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Dr Mark Flear

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The debate about wheelchair spaces on buses goes 'round and round': access to public transport for people with disabilities as a human right

ABIGAIL PEARSON

Keele University[1]

Abstract

This article examines the cases bought by Paulley concerning access to buses for wheelchair users when the wheelchair space is occupied by a buggy. It argues that the conclusion by the Supreme Court was unsatisfactory and a missed opportunity for a public statement about the rights of people with disabilities. It argues that reasonable adjustment is a problematic concept and fails to address the competing needs of social groups in terms of accessibility. This is compounded by traditional distinctions between disability and impairment and a failure to consider disability access in the context of human rights despite the ratification of the UN Convention on the Rights of Persons with Disabilities.

Keywords: *Paulley*; CRPD; accessibility; reasonable adjustment; wheelchair space; disability; rights; access to transport.

The 'Wheels on the Bus'[2] is a sweet nursery rhyme sung by and to children to keep them amused on a journey. However, through adult eyes, it can be a neat encapsulation of our society and, more specifically, a comment about social representation and participation. Think about it: we've got the mums, we've got the dads and we've got the kids, but what about everybody else? Increasingly, the absence of everybody else and their co-existence with the mums, dads and kids on public transport is becoming an unavoidable question that needs to be answered. The recent court cases, brought by Mr Doug Paulley, concerning the balance between access to public buses for wheelchair users and parents with buggies, have revealed several deficiencies in the legal framework protecting and promoting the equal social, economic and cultural rights of persons with disabilities. Discussions around this issue, both in and out of the courtroom, give an insight into the changes and discourses critical to future legislative developments ensuring substantively equal access for all people with disabilities.

This article will explore these issues by first giving a brief overview of the developments of the cases from the County Court at Leeds,[3] to the Court of Appeal[4] and

1 With many thanks to Professor Anthony Bradney, Dr Eliza Varney and Dr Michael Fay for their feedback and encouragement during the pre-submission phase for this article.

2 'The Wheels on the Bus' by Verna Hills, Boston Massachusetts. See *American Childhood*, vol 25 (Milton Bradley 1939).

3 *Paulley v First Group plc* [2013] Leeds County Court Case 2YL85558.

4 *First Group plc v Paulley* [2014] COA EWCA Civ 1573.

then to the Supreme Court.[5] Then, the article will move on to discuss the key issues and arguments that were common to all the cases to highlight what they reveal about the strengths and weaknesses of the legislative framework concerning the rights of people with disabilities and societal attitudes. At the same time, it will consider how to address any weaknesses and to animate the legislative framework to bridge the gap between its intention and practice. Lastly, conclusions will be drawn about the steps needed to deliver equality in practice.

Legislative context

The right of wheelchair users to access public service vehicles (such as buses and coaches) whilst remaining in their wheelchairs was first protected by Part V of the Disability Discrimination Act (DDA) 1995[6] after years of direct protest by people with disabilities.[7] In 2010 the provisions of the DDA 1995 were absorbed into the Equality Act.[8] However, no such legislation exists for parents without disabilities with buggies.

The cases

The Leeds County Court case

Mr Paulley brought a claim of unlawful discrimination against First Group plc. The case focused on the need to clarify the firm's policy on the position of wheelchair users using the bus when the designated space is occupied by other passengers.

On 24 February 2012, when attempting to board a bus from Wetherby to Leeds, Mr Paulley submitted that he was unable to travel on the bus as the wheelchair space contained a pushchair with a sleeping child. The driver, in line with First Group plc's policy, asked the mother to move (by folding her pushchair) so that Mr Paulley could use the wheelchair space, but she refused. The driver felt that he could not compel her to move, so informed Mr Paulley that he would be unable to travel. Mr Paulley asked whether it would be possible for him to fold his wheelchair, store it elsewhere on the bus and sit in a passenger seat. However, the driver refused because it could create potential risk as the wheelchair could not be restrained when folded. Consequently, Mr Paulley took a later bus and missed his train.[9]

It was decided by the court that First Group could be said to have a provision, criterion or practice (PCP) which placed Mr Paulley at a disadvantage in relation to other passengers and that the proposed adjustment of a 'first-come, first-served' access to the space made by the company was not effective. Mr Paulley was awarded damages of £5500 for injury to feelings[10] and no injunctive order was made for six months to give First Group time to address the issues raised.[11]

5 *First Group plc (Respondent) v Paulley (Appellant)* [2017] UKSC 4.

6 Disability Discrimination Act 1995.

7 Damon Rose, 'When Disabled People Took to the Streets to Change the Law' *BBC News* (7 November 2015) <www.bbc.co.uk/news/disability-34732084>.

8 Equality Act 2010.

9 *Paulley v First Group plc* [2013] Leeds County Court Case 2YL85558, [3].

10 Ibid [24].

11 Ibid [25].

The Court of Appeal case

First Group was granted an appeal of the initial decision. The focus was on whether a bus company should have a policy to compel other abled-bodied passengers to vacate the wheelchair space, if it is required by a wheelchair user.[12]

The first issue to be considered was whether the PCP placed disabled people at a substantial disadvantage. Here, Lewison LJ drew attention to the fact that it was not whether a disabled person is at a substantial disadvantage to a non-disabled person, but whether the PCP has caused the disadvantage.[13] Lewison LJ could not form the necessary causative link between the PCP and the delay that Mr Paulley suffered. He argued that had another wheelchair user been occupying the space, and there had been free seats on board, Mr Paulley would still have been unable to travel because the Public Service Vehicle Accessibility Regulations 2000 prevent a wheelchair user from travelling outside of the designated wheelchair space.[14]

The next point to be considered was whether the PCP caused a substantial disadvantage. Whilst Lewison LJ was not prepared to overturn the County Court judge's assessment of the disadvantage as substantial, as there was no suggestion that the delay Mr Paulley suffered was atypical, he did question the extent to which any delay could constitute a substantial disadvantage, as the bus ran every 20 minutes.[15] However, this ruling could make delays even more likely, if the space is now more likely to be filled with a buggy because parents may be more reluctant to move than they were before the ruling.

The main difference between the Court of Appeal case and the County Court case was whether or not the 'first-come, first-served' element of access to the wheelchair space constituted a PCP, and whether or not it placed wheelchair users at a substantial disadvantage.[16] Lewison LJ was of the opinion that it did constitute a PCP, but that the reasoning and definition arrived at by the County Court judge was incorrect. Lewison LJ expressed concerns about the description of the 'first-come, first-served' convention as a PCP because it did not apply to everyone. If a parent with a buggy wanted to use the wheelchair space, non-disabled passengers who were using the space would not be asked to vacate it.[17] Consequently, Lewison LJ argued that the PCP incorporated a reasonable adjustment and a step to comply with the duty.[18] He referred to *Finnigan v Chief Constable of Northumbria Police*,[19] which stated that a PCP is the policy before a reasonable adjustment is implemented.

The court decided that to rule that bus companies should have a policy to compel other people to vacate the wheelchair space by leaving the bus would be unreasonable for several reasons. Firstly, that the bus driver would not have the power to remove a person from the bus physically without opening him or herself to potential battery charges.[20] Arguments were also made that parents with an ill or disabled child, who needed to keep a hospital appointment, or a parent with a disability might not be able to take the child

12 *First Group plc v Paulley* [2014] COA EWCA Civ 1573, [1].

13 Ibid [36].

14 Public Service Vehicle Accessibility Regulations 2000, s 12(4).

15 *First Group plc v Paulley* [2014] COA EWCA Civ 1573, [39].

16 Ibid [41].

17 Ibid [34].

18 Ibid [32].

19 *Finnigan v Chief Constable of Northumbria Police* [2013] EWCA Civ 1191; [2014] 1 WLR 445, [29].

20 *First Group plc v Paulley* [2014] COA EWCA Civ 1573, [50]

out of the buggy; or a person with another impairment might require use of the space.[21] Moreover, it was argued that a driver would not be able to make an accurate assessment of whose needs were greater, due to a lack of training.[22] Lastly, it was considered that for particular groups, such as persons with a visual impairment or a mother stranded with a baby, being removed from a bus might cause more disadvantage to them than to a wheelchair user who had to wait, due to differences in vulnerability.[23]

The Supreme Court case

The Supreme Court case was heard on 15 June 2016. The outcome of the case was a partial victory for Mr Paulley and a partial resolution of the issues put before the court. It was decided that the damages awarded by the County Court would not be restored and, whilst there was no requirement for First Group to have a policy which compelled people to leave the bus or the wheelchair space when it was required by a wheelchair user, the court found that the company had a duty to do more than simply ask and then accept a refusal. It was argued that additional measures could include stopping the bus for a short period to pressurise the intransigent passenger into moving.

Taking the scenic route to equality?

There are several commonalities between the reasoning in the cases which highlighted and compounded existing weaknesses in the legal framework relating to the rights of persons with disabilities and social attitudes. These will be explored in the following sections.

The UN CRPD: running for the bus?

It would have been valuable for the Supreme Court to consider disability more widely and in relation to human rights generally. Under the UN Convention on the Rights of Persons with Disabilities (CRPD), which was ratified by the UK in 2009, domestic laws must be consistent with it by expressing and reaffirming the human rights of persons with disabilities to ensure full equality under the law.[24] The absence of the CRPD from the discussions is disappointing, because it has the effect of transforming the convention into an Excalibur figure, with the potential for great power, but only when it is released. Until the courts and the UK government realise its power in practice, then its potential for meaningful change for people with disabilities will be limited to rhetoric rather than action.

Article 1 of the Convention offers wide-ranging guidance on the concept of disability, which encompasses long-term physical, mental, intellectual or sensory impairments. It also makes specific reference to the origin of disability in the interaction between impairment and society leading to social exclusion. Article 7 of the CRPD makes specific reference to the rights of children with disabilities, which would mean that a non-impaired parent with a disabled child would have the right to access the wheelchair space if needed. If the judges had considered disability in terms of the CRPD definition, then an inclusive stance could have been taken to stop any person without impairment from preventing a person with an impairment from accessing the wheelchair space when requested to do so by the driver, regardless of whether the person was a wheelchair user

21 Ibid [52].

22 Ibid [53].

23 Ibid [54]–[55].

24 CRPD and Optional Protocol (2006), Article 1.

or not. This is because the term non-disabled, non-wheelchair user causes some difficulty when considered in the context of the social model distinction between disability and impairment.[25] If disability is the result of the interaction between the impairment, or the biological aspect of disability and societal barriers,[26] such as a lack of accessible seating, then it may be possible to argue that a person with an impairment may find themselves to be disabled as a result of having to leave the accessible part of the bus so that another person can use it to remove their own disability. Therefore, I would argue that distinction should be drawn between passengers based on impairment rather than disability status.

It may seem strange to use what appears to be a medical model idea about the primacy of impairment over disability when discussing social access in relation to disability. In the social model, people are born with or acquire an impairment which does not necessarily disable them until they come into contact with societal, attitudinal or architectural barriers.[27] Conversely, the medical or individualist approach to disability is that it is the impairment, or the pathology of the individual with that impairment, which causes the disadvantage and disability that they experience, rather than any other external factors. This way of thinking often seeks to 'cure' the individual or to provide devices which lessen the overall impact of the impairment upon the individual's life.[28] However, in such a context, the notion of disability is too inclusive because the focus on access to society may also be an issue for non-impaired parents with non-impaired children who may find it difficult to access certain public spaces when using baby apparatus. However, in the situation raised by *Paulley*, the focus on biology without choice, which is neatly encompassed by the notion of impairment, is important to emphasise. In these particular cases, it is the choice element that matters. Based on the restrictions in the Public Service Vehicle Regulations 2000, wheelchair users can only access the one space because they are not permitted, even if possible, to fold their wheelchairs and transfer on to a seat. There is no such restriction for parents with buggies, nor are they confined to using one form of transporting their babies; for example, they could choose to use a sling or backpack. This is a perfect example of what Shakespeare has termed 'interactionism' in relation to disability and impairment. In conceptual terms, Shakespeare considers the effects of maintaining the traditional clear-cut distinction between social-model and medical-model thinking on disability.[29] Shakespeare argues that rather than sticking to these two diametrically opposed models, which have been traditionally favoured within British disability studies, it is possible to maintain a social-model sense of thinking about disability by looking at a number of the social-interactionalist models that exist. For example, he highlights some of the earlier works of Paul Hunt and UPIAS, which consider that disability arises from several factors and that no one factor should be treated in isolation from another.[30] Shakespeare argues that these more liberalised ideas have become ossified and have eclipsed the other social-model approaches to disability in terms of popularity. He comments that no writers have directly aligned themselves to the medical model, rather, that the distinction came when no differentiation was made between impairment and disability. Shakespeare stresses that seminal texts, such as

25 C Barnes and G Mercer, 'Chapter 1', in C Barnes and G Mercer (eds), *Implementing the Social Model of Disability: Theory and Research* (Disability Press 2004) 3.

26 Ibid.

27 Ibid 15–19.

28 Ibid 9–10.

29 T Shakespeare, *Disability Rights and Wrongs* (Routledge 2006).

30 Ibid 12–13.

Michael Oliver's 1990 *Politics of Disablement*, used personal tragedy theory and social oppression theory rather than the medical and social models.[31] He argues that this labelling results in an approach that regards disability as more than the dominance of doctors or diagnosis.[32] For Oliver, it is an approach that sites disability within the individual, stemming from functional limitations or psychological losses, rather than seeing it as originating from difficulties interacting with society and the resulting oppression.[33]

Section 6(1) of the Equality Act 2010,[34] which defines 'disability', supports the argument of ensuring access to public transport based on impairment, rather than disability, because, it states:

> A person (P) has a disability if P has a physical or mental impairment, and the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

Being unable to use public transport due to the lack of an accessible space would be a constriction of day-to-day activity and this would not be limited solely to wheelchair users, but anyone else who needed to use the designated space as the result of an impairment which prevented them from accessing standard seats, such as needing to use a walking frame. However, despite interactionist approaches to disability, this definition is problematic in terms of human rights protection for people with disabilities at the domestic level because, while it uses the word 'disability', it focuses entirely on impairment within the individual, without considering the role of society and social structures. This serves to highlight that the Equality Act 2010 does not give any consideration to access rights for people with disabilities in terms of wider human rights because this misconception of impairment as 'disability' fails to acknowledge the dignity and autonomy of people with disabilities. Section 6 focuses on deficit and deviation from what is 'normal', rather than the worth of people with disabilities and their contributions to society, providing they can access it. Failure to consider factors outside of impairment renders s 6 different from interactionism because it does not permit people with disabilities to embrace either disability or impairment, depending on circumstance. Rather, it can be said that s 6 occupies a confusing hinterland, as disability is used as a label for impairment, and so is rendered meaningless.

There is scope within the CRPD, as I have argued elsewhere, to suggest that access to transport for disabled people constitutes part of the key human rights: respect for dignity and autonomy.[35] Traditional understandings of dignity present difficulties in relation to disability rights because they are predicated on independence[36] which can be a difficult threshold for some people with disabilities to meet, as they will never be able to achieve traditional independence.[37] Quinn proposes a new understanding of autonomy that is not

31 Ibid 15.

32 Ibid.

33 Ibid 14–15.

34 Equality Act 2010

35 Abigail Pearson, 'What's Worth Got to Do with It? Language and the Socio-legal Advancement of Disability Rights and Equality' (2014) 20(3) Web JCLI.

36 Abigail Pearson, 'A Comparative Study of "Reasonable Adjustment" and "Undue Burden" Provisions for People with Disabilities Accessing Public Transport Services under European Union Law' (Keele University September 2014) 15.

37 'Free from Outside Control; Not Subject to Another's Authority', A Stevenson (ed), *Oxford Dictionary of English* (3rd edn, Oxford University Press 2010).

dependent on narrow definitions of independence, which may have traditionally excluded disabled people, depending on their particular impairment.[38] This is an important restatement to make: Quinn proposes that all people, regardless of impairment, are supported in their decision-making process as they are influenced by the needs of others around them.[39] Full understanding of these needs and contexts can only be gained if people can participate in their communities.[40] Quinn's argument that autonomy within the CRPD means the ability to participate equally within society and to contribute makes the right to transportation an important factor in the autonomy of people with disabilities.[41] Autonomy is a foundational concept of dignity, which is an inviolable right. Therefore, if people with disabilities are denied their right to full autonomy because of states' failures to make transportation accessible, it can be argued that they are also being denied their inviolable right to dignity. Consequently, access to transportation for people with disabilities could be viewed as a fundamental human right, meaning that the higher threshold of effectiveness should always be applied.[42]

Accessibility is an independent right under Article 9 of the CRPD.[43] Effective and inclusive access to transport is central to achieving all the wider rights. Despite this, legislators maintain an economic rather than a rights-based approach, indicated by the presence of 'reasonable adjustment' and 'undue burden'[44] defences to limit the cost of access provision measures on service providers. Without effective and equal access to transport, people with disabilities cannot access education,[45] health,[46] social, political and cultural activities[47] to fully enjoy the rights automatically conferred on them by the CRPD. Subsequently, the abstract objectives of the CRPD cannot be achieved. If law-makers do not acknowledge the existence of the rights of people with disabilities, how can people with disabilities enjoy equality before the law?[48] Moreover, Article 8 of the CRPD requires that states raise awareness of the needs of and barriers facing persons with disabilities in society. A decisive outcome in *Paulley*'s case and reasoned and detailed obiter that could have been made public would have gone far in achieving this.

The continuing problem with reasonable adjustment

In the Court of Appeal case, Lewison LJ considered the Human Rights Equality Commission guidelines on when an adjustment is considered reasonable. These focus primarily on costs and the disruption resulting from adjustments made to accommodate people with disabilities. He made the distinction between a 'reasonable' and an 'effective' adjustment by referencing Slade LJ in the Employment Appeal Tribunal case, *Lancaster v*

38 G Quinn, 'Rethinking Personhood: New Directions in Legal Capacity Law and Policy, or How to Put the "Shift" back into "Paradigm Shift"' (University of British Columbia, Vancouver 2011) 17.

39 Ibid.

40 Ibid.

41 Pearson, 'A Comparative Study' (n 36) 2.

42 Ibid 21.

43 Ibid and Optional Protocol (2006) Article 9.

44 Ibid Article 5.

45 Ibid Article 24.

46 Ibid Article 25.

47 Ibid Article 29.

48 Ibid Article 12

TBWA Manchester:[49] 'an adjustment which gives a Claimant "a chance" to achieve a desired objective does not necessarily make the adjustment reasonable'.[50]

However, he argued that cost considerations superseded the need for reasonable adjustments to be effective.[51] This, then, begs the question whether 'reasonable adjustments' are really anything more than nominal concepts which pay lip service to the requirements of the legislature, to be seen to be doing something to make changes to secure social participation. This economic focus is incongruous with the perspective shift of the CRPD towards a rights-based focus.[52] It also appears in the CRPD at Article 2 and would be better to be replaced with 'assurance of rightful access'.[53] This reiterates the rights focus and removes the notion that disabled people should be mindful of 'not making unfair demands' and that these should be 'moderate in price' and 'average'.[54]

Whilst the Supreme Court was not concerned with making changes to the concept of reasonable adjustment in this case, it is possible that had their lordships adopted a rights-based focus to considering the existing PCP, they might have been able to highlight cost-conscious but effective solutions which could have opened the door for a re-evaluation of the concept of reasonable adjustment and the ways of funding increased accessibility. An example of a cost-conscious but effective adjustment would be a way to carry folded wheelchairs or buggies securely, if needed. This was considered by Arden LJ in obiter. However, it was already assumed to be costly and that expense would have to be taken into account.[55] This again places economics above rights. Moreover, Arden LJ observed that First Group had not considered whether such improvements could be made, despite the need to regularly review adjustments. Interestingly, comment was made that if Mr Paulley had been able to show that on his route there were always buggies in the wheelchair space, so that he was effectively deprived of the opportunity of travelling by bus, which Parliament had intended to protect, the outcome of the case may have been different.[56] This suggests that there is burden on the disabled person to show disadvantage, rather than for a company to show real evidence of anticipating the need for a particular adjustment despite the aims of s 20 of the Equality Act 2010. This is a further indication that the economic perspective supersedes the human rights perspective in practice.

In the Supreme Court ruling, the judgments of Lady Hale[57] and Lord Clarke[58] laid out that the purpose of reasonable adjustments is to overcome specific disadvantage experienced by persons with disabilities, not those with buggies. Lord Kerr highlighted that the recorder's original judgment meant that parents would not be forced off the bus if their buggy could be folded down. However, it is important to recognise that parents can choose whether or not to fold their buggy, or purchase one which can be folded down if no space is available. If they choose not to purchase a folding buggy then it is this

49 *Lancaster v TBWA Manchester* (2011) UKEAT/0460/10/DA, [46]
50 *First Group plc v Paulley* [2014] COA EWCA Civ 1573, [44].
51 Ibid [45].
52 Pearson, 'What's Worth . . .' (n 35).
53 Ibid.
54 Ibid.
55 *First Group plc v Paulley* [2014] COA EWCA Civ 1573, [82].
56 Ibid [83].
57 LJ Hale at 32, [94].
58 LJ Kerr at 52, [157].

choice that means they would have to leave the bus, not an order from the court.[59] These judgments were not made on emotional grounds. For example, there is no talk of unaccompanied children being scattered in the hedgerows as implied by Lord Neuberger.[60] Also, the discussion of the point of reasonable adjustments and their aims negated the issues of hierarchies of difficulties, which the other judgments failed to do. Emphasising that the purpose of reasonable adjustments is to overcome the disadvantage experienced by persons with disabilities when interacting with social structures, such as buses, and highlighting that there will be circumstances under which wheelchair users would not have the priority over the space (when it is already occupied by a wheelchair user or a person with another form of mobility equipment), then the distinction is rightly made that it would be reasonable for the wheelchair user to wait.[61] This is positive because it acknowledges that persons with disabilities are not unreasonable and simply want fair access, while also understanding other people's issues and points of view.

