



**Towards a Typology of Cultural Harm: the UK Gender Recognition Act 2004, 'Trans Fraud' and 'Gender Deception'**

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## Cultural Harm: ‘trans fraud’, ‘gender deception’ and zero-sum games

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### Abstract

*In recent years zemiology has emerged to pose key questions about the ways in which social harm emerges from non-criminalised deleterious acts, from criminalisation processes and from the everyday workings of our socioeconomic systems. This article explores and contributes to the zemiological perspective by focusing specifically on developing the notion of cultural harm, as one aspect of social harm. Utilising the examples of (i) the UK Gender Recognition Act 2004, (ii) a case of ‘trans fraud’ and imprisonment, (iii) and three legal cases involving ‘gender deception’, it explores the limitations of zero-sum approaches to recognising harm. In doing so, the article develops a typology of cultural harm that enables us to move beyond current conflicting claims to harm and begin to identify alternatives that better recognise and address all forms of harm, including those imposed by the hegemonic cis-hetero-patriarchal structures.*

**Keywords:** Cultural harm, zemiology, transgender, ‘gender fraud’

### Introduction

The aim of this article<sup>3</sup> is to explore the utility of a concept of cultural harm by applying it to contemporary debates about gender recognition and fraud/deception. Rather than simply arguing in favour of trans rights or for a

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more celebratory, empowering response to questions of equality and diversity, the approach we are adopting here focuses instead on the competing range of harms that are being evoked and the cultural meanings that underpin them. Underlying our argument are two key objectives: that a cultural harm approach allows us to recognise and respond to prevailing power imbalances; and that it should seek to dismantle rather than entrench community borders and barriers (see Cooper, 2002). In recent years British public policy and criminal justice discourses have recognised that hostility based on transgender identity is harmful (CPS, 2018). Yet, considerable disagreement exists about how to safeguard trans<sup>4</sup> and gender non-conforming communities from this threat. This raises questions as to whether this is a matter of public awareness, visibility, education and anti-poverty strategies or an issue that requires extra police, greater surveillance and better criminal laws. Simultaneously, the broad consensus that anti-trans hostility causes harm contrasts with recent legal responses to claims of gender identity fraud and public debates concerning gender and imprisonment.

In this article, we explore constructions of trans fraud and gender deception in order to help develop the concept of cultural harm. As we show, concerns about so-called deception by trans people in public spaces, public bathrooms, secure institutions as well as in the domestic sphere as partners and family members have gained momentum. However, while for policy- and law-makers the central questions when handling disputes about rights in relation to gender identity typically involve determining whether there is a risk of causing real harm to trans and gender non-conforming people themselves or to others, such discussions are marked by a tendency to interpret such issues too narrowly. Instead, we argue for a need to situate these issues within diverse discourses of harm and cultural harm, as part of the broader project of zemiology. In doing so, we argue, before turning to resolve the antagonisms between competing rights claims, policymakers must tackle a wider concern: how are these particular debates bound up in wider structures of cultural harm generation?

To begin to answer this question, this article focuses on developing a concept of cultural harm through exploring its application to a case study of constructions of trans fraud and gender deception, and by concluding with some tentative recommendations. By bringing a typology of cultural harm to bear on three examples representative of contemporary culture wars, we consider how cultural harm manifests through the destruction of ways of being, through the imposition of culture and through identity claims being challenged and undermined.

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<sup>4</sup> 'Trans' is being used here as an umbrella term to cover a variety of gender non-conforming identities and it is not limited to transgender people.

The article opens with an exploration of cultural harm. Specifically, it outlines the forms that cultural harm has taken in relation to different contexts, and the problems raised by a more critical analysis. Because contrasting norms and meanings underlie most political engagements with cultural harm, the article then draws a typology of cultural harm beyond existing configurations of forces and relations. In doing so, it identifies three key aspects of cultural harm: (i) harm *to* culture, (ii) harm *by* culture, and (iii) misrecognition. Subsequently, the article turns to apply this typology in three examples. The first example refers to the conflict that has arisen over proposed reforms to the GRA. We then move to explore a widely-discussed case linked to trans people in prison, before we examine cases of 'gender deception'. While harm is interpreted in diverse ways, as examined in this set of legal cases of gender deception, the approach we are adopting treats harm as injury or threat of injury to life, identity and ways of being in the world, with both interpersonal and wider structural consequences.

Our argument can be summarised as follows: we argue that existing approaches to trans people reinforce dominant sexual and gender binaries which, in doing so, inflict real, cultural harm on trans and gender non-conforming communities. At the same time, however, we argue that current approaches to recognising this type of cultural harm typically descend into zero-sum games between different groups' claims to harm. What is needed, we propose, is a better understanding of cultural harm, inspired by the perspective of zemiology, which provides new ways of thinking about, talking about and responding to harm, that also challenges the existing hegemonic cis-hetero-patriarchal gender order.

