A PRINCIPLED APPROACH TO CRIMINALISATION: WHEN SHOULD MAKING AND/OR DISTRIBUTING VISUAL RECORDINGS BE CRIMINALISED?

A Dissertation submitted by

Kelley Jean Burton

BBus(Accy)(Dist) LLB(Hons) GradDipLegalPrac LLM *(QUT)*

CertIII in Government *Nationally Recognised Training*

For the award of Doctor of Philosophy

2008

ABSTRACT

Determining the boundaries of the modern criminal law has become a difficult issue, particularly as 21st century criminal law struggles to deal with the widespread use of technology such as digital cameras, mobile phone cameras, video cameras, web cams, the Internet, email and the blogosphere, privacy concerns and shifts in modern culture. This thesis discusses making and/or distributing visual recordings, and issues which arise with the criminalisation of this conduct. Whilst various national and international jurisdictions have legislated in this regard, their responses have been inconsistent, and this thesis therefore takes a principled approach to examining the criminalisation of such conduct, examining constructs of privacy, harm, morality, culpability, punishment, social welfare and respect for individual autonomy. In framing criminal offences around this conduct, this thesis suggests that the criminal law should respect the consent of the person visually recorded and consider the subjective culpability of the person making and/or distributing the visual recording.

CERTIFICATION OF DISSERTATION

I certify that the ideas, results, analyses, and conclusions reported in this dissertation are entirely my own effort, except where otherwise acknowledged. I also certify that the work is original and has not been previously submitted for any other award, except where otherwise acknowledged.

K J Burton

Signature of Candidate 23 March 2009

ENDORSEMENT

Signature of Principal Supervisor 23 March 2009

ACKNOWLEDGMENTS

I am deeply indebted to my Principal Supervisor, Professor Geraldine Mackenzie, the Head of the Law School at the University of Southern Queesnsland (USQ), and my Associate Supervisor, Professor Sally Kift, of the Faculty of Law at the Queensland University of Technology (QUT). Despite having high profiles and heavy workloads, they devoted countless hours to this project, and I am very grateful for their comprehensive and astute feedback. Their words of wisdom have developed my analytical writing and critical thinking skills. Each chapter went through between 5 and 10 versions and, their positive outlook and vitality helped me to complete this challenging journey in 3.5 years, which is exceptional given that I am part-time student, and have been an external student for the last 1.5 years (since QUT lost the expertise of Geraldine to USQ). It was a wonderful privilege to work so closely with Geraldine and Sally, and I cannot thank them enough for their hard work. Thanks must also go to Geraldine for opening my eyes to the wonderful world of Endnote and, for making the extra effort to travel from Toowoomba to Brisbane on numerous occasions to meet Sally and me face-to-face.

The Dean of the Faculty of Law, Michael Lavarch, and the Head of the School of Law at QUT, Ros Mason; have been generous in their support of my PhD, even after I transferred my PhD from QUT to USQ, and I sincerely thank them. I would also like to thank the staff at the QUT Law Library for being so understanding about my extended book loans.

I would like to thank Dr Heather Douglas of the University of Queensland and Dr Belinda Carpenter of QUT for their feedback at my PhD Confirmation at QUT. They convinced me to change my PhD by publication to a PhD by thesis, and this undoubtedly enhanced my ability to complete this project so quickly.

The professional staff at USQ have offered a first class service to me and I would like to especially thank Annmaree Jackson, who has advised me of the reporting and submission requirements, and Heidi Davie, who has been instrumental in organising meeting times with Geraldine and returning drafts of chapters in the express post.

Many academics, former students and members of the QUT Thesis Support Group, have taken a keen interest in my research and progress. In this regard, I would specifically like to thank Dr Brian Fitzgerald of the QUT, Dr Michelle Markham of the Bond University, Dr Ben Mathews of the QUT, Dr Dan Svantesson of the Bond University, Nigel Stobbs of the QUT and Dr Mark Perry of the University of Western Ontario, Canada.

My Phd candidature also coincided with serious health and emotional issues, and I particularly thank my family, Mum, Dad, Jon, Dave and Kylee; and my best friends, for their unconditional love, support and encouragement.

PREFACE

My passion for teaching and learning about the criminal law, and my concern after reading media reports about the inappropriate use of mobile phone cameras inspired me to develop my thesis topic.

During my candidature, I won the 2005 University of Queensland TC Beirne School of Law Postgraduate Law Research Colloquium Prize for the Best Research Paper, which was attended by PhD students from across the country and sponsored by the Oxford University Press.

I have also been invited to present my thesis research in programs at various universities, for example, in September 2008 at the USQ, in February 2008 at the John Fleming Centre for Advancement of Legal Research at the Australian National University, in January 2007 at the University of Western Ontario, Canada, and in February 2006 at the QUT.

Based on my thesis research, I designed a unit entitled, 'Privacy and Criminal Law' and was invited to deliver this unit as a Visiting Professor at the University of Western Ontario, Canada, in January 2007.

In 2006, I presented a public lecture on the Queensland criminal laws relating to making and/or distributing visual recordings through the QUT Faculty of Law's public lecture series.

I have contributed to a research culture by producing a range of publications on my thesis topic as outlined below.

Refereed Scholarly Articles and Conference Papers

Kelley Burton, 'Criminalisation: Applying a Living-Standard Analysis to Non-Consensual Photography and Distribution' (2007) 7 *Queensland University of Technology Law and Justice Journal* 464.

Kelley Burton, 'Taming the Unruly Criminal Law: Where do you Draw the Boundaries of Criminal Conduct?' (2007) *JALTA* <http//www.alta.edu.au/2007_published_conference_papers.html>.

Professional and Non-refereed Articles

Kelley Burton, 'Erosion at the Beach: Privacy Rights not just Sand' (2006) 11(8) *Privacy Law and Policy Reporter* 216-218.

Kelley Burton, 'New Visual Recording Offences' (2006) 26(4) *Queensland Lawyer* 188-191.

Kelley Burton, 'Naked and Digital Eyes' (2006) Online Opinion <http://www.onlineopinion.com.au/view.asp?article=5217>

Kelley Burton, 'Why Voyeurs can get away with it' (2005) 25(10) *Proctor* 19-22.

Submission

Kelley Burton, Standing Committee of Attorneys General, Unauthorised Photographs on the Internet and Ancillary Privacy Issues, October 2005.

International Conference Papers

Kelley Burton, 'Zooming in on the Right to Privacy: Journalists making and publishing photographs and video clips' (Paper presented at the 13th International Conference of the Law & Literature Association of Australia, Melbourne, 14 July 2006).

Kelley Burton, 'A voyage through the proposed and existing voyeurism offences in New Zealand, United Kingdom, Canada and Australia' (Paper presented at the Australasian Law Teachers Association Conference, Hamilton, New Zealand, 6 July 2005).

National Conference Papers

Kelley Burton, 'Developing a Contextual Approach to Implied Consent in a Visual Recording Environment: Climate for Changing the Criminal Law' (Paper presented at the Australasian Law Teachers Association Conference, Cairns, 8 July 2008).

Kelley Burton, 'Taming the Unruly Criminal Law: Where do you Draw the Boundaries of Criminal Conduct?' (Paper presented at the Australasian Law Teachers Association Conference, Perth, 24 September 2007).

Kelley Burton, 'Voyage forward for Queensland: Unauthorised taking of photographs and making of film and its subsequent publication on the internet' (Paper presented at the University of Queensland TC Bernie School of Law Postgraduate Law Research Colloquium, Brisbane, 4 December 2005).

TABLE OF CONTENTS

1 CHAPTER 1: SETTING THE BOUNDARIES OF THE THESIS

This thesis discusses the critical question of when conduct should be criminalised; more specifically, when should making and/or distributing visual recordings be criminalised? This conduct is a pertinent example of the difficulties involved in the question of criminalisation given the recent prevalent use and improved capabilities of technologies such as digital cameras,[1] mobile phone cameras, video cameras, web cams, the Internet, email and the blogosphere; the inconsistent legislative responses nationally and internationally to proscribing an increasing range of perceived anti-social behaviours; and the numerous instances of making and distributing visual recordings that highlight privacy concerns.[2] While the notion of 'visual recordings' is explored in more detail below, it essentially canvasses both moving and still images, and includes photographs and film, which are made by people rather than by government or corporate entities.

The 21st century world is one of dynamic technological change and it is a part of contemporary culture to upload photographs and post videos to the Internet. The Internet also offers users the ability to store, organise photographs and video clips, and share them with the virtual community. Various websites facilitate this conduct, for example, flickr,[3] Myspace,[4] Facebook[5] and Youtube.[6] These websites record their popularity, for example, by the number of views attributed to a video and the number of photographs uploaded in the last minute. The online audience for and content of these sites is significant and growing: in a random minute, flickr recorded that approximately 5000 photographs were uploaded.[7] From an Australian perspective, an Internet Activity Survey conducted in March 2007 indicated there were 5.67 million household Internet subscribers.[8] Therefore, the widespread use of these

---

[1] Small cameras are being embedded in everyday devices such as teddy bears, clocks and exit signs: Canada, Department of Justice Canada, Voyeurism as a Criminal Offence: A Consultation Paper (2002) 1. See also Canada, Department of Justice Canada, Voyeurism as a Criminal Offence - Summary of Submissions (2002). There is a trend to embed small cameras in everyday objects, for example, teddy bears, clocks, smoke detectors, exit signs and pens: Clay Calvert and Justin Brown, 'Video Voyeurism, Privacy, and the Internet: Exposing Peeping Toms in Cyberspace' (2000) 18 *Cardozo Arts and Entertainment Law Journal* 469, 480.

[2] Linda Lavarch (Minister for Justice and Attorney-General), *Australian States and Territories to Look at Adopting Queensland Secret Filming Laws* (2006) Queensland Government <http://www.cabinet.qld.gov.au/MMS/StatementDisplaySingle.aspx?id=47477> at 28 July 2006.

[3] http://www.flickr.com.

[4] http://www.myspace.com.

[5] http://www.facebook.com.

[6] http://www.youtube.com.

[7] This changing statistic is recorded at http://www.flickr.com.

[8] Australian Bureau of Statistics, *8153.0 Internet Activity, Australia, Mar 2007* (2007) Australian Bureau of Statistics <http://www.abs.gov.au/ausstats/abs@.nsf/mf/8153.0/> at 29 October 2007.

technologies has prompted legislatures to determine when making and/or distributing visual recordings should be criminalised.

Determining the boundaries of the criminal law has become a serious contemporary problem because there is a trend towards criminal law encroaching upon conduct that was 'previously thought to be civil or regulatory in character'.[9] The development of the criminal law has been described as an 'unprincipled[,]…chaotic…[and] a lost cause'.[10] Further, it has been said that it is quickly approaching a 'watershed point'; that is, the criminalisation 'of almost everything'.[11] While not every type of conduct is criminalised, the criminal law has certainly expanded to deal with contemporary situations, especially in the area of technology. The question remains whether the boundaries of the criminal law should keep randomly expanding in a reactive and unprincipled way to deal with contemporary problems.

This introductory chapter will provide an insight into visual recording and distribution instances reported by the media, to highlight the broader issue of determining what conduct at the margins should be criminalised. This chapter will also identify the central issues, key concepts, and map out the structure of the thesis.

1.1 Conduct at the Margins of Criminal Law

Making and/or distributing visual recordings has been chosen for examination in this thesis over other examples of criminal conduct because it is topical in the 21st century[12] and a number of jurisdictions have recently provided a legislative response to this conduct.[13] Further, recent media reports (some of which are discussed below) are littered with examples of this type of incident, while it has been said that the community is 'outraged' by such conduct.[14] Whether making and distributing visual recordings should be criminalised has not been explored in a scholarly manner. This thesis will fill this gap by using a principled approach to the issue of criminalisation. The criminalisation of the making and/or distribution of visual recordings is ripe for discussion given the

---

[9] John C Coffee, 'Paradigms Lost: The Blurring of the Criminal and Civil Law Models - And What Can Be Done About It' (1992) 101 *The Yale Law Journal* 1875, 1875.

[10] Andrew Ashworth, 'Is the Criminal Law a Lost Cause?' (2000) 116 *The Law Quarterly Review* 225, 225.

[11] Erik Luna, 'The Overcriminalization Phenomenon' (2004-2005) 54 *American University Law Review* 703, 746.

[12] See generally the media reports below.

[13] See especially *Crimes Act 1961* (NZ) s 216G-N, which came into effect in December 2006; *Criminal Code* (Qld) s 227A-C, which came into effect in December 2005; *Criminal Code* (Can) s 162, which came into effect in November 2005; *Sexual Offences Act 2003* (UK) s 67, which came into effect in May 2004; and *Summary Offences Act 1988* (NSW) s 21G-H, which came into effect in March 2004.

[14] Standing Committee of Attorneys-General, *Unauthorised Photographs on the Internet and Ancillary Privacy Issues* (2005) <http://www.ag.gov.au> at 1 October 2005, 9.

widespread use and availability of potentially intrusive technology (such as mobile phone cameras, digital cameras, and video cameras) and the easy availability of, and access to, websites that encourage the community to upload still and moving images for public dissemination via the Internet.

Unlike, for example, murder and rape,[15] which are obvious crimes, making and/or distributing visual recordings does not sit squarely within the core of the criminal law. The criminalisation of this conduct pushes the boundaries of the criminal law and forces it to protect privacy interests, which are arguably more suited to protection by tort law, although not as yet in Australia.[16]

In his landmark article on privacy, Prosser identified that the law of privacy in the United States can be divided into four distinct torts:[17] intrusion upon seclusion, false publicity, appropriation and disclosing embarrassing private facts to the public.[18] Australia has not yet rejected or endorsed the tort of privacy. For example, Kirby J in the 2001 High Court of Australia case of *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*[19] postponed the decision on whether there should be a tort of privacy in Australia. Australia may embrace the tort of privacy in an appropriate case, given the developments of the tort of privacy in New Zealand.[20] From time to time, there have been comments suggesting that an Australian tort of privacy is possible, for example, as mooted by Skoien DCJ in the District Court of Queensland in *Grosse v Purvis*[21] and Hampel J in the Count Court of Victoria in *Doe v Australian Broadcasting Corporation*.[22]

However, this is not to say that it has never previously been contemplated that the criminal law could be used to regulate a right to privacy. Warren and Brandeis, in their classic 1890 article on privacy in America, claimed that a tort for damages should be available and that it would be 'desirable that the privacy of the individual should receive the added protection of the criminal law, but for this, legislation would be required.'[23] Their comment recognises from earlier times the possibility of overlap between tort law and criminal law.

---

[15] It is acknowledged that determining the scope of murder and rape may be less than clear-cut.
[16] In relation to tort, see generally S Warren and L Brandeis, 'The Right to Privacy' (1890) IV *Harvard Law Review* 193, 219 and Andrew McClurg, 'Bringing Privacy Law Out of the Closet: A Tort Theory of Liability for Intrusions in Public Places' (1995) 73 *NC Law Review* 989, 1025.
[17] William L Prosser, 'Privacy' (1960) 48 *California Law Review* 383, 389.
[18] Ibid.
[19] *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* [2001] HCA 63 at [189].
[20] See generally *Hosking & Hosking v Simon Runting & Anor* [2004] NZCA 34.
[21] *Grosse v Purvis* [2003] QDC 151. In particular, Skoien DCJ stated, 'It is a bold step to take, as it seems, the first step in this country to hold that there can be a civil action for damages based on the actionable right of an individual person to privacy. But I see it as a logical and desirable step. In my view there is such an actionable right': [442].
[22] [2007] VCC 281 at [161] – [162].
[23] S Warren and L Brandeis, 'The Right to Privacy' (1890) IV *Harvard Law Review* 193, 219.

Another reason why making and/or distributing visual recordings pushes the boundaries of criminal law is that this conduct is different, for example, from non-fatal offences against the person as it does not involve a threat of physical harm or actual physical harm like assault, assault occasioning bodily harm, grievous bodily harm or unlawful wounding. While making and/or distributing visual recordings is more akin to the offence of stalking, that offence would generally not be satisfied because the person visually recorded is often not aware of visual recording at the time it is done, and does not have, for example, an apprehension or fear of violence at that time.[24] Advances in technology allow a person making a visual recording to zoom in on the person being recorded. The size of visual recording equipment has decreased, and enables the person making the recording to embed it in, for example, shoes or a backpack, unbeknown to the person being recorded. Thus, the person recorded may be unaware of another person visually recording them because it is done covertly, without their knowledge or consent.

Making and/or distributing visual recordings is more prevalent today than ever before because of the availability of sophisticated technology, but it is not a new phenomenon. In 1890, Warren and Brandeis anticipated the need to protect privacy from people who make surreptitious and instantaneous photographs.[25] More explicitly, the literature approximately 100 years later discusses an incident where a female, who was leaving a funhouse with her two children, was photographed when an air jet unexpectedly blew her skirt up in the air, such that her underwear was visible in the photograph.[26] The photographer published the photograph on the front page of a newspaper. As a result of this, the female was 'embarrassed, self-conscious, upset…was known to cry on occasions'[27] and brought a civil action on the basis that her privacy had been invaded. The Alabama Supreme Court concluded that the female had a reasonable expectation of privacy in the circumstances because the intrusion

---

[24] See especially *Criminal Code* (Qld) s 359B and *R v Davies* [2004] QDC 279, 5, where McGill DCJ states that apprehension or fear has to be assessed at the time when the conduct occurs. In that case, a step-father visually recorded his step-daughters showering in their bathroom without their knowledge. The brother of the step-daughters later found the video camera in the ceiling vent of the bathroom and reported it to police. The step-father was not convicted of stalking because the fourth element of stalking relating to apprehension, fear and detriment was not satisfied.

[25] S Warren and L Brandeis, 'The Right to Privacy' (1890) IV *Harvard Law Review* 193, 195 and 211.

[26] Andrew McClurg, 'Bringing Privacy Law Out of the Closet: A Tort Theory of Liability for Intrusions in Public Places' (1995) 73 *NC Law Review* 989, 1045; Lance Rothenberg, 'Re-thinking Privacy: Peeping Toms, Video Voyeurs, and the Failure of Criminal Law to Recognize a Reasonable Expectation of Privacy in the Public Space' (1999-2000) 49 *American University Law Review* 1127, 1148 and Clay Calvert and Justin Brown, 'Video Voyeurism, Privacy, and the Internet: Exposing Peeping Toms in Cyberspace' (2000) 18 *Cardozo Arts and Entertainment Law Journal* 469, 490.

[27] Clay Calvert and Justin Brown, 'Video Voyeurism, Privacy, and the Internet: Exposing Peeping Toms in Cyberspace' (2000) 18 *Cardozo Arts and Entertainment Law Journal* 469, 490.

was indecent, vulgar, embarrassing and without the female's volition.[28] This incident occurred in the 1960s, but numerous incidents of unsavoury visual recording and distribution have been reported beyond 2000.

The Australian Standing Committee of Attorneys-General highlights several prominent instances of making and distributing unauthorised visual recordings in its 2005 discussion paper.[29] One of these instances involved photographing children at South Bank Parklands in Brisbane without the knowledge or permission of their parents.[30] When the children were photographed, they were dressed in swimming costumes and playing in a public park. The images were brought to the media's attention when they were uploaded to a website. The website had no links to pornography or paedophilia, but it raised concerns about whether the person uploading the recordings to the Internet had a perverted purpose and, ultimately, after media exposure, the author of the website removed the images. At the time of the incident, the conduct was not criminalised in Queensland, but the media claimed the community was outraged by such conduct,[31] although no evidence was provided to back up this assertion. While this instance is instinctively concerning, the criminalisation of such conduct is relatively problematic, as will be discussed in later chapters. The South Bank Parklands instance starkly illustrates the difficulties in balancing the privacy of the person photographed and the freedom of expression of the photographer. The criminal law needs to keep abreast of advances in technology and contemporary behavioural patterns. This thesis will determine whether a principled approach to criminalisation supports the criminalisation of this type of conduct.

Further instances discussed in the Australian Standing Committee of Attorneys-General Discussion Paper include photographing, without their knowledge,

---

[28] *Daily Times Democrat v Graham* 276 Ala 380 (1964). Note that this is a civil case and not a criminal case.

[29] Standing Committee of Attorneys-General, *Unauthorised Photographs on the Internet and Ancillary Privacy Issues* (2005) <http://www.ag.gov.au> at 1 October 2005, 5-6. Note that this discussion paper suggests that visual recordings are unauthorised where the person visually recorded does not consent to the visual recording and where the person visually recorded is unaware that the visual recording has been made.

[30] Standing Committee of Attorneys-General, *Unauthorised Photographs on the Internet and Ancillary Privacy Issues* (2005) <http://www.ag.gov.au> at 1 October 2005. See also 'Parents warned over online beach photos', *The Age*, 27 January 2005. Public places are places where members of the public may choose to go: *Ward v* Marsh [1958] ALR 724, 725, per Lowe J. See also 'Torquay Man's 'Abhorrent' Collection 10,000 child porn pics', *Geelong Advertiser* 7 July 2006, 'Cyber Law to be Tightened, Says Maran', *The Hindu* (India), 13 July 2006, Caroline Overington, 'Sugar and Spice...or Kiddie Porn?' *The Australian* 10 October 2006, Privacy International, 'Privacy Advocates Call for Closed-circuit TV Controls' (1995) 2 *Privacy Law and Policy Reporter* 91, Robin Perrie, 'Keep 'em Peeled', *The Sun* (Newcastle), 1 September 2006, for a discussion of prominent examples relating to children or a discussion pertaining to public places.

[31] See especially the media reports highlighted in Standing Committee of Attorneys-General, *Unauthorised Photographs on the Internet and Ancillary Privacy Issues* (2005) <http://www.ag.gov.au> at 1 October 2005, [12].

Melbourne school boys dressed in half of their rowing suits,[32] and a 16 year old surf lifesaver.[33] Similar instances have occurred outside Australia, where for example, in New Zealand, a man filmed school girls walking along a public street, through a gap in a curtain in a bus parked on a public street.[34] In all of these examples, there was no pre-existing relationship between the person making the visual recording and the person visually recorded, the people visually recorded were children, the children were clothed, the visual recordings were made in public places and were made without the knowledge or express consent of the people visually recorded.

Many instances of making and/or distributing visual recordings involve visual recordings of women and children, and have a voyeuristic aspect. According to the 2002 Canadian Consultation Paper on Voyeurism, most victims of sex crimes are women and children.[35] There are many instances where women have been visually recorded whilst doing every day activities in places that may be accessed by the public. For example, photographing topless female bathers at a public beach,[36] photographing up the skirts of females while they are in shopping malls,[37] and photographing a female dressed in outer clothing sitting

---

[32] Standing Committee of Attorneys-General, *Unauthorised Photographs on the Internet and Ancillary Privacy Issues* (2005) <http://www.ag.gov.au> at 1 October 2005, 5. See further 'Vic-Police Powerless to Act on Gay Website Containing Schoolboys', *Australian Associated Press*, 22 February 2002 .

[33] Standing Committee of Attorneys-General, *Unauthorised Photographs on the Internet and Ancillary Privacy Issues* (2005) <http://www.ag.gov.au> at 1 October 2005, 5. See 'Teen Put on Gay Site May Lead to Camera Ban', *Herald Sun* 3 April 2002, for further details about this example.

[34] New Zealand, New Zealand Law Commission, Intimate Covert Filming Study Paper, Study Paper No. 15 (2004) 41, *Police v R* (20 February 2004) District Court Dunedin, Judge O'Driscoll. *Hosking v Runting* [2004] NZCA 34 is an analogous New Zealand case, which involved photographing and publishing the photographs in a magazine of a celebrity's children wearing outer clothing in a public place.

[35] Canada, Department of Justice Canada, Voyeurism as a Criminal Offence: A Consultation Paper (2002) 4.

[36] Standing Committee of Attorneys-General, *Unauthorised Photographs on the Internet and Ancillary Privacy Issues* (2005) <http://www.ag.gov.au> at 1 October 2005, 19. See also Kelley Burton, 'Erosion at the Beach: Privacy Rights Not Just Sand' (2006) 11 *Privacy Law and Policy Reporter* 216, 'Topless Photos Prove Costly', *Herald Sun* 2 December 2004, 'Parents Warned Over Online Beach Photos', *The Age* 27 January 2005 , *Australian Police Arrest Nudists* (2000) BBC News at 23 August 2005 and Natasha Bita, 'Italian Beaches Littered by Laws', *The Australian* (Florence), 15 August 2005, for more information about these beach examples. A further example in a public place was discussed in Kate Uebergang, 'Fetish Stalker Fined', *The Courier Mail* (Brisbane), 10 August 2006, but note that this example does not relate to a beach.

[37] Standing Committee of Attorneys-General, *Unauthorised Photographs on the Internet and Ancillary Privacy Issues* (2005) <http://www.ag.gov.au> at 1 October 2005, 19. See also 'Second Man Held Over Snaps of Women at Tennis', *Sydney Morning Herald*, 22 January 2007, 'Victorian Charged Over Indecent Schoolies Photos', (Gold Coast), 2006, 'Schoolies Urged to Look out for Peers', *Courier-Mail* (Gold Coast), 20 November 2006, *Teacher Refused Bail in 'Upskirt' Case* (2007,) News Limited <http://www.news.com.au> at 12 May 2007, Jessica Marszalek, 'Peeping Tom, Thieves Target Schoolies', *The Australian* (Gold Coast), 21 November 2006, 'Not a Pretty Picture in this Legal Minefield', *Sydney Morning Herald*

on a step outside a Canadian building and subsequently publishing it in a magazine.[38] In this second set of examples, there was no pre-existing relationship between the person making the visual recording and the person visually recorded, the people visually recorded were female and the visual recordings were made in public places such as a public beach or shopping centre.

The criminalisation of these examples of making visual recordings in a public place is potentially problematic, because it may protect privacy interests at the expense of individual autonomy in the sense of an individual's freedom to make visual recordings. Further, if the visual recording is made without the knowledge or express consent of the person visually recorded, it may be difficult to catch the person making the visual recording at the time they make the visual recording. Other issues that arise from these examples are whether the person making the visual recording intended to visually record the individual recorded; whether the person visually recorded impliedly consented to being recorded because they were in a public place; whether visually recording a person is the same as observing a person; whether children should be protected over and above adults; and whether there is any harm attached to making a visual recording. The problems associated with criminalising the subsequent distribution to the Internet of these examples of visual recordings made in public places relate to enforcement, protecting privacy interests, respecting individual autonomy, whether the person visually recorded consented, the culpability of the person distributing the visual recording, and the harm and immorality in distributing the visual recording.

(Sydney), 30 August 2005, ; Chris McLeod, 'Sneaky Cameras' (2003) (August) *Australian Press Council News* 7, Andrew McClurg, 'Bringing Privacy Law Out of the Closet: A Tort Theory of Liability for Intrusions in Public Places' (1995) 73 *NC Law Review* 989, 1150-65, Lance Rothenberg, 'Re-thinking Privacy: Peeping Toms, Video Voyeurs, and the Failure of Criminal Law to Recognize a Reasonable Expectation of Privacy in the Public Space' (1999-2000) 49 *American University Law Review* 1127, New Zealand, New Zealand Law Commission, Intimate Covert Filming Study Paper, Study Paper No. 15 (2004) 2, 'Teacher 'Films up Teen's Skirt' at Shopping Centre', *Sydney Morning Herald* 12 May 2007, *Tram Voyeur 'Filmed Up Skirts'* (2007) News Limited <http://www.news.com.au/story> , *Crackdown Planned on Pervert Photos* (2007) News Limited <http://www.news.com.au/story> .

[38] *Aubry v Editions Vice-Versa* [1998] SCR 591. See also 'N.S. Voyeur Convicted under New Law', *Canada Digest* (Amherst), 29 September 2006, 'Voyeur Guilty', *The Plain Dealer* (Cuyahoga Falls), 28 September 2006, 'First Voyeurism Sentence 'a slap in the face,' says woman who proposed law', *Halifax Chronicle-Herald* (Amherst), 1 September 2006, 'N.S. Man who Videotaped Girl in Shower Pleads Guilty to Voyeurism', *Halifax Chronicle-Herald* (Amherst), 30 August 2006, 'Peeping Tom Incident Prompts 'Fishbowl' Warning', *Times-Colonist* (Victoria, Canada), 4 August 2006, 24, 'Teacher Appears in Court Today', *Vancouver Sun* 24 August 2006, 22, 'Man Convicted under New Voyeurism Law Gets 90 Days in Nova Scotia Jail', *Halifax Chronicle-Herald* (Amherst), 29 September 2006, Petti Fong, 'Former Teacher Pleads Guilty to Voyeurism', *The Globe and Mail* (Vancouver), 15 July 2006, JWL, 'HFX OUT HQQ', *Halifax Chronicle-Herald* (Amherst), 29 September 2006, and note that all these examples are Canadian.

Other instances of making and/or distributing visual recordings have involved more private settings than public parks and public beaches. They may also involve a focus on private body parts and sit more readily in the realm of criminal law than the earlier example of visually recording a child playing in a public park. In particular, the 2004 New Zealand Law Commission study paper highlights incidents such as filming teenage girls undressing in their bedroom, filming boys undressing using a hand-held camera behind a one-way window, installing a camera in a dressing room to film female performers, filming a woman trying on a swimsuit at a market changing booth, filming women using a tanning salon, filming cheerleaders undressing using a video camera behind a two-way mirror and filming females as they used the home bathroom of the person making the visual recording.[39] Similar incidents have been reported in

[39] New Zealand, New Zealand Law Commission, Intimate Covert Filming Study Paper, Study Paper No. 15 (2004) 2. See also *Giller v Procopets* [2008] VSCA 236 where the Victorian Court of Appeal provided a civil remedy (damages) to the plaintiff where her ex-boyfriend published a video of the couple engaging in consensual sexual activity. Also note the parallels between the conduct covered in this thesis and some examples of cyberbullying. In particular, cyberbullying included photographing an overweight Japanese boy whilst he is changing in a locker room and distributing the photograph within seconds to classmates: Darby Dickerson, 'Cyberbullies on Campus' (2005-2006) 37 *University of Toledo Law Review* 51; Paris S Strom and Robert D Strom, 'Cyberbullying by Adolescents: A Preliminary Assessment' (2005) 70 *The Educational Forum* 21. Similar incidents involved photographing athletic students in a state of undress in locker rooms and showers: David A Myers, 'Defamation and the Quiescent Anarchy of the Internet: A Case Study of Cyber Targeting' (2005-2006) 110 *Pennsylvania State Law Review* 667. Cyberbullying included the classmates of a boy posting on the Internet a film of the boy emulating a Star Wars fight: Marilyn A Campbell, 'Cyber Bullying: An Old Problem in a New Guise?' (2005) 15 *Australian Journal of Guidance & Counselling* 68. Further, it included posting photographs of students in compromising positions on a website: Marilyn Campbell, 'Cyber-Bullying: The Case for New School Rules' (2005) (May) *Principal Matters* 6. Another example was posting on the Internet photographs of an ex-girlfriend masturbating: Shaheen Shariff and Rachel Gouin, *Cyber-Dilemmas: Gendered Hierarchies, Free Expression and Cyber-Safety in Schools* <www//oii.ox.ac.uk> at 23 November 2006. Cyberbullying has been defined as 'the use of information and communication technologies to support deliberate, repeated, and hostile behaviour by an individual or group, that is intended to harm others': Bill Belsey, *Cyberbullying: An Emerging Threat to the "Always On" Generation* (2006) <http://www.cyberbullying.ca/> at 23 November 2006. It includes outing, which is defined as the 'public display, posting, or forwarding of personal communication or images, especially communication that contains sensitive personal information or images that are sexual in nature': Anne Bamford, 'Cyber-bullying' (2005) 25 *Classroom* 18. Cyberbullying is very broad and extends beyond covert and non-consensual visual recordings. It also includes manipulating visual recordings, but this conduct and a general exploration of cyberbullying is well beyond the scope of this thesis. Further literature on cyberbullying includes Renee L Servance, 'Cyberbullying, Cyber-harassment, and the Conflict Between Schools and the First Amendment' (2003) *Wisconsin Law Review* 1213 and Amanda Froude, 'Cyber bullying' (2005) 35 *Independent Education* 38. Also see literature on voyeurism and prohibited visual recordings, for example, 'Law School Student's Roommate Shocked He was the Star in a Shower Scene: Campus Soap Opera', *National Post* 21 June 2006, Paul Lewis, 'Suspended Sentence for Student Voyeur', *The Guardian* 8 September 2006, 16 'Senate Passes Bill to Prohibit Employers from Taping Employees in Changing Rooms', *US Federal News* (New York), 25 May 2006, 'Shower Spy is Spared Prison', *Daily Mirror* 8 September 2006, 35 'Former State Worker Appeals Sentence for Taping Girls', *Associated Press Newswires* (Santa Fe), 18 June 2006, 'An Unnecessary Video Intrusion: Security Worries Don't Justify Assault on Personal Privacy',

Canada, including a man who filmed his female colleagues using a co-ed washroom;[40] a man who videotaped his consensual sexual activities with a female without her knowledge and showed them to his friends at a party;[41] and a landlord who installed a video camera in the air vent of a rental apartment tenanted by a female.[42] This last Canadian incident is analogous to incidents in the United Kingdom where landlords fixed spy holes into bathrooms;[43] in New South Wales where a man filmed his female flatmates whilst they were showering;[44] and in Queensland where a stepfather filmed his adult stepdaughters showering.[45] Another intimate example involved a man peeping through a bedroom window and photographing a female while she was sleeping.[46]

In most (but not all) of these last instances, the recordings occurred in private places, and there was a pre-existing relationship between the person making the visual recording and the person visually recorded. The people visually recorded were mostly women or children, and the visual recordings were made in private places where the person visually recorded was engaging in a private activity such as showering, undressing or engaging in sexual activities.[47] Criminalising some of these instances of visual recording is less problematic because this conduct ostensibly is starting to take on some criminal law

---

Calgary Herald 11 July 2006, Jeremy Armstrong, 'Tan Horror Man Guilty', *Daily Mirror* (Staffs), 3 June 2006, Nancie L Katz, 'Ladies' Room Perv Avoids Jail', *New York Daily News* (Brooklyn), 6 September 2006, 29, Aaron H Kastens, 'State v Stevenson, The "Peeping Tom" Case: Overbreadth or Overblown?' (2001) *Wisconsin Law Review* 1371, Diane Wood, 'Toilet Voyeur Sent to Prison; Man's 'Disgusting' Crimes Included Filming Kids, Friends in Bathroom', *Kitchener-Waterloo Record* 10 June 2006, and note that these examples have been derived from Canada and the United States of America.

[40] Canada, Department of Justice Canada, Voyeurism as a Criminal Offence: A Consultation Paper (2002) 1. This is similar to an example in Hobart, where a primary school cleaner drilled a hole in the ceiling of a toilet and installed a camera to view female students and teachers using the toilet: Glenn Cordingley, *Cleaner Photographs Kids on Toilet* (2007) News Limited <http://www.news.com.au/story> at 11 May 2007.

[41] Canada, Department of Justice Canada, Voyeurism as a Criminal Offence: A Consultation Paper (2002) 6.

[42] Ibid 1.

[43] England and Wales, Home Office, *Setting the Boundaries: Reforming the Law on Sex Offences* (2000), 12. Compare Michael A Scarcella, 'Homeowner's Hidden Camera Helps Send Voyeur to Jail', *Sarasota Herald-Tribune* (Manatee County), 14 August 2006, and Raymond Wacks, 'Home videos: Is the Surveillance of Domestic Helpers Lawful?' (2000) *Privacy Law and Policy Reporter* 49.

[44] NSW, *Parliamentary Debates,* Legislative Assembly, 27 February 2004, (Ms Angela D'Amore).

[45] *R v Davies* [2004] QDC 279. This case is similar to an incident reported by the media, where an ex-policeman filmed two girls showering in his home. The two girls were aged 9 and 14 years old, and the camera was hidden in a towel: *Ex-policeman Filmed Girls in Shower* (2007) News Limited <http://www.news.com.au> at 18 May 2007.

[46] Rebecca Cavanagh, *Snapped Naked While Sleeping* (2007) News Limited <http://www.news.com.au/story> at 9 June 2007.

[47] Note that while up-skirt filming focuses on a person's private body parts and/or underwear, it does not fall within this group of instances because it generally occurs in public places rather than in a bathroom, toilet, bedroom or communal change room.

features, for example, intentional conduct directed at identifiable victims, and is more likely to be harmful and indecent.

In this technologically advanced era, the criminal law has been forced to address this conduct and this has resulted in legislative responses nationally and internationally. Irrespective of whether the recording occurs in a private or public place, similar issues arise. For example, whether the harm associated with the conduct is serious enough to justify criminalisation, whether the individual autonomy to make visual recordings (freedom of expression) should outweigh the social welfare interest of privacy, whether the person making and/or distributing the visual recording is culpable and whether the person visually recorded consented to the visual recording.

Overall, making and/or distributing visual recordings and the response of criminalising conduct in general, invokes a range of concepts. Some of the central concepts include criminalisation, harm, morality, culpability, consent, public and private dichotomy, privacy, visual recording, distributing and voyeur. These central concepts and the central issues of this thesis will be briefly introduced below and will be explored in more detail throughout the thesis.

1.2 Central Issue and Concepts

The central question in this thesis is: When should making and/or distributing visual recordings be criminalised? At the outset, it should be noted that this thesis is not concerned with sentencing issues,[48] but rather with criminalisation.

---

[48] For completeness, in the United States of America, a maximum sentence of one year's imprisonment, a fine, or both apply to video voyeurism: *Video Voyeurism Act* 18 USC §1801(a) (2004). The maximum penalties in Queensland, New South Wales, the United Kingdom and Canada are higher than the United States of America. In Queensland, the maximum sentence for observing or recording another person without consent in breach of privacy or distributing a prohibited visual recording is two years' imprisonment: *Criminal Code* (Qld) s 227A and B. Similarly, the maximum penalty in the New South Wales for filming another person for indecent purposes pursuant to *Summary Offences Act 1988* (NSW) s 21G, is a fine of 100 penalty units ($110,000: *Crimes (Sentencing Procedure) Act 1999* (NSW) s 17) in addition to or instead of two years imprisonment: *Summary Offences Act 1988* (NSW) s 21G. In the United Kingdom, the maximum penalty for voyeurism is two years' imprisonment if the accused is convicted on indictment: *Sexual Offences Act 2003* (UK) s 67(5). If the accused is liable on summary conviction, the maximum penalty is six months' imprisonment, a fine not exceeding the statutory maximum, or both penalties: *Sexual Offences Act 2003* (UK) s 67(5). The maximum penalty is marginally higher in New Zealand, compared to Queensland, New South Wales and the United Kingdom. The maximum penalty for making an intimate visual recording or publishing, importing, exporting or selling an intimate visual recording is three years imprisonment: *Crimes Act 1961* (NZ) ss 216H and J. Canada offers the harshest maximum penalty for voyeurism, that is, five years' imprisonment: *Criminal Code* (Can) s 162(5). Maximum penalties are only given in worse-case scenarios, see for example the *Penalties and Sentences Act 1992* (Qld) s 9(2)(b). Whether there is consistency in sentencing in these jurisdictions will only become apparent as these offences are applied over time. Note that

The literature suggests that there is not a unifying factor that underpins every decision to criminalise conduct.[49] This thesis will explore the central question by adopting a principled approach to criminalisation, which is founded on the principles of harm, morality, social welfare, individual autonomy, punishment, culpability, consent and the distinctions between criminal law and civil law.[50] Such an approach has also been accepted by the literature.[51]

Overall, this thesis does not set out to provide a concrete formula for determining whether to criminalise conduct. It does not attempt to identify and weigh all of the reasons for and against the decision to create a new offence. Such a balancing approach is flawed because, as Schonsheck argues, assigning a weight to a reason is 'intensely subjective and inherently controversial'.[52] As an alternative, Schonsheck espouses a three step filtering process,[53] which is a methodical approach. The first filter is relevant to this thesis. The first filter is called the 'Principles Filter', [54] which involves discussing principles including individual autonomy. After deciding that there is a principled basis for criminalising the conduct, the second filter is used to determine whether the conduct could be reduced or eliminated by means other than criminal law, for example, an education campaign.[55] The second filter is called the 'Presumptions Filter'.[56] Once it is determined that criminalisation is the appropriate state action, the third filter comes into play. The third filter is called the 'Pragmatics Filter'.[57] It considers the pragmatic outcome of the

---

making a comparison between the maximum penalties for these offences and offences of a similar nature is outside the scope of this thesis.

[49] AP Simester and GR Sullivan, *Criminal Law Theory and Doctrine* (2003) 3.

[50] Bernadette McSherry and Bronwyn Naylor, *Australian Criminal Laws: Critical Perspectives* (2004) 17 and Andrew Ashworth, *Principles of Criminal Law* (5th ed, 2006) 23-28. With regard to distinguishing criminal law from civil law refer generally to John C Coffee, 'Paradigms Lost: The Blurring of the Criminal and Civil Law Models - And What Can Be Done About It' (1992) 101 *The Yale Law Journal* 1875, James Lindgren, 'Why the Ancients may not have Needed a System of Criminal Law' (1996) 76 *Boston University Law Review* 29 and Kenneth Mann, 'Punitive Civil Sanctions: The Middleground between Criminal and Civil Law' (1992) 101 *The Yale Law Journal* 1795.

[51] Jonathan Schonsheck, *On Criminalization: An Essay in the Philosophy of the Criminal Law* (1994) 16. Refer also to Andrew Ashworth, *Principles of Criminal Law* (5th ed, 2006) 22; Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (2nd ed, 2005) 49; AP Simester and GR Sullivan, *Criminal Law Theory and Doctrine* (2003) 8 and Mark Findlay, Stephen Odgers and Stanley Yeo, *Australian Criminal Justice* (3rd ed, 2005) 5.

[52] Jonathan Schonsheck, *On Criminalization: An Essay in the Philosophy of the Criminal Law* (1994) 33.

[53] Ibid 16.

[54] Ibid.

[55] Ibid. See also AP Simester and GR Sullivan, *Criminal Law Theory and Doctrine* (2003) 21, which recommends an inquiry into whether the criminal law is the most appropriate mechanism for regulating the activity: 21. This involves considering the advantages and disadvantages of using criminal law compared to its alternatives: 21. The criminal law should only be used as a last resort: 21.

[56] Jonathan Schonsheck, *On Criminalization: An Essay in the Philosophy of the Criminal Law* (1994) 16..

[57] Ibid.

criminal law and requires a cost and benefit analysis of the consequences of the imposition of the criminal law.[58] The scope of this thesis will embrace an inquiry consistent with the 'Principles Filter' as it will explore whether harm, morality, social welfare and individual autonomy justify the criminalisation of conduct. This thesis cannot do justice to all three filters and thus it concentrates on the first filter and leaves the 'Presumptions Filter'[59] and the 'Pragmatics Filter'[60] open to future research in the novel area of making and/or distributing visual recordings. As discussed in chapter 2, the criminalisation literature supports the adoption of a principled approach to criminalisation and the principles used in this thesis.

This analysis will serve as a useful tool for legislatures as it explains when it is appropriate to criminalise making and/or distributing visual recordings. This is a timely tool as it will enable those jurisdictions that have recently provided a legislative response to this conduct an opportunity to review their criminal laws. It will guide those jurisdictions that have postponed enacting criminal laws on the appropriate boundary of the criminal law to address this conduct. While the findings of this thesis will focus on making and/or distributing visual recordings, the framework developed in this thesis will equip legislatures with the resources necessary to deal with new problems that emerge in this challenging technological environment.

As stated above, this thesis explores whether making and/or distributing visual recordings should be criminalised, and therefore the definition of criminalisation is central to this discussion. Chapter 2 will illuminate the harm, immorality, social welfare and individual autonomy principles underpinning the decision to criminalise conduct. Two key concepts discussed in chapter 2 are 'harm' and 'morality' and they will be briefly introduced below. Chapter 4 will examine the importance of culpability in criminalising conduct and chapter 5 will review the relevance of consent in criminalising conduct and, in doing so, the concepts of 'culpability', 'consent', the 'public and private dichotomy' and 'privacy' emerge and will be introduced below. The examples investigated throughout this thesis regarding visual recording and distribution require a brief introduction of several central contextual concepts including 'visual recording', 'distribution' and 'voyeurism'. Briefly exploring definitions of these concepts below will help set the scope of this thesis.

---

[58] Ibid.
[59] Jonathan Schonsheck, *On Criminalization: An Essay in the Philosophy of the Criminal Law* (1994) 16.
[60] Ibid.

1.2.1 Criminalisation

Most of the literature discussing criminalisation does not define this term and assumes that the reader understands it,[61] but it is useful to delve further into this concept. Lacey, Wells and Quick suggest that the 'substance of criminalisation' is 'how societies define deviance and determine which deviance calls for definition as criminal, and which behaviour actually meets with criminal enforcement'.[62] For the purpose of this thesis, criminalisation is defined as how to decide whether conduct should be controlled by the criminal law, and will use the term 'criminalisation debate' to reflect whether conduct should be criminalised. This thesis will enter the criminalisation debate in the context of making and/or distributing visual recordings and will explore whether this conduct should be criminalised using a principled basis. The notions of 'criminalisation' and 'criminalisation debate' require an understanding of a related concept, that is, 'crime'.