Common decency and virtue ethics: or rights v social niceties

Both the Court of Appeal and Supreme Court judgments argued that moving from a wheelchair space to permit a wheelchair user to access the bus was a matter of 'common' decency[62] and 'courtesy'.[63] Relying on public decency to enable persons with disabilities to access public services and participate in society embodies a right by charity approach, which is both paternalistic and dangerous, as it disempowers one group to another. In Book II of *The Nicomachean Ethics*, Aristotle stated that: 'legislators make citizens good by forming habits in them, and this is the wish of every legislator and those who do not effect it miss their mark, and it is in this that a good constitution differs from a bad one'.[64]

In the case of Mr Paulley, the Supreme Court and other judges appear to be attempting to form 'good habits' in citizens by modelling them in court judgments, but the lack of enforcement in their own decisions (such as deciding that bus companies have to take more decisive action to remedy difficulties) means that these virtue ethics are not put into practice and can be said to have resulted in a bad constitution. Additionally, this highlights a discrepancy with virtue ethics and its lack of deontology or normative power, because it does not tell people how to act, or assist them in practical situations. It only tells them to think about what a 'good person' would do. This is also problematic because it assumes that all virtues and values are universal and of the same importance to everybody.

Morris explores the impact and development of a charity-based approach to disability and the way that misrepresentations of disability can be used to generate charity revenue which undermines the concept of people with disabilities as autonomous beings.[65] Morris argues that a possible antidote to these negative representations of disability is the development and promotion of a disability culture that would present people with disabilities with accurate, self-made representations which would give confidence and

59 LJ Kerr at 43, [131] and 44, [133].

60 LJ Neuberger at 26, [81].

61 LJ Hale at 35, [105].

62 LJ Lewison, Court of Appeal [1].

63 LJ Sumption at 30, [88].

64 Aristotle, *The Nicomachean Ethics*, W D Ross (trans) (Oxford University Press 1998).

65 J Morris, *Pride against Prejudice: Transforming Attitudes to Disability* (Women's Press 1991) 73.

pride in difference and acknowledge that the experiences of people with disabilities are valuable and important.[66]

Campbell offers a succinct description of the general movement in the charitable representation of disability from the 1950s to the 1980s.[67] Between the 1950s and the 1970s she categorises the approach to charity and disability as 'fundraising garden parties' where people talked about 'poor unfortunates' and 'incurables' who could be 'cared for'.[68] The majority of emphasis was not on representations of people with disabilities themselves, but on the focus of those more fortunate in doing 'selfless deeds'.[69] There were elegant images of able-bodied people consuming tea and cakes from fine china, but no people with disabilities.[70] Campbell argues that people with disabilities were 'acted upon' rather than consulted.[71] Campbell moves on to discuss the 1980s which she labels 'the decade of the courageous and exceptional' which began to question institutionalisation, and constructed another image of people with disabilities as 'an example to everyone', where people achieved major feats of courage and bravery or had special skills in undertaking everyday tasks.[72] In 1990, she argues that people were encouraged to 'look at the ability not the disability'.[73] Campbell argued that after consultation with people with disabilities, organisations and charities were concentrating on recognition of contributions to society rather than on the impairment, although Campbell argues that this ignores the impact of the impairment and does not give any status to people with disabilities.[74] This new image was simply another way of asking society to recognise normality, rather than providing positive images of disability and addressing barriers.[75]

Both Morris and Campbell offer interesting insights into the discussion of the relationship between rights and charity for people with disabilities. Whilst both advance a rights-based perspective over the benevolent benefactor approach of charity, both indicate difficulties that would appear to underpin modern and legislative approaches to this dichotomy. For example, Morris continues the trope of reasonableness in her calls for people with disabilities to be able to enjoy 'a reasonable quality of life'.[76] The use of the word 'reasonable' here perpetuates and, in some senses, legitimates the low expectations of people with disabilities about their quality of life. It also lowers the expectation of those instrumentally involved in the expenditure on and legislation for the rights of people with disabilities to access society and the services that it entails. Both Morris and Campbell emphasise the difficulties with, and the danger of, continuing a separatist approach in terms of disability and the wider society. In terms of the legislative framework, it may be possible to argue that, by parcelling the rights of people with disabilities into specific pieces of legislation, thus building a patchwork of

66 Ibid 75.

67 J Campbell, 'Developing our Image: Who's in Control?', in Disability Studies Leeds, paper presented at 'Cap-in-Hand' Conference (February 1990) <http://disability-studies.leeds.ac.uk/files/library/Campbell-DEVELOPING-OUR-IMAGE.pdf>.

68 Ibid.

69 Ibid.

70 Ibid.

71 Ibid.

72 Ibid.

73 Ibid.

74 Ibid.

75 Ibid.

76 Morris (n 65) 16, 72, 78 and 92.

documents that are superimposed into existing legislation, it is arguable that their mere existence is addressing the problem, regardless of how effective or ineffective their implementation and use may be. This ghettoisation within the legislative framework might halt the effectiveness as much as it could help it. Campbell also exhibits elements of this separation in her discussion of changes to charity approaches because she argues that, whilst people with disabilities should be recognised as people who can achieve things, she also argues that this recognition of achievement should not eclipse recognition of the impairment and the importance of the impairment to the person. However, continually arguing that disability and impairment should have a status of their own is potentially alienating to people with disabilities who do not identify with this sense of feeling, as explored by Shakespeare.[77] Therefore, it is possible to argue that both authors illustrate that a way to overcome existing weaknesses in both the framework and its implementation is to recognise, defend and value the right to choose, either to live a great life instead of a reasonable one, or to be seen as a disabled person or a person with a disability.

Signs, stereotypes and spaces

Lord Neuberger referred to the presence of a 'wheelchair sign' and a note requesting passengers to give up the space to a wheelchair user, when required, as a means of demonstrating that First Group had exceeded its requirements under the accessibility regulations by placing the note in addition to the symbolic sign. However, simply assuming that the use of the wheelchair sign will ensure accessibility for people with disabilities is naive at best and tokenistic at worst. Several authors have highlighted issues with the use of pictorial symbols as a means of securing disability access. For example, Ben-Moshe and Powell[78] evaluate the current movement to reconceptualise the international symbol for access that is currently a person in a white wheelchair on a blue background, reinforcing the sense of a hierarchy of disability, with wheelchair use representing disability as a whole. Wilkins argues that this symbol should be abolished and replaced with a large letter A. 'A' stands for many things: 'A for Accessible. A for Accommodating. A for All . . . The "A" doesn't just focus on architectural access but on attitudinal access.'[79] Moshe and Powell view this suggestion as positive because it focuses on the role of the designers rather than the people who are wrongly excluded. However, they also argue that the use of the letter 'A' may not be practicable because different letters have different meanings in different languages.[80] They suggest the universal access symbol used in the Apple operating system as a potentially universal replacement.[81] However, unlike Wilkins' suggestion, which encompasses elements of the social model, prompting people to consider both the need for accessibility and their attitudes, the suggested Apple symbol ignores what is intrinsically different about the experience of people with disabilities compared to those without. Reeve criticises the traditional symbol of access because it:

77 Shakespeare (n 29) 55–6.

78 L Ben-Moshe and J J W Powell, 'Signs of our Times? Revis(it)ing the International Symbol of Access' (2007) 22(5) Disability and Society 489, 501.

79 D Wilkens (2004) 'Thoughts on the International Symbol of Access' 15(3) Access Press Online, in Ben-Moshe and Powell (n 78).

80 Ibid 502.

81 Ibid.

> . . . serves to legitimate some forms of bodily differences over others. People with hidden impairments who do not match the stereotypical disabled person who is a wheelchair user or older person can find themselves challenged when they use facilities . . . consequently someone may decide to adopt a physical marker of disability to use these facilities.[82]

She argues that this can result in an emotional cost of having to publicly identify as being disabled. However, it is arguable that the 'A' approach suggested by Wilkins, and critiqued by Ben-Moshe and Powell as not providing linguistic clarity in all languages, also fails to provide clarity of experience, much in the same way that the existing symbol does, according to Reeve. 'A' as accommodating for all, equally means accommodating to parents with buggies, to people who wish to move pianos by bus, or even to place their feet on the seat for a rest. It fails to conceptualise and respect the totality of the experience of people with disabilities: failure to access the bus could lead to failure to keep an appointment, which could lead to ill health, unemployment, personal care difficulties or any other number of consequences which could be continued over days, months and years if a line in the sand were not drawn and the right to access guarded both by the courts and society.

A further difficulty with the traditional symbol is that it does not mean anything. Deconstructed by the eye it is a dot over a right angle with a semi-circle underneath. It does not represent a wheelchair user, or a person with any impairment or disability, or even a person at all. It has become a sort of social conscience anaesthetic decoration, but it has proved so effective that the social conscience element has been completely desensitised and it is now seen as something which signals convenience in general rather than necessity for members of a social group to be able to access their rights. Therefore, there is an argument for modification, but any such modification must communicate the three-dimensional experience of disability and not solely focus on impairment, but rather the consequence of the interaction of the impairment with a society lacking awareness of the impact in using social structures which thus creates disability.

Conversely, Lady Hale recognised that people with disabilities are as likely as those without disabilities to require access to public transport to enable them to get to work. She highlighted that lack of access is one of the principal reasons that people with disabilities can find difficulty in accessing employment.[83] This statement is positive because it challenges images of people with disabilities as non-wage earners who can, and should, wait to access their rights because they have nothing important to do; it emphasises that society plays a specific role in the issues that people with disabilities face and the construction of stereotypes.

In the Court of Appeal case, Lewison LJ discussed the provision in the regulations that tip-up seats may be added to the wheelchair space along with a sign asking 'Please give up this space for a wheelchair user.'[84] This could lead to negative comment from other people, making people with disabilities feel conspicuous and inconvenient rather than dignified members of their society. 'Please' is indicative of an attitude that people with disabilities must negotiate for the right to use the bus rather than possessing the right as a member of society. However, Underhill LJ argued that:

82 D Reeve, 'Negotiating Psycho-emotional Dimensions of Disability and their Influence on Identity Constructions' [2002] 17(5) Disability and Society 493–508; D Reeve, 'Part of the Problem or Part of the Solution? How Far do "Reasonable Adjustments" Guarantee "Inclusive Access for Disabled Customers"?' in K Soldatic et al (eds), *Disability, Spaces and Places of Policy Exclusion* (Routledge 2014) 111.

83 LJ Hale at 31, [93].

84 *First Group plc v Paulley* [2014] COA EWCA Civ 1573, [11].

> In this context, the word 'request' does not mean simply asking a favour: the driver is conveying to the non-wheelchair user that they ought to move because the space is meant for wheelchair users who have priority.[85]

However, he acknowledged that with no power to compel passengers to leave the space there was little that could be done to overcome the difficulties highlighted by Lewison LJ (at para 50),[86] therefore it is arguable that people with disabilities have to negotiate for their rights without real support. Lewison LJ also highlighted the Public Service Vehicle Accessibility Regulations 2000, which require that buses be fitted with not less than one wheelchair space of specified dimensions (defined in either para 3 or 4) on the lower deck of the bus.[87] The bus in the *Paulley* case complied with para 4.[88] Reference was made to the diagram in Part II of the schedule to illustrate the dimensions of the chair to be carried. This clearly shows a manual wheelchair. This is potentially problematic as not all wheelchair users are able to use manual wheelchairs independently, which means that electric wheelchair users may not have equal access to public transportation that other wheelchair users have. Additionally, it may be argued that the lack of representation of the diversity of wheelchair use presents wheelchair users as an amorphous group and does not understand the desire and need for independence and the link with self-esteem. Geças argues that self-esteem is sub-divided into two dimensions – competence and worth.[89] Burke and Cast state that 'competence' refers to how capable and useful people believe themselves to be, while 'worth' is the perception that people have of their value in relation to others.[90] Legislation has the power to both augment and diminish self-esteem: clauses providing adjustment to the built environment to enable people with disabilities to function independently, or to exercise their right to personhood, increase their sense of competence and, consequently, self-esteem. This is dependent on a sense of independence, control over the built environment and a positive self-identity.

A further example of attempts to control the identity of wheelchair users is the refusal under the 2000 regulations to permit wheelchair users (who wish to and are able to do so) to transfer to a seat and fold their wheelchairs. This is particularly damaging because it, in a sense, ties the wheelchair user to their chair and leads them and their ability to participate in society to be defined by it. It also deprives a wheelchair user of the sense of agency and choice that is available to other travellers. Moreover, it is interesting that Lewison LJ was unwilling to describe a baby sleeping in a buggy as a cumbersome and bulky item, and that no comment was made about wheelchair users being unable to transfer from their chair and store it in another part of the bus (due to the regulations).[91] This shows both disrespect and inherent misunderstanding of the point and value of a wheelchair to the person using it. A wheelchair is not simply an object; for many it is a key element of their independence and agency, which enables them to participate in society, and therefore the same respect for it should be shown as to the buggy. This would help everyone in society to see its value and change the perspective of it as a cumbersome item, separate from the user, that society must accommodate at the inconvenience of others, which was a trope of both cases.

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85 Ibid [66].

86 Ibid 10.

87 Public Service Vehicle Regulations 2000, Schedule 1, Part 2, Diagram A.

88 Ibid.

89 V Geças and M L Schwalbe, 'Beyond the Looking-glass Self: Social Structure and Efficacy-Based Self-Esteem' [1983] Social Psychology Quarterly 46, 77–88.

90 P J Burke and A D Cast, 'A Theory of Self-Esteem' [2002] 80(3) Social Forces 1042.

91 LJ Lewison, Court of Appeal [16], [48].

Another difficult linguistic element appears in Lord Neuberger's judgment which talks about people without disabilities 'allowing' persons with disabilities to access the wheelchair space. This is indicative of unequal power relationships between persons with disabilities and those without because the word 'allow' conjures up images of a benevolent and enlightened society bestowing the right of access on persons with disabilities, rather than them being entitled to access things through being members of a community. An additional issue with Lord Neuberger's judgment was the emotive language used regarding competitions of need. There is a strange comparison between a new-born baby and a kebab[92] to illustrate a point about antisocial behaviour in the Public Service Vehicles (Conduct of Drivers, Inspectors, Conductors and Passengers) Regulations 1990, s 6 (1)(b). This had the unfortunate effect of bringing to mind Jonathan Swift's pamphlet 'A Modest Proposal', not only through collocating a baby with an edible item, but also the undertone of some of Lord Neuberger's argument that persons with disabilities would be so unreasonable in claiming their rights that they would see new-borns (with no mention of their mothers incidentally) littering the highways, much as the land-owner in Swift's imagination would see them grace his table.[93]

Lastly, both Lord Neuberger and the Court of Appeal judges described the need for equality legislation to consider 'the realities of life and interests of others'[94] which seems to be a misunderstanding of the point of equality legislation that was instituted precisely to overcome those difficulties, particularly for persons with disabilities, as highlighted by Lady Hale and Lord Kerr, which puts persons with disabilities directly at a disadvantage based on these readings.

The Supreme Court ruling: a case of the emperor's new clothes?

The rulings of Lord Neuberger, Lord Clarke and Lord Sumption present some difficulties and highlight continuing issues with reasonable adjustment similar to those discussed above: that what is considered reasonable is often decided based on the parameters and experiences of people without disabilities. This is particularly evident in para 51 of Lord Neuberger's judgment in which he argues that a parent with a baby in a buggy will have good or understandable reasons for refusing to move and that any challenges to these reasons may result in either confrontation or violence. It is arguable that, in making these arguments, Lord Neuberger is on the verge of accommodating this difficult behaviour, rather than challenging it and demonstrating an understanding of the purpose and need for reasonable adjustments. Moreover, at para 52, his arguments fail to see the point of view of wheelchair users or any person with a disability requiring the use of that space. This could amount to an example of judicially sanctioned indirect emotional disablism, as identified by Reeve. This happens when people who do not have to use reasonable adjustments fail to see the negative psychological effects that can occur, either when these reasonable adjustments fail to fulfil the purpose of overcoming disadvantage, or their use becomes embarrassing. This could become the case, particularly considering Lord Neuberger's suggestion (at para 53), and the measure ultimately decided on as a compromise between throwing people off the bus and doing nothing, namely to stop the bus for a time. It was his hope that doing so would 'pressurise' anybody refusing to move to change their mind. However, it is difficult to see how likely this would be to avoid

92 LJ Neuberger 19, [54].

93 Secret-satire-society.org, *A Modest Proposal and Other Short Pieces including a Tale of a Tub by Jonathan Swift* (Pennsylvania State University 2008) <www.secret-satire-society.org/wp-content/uploads/2015/11/Jonathan-Swift-A-Modest-Proposal.pdf>.

94 LJ Neuberger at 25, [72].

confrontation, and it is also arguable that it would place persons with disabilities in a particularly vulnerable position because, if the rest of the passengers riding the bus became frustrated with being held up, they may channel this towards the person with the disability, rather than the person refusing to move. This could lead to persons with disabilities having to deal with several agitated passengers rather than a single difficult passenger refusing to move. Recall that Lord Neuberger had already made the argument that a wheelchair user's request for reasonable adjustments also had to be made in the context of not inconveniencing others or causing delay.[95] This reasoning is flawed because it fails to understand that persons with disabilities can also experience these issues and they are not solely the preserve of the able-bodied; it also demonstrate his awareness that these factors may come into play in decision-making in terms of courses of action. It is difficult to see how this can qualify as a less aggressive policy.

Lady Hale and Lord Toulson recognised that the likelihood of confrontation is reduced if people understand rules clearly. Additionally, they argue that people who are likely to be so intransigent as to challenge this clarity publicly will be in the minority. If this were the case, a firm ruling would hopefully set new grounds of understanding for society at large and, as such, difficult behaviour would not be tolerated and would potentially be challenged.[96] This contextualises the other lawlords' fear of potential confrontation and the decision to avoid it, whilst also avoiding the issues. Similarly, the judgments of Lady Hale and Lord Kerr remove the unnecessary discussion about the need for the driver to make an assessment as to whose need for the space is greater because they centre their discussions around disability rather than impairment.[97] As non-disabled parents with buggies do not encounter disability unless their child is disabled (in which case they would be entitled to use the space), then clarity is provided. However, it would have been refreshing, and perhaps more useful, for both Lady Hale and Lord Toulson to speak about disability, rather than wheelchair use exclusively, in their judgments.

Additionally, regarding Lord Neuberger's supposed solution to the problem, there is no discussion of the need for the bus companies to support the driver in his or her actions of stopping the bus if this would result in regular delays or difficulties in running the route as a result.[98] Indeed, his references to this course of action specifically mention when the bus is running ahead of schedule, thus negating the possibility that delays could be caused in real life. Moreover, by arguing that the driver may form a view or that the driver may conclude that a person without a disability has sufficient grounds to decide not to move has the potential to make such a suggestion even more unworkable, particularly if the driver were to do so quickly to avoid the possibility of delays and to please the company's management if the previously mentioned support is not given. This would mean that persons with disabilities are perhaps doubly disadvantaged by both the individual and corporate procedures. In failing to consider such issues, it is arguable that Lord Neuberger is demonstrating that he is far removed from the realities of daily bus use and the pressure on both service providers and users, but also that he has failed to understand that the frequency with which this issue is likely to arise means that it would probably be unworkable.

95 LJ Neuberger at 19, [53].

96 LJ Hale at 35–6, [106].

97 LJ Toulson at 28, [82].

98 LJ Neuberger at 23, [67].

However, there is social and legal precedence to suggest that the law has a role in modelling social behaviour. The value of social modelling of this nature is demonstrated by responses to the 2007 smoking ban in England. There was evidence from two longitudinal studies conducted between 2009 and 2010 that, as a result of the ban, smokers questioned had 'reduced consumption largely because of the inconvenience of going outdoors to smoke, but also because of a perception that their greater visibility as a smoker attracted public disapproval'.[99] This finding indicates that public disapproval and government engagement with previously accepted behaviours can motivate social change that supports the potential impact of engagement by bus drivers in challenging passengers who refuse to move from wheelchair spaces. For example, Roscoe Pound cites that, although there is a relationship between law and ethics, neither can be achieved by solely relying on the other.[100] He also states that effective legal order is considered by including three separate factors to ensure a sound legal order:

- that justice is the ideal relation between people;
- that morals are the ideal development of the individual character; and
- that security must be assured.[102]

It is necessary to keep all three of these elements in balance to ensure aims in practice.[102] Therefore, in relation to disability law, relying on a sense of ethics, as shown in the judgments discussed in this article, will not achieve the outcome of security for people with disabilities. To do that, there needs to be consideration of how the law can provide this security. Other elements that need to be considered are Pound's assertion that law can only deal with external matters and behaviour and not internal ones, thus effective machinery and efficient outside agencies are required to evoke the law and thus change behaviour where necessary.[103] He calls this 'educative legislation', which provides a means for governments to promote ideals rather than offering means for litigants to enforce their rights.[104] It is arguable that disability-specific legislation in the UK fulfils this role, as well as providing a means for redress by setting anticipatory adjustment duties. However, the implementation of this legislation could be improved, as demonstrated in the *Paulley* cases. Pound recognises the importance of incentives which could be used in practice to secure more complete implementation of legislation in the UK and remove economic or social decision-making around access provisions.[105] A further example of growing public momentum to accept change around access to wheelchair spaces on public transport was indicated in February 2016 with Transport for London's Buggy Summit which served as a forum for parents and passengers with disabilities, bus companies and buggy manufacturers to come together and discuss problems in order to work towards solutions.[106] Therefore, it is arguable that, if the Supreme Court were to

99 L Bauld, *The Impact of Smoke Free Legislation in England: Evidence Review* (University of Bath 2011) <www.gov.uk/government/uploads/system/uploads/attachment_data/file/216319/dh_124959.pdf>.

100 R Pound, 'Law and Morals: Jurisprudence and Ethics' [1945] 23(3) North Carolina Law Review 185–222, 222.

101 Ibid.

102 Ibid.

103 R Pound, 'The Limits of Effective Legal Action' [1917] 3(1) American Bar Association Journal 69–70.

104 Ibid 61.

105 Ibid 59.

106 Transport for London 'TfL Hosts UK's First Ever Buggy Summit' (18 February 2016) <https://tfl.gov.uk/info-for/media/press-releases/2016/february/-tfl-hosts-uk-s-first-ever-buggy-summ>.

consider some of the arguments outlined in this article and to harness the potential and will of the public, a solution that acknowledges the rights of everyone could be found.

Additionally, there may be merit in considering the role of the public sector equality duty in relation to this case. Whilst private bus companies do not fall under the definition of public authorities and are outside the public sector unless they are carrying out a government-funded function,[107] which was not the case with First Group plc, it is arguable that they perform a public function by moving the public around. As such, they offer the perfect 'space' due to regularity of contact and competing arguments to:

- eliminate unlawful discrimination, harassment and victimisation and other conduct that is prohibited by the Act;
- advance equality of opportunity between people who share a characteristic and those who do not; and
- foster good relations between people who share a characteristic and those who do not.[108]

Whilst writers such as Hepple have criticised the weakness of 'due regard' in the duty and a 'tick-box approach',[109] it is arguable that if bus companies were compelled to defend the right of wheelchair users to access the service and to enter into negotiations with other passengers to find ways around conflicts of need, it would animate the legislation and give it the 'teeth' needed to tackle daily inequality and model a change in attitude towards social acceptance of exclusion.