### **The emergence of cultural harm**

The emergence of zemiology during the late 1990s marked a crucial shift for scholars who sought to move beyond the strict boundaries of the mainstream criminological canon (Pemberton, 2016; Boukli and Kotzé, 2018). Equipped with a new vocabulary and aspiring to open up a discursive space to articulate a multiplicity of harms that lie outside the conventional discourses of crime, processes of social harm generation became legitimate focal concerns (Hillyard and Tombs, 2017). The landmark edited collection *Beyond Criminology: Taking Harm Seriously* (Hillyard *et al.*, 2004) provided the foundations upon which future zemiological scholarship would build. In the collection's opening chapter Paddy Hillyard and Steve Tombs (2004: 19-20) identify different types of harm with which a social harm approach would be concerned. While in their identified types of harm there is a clear engagement with a normative approach, the sequence of harms also points to a set of values that both straddle and knit together different harms: (1) Physical harm; (2) Financial or

economic harm; (3) Emotional and psychological harm; (4) 'Cultural safety' (Hillyard and Tombs, 2004: 19-20).

Against that background, the idea took root that the notion of 'cultural safety' could be developed into a concept of cultural harm. For instance, Steve Tombs has recently deployed the concept of cultural harm in relation to the harms associated with the fire at Grenfell Tower in London on 14<sup>th</sup> June 2017. Discussing the aftermath of the fire, he suggests that

In terms of cultural harm ... it is clear that in their physical relocation – and hence, dispersal – that many of both the routines and networks which constitute social life – at school ... the local shops, around the flats and so on – have been rent asunder. But dispersal does not just mean loss of community – it can mean isolation and meaningless. (Tombs, 2019: 73)

Here we see the idea of cultural harm as the harms that arise from the destruction of people's ways of being in the world – the breaking up of their communities and their social life. This relates directly to culture as a way of life and the destruction of people's ways of life is identified as one form of cultural harm. However, as the above quote indicates, this is far from a single or unified concept of cultural harm.

Within a legal context that reflects structural constraints and pressures, a separate discussion of cultural harm has emerged from the recent work of legal scholars Erika Rackley and Clare McGlynn surrounding rape pornography. Rackley and McGlynn (2014) were critical of the decision to exclude images of rape from definitions of 'extreme pornographic images' in the UK *Criminal Justice and Immigration Act 2008* (see Palmer, 2018: 37). They argue that rape pornography causes cultural harm insofar as it 'sustains the cultural context in which society fails to take sexual violence seriously' (McGlynn and Rackley, 2014, para. 1.2). Rackley and McGlynn maintain that the role of rape pornography is crucial in normalising sexual violence and undermining women's autonomy, and in fostering harmful attitudes, rather than suggesting any direct link between viewing rape pornography and committing sexual violence. Although these claims can be debated, the relative success of these arguments is perhaps reflected in the subsequent criminalisation of possession of 'rape pornography' in England and Wales in 2015 (s.37 *Criminal Justice and Courts Act 2015*). Within this context, cultural harm bears primarily on the question of how a particular wrong occurred, how it relates to other wrongs and how it enables certain conditions to emerge. In this context, cultural harm does not emerge in relation to direct causation, and in this sense the issue of cultural harm is distinct from determining liability for the commission of harmful acts. But if we want to investigate the functions of cultural harm, we

need to first consider: what kind of explanatory frames (if any) are provided by a focus on culture?

### **From cultural criminology to cultural harm**

One reason for the absence of a unified concept of cultural harm has been the relative silence surrounding this notion within criminology, as one of us has commented previously (see Boukli and Renz, 2018). An exception to this can be found in the emergence of cultural criminology (Hayward, 2012; Presdee, 2000). Although space precludes more detailed elaboration of the perspective, central to cultural criminology is the emphasis placed on certain forms of criminality as an active, situated and politically charged response to a distinctively late modern cultural experience. Cultural criminology is defined as a distinct theoretical, methodological and 'interventionist' approach that places criminality and its control squarely in the context of culture. In this sense, crime as well as the agencies and institutions of crime control are viewed as cultural products or as creative constructs that carry complex meanings (Hayward, 2012). Sociocultural transgressions result from certain internal psychic and emotional conflicts that are themselves spawned by the contradictions and peculiarities of life in late modernity.

Within cultural criminology, 'culture' often features as a supplement to earlier ethnographic work on sub-cultures with techniques of media analysis derived from cultural studies (Fenwick, 2004). In this sense, emphasis is placed on certain forms of criminality as active, situated and politically charged responses to a distinctively late modern cultural experience. Late modernity is underscored, in this version of 'culture', by the dynamic tension between forms of control and resistance to that control (Fenwick, 2004: 378). As such, cultural criminology aims to resist explanations of crime that rest upon notions of opportunistic and rational-choice theories, and upon the 'dazzling', uncritical, and positivistic use of statistics (Young and Brotherton, 2014). Instead, it highlights the situated production of meaning that is embedded in all social acts, including crime.