As a useful starting point, Glanville Williams defines crime (or an offence) as 'a legal wrong that can be followed by criminal proceedings which may result in punishment'.[63] It is a circular definition because conduct becomes a crime if it is followed by criminal proceedings, while the relevant proceedings are criminal if the conduct is a crime. Two further criticisms of this definition of crime are that it merely states the consequences of a crime[64] and that the definition does not explain the types of conduct that constitute a crime in the first instance.[65] Despite the criticisms of Glanville William's definition of crime, it broaches the procedural distinction between criminal and civil law, which will be discussed in chapter 3.

Bronitt and McSherry offer a different definition of crime. In particular, they suggest that a crime 'is simply whatever the law-makers (legislatures or courts) at a particular time have decided is punishable as a crime.'[66] Similarly, it has been said that 'crime expresses social unity in that it signifies what constitutes acceptable and unacceptable behaviour'.[67] Consequently, the definition of

---

[61] See Andrew Ashworth, *Principles of Criminal Law* (5th ed, 2006) and Jonathan Schonsheck, *On Criminalization: An Essay in the Philosophy of the Criminal Law* (1994).
[62] Nicola Lacey, Celia Wells and Oliver Quick, *Reconstructing Criminal Law Text and Materials,* Law in Context (3rd ed, 2003) 12.
[63] Glanville Williams, *Textbook of Criminal Law* (2nd ed, 1983) 27. Williams does not discuss the issue of criminalisation in Glanville Williams, *Criminal Law The General Part* (2nd ed, 1961). Note that several resources use this definition including Bernadette McSherry and Bronwyn Naylor, *Australian Criminal Laws: Critical Perspectives* (2004) 5 and Andrew Ashworth, 'Is the Criminal Law a Lost Cause?' (2000) 116 *The Law Quarterly Review* 225, 226 and David Brown et al, *Brown, Farrier, Neal and Weisbrot's Criminal Laws - Materials and Commentary on Criminal Law and Process in New South Wales* (4th ed, 2006) 44.
[64] Ibid 29.
[65] Ibid 28.
[66] Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (2nd ed, 2005) 6.
[67] Canada, Law Commission of Canada, What is a Crime? Defining Criminal Conduct in Contemporary Society (2004) xii.

crime by itself does not provide much guidance on the content of criminal law. Thus, it is necessary to go beyond the definition of crime to determine when and what conduct should be criminalised, and look towards to the principles underpinning criminalisation to establish the content of the criminal law.

There are two sources of criminal law. These are statutory law, which is made by the legislature, and common law, which is made by the judges.[68] Making and/or distributing visual recordings are criminal offences created by the legislature and not the common law, although in many ways they are a response to public opinion on this particular issue.[69]

Criminal law in statutory form warns the community in advance of the consequences of engaging in proscribed conduct.[70] It has been said that its statutory form makes it readily accessible and easily understood by the public.[71] However, this is debatable considering that law students need instruction on how to locate the law and at times even judges agonise over the meaning of criminal provisions. In any event, the criminal law forces people to engage in desirable as opposed to undesirable conduct.[72] For this reason, criminal law has been described as 'a system for moral education'[73] that shapes preferences

---

[68] Mark Findlay, Stephen Odgers and Stanley Yeo, *Australian Criminal Justice* (3rd ed, 2005) 7.

[69] See *Crimes Act 1961* (NZ) s 216G-N, which came into effect in December 2006; *Criminal Code* (Qld) s 227A-C, which came into effect in December 2005; *Criminal Code* (Can) s 162, which came into effect in November 2005; *Sexual Offences Act 2003* (UK) s 67, which came into effect in May 2004; and *Summary Offences Act 1988* (NSW) s 21G-H, which came into effect in March 2004.

[70] Mark Findlay, Stephen Odgers and Stanley Yeo, *Australian Criminal Justice* (3rd ed, 2005) 8.

[71] Ibid 9. There are further benefits of having criminal laws prescribed in statutory form. For example, the concepts used in criminal law 'will cohere with and not reinvent existing legal concepts, facilitating understanding by professionals within the criminal justice system and avoiding the need for costly retraining exercises': AP Simester and GR Sullivan, *Criminal Law Theory and Doctrine* (2003) 24. However, with regard to the public easily understanding criminal laws in statutory form, Gardner puts forward a much more realistic view. In particular, '[m]ost people have better things to do than acquaint themselves with a mass of legal materials, however easy to read and understand. Most people, most of the time, need to know roughly what the law says on non-specialist matters without knowing, or caring, how the law says it': John Gardner, 'Rationality and the Rule of Law in Offences Against the Person' (1994) 53 *Cambridge Law Journal* 502, 513. On the same page, Gardner continues to claim that it is moral clarity that is required not textual clarity. In Nils Jareborg, 'Criminalization as Last Resort (Ultima Ratio)' (2005) 2 *Ohio State Journal of Criminal Law* 521 it is suggested that the offence must be defined in such a way that its application is not very difficult and its elements are not difficult to prove: 529. See also R A Duff, 'Law, Language and Community: Some Preconditions of Criminal Liability' (1998) 18 *Oxford Journal of Legal Studies* 189.

[72] Paul H Robinson, 'A Theory of Justification: Societal Harm as a Prerequisite for Criminal Liability' (1975) 23 *UCLA Law Review* 266, 266.

[73] John C Coffee, 'Paradigms Lost: The Blurring of the Criminal and Civil Law Models - And What Can Be Done About It' (1992) 101 *The Yale Law Journal* 1875, 1877. Similarly, Jareborg suggests that criminalisation makes it 'unequivocally and publicly clear that some sort of conduct is unacceptable and reprehensible': Nils Jareborg, 'Criminalization as Last Resort (Ultima Ratio)' (2005) 2 *Ohio State Journal of Criminal Law* 521, 528. Further, criminal law

and imposes costs.[74] Clearly drafted criminal laws provide the community with confidence that offenders are correctly labelled.[75] Garland agrees with the prescriptive and educational benefits of the criminal law. In particular, he says:

> Penal signs and symbols are one part of an authoritative, institutional discourse which seeks to organise our moral and political understanding and to educate our sentiments and sensibilities. They provide a continuous, repetitive set of instructions as to how we should think about good and evil, normal and pathological, legitimate and illegitimate, order and disorder. Through their judgments, condemnations and classifications, they teach us (and persuade us) how to judge, what to condemn, and how to classify, and they supply a set of languages, idioms, and vocabularies with which to do so. These signifying practices also tell us where to locate social authority, how to preserve order and community, where to look for social dangers, and how to feel about these matters.[76]

While Garland's comment signifies the important impact of criminal law, it does not provide any guidance on what types of conduct should be criminalised. This thesis will explore the principles underpinning the decision to criminalise conduct, especially in chapter 2.

1.2.2 Harm

This thesis will also explore the literature on the concept of 'harm' because it is used frequently to underpin the decision to criminalise conduct. Harm is relevant from a variety of perspectives, including culpability, consent and the dividing line between criminal law and civil law. As a starting point, the Oxford Dictionary of Philosophy states that harm includes 'bodily injury and injury to one's central and legitimate interests… [while the] disputed cases

---

has been described as an 'instrument of popular pedagogy, in order to sensitize the people': Nils Jareborg, 'Criminalization as Last Resort (Ultima Ratio)' (2005) 2 *Ohio State Journal of Criminal Law* 521, 528.

[74] John C Coffee, 'Paradigms Lost: The Blurring of the Criminal and Civil Law Models - And What Can Be Done About It' (1992) 101 *The Yale Law Journal* 1875, 1877.

[75] AP Simester and GR Sullivan, *Criminal Law Theory and Doctrine* (2003) 23. 'Textual clarity requires the avoidance of arcane, ornamented language, the avoidance of great technicality and complexity of drafting, and a minimisation of the scope of conflicting interpretation': John Gardner, 'Rationality and the Rule of Law in Offences Against the Person' (1994) 53 *Cambridge Law Journal* 502, 519. Note also that textual clarity may involve extra legal technicality, which may result in a conflict between certainty and textual clarity: John Gardner, 'Rationality and the Rule of Law in Offences Against the Person' (1994) 53 *Cambridge Law Journal* 502, 519. Note MacCormick's example of battery (where a rule that appears to be clear-cut has its problems, that is, When does a tap on the shoulder amount to friendship, warning of a mishap, a threat or sexual harassment?: Neil MacCormick, 'Reconstruction after Deconstruction: A Response to CLS' (1990) 10 *Oxford Journal of Legal Studies* 539, 544.

[76] David Garland, *Punishment and Modern Society: A Study in Social Theory* (1990) 252.

include the causing of discomfort, insult, nuisance, and offence.'[77] This definition is not exhaustive and highlights the difficulties in determining the boundaries of harm. In a criminal law context, harm was articulated by Feinberg as a 'thwarting, setting back, or defeating [of] an interest'.[78] Feinberg's definition is frequently cited by leading commentators, but it leaves various questions about the scope of harm unanswered. For example, it is debatable whether it includes psychological, economic or indirect harms.[79] In the context of making and/or distributing visual recordings, psychological and indirect harms are pivotal types of harm. For example, where the school boy rowers were visually recorded without their consent and the visual recordings were uploaded to a voyeuristic website, the boys felt violated, exploited, were angry and anxious about going in public places.[80] The boys did not know that they had been visually recorded until some time later when the visual recordings were viewed on the Internet. One of the key issues relating to harm is whether the harm involved in making and/or distributing visual recordings is serious enough to justify criminalisation. Chapter 2 will explore the harm principle in detail.

1.2.3 Morality

Similarly to the harm principle, morality is another justification for criminalising conduct. Morality will arise in this thesis in various guises; for example, it is relevant to culpability, consent and the dividing line between criminal and civil law. Moral wrongness is based on the norms of society, rather than the practices of a particular religion.[81] Arguably, there is not a shared understanding of the concept of 'morality'.[82] Despite this, Simester and Sullivan attempted to provide a generalised definition of it as an 'unpleasant

---

[77] Simon Blackburn, *Oxford Dictionary of Philosophy* (2005) under the definition of harm. Note that the term of 'offence' used in this quote signifies moral wrongness and not a crime.

[78] Joel Feinberg, *The Moral Limits of the Criminal Law: Harm to Others* (1984) 33. Simester and Sullivan have developed this definition as follows: 'When we are harmed, one or more of our interests is left in a worse state than it was beforehand. In turn, a person's *interests* comprise the things that make his [or her] life go well; thus we are harmed when our lives are changed for the worse. In particular, harm involves the impairment of a person's opportunities to engage in worthwhile activities and relationships, and to pursue valuable, self-chosen, goals. In this sense, harm is prospective rather than backward-looking: it involves a diminution of one's opportunities to enjoy or pursue a good life. Characteristically, harm is brought about through the impairment of V's personal or proprietary resources. However, as Feinberg observes, what makes such impairment harmful is not the impairment *per se* but its implication for V's well-being': AP Simester and GR Sullivan, *Criminal Law Theory and Doctrine* (2003) 10.

[79] Bernadette McSherry and Bronwyn Naylor, *Australian Criminal Laws: Critical Perspectives* (2004) 19.

[80] Standing Committee of Attorneys-General, *Unauthorised Photographs on the Internet and Ancillary Privacy Issues* (2005) <http://www.ag.gov.au> at 1 October 2005, 12.

[81] Andrew Ashworth, *Principles of Criminal Law* (5th ed, 2006) 41.

[82] Bernadette McSherry and Bronwyn Naylor, *Australian Criminal Laws: Critical Perspectives* (2004) 20.

and disliked psychological experience'.[83] This is a nebulous definition and epitomises one of the weaknesses of morality as a principle underpinning the decision to criminalise conduct. The principle of morality will be discussed in detail in chapter 2. Further, this thesis will consider the relevance of the principle of morality in deciding whether to criminalise making and/or distributing visual recordings.

1.2.4 Culpability

Culpability is defined as 'the moral value attributed to a defendant's state of mind during the commission of a crime'.[84] Findlay, Odgers and Yeo suggest that an offender's mental state may be ascertained objectively or subjectively.[85] They categorise strict and absolute liability offences as objective standards of culpability.[86] However, this thesis will unpack culpability into three standards; that is, subjective, objective and no-fault liability. No-fault liability is further divided into strict and absolute liability offences. Bronitt and McSherry endorse this tripartite approach to culpability.[87]

An objective standard of culpability, for example, negligence, is more aligned with the social welfare principle and the harm principle, which will be discussed in chapter 2, because they afford greater weight to the 'seriousness of the consequences and the deterrent effect of conviction and punishment'.[88] They place less emphasis on the offender's actual mental state. In contrast, the subjective mental states include intention, recklessness and knowledge.[89] These are more aligned to the autonomy of the individual principle, which will be discussed in chapter 2, because they hold individuals liable for their choice to engage in conduct.[90] They focus on the offender's mental state and place less emphasis on the consequences of the conduct. The no-fault standards of culpability, that is, strict and absolute liability, concentrate on the conduct rather than the offender's mental state or the consequences of the conduct. Consequently, the criminal law has at its disposal three standards of culpability.

---

[83] AP Simester and GR Sullivan, *Criminal Law Theory and Doctrine* (2003) 15. Note that Simester and Sullivan use the concept of offence rather than moral wrongness.
[84] Stuart P Green, 'Why it's a Crime to Tear the Tag off a Mattress: Overcriminalization and Moral Content of Regulatory Offenses' (1997) 46 *Emory Law Journal* 1533, 1547.
[85] Mark Findlay, Stephen Odgers and Stanley Yeo, *Australian Criminal Justice* (3rd ed, 2005) 15-21.
[86] Ibid 20.
[87] Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (2nd ed, 2005) 187.
[88] Ibid 18. See also, Bernadette McSherry and Bronwyn Naylor, *Australian Criminal Laws: Critical Perspectives* (2004) 65.
[89] Ibid 16-17.
[90] Ibid 69.

McSherry and Naylor suggest that any quest for a universal form of culpability, whether it be objective or subjective, is doomed to fail.[91] Chapter 4 does not seek a universal standard of culpability, but will explore whether it is apt to use a subjective, objective and/or no-fault standard of culpability in criminalising the making and/or distribution of visual recordings.

1.2.5 Consent

Despite the fact that Simester and Sullivan suggest it is difficult to fashion a notion of 'consent' that is serviceable in all contexts,[92] this thesis will draw on the definition of consent for the purposes of the non-fatal offences against a person and sexual offences as a guide for determining the boundaries of consent in visual recording and distribution offences. In particular, non-fatal offences against a person construe consent to be express, implied or tacit.[93] This construction of consent is consistent with McSherry and Naylor's list of adjectives for consent; that is, 'explicit, implicit, express, implied, presumed, informed, unwilling, reluctant, grudging, half-hearted, [and] unreserved'.[94] Implied consent is less obvious than express consent and is worthy of further discussion at this point.

With regard to implied consent, Glanville Williams suggests that three conditions must be present. Firstly, the victim must know the act is being done or proposed to be done in relation to their body by the offender who is present.[95] This means that a person cannot consent to an act unless they know what is done. Secondly, the victim must have the ability to refuse consent.[96] The first and second conditions for implied consent may be a problem in the context of making and/or distributing visual recordings because the person may not know that they are being visually recorded at the time it is done and therefore does not have the ability to refuse consent. Thirdly, the victim must indicate his or her refusal to consent by, for example, words, gestures or resistance.[97] Implied consent is of particular relevance to the examples used in this thesis: for example, does a person impliedly consent to being visually

---

[91] Bernadette McSherry and Bronwyn Naylor, *Australian Criminal Laws: Critical Perspectives* (2004) 65.
[92] AP Simester and GR Sullivan, *Criminal Law Theory and Doctrine* (2003) 612.
[93] A key case in Queensland on the concept of consent is *Kimmorley v Atherton; ex parte Atherton* [1971] Qd R 117. In that case, Hoare J stated that a 'consent may be express or it may be implied or tacit': at 133. Several other cases discuss the concept of consent in the context of non-fatal offences against the person, for example, *Boughey v The Queen* (1986) 60 ALJR 422, *R v Watson* [1987] 1 Qd R 440, *R v Raabe* [1984] 1 Qd R 115, *McNamara v Duncan* (1971) 26 ALR 584, *Kirkpatrick v Tully* [1991] 2 Qd R 291, *Lergesner v Carroll* [1991] 1 Qd R 206, *Re Lenfield* (1993) 114 FLR 195 and *Horan v Ferguson* [1995] 2 Qd R 490.
[94] Bernadette McSherry and Bronwyn Naylor, *Australian Criminal Laws: Critical Perspectives* (2004) 211.
[95] Glanville Williams, *Textbook of Criminal Law* (2nd ed, 1983) 550.
[96] Ibid 550.
[97] Ibid 550.

recorded in a public place merely because they appear in a public place? Chapter 5 will examine this issue more closely.

Express or implied consent may generally be vitiated in three situations. Firstly, where a victim's consent is vitiated by mistake or fear.[98] Secondly, a victim's consent is vitiated where a victim is incapable of consenting because he or she falls within a vulnerable group, for example, children.[99] Thirdly, where public policy denies anyone from consenting to the act, for example, if the act is immoral or injures society.[100] If the consent of the victim is vitiated in one or more of these three situations, the criminal law may step in to protect the victim.

'Consent' emerges as a central concept in the context of making and/or distributing visual recordings, and notably, the statutory responses to this conduct hinge on the element of lack of consent,[101] such that if the person visually recorded consents to the making and/or distribution of the visual recording, the criminal law does not apply.[102] The element of lack of consent is not defined in any legislation for the purpose of visual recording and distribution offences,[103] but consent implies knowledge[104] and it 'must be given before or at the time of the act'.[105] In addition to discussing the conceptual boundaries of consent, chapter 5 explores the different approaches to the role of

---

[98] Ibid 550. In the context of sexual offences, legislative reforms explain when consent is vitiated. For example, in Queensland, consent is not voluntary if it is by force, threat or intimidation, fear of bodily harm, exercise of authority, false and fraudulent representations about the nature or purpose of the act or a mistaken belief induced by the accused that the accused was the victim's sexual partner: *Criminal Code* (Qld) s 348. See also Simon Blackburn, *Oxford Dictionary of Philosophy* (2005) definition of consent, which states that 'coercion, exploitation, fraud, [and] deception' imply at a lack of consent. 'Conversely, just or permissible transactions imply either the actual or potential consent of affected parties'. The definition of consent also raises the concept 'potential consent', which is based on motivations, knowledge, rationality and situation of the agent. The dictionary also provides an example of tacit consent, that is, where a person does not actually consent to the laws of the country, but is bound by the laws.

[99] Glanville Williams, *Textbook of Criminal Law* (2nd ed, 1983) 551.

[100] Ibid 551. McSherry and Naylor put forward female genital mutilation, indigenous customary law and sadomasochism as examples of acts where consent is vitiated on public policy grounds: Bernadette McSherry and Bronwyn Naylor, *Australian Criminal Laws: Critical Perspectives* (2004) 198-202. They suggest that these examples show how one culture can intrude on other cultures: 198.

[101] Ibid.

[102] Note that the following provisions explicitly refer to the element of consent: *Criminal Code* (Qld) ss 227A and B, *Summary Offences Act 1988* (NSW) ss 21G, *Crimes Act 1961* (NZ) s 216H and J, *Sexual Offences Act 2003* (UK) s 67 and *Video Voyeurism Act* 18 USC §1801(a) (2004). In New Zealand, the definition of intimate visual recording refers to visual recordings made without the 'knowledge or consent' of the person visually recorded. The Canadian offence of voyeurism does not refer to consent: *Criminal Code* (Can) s 162.

[103] Note that consent is defined in the *Criminal Code* (Qld) s 348, for the purpose of sexual assault and rape. The concept is used in other non-fatal offences, for example, assault and assault occasioning bodily harm in *Criminal Code* (Qld) ss 335 and 339, respectively.

[104] Glanville Williams, *Criminal Law The General Part* (2nd ed, 1961) 867.

[105] Ibid 770.

consent in the criminalisation debate particularly as discerned from the 1995 England and Wales' Consultation Paper on consent,[106] for example, quantitative, quantitative plus exceptions, individual autonomy, paternalism and morality. Chapter 5 develops an additional approach to the role of consent, which is a contextual approach.

Consent may be present as an element of an offence or a defence. When viewed as an element of the offence in the context, for example, of an assault, the victim has the capacity to waive their physical integrity.[107] The philosophical underpinning for consent viewed in this light is respecting the victim's autonomy.[108] This means that when a person agrees to the conduct, it will not amount to an offence because the element of lack of consent will not be satisfied.[109] In contrast, when viewed as a defence, the elements of the offence may be satisfied, and the victim's lack of consent operates to negative the offence.[110] Examining the notion of 'lack of consent' is central to this thesis because it focuses on making and/or distributing visual recordings, and in many cases this is done without the consent of the person visually recorded. Another issue relating to consent is the modern conceptualisation of consent as appropriate to contemporary contexts.

1.2.6 Public and Private Dichotomy

This thesis will consider whether the public and private dichotomy should impact on the decision to criminalise conduct broadly and then more specifically in the context of making and/or distributing visual recordings. There is no universally accepted distinction between private and public.[111] These concepts have changed over time and differ depending on the context.[112] As a starting point, Blackstone asserts that crimes 'are a breach and violation of the public rights and duties, due to the whole community',[113] while civil

---

[106] England and Wales, Law Commission for England and Wales, Consent in the Criminal Law, Consultation Paper No. 139 (1995) 245-276.
[107] Andrew Ashworth, *Principles of Criminal Law* (5th ed, 2006), 318.
[108] Ibid.
[109] It should be noted that some non-fatal offences against the person do not contain the element of lack of consent, for example, grievous bodily harm, unlawful wounding and torture. Consequently, these offences will be committed even if the victim consented to the injuries.
[110] Andrew Ashworth, *Principles of Criminal Law* (5th ed, 2006) 318.
[111] Ted Honderich (ed), *The Oxford Companion to Philosophy* (New Edition ed, 2005), 770.
[112] Ibid, 770.
[113] William Blackstone, *Commentaries on the Laws of England* (1979 (originally published in 1765)) 5. Note that Blackstone uses the terms of 'rights' and 'duties' and not 'interests'. Blackstone concludes that 'in taking cognizance of all wrongs, or unlawful acts, the law has double view: viz not only to redress the party injured, by either restoring to him his right, if possible; or by giving him an equivalent;…but also to secure to the public the benefit of society, by preventing or punishing every breach and violation of those laws, which the sovereign power has thought proper to establish, for the government and tranquillity of the whole': 7.

injuries are private wrongs and infringe individual civil rights.[114] '[G]ross and atrocious injuries',[115] for example, murder and robbery, are criminalised because the offender cannot repair the injuries.[116] In contrast, crimes of an inferior nature involve less severe public punishment and the possibility of a private remedy.[117] In this regard, Blackstone provides an example of the overlap between criminal law and civil law and, he notes that in the case of beating another person, there is a crime for disturbing the peace and a private (civil) remedy for trespass to person.[118] A further example of the overlap between criminal and civil law is nuisance,[119] though there are many others. Chapter 3 will identify the distinctions between criminal law and civil law to help sharpen the focus of the criminal law.[120] One example of a distinction is the public and private distinction. In this sense, public and private do not relate to place, but rather to interests: the criminal law is considered to be 'primarily public'[121] because it protects social welfare interests rather than individual interests.[122]

The public and private dichotomy will also emerge in chapter 5, which will explore the conceptual boundaries of consent and the different approaches to the role of consent in the criminal law. In that chapter, public interest emerges as an exception to the quantitative plus exceptions approach to consent, which is discerned from the 1995 England and Wales' Consultation Paper on consent.[123] Further, chapter 5 discusses a contextual approach to consent and in doing so, it is necessary to consider whether there is a right to privacy in a public place and how to distinguish a public place from a private place.

---

[114] Ibid.
[115] Ibid 6.
[116] Ibid. While Blackstone does not expressly use the notion of 'morally wrong' when discussing the example of murder and robbery, he does impliedly because he states, 'When the word *crime* is used with reference to moral law, it implies every deviation from moral rectitude': 5. Thus, he acknowledges that murder and robbery, which are crimes, are morally wrong.
[117] Ibid.
[118] Ibid.
[119] Ibid.
[120] Paul H Robinson, 'The Criminal-Civil Distinction and the Utility of Desert' (1996) 76 *Boston University Law Review* 201, 212.
[121] James Lindgren, 'Why the Ancients may not have Needed a System of Criminal Law' (1996) 76 *Boston University Law Review* 29, 36.
[122]Kenneth Mann, 'Punitive Civil Sanctions: The Middleground between Criminal and Civil Law' (1992) 101 *The Yale Law Journal* 1795, 1806.
[123] England and Wales, Law Commission for England and Wales, Consent in the Criminal Law, Consultation Paper No. 139 (1995) 245-276.

1.2.7 Privacy

There is a wealth of literature on privacy and canvassing all of its meanings is well beyond the scope of this thesis.[124] 'Privacy' is an elusive concept and it has been said that the ability to find a single short definition of privacy is misguided.[125] The spirit of privacy is self-respect, whereas the essence of a breach of privacy is shame and indignity.[126] The origins of privacy as a legal concept go back to 1890, when Warren and Brandeis referred to privacy as the 'right to be let alone'.[127] As will be discussed in chapter 5, this legal definition is flawed, but it provides a general gist of the notion. The Australian Law Reform Commission, in its 2008 report on privacy, turns away from an overarching definition of 'privacy' and prefers Solove's approach to privacy, which will be discussed in detail in chapter 5, by labelling it as a 'useful template for law reform' and a 'pragmatic approach to privacy'.[128]

The scope of privacy will have ramifications for the scope of harm, which is a principle that underpins criminalisation. The harm principle is discussed in more detail in chapter 2. Subsequent chapters in this thesis will consider whether invasion of privacy in the context of making and/or distributing visual recordings warrants the criminalisation of this conduct.

In this thesis, the significance of privacy stems from the public place and private place dichotomy. This issue is whether a person waives their right to privacy and thus consents to being visually recorded merely because they are in

---

[124] Note that the author has read Australia, Australian Law Reform Commission, For Your Information: Australian Privacy Law and Practice, Report No. 108 (2008), but it was released too late to be fully incorporated in this thesis. See especially Daniel Solove, 'A Taxonomy of Privacy' (2006) 154 *University of Pennsylvania* 477, Daniel Solove, 'Conceptualizing Privacy' (2002) 90 *California Law Review* 1087 , David Lindsay, 'An Exploration of the Conceptual Basis of Privacy and the Implications for the Future of Australian Privacy Law' (2005) 29 *Melbourne University Law Review* 131, James Whitman, 'The Two Western Cultures of Privacy: Dignity Versus Liberty' (2003-2004) 113 *The Yale Law Journal* 1151, Edward J Bloustein, 'Privacy Is Dear at Any Price: A Response to Professor Posner's Economic Theory' (1978) 12 *Georgia Law Review* 429, Robert Chalmers, 'Orwell or All Well? The Rise of Surveillance Culture' (2005) 30 *Alternative Law Journal* 258, Tim Dixon, 'Valuing Privacy: An Overview and Introduction' (2001) 7 *University of New South Wales* 2, Charles Fried, 'Privacy' (1968) 77 *The Yale Law Journal* 475, Charles Fried, 'Privacy: Economics and Ethics A Comment on Posner' (1978) 12 *Georgia Law Review* 423 and William L Prosser, 'Privacy' (1960) 48 *California Law Review* 383, which merely skims the surface of the literature on privacy.

[125] R Parker, 'A Definition of Privacy' (1974) 27 *Rutgers Law Review* 275, 277. See also Daniel Solove, 'Conceptualizing Privacy' (2002) 90 *California Law Review* 1087, 1099.

[126] Simon Blackburn, *Oxford Dictionary of Philosophy* (2005) under the definition of privacy.

[127] S Warren and L Brandeis, 'The Right to Privacy' (1890) IV *Harvard Law Review* 193, 195. Further, they assert that the notion of 'inviolate personality' underpins privacy: 205.

[128] Australia, Australian Law Reform Commission, For Your Information: Australian Privacy Law and Practice, Report No. 108 (2008)Australian Law Reform Commission, 'For Your Information: Australian Privacy Law and Practice' (Report No. 108, 2008) [1.67].

a public place. Consequently, privacy is a central concept in this thesis and is discussed in chapter 5.

While the concepts of 'harm', 'morality', 'culpability', 'consent', 'public and private dichotomy' and 'privacy' relate to the decision of criminalising conduct more generally, the specific instance of conduct being considered for potential criminalisation in this thesis requires consideration of a range of concepts relating to making and/or distributing visual recordings. These concepts include 'visual recording', 'distribution' and 'voyeurism'. Each of these will be discussed in turn.

1.2.8 Visual Recording

As mentioned in the beginning of this chapter, digital cameras, mobile phone cameras, video cameras, the Internet, email, and the blogosphere have enhanced our ability to take photographs and make videos and distribute them to other people. Websites such as flickr,[129] Myspace,[130] Facebook[131] and Youtube[132] refer to concepts including 'photographs', 'videos' and 'film', presumably because they are more easily understood by the community, modern legislative approaches are tending to use the notion of 'visual recording' to capture photographs, videos and film. 'Visual recording' is a central concept arising out of making and/or distributing visual recordings.

Queensland and New Zealand have fostered the concept of 'visual recording' in their legislative responses.[133] In particular, Queensland specifically refers to 'visually record', which is defined to mean 'record, or transmit, by any means, moving or still images of the person or part of the person'.[134] The use of the word 'transmit' is significant because it will apply to people who, for example, transmit images in real-time to the Internet, but may not make a recording.[135] Even though one of the examples provided in the Queensland legislation[136] refers to a mobile phone camera, the visual recording offences are technology neutral because they apply to moving and still images. Consequently, the offences apply to digital cameras and video cameras, but not sound recordings. New Zealand provides some specific examples of visual recordings, such as a

---

[129] http://www.flickr.com.
[130] http://www.myspace.com.
[131] http://www.facebook.com.
[132] http://www.youtube.com.
[133] *Criminal Code* (Qld) s 207A, which came into effect in December 2005; *Crimes Act 1961* (NZ) s 216G, which came into effect in December 2006.
[134] *Criminal Code* (Qld) s 207A.
[135] For this reason s 40 of the Summary Offences Amendment (Upskirting) Bill 2007 (Vic) uses the concept of visually capture rather than visual recording. Visually capture, in relation to a person's genital or anal region, means capture moving or still images of that region by a camera or any other means in such a way that a recording is made of those images or those images are otherwise capable of being distributed'.
[136] *Criminal Code* (Qld) s 227A(2).

photograph, videotape or digital image.[137] These examples are consistent with the concepts used in the legislative responses of New South Wales, Canada and the United States, which occurred earlier than the responses in Queensland or New Zealand.[138]

In New South Wales, the statute refers to one or more moving or still image.[139] In Canada, the legislation refers to 'photographic, film or video recording made by any means,'[140] while in the United States of America, the provision refers to 'videotaping, photographing, filming or recording'.[141] The United Kingdom counterpart takes a different approach and leaves the concept of 'recording' open to judicial interpretation.[142] Arguably this flexibility enables the law to keep pace with advances in technology. The legislative responses have focused on visual recordings rather than sound recordings. It should be emphasised that a discussion of recordings that merely capture sound are beyond the scope of this thesis. Despite the use of different concepts across the world for visual recording, the relevant legislative responses apply to moving and still images, and thus are intended to have the same scope.

Most of the relevant scholarly literature has been published in the United States, and pre-dates the legislative reaction in Queensland and New Zealand. As a result, the literature does not use the concept of 'visual recording', but rather employs photographing, filming and videotaping.[143] Similarly, relevant newspaper articles tend to use 'photographing', 'filming' and 'videotaping', presumably because these references are easily understood by the public. Visual recording is more appropriate because it is a broad concept that is technology neutral and more likely to keep up with advances in technology than the more specific alternatives identified above.

The discussion in this thesis will enquire into (1) a person who makes a visual recording, (2) a person who distributes a visual recording and (3) a person who makes and distributes a visual recording. Legislatures across the world have responded differently in criminalising these acts and the legislative responses

---

[137] *Crimes Act 1961* (NZ) s 216G(1).
[138] *Summary Offences Act 1988* (NSW) s 21G(2)(a), which came into effect in March 2004; *Criminal Code* (Can) s 162(2), which came into effect in November 2005; and *Video Voyeurism Act* 18 USC §1801(b)(1), which came into effect in December 2004.
[139] *Summary Offences Act 1988* (NSW) s 21G(2)(a).
[140] *Criminal Code* (Can) s 162(2).
[141] *Video Voyeurism Act* 18 USC §1801(b)(1) and (2) (2004).
[142] *Sexual Offences Act 2003* (UK) s 67.
[143] See especially Clay Calvert and Justin Brown, 'Video Voyeurism, Privacy, and the Internet: Exposing Peeping Toms in Cyberspace' (2000) 18 *Cardozo Arts and Entertainment Law Journal* 469, Lance Rothenberg, 'Re-thinking Privacy: Peeping Toms, Video Voyeurs, and the Failure of Criminal Law to Recognize a Reasonable Expectation of Privacy in the Public Space' (1999-2000) 49 *American University Law Review* 1127, and Elizabeth Paton-Simpson, 'Privacy and the Reasonable Paranoid: The Protection of Privacy in Public Places' (2000) 50 *University of Toronto Law Journal* 305.

have informed the delimitations in this thesis.[144] Most jurisdictions do not specifically prohibit a person from setting up visual recording equipment,[145] but arguably this type of conduct could be treated as an attempt to make a visual recording. Most jurisdictions do not prohibit a person from merely possessing a visual recording.[146] Consequently, emphasis is placed on making and/or distributing a visual recording rather than merely attempting to make or possess a visual recording.

The thesis will canvass visual recordings made or distributed by individuals, as opposed to corporate, commercial or government entities.[147] It will not explore visual recordings made by law enforcement officers acting reasonably in the course of their duties, visual recordings made in the name of public good or the interest of national security, or visual recordings where the person visually recorded is in lawful custody or under a supervision order. This delimitation has again been informed by the legislative responses.[148] The thesis will delve

---

[144] See especially *Criminal Code* (Qld) s 227A-B, *Crimes Act 1961* (NZ) s 216H and J, *Criminal Code* (Can) s 162(1) and (4) and *Video Voyeurism Act* 18 USC §1801(a) (2004). Contrast the position in New South Wales where it is an offence to film for indecent purpose pursuant to *Summary Offences Act 1988* (NSW) s 21G, but there is no reference to distributing indecent films in the *Summary Offences Act 1988* (NSW). Further, the legislative response in the United Kingdom does not specifically refer to distributing voyeuristic images, but it does catch a person who operates equipment with the intention of enabling another person to engage in voyeurism: *Sexual Offences Act 2003* (UK) s 67(2). Consequently, this would capture a person who, for example, distributes the images via the Internet in real time. Note that distribution of video voyeurism is not covered in the United States Code.

[145] See especially *Criminal Code* (Qld) s 227A-C, *Crimes Act 1961* (NZ) s 216G-N, *Criminal Code* (Can) s 162 and *Video Voyeurism Act* 18 USC §1801 (2004). Note that installing a device to facilitate filming for indecent purposes is an offence in New South Wales: *Summary Offences Act 1988* (NSW) s 21H. Further, installing equipment with the intention to commit voyeurism is an offence in the United Kingdom: *Sexual Offences Act 2003* (UK) s 67.

[146] See especially *Criminal Code* (Qld) s 227A-B, *Summary Offences Act 1988* (NSW) ss 21 G and H, *Criminal Code* (Can) s 162, *Sexual Offences Act 2003* (UK) s 67-8 and *Video Voyeurism Act* 18 USC §1801 (2004). The position in New Zealand may be distinguished from these jurisdictions because it prohibits a person from possessing an intimate visual recording where they know it is an intimate visual recording and where they intend to distribute it: *Crimes Act 1961* (NZ) s 216I.

[147] See generally Helene Wells, Troy Allard and Paul Wilson, 'Crime and CCTV in Australia: Understanding the Relationship' (Centre for Applied Psychology and Criminology: Bond University, Australia, 2006) for a discussion on closed circuit television recordings made by government entities.

[148] See espeically *Criminal Code* (Qld) s 227C, *Crimes Act 1961* (NZ) s 216K and N, *Criminal Code* (Can) s 162(3) and (6) and *Video Voyeurism Act* 18 USC §1801(c) (2004). Queensland provides several exemptions relating to law enforcement purposes. For example, the visual recording offences will not apply to a law enforcement officer reasonably performing their duties: *Criminal Code* (Qld) s 227C(1). A further exemption is granted to a person acting reasonably in the performance of their duties where the person visually recorded is in lawful custody (detained under the *Mental Health 2000* (Qld) or subject to a supervision order): *Criminal Code* (Qld) ss 227C(2) and (3). A supervision order includes a community based order under the *Penalties and Sentences Act 1992* (Qld), a community based order or supervised release order under the *Juvenile Justice Act 1992* (Qld), a post-prison community based release order or a conditional release order under the *Corrective Services Act 2000* (Qld), an intensive drug rehabilitation order under the *Drug Rehabilitation (Court Diversion) Act 2000* (Qld), and a

into visual recordings made and/or distributed for a voyeuristic purpose, but will not be confined to them. People may make and/or distribute visual recordings for a range of other purposes including to embarrass or humiliate a person visually recorded, to portray family and friends, or to capture a landmark where another person accidentally appears in the background of the visual recording.

1.2.9 Distributing

In addition to making visual recordings, this thesis also focuses on distributing visual recordings; thus, it is useful to define the concept of 'distributing' in this context. In December 2005, Queensland introduced an offence of distributing a prohibited visual recording.[149] Distributing has been defined to include '(a) communicate, exhibit, send, supply or transmit to someone, whether to a particular person or not; and (b) make available for access by someone, whether by a particular person or not; and (c) enter into an agreement or arrangement to do something in paragraph (a) or (b); and (d) attempt to distribute'. It is almost impossible to envisage a type of distribution that is not caught by this overarching definition. Unlike the Queensland definition of 'distributing', the Canadian approach simply lists 'prints, copies, publishes, distributes, circulates, sells, advertises, or makes available the recording',[150] and overlooks attempting to distribute.

New Zealand uses slightly different terminology to Queensland and Canada, and punishes a person who publishes, imports, exports or sells an intimate visual recording.[151] New Zealand defines publishing to include displaying, sending, distributing, conveying and storing electronically.[152] In New Zealand, the concept of 'sells' is defined separately to publishes. Thus, the Queensland notion of 'distributes' offers a more encompassing single concept. In contrast, New South Wales, the United Kingdom and the United States of America do

---

supervision order or an interim supervision order under the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld): *Criminal Code* (Qld) ss 227C(3). New Zealand provides more exemptions than Queensland. New Zealand grants an exemptions to police, Customs officers, officers and employees of the New Zealand Security Intelligence Service, employees of the Department of Corrections, lawyers and agents providing legal advice or making representations in proceedings: *Crimes Act 1961* (NZ) s 216N. With regard to publishing a covert visual recording, exceptions are provided to postal operators, couriers, network operators and service providers: *Crimes Act 1961* (NZ) s 216K. Canada provides an exemption for peace officer who is acting under a warrant: *Criminal Code* (Can) s 162(3). Canada also provides a defence for voyeurism if it is carried out in the public good: *Criminal Code* (Can) s 162(6). Whether the act serves the public good is a question of law: *Criminal Code* (Can) s 162(7)(a). The United States of America,does not prohibit video voyeurism if it is done for an intelligence, lawful law enforcement or correctional activity: *Video Voyeurism Act* 18 USC §1801(c) (2004). Note that there are no exemptions in New South Wales and the United Kingdom.

[149] *Criminal Code* (Qld) s 227B(1).

[150] *Criminal Code* (Qld) s 162(4).

[151] *Crimes Act 1961* (NZ) s 216J(1).

[152] *Crimes Act 1961* (NZ) s 216J(2).

not offer a definition of distribution.[153] While different wording is used in Queensland, New Zealand and Canada, this thesis submits that all approaches to distribution capture the key form of distribution mentioned in the media reports, which is uploading a visual recording to the Internet.[154] Two other prevalent forms of distribution in a technological environment are sending visual recordings to other people via email and by mobile phone.

1.2.10 Voyeur

Various legislative responses across the world specifically refer to voyeurism,[155] sexual purpose,[156] sexual gratification[157] or sexual arousal,[158] and this thesis will include examples of making and/or distributing visual recordings that are done for these purposes. Consequently, at this point, it is useful to define the concept of 'voyeur'.

The concept of 'voyeur' stems back to legend of Lady Godiva (in approximately 1050).[159] According to the legend, Tom looked at Lady Godiva as she rode naked through the town on a horse in protest of taxes. As a result, Tom was named Peeping Tom.[160] Depending on the version of the legend, Peeping Tom was either blinded or killed for his action. The notion of 'Peeping Tom' is synonymous with a voyeur.

The Australian, New Zealand and, England and Wales Discussion Papers on visual recording do not define voyeur.[161] In contrast, the Canadian Consultation Paper draws on the Canadian Oxford Dictionary for a definition of

---

[153] New South Wales and the United Kingdom refer to indecent filming and voyeurism, respectively, for the benefit of a third person, and thus envisage distribution, but they do not provide a definition of distribution: *Summary Offences Act 1988* (NSW) s 21G and *Sexual Offences Act 2003* (UK) s 67. In contrast, the United States of America does not contemplate distribution and only applies to a person who captures an image, that is, the making of a visual recording: *Video Voyeurism Act* 18 USC §1801(a) (2004).

[154] Standing Committee of Attorneys-General, *Unauthorised Photographs on the Internet and Ancillary Privacy Issues* (2005) <http://www.ag.gov.au> at 1 October 2005, 9.

[155] *Video Voyeurism Act* 18 USC §1801 (2004), *Sexual Offences Act 2003* (UK), s 67.

[156] *Criminal Code* (Can) s 162(1)(c).

[157] *Sexual Offences Act 2003* (UK), s 67.

[158] *Summary Offences Act 1988* (NSW), s 21G(1).

[159] Clay Calvert and Justin Brown, 'Video Voyeurism, Privacy, and the Internet: Exposing Peeping Toms in Cyberspace' (2000) 18 *Cardozo Arts and Entertainment Law Journal* 469, 475.

[160] Rothenberg suggests that today's 'video voyeur may be little more than the next generation of yesterday's Peeping Tom': Lance Rothenberg, 'Re-thinking Privacy: Peeping Toms, Video Voyeurs, and the Failure of Criminal Law to Recognize a Reasonable Expectation of Privacy in the Public Space' (1999-2000) 49 *American University Law Review* 1127, 1145.

[161] Standing Committee of Attorneys-General, *Unauthorised Photographs on the Internet and Ancillary Privacy Issues* (2005) <http://www.ag.gov.au> at 1 October 2005, New Zealand, New Zealand Law Commission, Intimate Covert Filming Study Paper, Study Paper No. 15 (2004) and England and Wales, Home Office, *Setting the Boundaries: Reforming the Law on Sex Offences* (2000).

voyeur. The Canadian Oxford Dictionary defines a voyeur as 'a person who derives sexual gratification from the unauthorised observation of others as they undress or engage in sexual activities'. Similarly, the Australian Oxford Dictionary (2nd ed, 2004) defines a voyeur as '(1) a person who obtains sexual gratification from observing others' sexual actions or organs, (2) a powerless or passive spectator and (3) a person who enjoys seeing the pain or distress of others'. Unfortunately, the Canadian and Australian legislative definitions do not shed any light on why some legislatures used the concept of 'sexual purpose' or 'sexual arousal' instead of or in addition to 'sexual gratification', but it seems that the difference (if any) would be trivial and that they all pursue voyeurs. The definitions of 'voyeur' discussed above fail to explain the concept of 'observation' in any depth and, do not provide any concrete examples of the types of devices voyeurs may use to observe another person for sexual gratification. Some examples of devices include a digital camera, mobile phone camera or video camera. This thesis will draw on voyeuristic examples of visual recording, but will not be confined to them. Even though some of the examples of visual recording discussed in this thesis may overlap with the notion of 'pornography', or 'paedophilia', a discussion of these concepts and how they are regulated by the criminal law is beyond the scope of this thesis.

1.3 Structure of Thesis

This thesis is divided into six chapters. Chapter 1 has outlined the key issues and key concepts in this thesis. In this technological environment, with advances in the size and capabilities of mobile phone cameras, digital cameras, video cameras and the Internet, making and/or distributing visual recordings has become problematic. The community is said to be concerned about people visually recording children playing in a public park where the recording is done without consent; up-skirt filming; and visually recording people in, for example, communal change rooms and bathrooms. This first chapter has highlighted several examples of this problem. The criminal law in the 21st century has been called upon to consider this issue and various jurisdictions have provided a legislative response. However, unlike murder or rape, the characterisation of making and/or distributing visual recordings as criminal is far from clear-cut and emerging technologies are continually forcing a fresh consideration of the ambit of the criminal law and what is accepted as a normal consequence of using a public place today.[162] This thesis will explore this issue, and discuss whether a principled approach to criminalisation supports the criminalisation of making and/or distributing visual recordings.