Conclusion

In as much as the Supreme Court ruling was hailed a success by Mr Paulley and his legal representatives,[110] the decision appears to represent a lost opportunity to send a signal that the rights of persons with disabilities and the ability to exercise these rights is non-negotiable and that, in some cases, different treatment and potential inconvenience for people without disabilities will be needed to ensure substantive equality in practice. More worryingly still, the rhetoric in some of the judgments demonstrates that there is a disparity between perceived difficulties facing persons with disabilities and the reality. The presence of such disparity at the highest legal level suggests that more work is needed to change attitudes and practices. Only weeks after the ruling, there were more reports of persons with disabilities being unable to access public transport due to spaces being occupied by buggies,[111] thus demonstrating that no clarity has been delivered.

107 Freedom of Information Act 2000, s 4(4).

108 Equality Act 2010, s 149.

109 B Hepple, 'The New Single Equality Act in Britain' [2010] Equal Rights Review 11–24, 16.

110 Disability Rights UK, '*First Group plc v Paulley*: Supreme Court Upholds Doug Paulley's Case against Firstgroup plc to a Limited Degree' (nd) <https://www.disabilityrightsuk.org/firstgroup-plc-v-paulley>.

111 ITV, 'Pushchair User Refuses Wheelchair User Access to the Bus: Outside Supreme Court' *ITV News* (18 January 2017) <www.youtube.com/watch?v=UDsuSTZcO3Y>.

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Human rights: contesting the displacement thesis

PAUL O'CONNELL*
READER IN LAW, SOAS UNIVERSITY OF LONDON

'You don't roll some unitary boulder of language or justice uphill; you try with others to assist in cutting and laying many stones. †

Abstract

From within the camp of broadly left-wing or progressive critiques of human rights, one of the key objections that has emerged is what will be referred to here as 'the displacement thesis'. In sum, this critique maintains that reliance on the language of human rights by movements for radical social change is problematic, because it tends to crowd out (or displace) other, potentially emancipatory, languages, and as a consequence distract attention from broader, structural causes of injustice and oppression. It is argued here that, while this argument is intuitively appealing, it falls short for a variety of reasons. There are, to be sure, many problems with human rights, but the mobilisation of rights language can nonetheless make an important contribution to movements for radical social change, without displacing or precluding the mobilisation of other emancipatory languages, and the challenging of deeper, structural causes of injustice.

Keywords: human rights; displacement thesis; critique; struggle; emancipatory politics

1 Introduction

In the early 1990s Louis Henkin confidently declared that human rights were 'the idea of our time . . . the only political–moral idea that has won universal acceptance'.[1] Much water has passed under the bridge since then, with myriad challenges to and critiques of human rights developing from various points along the political and ideological spectrum.[2]

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† Adrienne Rich, *Arts of the Possible* (WW Norton & Co 2001) 6.

1 Louis Henkin, *The Age of Rights* (Columbia University Press 1990) ix.

2 For summaries of the main critiques of human rights, see: Marie-Bénédicte Dembour, 'Critiques' in D Moeckli, S Shah and S Sivakumaran (eds), *International Human Right Law* (3rd edn, Oxford University Press 2017) 53 and Frédéric Mégret, 'Where Does the Critique of International Human Rights Stand? An Exploration in 18 Vignettes' in J M Beneyto and D Kennedy (eds), *New Approaches to International Law* (Springer 2012) 3.

Notwithstanding this, human rights remain a central concern today,[3] and stand as 'the *doxa* of our time'.[4] As Balfour and Cadava put it, human rights are now 'one of the most pressing and intractable matters of political life'.[5] On this intractable terrain, one of the key critiques of human rights, usually voiced from the left/progressive side of the debate, is the apprehension that the language of human rights tends to undermine movements for radical social change by tempering their ambitions and limiting their horizons to a narrow set of legal demands, eliding broader causes of injustice and foreclosing other emancipatory languages: this, in essence, is what might usefully be called the displacement thesis.

The displacement thesis raises important, and pressing, questions about the nature of human rights, and the value, or otherwise, of social movements engaging and mobilising the language of human rights. These are not mere abstract considerations, of concern only to closed systems of recondite academic exchange. Rather, they are pressing and important issues, because all around the world, at a critical historical juncture,[6] social movements are articulating their opposition to the extant social order, often through the language of human rights. This has seen mass movements mobilise behind demands for the right to housing in Spain and South Africa,[7] land in Brazil,[8] racial equality and protest in the USA,[9] water in Ireland,[10] and the right to the city in Turkey and elsewhere,[11] to name but a few. If, then, the displacement thesis holds, and the language of human rights invariably undermines social movements by narrowing their emancipatory horizons, this is a strong argument for jettisoning the language of human rights in these movements and elsewhere.

The argument presented here is that the displacement thesis does not hold, and that movements for radical social change can and do engage the language of human rights without necessarily limiting the emancipatory imagination or ambition of those involved in such movements. The argument unfolds as follows: first I outline the contours of the displacement thesis, drawing in particular on the work of Wendy Brown to illustrate the

3 As Amartya Sen puts it, the 'rhetoric of human rights is omnipresent in the contemporary world'. Amartya Sen. 'The Global Reach of Human Rights' (2012) 29 Journal of Applied Philosophy 91, 91.

4 Stefan-Ludwig Hoffmann, 'Introduction: Genealogies of Human Rights' in S-L Hoffmann (ed), *Human Rights in the Twentieth Century* (Cambridge University Press 2011)1, 1.

5 Ian Balfour and Eduardo Cadava, 'The Claims of Human Rights: An Introduction' (2004) 103 South Atlantic Quarterly 277, 277.

6 The stakes of the current historical period – characterised by the general crisis of capitalism – are brought into sharp relief by Immanuel Wallerstein, who argues that: 'We may think of this period of systemic crisis as an arena of struggle for the successor system . . . We are faced with alternative choices which cannot be spelled out in institutional detail, but may be suggested in broad outline. We can choose collectively a new system that essentially resembles the present one: hierarchical, exploitative and polarizing . . . Alternatively we can choose a radically different system, one that has never previously existed – a system that is relatively democratic and relatively egalitarian.' Immanuel Wallerstein, 'Structural Crises' (2010) 62 New Left Review 133, 140–1.

7 On South Africa, see Jackie Dugard, Tshepo Madlingozi and Kate Tissington, 'Rights Compromised or Rights Savvy? The Use of Rights-based Strategies to Advance Socio-economic Struggles by Abahlali baseMjondolo, the South African Shack-Dwellers' Movement' in H A Garcia, K Klare and L Williams (eds), *Social and Economic Rights in Theory and Practice* (Routledge 2015) 23; and on Spain, see Ada Colau and Adrià Alemany, *Mortgaged Lives: From the Housing Bubble to the Right to Housing* (Journal of Aesthetics and Protest 2014).

8 Peter Houzager, 'The Movement of the Landless (MST), Juridical Field, and Legal Change in Brazil' in B de Sousa Santos and C A Rodríguez-Garavito (eds), *Law and Globalization from Below* (Cambridge University Press 2005) 218.

9 Fredrick Harris, 'The Next Civil Rights Movement?' (2015) 63(3) Dissent 34.

10 Daniel Finn, 'Water Wars in Ireland' (2015) 95 New Left Review 49.

11 Mehmet Baris Kuymulu, 'Reclaiming the Right to the City: Reflections on the Urban Uprisings in Turkey' (2013) 17(3) City 274; and David Harvey, 'The Right to the City' (2008) 53 New Left Review 23.

main thrust of the argument; secondly, it is argued that this thesis relies on a truncated, abstract understanding of human rights, and the relationship between rights and social change; the third section argues that the practice(s) of social movements shows that it is possible for movements to engage the language of human rights without losing sight of the broader, structural causes of injustice they confront; the final section then ties the argument together, noting the positive role that human rights can play in movements for fundamental social change. It should be stressed at the outset that the argument presented here is by no means a blanket defence of, or *apologia* for, human rights, nor indeed is it an argument for the necessity of rights language in movements for radical social change. It is, far more modestly, an argument that one apparently radical and intuitively appealing critique of human rights does not quite hold, and that, notwithstanding the many problems with the language of human rights, social movements can mobilise this language as part of broad movements for social change.

2 The displacement thesis

Human rights have, of course, long since come in for criticism: from Jeremy Bentham's dismissal of rights as nonsense on stilts,[12] to Karl Marx's radical critique of the limitations of bourgeois rights under capitalism.[13] Throughout the late twentieth century, as the language of rights came to play a more prominent role, critiques of rights became more pronounced. In particular the Critical Legal Studies (CLS) movement launched a variety of scathing critiques of 'rights talk' and practice,[14] with particular emphasis on the US constitutional tradition.[15] Within this milieu various rights critiques emerged, some of the main claims being that rights and 'rights talk' tended: (i) to insulate and valorise subordination in the private sphere; (ii) to legitimate, perpetuate and conceal greater injustice than they addressed; and (iii) that the language of rights tended to be atomistic and to alienate people from one another.[16]

For present purposes, it is a variation on the second of these arguments that is of most interest. The basic idea is captured well by Morton Horowitz, who wrote that:

> . . . the vindication of rights is set in an exclusively legal and individual specific framework, drawing energy and imagination away from structural change. Indeed, framing issues of social justice in terms of individual rights has the additional effect of denying equal legitimacy to claims that the overall social distribution of wealth and power is unjust.[17]

In other words, mobilising the language of human rights tends to distract us from broader, structural causes of injustice, and to undermine, or displace, other languages or

12 Jeremy Bentham, 'Nonsense upon Stilts' in P Schofield, C Pease-Watkin and C Blamires (eds), *Rights, Representation and Reform: Nonsense upon Stilts and Other Writings on the French Revolution* (Oxford University Press 2002) 317.

13 Karl Marx, 'On the Jewish Question' in R C Tucker (ed), *The Marx-Engels Reader* (2nd edn, WW Norton & Co 1978) 26.

14 For useful overviews of the CLS movement, see Roberto Mangabeira Unger, *The Critical Legal Studies Movement* (Verso 2015); and Alan Hunt, 'The Theory of Critical Legal Studies' (1986) 6 Oxford Journal of Legal Studies 1.

15 Duncan Kennedy, 'The Critique of Rights in Critical Legal Studies' in W Brown and J Halley (eds), *Left Legalism/Left Critique* (Duke University Press 2002) 178.

16 See Robin West, 'Tragic Rights: The Rights Critique in the Age of Obama' (2011) 53 William and Mary Law Review 713, 716; and Anthony Chase, 'The Left on Rights: An Introduction' (1984) 62 Texas Law Review 1541.

17 Morton Horwitz, 'Rights' (1988) 23 Harvard Civil Rights–Civil Liberties Law Review 393, 400.

ways of seeing,[18] that might better allow us to get to the root causes of injustice and denial of human rights. By framing matters in this way, Horowitz captures the essence of the displacement thesis, and anticipates, in outline, the key elements of an argument that has, in due course, become central to critiques of human rights.

More recently, a fuller account of this argument has been advanced by Wendy Brown. In a well-known essay, in which she convincingly dispatches Michael Ignatieff's liberal defence of human rights,[19] Brown registers a number of concerns that arise from 'human rights assuming centre stage as . . . *the* international justice project'.[20] While Brown rehearses a number of well-established critiques of human rights, the central aspect of her argument, for present purposes, is the concern that:

> Human rights activism is a moral–political project and i*f it displaces, competes with, refuses, or rejects other political projects, including those also aimed at producing justice*, then it is not merely a tactic but a particular form of political power carrying a particular image of justice, and it will behoove us to inspect, evaluate and judge it as such.[21]

Brown goes on to argue that in light of the renewed vigour of US imperialism and the suffering it occasions, perhaps instead of human rights, support for anti-imperialist struggles and indigenous movements in post-colonial societies, or other political/justice projects, would be more efficacious in resisting the depredations of the global imperial order.[22]

Having argued that mobilising the language of human rights tends to crowd out other, possibly more efficacious frameworks (or 'justice projects'), Brown then calls on us to recognise 'the difficulty of trying to engage in both kinds of projects simultaneously'.[23] In other words, if we mobilise human rights, we will most likely have jettisoned alternative languages and perspectives on the injustice we oppose. Brown concludes by arguing that human rights discourse:

> . . . is a politics and it organizes political space, often with the aim of monopolizing it. It also stands as a critique of dissonant political projects, converges neatly with the requisites of liberal imperialism and global free trade, and legitimates both as well.[24]

In place of this, Brown argues that we should broaden our horizons and, instead, foreground 'other kinds of political projects, including other international justice projects' which directly address the structural character of global capitalism and hyper imperialism. The argument, in sum, is that the language of human rights cannot 'articulate or address the conditions producing' violations of human rights,[25] and even more problematically, mobilising the language of human rights tends to distract us from the broader, structural causes of suffering and injustice.

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18 In this way, the argument chimes with a concern among critical commentators that 'reliance on rights in political struggles and by political movements invites a kind of legal imperialism, in which courts and lawyers take on an unhealthy prominence'. Austin Sarat and Thomas Kearns, 'Editorial Introduction' in A Sarat and T Kearns (eds), *Identities, Politics and Rights* (University of Michigan Press 1997) 1, 4–5.

19 Michael Ignatieff, *Human Rights as Politics and Idolatry* (Princeton University Press 2001).

20 Wendy Brown, '"The Most We Can Hope for . . .": Human Rights and the Politics of Fatalism' (2004) 103 South Atlantic Quarterly 451, 453 (original emphasis).

21 Ibid (emphasis added).

22 Ibid 460.

23 Ibid.

24 Ibid 461.

25 Wendy Brown, 'Suffering Rights as Paradoxes' (2000) 7 Constellations 230, 239.

In Brown's work, then, we find a very clear articulation of the essential elements of the displacement thesis. However, it is possible to discern the same basic argument in the work of a number of critical scholars. David Kennedy, for example, argues that even 'very broad social movements' will tend to 'have their vision blinkered by the promise of recognition in the vocabulary and institutional apparatus of human rights', and as such 'will be led away from the economy and toward the state, away from political/social conditions and toward the forms of legal recognition'.[26] Likewise Robin West warns that reliance upon the language of human rights will 'distract our critical gaze, thereby legitimating larger injustices'.[27] In a similar vein Conor Gearty and Costas Douzinas argue that 'human rights stop us talking about bigger questions, those of power, justice and poverty'.[28] Each of these statements is a different way of articulating the same general displacement thesis put forth most clearly by Brown. If the thrust of the displacement thesis was confined to the practices of mainstream human rights organisations, and formal, liberal legalism, then, in certain key respects, it would be a valuable and incontrovertible addition to how we think about and critically engage with human rights. If the target was simply the 'global human rights industry',[29] and mainstream scholarship, there would be little to contest in the displacement thesis.

But, it goes far beyond this. The various articulations of the displacement thesis are framed in imperative terms; the issue is not liberal legalism or mainstream human rights discourse, but human rights *as such*. As Gearty and Douzinas put it above, human rights, as such, stop us seeing the bigger issues of power, justice and poverty. Likewise, Brown concludes her piece – from which the key lines of the displacement thesis have been sketched above – by arguing that according centrality to human rights reflects a high degree of pessimism and fatalism on behalf of 'progressives', in general, and urging that if 'others have not yet arrived at this degree of fatalism, then we would do well to take the measure of whether and how the centrality of human rights discourse might render . . . other political possibilities more faint'.[30] In sum, the displacement thesis is one specific strand of a more generalised critique and dismissal of human rights.[31] In the next section, it will be argued that while, as a critique of liberal legalism, the displacement thesis is appealing, it is fundamentally unsustainable as a broader critique of human rights as such.

3 Contesting the displacement thesis

The virtue of the displacement thesis is that it points up some of the key shortcomings of mainstream human rights practice and discourse. Certainly, there are sufficient historical examples, drawn in particular from the US constitutional tradition, to demonstrate how an over-reliance – perhaps a naive faith – in the language of rights has facilitated the co-optation of social movements, and led to fundamental structures of

26 David Kennedy, 'The International Human Rights Movement: Part of the Problem' (2002) 15 Harvard Human Rights Journal 101, 110.

27 West (n 16) 721.

28 Conor Gearty and Costas Douzinas, 'Introduction' in C Gearty and C Douzinas (eds), *The Cambridge Companion to Human Rights Law* (Cambridge University Press 2012) 1, 14. Though it should be noted that both Douzinas and Gearty have, to varying degrees, written in support of human rights, see Costas Douzinas, *Human Rights and Empire* (Routledge-Cavendish 2007); and Conor Gearty, *Can Human Rights Survive?* (Oxford University Press 2005).

29 Neil Stammers, *Human Rights and Social Movements* (Pluto Press 2009) 19.

30 Brown (n 20) 462.

31 Slavoj Zizek, 'Against Human Rights' (2005) 34 New Left Review 115; and Jarret Zigon, 'Human Rights as Moral Progress? A Critique' (2013) 28 Cultural Anthropology 716.

oppression being left unchecked.[32] The problem with the displacement thesis is that it moves from this useful insight to an overbroad claim about the nature of human rights as such. Two of the important reasons for this leap from correct premises to incorrect conclusions are that: (i) the displacement thesis, articulated by scholars within a critical–liberal tradition, gives too much autonomy to language and ideas (in particular the dominant rendering of ideas); and (ii) pays far too little attention to the actual practices of social movements and human agency in articulating human rights claims. This section unpacks both of these issues, which, taken together, constitute key theoretical and methodological shortcomings of the displacement thesis and other strands of left-liberal critique of human rights, namely the privileging of language and ideas abstracted from concrete social conditions and struggles.

In *The German Ideology*, Marx and Engels argued that 'neither thoughts nor language in themselves form a realm of their own . . . they are only manifestations of actual life':[33] in contrast to this insight, an implicit premise of the displacement thesis is that the discourse of human rights operates with a logic of its own. Human rights appear to have the power to distract our gaze, to stop us from seeing bigger issues of power, and to displace other, emancipatory, languages and perspectives. In this way, proponents of the displacement thesis become preoccupied with contesting ideas abstracted from concrete struggles and lose sight of the fact that 'categories of thought are expressions of the social relations that underlie them'.[34] The displacement thesis takes as its object of critique the idea of human rights, rather than the concrete relationships that underlie any given struggle over human rights.

Even more problematically, those who articulate the displacement thesis take for granted the dominant rendering of human rights (liberal–legalist) and uncritically make it the subject of their critique. This reflects a broader trend in various strands of late twentieth and early twenty-first-century critique. As John Holloway, writing about some variants of Marxist critique, notes:

> What we see first . . . is the dominant moment of the antagonistic unity. And something awful happens. Our critique degenerates into a theory of domination. Marxism becomes a theory of capitalist domination. Reactionary claptrap, in other words – a theory that encloses us in the enclosure that it pretends to criticise. A theory of Cassandra, a theory that separates the analysis of capitalism from the movement of struggle.[35]

The positive aspect of the displacement thesis, recognition of the inherent limits of liberal–legalist rights talk, is undermined by the fact that it remains myopically focused on this dominant rendering of human rights. The overemphasis on how human rights are and have been used to sustain and legitimate the status quo morphs into a deterministic understanding of the nature of human rights as such. Because the focus is on how the great and the good engage with human rights, all that can be seen is the negative aspect of human rights. A failure to understand human rights as grounded in antagonistic social struggles and, as such, reflecting such antagonisms, results in a one-sided, negative understanding of human rights, and leads, readily, to their dismissal.

32 West (n 16); and Gavin Anderson, *Constitutional Rights After Globalisation* (Hart 2005) 79–99.

33 Karl Marx and Frederick Engels, 'The German Ideology' in *Marx–Engels Collected Works*, vol 5 (Lawrence & Wishart 2010) 447.

34 John Holloway, 'Crisis and Critique' (2012) 36(3) Capital and Class 515, 516.

35 Ibid.

This privileging of ideas/language abstracted from concrete social struggles and relationships also leads to the idea, central to the displacement thesis, that there are other languages or perspectives for comprehending and challenging injustice that avoid the pitfalls of human rights. But this contention is simply not borne out: one need only look at how in recent years neoliberalism weaponised the emancipatory concept of individual freedom/liberty,[36] or how late capitalism appropriates, as it hollows out, the idea of democracy,[37] to understand that in a system of global capitalism there is no language or discourse that is not, in some way, compromised, or undermined by the social reproductive processes of the extant order.[38] As Prabhat Patnaik argues, just as democracy and equality are impoverished under capitalism, so too are human rights, but this is no reason to abandon any of these emancipatory languages.[39] There is no pure, silver-bullet argument or perspective that allows us to engage and confront the injustices of the existing capitalist order.[40] Once this is grasped then the generalised critique and rejection of human rights grounded on the displacement thesis loses much of its lustre.

Another important reason why proponents of the displacement thesis reach their generalised conclusions is because their analyses tend to neglect, or undervalue, the role of social struggles in articulating and contesting formulations of human rights. While Douzinas, who with Gearty (as noted above) espouses a version of the displacement thesis, has elsewhere acknowledged that human rights 'started their lives as the principle of liberation from oppression and domination, the rallying cry of the homeless and the dispossessed, the political program of revolutionaries and dissidents',[41] he, along with others, abandons the perspective of social struggle in thinking about human rights today and gives priority to critiquing the dominant, institutionalised form and practices of human rights. Much like the triumphant bourgeois thinkers of the eighteenth and nineteenth centuries, such critics seem to declare that there has been history, but there is no more. This stance, however, is fundamentally mistaken. For, while the global human rights industry (of lawyers, international organisations, NGOs, academics and more) certainly provides us with a dominant discourse of human rights, the history and contemporary relevance of human rights are unintelligible without foregrounding the role of social struggle.

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36 David Harvey, *A Brief History of Neoliberalism* (Oxford University Press 2007).

37 Peter Mair, *Ruling the Void* (Verso 2013); and Samir Amin, *The Liberal Virus* (Pluto Press 2004).

38 Thinking otherwise is to engage in what Hunt refers to as 'a form of "Leftism" whose inescapable error lies in the fact that it imagines a terrain of struggle in which social movements can, by an act of will, step outside the terrain on which [social] struggle is constituted'. Alan Hunt, 'Rights and Social Movements: Counter-Hegemonic Strategies' (1990) 17 Journal of Law and Society 309, 320.