For cultural criminology, 'culture' is intertwined with crime. Specifically, Jeff Ferrell (1995) highlights three key areas for cultural criminology: (i) crime as culture – essentially establishing that a great deal of criminal behaviour is also subcultural behaviour; (ii) culture as crime – relying on the premise that a variety of cultural activities (e.g. art, music, and fashion shows) may actually be defined as 'criminogenic' or indeed labelled as criminal; and lastly, (iii) in a variety of ways the media construct the reality of crime and crime control. However, when trying to disentangle a definition of culture from crime, commentators have questioned the consistency of what cultural criminologists actually mean by 'culture' in the above three key areas (O'Brien, 2005).

When it comes to definition, literary theorist Terry Eagleton (2000; 2016) maintains that culture is an exceptionally complex word with four major senses standing out: (i) a body of artistic and intellectual work; (ii) a process of spiritual and intellectual development; (iii) the values, customs, beliefs and symbolic practices by which men and women live; (iv) a whole way of life (2016: 1). Regarding the latter sense, if culture can also signify a corporate way of life, as it does when we speak of beach culture, police culture, hipster culture, club culture and so on, then it is hard for it to serve as a yardstick by which to assess such forms of life, as they seem to be intrinsic to the status quo and only exist simply to 'affirm a particular social identity', rather than to cast a critique on the social order as a whole (Eagleton, 2016: 160).

Nevertheless, for Eagleton, things are slightly different when political cultures (gay, feminist, ethnic, musical), which are indeed deeply critical of the status quo, are involved. For instance, many feminists have seen feminist action and the overthrow of capitalism as two interconnected goals. In doing so, they have envisaged a world beyond the horizon of patriarchal and capitalist reality. As long as the language of gender, identity, marginality, diversity, and oppression is articulated in connection to state, property, class struggle, ideology and exploitation, and the prospect of fundamental change, then culture is linked to materiality (Eagleton, 2016: 160). So, 'war, hunger, drugs, arms, genocide, disease, ecological disaster' all have their cultural aspects, but culture is not the core of them (Eagleton, 2016: 162).

Building on this understanding of culture, the concept of cultural harm inspired by zemiologists (see for example Tombs, 2019) allows a broader understanding of both culture and the harms produced both within and by culture. Between the analyses of the fire at Grenfell Tower and rape pornography cases, cultural harm is presented as either the destruction of people's life – of their way of being – and of their material resources, or a zero-sum game with one side 'winning' in discussions about harm. In terms of the latter, as reflected in debates about rape pornography, the two sides involve: either the primacy of general human rights over cultural rights, or the primacy of freedom from the cultural harm of pornography over the right to freedom of expression. As it will be shown, this conflict appears to be similar to the legal analyses over trans rights and same-sex spaces as well as the sexual assault claims which turn on proof of 'gender fraud'. However, first we need to develop a clearer account of cultural harm as a basis for this analysis.

## **Cultural harm**

A recent review of the literature around 'cultural harm' has therefore revealed three ways in which 'cultural harm' seems to be defined implicitly:

1. Cultural harm as harm *to* culture
2. Cultural harm as harm *by* culture
3. Cultural harm as misrecognition

### *1. Cultural harm as harm **to** culture*

Taking each of these in turn, cultural harm as harm *to* culture is reflected in the way in which Tombs (2019) uses this term in relation to the harms of Grenfell Tower. It is harm that arises through the destruction or undermining of particular cultures or ways of being. This harm can result from acts such as the destruction or misuse of cultural artefacts or the denial of minority rights linked to unfair distribution of resources, wealth and services or more subtly through the undermining of particular communities.

In this sense, arguably, political cultures (in Eagleton's sense of the term) that tap into non-normative genders are at stake in the examples that we visit in the next section. This is because collectively-developed genders can take both conventional forms as well as forms that interrogate the contemporary status quo (Cooper and Renz, 2016). It is those networks and communities in which dissident or non-normative genders are cultivated that have often been affected and cultural harm against them remains largely unaddressed.

### *2. Cultural harm as harm **by** culture*

Cultural harm as harm *by* culture refers to harms that result from the imposition of a particular culture. This can either be the imposition of a particular culture upon individuals or of a particular dominant culture upon another, minority culture via processes of cultural imperialism. This idea of cultural harm is most readily found in discussions about minority rights (see Fagan, 2017) and, more recently (and perhaps most extensively), in discussions about the criminalisation (or not) of rape pornography. In the analysis that follows, we demonstrate how the dominance of hetero- and cisnormativity within a patriarchal social order defines gender and sexual roles in ways that serve to undermine other cultures. At the same time, however, these dominant cultures are presented as the neutral background within which culture wars emerge.

### *3. Cultural harm as misrecognition*

Cultural harm as misrecognition relates to the harms that arise from having one's identity challenged, misrepresented or undermined. It is typically derived from a Hegelian idea that, as Nancy Fraser (2000: 109) puts it: 'identity is constructed dialogically, through a process of mutual recognition'. This is the idea that our subjective sense of our identity and our sense of self is necessarily developed in relation to others. Therefore, as Fraser (2000: 109) continues, '[t]o be denied recognition – or to be 'misrecognized' – is to suffer both a distortion of one's relation to one's self and an injury to one's identity'. This is a concept of harm that Majid Yar (2012a, 2012b) has developed in particular (although in his case with a view to making this the overarching definition of harm in general). Fraser, however, develops this idea of misrecognition further, but this time not in relation to identity recognition but in what she calls 'status subordination'. Therefore, the harm of misrecognition is found not 'in the depreciation and deformation of group identity, but [in] social subordination – in the sense of being prevented from participating as a peer in social life' (Fraser, 2000: 113).