There is not one single principle that consistently underpins every decision to criminalise conduct. Chapters 2, 3, 4 and 5 will discuss a range of principles that underpin the decision to criminalise conduct. More specifically, chapter 2

[162] Determining the scope of murder and rape may be difficult.

will discuss the conceptual boundaries of harm, social welfare, individual autonomy, morality and punishment of the offender. While the fluidity of these concepts enables the criminal law to keep abreast of advances in technology and shifts in contemporary conduct, the fluidity challenges the boundaries of the criminal law. Chapter 2 will establish whether any or all of these principles support the criminalisation of making and/or distributing visual recordings.[163]

Chapter 3 will distinguish criminal law from civil law in order to identify the features of the criminal law, as a further determinant in whether making and/or distributing visual recordings should be criminalised. It will review the following distinctions: punishment and compensation; prohibiting and pricing; public and private; subjective and objective culpability; risk of harm and actual harm; moral and immoral conduct; essentialist approach and the hybrid approach. This chapter will recognise that the boundaries between criminal law and civil law are blurred, which exacerbates the problem investigated in this thesis, that is, determining whether conduct should be criminalised.

Chapter 4 will explore the conceptual boundaries of culpability as well as the subjective, objective and no-fault standards of culpability. The availability of three standards of culpability complicates the decision about which is the appropriate standard of culpability that should be used, if making and/or distributing visual recordings were to be criminalised.

Chapter 5 will examine the conceptual boundaries of consent. Implied consent is of particular relevance to this thesis because the people in digital images are often unaware that they have been visually recorded and do not expressly consent to being in them. In many situations, the setting is a public place and one issue is whether a person who merely steps outside their home has impliedly consented to being photographed or filmed. There are many approaches to the role of consent in the criminal law, for example, quantitative, quantitative plus exceptions, individual autonomy, paternalism, morality and contextual, which will be discussed in detail in chapter 5. Chapter 5 develops a contextual approach to consent based on privacy literature and considers how the myriad of approaches to consent apply in the context of making and/or distributing visual recordings.

The final chapter will summarise the key findings of a principled approach to criminalisation, which is established in chapters 2-5. In the context of making and/or distributing visual recordings, chapter 6 will compare the findings of a principled approach to criminalisation with the legislative responses in Queensland, New South Wales, Canada, New Zealand and, England and Wales. These jurisdictions have been chosen because they have recently provided a legislative response in this area. Where there is a discrepancy between a

[163] While chapter 2 recognises that the reaction of the public may provide guidance on whether conduct should be criminalised, it does not form part of a principled approach to criminalisation.

principled approach and the legislative responses, this thesis will recommend reforms to ensure that the reach of the criminal law is based on principle.

1.4 Conclusion

In addition to mapping out the structure of this thesis and introducing key concepts, this chapter raised the central issue, that is, when should making and/or distributing visual recordings be criminalised? This conduct sits at the margins of the criminal law and is topical given the recent inconsistent legislative responses in several jurisdictions and the increasing use of visual recording technologies in the 21st century. Some of the key examples of this conduct discussed in this chapter include making and/or distributing visual recordings of a child playing in a public park, a topless female bather at a public beach, a person engaging in a private act such as showering and, up-skirt filming. The criminalisation of contemporary issues should be done in a principled rather than ad hoc manner. Once it is determined that conduct should be criminalised, in framing criminal offences it is important to consider the appropriate standard of culpability and the role of consent. The next chapter will discuss whether the principles of harm, social welfare, individual autonomy, morality and punishment of the offender support the criminalisation of making and/or distributing visual recordings.

2 CHAPTER 2: PRINCIPLES UNDERPINNING THE DECISION TO CRIMINALISE CONDUCT

Chapter 1 introduced several central concepts including 'criminalisation' and, this chapter will explore the principles underpinning the decision to criminalise conduct. Whether to criminalise making and/or distributing visual recordings is a perfect example of the difficulties in determining what conduct should be criminalised. If a child is visually recorded fully clothed in a public place, whether or not for the purposes of sexual gratification, should this be a criminal offence? If a woman is visually recorded sunbathing topless, or after she accidentally exposes herself, should this be a criminal offence? Although these are thorny examples, these fact situations, and the controversy which has surrounded them in this context, illuminate the challenges that exist in drawing the criminalisation line.

This offence of making and/or distributing visual recording exists only because of modern technology, and in a number of ways stretches the boundaries of conceptions of criminalisation. In some cases, such as up-skirt filming, criminalisation of the conduct is not difficult to envisage. In others, such as the filming of persons who are fully clothed, it is much more difficult, regardless of the motive. This offence is at the margins of the criminal law, and is a contemporary example of the very challenging issue of when a criminal offence actually occurs.

2.1 No Single Principle Underpinning Criminalisation

Some commentators suggest that there is no unifying factor that underpins every decision on whether to criminalise conduct and, as this chapter will demonstrate, there is no single test which can be offered to assist with this decision. As will be seen, writers in this area have suggested a number of different approaches, some more satisfactory than others, but none giving a definitive answer.

For example, Simester and Sullivan note that 'the sheer variety of conduct that has been designated a criminal wrong defies reduction to any 'essential' minimum'.[164] In coming to this conclusion they argue that the criminal law is commonly used to control conduct that lacks a moral dimension and as a 'public means of suppression'.[165] They provide some examples where the criminal law in England and Wales has been 'overused-as a regulatory device'.[166] While their examples of failing to notify a driving licence authority of a change of address and providing an incomplete consumer credit contract

[164] AP Simester and GR Sullivan, *Criminal Law Theory and Doctrine* (2003) 3.
[165] Ibid.
[166] Ibid.

are quite different from making and/or distributing visual recordings, they illustrate how the criminal law has managed to expand its boundaries well beyond its core. The core in this sense canvasses types of offences that should obviously be characterised as criminal.[167]

Similarly, McCutcheon contends that 'the limits of the criminal law cannot be set by reference to a 'simple principle', be it harm, individual liberty or whatever. Instead the boundaries of the law are shaped by a variety of forces that operate as broad guidelines rather than its clear-cut criteria'.[168] He continues that searching for a single criterion underpinning criminalisation is futile.[169] McCutcheon's analysis indicates two principles that underpin the decision to criminalise conduct, that is, harm and individual autonomy. Further, McSherry and Naylor have placed emphasis on McCutcheon's construction by inserting it at the end of their section on the aims of the criminal law in their book.[170]

McCutcheon is not the only academic who suggests that the search for a single principle underpinning criminalisation is fruitless. Duff suggests that

> we should not even hope to develop a single theory of criminal liability, but must instead recognize that in different contexts liability and culpability will take different forms and display quite different logical structures.[171]

He notes that the criminal law mirrors a range of values, some of which are incompatible; and rather than finding a unifying principle that underpins criminalisation, it is more important to identify the types of wrongdoing that should be relevant to the criminal law. Duff does not offer any insight into what types of wrongdoing should be controlled by the criminal law that may assist the legislature to determine whether new problems emerging in a technological environment should fall within or outside the boundaries of the criminal law.

Duff's reference to 'logical structures' in the quote above is reflected in Findlay, Odgers and Yeo's comment that the boundaries of criminal law are

---

[167] See also Douglas Husak, 'Crimes Outside the Core' (2003-2004) 39 *Tulsa Law Review* 755, 756, where Husak provides alternative but arguably consistent definitions of core offences as 'those that consume the bulk of the workload in our systems of criminal justice…[and] those that exhibit whatever features commentators take to be important'.

[168] Paul McCutcheon, 'Morality and the Criminal Law: Reflections on Hart-Devlin' (2002) 47 *Criminal Law Quarterly* 15, 37-8.

[169] Ibid 38.

[170] Bernadette McSherry and Bronwyn Naylor, *Australian Criminal Laws: Critical Perspectives* (2004) 22.

[171] R A Duff, 'Theorizing Criminal Law: A 25th Anniversary Essay' (2005) 25 *Oxford Journal of Legal Studies* 353, 363.

based on rationality and justice and not merely chance or contingency.[172] They argue that the development of criminal law has been unpredictable because of a 'fundamental ambiguity of its central organising principles'.[173] There is not an easy answer 'to why the criminal law has taken one direction and not another over a particular subject'.[174] The justification for criminalisation stems from one or more policies or principles being priviledged during a value laden selection process.[175] The question remains however as to how these values are determined. Different societies, at different times in history, have determined that some activities should be categorised as criminal. Notably however, in relation to some activities, whether they are criminalised has differed from time to time.

Lacey, Wells and Quick describe how societies determine whether conduct is criminalised as the 'substance of criminalisation'.[176] Unfortunately, they do not provide guidance on how societies determine what should be criminalised, but state upfront that the 'substance of criminalisation' is a key assumption of their book and that it is 'of central importance to understanding criminal law'.[177] Lacey, Wells and Quick concentrate on the impact the criminal law has on social relations and politics.[178] Rather than focussing on the impact of the criminal law, this thesis will pay attention to the principles underpinning criminalisation. Accurately, Lacey, Wells and Quick recognise that a crime 'is a construct of particular legal and social systems, reflecting temporally and geographically specific interests'.[179] However the question remains as to why they leave such an important question, on how societies determine whether conduct should be criminalised, unanswered.

Ashworth rightly notes that the decision to criminalise conduct is multifaceted and justified by a range of 'conflicting social, political and historical factors'.[180] Proof of this is the fact that a number of offences have moved in and out of criminalisation. There is no doubt that offences such as rape and murder are appropriately criminalised, have always been, and fittingly attract, society's condemnation. However at the margins of criminal law are the more testing examples, one of which is making and/or distributing visual recordings. This conduct is also an example of the way in which new technologies have created offences where none previously existed. It is in these challenging areas that the issue of what constitutes a criminal offence becomes less clear cut.

---

[172] Ibid. Mark Findlay, Stephen Odgers and Stanley Yeo, *Australian Criminal Justice* (3rd ed, 2005) 12.
[173] Ibid.
[174] Ibid.
[175] Ibid.
[176] Nicola Lacey, Celia Wells and Oliver Quick, *Reconstructing Criminal Law Text and Materials,* Law in Context (3rd ed, 2003) 12.
[177] Ibid.
[178] Ibid.
[179] Ibid.
[180] Andrew Ashworth, *Principles of Criminal Law* (5th ed, 2006) 17.

Norrie suggests that one factor in the decision to criminalise can be more influential than the others. For example, he places more emphasis on social relations as opposed to political or historical factors, but recognises that the boundaries of the criminal law change over time. In particular, Norrie suggests that 'modern criminal law was formed in a particular historical epoch and derived its characteristic 'shape' from fundamental features of the social relations of that epoch'.[181] The influence of social, political and historical factors on criminalisation is difficult to measure and compare, but it is possible that one may be more influential than the others. Rather than engage with social, political and historical factors, a principled approach to criminalisation will be adopted.

In contrast to singling out one aspect of potentially greater influence, some commentators have provided a list of matters to be considered in making the decision on whether to criminalise conduct. For example, Simester and Sullivan place emphasis on Lord Mostyn's factors to be taken into consideration in determining whether criminal offences should be created.[182] These are that the conduct must be sufficiently serious to justify criminalisation, whether the conduct could be controlled by other means, the enforceability of the offence, the ability to clearly articulate the offence, and that the penalty corresponds with the offence's seriousness.[183] While this list of factors appears compelling at first instance, it is not exhaustive and it does not indicate how the factors should be prioritised or weighted. Further, it does not indicate whether every factor needs to be considered before making the decision on whether to criminalise conduct, nor whether the application of the majority of factors is sufficient. Most of the factors listed by Lord Mostyn relate to the 'Presumptions' and 'Pragmatics' filters, which were discussed in chapter 1.[184] The 'Presumptions Filter', as discussed by Schonsheck, is used to determine whether the conduct could be reduced or eliminated by means other than the criminal law, for example, an education campaign.[185] The 'Pragmatics Filter' considers the pragmatic outcome of the criminal law and requires a cost and benefit analysis of the consequences of the criminal law.[186] As mentioned in chapter 1, these filters are beyond the scope of this thesis, which is using another filter, that is, the 'Principles Filter'.[187] Thus, while there are many questions around enforceability and ability to clearly articulate offences and penalties, these questions on form go beyond the boundaries of a principled approach to criminalisation, which centres on content. However, the process of

---

[181] Alan Norrie, *Crime, Reason and History* (2001) 8.
[182] AP Simester and GR Sullivan, *Criminal Law Theory and Doctrine* (2003) 8. Lord Mostyn is from the House of Lords in England.
[183] Ibid. It is important to consider the cost of enforcement, including the need for extra resources.
[184] Jonathan Schonsheck, *On Criminalization: An Essay in the Philosophy of the Criminal Law* (1994) 16.
[185] Ibid.
[186] Ibid.
[187] Ibid.

determining whether conduct is sufficiently serious to be criminalised is important from the perspective of the harm principle and is explored below.

Similar ambiguities are found in Jareborg's six legitimate arguments for criminalisation, which are blameworthiness, need, moderation, inefficiency, control costs and victim's interests.[188] From Jareborg's list, only 'blameworthiness' and 'victim's interests' are relevant to a principled approach to criminalisation because the other arguments listed by Jareborg are more relevant to the 'Presumptions' and 'Pragmatics' filters, rather than the 'Principles Filter'.[189] Rather than use the terms 'blameworthiness' or 'victim's interests', 'culpability' and 'consent', will be used respectively. Culpability and consent are defined in chapter 1.

In terms of culpability, Jareborg states that an 'intentional act is more reprehensible than a negligent act'.[190] He also suggests that the motives of the offender may make a difference because 'not everyone has the same ability to act as a fully responsible agent'.[191] He suggests that culpability depends on 'what values and interests have been infringed or threatened, and partly on whether the conduct involves actual infringement (harm), or creates a danger of such infringement, or is related to such infringement in some more distant way'.[192] The offender's culpability and the victim's consent are important principles underpinning criminalisation. The culpability and consent principles will be addressed separately in chapters 4 and 5, respectively.

Rather than providing a list of factors to be considered in making the decision to criminalise conduct, Husak recommends that an exhaustive list of positive and negative reasons for enacting criminal offences be devised.[193] His list falls within the 'Pragmatics Filter' rather than the 'Principles Filter' because the list relates more to the costs associated with implementing criminal law.[194] However, creating two lists, that is, for and against criminalisation, does not overcome the problems encountered by Lord Mostyn and Jareborg above. The negative reasons for criminalising conduct are consistent with a minimalist

---

[188] Nils Jareborg, 'Criminalization as Last Resort (Ultima Ratio)' (2005) 2 *Ohio State Journal of Criminal Law* 521, 521.
[189] Jonathan Schonsheck, *On Criminalization: An Essay in the Philosophy of the Criminal Law* (1994) 16.
[190] Nils Jareborg, 'Criminalization as Last Resort (Ultima Ratio)' (2005) 2 *Ohio State Journal of Criminal Law* 521, 527.
[191] Ibid.
[192] Ibid.
[193] Douglas Husak, 'The Criminal Law as Last Resort' (2004) 24 *Oxford Journal of Legal Studies* 207, 213. Husak provides some examples of the negative reasons, that is, the reasons that do not support criminalisation including 'use of available resources, court facilities, police time, enforcement costs, [and] effects on individual expectations': 213. Husak uses Feinberg's moral limits of the criminal law as an example of a positive reason in favour of criminalisation: 213.
[194] Jonathan Schonsheck, *On Criminalization: An Essay in the Philosophy of the Criminal Law* (1994) 16.

approach to criminalisation and using criminal law as a last resort. Husak states that criminal law is used in an unprincipled way as the first resort for 'Anglo-American jurisdictions' because they create criminal offences 'casually and routinely'.[195] The notion of 'last resort' requires that the criminal law not be employed if other means could effectively control the conduct. Husak recommends that the term 'last resort' be used as a 'tiebreaker'.[196] 'Last resort' arises in chapter 3 where criminal law is distinguished from civil law in an effort to sharpen the focus of criminal law. Instead of recommending that making and/or distributing visual recordings should be criminalsed as a first resort, this thesis seeks to approach this issue in a principled manner.

2.2 Unpacking the Principles Underpinning Criminalisation

With the exception of culpability and consent, this chapter provides an overview of the central principles underpinning the decision to criminalise conduct. The principles discussed in this chapter have been derived from the inconsistent literature on criminalisation. Findlay, Odgers and Yeo state that the key aim of the criminal law is to prevent certain kinds of conduct 'that society regards as either harmful or potentially harmful'.[197] Consequently, they view the harm principle as the overarching principle protected by the criminal law. Further, they state that in achieving this key aim of the criminal law, it is necessary to identify the fundamental interests that deserve the protection of the criminal law.[198] They provide three examples of fundamental interests, that is, individual autonomy, moral wrongness and community welfare.[199] The scope of the term 'community welfare' is analogous to McSherry and Naylor's social welfare. McSherry and Naylor suggest that the aims of criminal law are shaped by punishment, prevention of harm, preservation of morality and social welfare.[200]

Ashworth's analysis on criminalisation is arguably the most comprehensive discussion.[201] He discusses all of the politics of lawmaking, principle of individual autonomy, principle of welfare, harm and minimalism, assessing the seriousness of offences, morally wrong behaviour, criminalising omissions, minor harms, remote harms and victimless crimes, under the head of criminalisation.[202] Many of these topics will be explored in this chapter, except

---

[195] Ibid 208.
[196] Ibid 217.
[197] Mark Findlay, Stephen Odgers and Stanley Yeo, *Australian Criminal Justice* (3rd ed, 2005) 2.
[198] Ibid.
[199] Ibid 3-4.
[200] Bernadette McSherry and Bronwyn Naylor, *Australian Criminal Laws: Critical Perspectives* (2004) 17-22.
[201] Andrew Ashworth, *Principles of Criminal Law* (5th ed, 2006) chapter 2.
[202] Ibid 22-52.

for criminalising omissions because it is acts rather than omissions that are relevant to making and/or distributing visual recordings.

While this chapter acknowledges the important impact that the politics of lawmaking (for example, public opinion and the role of the media) have on the development of criminal law, it cannot be called a principle because it does not offer a theoretical foundation for criminalisation like the principles of harm, morality, social welfare, individual autonomy and punishment.[203] This chapter will discuss public opinion because it is an important practical consideration in the decision on whether to criminalise conduct.

Ashworth's 'principle of welfare' is analogous to 'social welfare' and 'community welfare', which are used by the other commentators above. Instead of the using the phrase 'aims of the criminal law' in his chapter on criminalisation, Ashworth utilises the phrases, 'theoretical justifications for criminalization'[204] and the 'principles that may tell for or against making conduct criminal'.[205]

Bronitt and McSherry use the terms 'theories'[206] and 'normative ideas'[207] to refer to the prevention of harm, morality, the public interest and the preservation of welfare.[208] Bronitt and McSherry's notion of 'public interest' is akin to Ashworth's 'politics of lawmaking' because they concede that '[w]hile appearing to be neutral and objective, the public interest is a highly political concept.'[209]

In summary, the literature on criminalisation uses the terms 'aims', 'principles', 'justifications', 'theories' and 'normative ideas' indiscriminately, and principle will be used here. This chapter will synthesise the conceptual boundaries of the principles examined by the various authors mentioned above, albeit that some principles are named differently. In particular, it will provide an overview of:

- reaction to public opinion,
- protection from harm,
- preservation of morality,
- promotion of social welfare,
- respect for individual autonomy, and
- punishment of the offender.

---

[203] Andrew Ashworth, *Principles of Criminal Law* (5th ed, 2006) 23.
[204] Ibid 23.
[205] Ibid 22.
[206] Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (2nd ed, 2005) 51.
[207] Ibid.
[208] Ibid 51-62.
[209] Ibid 58.

In doing so, this chapter will explore the conceptual boundaries of the underpinning notions of 'harm', 'morality', 'social welfare interests' and 'individual interests'. After unpacking each principle above, the lessons learned about each principle in the context of making and/or distributing visual recordings will be applied.

2.2.1 Reaction to Public Opinion

Public opinion, politicians and the media have had a profound influence on the boundaries of the criminal law. Ashworth places great emphasis on the role of the 'politics of lawmaking' in criminalisation by discussing this ahead of concepts such as individual autonomy, social welfare and harm.[210] An examination of criminalisation is incomplete without making reference to public opinion, and the role of the media and politicians in shaping contemporary criminal laws.

Prima facie, public opinion may appear to be a 'counter-intuitive place'[211] to determine whether to criminalise conduct. However, Lacey, Wells and Quick recognise that ordinary people shape the definition of crime[212] and that public opinion and perceptions of public opinion are 'enormously influential'.[213] Politicians who are accountable to the public are heavily influenced by their understanding of public opinion.[214] The 'criminal law should not be significantly out of touch with society's expectations'[215] and it 'should be under continuous scrutiny to ensure that it maintains the respect of society'.[216]

---

[210] Andrew Ashworth, *Principles of Criminal Law* (5th ed, 2006) 23.
[211] Nicola Lacey, Celia Wells and Oliver Quick, *Reconstructing Criminal Law Text and Materials,* Law in Context (3rd ed, 2003) 78.
[212] Ibid.
[213] Ibid. It has been said that 'key universal feature of crime was the reaction of the social audience [that is, public opinion], …rather than the qualities of the act itself or the characteristics of the actor': David Brown et al, *Brown, Farrier, Neal and Weisbrot's Criminal Laws - Materials and Commentary on Criminal Law and Process in New South Wales* (4th ed, 2006) 98.
[214] Nicola Lacey, Celia Wells and Oliver Quick, *Reconstructing Criminal Law Text and Materials,* Law in Context (3rd ed, 2003) 78.
[215] Mark Findlay, Stephen Odgers and Stanley Yeo, *Australian Criminal Justice* (3rd ed, 2005) 12-13. Further, '[t]hese expectations range from individual freedom to conduct one's own affairs with minimal restrictions, to ideas about shared responsibilities as a member of a community': Mark Findlay, Stephen Odgers and Stanley Yeo, *Australian Criminal Justice* (3rd ed, 2005) 12-13. Jareborg suggests that if criminalisation 'is so manifestly at odds with public opinion', it might be disregarded or 'contribute to undermining the respect for the criminal justice system': Nils Jareborg, 'Criminalization as Last Resort (Ultima Ratio)' (2005) 2 *Ohio State Journal of Criminal Law* 521, 529.
[216] Mark Findlay, Stephen Odgers and Stanley Yeo, *Australian Criminal Justice* (3rd ed, 2005) 13. See also Michael Kirby, 'Editorial' (2001) 25 *Criminal Law Journal* 181, 183. See also Jerome Hall, 'Theory and Reform of Criminal Law' (1978) 29 *The Hastings Law Journal* 893 and Henry M Hart, 'The Aims of the Criminal Law' (1958) 23 *Law and Contemporary Problems* 401.

There is a vast amount of literature discussing how society ranks the seriousness of different crimes.[217] Crime seriousness surveys put various vignettes to respondents and ask them to indicate the seriousness of each vignette usually using a Likert Scale.[218] The results of crime seriousness surveys are relevant to a wide-range of policy and legislative decisions, for example, perceptions of appropriate punishment, allocation of police and prosecution resources, measuring changes in crime trends and to evaluate models of law.[219] Designing a valid and reliable crime seriousness survey is a complex process.[220] Drawing a line on the Likert Scale at which point the conduct should be criminalised appears to be an arbitrary process and gives a false sense of precision. Perhaps a means of enhancing this process is to attach descriptors to the Likert Scale, similarly to the harm gradation table explored below. Despite these weaknesses in crime seriousness surveys, they indicate the public's opinion and may influence the decision to criminalise conduct.

Ashworth includes the criminal law's response to public opinion in his notion of the 'politics of lawmaking'.[221] This notion includes other factors that result

---

[217] Note that most of the literature on crime seriousness surveys was published in the 1980s or 1990s. For a very recent example, see Sergio Herzog, 'Public Perceptions of Crime Seriousness: A Comparison of Social Divisions in Israel' (2006) 39 *Israel Law Review* 57, where 987 Israel adults (over 16 years of age) were surveyed over the telephone about 18 different vignettes (including rape, assault, burglary, murder): 62-3 and 79. See also Bryan Byers, 'Teaching about Judgments of Crime Seriousness in Research Methods' (1999) 10 *Journal of Criminal Justice Education* 339, where an instructor in research methods taught his students how to judge crime seriousness using a rating of 1 (not serious) to 100 very serious. Byers presented his students with 22 types of conduct, for example, soliciting for prostitution, planned killing of a police officer, knowingly selling stolen goods and cross-dressing in public places: 348. See also Alexis M Durham, 'Crime Seriousness and Punitive Severity: An Assessment of Social Attitudes' (1988) 5 *Justice Quarterly* 131, where criminology students were asked to indicate the crime seriousness of 25 offences by ranking them on a scale of 1 (not serious) to 5 (very serious). Some of the examples of the offences include armed robbery, shoplifting, arson and forcible rape. In another survey, the respondents were selected from a Pretoria City Council census: DJ Pitfield and CMB Naude, 'Public Opinion on Crime Seriousness and Sentencing' (1999) 12 *South African Journal of Criminal Justice* 22. The respondents in this survey were asked to rate 22 offences from 1 (not serious) to 10 (very serious). For further examples of crime seriousness surveys see Deirdre Golash and James P Lynch, 'Public Opinion, Crime Seriousness, and Sentencing Policy' (1995) 22 *American Journal of Criminal Law* 703, Joseph F Sheley, 'Crime Seriousness Ratings: The Impact of Survey Questionnaire Form and Item Content' (1980) 20 *British Journal of Criminology* 123, Robert F Meier and James F Short, 'Crime as Hazard: Perceptions of Risk and Seriousness' (1985) 23 *Criminology* 389, and Francis T Cullen et al, 'Consensus in Crime Seriousness: Empirical Reality or Methodological Artefact?' (1985) 23 *Criminology* 99.. In contrast to these examples that use public opinion to gauge crime seriousness, see Mark A Cohen, 'Some New Evidence on the Seriousness of Crime' (1988) 26 *Criminology* 343, which takes a monetary approach.

[218] David A Parton, Mark Hansel and John R Stratton, 'Measuring Crime Seriousness: Lessons from the National Survey of Crime Severity' (1991) 31 *British Journal of Criminology* 72, 73.

[219] Terance D Miethe, 'Public Consensus on Crime Seriousness: Normative Structure or Methodological Artifact?' (1982) 20 *Criminology* 515, 516.

[220] Geoff Payne and Judy Payne, *Key Concepts in Social Research* (2004) 195 and 233.

[221] Andrew Ashworth, *Principles of Criminal Law* (5th ed, 2006) 25.

in the enactment of criminal laws, for example, law reform commission reports prepared after consultation, campaign of a pressure group, greater public exposure of harms and the views of law enforcers.[222] Criminalising conduct may be seen as an 'instantly satisfying political response to public worries'[223] about publicised inappropriate conduct. It is also suggested as more proactive than merely consulting with the public or commissioning research.[224] Ashworth agrees that the boundaries of criminal law are largely due to exercises of political power at various points in time.[225] He discounts the notion of morally wrong behaviour underpinning criminalisation.[226] Instead, Ashworth concludes that 'there are many offences for which criminal liability is merely imposed by Parliament as a practical means of controlling an activity, without implying the element of social condemnation which is characteristic of the major or traditional crimes'.[227] This view is consistent with modern criminal law frequently being used to implement 'regulatory' offences, as will be discussed below under the head of the preservation of morality. Consequently, the growth of modern criminal law 'may reflect particular phases in contemporary social history, as written by the mass media and politicians'.[228]

According to Beale, the media emphasises crime stories to grab the attention of viewers or readers, and that the stories are modified to meet the perceived demand.[229] The media publicise and exemplify competing social realities in television soap operas and selected news stories.[230] Lacey, Wells and Quick suggest that there is a long history of the media producing images of victims, perpetrators and crime responses that are 'often far removed from empirical reality',[231] while other literature highlights the role of media in creating moral panics.[232]

---

[222] Ibid.
[223] Ibid 23.
[224] Ibid.
[225] Ibid 1.
[226] Ibid 2.
[227] Ibid 1-2.
[228] Ibid 25.
[229] Sara Sun Beale, 'The News Media's Influence on Criminal Justice Policy: How Market-Driven News Promotes Punitiveness' (2006) 48 *William and Mary Law Review* 397, 398. See also Geraldine Mackenzie, *How Judges Sentence* (2005) 168.
[230] Nicola Lacey, Celia Wells and Oliver Quick, *Reconstructing Criminal Law Text and Materials,* Law in Context (3rd ed, 2003) 75.
[231] Ibid. Compare Ericson who portrays the role of the media in a more positive light. In particular, Ericson states that the 'media do not distort reality, but rather provide a discourse – an institutional mode of classifying and interpreting reality – that helps people to construct their own organizational realities': Richard V Ericson, 'Mass Media, Crime, Law, and Justice - An Institutional Approach' (1991) 31 *The British Journal of Criminology* 219, 242.
[232] See especially David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (2001), where an account of the media was provided, that is, 'it has provided us with regular, everyday occasions in which to play out the emotions of fear, anger, resentment, and fascination that our experience of crime provokes': 158. With regard to moral panics, see also Chris Hale et al (eds), *Criminology* (2005) 150.

It has been suggested that this sensationalism has been driven by the wish to boost television ratings, sell magazines and newspapers, and generally increase profits.[233] Sensationalism is also driven by 'politicians and moral entrepreneurs [who] utilize the media to deploy evocative crime imagery as they work to consolidate political power or criminalize marginal groups.'[234] Despite this criticism of the media, they can have a positive role in shaping the boundaries of the criminal law.[235] The media are an 'important means of conveying ideas and arguments about law reform, they also influence perceptions of how threatening crime is, what kind of crime is prevalent, and what should be done about it.'[236] Media reports may reflect public opinion as well as relevant social welfare interests, individual interests and acceptable levels of morality. Thus, the media are influential in determining what conduct is criminalised and what conduct is not criminalised.

The boundaries of the criminal law are shaped by the media, politicians and public opinion, but they are not part of a principled approach to criminalisation because they are sensationalist rather than theoretical considerations.[237] It would be remiss to avoid a discussion on public opinion, the role of the media and the politics associated with criminalisation because their impact is significant and it is important for the law to have the respect of society.

Gauging public opinion via a reliable and valid crime seriousness survey is a complex process. Not surprisingly, there is no literature that attempts to gauge the public's opinion on the crime seriousness of making and/or distributing visual recordings. Thus, there is an opportunity to undertake further research on making and/or distributing visual recordings by conducting a crime seriousness survey to gauge public opinion. While public opinion may support criminalisation, as discussed above, public opinion is not a theoretical foundation and does not form a part of a principled approach to criminalisation.

Using public opinion to shape the boundaries of the criminal law resonates with criminalising conduct on the basis of social welfare principle because they are both democratically determined. However, unlike the social welfare principle, public opinion does not offer a theoretical basis for determining what should be criminalised and what should not be criminalised. For completeness, this section will illustrate the public's opinion on examples of making and/or distributing visual recordings as reported by the media and portrayed in the consultation papers.

---

[233] Ibid. See also Sara Sun Beale, 'The News Media's Influence on Criminal Justice Policy: How Market-Driven News Promotes Punitiveness' (2006) 48 *William and Mary Law Review* 397.
[234] Ibid 150-151.
[235] Rob White and Fiona Haines, *Crime and Criminology: An Introduction* (3rd ed, 2004) 8.
[236] Nicola Lacey, Celia Wells and Oliver Quick, *Reconstructing Criminal Law Text and Materials*, Law in Context (3rd ed, 2003) 75.
[237] Andrew Ashworth, *Principles of Criminal Law* (5th ed, 2006) 23.

According to the 2005 Australian Standing Committee of Attorneys-General Discussion Paper, the 'media reported on the community outrage' at the South Bank Parklands incident, discussed in chapter 1, where children playing in a public park were secretly visually recorded and their images were uploaded to the Internet.[238] Several other incidents of making and/or distributing visual recordings that have prompted public concern have littered media reports as well as the discussion papers in Australia, Canada and New Zealand. Numerous examples of these incidents were highlighted in chapter 1 and will not be repeated here. On one view, the community outrage and concern regarding, for example, a stranger secretly making visual recordings of children playing in a public park and uploading them to the Internet, provides support for criminalisation of this conduct. However, the expansion of the criminal law should be principled and not merely based on allegations of public outrage as expressed in media reports. The first principle discussed in this chapter is that of harm.

2.2.2 Protection from Harm

The purpose of this section is to provide an overview of the scope of the harm principle. The flexible core of the notion of 'harm' has made the harm test notoriously difficult to apply,[239] and there is a positive correlation between the scope of harm and the breadth of criminal laws. However, the reality is that not every type of harm warrants the protection of criminalisation. This section will consider whether the harm principle relates to the harm to others or harm to oneself, whether the concept of 'harm' has nebulous edges and how to decide what interests it protects, whether the criminal law should interfere in minor harms and the ramifications of this, and how von Hirsch and Jareborg's living-standards analysis tool offers a framework for grading harm.[240] It will then consider whether the criminalisation of making and/or distributing visual recordings is justified on the basis of the harm principle.

2.2.2.1 Harm to Others

Several commentators have identified the need for the harm principle to relate to harm to others rather than harm to the offender (the latter being legal paternalism).[241] For example, Ashworth cites John Stuart Mill's harm principle

---

[238] Ibid 5.

[239] Nicola Lacey, Celia Wells and Oliver Quick, *Reconstructing Criminal Law Text and Materials,* Law in Context (3rd ed, 2003) 8.

[240] Andrew von Hirsch and Nils Jareborg, 'Gauging Criminal Harm: A Living-Standard Analysis' (1991) 11 *Oxford Journal of Legal Studies* 1.

[241] Note that liberal philosophers, for example, Feinberg , generally reject harm to the offender and immorality as a justification for criminalisation: see AP Simester and GR Sullivan, *Criminal Law Theory and Doctrine* (2003) 8. Note that a victimless crime falls within the harm principle if it, for example, impairs collective welfare or violates a government interest: see AP

underpinning criminalisation, that is, 'the only purpose for which power can be rightfully exercised over any member of a civilized community, against, his [or her] will, is to prevent harm to others'.[242] Mill argues that conduct should *only* be criminalised if it causes harm to others. He impliedly rejects criminalisation if it merely protects the offender from harm. Further, the use of the word *only* rejects criminalisation if it is based on any other ground. With regard to harm to others, Mill's view is consistent with the view expressed by Findlay, Odgers and Yeo; that is, that conduct should be criminalised if it injures the rights and interests of other people, that is, harms others.[243]

Feinberg is more explicit and accepts harm to others as a justification for criminalisation, but rejects legal paternalism. In particular, Feinberg states, 'It is always a good reason in support of penal legislation that it would probably be effective in preventing (eliminating, reducing) harm to persons other than the actor *and* there is probably no other means that is equally effective at no greater cost to other values'.[244] Feinberg's principle of harm also suggests that harm to

---

Simester and GR Sullivan, *Criminal Law Theory and Doctrine* (2003) 11. Simester and Sullivan provide some examples of such victimless crimes including tax evasion, counterfeiting and contempt of court: 8. Note that there 'is a growing sphere of legislative activity that uses the criminal sanction to endorse policies that stand apart from harm prevention': Mark Findlay, Stephen Odgers and Stanley Yeo, *Australian Criminal Justice* (3rd ed, 2005) 2. This quote acknowledges that some crimes are in fact harmless.

[242] Andrew Ashworth, *Principles of Criminal Law* (5th ed, 2006) 30.

[243] Mark Findlay, Stephen Odgers and Stanley Yeo, *Australian Criminal Justice* (3rd ed, 2005) 3. See also Mirko Bagaric, 'The "Civil-isation" of the Criminal Law' (2001) 25 *Criminal Law Journal* 184, which ties the harm principle and the social welfare principle (discussed later in this chapter) with the utilitarian principle. Note that in this thesis, the notion of utilitarianism is encompassed in social welfare. In particular, Bagaric says 'From a utilitarian perspective, the criminal law should seek to protect and enforce important human interests that are necessary for human flourishing. This approach appears to justify a far wider range of criminal offences than rights-based moral theories. A tenable utilitarian argument can be made in favour of criminalising much of the conduct that is prohibited by even the most trivial of regulatory offences. For example, it could be argued that it is morally permissible to forbid the riding of a bicycle without a helmet because it reduces the risk that cyclists will become a burden to the community by utilising scarce public health dollars. Similarly, it could be argued that parking offences are justifiable because parking in a no parking zone may inconvenience others more than it benefits the offender. However, an argument along such lines would be weak. Every legal prohibition to some degree encroaches upon personal liberty. Personal liberty weighs very heavily on the utilitarian scales because the capacity for people to lead their lives according to their own lights is an important ingredient for happiness. Further, so far as regulatory offences are concerned the other side of the scales appears to be lightened for two reasons. First, the interests sought to be protected by regulatory offences are generally not very important. Secondly, the risk of harm inherent in the conduct is normally remote': 190-1. See more generally Andrew Ashworth, 'Criminal Attempts and the Role of Resulting Harm under the Code, and in the Common Law' (1988) 19 *Rutgers Law Journal* 725.

[244] Joel Feinberg, *The Moral Limits of the Criminal Law: Harm to Others* (1984) 26. Note that there is another book in this series relating to offence, that is, Joel Feinberg, *The Moral Limits of the Criminal Law: Offense to Others* (1985). Simester and Sullivan refer to the first formulation of the harm principle, which was articulated by John Stuart Mill. In particular, '…the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number is self-protection. That the only purpose for which power can rightfully be exercised over any member of a civilised community against his

others is only one consideration in the decision to criminalise conduct and opens the path for other considerations.

Thus, the harm principle is appropriately concerned with the harm to others and, in the context of making and/or distributing visual recordings, this is important because the person making and/or distributing the visual recording potentially causes harm to the person visually recorded.[245] In some instances, making and/or distributing a visual recording of another may not cause any harm because, for example, a topless female may sunbathe in a public place because she wants to be, or does not mind if she is, visually recorded by others. On the other hand, a topless female sunbather may be offended and may feel that her privacy has been invaded.[246] Similarly, when school boys wearing rowing costumes were secretly visually recorded and the visual recordings were uploaded to the Internet, they were angry, felt violated and exploited, and were anxious about going into public places.[247] Other boys in the same situation may not mind or may be quite happy to have their image uploaded to the Internet. Thus, making and/or distributing visual recordings may cause harm to those who are visually recorded, it largely depends on the individual visually recorded.

2.2.2.2 The Ambit of Harm

Mill, a leading liberal philosopher, did not provide a definition of harm when espousing his harm principle, but Feinberg, another influential liberal philosopher, defined harm as a 'thwarting, setting back, or defeating an interest'.[248] When determining the importance of opposing interests, three

---

[or her] will is to prevent harm to others. His or her own good, either physical or moral, is not a sufficient warrant.': AP Simester and GR Sullivan, *Criminal Law Theory and Doctrine* (2003) 9.

[245] This thesis is not concerned with a person who possesses a visual recording for their own sexual gratification, which may in turn cause themselves harm because they exacerbate their own sexual disorder.

[246] Standing Committee of Attorneys-General, *Unauthorised Photographs on the Internet and Ancillary Privacy Issues* (2005) <http://www.ag.gov.au> at 1 October 2005, 12.

[247] Ibid.

[248] Joel Feinberg, *The Moral Limits of the Criminal Law: Harm to Others* (1984) 33. It is acknowledged that Feinberg developed the notion of harm in four volumes and that this simplified version of harm comes from volume 1. Simester and Sullivan have developed this definition as follows: 'When we are harmed, one or more of our interests is left in a worse state than it was beforehand. In turn, a person's *interests* comprise the things that make his [or her] life go well; thus we are harmed when our lives are changed for the worse. In particular, harm involves the impairment of a person's opportunities to engage in worthwhile activities and relationships, and to pursue valuable, self-chosen, goals. In this sense, harm is prospective rather than backward-looking: it involves a diminution of one's opportunities to enjoy or pursue a good life. Characteristically, harm is brought about through the impairment of V's personal or proprietary resources. However, as Feinberg observes, what makes such impairment harmful is not the impairment *per se* but its implication for V's well-being': AP Simester and GR Sullivan, *Criminal Law Theory and Doctrine* (2003) 10.

factors are taken into consideration, that is, 'a. how 'vital' they are in the interest networks of their possessors; b. the degree to which they are reinforced by other interests, private and public; [and] c. their inherent moral quality'.[249] The harm principle invokes a balancing of the degree of probability of the harm and gravity of the possible harm compared with the social value of the conduct.[250] A further requirement of harm is that it be wrongful.[251] 'One person *wrongs* another when his [or her] indefensible (unjustifiable and inexcusable) conduct violates the other's right, and in all but certain very special cases such conduct will also invade the other's interest and thus be harmful in the sense [of a setback to interests]'.[252] As will be discussed below, privacy interests and freedom of expression are certainly integral to the context of making and/or distributing visual recordings. The harm principle only respects individual autonomy to the extent that individual autonomy does not interfere with other individuals.[253] Individual autonomy is another principle underpinning criminalisation and is discussed later in this chapter.

While Feinberg's definition of harm was a significant contribution to the harm principle, it has been subjected to criticism. One of the criticisms has been with respect to the ambiguity of the type of interest protected by the harm principle. In particular, Ashworth notes that Feinberg's definition of harm, which focuses on an individual's legitimate interests, does not address the political, cultural or moral nature of the interest setback.[254] Further, McSherry and Naylor conclude that the definition does not canvass wider social, indirect or gendered harms.[255] They question whether harm encompasses indirect, potential, psychological or economic harm,[256] without putting forward any arguments or a conclusion on these issues. Ashworth adds to the debate by discussing another type of harm,

---

[249] Joel Feinberg, *The Moral Limits of the Criminal Law: Harm to Others* (1984) 217.
[250] Andrew Ashworth, *Principles of Criminal Law* (5th ed, 2006) 31.
[251] Joel Feinberg, *The Moral Limits of the Criminal Law: Harm to Others* (1984) 105.
[252] Ibid 34. See also Andrew Ashworth, *Principles of Criminal Law* (5th ed, 2006) 31, which suggests that wrongfulness is an essential ingredient in the harm principle and 'needs to be analysed not in terms of notions of moral wrong but in terms of the interests of others and conceptions of their personhood and autonomy'.
[253] Paul H Robinson, 'The Role of Harm and Evil in Criminal Law: A Study in Legislative Deception?' (1994) 5 *Contemporary Legal Issues* 299. See also Heather Douglas and Lee Godden, 'Intimate Partner Violence: Transforming Harm into a Crime' (2003) 10 *Murdoch University Electronic Journal of Law* and Heather Douglas and Lee Godden, 'The Decriminalisation of Domestic Violence: Examining the Interaction Between the Criminal Law and Domestic Violence' (2003) 27 *Criminal Law Journal* 32 with regard to harm in the context of domestic violence.
[254] Andrew Ashworth, *Principles of Criminal Law* (5th ed, 2006) 30.
[255] Bernadette McSherry and Bronwyn Naylor, *Australian Criminal Laws: Critical Perspectives* (2004) 19.
[256] Ibid. Cf John Gardner, 'Rationality and the Rule of Law in Offences Against the Person' (1994) 53 *Cambridge Law Journal* 502, 515, which focuses on the ways of bringing about harm rather than on the types or degrees of harm..

that is, remote harm.[257] While direct and physical harms fall within the core of harm, it has nebulous edges. These nebulous edges may be averted by identifying the interests protected by the harm principle.[258] Making choices about the interests protected is morally loaded.[259] However, this is necessary because if there was no conception of the relevant interests, the harm principle would be vacuous.[260]

Adopting a principled approach to criminalisation on the ground of harm, in the context of making and/or distributing visual recordings, requires the consequences of the conduct to fall within the ambit of harm. If a limited interpretation of harm is embraced, for example, that harm only includes physical harm and direct harm; the principle will not support the criminalisation of making and/or distributing visual recordings. This is because making and/or distributing a visual recording does not cause physical harm, unlike assault offences and the offences endangering life or health. Further, making a visual recording will not result in a direct or immediate harm where a person does not know that they have been visually recorded and only find out that they have been visually recorded when they see their image, for example, on the Internet, which may be some months later. On the other hand, this may be a direct harm of distributing the visual recording. Thus, if the notion of 'harm' only encapsulates physical and direct harm, making and/or distributing visual recordings should not be criminalised under the principle of harm.

