying that their contribution to cultural harm is in some way unique. Within the literature advocating the criminalisation of rape pornography, this is largely assumed rather than articulated. Assurances are given that prohibition would not and should not apply to cartoons or to non-pornographic works,[90] but it is unclear why these should be automatically exempt. Indeed, a UN report used to bolster the claim that rape pornography is culturally harmful, states that:

> Images in the media of violence against women, in particular those that depict rape or sexual slavery as well as the use of women and girls as sex objects, *including pornography*, are factors to the continued prevalence of such violence, adversely influencing the community at large, in particular children and young people.[91]

This implies that pornography is one among a number of media forms that convey culturally harmful messages about gender roles and sexuality.

This is clearly the case. Take, for example, the popular sitcom *How I Met Your Mother*. Many of the show's jokes revolve around the (often successful) tactics used by the character Barney Stinson to persuade women to have sex with him. These include propositioning women who are heavily intoxicated (such that their capacity to consent may be compromised), and carrying out numerous elaborate deceptions including lying about his gender, and claiming 'sex with [him] would cure their nearsightedness', either of which would vitiate consent for the purposes of a rape charge in English law.[92] The idea that these actions could constitute sexual assault is never explored within the show. Notwithstanding occasional expressions of disgust from other characters, Barney's actions are presented as a source of comedy for the characters and audience alike. Meanwhile the women who are taken in are presented as bimbos who got what they deserved. This example serves to illustrate that images which legitimise rape by using it as a form of entertainment, minimising its harms and making it difficult to recognise sexual violence *as* sexual violence are not exclusive to pornography. Why then, should *pornographic* depictions of rape be treated as exceptional?

One obvious distinction between the example above and 'rape pornography' is that the former does not depict sexual activity itself, only characters discussing it, and is not explicit. However, as s 63 already requires images to be 'explicit', this does not explain the need for an additional requirement that they be 'pornographic'. The example above also calls into question whether 'explicit' images are necessarily more harmful. The

89 CJIA, s 63(7A).

90 McGlynn and Rackley, 'Striking a Balance' (n 31) 684–85.

91 *The Report of the United Nations Fourth World Conference on Women*, Beijing September 1995, para 118 (emphasis added); cited in McGlynn and Rackley, *Evidence to Joint Committee on Human Rights* (n 12) para 4.7 and in Garner and Elvines (n 10) 4. Similarly, research by the British Board of Film Classification cited in Rackley and McGlynn (n 40) as evidence of cultural harm analysed films *not* classed as pornographic works.

92 *R v McNally* [2013] EWCA Crim 1051; *R v Flattery* (1877) 2 QBD 410; *R v Williams* [1923] 1 KB 340.

specific focus on materials designed for sexual arousal makes sense within a direct harm framework, which theorises that viewing rape pornography conditions men to be sexually aroused by rape and therefore makes it more likely that they will commit rape. But, as explained above, the weaknesses of direct harm arguments have resulted in the emergence of cultural harm as a more robust framework for understanding the potential harms of rape pornography. Under a cultural harm framework, which theorises that the consumption of rape pornography and social and legal tolerance thereof normalises and trivialises sexual violence, it is unclear why depicting rape as a source of sexual arousal is inherently more problematic than portraying it as a source of comedy.

An alternative rationale for the specific focus on pornography could be that, whereas rape pornography overwhelmingly depicts rape in ways that trivialise and/or promote sexual violence, depictions of rape in other media are more varied. Rape in mainstream film and television ranges from sensitive portrayals of the trauma of sexual violence and the resilience of survivors, to its use as little more than a titillating plot device. By contrast, if pornography is by definition produced for the purpose of sexual arousal, then pornographic depictions of rape must invariably portray rape as arousing. It could, therefore, be argued that *all* rape pornography conveys messages which are culturally harmful, whereas only *some* non-pornographic depictions of rape do so. Such an assertion is difficult to reconcile with a literature which, as discussed above, acknowledges the heterogeneity of pornographic depictions of non-consensual sex, attempting to distinguish 'BDSM imagery' from 'rape porn'. It also fails to explain why pornographic texts or illustrations which glorify rape should be treated differently from explicit and realistic images which do the same. The cultural harm framework does not provide a principled basis on which to distinguish explicit pornographic images from non-pornographic works.