It is important to note that these categories are overlapping. For example, the harms that are done *to* a culture are often inflicted *by* the imposition of another culture, typically (but not exclusively) by a majority culture on a minority one. Here harm is seen as being done *to* existing culture *by* the claims of another social group. But the harms done *to* and *by* culture also relate to misrecognition, insofar as the infliction of harm *by* and *to* culture is often manifested in the experience of *misrecognition* and the status subordination this entails. These harms of recognition are the symptoms or lived effects of cultural harm.

An example of this can arguably be seen in issues of cultural appropriation. As Rebecca Tsosie (2002: 313) highlights 'cultural appropriation harms the appropriated community because it interferes with the community's ability to define itself and establish its own identity'. For Tsosie this applies in the context of the marginalisation of Native American groups according to which western liberal culture has the power to control which cultural narratives are protected and which are silenced.

By shifting emphasis from individual responses to dominant cultural scripts as a way of making sense of individual transgressive and deviant behaviour, we argue, a zemiological perspective encourages consideration of the broader harms that arise through processes of cultural protection and the denial of cultural recognition. In doing so, it encourages a critical reflection on how cultural expressions (including theories and practices, and policies that construct and deny identities) – including criminology itself – are involved in the infliction of harm. We can see this by looking at three examples of constructions of 'trans fraud' and 'gender deception'.

### Three examples

Increasingly, cultural understandings of gender have shifted. Gender is being seen in more fluid terms and the rights and experiences of trans people have come to the fore of public debates. Specifically, as trans issues have become more visible in the twenty-first century, they have given rise to conflicting perspectives of trans and gender non-conforming people as, on the one hand, a (vulnerable and marginalised) group in need of recognition and protection, and, on the other hand, a threat to already vulnerable ciswomen<sup>5</sup> and as an extension of the systemic patriarchal social order that controls and silences women. Methodologically, the examples chosen testify to the substantial and wide-ranging engagement of legal and public policy discourse with concerns about deception and fraud in relation to gender. Having determined that harms are occurring in relation to these discussions, we set out to explore how cultural harm is more tightly entwined with the systemic character of harmful conditions. In terms of accessing the legal cases, appeal cases are generally reported and, therefore, we analysed the case reports, judgements and transcripts to the extent that they were available. In other instances, we drew on media reports to gather details for each case. These examples are not intended as exhaustive accounts, but rather as heuristic devices that enable us to see how the concept of cultural harm, as we have tentatively sought to delineate it, can apply in a real-world setting. At the same time, it is anticipated that by considering these issues some useful ways of theorising and responding to cultural harm can be suggested, beyond an existing tendency to treat them as zero-sum games.

#### *Example 1: proposed reforms to the Gender Recognition Act 2004 for England and Wales*

Our initial example relates to the proposed reforms of the GRA. Increasing concerns are particularly evidenced by recent anxieties regarding the potential deployment of (usually female) gender identity as a means of accessing sex-restricted spaces (typically what are seen as ‘women’s spaces’). For example, concern about people assigned as male at birth<sup>6</sup> adopting a female gender identity in order to access women’s toilets has received notable public and media attention in both the US and UK (see BBC 2016; Wood, 2018). In the UK particularly, recent government proposals to reform the GRA have been a source of conflict and debate (Renz, [forthcoming]; Renz, 2015).

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<sup>5</sup> ‘Cis’ or cisgender is the current term used to describe people whose gender identity matches their sex as assigned at birth.

<sup>6</sup> For the process involved in this identification at birth see e.g. Fausto-Sterling, 2012.

The GRA is a piece of UK legislation designed to outline the circumstances under which a person can legally change their sex as recorded on their birth certificate, provided that the sex marker they wish to acquire is either male or female. At present, from the perspective of a majority of trans people, many of the formal requirements for obtaining a Gender Recognition Certificate under current law, are seen to be bureaucratic, expensive, and intrusive. In particular, a requirement to provide evidence of a diagnosis of 'gender dysphoria' is seen to 'perpetuate the outdated and false assumption that being trans is a mental illness' (Minister for Women and Equalities, 2018: 21). As a result, there are concerns that although many people may want formal recognition of their gender identity, there are currently considerable barriers to accessing this.

Consequently, in 2018 a public consultation took place regarding government proposals to reform the GRA to make it easier for people to have their gender identity formally recognised (Minister for Women and Equalities, 2018). However, some groups and individuals have expressed concerns that loosening the restrictions on who is able to legally identify as male or female may have harmful implications for single-sex spaces – particularly those spaces that have historically been established as safe spaces for women – such as rape and domestic violence support services and centres, prisons, and public bathrooms and changing rooms. Critics of the proposed reforms have argued that in a patriarchal society the experiences of those who have acquired a female gender identity at a later stage are fundamentally different to those of ciswomen who were identified as female at birth and, as such, the presence of trans women in spaces designed for ciswomen further undermines ciswomen's voices and rights (Cooper, 2019). Further, it has been suggested that changing the law would allow predators to legally change their gender as a means of accessing women-only spaces with the sole intention of perpetrating direct sexual, psychological and physical violence upon women.