39 As Patnaik puts it: 'just as "democracy" in a bourgeois society serves to camouflage exploitation, just as "equality" in a bourgeois society is only the equality of commodity-owners in the marketplace, underlying which is the reality of exploitation, likewise "rights" in a bourgeois society are meant only to sustain a structure of exploitation. But this does not make "rights" meaningless, no more than it makes "democracy" or "equality" meaningless. On the contrary, just as "democracy" and "equality" can get realised only in a society transcending capitalism, i.e., in a socialist society, likewise "rights" too become meaningful only in a socialist society, which is why the left must struggle over "rights" in a bourgeois society, as it struggles over "democracy" and "equality".' Prabhat Patnaik, 'A Left Approach to Development' (2010) 45 (30) Economic and Political Weekly 33, 36–7.

40 In this regard Martha McCluskey is right to warn that 'left activists' who strive for political purity 'are likely to end up divided, exhausted, and immobilised'. Martha McCluskey, 'Thinking with Wolves: Left Legal Theory after the Right's Rise' (2006) 54 Buffalo Law Review 1191, 1200.

41 Costas Douzinas, 'The End(s) of Human Rights' (2002) 26 Melbourne University Law Review 445, 445.

This point is well made by Neil Stammers, who argues that 'ordinary people – working together in social movements – have always been the key originating source of human rights'.[42] In a similar vein Makau Mutua has recently argued that 'popular mass struggles by marginalized groups and colonized peoples were the key catalyst in giving content to the postwar human rights movement'.[43] While not claiming that social movements and struggles are the only factors of concern in the study of human rights, Stammers insists that 'the historical emergence and development of human rights needs to be understood and analysed in the context of social movement struggles against extant relations and structures of power'.[44] Stammers notes that, in due course, the institutionalisation of human rights, in one form or another, necessarily generates a set of contradictions about how rights are encountered and engaged.[45] However, he is critical of accounts of human rights that are 'fixated upon existing institutional and legal frameworks' and ignore the 'social processes' that led to the establishment of such frameworks and shape their continued contestation.[46] He is also critical of human rights critiques and critics that overemphasise the autonomy of discourse, warning that they can signal 'a return to forms of . . . structural determinism and the elimination of the possibility of social actors being able to engage in any form of meaningful agency'.[47]

To avoid committing either of these errors, we should instead foreground the concrete struggles of groups, communities and movements in advancing and articulating human rights claims, as part of broader movements for radical social change. In place of a myopic focus on dominant structures, or the implicit quietism of discourse critique, our understanding of, and engagement with, human rights should be one which begins from an understanding that 'the history of human rights can and should be seen as a history of social struggle over very real matters of power, resources, and political voice'.[48] Groups and movements engaged in concrete struggles over power, resources and contested relationships do not, as the displacement thesis implies, engage in a sort of emancipatory monolingualism. Instead, they routinely frame their claims for justice, equality and social transformation in a range of dialects. If it were otherwise, then the partisans of the French Revolution would have confined themselves to inscribing on their banners Freedom, Justice, or Equality, not all three.

Of particular importance, for present purposes, is the fact that in an era of crisis-ridden neoliberal capitalism, social movements all around the world are framing their opposition to the extant order and their embryonic visions of an alternative, in large part, through the language of human rights. As Armaline and his colleagues note, human rights struggles 'are increasingly shaped by and targeted toward systems of privilege and oppression and their social and ecological effects – neoliberal economic globalization (capitalism) in particular'.[49] In the next section we will look at concrete instances of

42 Stammers (n 29) 1. Similarly, William Armaline and his colleagues argue that 'human rights have been and continue to be defined and realised primarily through bottom-up power struggles and social movements'. William Armaline, Davita Silfen Glasberg and Bandana Purkayastha, *The Human Rights Enterprise* (Polity Press 2015) 115.

43 Makau Mutua, *Human Rights Standards: Hegemony, Law and Politics* (State University of New York Press 2016) 14.

44 Stammers (n 29) 2; see also Kate Nash, *The Political Sociology of Human Rights* (Cambridge University Press 2015) 19–40.

45 Ibid 102–30.

46 Ibid 22.

47 Ibid 17.

48 Armaline et al (n 42) 4.

49 Ibid 10.

contemporary social struggles that mobilise the language of human rights, alongside broader narratives about justice, democracy and social transformation, to illustrate how an alternative starting point in thinking about human rights can lead us to very different conclusions to those sketched out by proponents of the displacement thesis.

4 Social movements and human rights

At its best, the displacement thesis recalls Audre Lorde's cutting insight that the 'master's tools will never dismantle the master's house'.[50] Where it falls short, however, is in failing to appreciate that a 'different future has to be the future of this particular present. And most of the present is made up of the past. We have nothing with which to fashion a future other than the few, inadequate tools we have inherited from history.'[51] In this section the focus is on how two contemporary social movements have mobilised the language of human rights to challenge specific injustices, but have done so in a way that brings in other languages and perspectives that broaden their struggles out into a more thorough critique of the extant social order. While accepting completely that two swallows do not make a spring, these examples show that social movements can and do mobilise the language of human rights in a way which remains attentive to broader structural causes of injustice. It also shows that social movements routinely engage in a sort of emancipatory or critical multilingualism, which mobilises democracy, equality, race, gender and class alongside human rights claims. In this way protagonists in social movements routinely understand, as Audre Lorde did, that they cannot 'afford the luxury of fighting one form of oppression only'.[52] The two examples considered here are the struggle for housing carried on by Focus E15 in London and the struggle against domestic water charges in Ireland.

4.1 Focus E15 and the right to housing

One of the more pronounced crises in the UK today is the lack of affordable or adequate housing for large sections of the population. This crisis has its origins in shifts, from the 1980s onwards, towards privatisation of the social-housing stock,[53] the model of financialised accumulation characteristic of the last three decades of neoliberal capitalism,[54] and more recently the impact of austerity on social welfare provision.[55] All of this has combined to make the housing issue one of the central concerns in modern Britain. For a variety of reasons, this general crisis takes on a more acute character in London. As Michael Edwards has argued, London experiences 'extreme forms' of the general problems associated with the housing crisis (social-housing waiting-lists, rising rents and house prices, insecure tenancies, overcrowding, declining quality of properties),[56] but precisely because of this London is also the site of many noteworthy, albeit 'embryonic and fragmented', movements of resistance in response to the housing crisis.[57]

50 Audre Lorde, *Sister Outsider: Essays and Speeches* (Ten Speed Press 2013) 112.

51 Terry Eagleton, *Why Marx Was Right* (Yale University Press 2011) 71.

52 Audre Lord, 'There is No Hierarchy of Oppressions' (1983) 14 Bulletin: Homophobia and Education 9.

53 Mary Robertson, 'The Great British Housing Crisis' (2017) 41 Capital and Class 195, 196.

54 Michael Edwards, 'The Housing Crisis and London' (2016) 20 City 222.

55 Steve Tombs, 'Undoing Social Protection' in V Cooper and D Whyte (eds), *The Violence of Austerity* (Pluto 2017) 133.

56 Just Fair, *Protecting the Right to Housing in England: A Context of Crisis* (Just Fair 2015).

57 Edwards (n 54) 222.

One of these movements of resistance is Focus E15, which was formed in September 2013 by a group of young working-class mothers to oppose their eviction from a local council-run supported housing unit in Newham, East London.[58] Using a variety of tactics, from weekly street stalls, to petitions, occupations and marches, the Focus E15 campaigners successfully resisted their eviction and 'then went onto campaign for the housing and urban rights of ordinary Londoners'.[59] The Focus E15 movement frames its campaign around the emblematic slogan of 'social housing not social cleansing' and understands it as being a 'battle for everybody's basic human rights and equality'.[60] In particular, and unsurprisingly, the campaign sees its struggle as part of a broader 'fight for the right to decent, affordable, secure housing'.[61] The language of human rights, in particular the right to housing, is therefore central to the Focus E15 campaign.

However, alongside this, and as a matter of course, the Focus E15 campaigners mobilise the language of class, gender and race, and situate their campaign, explicitly, in the broader context of neoliberal capitalism and opposition to the logic of commodification inherent in that system of social reproduction. As one of the campaigners put it:

> The way I see it, it seems like London is turning into a place that is just for purely rich people and investors, bankers, they are all coming into London . . . and all working-class people are being pushed out, and like eventually it's going to turn into like we will be living in the slums, we will be living in houses that are falling apart, that they are not getting anything done to them, because we are the poor people, we are the poor side, they are the rich side.[62]

The Focus E15 campaigners consistently and clearly articulate their struggle for the right to housing as part of a broader dynamic of working-class opposition to the depredations of neoliberal capitalism. Most of them having been newly politicised by their initial campaign to prevent their eviction now understand that the local council had underestimated 'the strength of working class mothers coming together and demanding their right to safe and decent housing in London'.[63]

The multiple, overlapping languages mobilised by Focus E15 include human rights but also 'class, place, gender . . . motherhood . . . generation and race'.[64] One manifestation of this is that, when the campaign successfully obtained some funding to support organisational/office space, the campaigners promptly declared their new premises 'Sylvia's Corner' in homage to the 'militant suffragette and socialist' Sylvia Pankhurst, who had been active in East London in the early twentieth century. The campaigners chose this name for their premises to 'directly [link] the current struggles led by today['s militant women to the inspiring revolutionary struggles of the past'.[65] As well as understanding

58 Paul Watt, 'A Nomadic War Machine in the Metropolis: En/countering London's 21st Century Housing Crisis with Focus E15' (2016) 20 City 297; and Focus E15, '3 Years of Resistance: How We Did It' (23 September 2016) <https://focuse15.org/2016/09/23/3-years-of-resistance-how-we-did-it>.

59 Watt (n 58) 298.

60 Focus E15, 'Statement by Jasmine and Sam, Focus E15 Campaign' (15 October 2014) <https://focuse15.org/2014/10/15/statement-by-jasmin-and-sam-focus-e15-campaign>.

61 Focus E15, 'The Housing Bill, Civil Disobedience and the Mothers of Argentina' (18 January 2016) <https://focuse15.org/2016/01/18/the-housing-bill-civil-disobedience-and-the-mothers-of-argentina>.

62 Quoted in Watt (n 58) 302.

63 Focus E15 (n 58).

64 Watt (n 58) 316.

65 Focus E15, 'Militant Suffragette Sylvia Pankhurst Inspires Housing Campaigners' (2 June 2016) <https://focuse15.org/2016/06/02/militant-suffragette-sylvia-pankhurst-inspires-housing-campaigners>.

its campaign for the right to housing as being embedded in relations of class, gender and race, the campaign connects its struggle with international campaigns for the right to housing, and understands the current crisis in housing as a consequence of the extant system of neoliberal capitalism. As the group put it in a recent statement, the 'whole of Europe is in the grip of a capitalist crisis, a neo-liberal disaster and we must ensure that we continue to fight for our human right to have decent homes'.[66] In the same statement, the Focus E15 campaigners explicitly articulate their struggle for the right to housing as being against the financialised, commodified system of housing provision.

The Focus E15 campaign is one of a number of groups working to challenge the acute housing crisis in London, and, while it is a relatively small group, it is one of the more inspirational and integral elements of the broader movement for decent housing in London today. What the above survey of Focus E15's activities and the ways in which it articulates its analysis and claims shows is that social movements engaged in concrete struggles can and do mobilise the language of human rights, without necessarily losing sight of the broader causes of the injustices they oppose. As Watt notes, the Focus E15 campaign has 'demonstrated an unerring capacity to discursively crystallise the political economic and social contradictions underpinning London's housing crisis'.[67] One way in which the campaigners have crystallised their response to this crisis is through demands for the human right to housing. But, crucially, this has not been done through an appeal to liberal–legalist notions of human rights. Rather, it has seen the language of the right to housing mobilised in a way which situates it at the intersection of class, race and gender and is attentive to the structural causes of the housing crisis which the campaigners confront.[68]

4.2. Ireland and the Right2Water

Throughout the world, the last twenty years have seen a series of intense, sometimes protracted, struggles over access to water. These struggles have emerged and been fought out in the context of a period of neoliberal hegemony, and the consequent commodification and financialisation of this most basic of human needs.[69] One such struggle has unfolded in Ireland since 2014, where successive centre-right governments have sought to introduce individualised metering and domestic water charges, against which a mass movement has arisen asserting the right to water.[70] The Irish 'water war', as some have dubbed it, erupted after a six-year period of austerity budgets, which saw cuts to public spending, social welfare, the downgrading of public services and rising taxes for low and middle-income households. All of which led to one-third of the Irish

66 Focus E15, 'The Privatisation of Housing Means Misery for European Working Class' (7 June 2017) <https://focuse15.org/2017/07/07/the-privatisation-of-housing-means-misery-for-european-working-class>.

67 Watt (n 58) 316.

68 This is an instance in which claiming the right to housing represents 'a demand for profound social change, giving communities power to alter patterns of ownership and provides housing as a right rather than a commodity'. Joe Hoover, 'The Human Rights to Housing and Community Empowerment: Home Occupation, Eviction Defence and Community Land Trusts' (2015) 36 Third World Quarterly 1092, 1095.

69 Manuel Couret Branco and Pedro Damião Henriques, 'The Political Economy of the Human Right to Water' (2010) 42 Review of Radical Political Economics 142; Oriol Mirosa and Leila Harris, 'Human Rights to Water: Contemporary Challenges and Contours of a Global Debate' (2012) 44 Antipode 832; and Kate Bayliss, 'The Financialization of Water' (2014) 46 Review of Radical Political Economics 292.

70 Finn (n 10); Rory Hearne, 'The Irish Water War' (2015) 7 Interface 309; and William Wall, 'Water and its (Dis)Contents' (2015) 5 Studi irlandesi 209.

population living in deprivation, the highest net emigration figures in the Organisation for Economic Co-operation and Development (OECD) and the decimation of living standards for individuals and working-class communities.[71] In large part this austerity was imposed in the context of a memorandum of understanding (MoU) agreed between the Irish state and the Troika (EU, International Monetary Fund and European Central Bank), which has seen Ireland pay back a disproportionate share of the Eurozone banking crisis.[72] One of the elements of this MoU was that Ireland would establish a new water utility and introduce water charges.

In late 2013 the then government set up a semi-state body, Irish Water, and began the process of installing water meters in residential properties. Almost immediately this policy ran into opposition, with local communities, particularly in working-class areas in Dublin and Cork, mobilising to prevent the installation of water meters. The burgeoning opposition to the charges led to the establishment of a national campaign group in 2014, Right2Water, made up of community groups, trade unionists and broadly left-wing political parties. Right2Water, as the name implies, was 'established as a broad-based campaign with one key belief and one key objective – that water is a human right and that water charges should be abolished'.[73] The campaign mobilised hundreds of thousands of people at national days of protest, while newly politicised and galvanised communities continued their tactics of preventing meter installation, boycotting the water charges, and protesting against government ministers.

All of this has combined to extract concessions from the government, and indeed the issue of water charges was a key factor in bringing down one government and decimating the Irish Labour Party, which was seen by many-working class people as having betrayed them on the issue of water charges. While these represent definite achievements for the anti-water charges campaign, the issue has not yet been resolved, and it is probable – if not likely – that some form of domestic water charge will be introduced in the near future.[74] Notwithstanding this, the Right2Water movement in Ireland remains 'one of the largest and broadest, and most sustained, social movements in Ireland since independence in 1921'.[75]

For present purposes our concern, as with the case of the Focus E15 campaign, is with how the Right2Water movement in Ireland engaged the language of human rights alongside other frames of reference, and connected the specific rights struggle its protagonists were engaged in with broader causes of injustice. In this regard one of the striking things about the Right2Water campaign is that it was, from the very beginning, a campaign which conceived of the right to water as a basic social good, in direct opposition to the logic of commodification, privatisation and austerity.[76] From the outset the Right2Water campaign articulated its defence of the right to water alongside an explicit understanding that rights 'cannot be guaranteed if they are subject to market

71 Hearne (n 70) 309.

72 Finn (n 10) 51.

73 Right2Water, 'Right2Water – Strategy, Tactics, Unity' (2015) <www.right2water.ie/blog/right2water-%E2%80%93-strategy-tactics-unity>.

74 Right2Water, 'The Right2Water Battle Continues and It'll Never End' (2017) <www.right2water.ie/blog/right2water-battle-continues-and-it%E2%80%99ll-never-end>.

75 Hearne (n 70) 312.

76 With good cause, for as Branco and Henriques note, the 'commodification of society . . . is contradictory with a society whose purpose is to enhance human rights'. Branco and Henriques (n 69) 154.

forces'.[77] The campaign also situated the struggle for the right to water in the context of the much broader political malaise of the Irish state, calling for the need to break with a political system founded on a 'a profit driven orgy of greed', in order to deliver 'real change' and 'create a Republic which puts the great mass of the people before it's [sic] self serving elites'.[78]

These views are echoed by the grassroots community protesters who made up the backbone of the Right2Water campaign; as Hearn notes, these protesters were 'motivated by a range of factors' including the 'impacts of austerity (which was the most cited reason for protesting)' and by the 'belief that the . . . government have . . . put the interests of the banks, Europe, and the bondholders before the needs of the Irish people, and that . . . working, poor and middle income people have paid an unfair burden of austerity'.[79] As one of the many protestors put it: 'I want a fair society for all not just the rich.'[80] In this way the campaign for the right to water in Ireland, and the mobilisation of the language of human rights, forms part of a broader campaign against austerity, neoliberalism and the perceived degradation of democracy, with human rights claims articulated at the intersection of class, national sovereignty and economic justice.[81] It is noteworthy that the Right2Water campaign led, in due course, to the establishment of the Right2Change campaign, which articulated a set or policy proposals (centred around ten core rights, including rights to housing, decent jobs, democratic reform, natural resources and others) and called on political parties at the 2016 general election to commit to these policies, in exchange for support from the campaign's members.[82] While the platform did not have the electoral impact desired, it again demonstrated how a social movement engaged in concrete struggles can conceive and mobilise the language of human rights in a way which addresses itself to broader, structural causes of injustice.

Much like the Focus E15 campaigners, the Right2Water protagonists in Ireland do not see themselves constrained by the narrow horizon of liberal–legalism. While Ireland is a party to the International Covenant on Economic, Social and Cultural Rights (ICESCR), the right to water, as such, is not a formally recognised right in Ireland.[83] This, of course, did not matter to the campaigners. Their demands were not for benevolent largesse, but rather the articulation, through the language of rights, of demands for a radically different sort of economic, political and social system. A central impulse of neoliberal

77 Right2Water, 'Water Rights and Wrongs: The European Experience' (2014) <www.right2water.ie/blog/water-rights-and-wrongs-european-experience>.

78 Right2Water, '2015 – The Year We Change Ireland' (2015) <www.right2water.ie/blog/2015-year-we-change-ireland>.

79 Hearn (n 70) 317; and Rory Hearn, *The Irish Water War, Austerity and the 'Risen People'* (Department of Geography, Maynooth University April 2015).

80 Quoted in Hearne (n 70) 319.

81 Paul O'Connell, 'Demanding the Future: The Right2Water and Another Ireland' Critical Legal Thinking (29 September 2014) <http://criticallegalthinking.com/2014/09/29/demanding-future-right2water-another-ireland>.

82 Right2Water, 'Irish People Have a Right2Change Say Right2Water Unions as Well Over 80,000 Take to the Streets' (2016) <www.right2water.ie/blog/irish-people-have-right2change-say-right2water-unions-well-over-80000-take-streets>.

83 Although the possibility of a constitutional right to have access to safe water was hinted at in the seminal case of *Ryan v Attorney General* [1965] IR 294, this possibility was never fully developed. Given the trajectory of Irish Supreme Court jurisprudence in relation to socio-economic rights in recent years, such a development now seems highly unlikely; see Paul O'Connell, *Vindicating Socio-Economic Rights: International Standards and Comparative Experiences* (Routledge 2012) 138–67.

capitalism is the commodification of the entire life course:[84] by insisting that certain things are too important to be surrendered to the market, the struggle for the right to water represents an embryonic rejection of the extant social order.[85] As William Wall argues, behind the rejection of water charges, and the assertion of the right to water, lies a general rejection of the 'neoliberal state' and 'while the subject of water . . . resonates strongly with the protestors it is also only no more than the symbol of other disaffections, discontentments and dissonances'.[86] For the Right2Water campaign and Focus E15 the language of human rights is an important shorthand, a way of giving crystallised expression to the specific injustice they are confronting *and* to the broader structures which produce it. Both of these movements demonstrate, clearly, that there is no necessary trade-off for social movements, that they can and do mobilise the language of human rights without displacing other critical frameworks of analysis or becoming inattentive to the structural causes of the injustices they confront.

5 Human rights and social change

As stated above, the aim of this article is not to mount a general defence of human rights, even less so of the dominant, liberal rendering of human rights that holds sway in most institutional settings and mainstream scholarship.[87] Much more modestly, the objective here has been to highlight and make explicit the terms of the displacement thesis, and to show that, as a generalised critique of human rights, it does not hold. With that done, in this final section I want to bring together some implications of this discussion for how social movements, and socially engaged scholars, should engage with the question of human rights. In this regard, there are three important, and overlapping, points that need to be made: (i) the first is that human rights, as such, will not and cannot solve the fundamental problems and injustices that confront the vast majority of people in the world today; (ii) notwithstanding this, human rights can, and in certain circumstances should, form part of the arsenal of movements for radical social change; (iii) and, crucially, it is essential to supplement the language of human rights with a broader political and theoretical perspective.

In relation to the first point, it is beyond doubt that human rights are no *panacea* for all social ills, and in and of themselves will not and cannot address the fundamental property question that defines the contemporary world order.[88] Put simply, the fundamental causes of inequality and injustice in various forms are embedded in the structural logic of the system of global capitalism, predicated on the concentration of property in the hands of a few and the consequent exploitation and impoverishment of the many – human rights can never transcend and fundamentally alter this state of affairs.[89] As such, human rights can never deliver the utopia promised by liberal–legalism and therein lies the kernel of truth at the heart of various left-liberal critiques of human

84 Robin Blackburn, 'Crisis 2.0' (2011) 72 New Left Review 33, 35.

85 Patnaik (n 39) 35, for example, argues that struggles for the recognition of socio-economic rights, such as the right to water, can form part 'of a series of measures that constitute a dialectics of subversion of the logic of capital'.