The types of harm will vary from individual to individual and case to case.[261] However, the types of harm (if any) caused by making and/or distributing visual recordings may be described as psychological, indirect and potential harms. As an example, what types of harm did the school boys wearing rowing costumes suffer? They were secretly visually recorded and their images were uploaded on a voyeuristic website. The boys' reactions included 'feelings of anger, a sense of violation, anxiety about going out in public places, feelings of exploitation and invasion of privacy'.[262] In another example, women who had been secretly filmed by an operatic society technician in a changing room described their feelings as 'humiliated', 'really disgusted' and 'sick and

---

[257] Ashworth argues that remote harms should not be criminalised because it goes against the principles of causation and harm: Andrew Ashworth, *Principles of Criminal Law* (5th ed, 2006) 49.

[258] Neil MacCormick, *Legal Right and Social Democracy* (1982) 29. See also the four generic-interest dimensions discussed below.

[259] Ibid. See also Ashworth, who contends that the scope of harm depends on one's commitment to individual autonomy and social welfare: Andrew Ashworth, *Principles of Criminal Law* (5th ed, 2006) 32.

[260] Neil MacCormick, *Legal Right and Social Democracy* (1982) 30.

[261] New Zealand, New Zealand Law Commission, Intimate Covert Filming Study Paper, Study Paper No. 15 (2004) 8.

[262] Standing Committee of Attorneys-General, *Unauthorised Photographs on the Internet and Ancillary Privacy Issues* (2005) <http://www.ag.gov.au> at 1 October 2005, 12.

shocked'.[263] In a further example, a female who had been secretly filmed by a friend in the bathroom and bedroom described her feelings 'as though her skin had been ripped off' and 'felt that the voyeur's actions should have been "treated like rape"'.[264] While the response of the person visually recorded may vastly differ, it is 'likely to fall within the parameters of development of psychological symptoms and disorders, distrust in relationships, fear of personal safety, and shame and humiliation'.[265]

In assessing harm, the 2005 Australian Standing Committee of Attorneys-General Discussion Paper suggests that the following factors should be taken into consideration:

- a lack of consent to the making of the visual recording and the distribution of the visual recording (this point revolves around controlling one's own image);
- the nature of the visual recording, that is, whether the visual recording objectifies the person visually recorded;
- whether the visual recordings are displayed in a sexually explicit context or involve objectification themes;
- whether the purpose of the visual recordings is for sexual gratification; and
- the fact that visual recordings are permanent records that can be scrutinized at later points in time and can be distributed to a world wide audience.[266]

These factors provide guidance on how to avert the nebulous edges of the concept of 'harm' in the context of making and/or distributing visual recordings. Notably, the Australian Standing Committee of Attorneys-General did not expressly list privacy, but arguably it is included in the first factor about having the ability to control one's image, which will be discussed in detail in chapter 5.

The 2004 New Zealand Law Commission's Study Paper provides a different range of factors including:

- the relationship between the offender and the subject;
- the location;
- how the visual recording is distributed;
- the nature of the activity visually recorded; and
- whether the subject is vulnerable due to pre-existing factors.[267]

---

[263] New Zealand, New Zealand Law Commission, Intimate Covert Filming Study Paper, Study Paper No. 15 (2004) 8.
[264] Ibid. 8.
[265] Ibid.
[266] Standing Committee of Attorneys-General, *Unauthorised Photographs on the Internet and Ancillary Privacy Issues* (2005) <http://www.ag.gov.au> at 1 October 2005, 12.
[267] New Zealand, New Zealand Law Commission, Intimate Covert Filming Study Paper, Study Paper No. 15 (2004) 8.

The factors from the 2004 New Zealand Law Commission's Study Paper omit privacy, but it could be implied from the location and the nature of the activity recorded.

In contrast, the 2002 Canadian Department of Justice's Consultation Paper places emphasis on privacy, and addresses harm from two perspectives. The first perspective protects an individual's privacy where it coincides with protecting an individual's physical or sexual integrity.[268] The second perspective takes into account the frequency of an offence.[269]

Even though the factors and perspectives identified in the Australian, New Zealand and Canadian Consultation Papers may not be exhaustive and have not been weighted, they provide guidance on the scope of the term 'harm' in the context of making and/or distributing visual recordings and intimate that some instances of this conduct involve more harm than others.[270] For example, where the person visually recorded is sexually objectified; where the person making and/or distributing the visual recording abuses their position of trust with the person visually recorded; whether the person visually recorded is in a private location such as a toilet, bathroom, shower or bedroom; and whether the visual recordings are sexually explicit and portray a person's private body parts. The conception of 'private body parts' utilised in this thesis does not include female breasts, and the purpose of this is to permit a distinction, for example, between a woman who openly exposes her breasts at a public beach and a woman who reveals her breasts as she undresses in a bathroom.

While the Discussion Papers above suggest that examples involving sexual objectification, abuse of a position of trust, private locations and private body parts are more serious than other examples of making and/or distributing visual recordings (for example, making a visual recording of a person walking down a public street, playing in a public park or sunbathing at a public beach), the question remains whether even these more serious examples are only minor and non-serious harms, and thus should not be criminalised on the basis of the harm principle.

2.2.2.3 Minor Harm

Harm can be divided into many categories, for example, minor, serious and grave. Minor harms are particularly significant because, as will be discussed below, making and/or distributing visual recordings would appear to fall within

---

[268] Canada, Department of Justice Canada, Voyeurism as a Criminal Offence: A Consultation Paper (2002) 8.

[269] Ibid. This perspective caters for those offenders who suffer from paraphilia, which usually results in a high level of voyeuristic conduct.

[270] Examples of making and/or distributing visual recordings that should be criminalised will be explored in the final chapter of this thesis.

the minor harm category rather than the serious or grave categories. Some types of minor harm are not criminalised as they fall outside the scope of 'harm' required for the purposes of criminalisation. For example, Feinberg states that harm does not canvass 'mere transitory disappointments, minor physical and mental 'hurts,' and a miscellany of disliked states of mind, including various forms of offendedness, anxiety, and boredom'.[271] In contrast, some types of minor harms are criminalised, for example, dropping litter and illegal parking.[272] Perhaps the only way of reconciling why some examples of a minor harm are criminalised and others are not is with reference to another principle underpinning criminalisation, such as morality, social welfare, and individual autonomy, rather than harm. According to Feinberg, the criminalisation cut-off point for minor harm depends on whether criminalising the harm causes more harm than it prevents.[273] This balancing act is probably easier said than done.

Feinberg provides some factors to assist in making the decision to criminalise minor harms. In particular, he uses the factors for conduct which he describes as not 'perfectly harmless' or 'directly harmful'.[274] Feinberg's factors relate to the specific harm in question and are difficult to apply. In particular, he does not comment on the weight of these factors, whether they are listed in order of priority or whether they all need to be considered in determining criminalisation. In any event, the factors provide more guidance than finding the cut-off point by a pros and cons balancing act.

Ashworth describes regulatory offences as minor offences, and these are reinforced by the criminal law because it is 'relatively cheap, convenient, and

---

[271] Joel Feinberg, *The Moral Limits of the Criminal Law: Harm to Others* (1984) 215-216.

[272] Andrew Ashworth, *Principles of Criminal Law* (5th ed, 2006) 1. For this reason, Gardner diminishes the significance of the harm principle in determining whether conduct is criminalised: John Gardner, 'Rationality and the Rule of Law in Offences Against the Person' (1994) 53 *Cambridge Law Journal* 502, 514.

[273] Joel Feinberg, *The Moral Limits of the Criminal Law: Harm to Others* (1984) 216.

[274] Feinberg's factors are:

> '(a) the greater the *gravity* of a possible harm, the less probable its occurrence need be to justify prohibition of the conduct that threatens to produce it;
> (b) the greater the *probability* of harm, the less grave the harm need be to justify coercion;
> (c) the greater the *magnitude* of the risk of harm, itself compounded out of gravity and probability, the less reasonable it is to accept the risk;
> (d) the more *valuable* (useful) the dangerous conduct, both to the actor and to others, the more reasonable it is to take the risk of harmful consequences, and for extremely valuable conduct it is reasonable run risks up to the point of clear and present danger;
> (e) the more *reasonable* a risk of harm (the danger), the weaker is the case for prohibiting the conduct that creates it': Joel Feinberg, *The Moral Limits of the Criminal Law: Harm to Others* (1984) 216.

Further, Husak argues that the heavy hand of the criminal law should not prevent minor or insignificant risks, but only substantial risks. Husak acknowledges that the term substantial requires a baseline for comparison and suggests that 'only an act-type that creates reasonable risks can provide the appropriate baseline': Douglas N Husak, 'Reasonable Risk Creation and Overinclusive Legislation' (1997-1998) 1 *Buffalo Criminal Law Review* 599, 606-7.

swift.'[275] Jareborg makes an important point that the low costs associated with criminalisation have caused criminal law to be used as a 'first resort',[276] rather than a last resort.[277] He recommends criminalisation if 'an intended result cannot be achieved by less intrusive or costly means'.[278] In contrast to Ashworth and Jareborg, Simester and Sullivan suggest that 'criminal law is a powerful, expensive, and invasive tool. It should not be used lightly'.[279] Thus economic considerations and expediency have been used to justify criminalisation, without the need for conduct to reach a specific level of wrongfulness or falling within the category of an unacceptable form of behaviour.[280] This modern perspective of the criminal law is aligned with Farmer's description of the criminal law as a 'predominantly administrative system managing enormous numbers of relatively non-serious and 'regulatory offences''.[281] While there is a proliferation of criminal offences involving minor harms and there are economic considerations associated with criminalisation, the harm principle does not support the criminalisation of minor harms, and they should not be criminalised unless they are justified by another principle underpinning criminalisation.

This thesis therefore argues that the harm principle should not be used to justify the criminalisation of minor harms. Criminalising minor harms goes against Ashworth's normative claim that criminal law is 'society's strongest form of official censure and punishment, should be concerned only with major wrongs, affecting central values and causing significant harms'.[282] Further, by criminalising minor harms, the harm principle fails to delineate the boundaries

---

[275] Andrew Ashworth, *Principles of Criminal Law* (5th ed, 2006) 48. Note that regulatory offences have been described as 'minor offences that use the threat of punishment to achieve the smooth running of day-to-day social intercourse and activities such as road traffic flow, business regulation, urban planning, licensing procedures and so forth': Mark Findlay, Stephen Odgers and Stanley Yeo, *Australian Criminal Justice* (3rd ed, 2005) 6.

[276] Nils Jareborg, 'Criminalization as Last Resort (Ultima Ratio)' (2005) 2 *Ohio State Journal of Criminal Law* 521, 524. Jareborg names the first resort principle as 'criminal law inflation': 524.

[277] See also Douglas Husak, 'The Criminal Law as Last Resort' (2004) 24 *Oxford Journal of Legal Studies* 207, 208.

[278] Nils Jareborg, 'Criminalization as Last Resort (Ultima Ratio)' (2005) 2 *Ohio State Journal of Criminal Law* 521, 527.

[279] AP Simester and GR Sullivan, *Criminal Law Theory and Doctrine* (2003) 24.

[280] Andrew Ashworth, *Principles of Criminal Law* (5th ed, 2006) 48. Further see Bernard E Harcourt, 'The Collapse of the Harm Principle' (1999-2000) 90 *The Journal of Criminal Law & Criminology* 109. In particular, Harcourt states: 'Harm to others is no longer a *limiting* principle. It no longer *excludes* categories of moral offences from the scope of the law. It is no longer a *necessary (but not sufficient) condition,* because there are so many non-trivial harm arguments. Instead of focusing on whether certain conduct causes harm, today the debates center on the types of harm, the amounts of harm, and our willingness, as a society, to bear the harms': 182.

[281] L Farmer, 'The Obsession with Definition' (1996) 5 *Social and Legal Studies* 57, 64-66.

[282] Andrew Ashworth, *Principles of Criminal Law* (5th ed, 2006) 17. Note that Ashworth does not provide a list of significant harms or central values, nor does he provide any guidance on how they are determined or whether they change over time with advances in technology.

of criminal, quasi-criminal and civil laws.[283] The criminal law would be labelled as 'drastically over-used' if it criminalised all conduct that caused or could potentially cause harm.[284] Further, overuse of the criminal law would 'impair the criminal law's nondeterrent functions.'[285] Consequently, the legislature needs to carefully determine the dividing line between what types of harmful conduct fall within the ambit of criminal law and what falls outside.[286] On this basis, if the conduct falls within minor harm, it should not be criminalised under the harm principle. This is not to say that minor harms should never be criminalised because the criminalisation of minor harms may be justified by another principle underpinning criminalisation.

2.2.2.4 Determining the Seriousness of Harm

Simester and Sullivan, and Ashworth suggest that conduct should be criminalised if it involves serious harm.[287] However, determining the seriousness of harm is a complex process. Ashworth declares that seriousness involves three dimensions, that is, harmfulness, culpability and remoteness.[288] The harm principle is discussed in this chapter, while culpability is discussed in detail in chapter 4.[289] Von Hirsch and Jareborg gauge the seriousness of criminal harm by conducting a living-standard analysis.[290] The living-standard

---

[283] Bernadette McSherry and Bronwyn Naylor, *Australian Criminal Laws: Critical Perspectives* (2004) 19. See also Mirko Bagaric, 'The "Civil-isation" of the Criminal Law' (2001) 25 *Criminal Law Journal* 184, 191 where he suggests that the harm caused by 'breaches of civil law is certainly no less than violations of many criminal laws'. See further Andrew Ashworth, *Principles of Criminal Law* (5th ed, 2006) 31.

[284] Mark Findlay, Stephen Odgers and Stanley Yeo, *Australian Criminal Justice* (3rd ed, 2005) 4.

[285] John C Coffee, 'Paradigms Lost: The Blurring of the Criminal and Civil Law Models - And What Can Be Done About It' (1992) 101 *The Yale Law Journal* 1875, 1877. Further, Ashworth suggests that unenforceable offences will bring the criminal law into disrepute: Andrew Ashworth, *Principles of Criminal Law* (5th ed, 2006) 34.

[286] Mark Findlay, Stephen Odgers and Stanley Yeo, *Australian Criminal Justice* (3rd ed, 2005) 4. The harm principle is discussed in more detail below.

[287] AP Simester and GR Sullivan, *Criminal Law Theory and Doctrine* (2003) 11 and Andrew Ashworth, *Principles of Criminal Law* (5th ed, 2006) 35-40.

[288] Andrew Ashworth, *Principles of Criminal Law* (5th ed, 2006) 38.

[289] In the context of remoteness Ashworth was specifically referring to attempted offences, conspiracies, drunk driving and possession, where there was no actual harm. Exploring the concept of remoteness is outside the ambit of this thesis.

[290] Andrew von Hirsch and Nils Jareborg, 'Gauging Criminal Harm: A Living-Standard Analysis' (1991) 11 *Oxford Journal of Legal Studies* 1. Note that my work in this section has been published in Kelley Burton, 'Criminalisation: Applying a Living-standard Analysis to Non-consensual Photography and Distribution' (2007) 7 *Queensland University of Technology Law and Justice Journal* 464. See also Mike Treip, 'Re-Thinking the Study of Criminal Law?' (1992) 55 *The Modern Law Review* 733. The definition of living standard used in this work is much broader than that used by economists. It refers to 'the degree of economic affluence or want…[and] non-economic capabilities that affect personal well-being': Andrew von Hirsch and Nils Jareborg, 'Gauging Criminal Harm: A Living-Standard Analysis' (1991) 11 *Oxford Journal of Legal Studies* 1, 7.

analysis tool and the literature on the harm principle support the criminalisation of conduct where it falls within the notions of 'serious' and 'grave'. Rather than seeking an overarching concept of 'harm', it is useful to grade the harm involved in contemporary scenarios. If the conduct does not fall within the notions of 'serious' or 'grave', it should not be criminalised on the basis of the harm principle. In that instance, the harm involved would be described as non-serious and the conduct should only be criminalised if another principle justifies the criminalisation.

Non-serious harm includes the notion of 'minor harm' discussed above. However, non-serious harm goes further than just minor harms and includes other grades of harm such as upper-intermediate harm, lower-intermediate harm and lesser harm, which are discernable from von Hirsch and Jareborg's harm gradation table,[291] which is discussed below. While von Hirsch and Jareborg do not specifically use the notion of 'minor harm' or 'non-serious harm', it is arguable that minor harm falls within their grade of lesser harm or lower-intermediate harm because a minor harm done to a person may not affect their living standard, only marginally affect their living standard or affect their enhanced well-being.

2.2.2.5 Living-standard Analysis

Von Hirsch and Jareborg propose a living-standard analysis tool to 'assess harm, to see how serious an offence is; and…to determine its seriousness for the purpose of determining the severity of the punishment'.[292] They comment that the consideration of harm is important to determining whether conduct is criminalised, by stating

> There is, of course, another context for considering harm-namely, when deciding whether conduct should be declared criminal at all. Whether conduct is harmful, and how harmful it is, should be an important factor in the legislative consideration about its proscription.[293]

However, as von Hirsch and Jareborg were interested in sentencing, they used a living-standard analysis to grade the harm associated with conduct that has already been criminalised, for example, homicide, assault, battery, petty assault, armed robbery, forcible rape, date rape, burglary with ransacking, common residential burglary and auto theft.[294] They did not use the living-standard analysis to determine whether conduct should be criminalised, and this section will apply the novel idea that the living-standard analysis tool provides a useful

---

[291] Andrew von Hirsch and Nils Jareborg, 'Gauging Criminal Harm: A Living-Standard Analysis' (1991) 11 *Oxford Journal of Legal Studies* 1, 29.
[292] Ibid 3.
[293] Ibid 3-4.
[294] Ibid.

framework for determining whether conduct should be criminalised on the basis of the seriousness of harm.

Ashworth describes the living-standard analysis as 'pathbreaking' because it provides a process for determining the interests that should be protected by the criminal law.[295] In particular, he states that the 'value of the von Hirsch-Jareborg approach is that it identifies the stages of thought through which it is desirable to pass when making judgements'.[296] The living-standard analytical tool 'urges one to dig deeper, and to look more closely at the interests affected'.[297] Even though von Hirsch and Jareborg suggest that the living-standard analysis could be employed to determine whether conduct should be criminalised,[298] they did not use it for this purpose. Their approach is normative because it indicates how offences 'should' be rated,[299] and has merit because it provides a framework for grading harm rather than determining this intuitively and impressionistically. The living-standard analysis tool is important because legislatures could utilise this tool to grade the level of harm involved in the conduct and thus justify their decision on whether to criminalise the conduct on the basis of the harm principle. Thus, it would assist the legislatures to adopt a more principled approach to criminalisation.

Importantly, while the living-standard analysis offers a practical tool to grade harm it does not offend the 'Pragmatics Filter' or the 'Presumptions Filter'.[300] The harm principle is relevant to the 'Principles Filter'. To reiterate, the 'Pragmatics Filter' is concerned with whether the conduct can be reduced or eliminated by means other than the criminal law, for example, via an education campaign. The 'Presumptions Filter' is concerned with the pragmatic outcome of the criminal law and requires a cost and benefit analysis of the consequences of the criminal law. As mentioned in chapter 1, the 'Principles Filter' is the most relevant because it is consistent with a principled approach to criminalisation, and while the latter two filters are important practical considerations, they are separate inquiries. Detailing the components of the living-standard analysis tool is imperative at this stage in the chapter because the tool will then be applied to examples of making and/or distributing visual recordings at the end of this section.

The living-standard analysis commences by identifying the 'generic-interest' dimension affected by the crime.[301] Under von Hirsch's and Jareborg's

---

[295] Andrew Ashworth, *Principles of Criminal Law* (5th ed, 2006) 37.
[296] Ibid 39.
[297] Ibid.
[298] Ibid 3.
[299] Ibid 6.
[300] Jonathan Schonsheck, *On Criminalization: An Essay in the Philosophy of the Criminal Law* (1994) 16.
[301] Notably von Hirsch and Jareborg's 'generic-interests' are more specific than Feinberg's definition of harm, which essentially suggests that harm is setting back an interest without

schema, there are four generic-interest dimensions, namely, 'physical integrity, material support and amenity, freedom from humiliation, and privacy and autonomy'.[302] These generic-interest dimensions should not be viewed as opposing interests because they might all be relevant to a particular situation. Physical integrity 'embraces health, safety, and avoidance of physical pain'.[303] Material support and amenity includes all types of material interests, for example, food, shelter and luxuries.[304] Freedom from humiliation encompasses 'injuries to self-respect that derive from others' mistreatment'.[305] Privacy and autonomy 'promotes self-respect'[306] and helps a person to pursue various preferences.[307] While the generic-interest dimensions appear compelling, a decision-maker should be aware of their weaknesses.

One of the weaknesses with the von Hirsch and Jareborg living-standard approach is that their list of generic-interest dimensions appears to be random, incomplete and without theoretical justification. As mentioned above, the living-standard analysis tool assists the 'Principles Filter'. The generic-interest dimensions are based on their impressions of 'legally-protected interests'[308] usually involved in '*criminal* conduct which injures or threatens *identifiable victims*'.[309] The inclusion of freedom from humiliation in the list above is appropriate because a person is 'worse off when treated in a degrading fashion'.[310] Similarly, the inclusion of privacy and autonomy is justified because 'it promotes self-respect'[311] and 'helps one pursue preferences of various kinds'.[312] The weight attributed to privacy and autonomy may vary from culture to culture.[313] The living-standard analysis gives credence to a broad range of interests that may have been overlooked had the criminalisation decision been made intuitively. However, the living-standard analysis could be strengthened by refining the scope of the freedom from humiliation, and privacy and autonomy generic-interest dimensions. Further, the living-standard analysis could be strengthened if it was based on a list of generic-interest dimensions that was supported by theory. In any event, the generic-interest dimensions as currently constructed, especially privacy and autonomy, and

---

actually illustrating any interests: Joel Feinberg, *The Moral Limits of the Criminal Law: Harm to Others* (1984) 33.

[302] Andrew von Hirsch and Nils Jareborg, 'Gauging Criminal Harm: A Living-Standard Analysis' (1991) 11 *Oxford Journal of Legal Studies* 1, 19. These are interests that should be protected by the harm principle. See the discussion above under The Ambit of Harm.

[303] Ibid 20.

[304] Ibid.

[305] Ibid.

[306] Ibid.

[307] Ibid.

[308] Andrew von Hirsch and Nils Jareborg, 'Gauging Criminal Harm: A Living-Standard Analysis' (1991) 11 *Oxford Journal of Legal Studies* 1, 19-20.

[309] Ibid 3 and 19-20. Note that the notion of 'legally-protected interests' is unique to von Hirsch and Jareborg's discussion and has not been used in the definitions of harm above.

[310] Ibid 20.

[311] Ibid.

[312] Ibid.

[313] Ibid 21.

freedom from humiliation are relevant to making and/or distributing visual recordings and this chapter will take an incremental step to apply the tool to a new context.

The next step in the living-standard analysis is to estimate the degree to which the living standard of a typical victim would be affected in a typical case. In this way, the tool's proponents support a 'standard harm' rather than dealing with victims who are particularly vulnerable or resilient.[314] The living standard does not focus on an 'actual life quality or goal achievement, but on the *means* or *capabilities* for achieving a certain quality of life. It is also standardized, referring to the means and capabilities that would *ordinarily* help one achieve a good life'.[315] Consequently, the living standard can be employed without knowing a particular person's life goals.[316] The living standard approach differs from a consideration of social welfare interests because the former is not based on a choice criterion, but is rather based on the 'means for achieving a certain quality of life'.[317] For the same reason the generic-interest dimensions are different from individual interests. The principles of individual autonomy and social welfare are discussed below.

von Hirsch and Jareborg grade an intrusion into a person's living-standard at one of four levels as set out in the table below.[318] Four levels were chosen because the difference between them was reasonably easy to discern.[319] A larger number of levels, for example, 100, would have given a deceptive sense of precision.

Level	*Category*	*General Description*
1˚	Subsistence	Survival, but with maintenance of no more than elementary human capacities to function. No satisfactions presupposed at this level.
2˚	Minimal well-being	Maintenance of a minimal level of comfort and dignity.
3˚	Adequate well-being	Maintenance of an 'adequate' level of comfort and dignity.
4˚	Enhanced well-being	Significant enhancement in quality-of-life above the mere 'adequate' level.

The terms 'subsistence', 'minimal well-being', 'adequate well-being' and 'enhanced well-being' presented in the table above are worthy of further exploration. 'Subsistence' 'means barely getting by. Included would be preservation of one's major physical and cognitive functions, and preservation

[314] Ibid 4. In these cases, principles of aggravation and mitigation would be relevant.
[315] Ibid 10.
[316] Ibid 10-11.
[317] Ibid 11.
[318] Ibid 17.
[319] Ibid.

˚.

Whether a level 1˚ to 4˚ is attributed to the conduct sought to be criminalised depends on the temporal perspective taken. Von Hirsch and Jareborg adopt a one-year or slightly longer temporal perspective.[324] This means that the relevant question in assessing the conduct is 'How has your year been?'[325] rather than 'How was your day?'[326] or 'How was your last decade?'.[327] It is asserted that these latter two expressions overrate or underrate the conduct.

To link the levels in the table above with the generic-interest dimensions identified earlier, von Hirsch and Jareborg suggest that physical integrity and material support and amenity may relate to all four levels in the table above.[328] In contrast, freedom from humiliation, and privacy and autonomy develop at levels 2˚ to 4˚ in the table above.[329] The reason for this is that level 1˚relates to survival, and a person may survive without privacy or freedom from humiliation.[330] After determining the relevant level in the table above, the next step is to map the level onto a harm gradation scale.[331] The von Hirsch and Jareborg harm gradation table is set out below.[332] The critical grades in terms of the criminalisation decision are serious and grave, which are satisfied if the conduct impacts on a person's minimal well-being or subsistence.

Harm Gradation	*Living-Standard Level Intruded Upon*
I – grave	Subsistence (living-standard level 1˚)
II – serious	Minimal well-being (level 2˚)
III – upper-intermediate	Adequate well-being (level 3˚)
IV – lower-intermediate	Enhanced well-being (level 4˚)
V – lesser	Living standard not affected or only marginally so

[320] Ibid 18.
[321] Ibid.
[322] Ibid 19.
[323] Ibid.
[324] Ibid 22.
[325] Ibid.
[326] Ibid 21.
[327] Ibid 22.
[328] Ibid 21.
[329] Ibid.
[330] Ibid 18.
[331] Ibid 29.
[332] Ibid.

Von Hirsch and Jareborg acknowledge that their living-standard levels are not precise and 'their application to criminal harms will leave much to judgment'.[333] Despite suggesting that the living-standard analysis can be used to determine whether conduct is criminalised, von Hirsch and Jareborg did not indicate the cut-off point on the harm gradation table where conduct should be criminalised. In fact, they retreat on the issue of criminalisation by advising that if a type of conduct constitutes grave harmfulness on the harm gradation table above, it 'does not necessarily settle whether it should be proscribed'.[334] The living-standard analysis tool is therefore a useful process in justifying the decision whether to criminalise conduct on the basis of the harm principle. The living-standard analysis provides 'a systematic conceptual framework'[335] for gauging criminal harm that is 'superior to untutored intuition and guesswork'.[336]

Elsewhere in a published analysis, I considered whether four examples of making visual recordings should be criminalised on the basis of the living-standard analysis tool.[337] The four examples, which were based on examples reported by the media, are (1) visually recording a child playing in a public park; (2) visually recording a topless female bather at a public beach; (3) up-skirt filming at a shopping centre; and (4) visually recording a housemate as they shower in the bathroom. Intuitively (3) and (4) may be more serious than (1) and (2) because they involve a greater intrusion on privacy (which is one of the generic-interest dimensions) and thus greater harm. However, applying the living-standard analysis tool, all four examples of making a visual recording were ranked at the same level, that is, level 4̊, which meant that the conduct impacted on a person's enhanced well-being and was graded at lower-intermediate on the harm gradation table. This fell a long way short of the serious or grave harms, which impact on a person's minimal well-being or subsistence. A typical victim of example (4) may not sufer serious psychological harm. In contrast, von Hirsch and Jareborg suggest that the humiliation associated with being raped by a stranger at gunpoint is serious.[338]

---

[333] Ibid.
[334] Ibid 4.
[335] Ibid.
[336] Ibid.
[337] Kelley Burton, 'Criminalisation: Applying a Living-standard Analysis to Non-consensual Photography and Distribution' (2007) 7 *Queensland University of Technology Law and Justice Journal* 464. This article explains in detail why the four examples are non-serious.
[338] Andrew von Hirsch and Nils Jareborg, 'Gauging Criminal Harm: A Living-Standard Analysis' (1991) 11 *Oxford Journal of Legal Studies* 1, 26. They state, '[w]e hardly need belabour that forced sex is about the most demeaning imposition that can be imagined – far more humiliating than a beating. Because of the strength, in our culture, of the norm that sexual favours may be granted only with consent, forced sexual intercourse is an extreme form of being subjected to another's dominion. Thus we would rate this at the highest level of intrusions to self-respect'.

As discussed above, the literature requires the level of harm to be serious before criminalising the conduct on the basis of the harm principle.[339] Thus, if the legislature decided to criminalise making a visual recording, they should base their decision on another principle. A principled approach to criminalisation does not support the legislature merely interpreting harm liberally or drawing the cut-off on the living-standard analysis tool at a lower point to criminalise new non-serious contemporary problems.

According to this analysis, distributing a visual recording would result in more harm and thus would be more serious than simply making a visual recording because it involves a greater intrusion on privacy, which is one of the generic-interest dimensions in the living-standard analysis tool. Some more serious examples of distributing a visual recording include distributing a visual recording for sexual gratification; uploading the visual recording to the Internet to a world wide audience as opposed to distributing the visual recording to a small number of individuals; distributing moving visual recordings as opposed to still visual recordings because the former are better at capturing a person's personality; and distributing visual recordings that damaged the personal or professional relationships of the individual visually recorded. However, the question remains whether these examples of distribution are serious enough to fall within the serious or grave levels of harm on the living-standard analysis tool.

Elsewhere, I have intimated that it was possible for the grade of harm attributed to distribution to range between level 2˚ (serious harm) and level 4˚ (lower-intermediate harm) but suggested that a lower grade would be more appropriate because the harm is assessed from a one-year temporal perspective.[340] Thus, my application of the living-standard analysis tool suggests that distributing a visual recording is also non-serious and should not be criminalised on the basis of the harm principle.

2.2.2.6 Using Harm as a Framework in the Criminalisation Decision

Lacey, Wells and Quick state that the harm principle has a 'strong common-sense appeal'[341] and has a 'significant place in the public debate about criminal law and its limits'.[342] However, as discussed above, the scope of harm and gauging the level of harm are problematic. McSherry and Naylor note that the harm principle explains why conduct should not be criminalised, but has

---

[339] For example refer to Andrew Ashworth, *Principles of Criminal Law* (5th ed, 2006) 35-40 and AP Simester and GR Sullivan, *Criminal Law Theory and Doctrine* (2003) 11.
[340] Kelley Burton, 'Criminalisation: Applying a Living-standard Analysis to Non-consensual Photography and Distribution' (2007) 7 *Queensland University of Technology Law and Justice Journal* 464, 473-4.
[341] Nicola Lacey, Celia Wells and Oliver Quick, *Reconstructing Criminal Law Text and Materials*, Law in Context (3rd ed, 2003) 9.
[342] Ibid.

difficulty in explaining why conduct should be criminalised.[343] This is confirmed by the results of the living-standard analysis above, which suggest that none of the four examples of making and/or distributing visual recordings should be criminalised because the harm involved was not serious or grave. Thus, in this instance, the harm principle explains why this contemporary conduct should not be criminalised.

Additionally, Lacey, Wells and Quick 'suggest that the harm principle is not only indeterminate at a normative level but also incomplete at an explanatory level'.[344] Rather than offering an ideal or explanation, the harm principle offers 'an ideological framework in terms of which policy debate about criminal law is expressed.'[345] Despite the ambiguities associated with the harm principle, it offers a framework in which to situate contemporary problems and thus is valuable to the criminalisation debate.

To reiterate my key points above, the decision on whether to criminalise conduct may be based on the harm principle. The concept of 'harm' is difficult to define and there is not one single overarching definition of the concept that is accepted in all contexts of criminal law. Having a fluid definition of harm contributes to the blurred boundaries of the criminal law, but at the same time enables the criminal law to keep up with contemporary values, society and advances in technology. Instead of seeking an overarching definition of harm, this chapter has isolated a specific tool that provides a means of grading the harm involved in conduct as serious or non-serious, and thus justifying the decision on whether conduct should be criminalised.

As discussed above, Simester and Sullivan, and Ashworth state that conduct should only be criminalised if it involves serious harm.[346] Using the living-standard analysis tool, if the conduct falls within the serious or grave grades of harm, it should be criminalised on the basis of the harm principle. However, if the conduct falls within the upper-intermediate, lower-intermediate and lesser harm grades, the conduct should not be criminalised under the harm principle, but may be criminalised on the basis of another principle. To recap, making and/or distributing visual recordings do not fall within serious or grave harm as interpreted by the living-standard analysis tool and thus should not be criminalised on the basis of the harm principle. The next principle underpinning criminalisation, morality, shares the same fluidity as harm.

---

[343] Bernadette McSherry and Bronwyn Naylor, *Australian Criminal Laws: Critical Perspectives* (2004) 19.
[344] Nicola Lacey, Celia Wells and Oliver Quick, *Reconstructing Criminal Law Text and Materials,* Law in Context (3rd ed, 2003) 9.
[345] Ibid. Interestingly, Bernadette McSherry and Bronwyn Naylor, *Australian Criminal Laws: Critical Perspectives* (2004) 19 says exactly the same thing.
[346] AP Simester and GR Sullivan, *Criminal Law Theory and Doctrine* (2003) 11 and Andrew Ashworth, *Principles of Criminal Law* (5th ed, 2006) 35-40.

2.2.3 Preservation of Morality

Similarly to the protection of harm principle, the preservation of morality is another possible principle underpinning the decision to criminalise conduct. Lord Devlin is the key advocate of the preservation of morality principle, and claims that morality underpins the 'social fabric of society'[347] and immoral behaviour erodes 'that fabric and consequently'[348] destabilises society. Lord Devlin asserts that society will disintegrate unless immoral acts are criminalised.[349] The Oxford Companion to Philosophy suggests that legislative responses to protect public morals prohibit or restrict 'acts and practices judged to be damaging to the character and moral well-being of persons who engage in them or who may be induced to engage in them by the bad example of others.'[350]

The scope of morality is subject to debate. Lord Devlin argues that criminal law should prohibit behaviour that is immoral according to the norms of a society.[351] It is not confined to the teachings of a particular religion. Ashworth notes that this is realistic in a British context because several religions with differing perspectives are practised in British society.[352] Further, Ashworth contends that morality fluctuates with place and time,[353] and Lacey, Wells and Quick agree with Ashworth on this point.[354] Similarly, Simester and Sullivan assert that moral stagnation is unattractive,[355] and suggest that 'difference, even conflict, between the lives and values of citizens can be a dynamic force for the evolution of a vigorous, thriving, and valuable culture.'[356] In any event, Duff states that the

---

[347] Mark Findlay, Stephen Odgers and Stanley Yeo, *Australian Criminal Justice* (3rd ed, 2005) 3.

[348] Ibid. Cf Hamish Stewart, 'Legality and Morality in HLA Hart's Theory of Criminal Law' (1999) 52 *SMU Law Review* 201.

[349] Patrick Devlin, *The Enforcement of Morals* (1965) 8-14.

[350] Ted Honderich (ed), *The Oxford Companion to Philosophy* (New Edition ed, 2005), under enforcement of morals. Protecting the persons who engage in the offences has been referred to as unjustifiable legal paternalism: AP Simester and GR Sullivan, *Criminal Law Theory and Doctrine* (2003) 18.

[351] Ibid 20. See also Horder who recognises that a serious crime against a person describes what a person has actually done but also captures the 'moral essence of the wrong involved': Jeremy Horder, 'Rethinking Non-Fatal Offences Against the Person' (1994) 14 *Oxford Journal of Legal Studies* 335, 335. Further, Horder refers to the concept of representative labelling, which means defining an offence in a way that provides an 'accurate moral grasp of what' the offender has done: 339.

[352] Andrew Ashworth, *Principles of Criminal Law* (5th ed, 2006) 41. Further, there is no simple equation between crime and sin: David Brown et al, *Brown, Farrier, Neal and Weisbrot's Criminal Laws - Materials and Commentary on Criminal Law and Process in New South Wales* (4th ed, 2006) 91. See also Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (2nd ed, 2005) 58.

[353] Andrew Ashworth, *Principles of Criminal Law* (5th ed, 2006) 44.

[354] Nicola Lacey, Celia Wells and Oliver Quick, *Reconstructing Criminal Law Text and Materials,* Law in Context (3rd ed, 2003) 5.

[355] AP Simester and GR Sullivan, *Criminal Law Theory and Doctrine* (2003) 17.

[356] Ibid.

> criminal law reflects a range of different values, which are not always either commensurable or consistent; that the criminal law's offence definitions should pick out recognizable types of moral wrongdoing – and that we must recognize the different kinds and structures of wrongdoing that properly concern the criminal law.[357]

Lord Devlin states that 'morality could be determined by enquiring into what every right-minded person considered immoral'.[358] However, this has been criticised because it is doubted whether a shared morality can be identified.[359] Further, if a shared morality was identified, it could be used to 'discriminate against minority groups'.[360] This is similar to a statement made by Findlay, Odgers and Yeo, who state that the definition of morality 'may well stem from irrational prejudices rather than reasoned moral indignation'.[361] They state that morality is imprecise and rests on 'mere feelings of disgust'.[362]

As noted in chapter 1, moral wrongness and offensiveness are often used interchangeably or synonymously in the literature.[363] However, it has been suggested that they are different because offensive conduct is done in public.[364] According to Simester and Sullivan, the term 'offence' is akin to an 'unpleasant and disliked psychological experience'.[365] Offensive conduct is wrong when it 'treats persons with a gross lack of consideration or respect'.[366] The concept of 'offence' in a criminal context may also mean a crime, which can be categorised as an indictable offence or summary offence.[367] This is not the sense in which the word is used here.

---

[357] R A Duff, 'Theorizing Criminal Law: A 25th Anniversary Essay' (2005) 25 *Oxford Journal of Legal Studies* 353, 363.

[358] Bernadette McSherry and Bronwyn Naylor, *Australian Criminal Laws: Critical Perspectives* (2004) 20. The criminal law represents a set of minimum standards rather than maximum standards: Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (2nd ed, 2005) 55.

[359] Bernadette McSherry and Bronwyn Naylor, *Australian Criminal Laws: Critical Perspectives* (2004) 20.

[360] Ibid 21. An example of Nazi Germany is used to support this criticism.

[361] Ibid.

[362] Mark Findlay, Stephen Odgers and Stanley Yeo, *Australian Criminal Justice* (3rd ed, 2005) 3. Cf Andrew Ashworth, *Principles of Criminal Law* (5th ed, 2006) 40, which refers to feelings of disgust, indignation and intolerance amongst ordinary members of the society.

[363] See also Joel Feinberg, *The Moral Limits of the Criminal Law: Offense to Others* (1985), which uses 'offence'.

[364] David Brown et al, *Brown, Farrier, Neal and Weisbrot's Criminal Laws - Materials and Commentary on Criminal Law and Process in New South Wales* (4th ed, 2006) 95.

[365] AP Simester and GR Sullivan, *Criminal Law Theory and Doctrine* (2003) 15.

[366] Ibid 16.

[367] Glanville Williams, *Textbook of Criminal Law* (2nd ed, 1983) 18. Note that some quotes used in this thesis may use the term offence to mean moral wrongness. In such situations, common sense will prevail.

Criminalisation on the basis of morality should be used sparingly. This protects freedom of expression,[368] and is consistent with the notion of 'minimalism' and Feinberg's suggestion that criminalisation is only supported when it prevents serious immorality.[369]

Criminalising serious immorality is similar to the view that criminal law should be limited to 'breaches of important moral principles'.[370] However, this view would be more meaningful if it specified where to draw the line between important and unimportant morals or provided a comprehensive list of examples of important and unimportant morals.[371] In contrast, Simester and Sullivan recommend a 'thick skin'[372] approach to criminalising immoral conduct and recommend that people tolerate incivility on the ground of 'personal and cultural diversity'.[373] This 'thick skin' approach is consistent with minimalism.

2.2.3.1 Moral Dimension

Bronitt and McSherry recognise that many serious offences have a moral dimension.[374] Lacey, Wells and Quick refer to an offence with a moral dimension as a 'real' crime, which is to be contrasted to a regulatory offence, which generally lack a moral dimension.[375] However, they note that some regulatory offences are not trivial and result in penalties that impinge on a person's livelihood.[376] Further, they acknowledge that many offences can be viewed from both a moral and regulatory perspective, 'with our attitudes to the boundary between 'regulatory' and 'real' crime shifting over time'.[377] Lacey, Wells and Quick provide driving under the influence of alcohol as an example of an offence that was viewed as a regulatory offence 20 years ago, 'while today it has become heavily moralised'.[378] They recognise that the criminal law is a 'system of quasi-moral judgment which reflects a society's basic values'.[379]

---

[368] Ibid.
[369] Joel Feinberg, *The Moral Limits of the Criminal Law: Offense to Others* (1985) 1.
[370] Mirko Bagaric, 'The "Civil-isation" of the Criminal Law' (2001) 25 *Criminal Law Journal* 184,193.
[371] Note that Bagaric provides two examples, that is, littering and illegal car parking, but does not give any further guidance on dividing important and unimportant moral principles: Mirko Bagaric, 'The "Civil-isation" of the Criminal Law' (2001) 25 *Criminal Law Journal* 184, 193.
[372] AP Simester and GR Sullivan, *Criminal Law Theory and Doctrine* (2003) 16.
[373] Ibid.
[374] Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (2nd ed, 2005) 58.
[375] Nicola Lacey, Celia Wells and Oliver Quick, *Reconstructing Criminal Law Text and Materials,* Law in Context (3rd ed, 2003) 5.
[376] Ibid.
[377] Ibid.
[378] Ibid.
[379] Ibid 4. Crimes with quasi-morality should only be invoked where there is a serious threat to interests shared by the community. Further, Lacey doubts whether quasi criminal laws have been so successful that other forms of 'less draconian, costly and socially divisive means of

It has been suggested that morality does not need to support every crime to be a valid principle underpinning the decision to criminalise conduct. In particular, 'for moral principles to explain and justify the settled rules of law only a significant portion of the rules need to be consistent with the background moral theory'.[380] This conclusion could have been strengthened by supporting it with evidence, for example, comparing the proportion of criminal offences that are consistent with the principle of morality with the proportion of criminal offences that are not consistent with the principle of morality. Further, this conclusion leaves open for interpretation the point at which the term 'significant portion' is satisfied. Presumably, the point lies between 50 per cent and 100 per cent. On the basis of Lacey, Wells and Quick's construction of 'real' crimes, morality underpins 'real' crimes, but it may not underpin regulatory offences, some of which lack a specific moral dimension.[381] Lacey, Wells and Quick do not provide any examples of regulatory offences that lack a specific moral dimension to support their argument, but an example of such an offence is where a pedestrian crosses a road against the pedestrian lights.[382] The literature confirms that some of the more recent incursions into the criminal law are becoming more 'civilised' and more paternalistic rather than having a moral dimension.[383]

There are other examples of criminal offences that are purely regulatory in nature and lack a moral dimension.[384] These include leaving a vehicle in a no standing zone, not wearing a seat belt, leaving a vehicle for a longer than fixed period and travelling without a ticket.[385] They do not protect any recognisable right,[386] are aimed at controlling conduct,[387] and have little moral foundation. Further, Bronitt and McSherry maintain that 'the modern criminal law does not universally promote or enforce any particular conception of morals'.[388] As discussed earlier in this chapter, while they do not explicitly attribute a timeframe to the notion of 'modern criminal law', Bronitt and McSherry make

---

social governance' cannot be used: Nicola Lacey, 'Abstraction in Context' (1994) 14 *Oxford Journal of Legal Studies* 255, 266.

[380] Mirko Bagaric, 'The "Civil-isation" of the Criminal Law' (2001) 25 *Criminal Law Journal* 184, 187.

[381] Nicola Lacey, Celia Wells and Oliver Quick, *Reconstructing Criminal Law Text and Materials,* Law in Context (3rd ed, 2003) 5.

[382] Commonly known as jay walking. This is an example of a regulatory offence in Queensland. See *Transport Operations (Road Use Management – Road Rules) Regulation 1999* (Qld) s 231.

[383] See generally Mirko Bagaric, 'The "Civil-isation" of the Criminal Law' (2001) 25 *Criminal Law Journal* 184. For example, it is an offence not to wear a seat-belt.

[384] Ibid 189-190.

[385] Ibid.

[386] Recognisable rights are established in the *Universal Declaration of Human Rights* (entered into by Australia on 10 February 1948), the *International Covenant on Economic, Social and Cultural Rights* (entered into by Australia on 10 March 1976) and the *International Covenant on Civil and Political Rights* (entered into by Australia on 13 November 1980).