In terms of our analysis of cultural harm, central to these debates about the implications of proposed reforms to the GRA lies the potential for cultural harm, predominantly as *misrecognition* of trans and gender non-conforming individuals and communities – that is, the harm that results from having one's identity challenged, misrepresented or undermined. In its existing form, the requirement for a medical diagnosis of 'gender dysphoria' could be interpreted as a challenge that trans and gender non-conforming people must successfully 'prove' their identity in particular socially-prescribed ways, in order to gain recognition. By the same token, however, these and similar obstacles, such as the failure to prove this sufficiently or to obtain a Gender Recognition Certificate more generally, or even simply to 'pass' in one's gender presentation in ways that are deemed satisfactory to a hetero- and cis-normative audience, can be used as ways of denying trans and gender non-

conforming individuals' identity. Moreover, the misconstruction of proposed reforms to the GRA as the 'make or break' turning point for ciswomen's safety, while actually single-sex spaces are protected by the *Equality Act 2010*, is testament to the force of misrecognition.

Specifically, underlying current GRA legislation is an assumption that trans people continue to exist within established masculine/feminine gender binaries. The assumption underlying the GRA regarding a legal change of gender is that a person can be either male or female – but not something either outside this binary or both male and female positions. Therefore, although it is accepted that someone may be incorrectly assigned to either side of the binary, the binary itself is not questioned (although it should be acknowledged that the recent consultation explores whether to remove the requirement to identify as male or female in the GRA). In doing so, it denies the identities of those who do not conform to existing binaries and undermines ways of being that lie outside hegemonic gender binaries.

At the same time, by considering the case of gender identity in this way, we can also begin to see the multidimensional nature of cultural harm. Cultural harm in this instance, is also the harm done *to* a culture – that is, the destruction or undermining of particular cultures or ways of being.

### *Example 2: 'trans fraud' and imprisonment*

Directly linked to the above example, this second example considers the case of gender identity in constructions of 'trans fraud', in which we can also begin to see the multidimensional nature of cultural harm. The idea of cultural harm as harm *to* a culture has been reflected in cases concerning the denial of trans rights. For example, when determining prison facilities for trans people and their rights to recognition and to access particular spaces, decisions are imposed upon trans people regarding their 'true' nature. Thus, while the outcome of the GRA consultation is yet to be determined, the reframing of transgender rights within this context has had a number of consequences.

One such consequence has been the perpetuation and amplification of the construction and portrayal of trans people in general and trans women in particular, as deceptive and potentially predatory. This is seen particularly for instance through discussions regarding the case of Karen White. In September 2017, White, a trans woman with a number of previous convictions, including convictions for sexual violence, was arrested following an alleged stabbing. Although White had not obtained a Gender Recognition Certificate and therefore was, legally, male, she was transferred to a women's prison on the basis of her self-identification as female. Whilst at New Hall women's prison, she sexually assaulted two female inmates and was subsequently also

convicted of two rapes committed before she was imprisoned (Parveen, 2018). Following these convictions, White was detained in a men's prison.

The case caused widespread public outcry and has fed into debates outlined above regarding proposals to reform the GRA. In particular, White has been held up as a key example of the idea that gender identity could be deployed by predatory men to gain access to vulnerable women. Such fears have been stoked by popular media discourse surrounding the case, with White described variously as a 'trans faker' (Bannerman and Lister, 2018), 'a perverse and brutal charlatan' (Vine, 2018), a 'transgender 'fraud'' (Jeeves, 2018), and a 'sex fiend' and a 'pervert' (Binns, 2018). A tendency to refer to White by masculine pronouns has been evident in some newspaper commentaries on the case (e.g. Davies, 2018), as has suspicion raised about White's 'commitment' to a female gender identity (see, for example, Parveen, 2018; see also Davies, 2018).

Without wishing to be drawn into the particularities of White's case *per se*, it is reflective of broader concerns about trans identity and the formal recognition of that identity, as different groups retreat into different ideological tribes of identity (Allan, 2018). As it stands, the case of Karen White is presented typically in black and white terms: White as a manipulative fraud who, in the absence of physical or medical evidence, cynically presented herself as a woman when she was 'really' a man, in order to gain access to the opportunity to abuse vulnerable women. Therefore, further altering the grounds on which gender recognition is officially granted will open the floodgates and allow more cases to occur, which will fundamentally compromise the safety of women, as men will use fraudulent claims to female gender identity as a means to access women-only spaces.

The issues involved here are obviously important, difficult, and contested and there should be no doubt that the crimes committed by White will have had the capacity to produce real harm to her victims. However, neglected from mainstream media discourse is wider acknowledgement of both the sources of those harms, and also the harms that may be facilitated, if not directly resultant, from this contemporary 'trans panic' (Allan, 2018). In particular, there is a danger that contemporary constructions of trans people as 'deceptive' reflect and reinforce stereotypical views of trans people as, at best, 'in denial' and at worst 'devious' and 'predatory', whilst reifying hegemonic gender and sexual identities.