86 Wall (n 70) 221.

87 For an excellent recent critique of the dominant human rights regime, see Mutua (n 43).

88 As Robin Blackburn puts it, the 'plight of billions can be represented as a lack of effective rights, but it is the "property question" – the fact that the world is owned by a tiny elite of expropriators – that is constitutive of that plight. The slogan of rights takes us some way along the path; but it alone cannot pose the property question relevant to the 21st century.' Robin Blackburn, 'Reclaiming Human Rights' (2011) 69 New Left Review 126, 137–8.

89 Karl Marx, 'Critique of the Gotha Program' in Tucker (ed) (n 13) 525, 530–1.

rights However, while many critiques move swiftly from the recognition that human rights routinely serve 'great power ends',[90] to the conclusion that human rights must therefore be jettisoned,[91] we do better to understand the necessarily contradictory nature of human rights, and what reliance on the language of human rights tells us about the broader, structural context.

On the latter point, it is useful to recall Marx's observations on the Young Hegelians and their critique of religion in the early nineteenth century. Reflecting on this debate Marx made the important point that the critique of religion was, in truth, a critique of the social conditions which call forth religion, as he put the demand 'to give up illusions about the existing state of affairs is the demand to give up a state of affairs that requires illusions. The criticism of religion is therefor in embryo the criticism of the vale of tears.'[92] In other words, our focus should not be on the language (whether religious or human rights), but on the conditions which call forth the language. The conditions and context in which we engage human rights today is, as Wolfgang Streeck puts it, one of capitalist crisis and a 'lasting interregnum'.[93] As Antonio Gramsci long ago warned us, in such an interregnum 'morbid phenomena of the most varied kind come to pass'.[94] The coming to power of Donald Trump in the USA and the emergence of various forms of authoritarian statism around the world,[95] coupled with the prolonging of the life cycle of neoliberalism through the mantra of austerity,[96] speak to the prescience of Gramsci's warning. In these circumstances, as living standards are squeezed and basic civil rights rolled back, we are likely to see even more social movements mobilise the language of human rights in their campaigns and struggles.

This should neither surprise or alarm us. The mobilisation of human rights by social movements, as shown above, need not mean they will be led down a political or strategic blind alley. What is important in this context is understanding clearly the strengths and limitations of human rights, and their necessarily contradictory nature. Human rights are not, as Brown argued elsewhere, paradoxical in the sense of being some puzzle of formal logic.[97] Rather they are contradictory, in the way that all real things are.[98] The potentially progressive and emancipatory aspect of human rights exists side by side with the conservative aspect. As Ed Sparer put it, 'the potential contribution of human rights . . . coexists with their negative potential',[99] and as 'much as rights are instruments of legitimizing oppression, they are also affirmations of human values. As often as they are used to frustrate social movement, they are also among the basic tools of social

90 Blackburn (n 88).

91 Zizek (n 31)

92 Karl Marx, 'Contribution to the Critique of Hegel's Philosophy of Law' in *Marx–Engels Collected Work*s, vol 3 (Lawrence & Wishart 2010) 176.

93 Wolfgang Streeck, *How Will Capitalism End?* (Verso 2016) 13.

94 Antonio Gramsci, *Prison Notebooks*, vol II, J Buttigieg (ed/trans) (Columbia University Press 2011) 33.

95 Philip Alston, 'The Populist Challenge to Human Rights' (2017) 9 Journal of Human Rights Practice 1.

96 Bob Jessop argues that the current period involves 'a *politics* of austerity, not just austerity *policies* . . . a politics orientated towards reorganizing the balance of forces in favor of capital'. Mikkel Flohr and Yannick Harrison, 'Reading the Conjuncture: State, Austerity, and Social Movements, an Interview with Bob Jessop' (2016) 28 Rethinking Marxism 306, 312 (original emphasis).

97 Brown (n 25).

98 Sean Sayers, 'The Marxist Dialectic' (1976) 14 Radical Philosophy 9, 11–15.

99 Ed Sparer, 'Fundamental Human Rights, Legal Entitlements, and the Social Struggle: A Friendly Critique of the Critical Legal Studies Movement' (1984) 36 Stanford Law Review 509, 519.

movement.'[100] This is the case not just with human rights, but with any emancipatory discourse that we might seek to mobilise, and it has ever been thus. As George Lichtheim notes (and without wanting to carry the religious metaphor too far), in earlier historical periods and social orders, the language of scripture was routinely mobilised to both challenge and defend the extant order.[101]

The language of human rights, divorced from the limitations of liberal–legalism or a purely litigation-focused strategy, can with all of its limitations and shortcomings form a significant 'component of counter-hegemonic strategies' and a 'potentially fruitful approach to the prosecution of transformatory political practice'.[102] As the examples discussed above (and others abound) show, it can do so without displacing other frameworks of critique, or losing sight of deeper, structural causes of injustice. However, it is even more likely that both activism and scholarship on human rights will develop along these lines if they are grounded in a theoretical perspective which understands the structural character of the extant system, foreground the active role of people in transforming their circumstances, and bring a nuanced understanding to the contradictory nature of rights, social struggles and more. Marxism provides such a framework,[103] as David Fasenfest recently argued: 'Marxism provides the language of and mechanisms for resistance to neoliberal agendas that strip human rights, and promotes common cause with all who struggle for human rights.'[104] This is just one possibility, but, unlike liberal accounts of human rights, those which draw on the resources of the Marxist tradition are unlikely to succumb to the siren call of liberal–legalism, or lose sight of the structural causes that result in the denial of human rights.

6 Conclusion

Only time will tell how movements will engage the language of human rights in the years to come, but what is clear from the above discussion is that such movements can mobilise this language without displacing other critical frames of reference or losing sight of the power relations and structural causes that undermine human rights. It is also clear from the above discussion that some contemporary social movements are – albeit in contradictory and uneven ways – reaching conclusions that fundamentally question and challenge the existing system of social relations. The positing of certain human needs, housing, water etc., as rights that should not be subject to the logic of the market, is a denial of the basic impulse of capital accumulation. In this way, the language of human rights is mobilised in a manner which calls into question, whether implicitly or explicitly, the bigger issues of power, poverty, inequality and so on that human rights are supposed to blind us to. As such, the displacement thesis looks singularly unconvincing.

100 Ibid 555.

101 'In a primitive community, religion is the principle source of social morality; hence religious faith can be invoked as the legitimation of demands for "justice" – meaning equal or at least equitable treatment. This has frequently been done, but it has always run into the same obstacle: conservatives no less than radicals can cite these religious precepts . . . Religion has thus traditionally served to sanctify the existing state of affairs, while furnishing a respectable form of protest for the oppressed by legitimizing their complaints against inequality and injustice.' George Lichtheim, *A Short History of Socialism* (Fontana 1975) 10–11.

102 Hunt (n 38) 326.

103 As Jacques Bidet notes, Marxism provides us with 'interpretive perspectives' for comprehending the totality of the changing world we inhabit, and for that reason can be 'mobilised wherever social and popular struggles unfold against economic or bureaucratic domination, male domination, imperial power and commodification'. Jacques Bidet, 'A Key to the Critical Companion to Contemporary Marxism' in J Bidet and S Kouvelakis (eds), *Critical Companion to Contemporary Marxism* (Haymarket Books 2009) 3, 6.

104 David Fasenfest, 'Marx, Marxism and Human Rights' (2016) 42 Critical Sociology 777, 779.

With all of that said, Upendra Baxi is correct when he argues that it remains 'important to stress that while human rights languages provide a striking arena for questioning the barbarity of power and domination, these at the same moment do not exhaust the range of normative politics'.[105] Social movements can and do mobilise the language of human rights as a crystallised shorthand for their complex, often partially articulated, opposition to prevailing social conditions.[106] But it is, of course, the broader context that is crucial in all of this. It is never the mobilisation or reliance on the language of human rights that is determinative in the success or failure of a given social movement,[107] but the broader, structural context. Situating our understanding of human rights within a theoretical framework that explains the nature of the social order we struggle in and against will be crucial in allowing us to both understand and change it.

105 Upendra Baxi, *The Future of Human Rights* (3rd edn, Oxford University Press 2008) xi.

106 It is interesting in this regard to recall Marx's comments on calls for the right to work during a tumultuous period of revolution and counter-revolution in mid-nineteenth-century France: 'The right to work is, in the bourgeois sense, nonsense, a wretched, pious wish. But behind the right to work stands power over capital, behind power over capital the appropriation of the means of production, their subjection to the associated working class, that is, the abolition of wage labour, capital and their mutual relationship.' Karl Marx, 'The Class Struggles in France: 1848–1850' in Karl Marx, *Surveys from Exile: Political Writings*, vol 2 (Verso 2010) 35, 69–70.

107 As Sparer puts it, it '[will] not be rights theory that stands as the obstacle to new, decentralized, participatory power but those real people whose class, institutional, and social interests are opposed to such a reordering and who use rights theory to protect their existing privileges'. Sparer (n 99) 520.

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Rape pornography, cultural harm and criminalisation

DR TANYA PALMER

Lecturer in Law, University of Sussex[*]

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.

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(Re)conceptualising state secrecy

Lydia Morgan

Birmingham Law School, University of Birmingham

Abstract

This paper seeks to reconceptualise state secrecy and asks whether it is adequately understood in the UK. It argues that state secrecy is systemic not exceptional and that it is supported by complex institutional structures and cultural practices. It analyses the legislative armoury of state secrecy, including investigatory powers (RIPA, DRIPA and IPA) and develops a tripartite model of state secrecy. Properly understood, state secrecy can be divided into three categories: esoteric, operational and efficient. Esoteric state secrecy restricts access to decision-making and information. It is a facet of power, utilised to control. Operational state secrecy protects techniques, procedures and investigations. It is not as all-encompassing as esoteric state secrecy, but can be cumulative where one demand for secrecy creates another. Finally, efficient state secrecy references the pragmatic sense in which secret conditions allow faster decision-making and the conceptual limits of transparency in a modern complex state. These categories illuminate how state secrecy's true effects are masked because it is so entrenched.

Keywords: Concept of secrecy; state secrecy; national security; public law; investigatory powers; freedom of information; transparency.

Introduction

States keep secrets. While, perhaps, expected, this poses particular challenges in self-defined liberal democracies such as the UK. These challenges become more acute when we recognise that, far from being exceptional, secret-keeping is the cultural mode of British politics. State-level secretive behaviour takes many forms. It is seen in the security services (MI5, MI6, Government Communication Headquarters (GCHQ)); in legislation (the Official Secrets Act 1909–1989 and the Freedom of Information Act (FOI) 2000); in 'national security' closed court hearings; and even in the involvement of the Prince of Wales in government policy formation.[1]

Partly because secrecy is treated as exceptional rather than ordinary, a systematic consideration is missing from the literature. From the perspective of law, this is odd. Secrecy is, after all, a concept with significant legal implications. Secrecy alters criminal procedures and evidential standards, and strains, if not outright overturns, the principle of open justice. It provides expanding investigative powers and a special role for

1 R Craig, 'Black Spiders Weaving Webs: The Constitutional Implications of Executive Veto of Tribunal Determinations' (2016) 79(1) Modern Law Review 166–82.

security-related agencies. Secrecy is used to justify internal as well as external mass surveillance. Even the transparency brought forth by the FOI is in fact couched in the need to protect and conceal information. Policy is developed and shaped behind secrecy's veil. Secrecy forces trust in government into a one-way street. The public must trust they are being governed well, but the public are not reciprocally trusted to scrutinise decision-making processes and outcomes. Not only does secrecy partition the public–government relationship, it also fractures relationships within the institutions of the state. When considered separately, these behaviours and activities can seem to be exceptional or unique to their particular arenas, but taken together they describe a common and accepted idea.

This article addresses, from a legal perspective, the lack of systematic and comprehensive consideration of the concept of secrecy. It is not concerned with disrupting the idea of secrecy, but interrogating the specific concept of state secrecy, that is, secrecy utilised in the service of the state. I argue that, when conceptualised in its fullest form, secrecy is a common, challenging and contentious mode of governing. I explore the question 'What is state secrecy?', explain the limits of existing conceptions and demonstrate the conceptual distinction between secrecy and state secrecy. Properly understood, state secrecy can be divided into three overlapping categories: esoteric, operational and efficient. The three elements should not be approached as detailed taxonomies with hard boundaries, but as models which illuminate the working and practice of state secrecy. Some aspects of secrecy fit within more than one category at a time but appear different cast in the alterative light. *Esoteric* state secrecy restricts access to decision-making and information. It is a facet of power, utilised to control. *Operational* state secrecy protects techniques, procedures and investigations. It is not as all-encompassing as esoteric state secrecy but can be cumulative where one demand for secrecy creates another. Finally, *efficient* state secrecy references the pragmatic sense in which secret conditions allow faster decision-making and the conceptual limits of transparency in a modern complex state. These categories illuminate how state secrecy's true effects are masked because it is so entrenched.

While the post-9/11 counter-terror response marks a distinct intemperate moment in the history of state secrecy, the shape and manner of secrecy in the UK does not only result from reactive shifts. Secrecy is so ingrained that rather than being, as Crossman suggested, 'the English disease'[2] and therefore a curable ailment, it is in fact part of the fabric of British political and legal character. Failure to recognise state secrecy as such means its persistence in an 'open society'[3] is unexplained and its benefits and harms ill-judged.

For political and legal concepts to be useful they must reflect and capture the reality of the thing they denote. Without an accurate definition the full scale of state secrecy and the challenges state secrecy poses to liberal democratic principles like accountability, transparency and individual liberty remain unmapped. Exposing the ingrained role of state secrecy enables the claim to necessity to be properly understood – and its excesses challenged – as well as better regulatory practice to be established. This article will show that, at some level, the poor and partial comprehension of state secrecy is a deliberate and expected consequence of a concept that inhibits examination and relates shadow-worlds with the implications of bureaucracy. The first section examines the various attempts to discuss or define state secrecy, before reviewing what aspects of the legal framework

2 R Crossman, 'The Real English Disease', *The New Statesman* (London, 25 September 1971) 1.

3 K Popper, *The Open Society and its Enemies*, vols1 and 2 (Routledge [1945] 2002).

might aid the search for a fuller understanding in the second. The final section will then present a conception of state secrecy to address the problems raised by existing accounts.

1 The meaning(s) of state secrecy

'At the heart of secrecy lies discrimination of some form, since its essence is sifting, setting apart, drawing lines.' [4]

How does state secrecy differ from secrecy? Secrecy is said to be intentional concealment.[5] As it relates to the communicative nature of sociality, it is relational, requiring a secret holder and a subject against whom the secret is held. Secret-keeping is an active endeavour requiring resources to maintain.[6] Concealment is not simply out of view, undiscovered or accidentally omitted. It implies obfuscation, something unavailable because it has been hidden, encrypted or closed to prevent it from being discovered, deduced or worked out. Mystification is instrumental to secrecy, but there is an epistemic difference between a mystery and a secret. However, since many more people are privy to state secrets, intentionality is less ascribable to the definition.[7] For example, at least 20,000 people directly work for the UK security and intelligence agencies and, even assuming secrecy within and between these agencies, a large number of people will be privy to the secrets they hold. So, while secrecy and state secrecy have in common the practice of *deliberate concealment*, each individual state secret may not have the same agent-driven intention as interpersonal secrets. Rather, concealment happens as a result of an institutional or cultural practice.[8]

Secrets do not occur within a vacuum, a singular homogeneous space. Secrecy requires two forms of space: one within which the secret is held; and another from which the secret is withheld. State secrecy multiplies the spaces because state secrets are kept from a variety of publics: the public enemy (external threat), the revolutionary public (internal threat) and the mandated public (members of the state). Similarly, there is a spatial layering of state secrecy within the bounds of the state apparatus. Withheld information bonds parties together through the confidence of the 'aggressive defence',[9] suggesting state secrecy's power is situated not in the content but in the act of making something secret. Secrecy amplifies, making any information 'somehow essential and significant'.[10] Once revealed, secrets are often paltry and devoid of potency.[11] Derrida, observing the intimate connection between controlling information and political power, explained that those who hold the archive, the collated information, hold authority.[12] But preservation is easily blurred with protection and exclusion, making access to the archive a measure of transparency. This is significant from a bureaucratic perspective, as secrecy can shield against criticism and insulate mistakes to facilitate rectification or camouflage.[13]

4 S Bok, *Secrets: On the Ethics of Concealment and Revelation* (Vintage 1989) 28.

5 Ibid 9.

6 E Shils, *The Torment of Secrecy*, P Moynihan (ed) (Elephant Paperback [1956] 1996) 26.

7 P Galison, 'Removing Knowledge' (2004) Critical Inquiry 31.

8 Bok (n 4) 5; P Major and C Moran, *Spooked: Britain, Empire and Intelligence Since 1945* (Cambridge University Press 2009); D Omand, *Securing the State* (Hurst 2012).

9 G Simmel, 'The Sociology of Secrecy and Secret Societies' (1906) 11(4) American Journal of Sociology 462.

10 Ibid 465; M Weber, 'Bureaucracy', in H Gerth and W Mills (eds), *From Max Weber: Essays in Sociology* (Routledge [1921–1922] 2009)

11 Bok (n 4) 4, 21.

12 J Derrida, 'Archive Fever: A Freudian Impression' (1995) 25(2) Diacritics 9–63, 11, fns 1, 12, 17.

13 Weber (n 10).

Secrecy then is potent but hazardous. Controlling the supply of information enables the secret-holder to influence 'what others know, and thus what they choose to do', meaning secrets also offer power to their holders.[14] Secrecy has a capacity, amplified at group and state level, to produce fanatical, obsessive, conspiratorial behaviour, only curbed by separating the functional benefits of secrecy from the risks contained in its symbolic power and continually balancing it against the imperative of publicity.[15] Of course, secrecy can be productive and useful. The tradition of secrecy in the family courts is protective and secrecy in the form of Chatham House Rules can facilitate discussion not otherwise publicly appropriate.

State secrecy should refer to an institutionally or culturally deliberate concealment which is powerful and dangerous. The existing literature only hints at this but in several competing perspectives; none of which, I contend, adequately captures this idea as a whole. Those that discuss state secrecy directly[16] describe it as an exceptional power and facet of control,[17] an institutional necessity,[18] and a constraint on transparency and accountability.[19] These existing conceptions are: (a) geographically and contextually inappropriate as they are largely concerned only with the USA; (b) insufficiently map on to the reality of state secrecy as an ordinary and standard cultural practice even in liberal democratic states like the UK and the USA; (c) as a consequence of (b), fail to capture that state secrecy seeks to obscure how commonplace it is; and, finally, (d) do not capture that state secrecy has a plurality of modes.

In the twenty-first century, state secrecy has largely been seen as an exceptional form of power or control. It regulates public knowledge and access to information, implying that state secrets are assets, instrumental bolsters to governmental power. Where normal regulation concerns how citizens and corporations behave, state secrecy regulates what they may know.[20] Much of the US literature centres on the so-called 'states secrets privilege' (SSP), a government-wide rather than strictly presidential executive privilege enabling evidence to be excluded from court proceedings.[21] Its power extends far beyond

14 Bok (n 4) 282.

15 Shils (n 6).

16 P Birkinshaw, *Reforming the Secret State* (Open University Press 1990); I Leigh, 'Changing the Rules of the Game: Some Necessary Legal Reforms to United Kingdom Intelligence' (2009) 35(4) Review of International Studies 943–55; A Kelso, 'Response to Bochel et al: "Scrutinising the Secret State"' (2010) 38(3) Policy and Politics 489–90.

17 D P Moynihan, *Secrecy: The American Experience* (Yale University Press 1999); S D Schwinn, 'The State Secrets Privilege in the Post-9/11 Era' (2010) 30(2) Pace Law Review 778; D M Curtin, 'Keeping Government Secrecy Safe: Beyond Whack-A-Mole' Max Weber Lecture Series 07 (European University Institute 2011); D O Thompson and M Garcia, *Veils of Secrecy: Government Practices and Prohibited Disclosures* (Nova 2012).

18 *National Commission on Terrorist Attacks upon the United States* (9/11 Commission Report 2004) 417 <http://avalon.law.yale.edu/sept11/911Report.pdf>.

19 E Goitein and D M Shapiro, *Reducing Overclassification through Accountability* (Brennan Center for Justice 2011); D Cole, 'Confronting the Wizard of Oz: National Security, Expertise and Secrecy' (2012) 44(5) Connecticut Law Review 1617–25, 1624.

20 Moynihan (n 17).

21 R M Pallitto and W G Weaver, *Presidential Secrecy and the Law* (John Hopkins University Press 2007); L K Donohue, 'The Shadow of State Secrets' (2010) (159) University of Pennsylvania Law Review 77; M Fenster, 'The Implausibility of Secrecy' (2014) 65(2) Hastings Law Journal 309–63; S Chesterman, *One Nation Under Surveillance* (Oxford University Press 2011); S Aftergood, 'If in Doubt, Classify' (2008) 37(4) Index on Censorship; Schwinn (n 17) 101–7; L Fisher, *In the Name of National Security: Unchecked Presidential Power and the Reynolds Case* (University Press of Kansas 2006).

actual cases as it is primarily used to circumscribe potential litigation, leading to it being referred to as 'graymail'.[22]

While viewing secrets as assets to be regulated captures the situation in a codified system such as in the USA, it is less applicable to the UK where prerogative is still a spectral reality which resists capture. Further, the regulatory position of the respective intelligence agencies differs. While the UK intelligence agencies were an open secret, known but not officially avowed until 1989, and operating under executive and military authority, the US Central Intelligence Agency and National Security Agency have always operated under the statutory authority of the National Security Act 1947. Indeed, the regulatory context of executive power in the USA is shaped by its codified constitutional structure, whereas in the UK the attempt to restrict executive power shapes the constitutional understanding of accountability.

The commodification of information[23] – and its relationship to the structure and history of the UK relevant to state secrecy – is distinct from that in the USA. The culture of secrecy[24] and deference to political elites is a more acceptable custom in British politics than in the USA,[25] where transparency was entrenched in 1966.[26] US statutory intervention arose from the need to break an executive presumption in favour of secrecy[27] and was regarded as revolutionary, particularly since no executive department or agency or the President supported it.[28] It is limited to federal and executive bodies, and records damaging to national security or other government interests are exempted.[29] The UK did not enact transparency legislation until 2000, although not for want of trying (see below).