[387] Mirko Bagaric, 'The "Civil-isation" of the Criminal Law' (2001) 25 *Criminal Law Journal* 184, 189.

[388] Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (2nd ed, 2005) 58.

reference to 'modern society' and later '21st century'.[389] Thus, the modern criminal law is tantamount to the contemporary criminal law and to the criminal law created in the 21st century.

Lacey, Quick and Wells note that some 'wrong' conduct is not criminalised.[390] In this sense, they use the word 'wrong' to mean 'immoral'.[391] They do not provide any examples of such conduct to support their argument, but adultery and lying may be examples. However, other literature notes that some people 'may scoff at or belittle others for breaching rules of etiquette, fashion trends or the rules of a sporting contest, we do not condemn people for doing so'.[392] On the other hand, some conduct, which is not 'wrong', is criminalised, for example, not wearing a bicycle helmet when riding a bicycle.[393] Consequently, there appears to be a regulatory aspect to modern criminal law.[394] Many offences would be decriminalised if criminal laws only dealt with breaches of important moral principles.[395] The changing nature of morality in time and place may lead to a shift in the boundaries of criminal law, but the fluidity of the concept of 'morality' ameliorates the criminal law's ability to keep up with advances in society.

Unlike the harm principle, the principle of morality did not receive any explicit attention in the 2005 Australian Standing Committee of Attorneys-General Discussion Paper,[396] the 2004 New Zealand Law Commission's Study Paper[397] or the 2002 Canadian Department of Justice's Consultation Paper.[398] This lack of attention is consistent with the argument above that morality does not always underpin modern criminal offences, which often lack a moral dimension and many of which are merely regulatory offences. Thus, the morality principle could be described as superfluous in the criminalisation debate. As discussed

---

[389] Ibid 56.
[390] Nicola Lacey, Celia Wells and Oliver Quick, *Reconstructing Criminal Law Text and Materials,* Law in Context (3rd ed, 2003) 4.
[391] Ibid.
[392] Mirko Bagaric, 'The "Civil-isation" of the Criminal Law' (2001) 25 *Criminal Law Journal* 184, 187. In such circumstances, people must comply with the 'demands of a 'higher' unwritten code of conduct': Paul H Robinson, 'A Theory of Justification: Societal Harm as a Prerequisite for Criminal Liability' (1975) 23 *UCLA Law Review* 266, 272.
[393] Nicola Lacey, Celia Wells and Oliver Quick, *Reconstructing Criminal Law Text and Materials,* Law in Context (3rd ed, 2003) 4.
[394] Ibid 4-5. Lacey, Wells and Quick also suggest that there is a utilitarian aspect to modern criminal law. The notion of utilitarianism would fall under the social welfare head in this chapter of the thesis.
[395] Mirko Bagaric, 'The "Civil-isation" of the Criminal Law' (2001) 25 *Criminal Law Journal* 184, 193.
[396] See generally Standing Committee of Attorneys-General, *Unauthorised Photographs on the Internet and Ancillary Privacy Issues* (2005) <http://www.ag.gov.au> at 1 October 2005.
[397] See generally New Zealand, New Zealand Law Commission, Intimate Covert Filming Study Paper, Study Paper No. 15 (2004).
[398] See generally Canada, Department of Justice Canada, Voyeurism as a Criminal Offence: A Consultation Paper (2002).

above, the notion of 'morality' changes with time and place and has been empirically associated with disgust.

While the relevant discussion papers do not explicitly refer to morality, they refer to notions that conjure up immorality in the context of making and/or distributing visual recordings. Examples of these notions include 'children as objects of adult sexual gratification',[399] 'sexual exploitation'[400] and 'non-consensual disrobing'.[401] These notions involve a sexual violation and examples of making and/or distributing visual recordings that encompass such notions are indecent. Visually recording a child as a sexual object and distributing the visual recording for the sexual gratification of adults is arguably one of the worst case scenarios of visual recording from a morality perspective. While up-skirt filming may be considered as equally immoral as photographing another person using a toilet, whether visually recording a topless female bather at a public beach is immoral is much more contentious and depends on the conception of morality. There is no universal definition of morality and some offences in the 21st century have no moral dimension or a limited one. As a result, this thesis will not use the principle of morality to justify the decision whether making and/or distributing visual recordings should be criminalised.

2.2.4 Promotion of Social Welfare

Ashworth states that criminalisation 'may be justified as a mechanism for the preservation of social order'.[402] Promoting social welfare reduces or avoids 'unnecessary hardship and financial cost to the community.'[403] Thus, it is a social defence.[404] Criminalising conduct under the label of promoting social welfare implies that 'there is a public interest in ensuring that such conduct does not happen and that, when it does, there is the possibility of State punishment'.[405] The social welfare principle recognises 'the social context in which the law must operate and gives weight to collective interests'.[406] It also reinforces a point made in chapter 3, that is, that the criminal law is preferable

---

[399] Standing Committee of Attorneys-General, *Unauthorised Photographs on the Internet and Ancillary Privacy Issues* (2005) <http://www.ag.gov.au> at 1 October 2005, 11
[400] Canada, Department of Justice Canada, Voyeurism as a Criminal Offence: A Consultation Paper (2002) 9.
[401] New Zealand, New Zealand Law Commission, Intimate Covert Filming Study Paper, Study Paper No. 15 (2004) 5.
[402] Andrew Ashworth, *Principles of Criminal Law* (5th ed, 2006) 22. See also Michael Kirby, 'Editorial' (2001) 25 *Criminal Law Journal* 181, 181.
[403] Andreas Schloenhardt, *Queensland Criminal Law: Critical Perspectives* (2006) 19.
[404] Mark Findlay, Stephen Odgers and Stanley Yeo, *Australian Criminal Justice* (3rd ed, 2005) 11.
[405] Andrew Ashworth, *Principles of Criminal Law* (5th ed, 2006) 2.
[406] Ibid 28.

to the civil law to prohibit conduct that harms the public rather than a specific individual.[407]

The social welfare principle concentrates on the '[s]tate's obligation to create the social conditions necessary for the exercise of full autonomy by individual citizens'.[408] Social welfare interests include 'the fulfilment of certain basic interests such as maintaining one's personal safety, health and capacity to pursue one's chosen life plan'.[409] These all encompassing social welfare interests coincide with individual goals such as 'life, liberty, property and health'.[410] While the social welfare principle and the individual autonomy principle (discussed below) may protect similar high-level interests, the interests are derived in a different manner. Under the social welfare approach to criminalisation, the interests are determined objectively (based on democratic decision making), and are not determined according to the preferences of each individual.[411] Arguably, it is the democratic decision making process that forces the literature to foster terms such as 'social welfare interests', 'community welfare interests', 'basic interests' and 'collective goals'. The terms 'social welfare principle', which is the name of the overarching principle, and social welfare interests, which are the collective goals protected by the social welfare principle,[412] will be used.

As social welfare interests are determined democratically, they are not fixed and shift over time as society evolves. The changing nature of social welfare interests impacts on the boundaries of the criminal law. This means that the legislature has the ability to adopt a broad notion of 'social welfare interests' to support their decision to criminalise conduct under the principle of social welfare. While the fluidity of the concept of 'social welfare interests' contributes to the serious problem of not being able to distinctly draw the boundaries of the criminal law, the fluidity enables the principle of social welfare and thus the criminal law, to keep up with advances and changes in society.

This section does not undertake the gruelling task of listing a current set of social welfare interests because such a list would be incomplete. Further, this section does not explain how a list of social welfare interests has had to evolve in light of advances in mobile phone cameras, video cameras and the Internet,

---

[407] Mark Findlay, Stephen Odgers and Stanley Yeo, *Australian Criminal Justice* (3rd ed, 2005) 5.
[408] Ibid 28.
[409] Ibid. Consequently, there is arguably overlap between the community welfare principle and the individual autonomy principle. However, as discussed below the two principles may conflict with each other.
[410] S E Marshall and R A Duff, 'Criminalization and Sharing Wrongs' (1998) 11 *Canadian Journal of Law and Jurisprudence* 7, 8.
[411] Andrew Ashworth, *Principles of Criminal Law* (5th ed, 2006) 28.
[412] An analogy can be made with the terminology used for individual autonomy. Individual autonomy is the name of the overarching principle, while individual interests are the individual goals protected by individual autonomy.

and changing community conceptions of privacy given the ubiquity of these new technologies.[413] Given the changeable construction of social welfare interests, this chapter will consider two interests that are of concern to the community according to the pertinent consultation papers, that is, freedom of expression and privacy.

The 2005 Australian Standing Committee of Attorneys-General Discussion Paper states that for

> any society to function in a relatively free and open manner there could not realistically be a requirement for all photographs to be taken with consent. If there were such restrictions, candid shots could never be taken, and the media would be severely constrained in the images they show us. Freedom of expression and artistic expression would undoubtedly be adversely affected.[414]

Thus, the social welfare interest of freedom of expression should surpass the social welfare interest of privacy in some instances to support the role of the media and to enable people to make candid visual recordings. Requiring the media to obtain the consent of all people in their visual recordings would be very onerous and would impede journalists and news reporters when time is of the essence. Further, making spontaneous visual recordings, particularly of family and friends, and physical landmarks, is clearly a right that should be protected. While the 2005 Australian Standing Committee of Attorneys-General Discussion Paper recognises the need to balance freedom of expression with privacy,[415] it does not provide any guidance on how to achieve this balancing act, except to say that the role of the media and the taking of candid shots should be supported.

Similarly, the 2004 New Zealand Law Commission's Study Paper emphasises privacy. In particular, it states that

> [s]ociety depends on a certain degree of privacy for individuals, but it also depends on social interaction and the ability to function freely in public…Privacy contributes significantly to people's right and ability to be fully functioning human beings and thereby assists in the functioning of civil society.[416]

While the 2004 New Zealand Law Commission's Study Paper stresses the need to protect privacy, it also recognises the need to protect freedom of expression. In a later section of the Study Paper, it recommends that freedom of expression

---

[413] Note that chapter 5 explores the conceptions of 'privacy' and 'consent' in detail.
[414] Standing Committee of Attorneys-General, *Unauthorised Photographs on the Internet and Ancillary Privacy Issues* (2005) <http://www.ag.gov.au> at 1 October 2005, 9.
[415] Ibid 10.
[416] New Zealand, New Zealand Law Commission, Intimate Covert Filming Study Paper, Study Paper No. 15 (2004) 5.

should outweigh privacy, for example, where a person visually records a topless female sunbather at a public beach.[417]

The 2002 Canadian Department of Justice's Consultation Paper on voyeurism acknowledges the changing nature of social welfare interests and the fact that they are determined democratically. For example, it contends that advances in technology have enabled voyeurs to intrude on a person's privacy in a greater manner than was perceived at the time the Canadian Code was drafted.[418] As discussed in chapter 1, this topic goes beyond voyeurism and canvasses making and/or distributing visual recordings, but the 2002 Canadian Department of Justice's Consultation Paper bolsters privacy as a relevant and superior social welfare interest.

Thus, there are two competing social welfare interests relevant to making and/or distributing visual recordings. With no rigid means of determining how to prioritise these two competing social welfare interests, the legislature is at liberty to prioritise them in a manner that suits their goals.[419] As will be discussed in chapter 5, the criminalisation decision is not simply a matter of protecting privacy in private places and protecting freedom of expression in public places because privacy does and should exist to some extent in a public place. Further, the social welfare interest does not need to reach a pre-ordained level, for example, serious, before it should justify criminalisation. Thus, the living-standard analysis tool, which was used above to grade the seriousness of harm, is unhelpful in determining which interest the social welfare principle should promote.

It is argued here that the social welfare interest of privacy should be promoted where a person makes and/or distributes a visual recording of another who is undressing, showering, using a toilet and engaging in a sexual activity; and where the visual recording focuses on a person's private body parts. In these examples there is a significant intrusion on privacy and there is no acceptable reason to promote freedom of expression. While the criminalisation of these examples was not justified under the head of prevention of harm and, the preservation of morality was discarded as being superfluous in the criminalisation debate, these examples should be criminalised under the head of promotion of social welfare.

As discussed above, the heads of prevention of harm and preservation of morality should not be used to support the criminalisation of making and/or distributing a visual recording of a child playing in a public park or a topless female bather at a public beach. Similarly, the social welfare principle should

---

[417] Ibid 39.

[418] Canada, Department of Justice Canada, Voyeurism as a Criminal Offence: A Consultation Paper (2002) 1.

[419] Arguably, the decision to criminalise conduct based on competing social welfare interests may be just as intensively subjective and inherently controversial as a decision founded on morality.

promote freedom of expression rather than privacy by permitting people to make visual recordings of, for example, a child playing in a public park and a topless female bather at a public beach, because the ability to make visual recordings is an important part of our lives in the 21st century and it is a freedom worth protecting. Many members of the community would make visual recordings for a socially desirable purpose, such as recording family and friends. It is unrealistic to suggest that the criminal law should prohibit people from making visual recordings of other people in public places, and if the criminal law did so, it would stand to lose the respect of the community. Further, the criminal law would be largely unenforceable because law enforcers may never find the visual recordings unless they see the person making the visual recordings. While it is recognised that some members of the community may make visual recordings of other people for a socially undesirable purpose, for example, sexual objectification, voyeurism, humiliation and embarrassment; it may only become a social problem if it is distributed, and thus it is suggested that, on balance, the criminal law should protect freedom of expression and permit people to make visual recordings.[420]

The position is different for distributing visual recordings, for example, to the Internet, which is becoming a common practice in the 21st century. A person invades another person's privacy to a higher extent when they not only make a visual recording, but then distribute it to a wider audience or in an inappropriate context. For example, a person may visually record a child wearing a tight, wet swimming costume and upload it to a website that is designed for the sexual gratification of adults. This is very concerning because the distribution has been done for a socially undesirable purpose and it is an example of where the criminal law should step in to protect the social welfare interest of privacy rather than freedom of expression. Other socially undesirable purposes for distribution may include humiliation, embarrassment, voyeurism and sexual objectification. In these situations, the criminal law should protect the privacy of the person visually recorded, rather than the freedom of expression of the person distributing the visual recording. Privacy is discussed in detail in chapter 5, which shows a relationship between privacy and implied consent.

The social welfare interests identified above (freedom of expression and privacy) intersect with the relevant individual interests, and thus it is timely to explore individual autonomy as a principle underpinning criminalisation.

[420] Note that the notion of 'sexual' does not govern all of the nouns listed, for example, humiliation and embarrassment.

2.2.5 Respect for Individual Autonomy

Findlay, Odgers and Yeo argue that the criminal law should respect individual autonomy.[421] This means that conduct should only be criminalised to the minimum extent necessary to provide other individuals with the same autonomy.[422] As stated above in relation to harm, the harm principle only respects individual autonomy to the extent that individual autonomy does not interfere with other individuals. Further, Ashworth states that the individual autonomy principle means that individuals should only be criminally responsible for acts if they have capacity and a fair opportunity to act differently.[423] Advocates of the minimalist approach to criminal law are concerned about the overuse of criminal law because of its coercive and liberty-depriving consequences.[424] Minimalism accepts the need to criminalise direct wrongs against victims and to safeguard interests, but is concerned that the State, groups or other individuals will abuse their power.[425] Consequently, respecting individual autonomy is a principle that may underpin the criminalisation decision.

Ashworth acknowledges that it is unsustainable for individuals to have complete freedom without qualifications.[426] He notes that individuals are 'entitled to equal concern and respect'.[427] Jareborg maintains that the criminal law could not protect all individual interests and that some individual interests are not worthy of protection.[428] The criminal law's protection of individual interests and values has been described as 'selective…[and] fragmentary'[429] in character. Additionally, Ashworth asks the question of whose individual autonomy is protected by the criminal law and draws attention to gender bias that is evident in the law.[430] Not every individual's autonomy preferences can be reflected in the criminal law. Instead of identifying specific individual interests, Marshall and Duff identify some broad significant individual interests,

---

[421] Mark Findlay, Stephen Odgers and Stanley Yeo, *Australian Criminal Justice* (3rd ed, 2005) 3.
[422] Ibid. Note that respect for individual autonomy does not always underpin the decision to criminalise conduct as there are victimless crimes: Mirko Bagaric, 'The "Civil-isation" of the Criminal Law' (2001) 25 *Criminal Law Journal* 184, 188.
[423] Andrew Ashworth, *Principles of Criminal Law* (5th ed, 2006) 27. This statement also links to the concept of culpability, which is discussed later in this thesis. See also Nils Jareborg, 'Criminalization as Last Resort (Ultima Ratio)' (2005) 2 *Ohio State Journal of Criminal Law* 521, 522 which suggests that culpability is a basic pillar of modern criminal law.
[424] Mark Findlay, Stephen Odgers and Stanley Yeo, *Australian Criminal Justice* (3rd ed, 2005) 4.
[425] Andrew Ashworth, *Principles of Criminal Law* (5th ed, 2006) 31.
[426] Ibid 27.
[427] Ibid 29.
[428] Nils Jareborg, 'Criminalization as Last Resort (Ultima Ratio)' (2005) 2 *Ohio State Journal of Criminal Law* 521, 526.
[429] Ibid 525.
[430] Andrew Ashworth, *Principles of Criminal Law* (5th ed, 2006) 27.

that is, life, liberty, property and health.[431] These individual interests are so broad that there is considerable overlap between them and the social welfare interests identified above. Consequently, the scope of individual interests is open to interpretation and may be shaped by the legislature to meet its goals. In the context of making and/or distributing visual recordings, privacy and freedom of expression fall readily within the individual interest of liberty.

Marshall and Duff explain why there may be alignment between individual and social welfare interests. In particular, they state that

> [a] group …[shares] the wrongs done to its individual members, insofar as it defines and identifies itself as a community united by mutual concern, by genuinely shared (as distinct from contingently coincident) values and interests, and by the shared recognition that its members' goods (and their identity) are bound up with their membership of the community. Wrongs done to individual members of the community are then wrongs against the whole community – injuries to a common or shared, not merely to an individual, good.[432]

While their account about the intersection of individual and social welfare interests is rational, it is possible that the converse is true, that is, that social welfare interests and individual interests will conflict.

Marshall and Duff have put forward a strategy for the social welfare principle to cope with such a conflict.[433] Their strategy begins with the view that the criminal law should protect 'common or collective goals',[434] which are social welfare interests. The second step is to identify the 'individual goals'[435] (if any) the criminal law should protect.[436] In the case of a conflict, social welfare interests may override individual interests, unless the individual interests are specifically recognised and protected in treaties and human rights legislation.[437]

The ambit of individual interests is potentially far reaching and the principle of respecting individual autonomy provides the legislature with the prospect of enlarging the criminal law. Drawing on the consultation papers about making and/or distributing visual recordings, there are two key competing individual interests, that is, the privacy interest of the person being visually recorded and

---

[431] S E Marshall and R A Duff, 'Criminalization and Sharing Wrongs' (1998) 11 *Canadian Journal of Law and Jurisprudence* 7, 8.
[432] S E Marshall and R A Duff, 'Criminalization and Sharing Wrongs' (1998) 11 *Canadian Journal of Law and Jurisprudence* 7, 20.
[433] Ibid 11.
[434] Ibid.
[435] Ibid.
[436] Ibid.
[437] Andrew Ashworth, *Principles of Criminal Law* (5th ed, 2006) 29. Findlay, Odgers and Yeo contend that the community welfare approach 'places a premium on community interests and would be prepared to override individual autonomy for the greater good of the community': Mark Findlay, Stephen Odgers and Stanley Yeo, *Australian Criminal Justice* (3rd ed, 2005) 4.

the freedom of expression interest of the person making and/or distributing the visual recording. Privacy and freedom of expression were also identified as social welfare interests in the previous section. The literature indicated that the social welfare interests should take priority over the individual interests in the event of a conflict but, as will be demonstrated soon, the trade-off is more complicated in practice. The individual interests of privacy and freedom of expression are evolving and change with advances in technologies that facilitate making and distributing visual recordings. Social welfare interests and individual interests are fluid concepts, which enable the criminal law to keep up with advances in technology, but pave the way for the legislature to expand the ambit of the criminal law. The criminal law should give priority to social welfare interests, but should not ignore individual interests.

The individual autonomy principle is consistent with the notion of 'minimalism' and may equally justify the decision to criminalise or not criminalise conduct. In the context of making and distributing visual recordings, the individual interest that could justify the decision to criminalise the conduct is privacy. This individual interest protects the autonomy of the person being visually recorded. In particular, the 2004 New Zealand Law Commission's Study Paper states that intimate covert visual recording

> robs individuals of the freedom to choose how they present themselves to others. Because they do not know they are being filmed they cannot adjust their behaviour to minimise the intrusion and control how they are viewed.[438]

In contrast, the individual interest that could justify the decision not to criminalise the making and/or distribution of visual recordings is freedom of expression. This individual interest protects the autonomy of the person making and/or distributing the visual recording. The 2005 Australian Standing Committee of Attorneys-General Discussion Paper recognises freedom of expression in this context.[439] It states that '[m]ost Australians have access to some form of photography equipment. Photographs can be taken for wide variety of purposes in public and private circumstances'.[440] It also mentions the ability to purchase small cameras and mobile phone cameras, as well as the ability to print visual recordings at home, to send visual recordings to other mobile phone users, and to upload the visual recordings to the Internet.[441] Thus, the principle of respecting individual autonomy may or may not justify the criminalisation of making and/or distribution of visual recordings. It depends on whether the individual interest of privacy or freedom of expression

---

[438] New Zealand, New Zealand Law Commission, Intimate Covert Filming Study Paper, Study Paper No. 15 (2004) 5.
[439] Standing Committee of Attorneys-General, *Unauthorised Photographs on the Internet and Ancillary Privacy Issues* (2005) <http://www.ag.gov.au> at 1 October 2005, 7.
[440] Ibid 8.
[441] Ibid 8-9.

is favoured; that is, the autonomy of the person being visually recorded or the person making and/or distributing the visual recording.

Thus, even though the literature above suggested that social welfare interests should be prioritised over individual interests, this is not an easy task in the context of making and/or distributing visual recordings because both of the individual interests, that is, freedom of expression and privacy, are both also social welfare interests. Thus, the legislature has the ability to exploit the prioritisation of individual interests and social welfare interests in this situation.

An instinctive approach to prioritising individual and social welfare interests would be to criminalise the conduct where the individual makes a visual recording of another person undressing, showering, using a toilet or engaging in a sexual activity, or where the visual recording focuses on a person's private body parts, because the social welfare interest of privacy is worthy of protection in these instances. Further, there is no acceptable reason for respecting the autonomy of the person making the visual recording in these instances. Thus, making and/or distributing these examples of visual recordings should be criminalised under the head of the social welfare principle as the individual autonomy principle does not offer a worthy reason not to criminalise these instances.

In all other examples of making visual recordings, for example, visually recording a person walking down the street, visually recording a topless female bather at a public beach, visually recording a child playing in a public park; the social welfare interest and individual interest of freedom of expression should be promoted over privacy. Thus, if these examples of making visual recordings were criminalised, they should be based on another principle because the harm, morality, social welfare and individual autonomy principles have not supported the criminalisation of this conduct. If, on the other hand, a person not only makes a visual recording of a child playing in a public park or a topless female bather at a public beach, but distributes them to a wider audience or in an inappropriate context, the purpose of the distribution should be considered, before determining whether the distribution should be criminalised. If the distribution was done for the purpose of sexual objectification, voyeurism, humiliation or embarrassment; perhaps the criminal law should protect the individual interest and social welfare interest of privacy rather than the individual interest and social welfare interest of freedom of expression, and step in to prohibit this conduct. The final section in this chapter is punishment of the offender. It is a weak basis for criminalising conduct because it is circular, that is, conduct should be criminalised if it deserves to be punished and if the conduct should be punished it is a crime. The principles of culpability and consent are discussed in chapters 4 and 5, respectively.

2.2.6 Punishment of the Offender

Simester and Sullivan describe punishment as 'an important facet of the criminal process…[and] an indispensable feature of criminal prohibitions'.[442] Similarly, Ashworth contends that a 'primary justification for criminal law and sentencing is that offenders deserve punishment for their offences'.[443] McSherry and Naylor claim that 'a positivist approach to criminal law often focuses on the main aim of the criminal law as being to punish offenders'.[444] Further, the definition of crime used in chapter 1 highlights the circular relationship between crime and punishment.

As correctly noted in the literature, the criminal law should be used for serious wrongs and as a last resort because of the stigma and punishment associated with it.[445] In particular, Ashworth states that the criminal law is 'society's strongest form of official censure and punishment, should be concerned only with major wrongs, affecting central values and causing significant harms'.[446] Ashworth's comment is consistent with the view of Findlay, Odgers and Yeo, who contend that criminal law is commonly reserved for serious wrongs.[447] Similarly, Simester and Sullivan advocate that criminal law should be used as a last resort because it stigmatises through prohibition, conviction and punishment.[448] Further, if the expansion of criminal law remains unchecked, it will have two ramifications, that is, the stigma attached to a conviction will no

---

[442] Ibid 3.
[443] Andrew Ashworth, *Principles of Criminal Law* (5th ed, 2006) 16.
[444] Bernadette McSherry and Bronwyn Naylor, *Australian Criminal Laws: Critical Perspectives* (2004) 17.
[445] Andrew Ashworth, *Principles of Criminal Law* (5th ed, 2006) 17, AP Simester and GR Sullivan, *Criminal Law Theory and Doctrine* (2003) 22 and Mark Findlay, Stephen Odgers and Stanley Yeo, *Australian Criminal Justice* (3rd ed, 2005) 5.
[446] Andrew Ashworth, *Principles of Criminal Law* (5th ed, 2006) 17.
[447] Mark Findlay, Stephen Odgers and Stanley Yeo, *Australian Criminal Justice* (3rd ed, 2005) 5. See also John C Coffee, 'Paradigms Lost: The Blurring of the Criminal and Civil Law Models - And What Can Be Done About It' (1992) 101 *The Yale Law Journal* 1875, 1875. Public opinion has been sought on crime-seriousness. This was discussed in more detail above.
[448] AP Simester and GR Sullivan, *Criminal Law Theory and Doctrine* (2003) 22. Jareborg in Nils Jareborg, 'Criminalization as Last Resort (Ultima Ratio)' (2005) 2 *Ohio State Journal of Criminal Law* 521 agrees with this and states that criminalisation 'should be used as a last resort, as uttermost means in uttermost cases': 523. However, compare Marshall and Duff who assert that the difference between criminal law and tort law does not lie in the seriousness of the wrong, but in the character of its wrong: S E Marshall and R A Duff, 'Criminalization and Sharing Wrongs' (1998) 11 *Canadian Journal of Law and Jurisprudence* 7, 8. 'Crime…is not just conduct which is inconsistent with values held by other members of the community – we may disapprove of many kinds of conduct, without thinking that we have the right, or the standing, to declare that others ought not to engage in them': 13. Crime is to believe that the conduct 'should be declared wrong by the community': 13. Criminal law should prohibit non-negotiable wrongs: 18. The term 'non-negotiable wrongs' is not specifically defined, but presumably it means serious wrongs.

longer be warranted and the legitimacy of criminal punishment will be threatened because it would lack a normative underpinning.[449]

Punishing the offender does not expressly indicate what types of conduct should be criminalised or what types of conduct should not be criminalised. However, it implies that criminal law should be used for serious wrongs and as a last resort. The conduct should not be criminalised under this head if the civil law provides an effective means of regulation. Chapter 3 elucidates the dividing line between criminal law and civil law.

The literature does not present a tangible definition for the concept of 'serious wrong' and this enables the criminal law to progress into unchartered terrain. However, the fluidity of the notion of 'serious wrong' enables the criminal law to keep up with contemporary problems in society. Above, the notion of 'serious' for the purposes of the harm principle was grounded in the living-standard analysis tool, and there is a corollary here in the context of serious wrong. Thus, if the conduct affects the victim's survival or their maintenance of minimal dignity and comfort, it is a serious wrong and should be criminalised under the auspices of the punishment principle. As the punishment principle is hinged on the notion of 'serious', it bolsters the impact of the harm principle.

As discussed above under the princple of harm, making and/or distributing visual recordings are not serious according to the living-standard analysis tool, and a legislature should only criminalise making and/or distributing visual recordings if another principle supports the criminalisation of this conduct.

Further, according to this principle, if making and/or distributing visual recordings could be effectively regulated by other means, for example, civil law or an education campaign, then the criminal law should not be utilised. It should be noted that the 2002 Canadian Department of Justice's Consultation Paper entitled, *Voyeurism as a Criminal Offence*, only considers the criminalisation of voyeurism (as opposed to civil remedies) because at the time it had expressed interest for six years in criminalising the conduct.[450] In contrast, the 2005 Australian Standing Committee of Attorneys-General Discussion Paper raises alternative means of regulating the use of unauthorised visual recordings, for example, the possibility of an 'education campaign focusing on the appropriate use of mobile phone cameras'[451] and a process whereby individuals could request that their images be removed from a website.[452] The 2005 Australian Standing Committee of Attorneys-General

---

[449] Mirko Bagaric, 'The "Civil-isation" of the Criminal Law' (2001) 25 *Criminal Law Journal* 184, 184-5.
[450] Canada, Department of Justice Canada, Voyeurism as a Criminal Offence: A Consultation Paper (2002) 3.
[451] Standing Committee of Attorneys-General, *Unauthorised Photographs on the Internet and Ancillary Privacy Issues* (2005) <http://www.ag.gov.au> at 1 October 2005, 36.
[452] Ibid.

Discussion Paper broaches the issue of whether there should be an enforceable civil right regarding the use of a person's own image.[453] Similarly, the 2004 New Zealand Law Commission's Study Paper recommends criminal and civil responses.[454]

As mentioned in chapter 1, whether an education campaign or civil remedy should reduce or eliminate making and/or distributing visual recordings is irrelevant because this examination falls within the 'Presumptions Filter' rather than the 'Principles Filter'.[455] However, chapter 3 will illuminate the dividing line between criminal law and civil law in an effort to sharpen the focus of criminal law and determine what conduct should be criminalised. Chapter 3 will build on the discussion in this chapter on the principle of punishment because one of the distinctions between criminal law and civil law is the punishment and compensation distinction. However, the key point made in this chapter with regard to punishment is that making and/or distributing visual recordings is not a serious wrong and should not be criminalised on that basis. Thus, the punishment principle is not that helpful because the harm principle already suggested above that making and/or distributing visual recordings may not be serious enough to be criminalised, using that principle.

2.3 Conclusion

There is no unifying principle that persistently underpins the decision to criminalise conduct. This chapter provides an overview of some of the principles underpinning criminalisation. In particular, it explores protection from harm, preservation of morality, promotion of social welfare, respect for individual autonomy, reaction to public opinion and punishment of the offender. A principled approach to criminalisation requires that one or more principles underpin the decision to criminalise conduct.

Making and/or distributing visual recordings are modern offences, which were introduced in New South Wales in March 2004,[456] in the United Kingdom in May 2004,[457] in the United States in December 2004,[458] in Canada in November 2005,[459] in Queensland in December 2005[460] and in New Zealand in

---

[453] Ibid 3. See also *Giller v Procopets* [2008] VSCA 236 where the Victorian Court of Appeal provided a civil remedy (damages) to the plaintiff where her ex-boyfriend published a video of the couple engaging in consensual sexual activity.
[454] New Zealand, New Zealand Law Commission, Intimate Covert Filming Study Paper, Study Paper No. 15 (2004) 26.
[455] Jonathan Schonsheck, *On Criminalization: An Essay in the Philosophy of the Criminal Law* (1994) 16.
[456] *Summary Offences Act 1988* (NSW) s 21G-H.
[457] *Sexual Offences Act 2003* (UK) s 67.
[458] *Video Voyeurism Act* 18 USC §1801 (2004).
[459] *Criminal Code* (Can) s 162.
[460] *Criminal Code* (Qld) ss 227A and B.

December 2006.[461] The novelty and short tenure of these offences certainly make them cutting edge, raising as they do so many issues of what is appropriate behaviour in public places, including questions of harm, morality, social welfare interests and individual autonomy.

This chapter discarded the principle of morality as a means for determining whether making and/or distributing visual recordings should be criminalised because, apart from the fact that there is no universal conception of morality, some offences in the 21st century have no or a limited moral dimension. Thus, the principle of morality is not compelling justification for criminalisation and should be used sparingly.

Making and/or distributing visual recordings should not be criminalised under the harm or punishment principles because the conduct does not satisfy the notion of 'serious' used above. Most specifically, this chapter utilised a conceptualisation of serious from the living-standard analysis tool, which requires the conduct to impact on the victim's survival or their maintenance of minimal dignity and comfort.

In the context of making and/or distributing visual recordings, privacy and freedom of expression are both social welfare interests and individual interests. Unlike the harm principle, social welfare and individual interests are not anchored around the notion of 'serious'. Where an individual makes and/or distributes a visual recording of another person undressing, showering, using a toilet or engaging in a sexual activity, or one that focuses on a person's private body parts, the social welfare interest of privacy is worthy of protection over the individual's interest of freedom of expression. In all other examples of making visual recordings, such as visually recording a child playing in a public park, an adult walking along a street or a topless female bather at a public beach, the social welfare interest of freedom of expression should take priority over privacy. However, if one of these latter visual recordings was distributed, for example, uploaded to the Internet, it needs to be considered whether the distribution was for a socially desirable purpose. If it is distributed for the purpose of sexual objectification, voyeurism, humiliation or embarrassment, the social welfare interest of privacy should take priority over freedom of expression.

According to media reports, the community has expressed outrage and concern about people making and/or distributing visual recordings of children playing in a public park and topless female bathers at a public beach. However, public opinion should not form part of a principled approach to criminalisation. The next chapter will take a minimalist approach to criminalisation and sharpen the focus of what is criminalised by distinguishing criminal law from civil law.

---

[461] *Crimes Act 1961* (NZ) s 216G-N.

3 CHAPTER 3: DISTINGUISHING CRIMINAL LAW FROM CIVIL LAW

Making and/or distributing unauthorised visual recordings is a particularly contemporary example of conduct that does not fit squarely within the core of the criminal law. While it sits at the periphery of the criminal law, the relevant question is when it should be criminalised. This chapter will explore the thesis question by distinguishing criminal law from civil law. The content of this chapter is significant because 'to define the proper sphere of the criminal law, one must explain how its purposes and methods differ from those of tort law'.[462] Coffee suggests that the 'blurring border between tort and crime predictably will result in injustice, and ultimately will weaken the efficacy of the criminal law as an instrument of social control'.[463] Thus, illuminating the distinctions in this chapter will sharpen the focus of criminal law and make it more effective.[464]

In the context of making and/or distributing visual recordings, quasi-criminal orders including police directions to move on, public nuisance offence, and restraining orders are ineffective. Police have the power to move people on in public places if their conduct causes anxiety, or is offensive, threatening, disrupting, disorderly or indecent.[465] While this may have application to visual recordings made in public places such as up-skirt filming and visually recording a child playing in a public park, there are a couple of practical problems with move-on orders. Firstly, before a police officer could give a move-on direction, they would need to see the person actually making the visual recording, and secondly, the person visually recorded may not have the opportunity to feel anxious or threatened because they may be unaware that they are in fact being visually recorded. Further, the police move-on powers are inapplicable to visual recordings made in the home and will not prevent people from, for example, uploading visual recordings on the Internet. For identical reasons, the public nuisance offence may not apply to making and/or distributing visual recordings.[466] Unlike a public nuisance offence, a restraining order proceeding

---

[462] John C Coffee, 'Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law' (1991) 71 *Boston University Law Review* 193, 193.
[463] Ibid.
[464] Paul H Robinson, 'The Criminal-Civil Distinction and the Utility of Desert' (1996) 76 *Boston University Law Review* 201, 212. Further Robinson asserts that if the criminal law 'earns a reputation as a reliable statement of what the community perceives as condemnable and not condemnable, people are more likely to defer to its commands as morally authoritative, at least in borderline cases where the propriety of certain conduct, or the degree of its impropriety, is unsettled or ambiguous': 212. He asserts that the real power of the criminal law is not in the threat of sanction, but is in protecting personal relationships and following internalised norms of appropriate conduct: 212.
[465] See especially *Police Powers and Responsibilities Act 2000* (Qld) ss 46 and 48.
[466] See especially *Summary Offences Act 2005* (Qld) s 6. As mentioned in chapter 1 a stalking offence is also unlikely to be successful in this context: *R v Davies* [2004] QDC 297. See further Kelley Burton, 'Why Voyeurs Can Get Away With It' (2005) 25 *Proctor* 19.

is not a criminal offence and must be decided on the balance of probabilities.[467] The court may make a restraining order against a person in relation to any person or property, but this is confined as the person making the visual recording may simply make visually recordings of other people in places outside the limits. Thus, quasi-criminal orders may not be feasible in these circumstances.

This chapter does not fall within the realm of the 'Presumptions Filter', which was discussed in chapter 1 and espoused by Schonsheck, because this chapter does not determine whether making and/or distributing visual recordings could be reduced or eliminated by civil or tort law.[468] While chapters 1 and 5 acknowledge that tort law has intervened in the past to control making and/or distributing visual recordings, this thesis is focussing on a principled approach to criminalisation, rather than an evaluation of whether tort law or civil law are an appropriate means for controlling this conduct. This chapter explores the distinctions between criminal law and civil law in order to gain a greater understanding of what conduct appropriately falls within the boundaries of the criminal law. The distinctions will provide guidance on whether there is a principled basis for criminalising the making and/or distribution of visual recordings.

There is a need to 'prevent the criminal law from sprawling over the landscape of the civil law'.[469] For example, Coffee hopes to resist criminal law encroachment.[470] He states that the 'criminal law's scope must be limited because society's capacity to focus censure and blame is among its scarcest resources'.[471] Similarly, Mann recommends a shrinking of the criminal law,[472] and Epstein recommends the shrinking of both criminal law and civil law.[473] These comments necessitate attention to the boundaries of criminal law.

There is at times an overlap between criminal law and civil law, but there is not a single unifying principle that consistently underpins the division between the two. For instance, Lindgren states 'the overlap [between criminal law and tort law] is so substantial that no one concept can effectively do the splitting. Even then, the two concepts of crime and tort are too unruly to stay in the

---

[467] See especially *Criminal Code* (Qld) s 359F(10) and (11). Note that knowingly breaching a restraining order is a criminal offence: *Criminal Code* (Qld) s 359F(8).
[468] Jonathan Schonsheck, *On Criminalization: An Essay in the Philosophy of the Criminal Law* (1994) 16.
[469] Ibid 201.
[470] John C Coffee, 'Paradigms Lost: The Blurring of the Criminal and Civil Law Models - And What Can Be Done About It' (1992) 101 *The Yale Law Journal* 1875, 1875.
[471] Ibid 1877.
[472] Kenneth Mann, 'Punitive Civil Sanctions: The Middleground between Criminal and Civil Law' (1992) 101 *The Yale Law Journal* 1795, 1802.
[473] Richard A Epstein, 'The Tort/Crime Distinction: A Generation Later' (1996) 76 *Boston University Law Review* 1, 21.

pigeonholes where we try to stuff them'.[474] Further, Seipp contends that the difference between criminal law and civil law is not based on 'two kinds of wrongful acts.[475] He conceives that the same wrong could be prosecuted either as a crime or as a tort'[476] in all instances. Equally, Hall asserts that 'the difference between civil injuries and crimes, can hardly be found in any difference between the ends or purposes of the corresponding sanctions'.[477] '[T]he decision whether to make a certain form of conduct a criminal or civil wrong is no more principled than the toss of a coin'.[478]

The commentators in this area provided different lists of attributes to separate criminal law from civil law. For example, Coffee asserts that the criminal law is different because of

> (1) the greater role of intent in the criminal law, with its emphasis on subjective awareness rather than objective reasonableness; (2) the criminal law's focus on risk creation, rather than actual harm; (3) its insistence on greater evidentiary certainty and its lesser tolerance for procedural informality; (4) its reliance on public enforcement, tempered by prosecutorial discretion; and (5) its deliberate intent to inflict punishment in a manner that maximizes stigma and censure.[479]

Further, Coffee distinguishes criminal law from civil law by arguing that criminal law prohibits conduct whereas civil law 'prices'[480] conduct.[481]

---

[474] James Lindgren, 'Why the Ancients may not have Needed a System of Criminal Law' (1996) 76 *Boston University Law Review* 29, 56. Note that tort law is an example of civil law.
[475] David J Seipp, 'The Distinction Between Crime and Tort in the Early Common Law' (1996) 76 *Boston University Law Review* 59, 59.
[476] Ibid. See also Bagaric who asserts that it is unsatisfactory that there is an enormous difference in the treatment of civil and criminal breaches because there is no coherent difference between civil and criminal wrongs: Mirko Bagaric, 'The "Civil-isation" of the Criminal Law' (2001) 25 *Criminal Law Journal* 184, 192.
[477] Jerome Hall, 'Interrelations of Criminal Law and Torts: I' (1943) XLIII *Columbia Law Review* 753, 759.
[478] Mirko Bagaric, 'The "Civil-isation" of the Criminal Law' (2001) 25 *Criminal Law Journal* 184, 184.
[479] John C Coffee, 'Paradigms Lost: The Blurring of the Criminal and Civil Law Models - And What Can Be Done About It' (1992) 101 *The Yale Law Journal* 1875, 1878.
[480] Coffee borrows the concept of 'prices', which was coined by Cooter: John C Coffee, 'Paradigms Lost: The Blurring of the Criminal and Civil Law Models - And What Can Be Done About It' (1992) 101 *The Yale Law Journal* 1875, 1876 and Robert Cooter, 'Prices and Sanctions' (1984) 84 *Columbia Law Review* 1523, 1523. Cooter uses the concept of prices to mean 'an amount of money exacted for doing what is permitted': 1552. Cooter uses the concept of 'sanction' instead of 'prohibit'. The concept of sanction means 'a detriment imposed for doing what is forbidden': 1552. He suggests that 'price is invariant with respect to the actor's state of mind and variable with respect to the harm caused by his [or her] action, while a sanction is variable with respect to states of mind affecting the seriousness of the fault and the need for deterrence': 1552.
[481] John C Coffee, 'Paradigms Lost: The Blurring of the Criminal and Civil Law Models - And What Can Be Done About It' (1992) 101 *The Yale Law Journal* 1875, 1882.

Notably, Coffee does not add this distinction to his list above or indicate the basis on which he prioritises the distinctions.

Similarly to Coffee, Mann canvasses the same distinctions but expresses them differently. He suggests that the difference between criminal law and civil law can be explained by 'subjective vs objective liability and wrongful vs harmful acts',[482] 'punishment vs compensation',[483] 'stigma and incarceration vs restitution and monetary payments',[484] 'high vs low certainty'[485] and 'state vs private initiative'.[486] Further, Mann contends that criminal law is different to civil law because of 'its punitive purposes, its high procedural barriers to conviction, its concern with the blameworthiness of the defendant, and its particularly harsh sanctions'.[487]

In contrast, Lindgren offers three approaches for distinguishing criminal law from civil law. He refers to these approaches as the 'essentialist [a]pproach', '[w]rongdoing/[c]ompensation [a]pproach' and the '[p]ublic/[p]rivate [a]pproach'.[488] This chapter will explore the distinctions between criminal law and civil law raised in the literature and will conclude by suggesting how the distinctions shed light on whether making and/or distributing visual recordings should be criminalised. The distinctions can be synthesised as:

- Punishment and compensation,
- Prohibiting and pricing,
- Public and private,
- Subjective and objective culpability,
- Risk of harm and actual harm,
- Immoral and moral conduct,
- Essentialist approach,[489]
- Hybrid approach,[490] and
- Not making the distinction between criminal law and civil law.[491]

---

[482] Kenneth Mann, 'Punitive Civil Sanctions: The Middleground between Criminal and Civil Law' (1992) 101 *The Yale Law Journal* 1795, 1805.
[483] Ibid 1807.
[484] Ibid 1809.
[485] Ibid 1810.
[486] Ibid.
[487] Ibid 1799.
[488] James Lindgren, 'Why the Ancients may not have Needed a System of Criminal Law' (1996) 76 *Boston University Law Review* 29, 36.
[489] John C Coffee, 'Paradigms Lost: The Blurring of the Criminal and Civil Law Models - And What Can Be Done About It' (1992) 101 *The Yale Law Journal* 1875, Kenneth Mann, 'Punitive Civil Sanctions: The Middleground between Criminal and Civil Law' (1992) 101 *The Yale Law Journal* 1795, James Lindgren, 'Why the Ancients may not have Needed a System of Criminal Law' (1996) 76 *Boston University Law Review* 29.
[490] James Lindgren, 'Why the Ancients may not have Needed a System of Criminal Law' (1996) 76 *Boston University Law Review* 29, 56.
[491] Mirko Bagaric, 'The "Civil-isation" of the Criminal Law' (2001) 25 *Criminal Law Journal* 184, 193.

Each distinction will now be explored in turn.