While the deliberate use of incorrect pronouns and implications of perversion and deception present clearly the harms of misrecognition, we can also see here instances of harm *to* a culture. To revisit Tombs' description of this aspect of cultural harm in relation to the Grenfell Tower fire, we can see in this case another example of how physical location, access to services and denial of established routines and networks, which constitute a way of being,

may be 'rent asunder' (Tombs, 2019: 73). For example, if a blanket policy to imprison on the basis of registered-at-birth-sex rather than gender were adopted, people's access, opportunity and freedom to express their gender would be at best suppressed and at worst denied. Moreover, the recognised use of 'protective custody' for trans prisoners (essentially a form of solitary confinement, see Lamble, 2012: 8) perhaps epitomises the 'isolation and meaninglessness' (Tombs, 2019: 73) that results from this sort of harm to culture.

Equally, as established, hegemonic gender binaries are continually reinforced and reified through legal discourse. When these formal and informal mechanisms fail, however, punitive sanctions arise with the final aspect of cultural harm in action: cultural harm as harm *by culture* – that is, the harm that results from the imposition of a particular culture. This can be seen in the third example to which we now turn: sexual intimacy and constructions of gender deception.

### *Example 3: Sexual intimacy and gender deception*

The tensions between the rights of trans people to recognition and protection versus the rights of others to be protected from potential deception and violence, also play out in the much more focused arena of legal cases involving 'gender deception'. Gender deception has been deployed as a successful legal argument in sexual offence prosecutions brought against trans and gender non-conforming people accused of sexual offences in the UK and elsewhere. According to this argument, gender deception potentially vitiates consent to sexual activity, and therefore disclosure of gender history and proof of that disclosure has effectively been demanded by courts. In what follows, three cases of gender deception are examined to explore the ways in which trans and gender non-conforming people become culturally intelligible through the criminal justice system as deceitful offenders. In these cases, as with those relating to the recognition of gender and accessing single-sex spaces discussed above, identification of harm is non-exclusive, as both sides can claim its presence and possibility: on the one hand, the right to sexual autonomy and choice of people to consent to perform certain acts only with people of certain genders; on the other hand, the right of trans people to privacy and security.

The first case to test the argument of gender deception in the UK was *R. v. Saunders* [1991], where the court sentenced Saunders to six years imprisonment for several counts of indecent assault against two cisgender women (Douglas, 2017). Subsequently, there have been six successful prosecutions between 2012 and 2017 in the UK, with most defendants, apart from two, receiving prison sentences and with all convicted defendants being placed on the sex offenders register (Sharpe, 2017a). Below we focus on three

of these cases, in terms of the legal precedent they set and their relevance to the concept of cultural harm.

In *R. v. Barker* [2012] (unrep), the defendant, aged 20, presented as a woman by the court, pleaded guilty to two counts of sexual assault (involving non-penetrative sexual touching) and one count of fraud, for which they<sup>7</sup> were sentenced to 30 months and three months imprisonment respectively (BBC, 2012). The court heard that one of the victims, who according to her testimony thought she had found the perfect boyfriend, realised something was wrong when she thought that the boy with whom she was having a relationship, looked similar to a boy the other victim was dating. Based on the evidence presented in the trial, the tools used by the defendant to deceive were largely 'performative' (Butler, 1988). Barker was wearing baggy clothes, hats and used a deeper voice, tapping into cultural conventions of masculinity. It was only after the police 'gave her a male strip search that they realised 'he' was in fact a girl' (Blake, 2012). In this sense, the convincingly gendered appearance of Barker appeared almost as an aggravating factor that stoked public anger over the alleged deception.

The case of *R. v. McNally* [2013], perhaps the most well-known of the gender fraud cases, followed the next year. This judgement is the first case on this legal issue that was appealed and consequently reported in full, and the decision is currently the leading authority on gender identity fraud under English law. As with the previous case, the defendant was presented as a woman by the court though it was reported that the defendant 'kept talking about wanting a sex change' (*McNally*, para.10). At the age of 13 McNally met M, who was 12 years old at the time, through a social networking site, where McNally used a male avatar. Over the next three years a romantic relationship developed between the two through online messenger, phone calls and webcam conversations. When McNally was 17 and M 16, they met in person on four occasions, two of which culminated in McNally digitally and orally penetrating M. During the fourth and final encounter the defendant was confronted by M's mother about their gender identity and the defendant admitted that they were identified female at birth. On 30 November 2011, M gave her full account to the police, where it was highlighted that she considered herself heterosexual and had consented to sexual acts because she believed these involved a boy. At the trial, the defendant pleaded guilty to six counts of assault by penetration contrary to s.2 of the *Sexual Offences Act 2003* and was sentenced to three years' detention in a young offender institution. However, they appealed against conviction and against the sentence on the grounds that as a matter of law the consent to the relevant sexual acts could

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<sup>7</sup> We are using gender-neutral pronouns here to navigate the conflicting information available about the defendant's gender identity.

not have been vitiated by deception as to the defendant's gender (*McNally*, paras. 25-26, 27, 46). However, the conviction was upheld and a revised 'sentence of nine months in a young offender institution, suspended for a period of two years, together with a suspended sentence supervision order also extending for two years' was imposed (*McNally*, para.52). So, while in a physical sense acts of assault by penetration were the same whether perpetrated by a male or a female, the sexual nature of such acts was 'different where the complainant is deliberately deceived by a defendant into believing that the latter is a male' (*McNally*, para.26). This has culminated in the introduction of the short-hand term 'gender fraud', which stands for the non-disclosure of gender history (Douglas, 2017: 154).