Commodification is also seen in the view of state secrecy as an institutional necessity. If we focus on the security context, secrecy is often referred to as necessary and functionally indispensable to governments. National security cannot be protected if governments cannot operate partially (or even largely) in secret. Internal secrecy persists as intelligence agencies resist sharing, upholding a 'need-to-know' information-protection culture.[30] Even the legislative branch in the USA lacks immunity from this proprietorial behaviour as national security is used to withhold information from Congress, making secrecy an inter-branch power battle.[31] But again, the USA as an exemplar of this point is not directly transferable to the UK (at least if popular sentiment prevails and the US

22 Donohue (n 21) 82, 85.

23 W M Arkin and D Priest, *Top Secret America* (Back Bay 2011) 176–82.

24 D Vincent, *The Culture of Secrecy: Britain, 1832–1998* (Oxford University Press 1998).

25 R T McKenzie and A Silver, *Angels in Marble* (Heinemann I968); E A Nordlinger, *The Working Class Tories* (MacGibbon & Kee I967); D Kavanagh, 'The Deferential English: A Comparative Critique' (1971) VI(3) Government and Opposition 333–60.

26 The Freedom of Information Act (FOIA) 5 USC §552 1966 developed a 1946 statute. Amendments were passed in the Government in the Sunshine Act 5 USC §552b 1976 referencing Judge Brandeis' proclamation that 'sunlight is said to be the best disinfectant': L Brandeis, 'What Publicity Can Do' *Harper's Weekly* (New York, 20 December 1913).

27 W Ginsberg, 'The Freedom of Information Act (FOIA): Background, Legislation, and Policy Issues' (Congressional Research Service 7–5700/R41933 2014).

28 S J Archibald, 'The Freedom of Information Act Revisited' (1979) 39 Public Administration Review 311–18.

29 FOIA 1966 (n 26).

30 9/11 Commission Report (n 18); Cole (n 19) 1624.

31 H Kitrosser, 'Supremely Opaque? Accountability, Transparency, and Presidential Supremacy' (2010) 5 St Thomas Journal of Law and Public Policy 62.

Constitution is not seen as ambivalent about strict publicity).[32] If anything, institutional necessity is too weak to explain the 'culture of secrecy' present in UK governance.[33]

Consider how in 2009 Justice Secretary Jack Straw warned that excessive publication of sensitive government information would 'be more likely than not to drive substantive collective discussion or airing of disagreement into informal channels and away from the record'.[34] Add that the UK spies on diplomats and politicians,[35] discourages the press from publishing sensitive information (through the D/DA (defence/defence advisory) notice system) and has a police force which uses secret, often controversial, tactics to monitor protest movements.[36] Finally, place those facts next to Bentham's words who, while espousing that 'without publicity, no good is permanent: under the auspices of publicity, no evil can continue',[37] also argued secrecy is acceptable to protect the innocent, prevent unnecessary punishment or when publicity would favour the projects of an enemy.[38] The result is a perspective which sees secrecy as part and parcel of the standard operating procedure of government, meaning that, where state secrecy is discussed as a necessity, it would be no short leap to recognise and explain secrecy as a normal and normalised mode of governing in liberal democratic states like the UK and the USA. Its existence is explained by reference to the age of principality and fiefdom coupled with its necessity during the ideological global power disputes of the Cold War. But state secrecy is more than a historical leftover or inter-relational need. State secrecy is not alien but *a*, if not *the*, cultural mode of British politics and by extension a key driver of power. It informs government behaviour, is the behavioural premise of security and intelligence service power and the investigatory approaches taken by the police, and grounds the legislative intention of acts which purportedly regulate state surveillance, although in reality likely encourages more of it.

The reality of state secrecy is not reflected in the idea of either power and control or institutional necessity. It is easy to sell state secrecy as a public good in a culture where it has deep roots, but this does not reflect its hazardous potential. However, in many ways the two are polar perspectives. The power-and-control view takes a negative view, whereas the institutional-necessity view casts state secrecy in a positive light, drawing out its essential role in the feasibility of government action. A workable and useful conception of state secrecy would need to combine both perspectives.

32 G Epps, *American Epic* (Oxford University Press 2013); US Constitution, Article 1, s 5, allows for secrecy in congressional proceedings; Pallitto and Weaver (n 21); Foreign Intelligence Surveillance Act 1978 and the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (US PATRIOT Act) is also relevant here.

33 Vincent (n 24).

34 HC Deb 24 February 2009, vol 488, col 154.

35 'GCHQ Intercepted Foreign Politicians' Communications at G20 Summits' *The Guardian* (London, 13 June 2013) <www.theguardian.com/uk/2013/jun/16/gchq-intercepted-communications-g20-summits>.

36 *R (on the Application of Catt) v Commissioner of Police of the Metropolis* [2015] UKSC 9; the identity of Mark Kennedy, who controversially infiltrated environmental protest groups, was concealed at trial (*R v Theo Bard and Others* [2014] EWCA Crim 463), 'Prosecutors Improperly Withheld Crucial Evidence from Trial of Protesters' *The Guardian* (London, 10 June 2015) <www.theguardian.com/uk-news/undercover-with-paul-lewis-and-rob-evans/2015/jun/10/prosecutors-improperly-withheld-crucial-evidence-from-trial-of-protesters>.

37 J Bentham, 'Of Publicity (Political Tactics)', *The Collected Works of Jeremy Bentham* (Clarendon Press [1843] 1999) 39.

38 Ibid.

Nor can these perspectives account for the kind of state secrecy which is not intended to assert a power, insulate from internal or external criticism, control an agenda, or manage public perception. Clearly, it is powerful and does control public perception, governmental behaviours and agendas, but state secrecy also self-generates (see below) and perceptions of secrecy can invite greater scrutiny and scepticism about government behaviour. Donohue's notion of 'graymail' shows how the SPP is actually used far more widely than the case law suggests; Sagar's account of the role of leaking in politics to control the release of information inadvertently neatly demonstrates how far information is commodified and therefore jealously protected; and Curtin illustrates from an EU perspective the true extent of executive discretion to conceal.[39] Until you go looking for attempts to conceal, it is seen as extraordinary, whereas in fact secrecy and secret-keeping proliferate and always have done so.

The blindness to state secrecy's commonality in the USA is shown in the Brennan Center for Justice's recent report on secret law.[40] It states, somewhat baldly, 'the United States does not have a tradition of secret law'.[41] This statement is curious given that the US Constitution was drafted in secret,[42] and the extent and use of the state secret's privilege and other executive powers. It is true legislation has always been published and 'a commitment to transparency took root early in the nation's history and has for the most part remained strong', *symbolically* speaking.[43] Given the report goes on to outline three *systemic* challenges to the legal pursuit of transparency,[44] it is curious that its authors would begin with a plainly inaccurate claim unless, of course, they do not wish to challenge US political and constitutional mythology by accepting that secrecy is, legally and politically speaking, commonplace. Further, to focus on the idea of 'law' is unhelpfully narrow given most secrecy occurs at a policy level. Nevertheless, this awkward juxtaposition of constitution-founding mythology and reality is informative in the conceptual analysis of state secrecy. When the perspective is flipped from transparency and accountability to an inquiry into the meaning of state secrecy, its persistent and arguably ingrained role becomes apparent. It changes state secrecy from an exception to a norm.[45]

Secrecy's necessity also subtly co-opts debates on the need for governmental transparency and accountability, with even its harshest critics recognising minimal utility in state secrecy.[46] Sagar claims 'there is broad agreement that state secrecy is justified . . . [if] it is used to protect national security and not to conceal wrong doing'.[47] This is accepted despite strong evidence of the damage state secrecy inflicts. In the balance

39 Donohue (n 21); R Sagar, S*ecrets and Leaks: The Dilemma of State Secrecy* (Princeton University Press 2013); D Curtin, 'Judging EU Secrecy' (2012) 2 Cahiers de Droit Européen 459–90.

40 E Goitein, *The New Era of Secret Law* (Brennan Center for Justice, New York University School of Law 2016) <www.brennancenter.org/sites/default/files/publications/The_New_Era_of_Secret_Law_0.pdf>.

41 Ibid 3.

42 Epps (n 32); A Amar, *America's Constitution: A Biography* (Random House 2005).

43 Goitein (n 40) 3.

44 Indeed, it also notes 'the design of the Constitution suggests that some level of secrecy within the executive branch may be tolerated or even protected'; Goitein (n 40) 4.

45 G Agamben, *State of Exception*, K Atwell (trans) (University of Chicago Press 2004); J Ferejohn and P Pasquino, 'The Law of the Exception: A Typology of Emergency Powers' (2004) 2(2) International Journal of Constitutional Law 210; B Honig, *Emergency Politics: Paradox, Law, Democracy* (Princeton University Press 2009).

46 S Aftergood, 'Reducing Government Secrecy: Finding What Works' (2009) 27(2) Yale Law and Policy Review 399–416.

47 Sagar (n 39) 16.

between secrecy and transparency, secrecy often wins.[48] Indeed, there is cognitive dissonance on information rights and transparency. Information released on request does not mean the organisation has been transparent or co-operative. The information was not actively released, or open and ready to be viewed at will; it had to be requested, thus requiring knowledge that the information existed. This difference is what made Edward Snowden's leaks[49] so significant. Both an implementation programme and a willingness to comply are needed for authentic openness.[50] When state secrecy is seen as something to balance against accountability, the focus slips towards *how* to balance it, overlooking state secrecy's subtler effects and outright neglecting the pre-assigned weight given to secret information.[51]

Having identified that existing commentary draws state secrecy in at least three different ways, it might seem unfair to claim there is no recognition of state secrecy existing in plural modes. However, none explicitly discusses the distinct forms or modes, either in their reflection on state secrecy or by surveying across the different scholarship. Without such recognition the conception is narrow, concentrated on security, and more easily justified. The extent of state secrecy in the UK is hard to grasp because it is a patchwork of formal statutory provisions, informal regulatory structures and underlying cultural practices which commodify information and see scrutiny as a danger not a value. Nevertheless, it is precisely this range which requires that even a minimally adequate definition of state secrecy needs to be understood as something which has plural, although related, modes.

2 The architecture of secrecy

Even at its most basic level the pursuit of state secrecy is both more complex and more elusive than might be expected. In the UK, it is not found in one configuration, but is comprised of an overlapping patchwork of formal structures, semi-formal regulatory mechanisms and informal cultures and practices. These are comprised of three elements:

- the formal institutionally secretive structures, such as the security and intelligence agencies, as well as the relevant law enforcement agencies, which while not secretive by design can operate in secret;
- the semi-formal regulatory mechanisms which are used to limit and control access to government material, such as the Official Secrets Act 1911–1989 and various civil actions;
- and, finally, the informal 'need to know' culture which not only characterises the relationship between the government, the people and external agencies but also between departments and units, as well as between the government, Parliament and the courts.

48 Chesterman (n 21); Aftergood (n 21).

49 *The Guardian*, 'NSA Files: Decoded – What the Revelations Mean for You' <www.theguardian.com/world/interactive/2013/nov/01/snowden-nsa-files-surveillance-revelations-decoded>.

50 R Hazell, B Worthy and M Glover (eds), *Does Freedom of Information Work? The Impact of FOI on Central Government in the UK* (Palgrave Macmillan 2010).

51 A Ashworth 'Taking a "balanced" view of the public interest' in *The Hamlyn Lectures: Human Rights, Serious Crime and Criminal Procedure* (Sweet & Maxwell 2002); J Waldron, 'Security and Liberty: The Image of Balance' (2003) 11(2) Journal of Political Philosophy 191–210.

This patchwork lays bare not only the long secretive history of British espionage,[52] but the cultural practice of secrecy,[53] a product of the aristocratic attitude to governing in which both Parliament and the public 'abdicate its powers' to the executive to scrutinise secrecy.[54] Citizens must trust those elected and appointed representatives, who represent the 'honour' system of British politics,[55] when their rights are curtailed for generalised and unspecified threats. They must trust a system which initially developed sanctions for breaching government secrecy not to protect the public but to prevent unauthorised disclosure.[56] Even watershed moments seemingly limiting executive power in fact reinforced and formalised it,[57] and, as we shall see, in the post-2001 counter-terrorism context there has been a new age of prerogative matching the structure of risk and security politics.[58]

Secretive institutions, behaviours and 'oversight'

Three institutions and their related committees[59] are especially relevant to state secrecy in the UK: the Security Service (or MI5); the Secret Intelligence Service (SIS) (or MI6); and GCHQ. Until 1989 they were popularly known,[60] but only as a badly kept public secret.[61] Placing these agencies under statutory authority provided the missing dimension, not only of their operation, but of constitutional law.[62] After numerous failed attempts to minimise access to information about MI5,[63] the Security Service Act (SSA) 1989 outlined MI5's powers and authority to defend the realm and maintain national security against espionage, terrorism and sabotage.[64] This extensive power also includes safeguarding the UK's economic wellbeing.[65] As a 'self-tasked' organisation, MI5 assesses its own priorities for action, a measure intended to ensure ministerial restraint and protect the service from accusations of political and partisan action.[66] In reality this advisory role provides a space for MI5 to monopolise its power.

52 T Cowdry, *The Enemy Within: A History of Espionage: Spymasters and Espionage* (Osprey 2006).

53 Vincent (n 24); Crossman (n 2).

54 C M Andrew, *The Defence of the Realm: The Authorized History of MI5* (Allen Lane 2009) 753; *Council of Civil Service Unions (GCHQ) v Minister for the Civil Service* [1985] AC 374, in particular per Lord Diplock at 952.

55 Vincent (n 24) 315.

56 D Hooper, *Official Secrets: The Use and Abuse of the Act* (1987) 17, 21; Major and Moran (n 8) 27–37.

57 FOI 2000 exemptions.

58 T Poole, Poole 'United Kingdom: The Royal Prerogative' (2010) 8(1) International Journal of Constitutional Law 146–55, 154.

59 Joint Intelligence Committee, the Joint Terrorism Analysis Centre and the National Security Committee. Supported by a National Security Advisor and National Security Secretariat, *The Strategic Defence and Security Review: Securing Britain in an Age of Uncertainty* (Cm 7948 2010) §6.1.

60 *Lord Denning's Report into the Profumo Affair* (Cmnd 2152 1963) detailed security services management and published the previously internal 1952 Maxwell Fyfe Directive. They had also been discussed in popular literature and some judicial documents since 1909.

61 Two earlier Acts indicated their existence and provided funding: the Civil List and Secret Service Money Act 1782 (repealed 1977) and the Government of Ireland Act 1920; P Birkinshaw, *Freedom of Information: The Law, the Practice and the Ideal* (Cambridge University Press 2010) 33.

62 Andrew (n 54) 28; Birkinshaw (n 61) 369.

63 Andrew (n 54); S Rimington, *Open Secret: The Autobiography of the Former Director-General of MI5* (Hutchinson 2001); Chesterman (n 21).

64 SSA 1989, s 1(2).

65 Ibid s 1(3).

66 I Leigh, 'Intelligence and the Law in the United Kingdom' in L K Johnson (ed), *The Oxford Handbook of National Security Intelligence* (Oxford University Press 2010) 642.

In contrast, as the furore surrounding the Snowden leaks demonstrates,[67] there is a continued reluctance to be candid about SIS (MI6) and GCHQ despite their recent moves to present themselves as more open (including GCHQ joining Twitter).[68] MI6 supplies the government 'with a global covert capability to promote and defend' national security and the economic well-being of the UK.[69] GCHQ, the eavesdropping agency, monitors radio and satellite transmissions in overseas countries and is the largest intelligence agency, with a staff of over five thousand.[70] In the 1980s, MI6 and GCHQ were the subject of public controversy,[71] but they were only officially acknowledged in 1992 and confirmed in the Intelligence Services Act (ISA) 1994. The statutory provisions are deliberately opaque,[72] outlining the astonishingly wide function to obtain and provide information on actions or intentions of persons outside the British Islands and other related tasks.[73] GCHQ obtains, monitors and 'interferes' with electromagnetic, acoustic and other emissions and any equipment producing such emissions.[74] These institutions sit at the forefront of the conception of state secrecy because common sense suggests that intelligence-gathering and spying relates directly to secrecy and much of the secretive behaviour of the state is undertaken to serve intelligence and surveillance functions.

All three agencies are also governed by another set of contentious legal provisions, which provide powers to other public bodies to operate and investigate in secret. Until 2016, investigatory powers were governed under the labyrinthine Regulation of Investigatory Powers Act (RIPA) 2000 and Data Protection and Investigatory Powers Act (DRIPA) 2014, which have been replaced with the already heavily criticised and judicially contested[75] Investigatory Powers Act (IPA) 2016. As the Explanatory Notes to IPA 2016 acknowledge, the powers provided largely already existed, including the interception of communications, the retention and acquisition of communications data, equipment interference, and the acquisition of bulk data. However, the IPA 2016 extends those powers and officially acknowledges others. But as DRIPA 2014 has been found inconsistent with the privacy protections in the EU Charter of Fundamental Rights in *Watson*,[76] and the IPA 2016 is substantially modelled on those provisions, it seems it will be open to challenge (the Court of Appeal is yet to rule on the extent of the

67 Z Bauman et al, 'After Snowden: Rethinking the Impact of Surveillance' (2014) 8(2) International Political Sociology 141–44.

68 GCHQ, '"Hello, World"': GCHQ Has Officially Joined Twitter' (16 May 2016); 'The Web Is a Terrorist's Command-and-Control Network of Choice' *Financial Times* (London, 3 November 2014) <www.gchq.gov.uk/news-article/hello-world-gchq-has-officially-joined-twitter>; <www.ft.com/content/c89b6c58–6342–11e4–8a63–00144feabdc0#axzz3I7Jjs7jf>.

69 ISA 1994.

70 MI5 employs around 4000 people <www.mi5.gov.uk/who-we-are> information is not available for SIS/MI6staff numbers.

71 *GCHQ* (n 54); and highlighted by the *Spycatcher* saga, see below.

72 L Lustgarten and I Leigh, *In from the Cold: National Security and Parliamentary Democracy* (Clarendon Press 1994) 65.

73 ISA 1994, s 1(1).

74 Ibid s 3(1).

75 Joined Cases C-203/15 and C-698/15 *Tele2 Sverige AB v Post-och telestyrelsen* (C-203/15) and *SS for the Home Department v Tom Watson et al* (C-698/15) ECLI:EU:C:2016:970 [2016].

76 Ibid.

inconsistency). The issue will remain even after Brexit as *Watson* draws directly on European Court of Human Rights (ECtHR) language.[77]

In relation to state secrecy, the act does four things. One, it introduces new powers in the guise of matching technological change. The fallout from the Snowden revelations and suggested need to plug 'capability gaps'[78] provided an opportunity to surreptitiously broaden surveillance powers to allow collection of bulk datasets,[79] the deployment of 'thematic' warrants[80] and in Parts 3 and 4 extend power to gather and retain communications data. For example, it placed government hacking, known as equipment interference (EI), on a statutory footing, thereby legitimising its use.[81] Two, it strengthens existing surveillance powers. In addition to the 'targeted interception' powers which allow access to the content of communications,[82] Part 2 also provides measures to enable 'thematic warrants', allowing groups of individuals to be targeted[83] where they share 'a common purpose or . . . carry on, or may carry on, a particular activity'.[84] No definition or limit is given on what size or type of group can be targeted. Were the powers to acquire information not strong enough, the Act also enables highly intrusive bulk personal data sets (BDPs) in Part 7 which capture data from 'a wide range of individuals, the majority of whom are unlikely to be of intelligence interest'.[85]

Three, it places an onus on private services providers to hold data for the government in case it is needed for national security. The Act co-opts the data-gathering activities of tech companies through technical capability notices (TCNs) and national security notices (NSNs).[86] With an NSN, a minister can require telecoms companies to take specified measures with respect to national security and TCNs require such companies to maintain the ability to remove encryption (even if this is not practically possible).[87] Finally, the Act also claims to improve the oversight system by consolidating existing oversight bodies into a new Investigatory Powers Commissioner[88] and providing the 'double-lock' mechanism whereby both the relevant minister and a commissioner approve warrants

77 *Zakharov v Russia* [GC] ECtHR 2015 47143/06 [119]; A Patrick, 'Who Sees You When You're Sleeping? Who Knows When You're Awake?' UK Human Rights Blog (21 December 2016) <https://ukhumanrightsblog.com/2016/12/21/who-sees-you-when-youre-sleeping-who-knows-when-youre-awake>.

78 D Lyon, 'Surveillance, Snowden, and Big Data: Capacities, Consequences, Critique' (2014) 1(2) Big Data and Society 1–13.

79 IPA 2016, Parts 6 and 7.

80 Ibid Part 2, s 17.

81 Ibid Part 5.

82 Ibid Part 2, s 20(2)(c) and s 20(4).

83 Part 2, s 17.

84 Part 2, s 17(2)(a).

85 Intelligence and Security Committee of Parliament, 'Privacy and Security: A Modern and Transparent Legal Framework' (HC 1075 2015).

86 IPA 2016, s 252.

87 See 'Could the UK Be about to Break End-to-end Encryption?' TechCrunch (27 May 2017) <https://techcrunch.com/2017/05/27/could-the-uk-be-about-to-break-end-to-end-encryption>; 'UK Government Can Force Encryption Removal, but Fears Losing, Experts Say' *The Guardian* (London, 29 March 2017) <www.theguardian.com/technology/2017/mar/29/uk-government-encryption-whatsapp-investigatory-powers-act>.