3.1 Punishment and Compensation Distinction

This distinction suggests that the 'criminal law is meant to punish, while the civil law is meant to compensate'.[492] Seipp acknowledges this difference and refers to this as a 'choice of vengeance or compensation'.[493] Seipp contends that criminal law and tort law (an example of civil law) offer the victim a choice to pursue justice for a wrongful act in two different ways.[494] He states that this choice is the 'remarkable' difference between criminal law and civil law, and discounts conduct, culpability and the private and public distinction.[495] Seipp advances an interpretation of the choice between criminal law and tort law as 'one law for the rich and another for the poor'.[496] However, his interpretation fails to recognise that a victim may prefer to have a wealthy offender charged with a criminal offence rather than seek compensation.[497]

Mann states that the criminal law should be restricted 'to areas of clearly egregarious behavior in which severely punitive civil monetary sanctions are ineffective'.[498] This implies that the criminal law should be used as a last resort for controlling conduct. Mann does not tender examples of egregarious conduct, but arguably murder and rape would fall within this conception. Similarly, other commentators suggest that criminal law is only invoked when tortious remedies are insufficient.[499] Epstein suggests that a tort remedy will not be appropriate where 'there are no victims to whom a tort remedy could be sensibly assigned'.[500] Further, Coffee suggests that compensation is inadequate (and thus a tort remedy is inadequate) where the crime 'create[s] a generalized sense of fear affecting persons other than actual victims'.[501] Thus, where there is no identifiable victim or where the crime generates fear amongst the community, it is more appropriate to use criminal law rather than civil (tort) law.

---

[492] Kenneth Mann, 'Punitive Civil Sanctions: The Middleground between Criminal and Civil Law' (1992) 101 *The Yale Law Journal* 1795, 1796. On this point, see also AP Simester and GR Sullivan, *Criminal Law Theory and Doctrine* (2003) 4.
[493] David J Seipp, 'The Distinction Between Crime and Tort in the Early Common Law' (1996) 76 *Boston University Law Review* 59, 84.
[494] Ibid.
[495] Ibid 83.
[496] Ibid.
[497] Ibid.
[498] Kenneth Mann, 'Punitive Civil Sanctions: The Middleground between Criminal and Civil Law' (1992) 101 *The Yale Law Journal* 1795, 1802.
[499] Richard A Epstein, 'The Tort/Crime Distinction: A Generation Later' (1996) 76 *Boston University Law Review* 1, 8. See also AP Simester, 'Moral Certainty and the Boundaries of Intention' (1996) 16 *Oxford Journal of Legal Studies* 445.
[500] Richard A Epstein, 'The Tort/Crime Distinction: A Generation Later' (1996) 76 *Boston University Law Review* 1, 8.
[501] John C Coffee, 'Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law' (1991) 71 *Boston University Law Review* 193, 234.

In the context of making visual recordings, the civil law would be ineffective where the individual in the visual recording is unidentifiable, and is thus not able to bring an action as a plaintiff. For example, where the visual recording is up-skirt filming or where the visual recording focuses on private body parts.[502] Another instance where the civil law would be ineffective is when making and/or distributing a visual recording does not result in any calculable damages. For example, what is the damage suffered and how can the damage suffered be quantified when a person makes a visual recording of a child playing in a public park? Does the damage increase if the person subsequently distributes the visual recordings on the Internet or to others via email? These thorny questions highlight the ineffectiveness of civil remedies in some situations as well as the difficulties in using civil law to control this conduct.

Mann suggests that 'imprisonment and the special stigma associated with convictions are the core remedies used to achieve the purposes of the criminal sanction'.[503] While imprisonment has historically been the distinctive outcome of criminal law, many modern offences result in 'fines and probation'.[504] Such remedies imposed by the criminal law are more akin to compensation, which has traditionally been awarded by civil law. Thus, this shift in criminal law remedies blurs the boundaries between criminal law and civil law. The stigma attached to conviction and imprisonment requires that criminalisation be used as a last resort in controlling the conduct.

Different evidentiary requirements stem from the punishment and compensation distinction between criminal and civil law. For example, the criminal law has higher evidentiary requirements than civil law,[505] such as the onus and standard of proof. Mann states that criminal law 'puts a higher value on certainty before imposing sanctions'.[506] More onerous rules of evidence, higher penalties (including imprisonment) and stigma associated with the criminal law denote that the criminal law should be used for serious wrongs and as a last resort. This argument depends on a normative distinction between serious and non-serious. Chapter 2 establishes the concepts of 'serious' and

---

[502] In these situations, the individual would be unidentifiable unless they had a distinguishing tattoo or birthmark. Where the individual has a distinguishing tattoo or birthmark, they would be identifiable and would be able to bring an action as a plaintiff, provided that they knew the visual recording was made and/or distributed. See especially Clay Calvert and Justin Brown, 'Video Voyeurism, Privacy, and the Internet: Exposing Peeping Toms in Cyberspace' (2000) 18 *Cardozo Arts and Entertainment Law Journal* 469, 498.

[503] Kenneth Mann, 'Punitive Civil Sanctions: The Middleground between Criminal and Civil Law' (1992) 101 *The Yale Law Journal* 1795, 1809.

[504] Ibid.

[505] Ibid 1799. See also Nicola Lacey, Celia Wells and Oliver Quick, *Reconstructing Criminal Law Text and Materials,* Law in Context (3rd ed, 2003) 5; Carol S Steiker, 'Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide' (1997) 85 *The Georgetown Law Journal* 775 and Franklin E Zimring, 'The Multiple Middlegrounds Between Civil and Criminal Law' (1992) 101 *The Yale Law Journal* 1901.

[506] Kenneth Mann, 'Punitive Civil Sanctions: The Middleground between Criminal and Civil Law' (1992) 101 *The Yale Law Journal* 1795, 1811.

'non-serious' based on the living-standard analysis tool and applies them to examples of making and/or distributing visual recordings.

If the individual in a visual recording is identifiable, it is necessary to consider whether making and/or distributing the visual recording falls within the notion of 'serious wrong'. Chapter 2 suggests that some examples of making a visual recording were more serious than other examples, such as where the individual is sexually objectified; where the individual is undressing, showering, using the toilet or engaging in a sexual activity; where the visual recording focuses on an individual's private body parts; and where the individual making the visual recording is in a position of trust to the individual visually recorded.

Chapter 2 establishes that distributing a visual recording generated more harm than merely making a visual recording and thus is potentially more serious. It suggests that distributing a visual recording for sexual gratification; posting the visual recording on the Internet to a world wide audience as opposed to distributing the visual recording to a small number of individuals; distributing moving visual recordings as opposed to still visual recordings; and distributing visual recordings that damaged the personal or professional relationships of the individual visually recorded were more serious than other examples of distributing a visual recording.

However, compared to other types of crimes, chapter 2 suggests that even these more serious examples of making and/or distributing visual recordings should fall within the non-serious category rather than the serious category. It follows that making and/or distributing visual recordings should not be criminalised under the punishment and compensation distinction, and even where the civil law is ineffective in controlling the conduct and the criminal law is the last resort, another principle should justify the criminalisation of the conduct. The notion of 'last resort' merely reinforces the decision not to criminalise the conduct.

3.2 Prohibiting and Pricing Distinction

Similarly to the punishment and compensation distinction, the prohibiting and pricing distinction focuses on the different remedies provided by criminal and civil law. It has been said that the criminal law prohibits conduct while the civil law prices conduct.[507] Coffee argues that criminal law should be used to prohibit conduct that

[507] John C Coffee, 'Paradigms Lost: The Blurring of the Criminal and Civil Law Models - And What Can Be Done About It' (1992) 101 *The Yale Law Journal* 1875, 1876 and Robert Cooter, 'Prices and Sanctions' (1984) 84 *Columbia Law Review* 1523, 1523. Coffee borrows the concept of 'prices', which was coined by Cooter.

> society believes lacks any social utility, while civil penalties should be used to deter (or "price") many forms of misbehaviour (for example, negligence) where the regulated activity has positive social utility but is imposing externalities on others.[508]

He asserts that the civil law prices modest departures from norms and does not prohibit behaviour.[509] The criminal law operates differently, in that it does not permit modest departures, unless there is an excuse or defence available.[510] Coffee suggests that society needs to determine whether it wants to prohibit or reduce the behaviour.[511]

Coffee recommends the use of criminal law when 'society can precisely articulate the desired standard of conduct'[512] and tort law when the standard of conduct is 'soft-edged'[513] and has a 'fuzzy quality'.[514] This necessary procedural certainty in the ambit of criminal law harks back to the list of factors mentioned in chapter 2 that is to be considered when creating an offence. More specifically, Simester and Sullivan refer to Lord Mostyn, who suggests that a

---

[508] John C Coffee, 'Paradigms Lost: The Blurring of the Criminal and Civil Law Models - And What Can Be Done About It' (1992) 101 *The Yale Law Journal* 1875, 1876. See also Macaulay as cited in Paul H Robinson, 'A Theory of Justification: Societal Harm as a Prerequisite for Criminal Liability' (1975) 23 *UCLA Law Review* 266, 268, who explains: 'When an act is of such a description that it would be better that it should not be done, it is quite proper to look at the motives and intentions of the doer, for the purpose of deciding whether he [or she] shall be punished or not. But when an act which is really useful to society, an act of a sort which it is desirable to encourage, has been done, it is absurd to inquire into the motives of the doer, for the purpose of punishing him if it shall appear that that his [or her] motives were bad'. Robinson suggests that views of what is societally useful and harmful will change over time and from society to society: Paul H Robinson, 'A Theory of Justification: Societal Harm as a Prerequisite for Criminal Liability' (1975) 23 *UCLA Law Review* 266. See also Robert Cooter, 'Prices and Sanctions' (1984) 84 *Columbia Law Review* 1523, John C Coffee, 'Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law' (1991) 71 *Boston University Law Review* 193, Mark G Kelman, 'Trashing' (1984) 36 *Stanford Law Review* 293 and Mark Kelman, 'Interpretive Construction in the Substantive Criminal Law' (1980-1981) 33 *Stanford Law Review* 591.

[509] John C Coffee, 'Paradigms Lost: The Blurring of the Criminal and Civil Law Models - And What Can Be Done About It' (1992) 101 *The Yale Law Journal* 1875, 1876.

[510] Ibid.

[511] Ibid 1886.

[512] Ibid.

[513] Ibid 1887.

[514] Ibid 1878. However, it should be noted that in some jurisdictions, the criminal law is not set out in a Criminal Code and is judge-made law, similar to tort law. In such jurisdictions, the benefit of judge-made criminal law is that the judiciary may 'create new offences and the vagueness of existing criminal law are needed to deal with new variations of social mischief without having to await the lumbering response of legislature': Mark Findlay, Stephen Odgers and Stanley Yeo, *Australian Criminal Justice* (3rd ed, 2005) 8. This position is similar to tort law, which is judge-made law. Further, compare the view of Findlay, Odgers and Yeo who suggest that some of the terms used in criminal law in statutory form are vague, for example, reasonableness. 'These concepts are vague to provide the flexibility needed for judges to respond properly to a whole variety of situations': 12.

proposed offence should be 'enforceable in practice…tightly drawn and legally sound'.[515] In contrast, the

> imprecision [of tort law] is consistent with the natural desire of judges to leave themselves discretion and flexibility in future cases…Because such a standard can never be fully realized nor even defined with specificity in advance, it seems self-evident that is should not be criminalized.[516]

Coffee's view about precise articulation in the criminal law is consistent with the principle of minimalism, which demands stronger justifications for criminalising behaviour as distinct from regulating behaviour with tort law.[517] Further, the criminal law would be brought into disrepute if it was fuzzy and unenforceable,[518] and it would not be as useful as a means of socialisation.

The prohibiting and pricing distinction between criminal and civil law gels with the promotion of social welfare principle discussed in chapter 2 because they both require the democratic determination of collective interests. It is appropriate to use criminal law where society determines to prohibit the behaviour rather than merely reduce it. Obviously, it is not appropriate to use criminal law unless the conduct can be clearly articulated and unless the conduct is enforceable, but these points relate more to the 'Presumptions Filter' or the 'Pragmatics Filter', rather than the 'Principles Filter', and are thus are not key factors here.[519]

Not all forms of making and/or distributing visual recordings should be prohibited. Chapter 2 noted that the criminal law would be made a mockery if it prohibited people from making visual recordings of other people in public places because this conduct is an inevitable part of life in the 21st century and such an offence would be difficult to enforce. The criminal law should prohibit a person from making a visual recording that focuses on another person's private body parts or another person engaging in a private act, as these are made for a socially undesirable purpose[520] where they are made without the consent of the person visually recorded. The criminal law should also prohibit a person from distributing a visual recording where that is done for a socially undesirable purpose, for example, sexual objectification, voyeurism, humiliation and embarrassment.

---

[515] AP Simester and GR Sullivan, *Criminal Law Theory and Doctrine* (2003) 8.
[516] John C Coffee, 'Paradigms Lost: The Blurring of the Criminal and Civil Law Models - And What Can Be Done About It' (1992) 101 *The Yale Law Journal* 1875, 1878-8.
[517] Andrew Ashworth, *Principles of Criminal Law* (5th ed, 2006) 31.
[518] AP Simester and GR Sullivan, *Criminal Law Theory and Doctrine* (2003) 8.
[519] Jonathan Schonsheck, *On Criminalization: An Essay in the Philosophy of the Criminal Law* (1994) 16.
[520] Note that valueless has not been used because the sexual objectification of children may have value to the person making the visual recording, but yet does not have value to society. Socially undesirable purpose is consistent with the terminology used in chapter 2.

3.3 Public and Private Distinction

Similarly to the prohibiting and pricing distinction, the public and private distinction asserts that criminal law focuses on collective interests. The emphasis on collective interests reinforces that the public and private distinction (as well as the prohibiting and pricing distinction) falls under the promotion of social welfare principle, which was discussed in chapter 2. In particular, in this context, the public and private distinction suggests that criminal law is 'primarily public'[521] and tort law is 'primarily private'.[522] Lindgren suggests that this is the 'heart'[523] of the criminal and civil law distinction.

Even though the criminal law is described as primarily public,[524] it does not mean it is restricted to conduct that occurs in public. It may apply to conduct that occurs in private. Marshall and Duff provide 'spouse-beating'[525] as an example of such conduct that may take place in private, but is a relevant issue for the criminal law.[526] The reference to primarily public[527] is in relation to interests[528] rather than the place where the conduct occurs. Mann explains that the criminal law sanctions certain wrongdoings because they 'are public wrongs, violating a collective rather than an individual interest. The criminal

---

[521] James Lindgren, 'Why the Ancients may not have Needed a System of Criminal Law' (1996) 76 *Boston University Law Review* 29, 36. The authors in the following two articles agree with this view: Marshall and Duff in S E Marshall and R A Duff, 'Criminalization and Sharing Wrongs' (1998) 11 *Canadian Journal of Law and Jurisprudence* 7, 7 and George P Fletcher, 'The Fall and Rise of Criminal Theory' (1997-1998) 1 *Buffalo Criminal Law Review* 275, 289. See also Glanville Williams, *Textbook of Criminal Law* (2nd ed, 1983) 33, where Williams states that 'the criminal law has to be used to protect the public interest because there is no one who can be relied upon to take civil proceedings on behalf of the public'.

[522] James Lindgren, 'Why the Ancients may not have Needed a System of Criminal Law' (1996) 76 *Boston University Law Review* 29, 36. Similarly, see David Brown et al, *Brown, Farrier, Neal and Weisbrot's Criminal Laws - Materials and Commentary on Criminal Law and Process in New South Wales* (4th ed, 2006) 85. However, Marshall and Duff in S E Marshall and R A Duff, 'Criminalization and Sharing Wrongs' (1998) 11 *Canadian Journal of Law and Jurisprudence* 7 suggest that the difficulty remains in distinguishing public from private: 7. Contrast Simester and Sullivan who contend that 'most harms are both public and private': AP Simester and GR Sullivan, *Criminal Law Theory and Doctrine* (2003) 8.

[523] James Lindgren, 'Why the Ancients may not have Needed a System of Criminal Law' (1996) 76 *Boston University Law Review* 29, 30

[524] Ibid 36.

[525] S E Marshall and R A Duff, 'Criminalization and Sharing Wrongs' (1998) 11 *Canadian Journal of Law and Jurisprudence* 7, 14.

[526] Ibid.

[527] James Lindgren, 'Why the Ancients may not have Needed a System of Criminal Law' (1996) 76 *Boston University Law Review* 29, 36.

[528] Note that most of the literature uses interests rather than rights. For example, refer to Glanville Williams, *Textbook of Criminal Law* (2nd ed, 1983) 33, S E Marshall and R A Duff, 'Criminalization and Sharing Wrongs' (1998) 11 *Canadian Journal of Law and Jurisprudence* 7, 14 and David Brown et al, *Brown, Farrier, Neal and Weisbrot's Criminal Laws - Materials and Commentary on Criminal Law and Process in New South Wales* (4th ed, 2006) 85. However, contrast William Blackstone, *Commentaries on the Laws of England* (1979 (originally published in 1765)) 5-7, which uses 'public rights and duties'.

sanction will apply even if no individual interest has suffered direct injury.'[529] In this sense, criminal laws require a social harm.[530] This interpretation is consistent with the contextual approach to consent, which will be discussed in chapter 5; that is, it is important to focus on the context in which the intrusion on privacy occurs rather than the place where the intrusion occurs. In the example of making and/or distributing visual recordings, it is not simply a matter of looking at the place where the person was located when they were visually recorded because privacy may exist in both a public or private place.

Mann's account is consistent with Blackstone's explanation that crimes are a breach of public interests that are due to the whole community, while civil injuries are private wrongs and infringe individual civil rights.[531] Further, Hall recognises that 'crimes affect the whole community, considered as a community, in its social aggregate capacity…they strike at the very being of society, which cannot possibly subsist where actions of this sort are suffered to escape with impunity'.[532] In this way, a purpose of the criminal law is to control anti-social behaviour.[533]

Similarly, Marshall and Duff ask the following questions in determining what types of conduct should be criminalised, that is,

> what kinds of wrongs should be seen as wrongs against 'us'; and this is to ask which values are (which should be) so central to a community's identity and self-understanding, to its conception of its members' good, that actions which attack or flout those values are not merely individual

---

[529] Kenneth Mann, 'Punitive Civil Sanctions: The Middleground between Criminal and Civil Law' (1992) 101 *The Yale Law Journal* 1795, 1806.
[530] Ibid.
[531] William Blackstone, *Commentaries on the Laws of England* (1979 (originally published in 1765)) 5-7. Blackstone notes that the public swallows up private where there are 'gross and atrocious' injuries (for example murder and robbery), because often it is impossible for the aggressor to repair the private wrong afterwards: 6. Further, where the crime is of an inferior nature, the public punishment is not severe and there is scope for private compensation: 6. Blackstone notes that in the case of beating another person, there is a crime for disturbing the peace and a private (civil) remedy for trespass to person: 6. Blackstone continues to provide a nuisance example where there may be a public remedy in criminal law as well as a civil law remedy. Blackstone concludes that 'in taking cognizance of all wrongs, or unlawful acts, the law has double view: viz not only to redress the party injured, by either restoring to him his right, if possible; or by giving him an equivalent;…but also to secure to the public the benefit of society, by preventing or punishing every breach and violation of those laws, which the sovereign power has thought proper to establish, for the government and tranquillity of the whole': 7.
[532] Jerome Hall, 'Interrelations of Criminal Law and Torts: I' (1943) XLIII *Columbia Law Review* 753, 757.
[533] Kenneth Mann, 'Punitive Civil Sanctions: The Middleground between Criminal and Civil Law' (1992) 101 *The Yale Law Journal* 1795, 1807.

> matters which the individual victim should pursue for herself [or himself], but attacks on the community.[534]

In the above quote, Marshall and Duff take two attempts to frame the question and did not attempt the arduous task of answering it.

Tenuous arguments have been put forward to undermine the public and private distinction, that is, 'that the personal is political or that the distinction is incoherent'.[535] Simester and Sullivan argue that the distinction between criminal law and civil law cannot be determined by reference to the public or private interest violated because most types of harms are public as well as private.[536] Perhaps they are correct and that the distinction between criminal law and civil law lies in expression and labelling. Despite this, the public and private distinction is compelling and explains why there are procedural differences between criminal and civil law. For example, the state brings and enforces a criminal sanction where public interests are at stake and where there is no plaintiff to bring the action. In civil law, a plaintiff brings the action.[537] Further, criminal law is better placed to regulate wrongs than tort law because the state 'pays the costs of investigating, prosecuting, and punishing criminal conduct',[538] instead of private individuals.

It is appropriate to utilise criminal law where public interests are breached and where the conduct affects the whole community, not merely the individual victim. This is consistent with the first distinction discussed in this chapter, that is, the punishment and compensation distinction, which suggests that conduct, should be criminalised where the society is generally fearful of it. It is appropriate to use the criminal law irrespective of whether the conduct actually occurred in a private or public place. This argument depends on notions of 'public' and 'private' interests.

---

[534] S E Marshall and R A Duff, 'Criminalization and Sharing Wrongs' (1998) 11 *Canadian Journal of Law and Jurisprudence* 7, 21-22. They use rape as an example of a 'wrong against us': 18.

[535] James Lindgren, 'Why the Ancients may not have Needed a System of Criminal Law' (1996) 76 *Boston University Law Review* 29, 37. The overlap of public and private interests depends on how they are expressed, for example, an 'individual's private interest in not being killed can also be expressed as a public interest in the value of human life': David Brown et al, *Brown, Farrier, Neal and Weisbrot's Criminal Laws - Materials and Commentary on Criminal Law and Process in New South Wales* (4th ed, 2006) 86. Consequently, the private and public distinction 'does not go far enough in helping us to understand the phenomenon of crime': 86. As opposed to public and private interests, the public and private dichotomy is also used in the context of place of crime. It is noted that this dichotomy operates in a 'class, race or gender-biased way. Simply put, access to the institutions of privacy – private homes, grounds, clubs, transport and so on – is highly unequal, being heavily structured in terms of class, race, sex and age. The homeless spend a large proportion of their time in public space as do certain Indigenous and youth cultures': 86.

[536] AP Simester and GR Sullivan, *Criminal Law Theory and Doctrine* (2003) 2.

[537] Jerome Hall, 'Interrelations of Criminal Law and Torts: I' (1943) XLIII *Columbia Law Review* 753, 760.

[538] AP Simester and GR Sullivan, *Criminal Law Theory and Doctrine* (2003) 22.

If making and/or distributing a visual recording impinges on a public interest, that is, affects the community as a whole and not just the individual victim, the conduct should be criminalised rather than being regulated by the civil law. As will be mentioned in chapter 5, an example of a public interest that is affected by visual recording is privacy. A greater invasion on privacy occurs where a person visual recorded is engaging in a private act and where a visual recording focuses on private body parts. In these situations, the community should protect the public interest of privacy more vigorously than the public interest of freedom of expression. On the other hand, if a person is visually recorded as they walk down a public street or play in a public park, the public interest of freedom of expression should be prioritised over privacy because this is an ordinary incident in the common intercourse of life, as discussed in chapter 5. In the case of distributing a visual recording of another person, the public interest of privacy should take priority, especially where the distribution is not done in the public interest, for example, sexual objectification, voyeurism, humiliation and embarrassment. This is consistent with the discussion in chapter 2 relating to the principles of social welfare and individual autonomy.

3.4 Subjective and Objective Culpability Distinction

The subjective and objective culpability distinction suggests that criminal law places emphasis on subjective culpability while civil law places emphasis on objective culpability. Various subjective, objective and no-fault standards of culpability are discussed below in chapter 4, and the criminal law regularly employs a subjective standard of culpability, which punishes the offender for what they meant to do.[539] The rationale for the criminal law using a subjective standard of culpability is that the criminal law centres on 'wrongful'[540] conduct and generally has higher penalties, evidentiary requirements and stigma, compared to the civil law.

Heriot highlights the importance of culpability in criminal law by using attempted offences as an example. She states that culpability is important to the determination of criminal liability and this is demonstrated in the criminal law's concern for harms caused by wrongful conduct and inchoate crimes.[541] Thus, if prohibited conduct is done with intent, then if fits 'more easily in the criminal camp'.[542] Similarly, Hall states that generally 'criminal law is chiefly

[539] L Waller and C R Williams, *Criminal Law: Text and Cases* (10th ed, 2005) 13.
[540] Kenneth Mann, 'Punitive Civil Sanctions: The Middleground between Criminal and Civil Law' (1992) 101 *The Yale Law Journal* 1795, 1805.
[541] Gail L Heriot, 'The Practical Role of Harm in the Criminal Law and the Law of Tort' (1994) 5 *Journal of Contemporary Legal Issues* 145, 146.
[542] Richard A Epstein, 'The Tort/Crime Distinction: A Generation Later' (1996) 76 *Boston University Law Review* 1, 8.

concerned with intentional harms whereas negligence bulks large in tort law'.[543]
In contrast to criminal law, civil law 'depends principally on the notion of objective liability, either disregarding the mental element in conduct or requiring only negligence'.[544] However, the distinction between civil law and criminal law is blurred on this account by the notion of 'criminal negligence'. Further, the modern trend in criminal law to use strict liability and absolute liability standards of culpability signifies a shift in the criminal law from a subjective to a no-fault standard of culpability in regulatory offences.[545] When criminal law and civil law both use subjective and objective standards of culpability, the boundary between criminal law and civil law is distorted. To add to the confusion, Lindgren suggests that '[m]ost crimes and most torts are based on wrongdoing and blameworthiness'.[546]

Even though making and/or distributing a visual recording is, depending on the circumstances, non-serious,[547] chapter 4 suggests that a subjective standard of culpability is appropriate in that context because it sheds light on the purpose (for example, sexual objectification, voyeurism, humiliation, embarrassment, or a socially useful purpose) of the person making the visual recording. It follows that a lack of consent should be an element of offences pertaining to making and/or distributing visual recordings. Chapter 4 also argues that both an objective and no-fault standard of culpability are inappropriate in the context of making and/or distributing visual recordings. Thus, the person making and/or distributing a visual recording must have the requisite subjective culpability before it could be said the conduct is criminalised.

If an individual intentionally sets up a video camera in the shower vent of their home to capture their housemates showering on film, the conduct should be criminalised. In contrast, if an individual accidentally captures another person undressing on their mobile phone camera, the conduct should not be criminalised, unless they proceed to intentionally distribute it to others, for example, uploading the image on the Internet, in which case the distribution should be criminalised. In a different example, if a tourist makes a visual

---

[543] Jerome Hall, 'Interrelations of Criminal Law and Torts: I' (1943) XLIII *Columbia Law Review* 753, 779.
[544] Kenneth Mann, 'Punitive Civil Sanctions: The Middleground between Criminal and Civil Law' (1992) 101 *The Yale Law Journal* 1795, 1805-6. See also John C Coffee, 'Paradigms Lost: The Blurring of the Criminal and Civil Law Models - And What Can Be Done About It' (1992) 101 *The Yale Law Journal* 1875, 1878.
[545] John C Coffee, 'Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law' (1991) 71 *Boston University Law Review* 193, 198.
[546] James Lindgren, 'Why the Ancients may not have Needed a System of Criminal Law' (1996) 76 *Boston University Law Review* 29, 37. See also AP Simester, 'Moral Certainty and the Boundaries of Intention' (1996) 16 *Oxford Journal of Legal Studies* 445, 4. However, Simester and Sullivan recognised that the punishment under criminal law is imposed with censure: AP Simester and GR Sullivan, *Criminal Law Theory and Doctrine* (2003) 5. See chapter 4 with regard to blameworthiness (culpability).
[547] See the discussion in chapter 2.

recording of a beach, but accidentally captures a topless female bather in the background, the person making the visual recording is not subjectively culpable and should not be criminally responsible. However, if, for example, the tourist intentionally uploads the image on the Internet for the purpose of humiliation, they should be criminally responsible.

3.5 Risk of Harm and Actual Harm Distinction

The previous distinction referred to causing harm and thus it is timely to consider the risk of harm and actual harm distinction. According to this distinction, the criminal law controls conduct where there is not only actual harm, but also when there is a risk of harm. As an example of where the criminal law captures a risk of actual harm, Heriot refers to an attempted offence. In contrast to the criminal law, the civil law concentrates on actual harm.[548]

The risk of harm and actual harm distinction sheds more light on what conduct should not be controlled by civil law than what conduct should be controlled by criminal law. More specifically, if the conduct merely involves a risk of harm, it should not be controlled by civil law. However, if the conduct involves a risk of harm or actual harm, it may be controlled by criminal law. In such a case, other distinctions between criminal law and civil law would need to support the criminalisation of the conduct, before the conduct should be criminalised.

If making and/or distributing visual recordings only produces a risk of harm, the civil law is inadequate because it only covers actual harm. A risk of harm may occur when a person sets up equipment to make a visual recording, but fails to make the visual recording. Similarly, there may be a risk of harm where a person possesses a visual recording, but does not distribute it. However, in many of the examples discussed in chapter 1, the person who made the visual recording also distributed the visual recording and caused actual harm, in the form of, for example, psychological harm. As discussed in chapter 2, the concept of 'harm' is notoriously difficult to define. Based on the literature on

---

[548] Gail L Heriot, 'The Practical Role of Harm in the Criminal Law and the Law of Tort' (1994) 5 *Journal of Contemporary Legal Issues* 145, 145. See also Fletcher who contends that people who intend to commit a crime and take steps to commit the crime should feel as guilty as those people who actually commit the crime: George P Fletcher, 'The Fall and Rise of Criminal Theory' (1997-1998) 1 *Buffalo Criminal Law Review* 275, 288. Compare victimless crimes, where moral wrongdoing rather than harm is at the core of criminalisation: Claire Finkelstein, 'Is Risk a Harm?' (2002-2003) 151 *University of Pennsylvania Law Review* 963, 965. Finkelstein makes a distinction between outcome harm and risk harm: 966. Contrast Marshall and Duff, who contend that harmful consequences and wrongfulness are not in general a way of distinguishing crimes and torts. In particular, 'a breach of contract could be far more serious in both its wrongfulness and its harmful consequences than a minor act of vandalism: but the former remains a matter of civil law, whilst the latter is a case of criminal damage': S E Marshall and R A Duff, 'Criminalization and Sharing Wrongs' (1998) 11 *Canadian Journal of Law and Jurisprudence* 7, 8.

criminalisation and the living-standard analysis tool, chapter 2 indicated that if the conduct fell within the realms of serious or grave harm, it should be criminalised. Chapter 2 established that making and/or distributing visual recordings is non-serious and does not fall within the serious and grave grades of harm pursuant to the living-standard analysis tool. Thus, even though this conduct involves an actual harm, rather than a risk of harm, it should not be criminalised on the basis of harm because the grade of harm is not sufficient.

3.6 Immoral and Moral Conduct

Similarly to the actual risk of harm and actual harm distinction above, the immoral and moral conduct distinction hinges on the nebulous boundaries of morality. As mentioned in chapter 2, it is difficult to find a shared understanding of morality. The notion changes over time and place. The immoral and moral conduct distinction between criminal law and civil law is normatively indeterminate unless a definition is attributed to immoral and moral. If immorality and morality are constructed as the difference between right and wrong, this distinction between criminal law and civil law would not be helpful because both criminal law and civil law should be used to control wrongs.[549] As discussed in chapter 2, immorality is usually associated with conduct with a sexual connotation. When used in this context, the immoral and moral distinction has a limited ability to segregate criminal law from civil law.

The immoral and moral conduct distinction suggests that immoral conduct should be criminalised whereas moral conduct should be controlled by the civil law. For example, Simester and Sullivan assert that 'criminal acts are those acts which are intrinsically morally wrong'.[550] Further, Coffee stresses that 'the factor that most distinguishes the criminal law [from tort law] is its operation as a system of moral education and socialization'.[551] 'Far more than tort law, the criminal law is a system for public communication of values'.[552] As a result of being a 'system of socialization…it must be used parsimoniously'.[553]

The immoral and moral conduct distinction has been criticised as a means of separating criminal law from civil law. For example, Ashworth is dubious about whether morality separates criminal law from civil law. More specifically, Ashworth states that there is 'no general dividing line between criminal and non-criminal conduct which corresponds to a distinction between immoral and moral conduct, or between seriously wrongful and other

---

[549] David J Seipp, 'The Distinction Between Crime and Tort in the Early Common Law' (1996) 76 *Boston University Law Review* 59, 59.
[550] AP Simester and GR Sullivan, *Criminal Law Theory and Doctrine* (2003) 3.
[551] John C Coffee, 'Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law' (1991) 71 *Boston University Law Review* 193, 193.
[552] Ibid 194.
[553] Ibid 201.

conduct'.[554] The creation of regulatory offences that lack a moral dimension has blurred the boundary between criminal law and civil law and undermines this normative distinction between criminal law and civil law at an explanatory level. Simester and Sullivan have directed further criticism at the morality principle and contend that 'mere immorality' is inadequate by itself for justifying criminalisation.[555]

The immoral and moral distinction has never been a compelling means of separating criminal law from civil law as several crimes lack a moral underpinning in the sense used in chapter 2. As suggested in chapter 2, immorality is a superfluous consideration in the criminalisation debate. Similarly, it is argued in this chapter that the other distinctions between criminal law and civil law do the real distinguishing work. Another approach to distinguishing criminal law from civil law is the essentialist approach, which is explored next.

3.7 Essentialist Approach

The essentialist approach is synonymous with the saying 'a crime is a crime is a crime…'.[556] This approach suggests that if conduct is penalised, then it is criminal.[557] Similarly to the punishment and compensation distinction made above, the essentialist distinction focuses on the results of the criminal law, that is, punishment rather than compensation.

The essentialist approach is inward looking and does not explain why many types of conduct can be explained both as essentially crimes and essentially torts. For example, the crime of assault corresponds to the torts of assault and battery. Lindgren contends that the essentialist approach is flawed because it is not based on evidence, research or argument.[558] The essentialist distinction overlooks Coffee's remark that both criminal law and civil law seek to deter behaviour through punishment[559] and that some of the remedies available in criminal law are also available in civil law. Further, the essentialist distinction does not explain why some types of conduct are regulated by criminal law and others are regulated by tort law.[560] In contrast to the other distinctions, the essentialist approach does not ever clearly separate criminal law from civil law,

---

[554] Andrew Ashworth, *Principles of Criminal Law* (5th ed, 2006) 2.
[555] AP Simester and GR Sullivan, *Criminal Law Theory and Doctrine* (2003) 18.
[556] James Lindgren, 'Why the Ancients may not have Needed a System of Criminal Law' (1996) 76 *Boston University Law Review* 29, 36.
[557] Ibid.
[558] Ibid 36-37.
[559] John C Coffee, 'Paradigms Lost: The Blurring of the Criminal and Civil Law Models - And What Can Be Done About It' (1992) 101 *The Yale Law Journal* 1875, 1875.
[560] James Lindgren, 'Why the Ancients may not have Needed a System of Criminal Law' (1996) 76 *Boston University Law Review* 29, 37.

and it does not provide a framework within which to situate contemporary problems.

In summary, the essentialist distinction is problematic because it does not provide any guidance on whether a future type of conduct should be criminalised. As a result, the essentialist approach should be discarded as a means of determining whether making and/or distributing visual recordings should be criminalised.

3.8 Hybrid Approach

Lindgren recommends a hybrid approach for distinguishing criminal law from civil law. In particular, Lindgren's hybrid approach combines two distinctions together, that is, the public and private distinction and the punishment and compensation distinction. In this hybrid approach, emphasis is placed on the public and private distinction because that does the 'real distinguishing work'.[561] Lindgren concludes that criminal law controls public blameworthiness.[562] By describing the hybrid approach in this manner, Lindgren incorporates culpability, without actually referring to the subjective and objective culpability distinction discussed above.

The hybrid approach merely reiterates the normative outcomes of the punishment and compensation distinction and the public and private distinction, and does not provide any new insights into what conduct should be on the criminal law side of the dividing line. The application of the two distinctions in the context of making and/or distributing visual recordings will not be repeated here. The hybrid approach places greater emphasis on the public and private distinction, but does not go as far to say that it is the single unifying factor that distinguishes criminal law from civil law. The hybrid approach overlooks the contributions made by the other distinctions to the criminalisation debate.

3.9 Not Making a Distinction Between Criminal Law and Civil Law

In contrast to the distinctions between criminal law and civil law discussed above, one commentator suggests that there be no distinction between criminal and civil wrongdoing, which would expand the power of the state to pursue any civil or criminal legal action.[563] Merely removing the criminal and civil law labels and calling all breaches of the criminal or civil law, breaches of the law (but yet maintaining different procedures for what was previously called criminal and civil law), merely avoids the task of drawing a line between

---

[561] Ibid.
[562] Ibid 56.
[563] Mirko Bagaric, 'The "Civil-isation" of the Criminal Law' (2001) 25 *Criminal Law Journal* 184, 193.

criminal and civil law. In fact, such a radical recommendation only considers a broader concern, that is, where to draw the dividing line between conduct that is regulated by the law and conduct that is not regulated by the law.

Not making the distinction between criminal and civil law avoids addressing the issue that the criminal law has encroached on the civil law and, fails to recognise the overlap between criminal law and civil law. Unlike the distinctions above, not making the distinction does not provide any guidance on boundaries and contravenes the view of the Australian Law Reform Commission, which favoured maintaining the distinction between criminal law and civil law.[564] In particular, the Australian Law Reform Commission suggested that the criminal law should only encroach in regulatory areas where the necessary censure and stigma were present.[565]

3.10 Conclusion

Distinguishing criminal law from civil law sharpens the focus of criminal law and provides guidance on whether making and/or distributing visual recordings should be criminalised. Further, as mentioned above, the Australian Law Reform Commission supports the continued separation of criminal law and civil law. This chapter builds on the pre-existing literature by collating various distinctions between criminal law and civil law in a single source. This chapter pioneers the application of the distinctions between criminal law and civil law in the context of making and/or distributing visual recordings.

The punishment and compensation distinction suggests that the more stringent penalties, onerous evidentiary requirements and the stigma associated with the criminal law mean that the criminal law should be used as a last resort and for serious harms. As noted in chapter 2 in the application of the living-standard analysis, all of the examples of making and/or distributing visual recordings fell within the descriptor of non-serious harm, rather than serious or grave harm. Thus, making and/or distributing visual recordings should not be criminalised under the punishment and compensation distinction. The criminal law may be a last resort when the civil law is ineffective. This may be case where the person visually recorded is unidentifiable and is unable to bring an action in civil law, for example, in up-skirt filming, or where damages cannot be calculated, for example, where a person is visually recorded playing in a park. However, it does not automatically follow that these types of making and/or distributing visual recordings should be criminalised because the criminal law should be used as a last resort. In fact, these examples of this conduct should only be criminalised if another principle supports their criminalisation. The notion of

[564] Australia, Australian Law Reform Commission, Principled Regulation: Civil and Administrative Penalties in Australian Federal Regulation, Report No. 95 (2002) Statement of Principle [3.110].
[565] Ibid.

'last resort' is not a justification for criminalisation in its own right, but merely a reinforcement that supports the decision to criminalise the conduct.

It has been said that the criminal law should prohibit conduct, whereas the civil law should price conduct. In the context of making and/or distributing visual recordings, this distinction requires an investigation into the purpose of the conduct. Many, but not all, visual recordings are made for a socially desirable purpose, for example, capturing family and friends, and landmarks. Consistent with the discussion in chapter 2 under the heads of social welfare and individual autonomy, the criminal law should prohibit people from making and/or distributing visual recordings: of another person who is undressing, showering, using a toilet or engaging in a sexual activity; or that focus on an individual's private body parts, where any of this conduct is done without the express consent of the person visually recorded. Further, and also consistently with the principles of social welfare and individual autonomy, which are discussed in chapter 2, the criminal law should prohibit a person from distributing a visual recording of a child playing in a public park or a topless female bather at a public beach, where it is done without the express, implied or tacit consent of the person visually recorded and where it is done for a socially undesirable purpose such as sexual objectification, voyeurism, humiliation and embarrassment.

The public and private distinction suggests that the criminal should protect public interests, irrespective of whether these occur in a public or private place. In the context of making and/or distributing visual recordings, 'public interests' include privacy and freedom of expression. A greater invasion on privacy occurs where a person visual recorded is engaging in a private act or where a visual recording focuses on private body parts. In these situations, the community should protect the public interest of privacy more vigorously than the public interest of freedom of expression. On the other hand, if a person is visually recorded as they walk down a public street or play in a public park, the public interest of freedom of expression should be prioritised over privacy. In the case of distributing a visual recording of another person, the public interest of privacy should take priority, especially where the distribution is not done in the public interest, for example, sexual objectification, voyeurism, humiliation and embarrassment. The public and private distinction confirms the results of the application of the social welfare principle and the individual autonomy principle in chapter 2 and the discussion on the public and private dichotomy in chapter 5.

The culpability distinction asserts that a subjective standard of culpability should be associated with the criminal law while an objective and no-fault standard of culpability should be associated with the civil law. This assertion is consistent with chapter 4, which establishes that a subjective standard of culpability is more appropriate than an objective or no-fault standard of culpability in the context of making and/or distributing visual recordings. As will be discussed in chapter 4, a subjective standard of culpability includes

intention, knowledge, wilful blindness and recklessness. Even though a subjective standard of culpability is appropriate in the context of making and/or distributing visual recordings, it does not necessarily follow that all examples of this conduct should be criminalised if the person making and/or distributing the visual recording is subjectively culpable. Chapter 4 notes that subjective culpability is not a principle that dictates whether making and/or distributing visual recordings should be criminalised, but rather is an important consideration in framing offences pertaining to this conduct.

The risk of harm and actual harm distinction indicates that the civil law should control conduct that causes actual harm and the criminal law should control conduct that causes harm or a risk of harm. However, as discovered in chapter 2, just because conduct involves any harm does not automatically mean it should be criminalised. Drawing on the results from chapter 2, none of the examples of making and/or distributing visual recordings involved serious or grave harm and thus should not be criminalised on the basis of the harm principle. It also follows that any conduct that risks non-serious harm, for example, setting up visual recording equipment but failing to make a visual recording, that is, an attempt at making a visual recording, should not be criminalised on the basis of the harm principle, but should not be controlled by the civil law.

The immoral and moral conduct distinction asserts that only immoral conduct should be criminalised, but this is only a starting point because not all immoral conduct should be criminalised. Further, several offences created in the 21st century have a limited or no moral dimension, and it is doubtful whether there is a shared understanding of morality. Thus, morality should be discarded as a means of separating criminal law from civil law.

The essentialist approach suggests that what conduct should amount to a crime is inherently obvious and that the types of conduct criminalised are criminal. It does not appreciate that the criminal law evolves over time to control contemporary problems and that some examples of conduct sit at the fringes of the criminal law. The essentialist approach does not offer a framework within which to situate making and/or distributing visual recordings and it is not helpful in determining whether this conduct should or should not be criminalised.

In the context of making and/or distributing visual recordings, the prohibiting and pricing distinction, and the public and private distinction are the most useful in determining when this conduct should be criminalised. In particular, these distinctions suggest that the criminal law should prohibit people from making and/or distributing visual recordings of another person engaging in a private act or that focuses on private body parts, where it is made or distributed without the express consent of the person in the image. Further, these distinctions suggest that the criminal law should prohibit a person from distributing a visual recording of a person in a public place, where it is done

without the express, implied or tacit consent of the person visually recorded and where it is done for a socially undesirable purpose such as sexual objectification, voyeurism, humiliation and embarrassment. Generally, the other distinctions discussed in this chapter have either been discarded because they have an inherent defect or they suggest that making and/or distributing visual recordings should not be criminalised.

The next chapter will explore the notion of 'culpability' and determine when it is appropriate to use subjective, objective and/or no-fault standards of culpability in an offence pertaining to making and/or distributing visual recordings. The standard of culpability attached to conduct impacts on whether the offender is criminally liable for their conduct and thus whether the conduct is criminalised. As a result, culpability is a significant principle in the criminalisation debate.

CHAPTER 4: APPROPRIATE STANDARD OF CULPABILITY

The previous chapter established that harm, morality, social welfare, individual autonomy and punishment are principles that may underpin the decision to criminalise conduct. Culpability stems from the principle of individual autonomy and is a key consideration in creating new offences for making and/or distributing visual recordings.[566] As was discussed in chapter 3, the criminal law is generally associated with subjective culpability and civil law is generally associated with objective culpability.[567] This generalisation overlooks a third category of culpability, that is, a no-fault standard of culpability, which has also been used in contemporary criminal law. Further, when the criminal law utilises an objective standard of culpability or no-fault liability, the boundary between criminal law and civil law is blurred. The imprecise boundaries of criminal law and civil law raise issues in a technological environment where members of society engage in novel acts and there is a need to determine whether any of these new types of conduct should be criminalised on a principled basis.