Inconsistency in the criminal law without a principled basis is undesirable. It is unfair to invoke the criminal sanction against consumers of image-based pornography but not against consumers of other equally harmful materials. In this instance, the inconsistency has additional undesirable consequences. In singling out pornography, the offence abstracts rape pornography from the broader context of misogyny and gendered violence in which it is created and viewed. Garner and Elvines, arguing in favour of the rape pornography amendment, claim that 'pornography which depicts rape, sustains a culture in which rape and sexual violence is normalised and perpetration is framed as an expression of sexual desire rather than as a criminal offence expressing gender inequality.'[93] Paradoxically, by focusing on pornography alone, the ensuing debate situates the consumption of rape pornography precisely as a contested sexual desire, with argument over whether that desire is legitimate and harmless or deviant and dangerous. Notwithstanding the fact that anti-pornography feminists view rape pornography as intimately connected with wider structures of gender inequality and violence, the offence itself obscures this connection by prohibiting rape pornography as one among a number of categories of extreme pornography, as opposed to one among a number of categories of misogynistic material. As such, it positions sexual deviance, rather than misogyny, inequality or violence as the core of the problem.

Given that the cultural harm framework does not provide a basis for distinguishing pornographic from non-pornographic depictions of rape, it could be argued that *all* culturally harmful depictions of rape should be criminalised, rather than just those which are pornographic. Such an offence would potentially be very wide-ranging and

93 Garner and Elvines (n 10) 2.

would be unlikely to attract the broad coalition of support that was mobilised behind the criminalisation of rape pornography. In addition, as explained in the previous section, there would still be an insufficiently close nexus between the possession of culturally harmful materials and the manifestation of the type of harms that would warrant criminalisation. There could perhaps be scope for more restrictive criminalisation along the lines of the offence of possessing racially inflammatory material.[94] The difficulty would be identifying what material counts as culturally harmful.

The rape pornography amendment seeks to solve this problem by using a set of criteria about the type of material (explicit, pornographic, images) and its content (rape or assault by penetration) as proxies for identifying culturally harmful material. However, singling out pornographic images is not an effective way to do so. It overlooks much equally harmful material, and implies that sexual deviance rather than inequality and misogyny are the root of the problem. In the final section, I argue that singling out images of rape and assault by penetration similarly overlooks other culturally harmful materials and runs the risk of perpetuating stereotypes about what a 'real rape' looks like.

'Real rape' and 'realistic' rape

Cultural harm locates the harms of pornography in its eroticisation of violence against women. This framing has roots in the radical anti-pornography feminism of the 1980s. Then, as now, feminists emphatically rejected the framework of obscenity and its emphasis on morality, disgust and offence. Their objection to 'pornography' was not an objection to all sexually explicit materials, only to sexualised representations of the subordination of women.[95] The most prominent example of this approach is the anti-pornography civil rights ordinances drafted by Catharine McKinnon and Andrea Dworkin, which defined pornography as the 'graphic sexually explicit subordination of women [or men, children or transsexuals]'.[96] This vague definition was accompanied by a list of additional criteria, at least one of which must be met for materials to come within the scope of the ordinance. Examples include 'women are presented dehumanised as sexual objects, things or commodities' or are 'presented in postures or positions of sexual submission, servility, or display'.[97] However, as with the overarching definition, these criteria are far from clear-cut or uncontested. The radical feminist definition of pornography therefore lacks certainty and is difficult to apply consistently.

A 'categories approach' to the regulation of pornography, as embodied in the CJIA, appears to offer a solution.[98] The Act designates various categories of pornography as 'extreme' by reference to the particular acts depicted, for example, intercourse with animals and acts which are life-threatening.[99] Whilst questioning some of these categories, McGlynn and Rackley endorsed the underlying approach and identified depictions of rape as one category which should be included.[100] Thus, rather than targeting all pornographic materials which might sexualise subordination, they have effectively singled out a subset – rape pornography – that unequivocally does so. There

94 Public Order Act 1986, s 23.

95 Diana Russell, 'Pornography and Rape: A Causal Model' in Drucilla Cornell (ed), *Feminism and Pornography* (Oxford University Press 2000).