88 IPA 2016, Part 8, s 227.

before they become effectual.[89] Significantly, in urgent circumstances this approval can be *ex post facto*.[90]

What does this mean for state secrecy? Commentary has long focused on intrusive surveillance and data-gathering in terms of privacy and due process rights.[91] The tendency is to ask who authorises access to data and meta-data – until recently an overlooked aspect of data collection.[92] It is hard to dispute that a thwarted terror attack is better than a successful one, but prevention should not be a carte blanche. There is little debate about legitimacy or necessity of secrecy in intelligence and security, or at least debate that is not motivated by external factors such as the ECtHR.[93] The assumption seems to be that extensive secretive powers operate on the assumption of political and legal trust without testing the foundation or architecture of that trust.[94] Just as RIPA 2000 did before it, IPA 2016 conceals that key provisions are vaguely worded and structurally tangled, and rely on blunt assertions of executive privilege regarding national security which, along with serious crime,[95] remains undefined in statute and is so broadly applied it is considered meaningless.[96]

The statutory provisions for investigatory powers hint at the scope of secrecy because they demonstrate that the state wants to collect information on its own citizens as well as foreign nations (and nationals) and how it will go about doing so. The powers indicated for a large range of bodies governed by and encapsulated by the IPA 2016 and earlier provisions are far-reaching. The possibility of effective oversight of those powers has similarly been captured by the cloaking demand of secrecy. For instance, the scrutiny of the security and intelligence agencies has been at best haphazard and at worst deliberately complicated. Prior to statutory provision, oversight took the same form as any other prerogative power. The agencies' directors general and chiefs deliver internal oversight providing annual reports to the Prime Minister.[97] External oversight evolved after a patchy start (the Security Service Tribunal did not uphold a single complaint in its first three years)[98] into a more cohesive framework under RIPA 2000.[99]

89 IPA 2016, Part 2, s 19 and s 23.

90 Ibid s 24.

91 K Ewing, *Bonfire of the Liberties* (Oxford University Press 2010).

92 L K Donohue, 'Bulk Metadata Collection: Statutory and Constitutional Considerations' (2014) Georgetown Law Faculty Publications 1350.

93 Curtin (n 17).

94 D Anderson, Independent Review of Terrorism Legislation, *A Question Of Trust: Report of the Investigatory Powers Review* (OGL 2015) <https://terrorismlegislationreviewer.independent.gov.uk/wp-content/uploads/2015/06/IPR-Report-Print-Version.pdf>.

95 Serious crime is left undefined: G Robertson, 'Recent Reform of Intelligence in the UK: Democratization or Risk Management?' (1998) 13(2) Intelligence and National Security 144–58, 148.

96 D Korff et al, 'Boundaries of Law: Exploring Transparency, Accountability, and Oversight of Government Surveillance Regimes' (2017) Global Report <https://ssrn.com/abstract=2894490>.

97 SSA 1989, s 2, and ISA 1994, s 2(2) both with relevant amendments in the Security Service Act 1996; Leigh (n 66).

98 M Phythian, 'The British Experience with Intelligence Accountability' (2007) 22:1 Intelligence and National Security 75–99, 77.

99 IPA 2016, s 234. The Investigatory Powers Commissioner replaces the Intelligence Services Commissioner which covered MI5 and MI6, and the Interception of Communication Commissioner which covers GCHQ (RIPA 2000, Part IV, ss 57–64).

The Investigatory Powers Tribunal (IPT), which hears complaints about communication interceptions and any security and intelligence matters, has been criticised for providing only nominal accountability.[100] Until 2015, when the IPT finally dared to find any agency behaviour unlawful[101] (albeit this behaviour now complies), there were no 'publicly recorded examples of a tribunal finding against any of the services'.[102] Accountability efficacy depends on various factors, including agency willingness, but between 2001 and 2007 *none* of the 600 complaints was upheld, and to 2011 a mere 10 of 1301 complaints were upheld.[103] Moreover, the 2011 and 2015 statistics in the IPT's report excludes all 660 complaints relating to Privacy International's 2015 campaign.[104] The annual report is further tainted by secrecy as it is subject to redaction 'if it appears . . . contrary to the public interest' or any other functions of the services.[105] While, as *Watson* indicates, conformity to necessity and proportionality standards will continue to circle the Act, a recent case suggests the limits to judicial review for investigatory powers are further tightening.[106]

Ineffectual parliamentary scrutiny further bolsters this secrecy. The Intelligence and Security Committee (ISC) introduced in 1994 was intended to bolster external oversight, but lacked teeth and so was replaced by the Intelligence and Security Committee of Parliament,[107] which is still not particularly effective. The Prime Minister can exclude any prejudicial information from its annual report[108] and delay its publication, significantly curtailing parliamentary debate. While reports have been more forthcoming in recent years, greater scrutiny is achieved in large part due to the committee members' expertise and 'ability to divine' the right questions.[109] The committee is further restricted by its domestic remit, the need for prime ministerial permission to scrutinise operational activities and the Cabinet's ability to veto demands for agency material. Since only one committee is trusted (officially and unofficially) to oversee the security and intelligence agencies, parliamentary oversight is remarkably inhibited.[110]

Information control

Information is controlled through three intersecting mechanisms: measures which ostensibly provide, but in fact restrict, access to information (FOI 2000 exemptions and the ministerial veto); criminal sanctions (the Official Secrets Act 1911–1989) and civil actions (confidence, third-party liability and contract).

100 Leigh (n 16) 648.

101 *Prism/Upstream case: Liberty and Others v FCO (the Security Service, SIS, GCHQ)* [2015] UKIPTrib 13_77-H.

102 Leigh (n 16) 648.

103 Ibid 648.

104 Report of the Investigatory Powers Tribunal 2011–2015 (OGL 2016) <http://ipt-uk.com/docs/IPT_Report_2011_15.pdf>.

105 IPA 2016, s 234(2), para 651; previously RIPA 2000, s 58(7).

106 *Privacy International v IPT* [2017] EWCA Civ 1868.

107 Justice and Security Act (JSA) 2013.

108 JSA 2013, s 3(4); Birkinshaw (n 16) 49.

109 M Phythian, 'A Very British Institution: The Intelligence and Security Committee and Intelligence Accountability in the United Kingdom' in L K Johnson (ed) (n 66) 715.

110 A Defty, 'Recent Events at the Intelligence and Security Committee', Democratic Audit UK (30 May 2015) <www.democraticaudit.com/?p=5706>; H Bochel, A Defty and A Dunn, 'Scrutinising the Secret State: Parliamentary Oversight of the Intelligence and Security Agencies' (2010) 38(3) Policy and Politics 483–7.

The UK came late to a statutory right to access public information[111] and only after significant retreat from the original proposals.[112] Official information was something to control not share. Earlier provisions such as the Public Records Acts 1958–1967 detailed a 30-year rule after which public records could be released,[113] unless the documents were still in use or of particular sensitivity.[114] Material relating to national security and defence could be closed for longer. The FOI 2000 sought to engender a vital change from the prevalent need-to-know culture to presumption in favour of disclosure.[115] Most agree these expectations were not met.[116]

Despite being applicable to any body performing a public function, outlining a positive duty to provide information, or at least confirm its existence,[117] and imposing a response time limit,[118] there are 23 exemptions to the application of FOI 2000 falling into two main categories: qualified (class and harm-based)[119] and absolute. Qualified exemptions are subject to a public interest balancing test,[120] although the Act 'fails conspicuously to say anything at all'[121] on the definition of public interest. The nine absolute exemptions prohibit discretionary public interest disclosure covering information relating to security, court records and parliamentary information prejudicing effective conduct of public affairs.[122] Public authorities need not confirm or deny the requested information's existence.[123] National security is also covered by the harm-based exemption and is defined by ministerial certificate (applicable to any of the 17 qualified exemptions), catching anything not covered by the Official Secrets Act 1989 and the Security and Intelligence Acts (1989, 1994, 1996). Although ministerial certificates can be challenged by the Information Commissioner and the First-Tier Tribunal (Information Rights), in some cases the certificate itself counts as conclusive evidence of the exemption being in the public interest.[124] Ministers can also veto disclosure on

111 FOI 2000; by way of comparison, Sweden enacted legal provision in 1776, USA 1966, Canada 1982, New Zealand 1982 and Australia 1982.

112 HC Deb 28 July 1999, vol 570.

113 The Public Record Office and the National Archives at Kew.

114 Public Records Acts 1958–1967, s 3(4).

115 Home Office (Freedom of Information Unit), *Your Right to Know: Freedom of Information* (Cm 3818 1997).

116 Birkinshaw (n 61) 118–19; C Hood 'From FOI World to Wikileaks World: A New Chapter in the Transparency Story?' (2011) 24(4) Governance: An International Journal of Policy, Administration, and Institutions 635–38, 637.

117 FOI 2000, s 1.

118 Ibid s 17(1)(c).

119 Class-based information can be withheld regardless of harm; harm-based exemptions are subject to a prejudice test (FOI 2000, s 2 and Part II); see further Home Office (n 115) 3.7.

120 Guidance is provided by the Information Commissioner, the 2004 Code of Practice on Access to Government <http://webarchive.nationalarchives.gov.uk/20150603223450/https://www.justice.gov.uk/downloads/information-access-rights/foi/foi-section45-code-of-practice.pdf.>.

121 M Turle, 'Freedom of Information and the public interest test' (2007) 23(2) Computer Law and Security Report 167–76, 167.

122 FOI 2000, ss 23, 32 and 36 respectively.

123 Ibid Part 1, s 2(1)(b).

124 Ibid s 2(2)(b), ss 23 and 24 in particular.

'reasonable grounds'.[125] The recent battle to prevent the release of the 'Black Spider Memos' shows this has been used politically, as much as for true public interest.[126]

It is worth noting how much this contrasts with the seeming advance of transparency in general. The FOI 2000 has provided a straightforward way to request information. Indeed, it has irritated the very politicians that enabled it with both politicians and mandarins complaining about the impositions the Act created. For example, Tony Blair expressed his 'regret' at the introduction of the FOI 2000 as it 'hugely constrained' ministers' confidence in having frank discussions with advisors.[127] Of course, this frustration is not relevant to the exemptions nor is it clear what kind and extent of transparency is produced by some FOI requests.[128] The UK might be beginning to follow the ECtHR trend to view the FOI 2000 as a general duty to provide information without needing to first request it, but again this is a matter as much of politics as it is of law and requires understanding the other mechanisms available to limit the flow of information.[129]

Information is also controlled by the informal Government Protective Marking Scheme (GPMS), which provides four classification levels – top secret, secret, confidential and restricted.[130] These bear no relation to the Official Secrets Act 1911–1989 sanctions but may be adduced as evidence of likely harm or damage in court.[131] These markings impart a practice valuing secrecy over transparency and are further complicated by D or DA notices, a voluntary press self-censorship system.[132] The controversial system,[133] which depends largely on media acquiescence, has been significantly undermined by the internet age, but its continued existence is indicative of the governmental preference for closed processes.

This all needs to be seen in the context of the formal criminal sanctions relating to state secrecy in the Official Secrets Act 1911–1989.[134] The Act's brevity disguises its power.[135] It outlaws espionage, sabotage and unauthorised and damaging disclosures of official information. The 1989 incarnation replaced the excessively blunt[136] if not

125 Ibid s 53; Hazell et al (n 50) 356.

126 *R (Evans) v Attorney General* [2015] UKSC 21; see M Elliot's analysis, 'Of Black Spiders and Constitutional Bedrock: The Supreme Court's Judgment in Evans' Public Law for Everyone (26 March 2015) <https://publiclawforeveryone.com/2015/03/26/of-black-spiders-and-constitutional-bedrock-the-supreme-courts-judgment-in-evans>; Craig (n 1).

127 T Blair, *A Journey* (Random House, 2010) 516; Public Administration Committee, Oral Evidence (HC 1582-iv, 23 November 2011).

128 M Fenster, 'The Opacity of Transparency' (2006) 91 Iowa Law Review 885–949; A Colquhoun, 'The Cost of Freedom of Information' (Constitution Unit, University College London, December 2010) 2 <www.ucl.ac.uk/constitution-unit/research/foi/countries/cost-of-foi.pdf>.

129 *Magyar Helsinki Bizottság v Hungary* (2016) ECHR App 18030/11 <http://hudoc.echr.coe.int/eng?i=001–167828>.

130 Home Office (Franks Committee), *Report on Section 2 of the Official Secrets Act 1911* (Cmnd 5104 1972) §62.

131 Birkinshaw (n 16) 92.

132 <www.dnotice.org.uk/danotices/index.htm>

133 Major and Moran (n 8) 155; N Wilkinson, *Secrecy and the Media: The Official History of the United Kingdom's D-notice System* (Routledge 2009); Hooper (n 56) 224, 226.

134 Official Secrets Act 1911–1989 is currently the subject of a Law Commission consultation seeking to recommend reform, including stricter punitive measures and removing 'barriers' to prosecution like the damage test: *Protection of Official Data: A Consultation Paper* (Law Com No 230, 2017) <www.lawcom.gov.uk/wp-content/uploads/2017/02/cp230_protection_of_official_data.pdf>.

135 Prior to 1989, the Act was more instrumental as a threat than a sanction (Franks Committee (n 131) §13:123), and the pedestrian pace of reform could be read as deliberate.

136 Birkinshaw (n 16) 367.

draconian s 2 in its entirety.[137] Section 1 offences are subject to a reverse burden defence,[138] placing the onus on the alleged person to prove they did not know or reasonably believe the information would be damaging.[139] Quite how a person could prove this is another matter; presumably security and intelligence personnel and notified persons have little room for manoeuvre in this respect. However, in a substantial departure from the 1911 Act, mere receipt of information by a third party is no longer an offence. And yet, while ordinary citizens are the least restricted, they are in fact the most in the dark, unlikely to ever be privy to the most 'sensitive' information. Further, there is no settled consensus on the authorisation procedure, leaving room for political manoeuvring around unauthorised disclosure.

While the use of civil actions has waned in recent years, they nevertheless play a key role in information control alongside criminal sanctions. The law of confidence has been used to maintain cabinet secrecy (*Crossman Attorney General v Jonathan Cape Ltd* [1976] QB 752); to cover third-party liability (*Spycatcher*); and restitutionary damages have been sought for breach of contract (*Attorney General v Blake* [2001] AC 268). The now infamous *Crossman* diaries case, saw Jonathan Cape Ltd and the *Sunday Times* sued for breach of confidence on the basis of Cabinet responsibility, in particular relying on the privy counsellor's oath, presumably as secrecy associated with collective Cabinet responsibility is ignored when it suits the government. The case was not an outright win for either side; any confidence owed was held to have passed,[140] and confidence is a matter of circumstance not rule.[141]

The *Spycatcher* saga, much too convoluted to warrant detail here,[142] is a farcical episode in the history of state secrecy and shows the absurd lengths the state will go in order to maintain control. At the centre of the litigation is whether a breach of confidence (either in equity or contract)[143] could extend to other jurisdictions, third-party liability for that breach and the extent of the public interest in disclosure or non-disclosure of information.[144] To the government's chagrin, Wright, a former British spy, sought to

137 Franks Committee (n 131) §88:37; Hooper (n 56) 123; Birkinshaw (n 16); and the occasional historic cases (*R v Tisdall* [1985] (Unreported, 23 March 1984), the failed prosecution of Clive Ponting (*R v Ponting* [1985] Crim LR 318) and the Aitken trial (*R v Aitken* (Unreported 1971); J Aitken, *Officially Secret* (Weidenfeld & Nicolson 1971) 22, 56, for a sense of the history.

138 The *mens rea* requirement was significant in reform, see *Reform of Section 2 of the Official Secrets Act 1911* (Cmnd 7285, 1978) §7:7; Aitken (n 138) 22, 56; Birkinshaw (n 16) 3.

139 Official Secrets Act 1989, s 1(5).

140 Per Widgery at 771.

141 H Young, *The Crossman Affair* (Hamish Hamilton 1976) 203; the subsequent Radcliffe Report maintained a preference for common law approach, but recommended formalising the vetting and approval system for proposed publications, including a 15-year rule publication bar: Select Committee on Public Administration (Radcliffe Report), *Report of the Committee of Privy Counsellors on Ministerial Memoirs* (Cmnd 6386, 1976) §45–57, 83–6.

142 There were multiple concurrent parts to the five-year litigation: an Australian case (*Attorney General for the UK v Heinemann Publishers Australia Pty Ltd* (1987) 8 NSWLR 341; *Attorney General for the UK v Heinemann Publishers Australia Pty Ltd* (1987) 10 NSWLR 86 and *Attorney General for the UK v Heinemann Publishers Australia Pty Ltd (No 2)* (1988) 78 ALR 449); an appeal to the interlocutory Millet injunctions (*Attorney General v Guardian Newspapers Ltd (No 1)* [1987] 3 All ER 316 – hereafter *Spycatcher (No 1)*); a hearing on the permanent injunctions (*Attorney General v Guardian Newspapers Ltd (and Others) (No 2)* [1990] 1 AC 109 – hereafter *Spycatcher (No 2)*); contempt of court proceedings (*Attorney General v Newspaper Publishing plc* [1987] 3 All ER 276) and ECHR Art 10 cases (*Observer v UK* (1992) 14 EHRR 153; *Times Newspapers Ltd and Neil v UK* (1993) 15 EHRR CD49).

143 *Spycatcher (No 2)*.

144 The clash of rival philosophies per Scott J, *Spycatcher (No 2)*, 143.

disrupt myths about the propriety and importance of shielding the UK's security and intelligence regime from public view. As injunctions have only domestic force, the court found itself the arbiters of a case already decided by the ensuing tumult in the international press.[145]

Despite the cat irrefutably being out of the bag, several principles emerged from the ruling: when using confidence to suppress official information, harm to the public interest must be proven; third-party disclosure in breach of confidence has a limited defence of iniquity; and public interest cannot necessarily be sustained once the information has already been disclosed.[146] The potential harm and indeed contact with national security, from the 'exceptionally dull book itself'[147] following worldwide publication, had 'become rather remote'.[148] Indeed, quite far from showing irreparable damage, the government admitted several claims were already published in '12 books and three television programmes'.[149] But this did not stop the government at the ECtHR[150] bizarrely claiming *Spycatcher* focused on national security when the substantive discussion was on confidentiality's limits.[151] This blurring of the line between public and private law, dubiously implying necessity, is a pattern repeated in *Blake*,[152] which also demonstrates how state secrecy is shaped by a Cold War mentality. The case's paradigmatic language highlights how an incendiary approach is a tactic in state secrecy cases:[153] Blake was a traitor, a double agent. Alleged treachery and risk to national security is a 'knock-down' argument, requiring no further discussion.

Post-2001 counter-terror context

Much of the legal framework for state secrecy, formal and informal, was formed in an earlier era, but has now been embedded in a post-2001 counter-terrorism context. State secrecy mechanisms have mushroomed since 2001: there have been at least 10 legislative attempts to increase the power of the government to protect national security and limit access to information.[154] This high volume demonstrates how controversial and problematic these acts and amendments are. Changes were often the result of growing judicial intervention.[155] Successive governments have been Janus-faced, promoting democracy while eschewing transparency and legitimacy as priorities. It is only on the basis of significant Acts like the Human Rights Act 1998 and the FOI 2000 that limited

145 *Spycatcher (No 2)*, 156.

146 *Spycatcher (No 2)*, 222. This arises again in *Attorney General v Punch* [2002] UKHL 50, which effectively closed a potential law of contempt loop-hole opened by the Court of Appeal's ruling: see R Earle, and N Hanbidge, 'Temporary Injunctions: Punch and the Paper Tiger' (2003) 14(3) Entertainment Law Review 62–3.

147 Ewing (n 91) 143.

148 Per Lord Bingham, *Spycather (No 2)*, 224.

149 *Observer v UK* (1992) 14 EHRR 153, 220.

150 *Times Newspapers Ltd and Neil v UK* (n 143); *Observer v UK* (n 143).

151 Per Morenilla *Observer v UK* (n 143) 219.

152 *Attorney General v Blake* [2001] AC 268.

153 A W B Simpson, 'A Decision per Incuriam?' (2009) 125 Law Quarterly Review 433.

154 Terrorism Act 2000, Anti-Terror, Crime and Security Act 2001, Criminal Justice Act 2003, Prevention of Terrorism Act 2005, Terrorism Act 2006, Counter-Terrorism Act 2008, Terrorism Prevention and Investigation Measures Act 2011, Justice and Security Act 2013, Crime Justice and Courts Act 2015 and Counter-terrorism and Security Act 2015.

155 *A and Others v Secretary of State for the Home Department* [2004] UKHL 56 (*Belmarsh*); *Secretary of State for the Home Department v Rehman (AP)* [2001] UKHL 47; R *(Binyam Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2010] EWCA Civ 158, EWHC Civ 65 (*Binyam Mohammed and BM); Secretary of State for the Home Department v JJ and Others* [2007] UKHL 45; *Secretary of State for the Home Department v MB*; *Same v AF* [2007] HL; *Gillian and Quinton v UK* [2010] ECHR 4158/05.

restrictions were available, but, where possible, even these were subverted. Public interest immunity (PII) certificates and closed material procedures (CMP) have crept into more areas to protect government information and MI5, MI6 and GCHQ agents. This includes expanded use of government-vetted special advocates[156] to inhibit the courts' ability to scrutinise questionable government behaviour and subvert the rule of law.[157] Similarly, the use of terrorism prevention and investigation measures (TPIMs), the successor to control orders, enables individuals to be restricted in a number of ways, utilising civil sanctions as anticipatory measures at a lower standard of proof.[158]

These measures are usually discussed in the language of emergency and necessity to protect national security.[159] The Explanatory Notes to the recent Counter-terrorism and Security Act 2015 describe the 'heightened threat to our national security'.[160] In many ways, emergency has ceased to represent the exceptional and become the norm. It allows the standard and expected aspects of the law to be replaced by a norm of emergency where 'the state of exception appears as the legal form of what cannot have legal form'.[161] But in the UK these powers are *residual* powers that have been replaced in the constitutionalising (and liberalising) efforts of the twentieth century: in order to recreate them, they must be recreated in legal form. The UK has become a fortress state, where state secrecy is the norm and where information is kept from the external actors as well as internal.

3 Conceptualising state secrecy

What does this legal and political patchwork tell us about the concept of state secrecy? The concept must encapsulate the extent of its power and its ability to commodify information, as well as its tendency to conceal itself and creep into a wide range of government practices. The following section outlines three *overlapping* parts to the concept which could be considered models of state secrecy. Some aspects of secrecy fit within more than one category at a time, but appear different cast in the alterative light. As all secrecy involves intentional concealment, the three concepts are distinguished in part by intentionality. Consider who intends to conceal, what is intended to be concealed, and from what public.

Esoteric secrecy

The first concept identified is esoteric state secrecy,[162] referencing the etymological and philosophical meaning, not the common understanding of abstruse or incomprehensible. Arising from the Greek *esoterikos*, from *esotero*, meaning 'inner', esoteric refers in this stricter sense to that designated or intended for an inner or privileged group. Insiders are

156 J Ip, 'Al Rawi, Tariq, and the Future of Closed Material Procedures and Special Advocates' (2012) 75(4) Modern Law Review 606–23; C Murphy, 'Counter-terrorism and the Culture of Legality: The Case of Special Advocates' (2013) 24(1) King's Law Journal 19–37, 37.