The availability of three categories of culpability, that is, subjective, objective and no-fault, complicates the decision on the appropriate standard of criminal culpability and, in turn, impacts on the decision to impose criminal liability.[568] The difficult decision on an appropriate standard of culpability in the criminal law is exacerbated when each of the three categories is scrutinised. For example, subjective culpability may be in the form of intention, knowledge or recklessness.[569] Negligence is an example of objective culpability,[570] while absolute liability and strict liability are examples of no-fault liability.[571] The differences in these concepts will be explored below. Determining when the criminal law should use a subjective, an objective or no-fault liability is difficult. In the technological environment where members of society engage in conduct at the margins of the criminal law, the criminal law is forced to confront this culpability problem.

Current legislative responses to making visual recordings use both subjective as well as objective standards of culpability. In terms of a subjective standard of culpability, the New Zealand offence for making an intimate visual recording uses two standards, which are intention and recklessness.[572] Arguably, the New Zealand offence has the lowest standard of subjective culpability because the other jurisdictions do not criminalise mere recklessness in this particular

---

[566] Andrew Ashworth, *Principles of Criminal Law* (5th ed, 2006) 38.
[567] Kenneth Mann, 'Punitive Civil Sanctions: The Middleground between Criminal and Civil Law' (1992) 101 *The Yale Law Journal* 1795, 1805-6.
[568] See generally Andrew Ashworth, *Principles of Criminal Law* (5th ed, 2006) 38.
[569] Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (2nd ed, 2005) 172.
[570] Ibid.
[571] Ibid 187.
[572] *Crimes Act 1966* (NZ) s 216H.

context. The United Kingdom's offence on voyeurism and the United States' offence on video voyeurism both use intention and knowledge.[573] In contrast, the Queensland provision on making a visual recording in breach of privacy has a higher standard of subjective culpability as it refers to 'purpose' which, as discussed below, falls in the realm of intention.[574] However, the Canadian and New South Wales provisions have the highest standard of subjective culpability and only prohibit a person from making a visual recording for a 'sexual purpose'[575] or 'sexual arousal or sexual gratification',[576] respectively. In addition to a subjective standard of culpability, all of these offences are hinged on the visual recording being made in circumstances where there is a reasonable expectation of privacy, which is an objective measure.[577] Thus, the legislatures have relied upon subjective and objective standards of culpability for making visual recordings, but not a no-fault standard of culpability. Utilising both a subjective and objective standard of culpability in an offence may appear to be reasonable and highlights the complexity in determining an appropriate standard of culpability. However, as discussed below, there are several drawbacks in using an objective standard of culpability.

In contrast to the offence of making a visual recording, a subjective standard of culpability is used for distributing visual recordings. For example, the New Zealand offence canvasses knowledge and recklessness, while the Canadian and Queensland offences require knowledge.[578] The United States, the United Kingdom and New South Wales do not have specific offences dealing with distributing visual recordings.[579]

This chapter will focus on the conceptual boundaries of culpability and various forms of subjective culpability, objective culpability and no-fault liability. More specifically it will examine intention, knowledge, recklessness, negligence, carelessness, absolute liability and strict liability. It will determine whether it is appropriate for the contemporary criminal law to use a subjective, an objective or no-fault standard of culpability in framing offences pertaining to making and/distributing visual recordings because this is an example of conduct that has arisen in the 21st century at the edges of the criminal law in a technological environment.

---

[573] *Sexual Offences Act 2003* (UK) s 67 and *Video Voyeurism Act* 18 USC §1801(a) (2004).
[574] *Criminal Code* (Qld) s 227A.
[575] *Criminal Code* (Can) s 162(1)(c).
[576] *Summary Offences Act 1988* (NSW) s 21G(1).
[577] *Crimes Act 1966* (NZ) s 216G; *Sexual Offences Act 2003* (UK) s 68; *Video Voyeurism Act* 18 USC §1801(a) (2004); *Criminal Code* (Qld) s 227A; *Criminal Code* (Can) s 162(1); and *Summary Offences Act 1988* (NSW) s 21G(1)(a).
[578] *Crimes Act 1966* (NZ) s 216J; *Criminal Code* (Can) s 162(4); and *Criminal Code* (Qld) s 227B.
[579] See generally *Video Voyeurism Act* 18 USC (2004); *Sexual Offences Act 2003* (UK); and *Summary Offences Act 1988* (NSW).

4.1 Conceptual Boundaries of Culpability

Culpability is defined as 'the moral value attributed to a defendant's state of mind during the commission of a crime.'[580] It 'reflects the degree to which an individual offender is blameworthy or responsible or can be held accountable'[581] and is a means of characterising the offender. Commentators use a range of terms that mean culpability. For example, Colvin, Simester and Sullivan, and Lacey, Wells and Quick use 'mens rea'.[582] McSherry and Naylor, and Bronitt and McSherry employ 'fault elements',[583] while Ashworth refers to 'positive fault requirements'.[584] Moore states that the term culpability is synonymous with 'moral responsibility…[and] moral blameworthiness'[585] and later refers to 'mental states'.[586] For simplicity, this chapter will use one concept to denote the offender's mental state, that is, 'culpability'.

Culpability is important in framing new criminal offences.[587] Alexander contends that the 'centrality of the culpable act in criminal law is stronger than the case for taking the causation of harm into consideration'.[588] He reaches this conclusion on the basis that a person who culpably risks harm flouts 'the principle of respecting the rights of others whether or not harm ensues'.[589] Breaching this principle is 'what retributive justice reflects'.[590] Lacey, Wells and Quick state that culpability 'is the linchpin of the asserted legitimacy of coercive state intervention towards individuals in response to "criminal" acts'.[591] Similarly, Green argues that the offences 'lacking *mens rea* do not

---

[580] Stuart P Green, 'Why it's a Crime to Tear the Tag off a Mattress: Overcriminalization and Moral Content of Regulatory Offenses' (1997) 46 *Emory Law Journal* 1533, 1547. Note that Ferzan suggests that culpability may be viewed from a descriptive perspective in the sense that a person may have the necessary mental state, or may be viewed from a normative perspective in the sense that a person may be blameworthy: Kimberly Ferzan, 'Holistic Culpability' (2006-2007) 28 *Cardozo Law Review* 2523, 2525.

[581] Stuart P Green, 'Why it's a Crime to Tear the Tag off a Mattress: Overcriminalization and Moral Content of Regulatory Offenses' (1997) 46 *Emory Law Journal* 1533, 1548.

[582] Eric Colvin, *Principles of Criminal Law* (2nd ed, 1991) 105; AP Simester and GR Sullivan, *Criminal Law Theory and Doctrine* (2003) 125; and Nicola Lacey, Celia Wells and Oliver Quick, *Reconstructing Criminal Law Text and Materials,* Law in Context (3rd ed, 2003) 49.

[583] Bernadette McSherry and Bronwyn Naylor, *Australian Criminal Laws: Critical Perspectives* (2004) 69 and Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (2nd ed, 2005) 172.

[584] Andrew Ashworth, *Principles of Criminal Law* (5th ed, 2006) 157.

[585] Michael Moore, *Placing Blame* (1997) 403.

[586] Ibid 404.

[587] See generally Paul H Robinson, 'A Functional Analysis of Criminal Law' (1993-1994) 88 *Northwestern University Law Review* 857, 859-860.

[588] Larry Alexander, 'Crime and Culpability' (1994) 5 *Journal of Contemporary Legal Issues* 1, 30.

[589] Ibid.

[590] Ibid.

[591] Nicola Lacey, Celia Wells and Oliver Quick, *Reconstructing Criminal Law Text and Materials,* Law in Context (3rd ed, 2003) 57.

involve culpability or blameworthiness,… [and] are not truly criminal'.[592] Also, Weinberg states that 'most modern theorists agree that the criminal law has no legitimate role to play in proscribing conduct that is not, in some way, morally blameworthy'.[593] Thus, assessing the appropriate standard of culpability is a significant decision in creating new criminal laws.

The importance of culpability in criminal law has changed over time. In particular, Weinberg notes that, before the thirteenth century, actus reus was enough to justify conviction and that, from the thirteenth century onwards, the accused person's state of mind was taken into account.[594] In contrast to this sketchy historical account of culpability in criminal law, Robinson provides a more detailed account. In particular, Robinson asserts that the criminal law recognised the distinction between wilful acts and accidents from the sixth century, the distinction between careless accidents and faultless accidents from the tenth century, the distinction between recklessness and negligence from the eighteenth century and the distinction between purpose and knowledge from the nineteenth century.[595] Waller and Williams declare that objective mental elements were preferred until the beginning of the twentieth century because an accused could not provide evidence on oath or be cross examined.[596] When this restraint was lifted and the accused was permitted to give sworn evidence and be tested on it, objective mental elements continued to be preferred because there was a fear that if a subjective mental element was used, the accused would be provided with an ability to control the trial outcome.[597] Robinson contends that culpability is 'not so fickle as to be a product of the current social context',[598] but the sophistication of the alternative standards of culpability coincides with the sophistication of society. Today, the key distinction is between subjective, objective and no-fault standards of culpability.[599]

Given 'the increased potential for technology-related accidents in our fast-paced culture',[600] for example, using a mobile phone while driving, Garfield suggests that the criminal law must reassess whether it is necessary to criminalise careless conduct. The contemporary technological revolution forces a consideration of the reluctance to use an objective standard of culpability and

---

[592] Stuart P Green, 'Why it's a Crime to Tear the Tag off a Mattress: Overcriminalization and Moral Content of Regulatory Offenses' (1997) 46 *Emory Law Journal* 1533, 1557.
[593] Mark Weinberg, 'Moral Blameworthiness - The 'Objective Test' Dilemma' (2003) 24 *Australian Bar Review* 173, 175.
[594] Ibid, 176.
[595] Paul H Robinson, 'A Brief History of Distinctions in Criminal Culpability' (1979-1980) 31 *The Hastings Law Journal* 815, 851.
[596] L Waller and C R Williams, *Criminal Law: Text and Cases* (10th ed, 2005) 12.
[597] Ibid.
[598] Paul H Robinson, 'A Brief History of Distinctions in Criminal Culpability' (1979-1980) 31 *The Hastings Law Journal* 815, 849.
[599] Mark Findlay, Stephen Odgers and Stanley Yeo, *Australian Criminal Justice* (3rd ed, 2005) 15-21.
[600] Leslie Yalof Garfield, 'A More Principled Approach to Criminalizing Negligence: A Prescription for the Legislature' (1997-1998) 65 *Tennessee Law Review* 875, 877.

no-fault liability, for example, negligence, carelessness strict liability and absolute liability, in modern day offences.[601] The criminal law needs to keep up with advances in technology and control problems that were previously non-existent or previously not considered blameworthy.[602] Where the criminal law expands to control these new problems, it should not automatically be assumed that the effect of the criminal law is weakened, but in fact it could be argued that social welfare interests are advanced by using criminal law.[603]

In any event, when creating criminal offences, Williams maintains that some key questions relating to culpability must be answered.[604] For example,

> 'How far is it proper to make a mental element an essential ingredient of an offence? Ought a particular offence to require intention, or should it be capable of being committed by recklessness, or just negligence, or even be an offence of strict liability, with virtually no element of fault?'.[605]

While not providing any guidance on how to answer these questions, Williams emphasises that the scope of the criminal law expands by reinterpreting the nebulous culpability concepts from a moral and social perspective.[606]

In addition to nebulous culpability concepts, Alexander considers whether additional standards of culpability should be used in criminal law or whether a unifying standard of culpability could be used.[607] He recognises the following standards of culpability: 'purpose [also known as intention], knowledge, recklessness, and negligence'.[608] Rather than recommending that additional standards of culpability should be used in criminal law, he suggests that recklessness incorporates knowledge, purpose and wilful blindness.[609] He contends that these standards of culpability 'exhibit the basic moral vice of insufficient concern for the interests of others'.[610] He concludes that recklessness 'can serve as a comprehensive, unified conception of criminal culpability'.[611] Similarly, the Criminal Law Officers Committee of the

---

[601] See generally Leslie Yalof Garfield, 'A More Principled Approach to Criminalizing Negligence: A Prescription for the Legislature' (1997-1998) 65 *Tennessee Law Review* 875, 877. See also Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (2nd ed, 2005) 183, which mentions the reluctance to use an objective standard of fault in criminal law.
[602] Leslie Yalof Garfield, 'A More Principled Approach to Criminalizing Negligence: A Prescription for the Legislature' (1997-1998) 65 *Tennessee Law Review* 875, 914.
[603] Ibid.
[604] Glanville Williams, *Textbook of Criminal Law* (2nd ed, 1983) 73.
[605] Ibid.
[606] Ibid.
[607] Larry Alexander, 'Insufficient Concern: A Unified Conception of Criminal Culpability' (2000) 88 *California Law Review* 931, 931.
[608] Ibid.
[609] Ibid 953.
[610] Ibid 931.
[611] Ibid 953.

Australian Standing Committee of Attorneys-General in 1992 stated that recklessness is the 'default fault element',[612] and the 'basic level of culpability'[613] unless otherwise specified. In contrast to Alexander, the Criminal Law Officers Committee of the Australian Standing Committee of Attorneys-General's leaves open the possibility of using standards of culpability other than recklessness.

Ashworth states that there is a 'widespread assumption' that one standard of culpability should apply in all criminal offences.[614] While Ashworth's comment appears to be practical because it creates certainty, he dilutes the notion of 'one standard' by using a broad descriptor, that is, mens rea, in which he incorporates 'intention, knowledge and subjective recklessness'.[615] Using this construction, the notion of 'one standard' is not a unifying descriptor. Further, this understanding of 'one standard' overlooks the reality that an objective standard and no-fault liability, for example, negligence, carelessness, strict liability and absolute liability, do have a place in the criminal law.

Other commentators steer away from advocating a universal standard of culpability. For example, McSherry and Naylor conclude that any quest for a universal standard of culpability, whether it be objective or subjective, is 'doomed to failure'.[616] While they do not subscribe solely to the objective or subjective standards of culpability, they also overlook the no-fault standard of culpability in their statement. Consequently, this chapter does not seek a single unifying standard of culpability to be applied to all criminal offences, but rather seeks to explore the conceptual boundaries of subjective and objective standards of culpability and no-fault liability, and identify whether it is appropriate for the criminal law to use one or more of these standards of culpability in the context of making and/or distributing visual recordings. The next section will examine the conceptual boundaries of the subjective standard of culpability.

4.2 Conceptual Boundaries of a Subjective Standard of Culpability

A subjective standard of culpability focuses on the individual's intention, that is, the offender's perspective, rather than the consequences of the conduct.[617]

---

[612] Criminal Law Officers Committee of the Standing Committee of Attorneys-General, *Chapter 2 General Principles of Criminal Responsibility,* Final Report Model Criminal Code (1993) 33.
[613] Ibid.
[614] Andrew Ashworth, *Principles of Criminal Law* (5th ed, 2006) 201. Note that Ashworth uses 'should' and not 'does'. He does not further clarify the notion of 'widespread assumption' by referring to the public or criminal lawyers.
[615] Ibid.
[616] Bernadette McSherry and Bronwyn Naylor, *Australian Criminal Laws: Critical Perspectives* (2004) 65.
[617] Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (2nd ed, 2005) 185.

The subjective standard of culpability does not focus on harmful consequences because these are outside of the control of the individual.[618] A subjective standard of culpability maintains that 'blame should be ascribed on the basis of an individual's intention, not consequences, accompanying such action.'[619]

According to the Criminal Law Officers Committee of the Standing Committee of Attorneys-General, intention, knowledge and recklessness fall within a subjective standard of culpability,[620] and wilful blindness is not a separate fault element but is subsumed by the concepts of 'knowledge' and 'recklessness'.[621] On this basis, wilful blindness will not be discussed further, but the conceptual boundaries of 'intention', 'knowledge' and 'recklessness' will be explored in turn. This will be followed by a discussion about when it is appropriate for the criminal law to use a subjective standard of culpability.

4.2.1 Intention

Intention does not have a concrete definition.[622] It is the most stringent mental element.[623] Intention is expressed in various pieces of legislation as 'intention', 'with intent to', 'with the purpose of' and 'wilfully'.[624] However, wilfully regularly includes recklessness, which is a separate subjective standard of culpability and is discussed below.[625] Other words used to denote intention are '"intent," "will," "wantonness," "volition," "purpose," "aim," "design," and "deliberation," with their derivatives; also "means to".'[626] A person may have several intentions in mind when they do an act, but the criminal law is interested in the one particular intention proscribed by the offence and does not

---

[618] Andrew Ashworth, *Principles of Criminal Law* (5th ed, 2006) 185.
[619] Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (2nd ed, 2005) 185.
[620] Criminal Law Officers Committee of the Standing Committee of Attorneys-General, *Chapter 2 General Principles of Criminal Responsibility,* Final Report Model Criminal Code (1993) 22. The Committee used negligence as the fourth standard of culpability. The standards of culpability identified by the Committee are similar to the four standards of culpability used in the Model Penal Code in the United States. The only difference being that in the United States, the concept of purpose is used instead of intention: Paul H Robinson, 'A Functional Analysis of Criminal Law' (1993-1994) 88 *Northwestern University Law Review* 857, 859. Bronitt and McSherry also note that intention, knowledge and recklessness are subjective standards of culpability: Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (2nd ed, 2005) 174, 178 and 180.
[621] Criminal Law Officers Committee of the Standing Committee of Attorneys-General, *Chapter 2 General Principles of Criminal Responsibility,* Final Report Model Criminal Code (1993), 29.
[622] Bernadette McSherry and Bronwyn Naylor, *Australian Criminal Laws: Critical Perspectives* (2004) 69. See also Nicola Lacey, 'A Clear Concept of Intention: Elusive or Illusory?' (1993) 56 *The Modern Law Review* 621, 621 where Lacey suggests that 'theoretical and practical consensus around a clear concept of intention seems as far away as ever'.
[623] Andreas Schloenhardt, *Queensland Criminal Law: Critical Perspectives* (2006) 64.
[624] Glanville Williams, *Textbook of Criminal Law* (2nd ed, 1983) 75.
[625] Ibid.
[626] Glanville Williams, *Criminal Law The General Part* (2nd ed, 1961) 35.

review the offender's conduct in general.[627] The Criminal Law Officers Committee of the Australian Standing Committee of Attorneys-General states that,

> A person has intention with respect to conduct when he or she means to engage in that conduct. A person has intention with respect to a circumstance when he or she believes that it exists or that it will exist. A person has intention with respect to a result when he or she means to bring it about or is aware that it will occur in the ordinary course of events.[628]

Ashworth notes that an abstract meaning of intention is unhelpful and it needs to be linked to the consequences or purpose.[629] Findlay, Odgers and Yeo suggest that the core of intention is purpose.[630] Similarly, Ashworth asserts that the core of intention is 'aim, objective, or purpose'.[631] Lacey, Quick and Wells refer to this as direct or purposive intention,[632] which is a 'decision to bring certain consequences or states of affairs about in so far as it lies within one's powers to do so and with the aim of so doing.'[633] Schloenhardt provides a straightforward definition, that is, intention captures an offender who 'meant to do the act or meant to achieve the consequences'.[634] While the commentators use slightly different terminology they appear to embrace the same fundamental idea. Equating intention with purpose is useful in the context of making and/or distributing visual recordings because a person who accidentally left their mobile phone camera on in a communal change room and makes a visual recording of another person undressing is not as culpable as a person who set out to visually record a person in such circumstances.

The conception is complicated by the notions of 'oblique intention' and 'transferred intention'. Williams asserts that oblique intention is the 'inevitable side-effect' of the offender's purpose.[635] Williams' use of side-effect is consistent with the notion of oblique, but his use of inevitable is more

---

[627] Andrew Ashworth, *Principles of Criminal Law* (5th ed, 2006) 175.
[628] Criminal Law Officers Committee of the Standing Committee of Attorneys-General, *Chapter 2 General Principles of Criminal Responsibility,* Final Report Model Criminal Code (1993) 22.
[629] Andrew Ashworth, *Principles of Criminal Law* (5th ed, 2006) 175.
[630] Mark Findlay, Stephen Odgers and Stanley Yeo, *Australian Criminal Justice* (3rd ed, 2005) 16. Further, McSherry and Naylor suggest that when intention is viewed as purpose, it reflects a 'tension between intention as a form of subjective fault and voluntariness in relation to physical elements': Bernadette McSherry and Bronwyn Naylor, *Australian Criminal Laws: Critical Perspectives* (2004) 70. According to McSherry and Naylor, legal philosophers have blurred the notions of voluntariness and intention: 70.
[631] Andrew Ashworth, *Principles of Criminal Law* (5th ed, 2006) 175.
[632] Nicola Lacey, Celia Wells and Oliver Quick, *Reconstructing Criminal Law Text and Materials,* Law in Context (3rd ed, 2003) 52.
[633] Ibid.
[634] Andreas Schloenhardt, *Queensland Criminal Law: Critical Perspectives* (2006) 64.
[635] Glanville Williams, *Textbook of Criminal Law* (2nd ed, 1983) 84.

synonymous with direct than oblique. Arguably, Lacey, Quick and Wells adopt a definition of oblique intention that is easier to understand, but still consistent with Williams. Their definition of oblique intention allows the 'jury to make a finding of intention when the defendant has done an act in the knowledge that a particular result will or is virtually certain to occur'.[636] McSherry and Naylor set a lower threshold and suggest that oblique intention is 'purpose plus foresight of probable consequence'.[637] McSherry and Naylor's use of probable consequence broadens the reach of oblique intention compared to Williams' use of inevitable side-effect and narrows the gap between intention and recklessness, which is discussed below. Irrespective of which definition of oblique intention is accepted, oblique intention broadens the scope of the term 'intention'.

An additional type of intention is transferred intention. It receives little coverage in the literature because it is only applied to limited offences, for example, murder and unlawful wounding.[638] It occurs where the offender commits the crime by completing the necessary physical elements, but with a different person in mind.[639] Transferred intention is less common than the other definitions of intention referred to above, but it is important to making visual recordings because a person may visually record a different person to whom they intended.

Irrespective of the definition of intention adopted, it is different to desire and motive. Intention does not necessarily require desire.[640] 'Intention is that species of desire on the part of a person that is coupled with his [or her] own actual or proposed conduct to achieve satisfaction.'[641] In contrast to desire and intention, motive refers to emotions, for example, 'jealousy, fear, hatred, desire for money, perverted lust, or even, as in so-called "mercy killings", compassion or love'.[642] Generally, motive is referred to as the ulterior intention, that is, the intention for the end result, while intention relates to the means of achieving the end result.[643] Williams concludes that motive is the intention with which the constituents of the actus reus were brought about.[644] The dividing line between intention and motive is complex, particularly given the definitions of intention above that refer to consequences, that is, the end result. In any event, motive is an example of circumstantial evidence that proves the offender's state of

---

[636] Nicola Lacey, Celia Wells and Oliver Quick, *Reconstructing Criminal Law Text and Materials,* Law in Context (3rd ed, 2003) 52.
[637] Bernadette McSherry and Bronwyn Naylor, *Australian Criminal Laws: Critical Perspectives* (2004) 70.
[638] Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (2nd ed, 2005) 176.
[639] Ibid 176.
[640] Ibid. 'In ordinary speech, "intention" and "motive" are often convertible terms. For the lawyer, the word "motive" generally refers to some further intent which forms no part of the legal rule': Glanville Williams, *Textbook of Criminal Law* (2nd ed, 1983) 75.
[641] Glanville Williams, *Criminal Law The General Part* (2nd ed, 1961) 36.
[642] Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (2nd ed, 2005) 175.
[643] Glanville Williams, *Criminal Law The General Part* (2nd ed, 1961) 48.
[644] Ibid.

mind.[645] In contrast to intention, knowledge is a lesser standard of subjective culpability and will be discussed in the next section.

4.2.2 Knowledge

McSherry and Naylor state that an offender may be criminally responsible if 'he or she acts with knowledge that a particular circumstance exists or awareness that a particular consequence will result from the performance of the conduct'.[646] It should be noted that they refer to actual knowledge and not imputed knowledge.[647] Similarly, the Criminal Law Officers Committee of the Australian Standing Committee of Attorneys-General affirms that, '[a] person has knowledge of a circumstance or a result when he or she is aware that it exists or will exist in the ordinary course of events'.[648]

Knowledge can be distinguished from intention. Ashworth contends that knowledge pertains to the circumstances of the crime, whereas intention pertains to the consequences of the crime.[649] However, his distinction is questionable given the result of contrasting intention and motive above. In particular, it was asserted that intention related to the means of achieving the end result while motive related to the end result. Despite this, knowledge is concerned with the circumstances of the crime and intention is concerned with arguably the consequences or the means of achieving the consequences.
Ashworth suggests that separating knowledge and intention on the basis of circumstances and consequences is acceptable, but is difficult in some offences.[650] He does not support this comment with any examples of difficult offences, but perhaps attempted rape may be one. However, Ashworth identified a means to distinguish intention from knowledge, that is, a person may intend something that does not come to fruition, but a person cannot know something that is not in fact true.[651] The next and final standard of subjective culpability discussed in this thesis is recklessness.

---

[645] Bernadette McSherry and Bronwyn Naylor, *Australian Criminal Laws: Critical Perspectives* (2004) 74.
[646] Ibid.
[647] Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (2nd ed, 2005) 179.
[648] Criminal Law Officers Committee of the Standing Committee of Attorneys-General, *Chapter 2 General Principles of Criminal Responsibility,* Final Report Model Criminal Code (1993) 22.
[649] Andrew Ashworth, *Principles of Criminal Law* (5th ed, 2006) 186.
[650] Ibid.
[651] Ibid 187.

4.2.3 Recklessness

Colvin defines 'recklessness' as 'the unjustifiable taking of a known risk'.[652] Recklessness describes a person's state of mind when they are 'aware of a risk that a particular consequence is *likely* to result', while they perform an act.[653] The essence of recklessness is the offender's awareness of risk.[654] The risks must be substantial and a real chance rather than a remote chance.[655] A reckless offender chooses to place their own interests ahead of others, if the risk materialises.[656] The risk is assessed from the offender's perspective and is thus subjective.[657]

The Criminal Law Officers Committee of the Australian Standing Committee of Attorneys-General states that,

> A person is reckless with respect to a circumstance when he or she is aware of substantial risk that it exists or will exist and it is, having regard to the circumstances known to him or her, unjustifiable to take the risk. A person is reckless with respect to a result when he or she is aware of a substantial risk that it will occur and it is, having regard to the circumstances known to him or her, unjustifiable to take the risk.[658]

Recklessness is distinguishable from intention and knowledge. Recklessness is generally a lower standard of culpability than intention[659] and knowledge.[660] As discussed above, intention requires the offender to have the purpose of bringing about certain consequences. In contrast, an offender who is reckless foresees that certain consequences may occur.[661] The distinction between

---

[652] Eric Colvin, *Principles of Criminal Law* (2nd ed, 1991) 129. See also *R v Crabbe* (1995) 156 CLR 464 for a case on recklessness.
[653] Bernadette McSherry and Bronwyn Naylor, *Australian Criminal Laws: Critical Perspectives* (2004) 75.
[654] Ibid.
[655] Ibid.
[656] Andrew Ashworth, *Principles of Criminal Law* (5th ed, 2006) 183.
[657] Andreas Schloenhardt, *Queensland Criminal Law: Critical Perspectives* (2006) 70. Contrast the English position on recklessness, which is much broader and blurs the distinction between subjective recklessness and criminal negligence: Bernadette McSherry and Bronwyn Naylor, *Australian Criminal Laws: Critical Perspectives* (2004) 76. In particular, recklessness in England 'embraces a *subjective* awareness of a risk: the person who is aware of a risk but goes ahead in any cases. But it also embraces an *objective* aspect: the person who fails to appreciate the risk when the risk would be obvious to the reasonable person': 76. The effect of this is that 'inadvertence to an obvious risk was as morally culpable as subjective risk-taking': 76. This position has not been applied in Australia: 76.
[658] Criminal Law Officers Committee of the Standing Committee of Attorneys-General, *Chapter 2 General Principles of Criminal Responsibility,* Final Report Model Criminal Code (1993) 22.
[659] Andreas Schloenhardt, *Queensland Criminal Law: Critical Perspectives* (2006) 17.
[660] Mark Findlay, Stephen Odgers and Stanley Yeo, *Australian Criminal Justice* (3rd ed, 2005) 5-6.
[661] Ibid 69.

oblique intention and recklessness is harder to draw, especially given that the literature provides inconsistent requirements for the foresight in oblique intention, that is, probable or virtual certainty. If oblique intention adopts a foresight of a probable consequence, the gap between intention and recklessness is narrowed.

Despite the reservation about the scope of oblique intention, the key difference between recklessness and intention is that the former relates to foresight and the latter relates to purpose. Foresight is also the key to distinguishing recklessness from knowledge. Knowledge requires 'foresight of an outcome as a virtual certainty',[662] but recklessness requires foresight of an outcome as a probable outcome. Having considered the conceptual boundaries of intention, knowledge, and recklessness, it is necessary to consider when it is appropriate for the criminal law to adopt a subjective standard of culpability.

4.3 Adopting a Subjective Standard of Culpability

As discussed above, a subjective standard of culpability includes intention, knowledge and recklessness.[663] Lacey, Quick and Wells suggest that the mental element of an offence is grounded in autonomy of the individual[664] because it places weight on the offender's conduct and circumstances.[665] A subjective standard of culpability regards individuals as 'autonomous persons with a general capacity to choose among alternative courses of behaviour, and respect for their autonomy means holding them liable only on the basis of their choices'.[666] It is the individual's 'choice and control'[667] that leads to criminal liability. Accordingly, punishing intentional conduct, reckless conduct and conduct done with knowledge is usually justified because the individual has 'chosen to engage in anti-social and morally blameworthy conduct'.[668]

The notion of 'individual autonomy' arose in chapter 2. In that chapter, respecting individual autonomy was explored as a principle underpinning the

---

[662] Ibid 68. Arguably, this distinguishes oblique intention from recklessness as well: see Nicola Lacey, Celia Wells and Oliver Quick, *Reconstructing Criminal Law Text and Materials,* Law in Context (3rd ed, 2003), 52.
[663] Mark Findlay, Stephen Odgers and Stanley Yeo, *Australian Criminal Justice* (3rd ed, 2005) 16-17.
[664] Nicola Lacey, Celia Wells and Oliver Quick, *Reconstructing Criminal Law Text and Materials,* Law in Context (3rd ed, 2003) 49.
[665] Mark Findlay, Stephen Odgers and Stanley Yeo, *Australian Criminal Justice* (3rd ed, 2005) 16.
[666] Andrew Ashworth, *Principles of Criminal Law* (5th ed, 2006) 158-159. See also Nicola Lacey, Celia Wells and Oliver Quick, *Reconstructing Criminal Law Text and Materials,* Law in Context (3rd ed, 2003) 50.
[667] Bernadette McSherry and Bronwyn Naylor, *Australian Criminal Laws: Critical Perspectives* (2004) 69.
[668] Leslie Yalof Garfield, 'A More Principled Approach to Criminalizing Negligence: A Prescription for the Legislature' (1997-1998) 65 *Tennessee Law Review* 875, 878.

decision on whether to criminalise conduct. A subjective standard of culpability also rests on the notion of individual autonomy. Individuals should only be criminally liable for their conduct if they have the capacity and opportunity to act differently.[669] However, individual choice does not justify why the specific example of making and/or distributing visual recordings should be framed with a subjective standard of culpability.

In a criminal case, the prosecution must prove the mental element.[670] Bronitt and McSherry contend that proof of fault is central to the criminal law and this helps to explain why there has been a modern reluctance to utilise no-fault liability in the criminal law.[671] Proving subjective culpability is difficult because it is impossible to look directly into the offender's mind to see whether they satisfy the requisite mental element at the relevant time.[672] If an offender does not confess their state of mind, a prosecutor will need to produce supporting evidence to prove it. Examples of supporting evidence include the offender's conduct before, during and after the act.[673] Further, Dresser asserts that attributing a mental state to an offender involves attributing a mental state based on the person's 'environment, perceptual capacities, interests, and past experiences'.[674]

Similarly, Bronitt and McSherry contend that subjectivity means that the 'trier of fact must make an assessment of fault in relation to the particular accused, taking into account his or her behaviour, experiences and characteristics such as age, social and cultural background'.[675] Consequently, a subjective standard of culpability has been described as unpredictable and leads to each 'case being governed by personal and perhaps emotional considerations'.[676] Bronitt and McSherry contend that difficulties in proving subjective states of mind gave popularity to an objective standard of culpability.[677] While a subjective standard of culpability may be more difficult to prove than an objective standard of culpability, this reason by itself is not sufficient to reject a subjective standard of culpability in the specific context of making and/or distributing visual recordings.

---

[669] Andrew Ashworth, *Principles of Criminal Law* (5th ed, 2006) 27.
[670] Glanville Williams, *Textbook of Criminal Law* (2nd ed, 1983) 79.
[671] Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (2nd ed, 2005) 174.
[672] AP Simester and GR Sullivan, *Criminal Law Theory and Doctrine* (2003) 138.
[673] Ibid.
[674] R Dresser, 'Culpability and Other Minds' (1992) 2 *Southern California Interdisciplinary Law Journal* 41, 78.
[675] Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (2nd ed, 2005) 173. Lacey, Quick and Wells assert that 'the socially skewed nature of the legal forum is important because it is likely to result in different standards of credibility for different defendants' stories and in differential inferences about what the defendant's attitude or state of mind was': Nicola Lacey, Celia Wells and Oliver Quick, *Reconstructing Criminal Law Text and Materials,* Law in Context (3rd ed, 2003) 56. By 'socially skewed nature of the legal forum', they refer to the judges and magistrates being predominantly male, middle-class, middle-aged and white: 56.
[676] L Waller and C R Williams, *Criminal Law: Text and Cases* (10th ed, 2005) 13.
[677] Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (2nd ed, 2005) 173.

Where the offence involves serious consequences for the convicted offender, the criminal law is less likely to depart from a subjective mental element.[678] Bronitt and McSherry state that intention is the standard of culpability in 'most serious crimes'.[679] Similarly, Williams argues that intention is usually used in serious offences where there is a deliberate offender.[680] Ashworth suggests that offences requiring proof of fault are taken more seriously by the public and integrated into our thinking[681] and hence have a stronger deterrent effect.

Where a serious offence has a subjective standard of culpability, this is referred to as correspondence, that is, where the fault and conduct elements correspond.[682] Aligning serious offences with a subjective standard of culpability is consistent with the notion that criminal punishment be reserved for people who voluntarily break the law and recognise the harmful aspect of their conduct or consequences.[683] The notion of 'correspondence' is similar to the notion of 'contemporaneity', which requires the fault element to be contemporaneous in time with the conduct element to constitute an offence.[684] The rationale for contemporaneity is that the criminal law should judge a person's character at the time of the offence rather than over a period of time.[685] Ashworth asserts that individual fairness is central to the issue of criminalising serious offences.[686] A subjective standard of culpability is usually used in conjunction with serious offences, higher penalties, more stigma and greater deterrence. Chapter 2 established that making and/or distributing visual recordings are non-serious compared to other crimes. Determining that the conduct is 'non-serious' suggests that a subjective standard of culpability may not be necessary for making and/or distributing visual recordings.

Findlay, Odgers and Yeo state that recklessness is generally associated with 'socially unjustifiable risk-taking'.[687] According to Bronitt and McSherry, in 'deciding whether an act is justifiable[,] its social purpose or social utility is important.'[688] The literature does not explain the distinction between social purpose and social utility, or provide examples of conduct that would meet these notions. To simplify the terminology, this chapter will use 'socially desirable purpose' as this was used in chapter 2. In the context of making and/or distributing visual recordings, the purpose of the making and/or distribution should be considered. For example, was the visual recording made

---

[678] Ibid 188.
[679] Ibid 174.
[680] Glanville Williams, *Textbook of Criminal Law* (2nd ed, 1983) 70.
[681] Andrew Ashworth, *Principles of Criminal Law* (5th ed, 2006) 168.
[682] Ibid 159.
[683] Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (2nd ed, 2005) 173.
[684] Andrew Ashworth, *Principles of Criminal Law* (5th ed, 2006) 161.
[685] Ibid.
[686] Ibid 169.
[687] Andreas Schloenhardt, *Queensland Criminal Law: Critical Perspectives* (2006) 17.
[688] Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (2nd ed, 2005) 181.

for the sexual gratification of the maker or a third party, to humiliate or embarrass a person in the visual recording? These examples do not have an important social purpose and were labelled as 'socially undesirable purposes' in chapter 2. In contrast, visual recordings made to capture landmarks where people are incidentally caught in the background, sports and games, or to photograph family and friends have a more important social purpose. These examples are 'socially desirable purposes'. Thus, the purpose of the offender is important in the context of making and/or distributing visual recordings because not all examples of this conduct should be prohibited by the criminal law. The purpose of the offender should be taken into account when assessing the offender's criminal liability.

To recap the key points above, in a modern technological age, the criminal law has at its disposal a subjective standard of culpability. In the context of making and/or distributing visual recordings, a subjective standard of culpability looks to the state of mind of the person making and/or distributing the visual recording. It holds offenders responsible for their choices. The proof of subjective culpability is more onerous for the prosecution. A subjective standard of culpability is appropriate where the offence is serious and results in a high penalty and high stigma. Chapter 2 established that making and/or distributing visual recordings is non-serious compared to other offences. Thus, the non-serious nature of making and/or distributing visual recordings does not support the automatic imposition of a subjective standard of culpability. However, as not all examples of making and/or distributing visual recordings should be criminalised because some examples serve a socially desirable purpose, the purpose of the offender sheds light on their conduct and should be considered. While there are arguments for and against using a subjective standard of culpability in the context of making and/or distributing visual recordings, the purpose of the offender is a crucial determinant in the criminalisation of this conduct and thus, a subjective standard of culpability should be an element of offences pertaining to making and/or distributing visual recordings.

It is now necessary to consider whether the criminal law should adopt an objective standard of culpability in the context of making and/or distributing visual recordings in a contemporary environment. In doing this, the next section will explore the conceptual boundaries of an objective standard of culpability including 'negligence' and 'carelessness'.

4.4 Conceptual Boundaries of an Objective Standard of Culpability

An objective standard of culpability focused on the consequences of the action.[689] In doing so, an objective standard of culpability attributes blame on

[689] Ibid 185.

the basis of outcome, luck or chance,[690] that is, where the offender has no control over the outcome. Bronitt and McSherry provide a useful example in this respect, that is, an act of careless driving that misses a child and an act of careless driving that causes the death of a child.[691] From a moral perspective, these two situations should be different.[692] In the context of making visual recordings, an example would be where a person carelessly uses their mobile phone camera in a communal change room and visually records a person undressing, compared to a person who carelessly makes a visual recording in a communal change room but does not capture anyone because no one used the communal change room at that time. Not taking the consequences of an act into consideration weakens the criminal law because causing harm is important to the criminal law and a completed offence should be treated differently to an attempted offence.[693] Examples of an objective standard of culpability include negligence and carelessness. Each will be explored in turn.

4.4.1 Negligence

Criminal negligence only arises where a duty of care[694] established by the criminal law has been breached, that is, where a person's acts or omissions do not satisfy the standard of care that would have been observed by a reasonable person.[695] The Criminal Law Officers Committee of the Australian Standing Committee of Attorneys-General recognise negligence as an objective standard of culpability[696] and arguably it is the 'high risk' that justifies the criminalisation of the conduct. Negligent conduct is assessed by an objective standard, usually what a reasonable person would have done or known in the same situation.[697]

Garfield suggested that legislators have continued to require gross negligence as a minimum for creating a criminal offence.[698] In contrast, Ashworth left the debate open between requiring gross and simple negligence before

---

[690] Ibid.
[691] Ibid 186.
[692] Ibid.
[693] Ibid.
[694] For example in Queensland, various duties are set out in *Criminal Code* (Qld) ss 285-290.
[695] Eric Colvin, *Principles of Criminal Law* (2nd ed, 1991) 148.
[696] Criminal Law Officers Committee of the Standing Committee of Attorneys-General, *Chapter 2 General Principles of Criminal Responsibility,* Final Report Model Criminal Code (1993) 22.
[697] Mark Findlay, Stephen Odgers and Stanley Yeo, *Australian Criminal Justice* (3rd ed, 2005) 19. See also Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (2nd ed, 2005) 173. Compare Kenneth W Simons, 'Deontology, Negligence, Tort, and Crime' (1996) 76 *Boston University Law Review* 273, which suggests that 'the community standard for individual… negligence reflects both a social determination of costs and benefits and a norm of reciprocity': 283.
[698] Leslie Yalof Garfield, 'A More Principled Approach to Criminalizing Negligence: A Prescription for the Legislature' (1997-1998) 65 *Tennessee Law Review* 875, 890.

criminalising serious conduct.[699] Simons contends that negligence is not a sufficient standard of culpability and recommends that the 'minimum standard for criminal liability in principle should be culpable indifference – a grossly insufficient concern for the interests of others'.[700] The notion of 'culpable indifference' is more appropriate for the

> retrospective question whether the defendant's risky and unjustifiable conduct displayed serious moral insensitivity to others, than to the prospective question whether the actor's conduct (and similar conduct by others) would cause significant disutility.[701]

If negligence is theoretically deemed to be an inappropriate standard of culpability in criminal law, then carelessness is also likely to be refuted as an appropriate standard of culpability in criminal law. Carelessness is another example of an objective standard of culpability. Carelessness requires a lower standard of culpability than negligence. The conceptual boundaries of carelessness will be considered in the next section.

4.4.2 Carelessness

McSherry and Naylor assert that while the ordinary meaning of carelessness may fall within the ordinary meaning of recklessness,[702] in a legal context, carelessness fits more squarely within the notion of 'negligence'.[703] More directly, Schloenhardt contends that carelessness is not sufficient to amount to recklessness.[704] Carelessness, and thus negligence, use an objective standard of culpability rather than a subjective standard,[705] while recklessness uses a subjective standard of culpability.

The criminal law generally treats recklessness as more serious than negligence[706] and thus carelessness. However, this is not always the case. For example, Ashworth asserts that a negligent person may be more culpable than a reckless person where a 'person who knowingly takes a slight risk of harm is less culpable than another person who fails to think about or recognize a high risk of the same harm'.[707]

---

[699] Andrew Ashworth, *Principles of Criminal Law* (5th ed, 2006) 194.
[700] Kenneth W Simons, 'Deontology, Negligence, Tort, and Crime' (1996) 76 *Boston University Law Review* 273, 298.
[701] Ibid.
[702] Bernadette McSherry and Bronwyn Naylor, *Australian Criminal Laws: Critical Perspectives* (2004) 75.
[703] Ibid 76. Cf Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (2nd ed, 2005) 183 who state that carelessness is not sufficient to amount to criminal liability, but is sufficient for civil liability.
[704] Andreas Schloenhardt, *Queensland Criminal Law: Critical Perspectives* (2006) 69.
[705] Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (2nd ed, 2005) 182.
[706] Glanville Williams, *Textbook of Criminal Law* (2nd ed, 1983) 97.
[707] Andrew Ashworth, *Principles of Criminal Law* (5th ed, 2006) 193.

Having considered the conceptual boundaries of negligence and carelessness, it is timely to review when it is appropriate for the criminal law to adopt an objective standard of culpability in the context of making and/or distributing visual recordings in the 21st century.

4.5 Adopting an Objective Standard of Culpability

In contrast to a subjective standard of culpability, Waller and Williams argue that an objective standard of culpability results in a 'consistent application of the criminal law from case to case.'[708] An objective standard of culpability is viewed as a consistent measure that everyone can apply.[709] It is easier to prove because everyone has 'an intuitive idea of how to apply that standard'[710] and an objective standard of culpability saves 'trouble and cost'.[711] The ease of proof does not provide a strong ground for using an objective standard of culpability in the context of making and/or distributing visual recordings because ease of proof is a practical issue and does not specifically relate to making and/or distributing visual recordings. Further, the ease of proof is questionable because an objective standard of culpability hinges on nebulous terms like reasonable and thus the application of an objective standard of culpability may be inconsistent.

The reasonable or ordinary person standard is provided with the 'veneer of legitimacy' because it is expressed as objective.[712] The objective standard assumes that there is community consensus on reasonable conduct.[713] However, the community consensus on this issue is doubtful as every person has their own idea of what is reasonable or not.[714] Further, the notion of 'reasonable person' needs to shift with advances in technology and the reasonable or ordinary person needs to become technologically savvy. The trier of fact will construct their own meaning of the term, which may be inconsistently applied and thus lead to an unfair outcome for the accused.[715] Ashworth asserts that an objective standard of culpability

> 'appear[s] much more malleable and unpredictable than subjective tests that ask whether or not a defendant was aware of a given risk, and they

[708] Ibid 13.
[709] Ibid.
[710] Tony Honore, 'Responsibility and Luck' (1988) 104 *The Law Quarterly Review* 530, 535.
[711] Ibid.
[712] Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (2nd ed, 2005) 184.
[713] Ibid.
[714] L Waller and C R Williams, *Criminal Law: Text and Cases* (10th ed, 2005) 13.
[715] Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (2nd ed, 2005) 184.