96 For the full text of the Minneapolis Ordinance, see Andrea Dworkin and Catharine MacKinnon, *Pornography and Civil Rights: A New Day for Women's Equality* (1988), Appendix A.

97 Ibid.

98 McGlynn and Rackley, 'Striking a Balance' (n 31).

99 CJIA 2008, s 63(7).

100 McGlynn and Rackley, 'Striking a Balance' (n 31).

may be debate at the periphery about whether depictions of particular postures or activities are inherently degrading. Pornographic images of rape, however, are framed as conclusively in the subordination camp, so obviously do they 'glorify violence against women'.[101]

The categories approach works by using a relatively clear-cut category as a proxy for a more complex one. Similarly, legal age limits are often used as a substitute for more nuanced assessment of individual capacity or readiness, on the basis that the age limit is easier to apply and roughly maps on to the category it is standing in for. Here, 'pornographic images of rape and assault by penetration' stands for the category 'materials which are culturally harmful because they normalise sexual violence'. I argue that rape pornography is a poor proxy for this category of material because a) its parameters are not sufficiently bounded, and b) it does not map closely on to the category it is used to represent.

The relevant category of extreme pornographic images is defined under s 63(7A) of the CJIA as follows:

> (7A) An image falls within this subsection if it portrays, in an explicit and realistic way, either of the following—
>
> (a) an act which involves the non-consensual penetration of a person's vagina, anus or mouth by another with the other person's penis, or
>
> (b) an act which involves the non-consensual sexual penetration of a person's vagina or anus by another with a part of the other person's body or anything else,
>
> and a reasonable person looking at the image would think that the persons were real.

Operationalising this category thus requires the fact-finder to consider whether the image is explicit, whether the physical acts depicted fall within those specified above (i.e. is sexual penetration involved?), and whether the persons appear to be real. These questions will be relatively straightforward in most cases. Crucially, however, fact-finders must also consider the more complex questions of whether the acts are portrayed as consensual, and whether they are portrayed in a realistic way.

The criminal justice system is notoriously bad at identifying actual instances of rape with sufficient certainty for a criminal conviction. A vast literature details the significant attrition at every stage of the criminal justice process.[102] While the reasons for attrition are complex, the challenges associated with proving the complainant's lack of consent are often a key factor. In a rape case, the investigation and subsequent trial attempt to determine whether the complainant consented based on the evidence before them. This usually includes testimony from the complainant about their state of mind at the time of the incident, testimony from the complainant, defendant and any witnesses about the parties' behaviour, and any relevant physical evidence. Research shows the various fact-finders in the process draw on stereotypes about rape and gendered expectations about sexual behaviour to make sense of this evidence.[103] As a result, rapes that closely resemble the 'real rape' stereotype – where the defendant is a male stranger who uses a weapon and/or extreme physical force, and the complainant is a sober, chaste woman

101 Ibid 690.

102 E.g. Kelly et al (n 66); Ministry of Justice, Home Office and the Office for National Statistics, *An Overview of Sexual Offending in England and Wales* (2013).

103 E.g. Jennifer Temkin and Barbara Krahé, *Sexual Assault and the Justice Gap: A Question of Attitude* (Hart 2008); Louise Ellison and Vanessa Munro, 'Better the Devil You Know? "Real Rape" Stereotypes and the Relevance of a Previous Relationship in (Mock) Juror Deliberations' (2013) 17 International Journal of Evidence and Proof 299.

who resists verbally and physically to the utmost of her ability – are more likely to be prosecuted and convicted.[104]

In a rape *pornography* case, there is no complainant to testify as to whether they consented. There are only the actions, and possibly words, of the characters as depicted in the images. The real rape stereotype is thus likely to take on a much greater role here than it does in rape and sexual assault cases. Images depicting the most extreme levels of physical violence (many of which would be covered by other extreme pornography categories), and obvious reluctance and resistance on the part of the victim, are much more likely to be identified as rape pornography than images depicting more subtle forms of coercion, or where consent is more ambiguous. As highlighted above, this tendency was already present in the campaign to ban rape pornography, which concentrated on stereotypical depictions of rape as examples of the material it sought to prohibit. Furthermore, the legislative decision to restrict the offence to depictions of non-consensual penetration diminishes the seriousness of non-penetrative sexual assaults. There is a danger then that operationalising the 'rape pornography' category will simply perpetuate the real rape stereotype. As such, the law itself would send a culturally harmful message.