157 A Hunt, 'From Control Orders to TPIMs: Variations on a Number of Themes in British Legal Responses to Terrorism' (2014) 62(3) Crime, Law and Social Change 290, 296; A Kavanagh, 'Special Advocates, Control Orders and the Right to a Fair Trial' (2010) 73(5) Modern Law Review 836–57.

158 A Ashworth and L Zedner, *Preventive Justice* (Oxford University Press 2014).

159 M Tushnet, 'Emergency Law as Administrative Law' in F Davis and F de Londras (eds), *Critical Debates on Counter-terrorism Judicial Review* (Cambridge University Press 2014) 121; C Gearty, 'State Surveillance in the Age of Security' in F Davis, N McGarrity and G Williams (eds), *Surveillance, Counter-terrorism and Comparative Constitutionalism* (Routledge 2014).

160 Counter-terrorism and Security Act 2015.

161 Agamben (n 45) 1.

162 Referencing Curtin (n 17) 7, but used differently.

privy to the secret. Outsiders are persons to whom the secrets are not revealed. It is a privilege to be deemed to have the expertise to be initiated as an insider. The content is less important than *who* controls the information and makes it secret.

Esoteric state secrecy limits the number of persons with a specific range of expertise who can be responsible for ensuring safe continuity of the nation, in other words, national security, covering anything from physical safety; the maintenance of borders; the detection and prevention of any threats; economic and stabilising factors such as the maintenance of a functioning economic market producing adequate wealth; to trade and bargaining power on an international platform. For example, national security is a founding premise of the Official Secrets Act 1911–1989 which criminalises espionage and the unlawful disclosure of information and protects state secrets. Only those who fall within a particular category or status are authorised to see and handle classified information. They are 'initiated' by 'signing' an Official Secrets Act declaration, a non-legally binding document making them aware of their obligations under the Act. Those transgressors who break rank and publicise information relating to national security without authorisation face retributive measures. The information might reveal the identity of insiders or reveal the knowledge insiders are privy to. Esoteric secrecy calls on parts of the state to be deferential to those within the sphere of power. The executive defers to its national security advisors, in other words, to its experts.

Esoteric state secrecy is stratifying. It creates groups of persons, an elite to whom particular (and powerful) information is available. Simply being part of the traditional 'elite' (the judiciary, the upper chamber of Parliament, the wealthy, the aristocratic and the corporate highflyer) does not admit one to the esoteric arena of state secrecy. This is a particular governmental and political privilege. Not all MPs or government ministers are cognisant of information concerning national security. The heads of the security and intelligence agencies report only to the Prime Minister and the relevant Secretary of State.[163] This institutes a principle of exclusion on the basis of expertise. If you are not the Commander-in-Chief (or de facto the commander's vested executive authority, such as the Prime Minister), or the government or Cabinet, or a person responsible for national security, you are neither able to determine the content of national security nor examine the evidence the determination is based on. Anyone not deemed an expert by those within will not be privy to national security information. Whether the Prime Minister and Cabinet members are experts, as a matter of fact, is a further question. For the exclusion claim, however, it is sufficient to accept they are since this is the current practice. This exclusion subverts the principles on which the ability of those who hold power is premised. The coterie has the expertise to represent and determine the public interest. The public 'consent' to government power, but only if there are measures to limit that power; but with government power, the position of privilege, the public cannot but accept the claim that those in power know more, know better. An expert is harder to challenge. Esoteric state secrecy provides an answer to the question 'Who gets to decide?' in the case of national security by curtailing the debate from the political and public realm and placing it only in the reach of 'those who need to know'.

Operational secrecy

The second conception, operational secrecy, is demonstrated by focusing on the UK's secret institutions. If for esoteric secrecy the relevant aspect of intentional concealment was *who* controlled information, operational secrecy is concerned with *why* they control

163 SSA 1989, s 2(2); ISA 1994, s 2(2).

information and *which* information they control. It is a functional argument, referencing the information's content. MI5, MI6 and GCHQ have never been very secret but have always been secretive. The secrecy is an imperfect arrangement accepted because absolute secrecy is neither achievable nor politically desirable. Stories of MI5, of British spies, of royal spies, of their exploits and achievements have abounded since their inception, if not before. Which begs the question, what is secret about MI5, GCHQ and MI6 if they are the worst kept secret in history? The answer is they were never intended to be secret in this sense. The concealment of their existence was a consequence of the covert manner in which they operate; their existence was never intended to be secret. The manner in which they behave is one characterised as 'hush-hush'. Reference is made to 'sources', 'advising' and 'intel'. Mention of the institutions and organisations from which information arises, at least prior to the twenty-first century, was scant.

The security and intelligence services' secrecy is the product of omission. The secrecy of their existence is pretence. It is no pretence, however, that their activities, procedures and tactics are most definitely secret. The domestic service was 'acknowledged'[164] as early as 1910 in an informal sense, but official avowal[165] provides a poor point of reference for operational procedure and technique. Details of current operations and procedures within the security and intelligence agencies is sparse or entirely absent. Whether or not the security and intelligence agencies successfully maintain control over operational secrecy is a separate question. They cannot control discussion and speculation about their activities.[166] This inability to prevent speculation references the idea of deep and shallow secrecy,[167] outlined below. Information the public knows exists but cannot access is shallow and information the public does not even know exists is deep. The security and intelligence agencies are shallow secrets, although some of their operations are deep secrets.

MI5, GCHQ and MI6, while not strictly secret or a deep secret, nevertheless typify operational secrecy in the UK. Their concern is to protect modern espionage techniques or 'tradecraft', as the intelligence terminology calls it.[168] This safeguards their procedures and techniques and conceals their activities and investigations from their targets. Operational secrecy refers to fragile and time-limited information, as well as information which has a longer 'shelf-life' or technical usage. There is still value in protecting knowledge of techniques used, even if a particular operational result is made public. There is a separate, more philosophical discussion here about the difference between theoretical and practical knowledge. Oakeshott criticised the rationalist preference for theoretical over practical knowledge.[169] But for the purposes of understanding the concept of operational secrecy, it suffices to say operational secrecy values both theoretical and practical knowledge. The work of the security and intelligence services is as much about preventing those engaged in espionage, sabotage, subversion and terrorism from acquiring a theoretical knowledge of the practices of MI5, MI6 and GCHQ as it as it is about surveillance of such persons.

164 Andrew (n 54) 28.

165 SSA 1989 and ISA 1994.

166 Fenster (n 129).

167 D Pozen, 'Deep Secrecy' (2010) 62 Stanford Law Review 257–339, 258.

168 L K Johnson (ed) (n 66) 14, 60.

169 M Oakeshott, 'Rationalism in Politics' in *Rationalism in Politics and Other Essays* (Liberty Fund [1962]/2nd edn 1991) 15.

The regulation of the security service, MI5, exemplifies operational secrecy. It is 'self-tasked', assessing its own priorities for action. The government provides some guidance on policy and the Intelligence and Security Committee performs oversight. With a domestic service, ministerial restraint is required, otherwise the Home Secretary or the Cabinet could be accused of requiring the service to act in a political or partisan manner.[170] But maintaining this 'arms-length' approach to policy provides room for a different kind of political controversy. MI5 justifies its autonomous advisory role on the basis of its expertise. Its self-tasked mandate, which keeps covert action outside domestic politics, is premised on prior advantages. The security services, observed Lord Neuberger, 'have an interest in the suppression of information'.[171] MI5 has an interest in maintaining the highest level of operational secrecy achievable because it reduces the scope for scrutiny of its work.

The statutory provisions reveal the extent to which this operational secrecy pervades the relationship between the agencies and government. While the directors general of MI5 and MI6 and the chief of the intelligence service (GCHQ) must produce an annual report for the Prime Minister and the Home or Foreign Office Secretary, there is no obligation for the Prime Minister to lay this report before Parliament or even the Intelligence and Security Committee.[172]

The Intelligence and Security Committee itself has offered the bare minimum penetration into the working procedures of the security and intelligence services until very recently. It was not a traditional Select Committee, with its attendant powers, but a 'committee of parliamentarians', executively appointed in consultation with the leader of the opposition. The Security and Justice Act 2013 rectified this, but the committee still suffers internal barriers to effective oversight. The publication of its annual report is invariably delayed to such a point when its contents are no longer of political interest. It can be redacted by the Prime Minister where the information is deemed to be 'prejudicial to the continued discharge of the functions of the services'.[173] In its 2015/2016 report there are 31 instances of redaction, most of which appear to relate to the budget in the appendices to an otherwise distinctly short report (five pages of actual text).[174] The 2013/2014 report only contains two-and-a-half pages of substantive text, one section of which relates to the death of a previous committee member.[175] The 2011/2012 report has 51 instances of redaction of uncertain length and detail.[176] A great deal of effort is expended on diluting the already weak powers of oversight over the security and intelligence services. Greater scrutiny is achieved at present only through the skills and expertise applied by those members of the committee divining the right questions to discover the underground well of security and intelligence behaviour.

Oversight is largely internal. The introduction of a single IPT under RIPA 2000 did little to change the nominal status of the complaints system. Between 2001 and 2007 there were 'no publicly recorded examples of a tribunal finding against any of the

170 Lustgarten and Leigh (n 72) 508.

171 The conclusion of the original and final edited 'paragraph 168', per Lord Neuberger MR, *Binyam Mohamed (Civ)* (n 156) 168.

172 SSA 1989, s 2(4), and ISA 1994, ss 2(4) and 4(4).

173 Security and Intelligence Act 2013, s 3(4).

174 Intelligence and Security Committee, *Annual Report 2015–2016* (HC 444 2016).

175 Intelligence and Security Committee, *Annual Report 2013–2014* (HC 794 2014).

176 Intelligence and Security Committee, *Annual Report 2011–2012* (Cm 8403 2011/2012).

services'.[177] Between 2001 and 2011 only 10 of 1301 had sufficient grounds to be upheld.[178] The year 2015 saw ground-breaking finds against the services, but the law had already been adjusted to legalise the practices.[179] Of course, it is possible the security and intelligence services consistently act in a manner beyond reproach, but the more likely explanation is that the system of oversight holds loss of operational secrecy a greater risk. All of which adds up to a great mass of behaviour which simply cannot be viewed through the magnifying glass of oversight and which cannot hope to capture the activities of the security and intelligence services, which by dint of their profession actively seek to act furtively. Their operational capacity can only be viewed through a tiny glass, darkly.

Efficient secrecy

The third concept of state secrecy is efficient secrecy. The state needs some secrecy to function well. Government in most forms operates to some purpose, be it public good, peace, order, the will of an autocrat, maximisation of freedom, or some other such driving factor. It is partly a logical proposition, whatever the purpose, that government should act so as to guarantee that purpose is satisfied.

Esoteric secrecy focuses on who gets to make decisions regarding information control. Operational secrecy focuses on the information's content and the behaviours of secret institutions. Efficient secrecy refers to a different type of information and a different type of public. Rather than information withheld on the basis of an enemy public or a public within, it is withheld from the mandated public (members of the state). It is a partly pragmatic and partly conceptual argument. Both elements refer to the idea of publicity as an ideal in liberal states. Complete publicity, the argument runs, is neither pragmatic nor conceptually possible. It makes no sense to publicise all information, even if you could publicise all information. In terms of an archetype example, efficient secrecy effectively presents two counter-publicity arguments. The first, the pragmatic argument, looks at Cabinet secrecy and the second, conceptual, looks at the limits of transparency.

It is a well-founded idea, arising from public choice theory, that efficient government is better government regardless of the particular political standpoint sought. The drive towards efficiency[180] has been shown to challenge some of the other principles which drive government. For instance, Newey defends political lying. While *prima facie* wrong, lying's wrongness 'is conditional on its violating the autonomy of its (intended) victim'.[181] In a democratic system the professional success of a politician depends on their appeal to the electorate, which is often based on 'highly implausible or blankly false claims about what can be delivered in office'.[182] The electorate recognise the exaggeration or plain falseness, but it still forms the mandate on which the successful politician is elected.

Fenster criticises the claim that transparent government is more efficient. He argues:

> [C]omplete transparency not only would create prohibitive logistical problems and expenditures . . . but more importantly, it would impede many of the

177 Leigh (n 16) 648.

178 Ibid.

179 *Liberty v Security Service, SIS and GCHQ* [2015] UKIPTrib 13_77-H.

180 J M Buchanan, 'Politics, Policy, and the Pigovian Margin' (1962) 29 Economica 17–28; A Breton, 'Toward a Presumption of Efficiency in Politics' (1993) 77(1) Public Choice 53–65.

181 G Newey, 'Political Lying: A Defense' (1997) 11(2) Public Affairs Quarterly 93–116, 106.

182 Ibid 107.

> government's most important operations and infringe upon the privacy interests of individuals who give personal information to the government.[183]

Newey and Fenster, in opting for pragmatism about transparency, claim not only that it is unobtainable but potentially undesirable. It is from these boundaries between competing political ideals that efficient secrecy arises.

Two elements demand consideration in connection with Cabinet secrecy. First, some secrecy in government makes for better, more efficient government because secrecy produces better deliberation and has a hand in producing an executive working in at least a pretence of consensus. Second, Cabinet secrecy is as much about the way in which the public is 'prepared' for the release of information. The Franks Report outlined the Cabinet need to retain the ability to discuss issues 'frankly and fully in private'.[184] The basis of Cabinet secrecy is the doctrine of collective responsibility. Were Cabinet discussions not secret, collective unity and the integrity of the discussions of the Cabinet would be damaged.[185] This goes further than the argument justifying secret discussions concerning national security. It potentially insulates the decision-making process within the Cabinet from scrutiny, or at least manages the way scrutiny is applied.

The *Crossman* diaries litigation is the classic statement of the protection of Cabinet secrecy. The issue in *Crossman* was whether the significant detail had yet passed into 'historical interest only'.[186] The antiquated practice at the basis of Cabinet secrecy imparts a duty of confidentiality. The Cabinet developed from a committee of the Privy Council, the formal body of advisors to the monarch. The Cabinet was once a committee which advised rather than decided. The procedure is inversed today, the Cabinet decides on behalf of the monarch and advises the monarch who (nominally) assents. As an advisory body, the Cabinet owed a duty of confidence to the monarch, underscored by the privy counsellor's oath. Members of the Cabinet are de facto privy counsellors and are required to take the oath, a duty of secrecy regarding matters discussed in Cabinet. The oath signifies the confidence privy counsellors owe as the sovereign's advisors, ensuring the Cabinet acts as one body and its parts owe a duty of confidentiality to the whole.

The decision in *Crossman* demonstrates the second factor in efficient secrecy, the idea of timing and presentation. While it was held that confidentiality and public interest exist with respect to the Cabinet, both were deemed time limited. The most common break with the principle of Cabinet secrecy is the regularity of leaks prior to announcements, which emphasises how timing is relevant to the idea of efficient secrecy. Widgery J claimed leaking 'is an accepted exercise in public relations'.[187] Information management, in this sense, is a strategic interpretation of Cabinet secrecy. Adjusting Bacon's aphorism, control of knowledge is power. Cabinet secrecy maintains that government works better when it controls when and how information is released. A well-timed leak can assist the government in preparing the public for a controversial decision in the same way a delay in publicising a decision can wait out the storm of conventional politics. These tactics are not necessarily a political or public good but attempt to secure efficient government. A controversial but necessary decision might fare better if government does not have to defend it in the court of public opinion.

183 Fenster (n 129) 902.

184 Franks Committee (n 131) §11:66.

185 Ibid §11:68.

186 *Crossman* at 759 §D.

187 Ibid 770, §E.

Secrecy in the service of the state has its origins not in the hard-won constitutional privileges or even the tacit assent on the part of the ruled populace, but in the very practice of rule. At its most basic, it ensures the survival of the state.[188] Efficient secrecy through the archetype of cabinet secrecy highlights a tension at the heart of liberal political theory.

On the one hand, political discourse is better when it is held in public, publicly available and open to as many people as possible. Political discourse denotes political decision-making, both the decisions made and the manner in which those conclusions are reached. According to Bentham, this universality suggests the inescapable viability of publicity as the 'fittest law for securing the public confidence'.[189] Only through publicity can the electorate act from knowledge. Secrecy, argues Bentham, is 'an instrument of conspiracy; it ought not, therefore, to be the system of a regular government';[190] whereas publicity exposes politics to the cleansing light of scrutiny. As Brandeis famously has it, sunlight is the best disinfectant.[191] Bentham gives three exceptions to the rule of publicity which are too narrow and idealistic to be of help. The 'fittest law' is to be suspended when its effects 'favour the projects of an enemy', unnecessarily injure innocent persons, and inflict too severe a punishment on the guilty.[192] Bentham gives little explanation for what he means by each of these. The meaning in the first two is relatively clear, but the third is less so.

On the other hand, efficient secrecy directly challenges Bentham's conception by suggesting secrecy has a role to play *even* when the general rule of liberal politics conforms to publicity. Decision-making and the process of deliberation leading to decisions can often be more efficiently and effectively made in closed spaces, by a limited number of persons. O'Neill notes '[a] well known result of debate is further debate, rather than the ending of all disputes'.[193] Publicity here is invoked in clear contradiction to most claims for publicity. Secrecy enhances deliberation. Removed from the pressures and brightness of complete publicity, debate is more reasonable, more flexible and results ultimately in more rational public outcomes.[194] Secrecy can benefit high-level discussions because members can 'speak candidly, change their positions, and accept compromises without constantly worrying about what the public and the press might say'.[195]

In addition to its impracticality, absolute publicity is not conceptually feasible. Lessig asks whether the trumpeting of transparency-as-value fails to consider it in a critical manner.[196] While freedom of information does not mean absolute transparency, the crippling, debilitating effects of too much transparency, with its consumption of energy and resources, could make for an inert political system. If we return to efficient government as one which acts towards some purpose, to champion a system which would paralyse decision-making seems a little perverse. Of course, no one is arguing for complete, absolute transparency. But expansive transparency can create problems. How

188 Pallitto and Weaver (n 21) 93.

189 Bentham (n 37) 29.

190 Ibid 39.

191 Brandeis (n 26).

192 Bentham (n 37) 39.

193 O O'Neill, *Constructions of Reason: Explorations of Kant's Practical Philosophy* (Cambridge University Press 1989) 537.

194 C Chambers, 'Autonomy and Equality in Cultural Perspective' (2004) 5(3) Feminist Theory 329–32, 329.

195 A Gutmann, and D Thompson, *Democracy and Disagreement* (Harvard University Press 1996) 115.

196 L Lessig, 'Against Transparency' *The New Republic* (9 October 2009) <www.newrepublic.com/article/books-and-arts/against-transparency>.

much transparency is enough to oil the wheels of the political machine, motivating government and public alike, and how much would paralyse and produce disaffection? This is a logical sense in which government can and should hold on to some information. It should be less concerned with actively publicising information. The difference is found in the motivating factor, like the difference between an advertent and inadvertent omission, which is key to understanding efficient secrecy.

The concept of transparency 'relies upon an inappropriate model of information and communication to produce an inaccurate understanding of government information'.[197] This is no less true of the concept of secrecy. Without an appropriate model of information and communication, the same tired comprehensions of secrecy will be rehearsed. What is government information? What is communication? Fenster reorients the discussion of information theory to accommodate the understandings arising from hermeneutic and structuralist theories of textual information.[198] The concept of state secrets cannot be based on the assumption that the state is an omniscient singular body, nor can it assume it is internally coherent with respect to the information it does hold. It is a pointless exercise to ask whether freedom of information legislation increases transparency if the model of information control is inaccurate.

Fenster's criticism of transparency is pertinent to the secrecy-for-efficient claim. The traditional account of transparency, presumes the existence of a coherent, responsible and responsive state in the traditional form that exists as a model of democratic government in liberal political theory.[199] Theories of transparency do not pay enough attention to the fractional nature of government. Does the Home Secretary, let alone the civil servants, really know what is going on? Who is doing what in the Foreign Office, in the Cabinet Office, in the Treasury? This is not to claim that there is no communication or collaboration between government departments. Rather it is to suggest epistemologically that anyone's understanding of the government is limited, even those on the inside and in the know.

What does this mean for state secrecy and the concept of efficient secrecy? It suggests, simply, that one person's intentional concealment is another person's unknown. The difficulty – perhaps the impossibility – is in telling the difference. The concept of efficient secrecy contains a potentially irresolvable ambiguity, in much the same way as there is an underlying question at the basis of the freedom of information debate: with whom does the final determination lie? Who ultimately gets to determine what is in the public interest to keep secret, or even, who gets to determine the public interest: the government or the people?

Conclusion

State secrecy is not a monist concept. It is supported by complex institutional, legislative, political and cultural structures and practices. This exploration of the concept of state secrecy has produced a tripartite definition. State secrecy is esoteric, operational and efficient. Esoteric describes the part of state secrecy that restricts access to decision-making and information. It is a facet of power, utilised to control. Operational describes state secrecy-protecting techniques, procedures and investigations. It is not as all-encompassing as esoteric secrecy but can accumulate through the employment of jigsaw theory. Finally, efficient secrecy describes state secrecy as functional and the product of

197 Fenster (n 129) 949.

198 Ibid 925.

199 Ibid 915.

the limits of transparency. Functional decisions are made faster and more effectively under secret conditions. The limits of transparency make secrecy inevitable as well as useful. The tripartite conceptualisation encompasses those transferable aspects of the existing literature on state secrecy. Power and control is seen in esoteric and operational secrecy. Institutional necessity is seen in operational and efficient secrecy. Efficient secrecy better describes how state secrecy is necessary but in need of balance and provides the boundaries of how that balancing might take place. The tripartite conceptions also make sense of the relationship between the three conceptions by giving content to the idea of state secrecy as in flux.

What does this tripartite definition of state secrecy tell us? State secrecy suppresses its own history, hiding its ingrained role in political history and the security rhetoric of the early twenty-first century. State secrecy as esoteric, operational and efficient provides public law with a perspective from which to explore not just the impact on civil liberties, but how and why state secrecy is a risky but fundamental part of the UK's constitution. By understanding what state secrecy is, as a legal entity and a socio-political behaviour, better regulatory practice can be established, challenging the security and intelligence agencies to work with and within scrutiny. It challenges the repetitive unsubstantiated claim of necessity, ensuring that, if it must exist, it is an intentional, not incidental, state secrecy, thereby bringing state secrecy to the democratic approach the UK purports to uphold, one which is vigilant to the dark charm of secrecy.