Lastly, in *R. v. Newland* [2015] the defendant was a university student, described by the presiding judge, Judge Dutton, as an 'intelligent, obsessive, highly manipulative, deceitful, scheming and thoroughly determined young woman'. The defendant befriended a fellow university student, X. Simultaneously they also contacted X through a fictitious Facebook profile under the name 'Kye', presenting themselves as a man. Newland was presenting as a man called 'Kye' and was establishing a romantic relationship with X, while they also presented themselves as a woman having a friendship with X. Over a period of two years Kye and X established a romantic relationship. However, according to Judge Dutton, the defendant's behaviour became increasingly controlling. X was required to wear a blindfold when the pair were together (Pidd, 2017), including when the relationship was subsequently consummated. The defendant and X had penetrative sex on up to ten occasions. Over time, however, X decided that she was not happy with the relationship. Faced with the prospect of ending the relationship, Kye threatened to kill himself and made up a story of Kye's mother having just died and needing to see X. Upon meeting, X and Kye engaged in oral sex, which culminated in X removing her mask and seeing her best friend wearing a prosthetic penis. Thereafter, Newland sent numerous emails to X apologising. Newland was sentenced to eight years imprisonment, reduced on appeal to six years for assault by penetration and to six months for an unrelated offence of financial fraud (see, also, Sharpe, 2017b).

On the one hand, in discussing the harms involved in these cases, the court drew attention to the interpersonal (physical, emotional and psychological) harms inflicted upon the *direct* victims, involved in '(active) deception', 'secrecy' and 'breach of trust'. This was mainly due to being harmed in irreparable and 'self-evident' ways by engaging in sexual intercourse involving LGBTQ and gender non-conforming people, which the criminal justice system perceived as homogender encounters. For instance, Judge Peter Moss (in relation to *Barker*), stated: 'the psychological damage to these innocent young women is self-evident', as the defendant had 'adversely touched their lives'

and had made them feel 'repulsive', 'dirty', 'angry' and 'suicidal' (see Judge Peter Moss quoted in Blake, 2012). Beyond these harms, the cases also drew attention to the harms inflicted on a number of people, including family, friends, the police and the wider society, all affected adversely *indirectly* by these instances of 'gender fraud' (see Judge Leveson in *McNally*; and reference to strip search in relation to *Barker* in Blake, 2012).

On the other hand, a cultural harm analysis of the case also reveals the interplay between the denial of recognition and the physical, psychological and emotional harms *by* culture to which the defendants of these cases were systematically exposed. We argue these harms manifest in three ways. Firstly, invoking 'spoiled identities' (Goffman, 1963), the defendants were portrayed as vulnerable by the court, of previously good character, with some retrospective accounts of medicalised history (including references to self-harm, social anxiety disorder, personality disorder, depression, OCD, low self-esteem, autism, ADHD) as well as with confusion surrounding their gender identity and sexuality (see, e.g., *McNally* para.47; Judge Dutton in *Newland*, p.3). Yet a discussion of vulnerabilities as well as of the conditions that engender and sustain those vulnerabilities along with the wider context that systematically reproduces these conditions is absent from the cases. In this sense, the courts have been selective as to which harms deserve *recognition*, and which can be ignored, amounting to harm as *misrecognition*.

Secondly, in the cases examined there is an underlying celebration of criminalisation attached to the idea that justice could not be served without resort to imprisonment and criminalisation. In this sense, punishment is the ultimate manifestation of harm *by* culture: it is a state-sanctioned form of harm that is deliberately inflicted to, in a Durkheimian sense, reinforce the dominant norms and values of society, including gender binaries. As a result, a wider discussion about the harms of imprisonment is silenced (see Drake, 2012; Scott, 2013), as well as the ways in which criminalisation and punishment entrench borders between communities (see Bowling and Phillips, 2007: 960).