McGlynn and Rackley advocate the insertion of a context clause, modelled after the Scottish extreme pornography provisions, to help clarify whether an image is prohibited. This would explicitly allow reference to be made to 'how the image is or was described', to assist in determining whether it depicts non-consensual penetrative sexual activity.[105] Such a clause would narrow the rape pornography category, as material not explicitly advertised as 'rape porn' would be less likely to be covered. This would not lessen the impact of stereotypes, because material marketed as rape porn and/or hosted on dedicated 'pro-rape' websites tends to closely resemble the real rape stereotype. It could, however, incentivise marketers to describe images in ambiguous language (e.g. 'rough sex' rather than 'rape'). This would make it easier for consumers to unwittingly download images of rape, placing them at risk both of prosecution and of exposure to culturally harmful themes. Arguably, it would also make the images themselves more culturally harmful if pornography depicting sexual coercion was advertised as images of sex rather than rape, implying that coercion is an acceptable feature of sexual encounters.

The requirement that depictions of rape be 'realistic' imports further confusion about the parameters of the offence. This is separate from the requirement that the *persons* must appear real (ruling out illustrations).[106] How is realism to be interpreted in this context? Do poor acting or overly glossy production values place an image outside the scope of the offence? What of unrealistic scenarios such as a victim enjoying being raped? This is a common pornographic narrative and one that has been highlighted as particularly harmful.[107] Does realistic mean 'presented as though it is real'? Jackman favours this interpretation, and uses the presence of credits at the end of pornographic films to emphasise that the scenes are simulated by actors.[108] By contrast, McGlynn and Rackley claim 'realistic' includes images that are simulated, and advocate making this

104 Temkin and Krahé (n 103).

105 Civic Government (Scotland) Act 1982, s 51A(7)(a).

106 CJIA, s 63(7A).

107 Meese Report (n 36).

108 Edward Docx, 'One lawyer's crusade to defend extreme pornography' *The Guardian* (London, 9 September 2015) <www.theguardian.com/law/2015/sep/09/one-lawyers-crusade-defend-extreme-pornography>.

explicit in the legislation.[109] Nevertheless, they devote particular attention to sites that present images as though they are real.[110]

A focus on images that are presented as though they are real appears to conflate two different forms of wrongdoing. A defendant who knowingly possesses images that he believes to document an actual rape (unless intending to submit them as evidence of a crime) is in a different moral position to a defendant who possesses rape images that he believes to be simulated. The first defendant participates in the continued violation of a victim of rape, and also creates a demand for further rapes to be committed and filmed.[111] The second defendant, as discussed in my analysis of the wrong of possession, exposes himself to a set of harmful messages that may negatively influence his attitudes to sex and sexual violation, and incentivises production of culturally harmful materials. I argued above that this type of wrongdoing is too remote from a relevant form of harm to justify criminalisation. However, given that the CJIA *does* criminalise this form of wrongdoing, it is unclear why a distinction is drawn between realistic and unrealistic depictions. Unrealistic depictions of rape, including animation, are not immune from conveying the types of misogynistic and violent messages identified as the cultural harm of rape pornography. Thus, the requirement that images be realistic renders the parameters of the rape pornography category less clear, and does not help to delineate culturally harmful from benign depictions.

The identification of various subgenres of pornography casts further doubt on the coherence of 'rape pornography' as a legal category. As discussed above, some advocates of the amended offence acknowledge the plurality of pornographic depictions of rape, in particular seeking to distinguish consensual BDSM images from rape pornography. Dustin and Elvines' preliminary findings showed that the former is more likely to feature 'hints of consent', as well as women taking active roles and experiencing pleasure.[112] McGlynn and Rackley appear to differentiate rape fantasies in which female pleasure is central from the material hosted on 'pro-rape' websites.[113] Critics of the offence have also argued that BDSM materials should be placed outside its scope. Zoe Stavri, for example, highlights the trend within BDSM pornography to show performers discussing how they would like an upcoming scene to play out, and reflecting on it afterwards.[114] Stavri cites this visible process of 'negotiation and boundary-setting' as a means of modelling positive consensual sexual encounters to viewers.[115]

It appears then that some pornographic images explore themes of power, consent and violence in ways that do not legitimate or minimise sexual assault. Do such images still qualify as rape pornography? It could be argued that a BDSM 'rape scene' bookended by footage of the performers discussing their willingness and enjoyment is not a depiction of non-consensual sex at all. The current law lacks clear guidance on this point. It could alternatively be argued that such scenes do depict rape, but do not do so in ways that encourage or make light of sexual violence, and are therefore not culturally harmful. If this is the case, the legal category 'rape pornography' does not closely map

109 McGlynn and Rackley, *Written Evidence CJC 12* (n 11) para 4.0.

110 McGlynn and Rackley, 'A Lost Opportunity' (n 6) 250.

111 Clare McGlynn and Erika Rackley, 'Image-Based Sexual Abuse' (2017) Oxford Journal of Legal Studies 1.

112 Dustin and Elvines (n 32).

113 McGlynn and Rackley, 'Striking a Balance' (n 31) 690, fn 67.

114 Zoe Stavri, 'Don't Ban "Rape Porn" – Introduce More Porn with Negotiation and Boundary-setting' *The Independent* (London, 23 July 2013) <www.independent.co.uk/voices/comment/dont-ban-rape-porn-introduce-more-porn-with-negotiation-and-boundary-setting-8727612.html>.

115 Ibid.

the set of images that are culturally harmful. Under s 63, the only relevant distinction between one pornographic image of rape and another is whether it is 'grossly offensive', 'disgusting' or 'obscene'.[116] This criterion provides some flexibility to exclude images from prohibition,[117] but it is a deeply flawed and unreliable mechanism for differentiating culturally harmful from benign materials.

This analysis of the parameters of the rape pornography category demonstrates that it is not fit for purpose. It is unclear which images will qualify as rape pornography or how such images are to be identified, and there is a high likelihood that criminal justice agents will rely on myths and stereotypes, which are themselves culturally harmful, to aid their determinations. As a proxy for culturally harmful pornography, the rape pornography category is both over- and under-inclusive: It excludes images of non-penetrative sexual assault and in practice is likely to exclude images that do not conform to the real rape stereotype, including images which portray more subtle forms of coercion and reluctance as standard aspects of a legitimate sexual encounter. Paradoxically, there is little to prevent BDSM rape scenes in which the participants' preferences and boundaries are explicitly negotiated from being brought within the scope of the offence.

Conclusions

Some media, including some pornography, is culturally harmful. I have articulated a theory of cultural harm grounded in social theory that relies on the following three claims: first, that our attitudes and behaviour are shaped by the cultures in which we are embedded. Second, these cultures are partly constituted by texts (broadly defined) and other cultural artefacts. Third, some of our cultural resources shape our attitudes and behaviour in harmful ways. It is certainly difficult to identify the specific contribution made by individual cultural artefacts, but it is nevertheless possible to analyse the messages conveyed by a particular text and to assess the likelihood that those messages are culturally harmful. Thus, it is possible to identify many pornographic depictions of rape as culturally harmful.

I am, however, sceptical about criminalisation – and specifically the rape pornography offence under s 63 of the CJIA – as a strategy to combat this form of harm. I have argued that the mere possession of culturally harmful material is too remote from the materialisation of a sufficiently serious harm to justify criminalisation. I have also argued that there is not a clear case for singling out rape pornography for criminalisation. Whilst there is a high likelihood that material placed in this category will be culturally harmful, this is also true of many other pornographic and non-pornographic texts. If there is to be any legal response to culturally harmful media, it should be based on a framework that recognises the links and intersections between misogynist, racist, classist and other harmful tropes, and their expression across all forms of media. Instead, we have a legal framework that assumes that sexually arousing images are especially dangerous.

116 CJIA, s 63(5A)(b).

117 Paul Johnson, 'Law, Morality and Disgust: The Regulation of "Extreme Pornography" in England and Wales' (2010) 19 Social and Legal Studies 147.