Thirdly, the evidentiary accounts considered in court attest to a heteronormative understanding of both the encounters and of distinct ways of being beyond heteronorms. For instance, in *McNally* the court recognised that the defendant had no intention to cause harm, yet the court also sustained that M had chosen to have sexual encounters with a boy, supposedly proven by M's purchase of condoms before their first face-to-face encounter in 2011. Following this, gender history is registered as a material fact, non-disclosure of which may vitiate consent. Inadvertently, then, sexual intimacy with trans and gender non-conforming people is portrayed as inherently harmful (Sharpe, 2015; 2009). But while the connection between 'gender fraud' and consent is vivid in the cases, a connection between trans and gender non-conforming culture and consent is totally absent. In this sense both the drive to establish a

prosecution and the subsequent punishments imposed may suggest that a dominant heteronormative culture invokes punitive and regulatory social conventions to govern gender performances and correct them. An inconsistent gender performance (which is not consistent throughout history and across documents) is then perceived as inauthentic in a series of fraudulent claims (Sharpe, 2015), which is arguably rooted in dated public views about certain biological traits attached to certain genders and their inherent deceit and vengeance (Heidensohn, 1985). Criminalisation then comes to appear necessary, not in the (gender deception) sense of strip searching to reveal a 'true gender' (performed by the police in *Barker*), but in the (cultural harm) sense of denying the possibility of a culture beyond the gender binary. In this last sense, harm to culture emerges.

Overall, these cases illustrate the complex and uncertain effects of using criminalisation to establish a culture grounded upon cis-hetero-masculinity. With the cases involving defendants and victims officially recognised as women at birth, it is crucial to take into account the wider harms linked to inequality when sexual violence is being weaponised by (cis)men to control (cis)women (see MacKinnon, 1991; Walklate, 2008; Cooper and Renz, 2016). The positions adopted by the court affirm that ciswomen are indeed vulnerable and considerably less protected when the defendants are cismen, as the same acts would have not been criminalised, if the defendants had been cismen and had failed to disclose their cisgender status or their ethnicity or age (see Sharpe, 2017a). Implicitly the judgements deal with the individual cases on the basis of deceptive, deviant, and offending 'individualism', completely detached from wider communities that may now sweepingly be deemed deceptive. Arguably the defendants in these cases are presented as triply transgressive: they transgress the gender binary and hence *gender norms*; they transgress the *social norms* by committing a crime and thus are now perceived as deviants and 'sexual predators'; they transgress *legal norms* as they do not fit in the strict categories of a hetero-cis-normative legal order, according to which 'consent' may be vitiated by someone's gender history.

## Conclusion

This article has sought to develop a typology of cultural harm and, in doing so, create new conceptual lines for considering conflicts between competing rights' claims. In relation to gender, our own view is that the harms of reducing debates about trans rights and protection of women-only spaces into zero-sum games, where one group's claims to harm 'wins' over another's, demands attention be given to new, radical ways of thinking and talking about harm.

Specifically, this includes making further use of the concept of cultural harm developed herein, to enable the identification of overlapping harms involved in such debates and, in doing so, facilitate the search for more effective solutions that recognise these often competing claims to harm and the broader structural inequalities that typically underlie them.

All three examples discussed above show how legal frameworks, including processes of punishment and criminalisation, serve to entrench borders and barriers between communities, thereby reducing them into antagonistic and polarised camps. By deploying the concept of cultural harm, however, we have sought to begin to break down some of the barriers imposed by the logic of conflicting and competing rights. Admittedly, our focus has been more on the cultural harms experienced by trans and gender non-conforming people. Our intention here is not to claim that these harms necessarily 'trump' those of other groups. Our intention, rather, is to deconstruct the dominant framework that presents rights in antagonistic terms. In doing so, we suggest the need for a more nuanced approach, such as that offered by zemiology in general, and the development of the concept of cultural harm in particular. However, committed as we are to a zemiological perspective more generally, through this analysis of the cultural harms that arise from current debates around trans rights, we are also able to see how the reduction of such issues into debates about rights can all too easily detract from broader, holistic analyses of harm.

In particular, by adopting a zemiological commitment to analysing all forms of harm together, we can see that, in the contemporary setting up of these discussions into issues of competing rights, what is further silenced is a wider discussion about the harms of imprisonment and of the ways in which criminalisation and punishment entrench borders between communities. For example, in isolating trans people as particularly dangerous in an otherwise 'safe women-only prison', the wider prison system is portrayed as merely neutral, a blank canvas on which 'trans versus cis' people can battle for security. Consequently, the danger is that such debates are cast into polarised zero-sum games, where one side 'wins' and the other side 'loses'. But these harms are not mutually exclusive and, we contend, it is fundamentally problematic to present them as such. It is also the harmful wider structures and systemic conditions that remain intact by focusing on particular rights claims. In this sense to focus on prison rights, the right to gender (history) disclosure in intimate relationships, or the right to simply self-identify one's gender, fails to address the overarching conditions and power relationships in which these issues are embedded.

The downfall of contemporary culture wars is that they frequently turn on evaluations of harm in terms of which group is harmed *most* by a particular course of action. For example, the harms inflicted upon trans people, if their rights are not recognised and protected or promoted versus wider society, if their rights to safety and protection are under threat from deception. What we

have shown through an analysis of cultural harm is the irreducibility of complex issues to these simple antagonisms, and instead have highlighted the multi-dimensional nature and structural anchoring of these debates.

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- R. v. Barker* [2012] Guildford Crown Court, unreported
- R. v. McNally* [2013] EWCA Crim 1051
- R. v. Newland* [2015] Chester Crown Court, unreported

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