> explicitly leave room for courts and even prosecutors to make social judgements about the limits of the criminal sanction.'[716]

Thus, the consistent and predictable application of an objective standard of culpability is doubtful, especially in a changing technological environment.

A further criticism with the reasonable person standard is that it fails to take into account the personal characteristics of the accused including race and gender.[717] However, embedding such personal characteristics into the reasonable person standard would make it meaningless.[718] It could be argued that the ordinary person test used in the excuse of provocation attempts to overcome these problems because it takes the offender's personal attributes, for example, sex, race, relationships and history, into account in determining the gravity of the provocation and only considers age in terms of immaturity in determining whether the ordinary person would be deprived of the power of self-control.[719] Despite these inherent defects in the reasonable person standard, the key reason for departing from an objective standard of culpability is that 'there should be no criminal responsibility in the absence of moral blameworthiness'.[720]

Waller and Williams contend that objective mental elements have resulted in a transfer of decision making power from the jury to the judge. In particular, a judge utilises his or her own conception of 'reasonableness' to determine whether a case has any evidence upon which a jury might decide how a reasonable person would conduct themselves. This is problematic where a judge's conception of reasonableness is different to a jury's because if a judge

---

[716] Andrew Ashworth, *Principles of Criminal Law* (5th ed, 2006) 195. Lacey, Quick and Wells also suggest that objective tests result in 'highly discretionary regulation': Nicola Lacey, Celia Wells and Oliver Quick, *Reconstructing Criminal Law Text and Materials,* Law in Context (3rd ed, 2003) 56. They suggest that the objective test is either entirely objective where there is no investigation into who is the reasonable person, or a modified objective test where some of the accused person's individual characteristics are taken into account: 56.

[717] Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (2nd ed, 2005) 184.

[718] Mark Weinberg, 'Moral Blameworthiness - The 'Objective Test' Dilemma' (2003) 24 *Australian Bar Review* 173, 187. Further, Garfield asserts that to ensure consistency, a formula or principle should be used to criminalise ordinary negligence: Leslie Yalof Garfield, 'A More Principled Approach to Criminalizing Negligence: A Prescription for the Legislature' (1997-1998) 65 *Tennessee Law Review* 875, 916.

[719] *Stingel v The Queen* (1990) 171 CLR 312, 326. The reason for only considering age in the second part of the provocation test is that, 'the process of development from childhood to maturity is something which, being common to us all, is an aspect of ordinariness': 330.

[720] Mark Weinberg, 'Moral Blameworthiness - The 'Objective Test' Dilemma' (2003) 24 *Australian Bar Review* 173, 186. Cf Leslie Yalof Garfield, 'A More Principled Approach to Criminalizing Negligence: A Prescription for the Legislature' (1997-1998) 65 *Tennessee Law Review* 875, 905 where he stated, 'Today, some courts and legislatures have retreated from the notion of imposing punishment without a mental element and have included a *mens rea* of ordinary negligence in regulatory crimes. By requiring proof of ordinary negligence, courts and legislatures have protected society from the harm that regulatory crimes seek to deter without permitting convictions absent any *mens rea.*'

considers that there is no relevant evidence on an issue arising in a case, the jury is precluded from considering the issue.[721] Thus, in practice, objective mental elements place greater decision making power in the hands of judges and this may be unfair to an accused where a jury has a different conception of reasonableness to a judge.

Arguably, criminalising negligence serves a general deterrent effect by warning the community to take care in proscribed situations.[722] However, critics have pointed out 'there is little deterrent value in punishing negligent acts since the actor is usually unaware of the risks attributable to his [or her] conduct'.[723] Further, the negligent offender does not necessarily realise the potential sanctions.[724] Bronitt and McSherry assert that criminalising negligence 'operates harshly against those who have a physical or intellectual disability'[725] and are unable to meet the reasonable person standard. Similarly, Honore argues that criminalising negligence essentially imposes strict liability on those people who are unable to attain the objective standard.[726] Ashworth expresses this point in a positive manner, that is, he suggests that as 'long as the individual had the capacity to behave otherwise, it is fair to impose liability in those situations where there are sufficient signals to alert the reasonable citizen to the need to take care.'[727] Perhaps in the context of making and/or distributing visual recordings, public information and corporate policies on, for example, the appropriate use of mobile phone cameras and the inappropriateness of visual recording people in communal change rooms, provide such sufficient warnings. The Criminal Law Officers Committee of the Australian Standing Committee of Attorneys-General recommends that the standard for criminal negligence should require the reasonable person to step into the shoes of the accused at the relevant time.[728]

---

[721] L Waller and C R Williams, *Criminal Law: Text and Cases* (10th ed, 2005) 13.

[722] Leslie Yalof Garfield, 'A More Principled Approach to Criminalizing Negligence: A Prescription for the Legislature' (1997-1998) 65 *Tennessee Law Review* 875, 880. See also Mark Findlay, Stephen Odgers and Stanley Yeo, *Australian Criminal Justice* (3rd ed, 2005) 19.

[723] Leslie Yalof Garfield, 'A More Principled Approach to Criminalizing Negligence: A Prescription for the Legislature' (1997-1998) 65 *Tennessee Law Review* 875, 883. See also 877 where it was said that 'deterring unacceptable behavior is most effective when individuals have the capacity to consciously choose the direction of their behaviour, but it is less successful when free choice is absent or substantially diminished. See also Mark Findlay, Stephen Odgers and Stanley Yeo, *Australian Criminal Justice* (3rd ed, 2005) 19.

[724] Leslie Yalof Garfield, 'A More Principled Approach to Criminalizing Negligence: A Prescription for the Legislature' (1997-1998) 65 *Tennessee Law Review* 875, 883.

[725] Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (2nd ed, 2005) 184. See also Nicola Lacey, 'In Search of the Responsible Subject: History, Philosophy and Social Sciences in Criminal Law Theory' (2001) 64 *Modern Law Review* 350, 354 where Lacey states that it is unfair to impose an objective standard on a person who did not have a genuine opportunity to reach it.

[726] Tony Honore, 'Responsibility and Luck' (1988) 104 *The Law Quarterly Review* 530, 537.

[727] Andrew Ashworth, *Principles of Criminal Law* (5th ed, 2006) 192.

[728] Criminal Law Officers Committee of the Standing Committee of Attorneys-General, 'Chapter 5 Fatal Offences Against the Person' in *Final Report Model Criminal Code* (1993) 153.

Where the consequences for the community outweigh the consequences for the offender, the criminal law is more likely to depart from a subjective mental element[729] and thus use negligence, carelessness, strict liability and absolute liability. Garfield also contends that social welfare is important to criminalising careless behaviour.[730] Balancing social welfare and the unfairness to the offender is arbitrary and is just as complicated as the process of comparing social welfare and individual welfare that was discussed in chapter 2.

An objective standard of culpability affords greater weight to the 'seriousness of consequences and the deterrent effect of conviction and punishment'[731], as opposed to a subjective standard of culpability, which places more emphasis on the seriousness of the mental state of the individuals.[732] In this way, an objective standard of culpability is similar to the harm principle, which is discussed in chapter 2, because the harm principle focuses on the consequences of the conduct. Chapter 2 established that the level of harm involved in making and/or distributing visual recordings is non-serious and thus an objective standard of culpability may not be necessary in this context.

Ashworth asserts that negligence may be an appropriate standard where there are 'well-known risks of serious harm',[733] where 'the conduct is extremely dangerous and may cause harm to a significant number of people',[734] and the offender has the capacity to take the necessary precautions.[735] Further, criminal law is justified 'when potential harm is likely to occur and is likely to be grave, either because it is likely to cause death, serious bodily injury, or widespread public injury'.[736] More specifically, Garfield recommends that ordinary negligence should be criminalised when three conditions are satisfied, that is, when many people frequently engage in the conduct, where many people will suffer harm as a result of the conduct, and where a reasonable person knows of

---

[729] Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (2nd ed, 2005) 188. Garfield states that 'societal protection has consistently been the paramount goal of modern criminal law': Leslie Yalof Garfield, 'A More Principled Approach to Criminalizing Negligence: A Prescription for the Legislature' (1997-1998) 65 *Tennessee Law Review* 875, 877.

[730] Leslie Yalof Garfield, 'A More Principled Approach to Criminalizing Negligence: A Prescription for the Legislature' (1997-1998) 65 *Tennessee Law Review* 875, 878.

[731] Mark Findlay, Stephen Odgers and Stanley Yeo, *Australian Criminal Justice* (3rd ed, 2005) 18. See also Bernadette McSherry and Bronwyn Naylor, *Australian Criminal Laws: Critical Perspectives* (2004) 65.

[732] George P Fletcher, 'The Fault of Not Knowing' (2002) 3 *Theoretical Inquiries in Law* 265, 270. In particular, Fletcher states that negligence is justified on the promotion of social welfare and that subjective culpability is a 'moral standard'.

[733] Andrew Ashworth, *Principles of Criminal Law* (5th ed, 2006) 194.

[734] Leslie Yalof Garfield, 'A More Principled Approach to Criminalizing Negligence: A Prescription for the Legislature' (1997-1998) 65 *Tennessee Law Review* 875, 887.

[735] Andrew Ashworth, *Principles of Criminal Law* (5th ed, 2006) 194.

[736] Leslie Yalof Garfield, 'A More Principled Approach to Criminalizing Negligence: A Prescription for the Legislature' (1997-1998) 65 *Tennessee Law Review* 875, 909.

the likely harm from the conduct.[737] Garfield overlooks a duty of care as a condition, which begs the question about whether a person who makes and/or distributes visual recordings owes a duty of care to act reasonably towards other people physically present in the community who may be visually recorded. Such a duty may be implausible in an environment where visual recording technologies are commonly used, but there are other compelling reasons for not using negligence as the standard of culpability in the context of making and/or distributing visual recordings.

Many people regularly engage in, for example, making visual recordings and distributing them on the Internet. Even in cases where the recording may cause harm, this conduct does not result in serious or grave harm; will not cause death, serious injury or widespread public injury. Consequently, based on Garfield's criteria above, negligence is not an appropriate standard of culpability for making and/or distributing visual recordings.

The criminalisation of negligent conduct has been criticised because it defeats the purpose of using criminal law as a last resort for the most damaging wrongs.[738] The criminal law should not be used to 'cure all potential societal ills'[739] and, even though the community may be concerned about people negligently making and/or distributing visual recordings, over-criminalisation is a good reason for not prohibiting this conduct.

According to Garfield, carelessness is an appropriate standard of culpability in criminal law, where the society views the accused as sufficiently blameworthy[740] and where the conduct is substantial and 'likely to yield grave harm'.[741] Garfield suggests that punishing careless conduct will 'fortify notions that society discourages such conduct and will encourage people to take precautions to lessen the risks accompanying inadvertent'[742] conduct. Garfield's view on culpability indirectly reinforces the importance of the harm principle. As discussed in chapter 2, none of the examples of making and/or distributing visual recordings are likely to result in serious or grave harm and thus under Garfield's view are not deserving of the carelessness standard of culpability.

To summarise the key points made above, the criminal law has at its disposal an objective standard of culpability such as negligence and carelessness, to address offences that might occur in a technological environment. Where the criminal law opts to use an objective standard of culpability, it will be criticised because it is inconsiderate for those who are unable to meet an ordinary or reasonable

---

[737] Ibid 917.
[738] Ibid 909.
[739] Ibid 910.
[740] Leslie Yalof Garfield, 'A More Principled Approach to Criminalizing Negligence: A Prescription for the Legislature' (1997-1998) 65 *Tennessee Law Review* 875, 878.
[741] Ibid 887.
[742] Ibid 885.

person standard because of an intellectual or physical disability; it punishes offenders who are unaware of the risks associated with their conduct and it may result in inconsistencies for offenders because people do not have a shared understanding of the concept of 'reasonable' or 'ordinary'. In the context of making and/or distributing visual recordings, it is not necessary to use an objective standard of culpability because this conduct does not involve serious or grave harm; it is not extremely dangerous; it does not cause extensive public injury and it is implausible to frame a duty of care to everyone in the community who may be visually recorded.

Having discussed the objective standard of culpability, it is important to consider the conceptual boundaries of a no-fault standard of culpability, that is, absolute liability and strict liability, and explore when it is appropriate for the criminal law to use a no-fault standard of culpability for offences that may be committed in the modern era.

4.6 Conceptual Boundaries of a No-fault Standard of Culpability

In offences containing a no-fault standard of culpability, the offender's state of mind is generally irrelevant. Similarly to an objective standard of culpability, the consequences of the conduct are important to a no-fault standard of culpability. However, a no-fault standard of culpability differs from an objective standard of culpability because the Crown is not required to prove a fault element. In an offence of absolute liability, the Crown only has to prove the physical elements. In contrast, a strict liability offence permits an accused to raise their state of mind via the excuse of an honest and reasonable mistake of fact.[743]

4.7 Adopting a No-fault Standard of Culpability

[743] For example in Queensland, refer to *Criminal Code* (Qld) s 24 on this excuse. See also Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (2nd ed, 2005) 189. Note that Husak tried to salvage the term strict liability and stated that strict liability is not 'liability in the absence of *mens rea*, but rather as liability that may be imposed on a defendant who is substantially less at fault than the typical perpetrator of that offense': Douglas N Husak, 'Varieties of Strict Liability' (1995) VIII *Canadian Journal of Law and Jurisprudence* 189, 207. Further, Husak identified seven types of strict liability, that is, '(1) a defendant's guilt need not be proved by the prosecution beyond a reasonable doubt; (2) a defendant could be convicted despite his lack of *mens rea;* (3) liability was not defeasible by any of the justifications that defeat liability for other offenses; (4) liability was not defeasible by any of the excuses that defeat liability for other offenses; (5) a defendant could be vicariously liable even though he had no relationship to the perpetrator that enabled him to control the latter's conduct; (6) a defendant need not have performed any voluntary act on which his liability could be based; and (7) any innocent purpose a defendant may have had would be irrelevant to his liability': 225. Delving into these seven types of strict liability is beyond the scope of this thesis.

As illustrated below, the literature suggests that a no-fault standard of culpability is usually justified for reasons of convenience; that the conduct is trivial; that the penalty does not include imprisonment; that the conduct requires extreme care; and to ensure compliance and ease of proof.

Strict liability and absolute liability offences are often justified on the basis of expediency.[744] Strict and absolute liability offences are usually 'trivial social mischiefs that hamper the smooth daily running of society'[745] and are regulatory offences at the periphery of the criminal law.[746] However, the criminalisation of trivial misconduct should only occur if it is done on a principled basis. The criminal law should be used as a last resort and not a first resort to correct social problems. Making and/or distributing a visual recording is at the margins of criminal law and in chapter 2, it was established that this conduct is non-serious.

A no-fault standard of culpability should be confined to trivial offences because no-one should be imprisoned without sufficient proof of fault.[747] Lacey, Quick and Wells contend that strict liability should be used when the 'penalties are low, and where stigma attached to conviction is low'.[748] They state that strict liability is 'marginalised as exceptional, relatively non-serious and calling for special justification'.[749] Findlay, Odgers and Yeo suggest that absolute and strict liability should be confined to trivial offences because it is 'not worth the public expense of requiring the prosecution to prove a subjective mental state'.[750] Chapter 2 established that making and/or distributing a visual recording involved non-serious harm based on the living-standard analysis tool.

---

[744] Mark Findlay, Stephen Odgers and Stanley Yeo, *Australian Criminal Justice* (3rd ed, 2005) 20.

[745] Ibid. Lacey, Wells and Quick suggest that strict liability offences are usually attributed to conduct that does not have any real stigma attached to it: Nicola Lacey, Celia Wells and Oliver Quick, *Reconstructing Criminal Law Text and Materials,* Law in Context (3rd ed, 2003) 50. For example, selling food and manufacturing processes. In these examples, the conduct is voluntarily entered into, there are discrete risks, the cost of proving a subjective mental element is prohibitive or out of proportion with unjustly convicting an innocent person and where strict liability protects the public and deters such conduct: 50. Strict liability offences 'are not mere sports, mere sporadic legislative oversights or anomalies': Richard A Wasserstrom, 'Strict Liability in the Criminal Law' (1959-1960) 12 *Stanford Law Review* 731, 741.

[746] Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (2nd ed, 2005) 187.

[747] See generally Andrew Ashworth, *Principles of Criminal Law* (5th ed, 2006) 174. See also Dressler who asserts that in the case of trivial harms, the traditional lines between purpose, knowledge and recklessness might not be important because the stigma and punishment are trivial, but they are important for serious offences: Joshua Dressler, 'Does One Mens Rea Fit All?: Thoughts on Alexander's Unified Conception of Criminal Culpability' (2000) 88 *California Law Review* 955, 963.

[748] Nicola Lacey, Celia Wells and Oliver Quick, *Reconstructing Criminal Law Text and Materials,* Law in Context (3rd ed, 2003) 52. Ashworth agrees with this point: Andrew Ashworth, *Principles of Criminal Law* (5th ed, 2006) 169.

[749] Nicola Lacey, Celia Wells and Oliver Quick, *Reconstructing Criminal Law Text and Materials,* Law in Context (3rd ed, 2003) 50.

[750] Mark Findlay, Stephen Odgers and Stanley Yeo, *Australian Criminal Justice* (3rd ed, 2005) 20.

It did not raise the question whether imprisonment was an appropriate maximum sentence for making and/or distributing visual recordings. If a term of imprisonment is appropriate as a maximum penalty for this conduct, a no-fault standard of culpability would not be an appropriate standard of culpability because an accused should not be imprisoned without the Crown proving his or her fault. Sentencing issues are beyond the scope of this thesis, but a maximum penalty of imprisonment may be appropriate in the context of making and/or distributing visual recordings because stalking, which received prominence in the late twentieth century, has been criminalised and attracts a maximum penalty of imprisonment.[751] Stalking is a similar problem to making and/or distributing visual recordings because, for example, it may include watching another person, it may be humiliating or invasive, and it may involve an abuse of power. Thus, while making and/or distributing visual recordings is non-serious based on the living-standard analysis tool, it may not necessarily be trivial per se because it may in fact deserve a maximum penalty of imprisonment.

Where a crime is non-serious, Ashworth supports the use of strict liability to protect public safety or alleviate social concern.[752] Similarly, Salako suggests that where people consciously do an activity that involves a relationship with the public, strict liability should be attached to the conduct.[753] Salako states that strict liability and absolute liability offences are created to advance 'some social, political and economic goals'.[754] Of course, these goals are 'open to conflicting, and often, acrimonious analyses'.[755] The community has expressed concern about how some people have used the latest visual recording technologies[756] and this has necessitated new social obligations. While the society expects its citizens to exercise care,[757] the relevant issue is whether the standard of culpability relevant to making and/or distributing a visual recording should be a no-fault standard of culpability.

Greater care will be expected from citizens when the harm to others is more serious.[758] An example of increased social obligations emerged during the

---

[751] See especially *Criminal Code* (Qld) s 359E.

[752] Andrew Ashworth, *Principles of Criminal Law* (5th ed, 2006) 173-4. See also Tony Honore, 'Responsibility and Luck' (1988) 104 *The Law Quarterly Review* 530, which suggests that strict liability should be attached to risky activities: 553. Wassertstrom suggests that some strict liability offences may reduce undesirable conduct, which benefits the community, but at the same time deletes desirable conduct: Richard A Wasserstrom, 'Strict Liability in the Criminal Law' (1959-1960) 12 *Stanford Law Review* 731, 739. He states that the perpetuation of strict liability offences is justifiable if a utilitarian argument can be made: 738.

[753] Solomon E Salako, 'Strict Criminal Liability: A Violation of the Convention?' (2006) 70 *The Journal of Criminal Law* 531, 536.

[754] Ibid 548.

[755] Ibid.

[756] Refer to the media reports discussed in chapter 1.

[757] Mark Findlay, Stephen Odgers and Stanley Yeo, *Australian Criminal Justice* (3rd ed, 2005) 19.

[758] Ibid.

Industrial Revolution in the 19th century in the United States when new regulatory offences were introduced to protect the society from hazardous conduct that threatened, for example, the safety of food and, required negligence as the standard of culpability.[759] A no-fault standard of culpability goes beyond an objective standard of culpability, for example, negligence, and requires 'a legal obligation of extreme (not merely reasonable) care'.[760] A no-fault standard of culpability has the effect of prohibiting the conduct, irrespective of the state of mind of a reasonable person or the offender. Chapter 2 established that the level of harm involved in making and/or distributing a visual recording is not serious and thus the expected standard of care is correspondingly low. While this conduct impinges upon privacy interests,[761] it is not hazardous in the sense necessary to justify an extreme standard of care.

Wasserstrom does not support the use of strict liability in the criminal law, even if the conduct is non-serious. He states that strict liability is not justified by low penalties or the ease of proving strict liability offences.[762] He suggests that the reason why low penalties are attributed to strict liability offences is because of the revulsion towards the concept of 'strict liability'.[763] He also states that the low penalties attached to strict liability offences have an ineffective deterrent function and higher penalties would make these offences more effective.[764] Even though Wasserstrom is speaking about strict liability offences, his comments are equally applicable to absolute liability offences, and do not support the use of no-fault liability in criminal law.

Ashworth asserts that criminalising conduct, which threatens prosecution and conviction, may have the indirect benefit of compliance.[765] For example, if a person was aware that certain conduct was governed by a strict liability offence, the person may exercise greater caution.[766] This is referred to as a 'compliance strategy', where conformity to the law is secured without the need to process or

---

[759] Leslie Yalof Garfield, 'A More Principled Approach to Criminalizing Negligence: A Prescription for the Legislature' (1997-1998) 65 *Tennessee Law Review* 875, 878.
[760] Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (2nd ed, 2005) 189. Bronitt and McSherry provide some examples of absolute liability offences, predominantly from New South Wales: 189. These examples target the protection of the environment and revenue, the control of industrial conditions and the preservation of road safety: 189.
[761] See chapter 5 on this point.
[762] Richard A Wasserstrom, 'Strict Liability in the Criminal Law' (1959-1960) 12 *Stanford Law Review* 731, 734. Salako says its unclear whether low penalties carry social stigma: Solomon E Salako, 'Strict Criminal Liability: A Violation of the Convention?' (2006) 70 *The Journal of Criminal Law* 531, 535.
[763] Richard A Wasserstrom, 'Strict Liability in the Criminal Law' (1959-1960) 12 *Stanford Law Review* 731, 741.
[764] Ibid 737.
[765] Andrew Ashworth, *Principles of Criminal Law* (5th ed, 2006) 168. See also Kenneth W Simons, 'Deontology, Negligence, Tort, and Crime' (1996) 76 *Boston University Law Review* 273, which suggests that absolute liability should be imposed where the 'injurer is extremely unlikely to respond to legal incentives': 278.
[766] Richard A Wasserstrom, 'Strict Liability in the Criminal Law' (1959-1960) 12 *Stanford Law Review* 731, 736.

punish offenders.[767] However, this requires the 'expectation of individual conformity'[768] to be reasonable and for the community to be aware that the proscribed conduct is wrong.[769] This is an important criticism of a no-fault standard of culpability, which brands people as criminals even though they have not done anything that the community considers blameworthy.[770] Further, a no-fault standard of culpability is inconsistent with the aims of criminal law and defy the 'accepted standards of criminal culpability which prevail in the community.'[771] These reasons also support the decision not to use a no-fault standard of culpability in the present example of making and/or distributing visual recordings.

Strict liability and absolute liability offences are easier to prove than a subjective and an objective standard of culpability because the prosecutor only needs to prove that the accused committed the physical elements of the offence.[772] A no-fault standard of culpability increases the chances of convicting an offender in a case where fault is difficult to prove.[773] However, this by itself, is not a convincing reason for adopting a no-fault standard of culpability in the context of making and/or distributing a visual recording.

People charged with strict liability offences are afforded more individual fairness than those charged with absolute liability offences.[774] The reason for this is that strict liability enables the offender to claim an honest and reasonable mistake of fact, whereas absolute liability does not offer the offender such opportunity. This is a relevant preference in the context of making and/or distributing a visual recording because the offender may wish to argue that they mistakenly thought that their mobile phone camera was turned off, that they mistakenly attached the wrong visual recording to an email, which was distributed to a large audience, or that they mistakenly believed they had a 'socially desirable purpose'.

While the criminal law may implement a no-fault standard of culpability, making and/or distributing visual recordings does not sit squarely within this category of culpability. To sum up the discussion above, this conduct is not

---

[767] Andrew Ashworth, *Principles of Criminal Law* (5th ed, 2006) 168.
[768] Ibid 909.
[769] Richard A Wasserstrom, 'Strict Liability in the Criminal Law' (1959-1960) 12 *Stanford Law Review* 731, 735. Further, Salako provides numerous examples of strict liability offences in the United Kingdom including protection of trees and wildlife, selling tobacco to a child and being a parent of a child who failed to attend school regularly: Solomon E Salako, 'Strict Criminal Liability: A Violation of the Convention?' (2006) 70 *The Journal of Criminal Law* 531, 532. Salako also notes that the categories of potential strict liability offences are not closed: 533.
[770] Richard A Wasserstrom, 'Strict Liability in the Criminal Law' (1959-1960) 12 *Stanford Law Review* 731, 734-5.
[771] Ibid 734.
[772] Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (2nd ed, 2005) 187.
[773] Peter Cane, 'Fleeting Mental States' (2000) 59 *Cambridge Law Journal* 273, 281.
[774] Mark Findlay, Stephen Odgers and Stanley Yeo, *Australian Criminal Justice* (3rd ed, 2005) 20.

trivial enough because in certain instances it may be worthy of imprisonment as a maximum penalty. Further, it is not serious enough so as to necessitate extreme care as opposed to reasonable care. This conduct falls in between trivial and serious conduct. While a no-fault standard of culpability offers the benefits of expediency, compliance and ease of proof by the Crown, these do not justify why making and/or distributing visual recordings, as opposed to other criminal activity, should attract a no-fault standard of culpability. As a result, a no-fault standard of culpability should not be attributed to making and/or distributing visual recordings.

Discarding a no-fault standard of culpability brings the discussion back to a subjective standard of culpability. While the discussion above suggested that a subjective standard of culpability may be appropriate in the context of making and/or distributing visual recordings, it should be considered whether a modern approach to culpability might avoid the dichotomy between a subjective and an objective standard of culpability.

4.8 Avoiding the Subjective and Objective Culpability Dichotomy

With respect to the subjective and objective standards of culpability, Robinson and Darley maintain that there was a paradigm shift between common law and modern criminal codes. They do not define modern criminal codes and presumably this means any Code. They argue that the common law took an objective approach to criminality, which focuses on the consequences of the conduct. In contrast, modern criminal codes took a subjective approach, which focuses on the individual's intention.[775] The subjective approach taken by the modern criminal codes is significant because the responses to making and/or distributing visual recordings have been legislative rather than judicial. As discussed above, the legislative responses to this conduct have placed great emphasis on a subjective standard of culpability.

Robinson and Darley assert that the subjective and objective views of criminal liability are 'unnecessarily dichotomous'[776] and that there is no need to take the same stance on all issues. They hypothesised that there should be a subjective

---

[775] Paul Robinson and John Darley, 'Objectivist Versus Subjectivist Views of Criminality: A Study in the Role of Social Science in Criminal Law Theory' (1998) 18 *Oxford Journal of Legal Studies* 409, 412. The objective approach is also known at the traditionalist approach and the subjective approach is also known as the modernist approach: 415. With regard to the modernist approach, Robinson and Darley focus on the Model Penal Code. Note that this conflicts with Garfield's historical account. He suggests that the subjective approach is the traditionalist approach and the objective approach is the modern approach: Leslie Yalof Garfield, 'A More Principled Approach to Criminalizing Negligence: A Prescription for the Legislature' (1997-1998) 65 *Tennessee Law Review* 875, 877. Presumably, the discrepancy relates to the century that they attribute to the term traditional.

[776] Paul Robinson and John Darley, 'Objectivist Versus Subjectivist Views of Criminality: A Study in the Role of Social Science in Criminal Law Theory' (1998) 18 *Oxford Journal of Legal Studies* 409, 415.

view of criminal liability and an objective view of grading the punishment deserved.[777] This thesis is concentrating on criminal liability as opposed to grading punishment and thus Robinson and Darley recommend a subjective view for liability.

To test their hypothesis about using a subjective view for liability and an objective view for grading, they conducted an initial vignette study in New Jersey. In essence, they surveyed 27 students and 21 jury-eligible people to determine whether people take an objective or subjective view of liability and grading.[778] The results of the survey indicated that most of the respondents surveyed took a subjective view of liability, that is, a person who intends to commit a crime and does an act towards it is criminally liable even if they do not commit harm or the crime was impossible to commit.[779] Further, the results of the survey indicated that most of the respondents took an objective view of grading.[780] They did not support the subjective view of grading, which ignores the importance of resulting harm and treats a person who had the intent to commit harm as morally equivalent to a person who caused harm.[781] Their survey navigates previously unchartered territory and highlights the importance of subjective culpability at the liability stage, that is, '[w]hen it comes to setting the minimal requirements for conduct to count as a crime'.[782] However, the low number of respondents surveyed in New Jersey means that the results cannot be extrapolated to the United States or world in general. Consequently, there is an opportunity for researchers to conduct a valid and reliable survey that has a larger number of respondents. In any event, Robinson and Darley's work highlights the importance of using a subjective standard of culpability.

While Robinson and Darley state that the dichotomy between subjective and objective standards of culpability is unnecessary,[783] their work does not avoid or overcome the dichotomy. It merely confirms the subjective view of criminal liability. It does not acknowledge the no-fault standard of culpability, that is, strict and absolute liability. Thus, a more sophisticated survey would recognise that the standards of culpability are not dichotomous, and can be divided into three standards of culpability, that is, subjective, objective or no-fault standards of culpability. This chapter has recognised these categories of culpability and explored when it is appropriate for the criminal law to adopt these standards of culpability.

4.9 Conclusion

[777] Ibid 416.
[778] Ibid 416.
[779] Ibid 435.
[780] Ibid.
[781] Ibid 416 and 435.
[782] Ibid 435.
[783] Ibid 415.

The criminal law has at its disposal subjective, objective or no-fault standards of culpability. In the context of making and/or distributing visual recordings, which is an example of conduct that is at the margins of the criminal law, the criminal law is forced to examine which standard of culpability is appropriate. This chapter explored the conceptual boundaries of culpability, intention, knowledge, recklessness, negligence, carelessness, absolute liability and strict liability.

While a subjective standard of culpability did not appear to be appropriate in the context of making and/or distributing visual recordings because the conduct was non-serious and has a low stigma, a subjective standard of culpability sheds light on the offender's purpose, which is important because the offender may have a socially desirable purpose for making and/or distributing a visual recording. Consequently, a subjective standard of culpability, that is, intention, knowledge and recklessness is appropriate in this context.

An objective standard of culpability, that is, negligence and carelessness, is inappropriate in the context of making and/or distributing visual recordings because this conduct does not involve serious or grave harm; it is not extremely dangerous and it does not cause extensive public injury. Further, the criminal law is criticised where it uses an objective standard of culpability because it is unfair to those that are unable to meet an ordinary or reasonable person standard because of an intellectual or physical disability; it punishes offenders who are unaware of the risks associated with their conduct and it may result in inconsistencies for offenders because people do not have a shared understanding of the concept of reasonable or ordinary.

A no-fault standard of culpability, that is, strict liability and absolute liability, is not appropriate in the context of making and/or distributing visual recordings. This conduct is not serious enough so as to necessitate extreme care rather than merely reasonable care. Further, the conduct is not nessarily trivial and may deserve a maximum penalty of imprisonment. This conduct falls in between these two extremes. While a no-fault standard of culpability offers the benefits of expediency, compliance and ease of proof by the Crown, these do not justify why making and/or distributing visual recordings, as opposed to other criminal activity, should attract a no-fault standard of culpability. As a result, a no-fault standard of culpability is not appropriate in the context of making and/or distributing a visual recording.

On balance, the criminal law should adopt a subjective standard of culpability for making and/or distributing visual recordings, which is largely consistent with the approach taken by the existing legislation in the various jurisdictions. As discussed above, the existing legislation generally adopts both a subjective and objective standard of culpability with respect to making visual recordings and a subjective standard of culpability with regard to distributing visual recordings. Waller and Williams suggest that in recent years there has been an adoption of subjective mental elements, which gives the juries the power to

decide what the accused intended.[784] This shift from objective to subjective mental elements reflects the view that people should be punished for what they mean to do.[785] Thus, what a person actually means to do is of paramount importance.[786] Similarly, Colvin suggests that the 'current orthodoxy of subjectivism has been made a valuable contribution to the orderly development of the criminal law and should not be abandoned lightly'.[787] However, this is not to undermine the important role of an objective standard of culpability and the proliferation of strict liability and absolute liability offences.

Bronitt and McSherry recognise the struggle between subjective and objective standards of culpability. In particular, they suggest that rather 'than view objective forms of liability as a deviation from the "true" principle of fault, the better view is that there is a perpetual tension between subjective and objective accounts of culpability in the criminal law.'[788] At some points in time for some offences, intention appears to be more in important in criminal law than consequences, while at other times, consequences are more important than intention.[789] The instability of culpability in criminal law reflects the diverse functions of modern criminal law[790] and any attempt to find a grand universal theory of culpability is illusive.[791] While this chapter has not sought to identify a universal standard of culpability, it has established that a subjective standard of culpability is appropriate in the context of making and/or distributing visual recordings.

This chapter has explored culpability, which takes into account the perspective of the person making and/or distributing the visual recording. The next chapter examines consent, which considers the important issue of the view of the person who is visually recorded.

---

[784] L Waller and C R Williams, *Criminal Law: Text and Cases* (10th ed, 2005) 13.
[785] Ibid.
[786] Ibid.
[787] Eric Colvin, 'Recklessness and Criminal Negligence' (1982) 32 *University of Toronto Law Journal* 345, 373.
[788] Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (2nd ed, 2005) 186.
[789] Ibid.
[790] Ibid.
[791] Ibid.

5 CHAPTER 5: CONSENT

The previous chapter explored the conceptual boundaries of culpability and discussed when it is appropriate to use subjective and/or objective standards of culpability to determine liability for an offence. This was relevant to the thesis question, when should conduct be criminalised and, more specifically, when should making and/or distributing a visual recording be criminalised, because if the offender lacked the requisite culpability for an offence, the conduct should not be criminalised. Of course, this brief summary overlooks strict and absolute liability offences that were discussed in chapter 4.

While the previous chapter took into account the offender's perspective, that is, the person making and/or distributing the visual recording, this chapter examines the perspective of the person who is visually recorded. This chapter will consider when it is appropriate for the legislature to include lack of consent as an element of an offence and will then examine the conceptual boundaries of consent. If a visual recording offence contains the element of lack of consent, the lack of consent of the person visually recorded needs to be proved to establish criminal liability. If a visual recording offence does not contain the element of consent, the consent of the person visually recorded should be irrelevant to establishing criminal liability. Like many offences against the person, the role of consent is an important issue in framing criminal offences pertaining to making and/or distributing visual recordings.

In the current context, as noted in chapter 1, the conceptual boundaries of consent, particularly implied consent, are important because, in many instances, a person does not know that they are visually recorded at the time the recording is made. Many legislative responses to making and/or distributing visual recordings have included the element of lack of consent, but do not define it.[792] The notion of 'implied consent' is particularly problematic in contemporary society because advances in mobile phone cameras, digital cameras, video cameras and the Internet beg questions about the appropriate use of such pervasive technologies. Does an individual impliedly consent to being visually recorded when they appear in a public place? Does an individual in a public place impliedly consent to having their image distributed on the Internet? Is it

[792] See especially *Criminal Code* (Qld) ss 227A and B, *Summary Offences Act 1988* (NSW) s 21G and *Video Voyeurism Act* 18 USC §1801(a) (2004). The United Kingdom voyeurism offence arguably makes the proof of consent more difficult for the Crown as it requires to prove that the offender knew that the victim did not consent, not merely that the victim did not consent: *Sexual Offences Act 2003* (UK) s 67(1). New Zealand takes a slightly broader approach to consent than Queensland, New South Wales, the United States and the United Kingdom. In New Zealand, the definition of 'intimate visual recording', which is imported into the offences for making and publishing an intimate visual recording, refers to 'without the knowledge or consent of the person who is the subject of the recording': *Crimes Act 1966* (NZ) s 216G. Note that the voyeurism offence in *Criminal Code* (Can) s 162(1) and (4) do not expressly refer to consent, but they hinge on a 'reasonable expectation of privacy' and 'surreptitiously': *Criminal Code* (Can) s 162(1).

appropriate to surreptitiously visually record other people? If so, in what circumstances? Is there a relationship between implied consent and privacy? This chapter will discuss these issues, and will examine the scope of 'consent', which includes implied consent, and then consider various approaches to the role of consent in the criminal law.

5.1 Conceptual Boundaries of Consent

As mentioned above, if a lack of consent is an element of an offence, the boundaries of consent are important to determining the perimeter of the criminal law. Consent is an 'all-or-nothing concept'.[793] As Brett notes, '[o]ne need only have a pro attitude; the question of *how much* one wanted to do this action is irrelevant'.[794] McSherry and Naylor provide a list of adjectives for consent, which include 'explicit, implicit, express, implied, presumed, informed, unwilling, reluctant, grudging, half-hearted, [and] unreserved'.[795] Other concepts have been used to refer to consent including agreement, permission, desire, will, assent and acquiescence.[796] These synonyms are vague and do not clarify the concept of 'consent', but they have been employed in the case law, for example, *Kimmorley v Atherton; ex parte Atherton*.[797] Many definitions are little more than 'consent is consent'.[798]

The concept of 'consent' can be viewed from several perspectives. For example, Wertheimer took a theoretical approach to consent in the context of rape and provides three accounts of what he describes as 'the ontology of consent',[799] that is, the subjective view, performative view and hybrid view. The subjective view of consent refers to the victim's mental state,[800] while the performative view of consent indicates that consent is behavioural and that an act is required for consent.[801] The subjective and performative views of consent are combined in the hybrid view, which requires a mental state and act.[802] Drawing on the work of Bryden, Wertheimer states that consent is better

---

[793] Kenneth W Simons, 'The Relevance of Victim Conduct in Tort and Criminal Law' (2004-2005) 8 *Buffalo Criminal Law Review* 541, 546.
[794] Nathan Brett, 'Sexual Offences and Consent' (1998) XI *Canadian Journal of Law and Jurisprudence* 69, 71.
[795] Bernadette McSherry and Bronwyn Naylor, *Australian Criminal Laws: Critical Perspectives* (2004) 211.
[796] Notes, 'Consent, Liability and Guilt: A Study in Judicial Method' (1954-1955) 7 *Stanford Law Review* 507, 513.
[797] Non-fatal offences against a person that include the element of consent are for example, assault, assault occasioning bodily harm and serious assault, which are provided in Queensland in *Criminal Code* (Qld) ss 335, 339 and 340, respectively.
[798] Notes, 'Consent, Liability and Guilt: A Study in Judicial Method' (1954-1955) 7 *Stanford Law Review* 507, 513.
[799] Alan Wertheimer, 'What is Consent? And is it Important?' (1999-2000) 3 *Buffalo Criminal Law Review* 557, 566.
[800] Ibid.
[801] Ibid.
[802] Ibid.

understood from the performative view. To illustrate this statement, Wertheimer uses marriage as an example. In particular, a person does not consent to be married because they have the necessary mental state (that is, they want or intend to get married), but they consent to marriage by doing an act, that is, saying 'I do'.[803] The notion that an act is necessary before there is consent is interesting in the context of making and/or distributing visual recordings because it prompts a question whether a person appearing in a public place has done an act sufficient to constitute consent to being visually recorded, or further, consent to having the visual recording distributed to world at large.

Wertheimer weakens his argument when he said it does not matter whether a performative or subjective approach was taken to consent, but that it was important to understand that consent was resolved by 'moral argument'.[804] Presumably a 'moral argument' requires the role of consent in the criminal to be determined by the morality approach to consent. The morality approach to consent will be discussed below. The morality approach intersects with the public interest approach to the role of consent, which will also be discussed below.

While Bix carves up the consent terrain differently to Wertheimer, he considers that the moral or public value of the activity is important in determining the issue of consent. Bix also states that the level of harm to which the victim consents, the possible harm that was consciously considered by the victim and the level of harm inflicted by the offender are important in resolving whether there is valid consent.[805] This is interesting because it makes a connection between consent and harm, and reinforces the importance of the harm principle, which was discussed in chapter 2. Further, Bix's explanation of consent reinforces the quantitative approaches to consent, which are discussed below.

5.1.1 Consent as Used in Non-fatal Offences Against a Person

Despite Wertheimer and Bix approaching consent from a theoretical perspective, their views are reflected in an ad hoc fashion in the case law relating to non-fatal offences against a person, for example, *Lergesner v Carroll*[806] and *R v Brown.*[807] This is significant in the context of making and/or distributing visual recordings because non-fatal offences against a person more closely resemble this criminal conduct than other areas of criminal

---

[803] Ibid 567.
[804] Ibid.
[805] Brian Bix, 'Consent, Sado-masochism and the English Common Law' (1997-1998) 17 *Quinnipiac Law Review* 157, 174.
[806] [1991] 1 Qd R 206.
[807] [1993] 2 WLR 556. Note that consent has been deemed irrelevant to heterosexual sadomasochism: *R v Emmett* unreported, 18 June 1999, No 9901191/Z2.

law for example, property offences or drug offences. There is not a single definition of 'consent' that serves all purposes.[808]

In the context of injury or a risk of injury, the Law Commission for England and Wales frames a complex definition of consent.[809] Their definition is useful in the context of making and/or distributing visual recordings because this conduct may result in an injury or risk of injury such as psychological harm, humiliation and embarrassment. Their definition of 'consent' includes express or implied consent.

In Queensland, Hoare J in *Kimmorley v Atherton; ex parte Atherton*[810] takes the concept of 'consent' further than the Law Commission for England and Wales in the context of assault and states that it 'may be express or it may be implied or tacit'.[811] His Honour further states that a 'person may consent (by acquiescence) to some particular course of conduct without being an enthusiastic co-operator'.[812] His Honour does not expand on the concepts of express, implied, tacit or acquiescence or attempt to distinguish them. Express consent may be viewed at the core of the concept of 'consent', while implied and tacit consent may be in the periphery of the notion of 'consent'. According to the literature, there is tacit consent, where 'one remains silent or passive in circumstances where, given certain conventions, such …conduct simply counts as consenting'.[813] In contrast, implied consent is not silent or passive, but is more assertive. Extending the concept of 'consent' to tacit complicates the boundaries of consent in the context of making and/or distributing visual recordings because the person visually recorded is often unaware that they are being visually recorded and is silent, and thus they should not necessarily be regarded as consenting to the visual recording.

5.1.2 Implied Consent

The notion of 'implied consent' is grounded in the 'ordinary incidents of social intercourse'.[814] These are 'commonplace, intentional but non-hostile acts such

---

[808] AP Simester and GR Sullivan, *Criminal Law Theory and Doctrine* (2003) 612.
[809] England and Wales, Law Commission for England and Wales, Consent in the Criminal Law, Consultation Paper No. 139 (1995) [4.52].
[810] Non-fatal offences against a person that include the element of consent are for example, assault, assault occasioning bodily harm and serious assault, which are provided in Queensland in *Criminal Code* (Qld) ss 335, 339 and 340, respectively.
[811] Several other cases discuss the concept of consent in the context of non-fatal offences against the person, for example, *Boughey v The Queen* (1986) 60 ALJR 422, *R v Watson* [1987] 1 Qd R 440, *R v Raabe* [1984] 1 Qd R 115, *McNamara v Duncan* (1971) 26 ALR 584, *Kirkpatrick v Tully* [1991] 2 Qd R 291, *Lergesner v Carroll* [1991] 1 Qd R 206, *Re Lenfield* (1993) 114 FLR 195 and *Horan v Ferguson* [1995] 2 Qd R 490.
[812] [1971] Qd R 117, 137.
[813] Jeffrie G Murphy, 'Consent, Coercion, and Hard Choices' (1981) 67 *Virginia Law Review* 79, 92.
[814] *Boughey v The Queen* (1986) 161 CLR 10, 24.

as patting another on the shoulder to attract attention or pushing between others to alight from a crowded bus'.[815] Even though they involve an 'application of force',[816] they do not amount, for example, to an assault because they are not done with hostility and more compellingly, the recipient impliedly consents to them as part of social intercourse. The High Court of Australia argues that 'actual hostility or hostile intent'[817] may change an 'ordinary incident of social intercourse into battery at common law or assault for the purposes of the Code.'[818] The High Court decision in *Boughey v The Queen* is significant here because if making visual recordings could be said to be 'ordinary incidents of social intercourse' then arguably people who are visually recorded, impliedly consent to the conduct of the person making the visual recording. Further, impliedly consenting to the distribution of visual recordings may be an ordinary incident in limited circumstances, for example, if it is done by a newspaper or television channel. Of course, some of the examples of making visual recordings illuminated in chapter 1 can never be considered to be 'ordinary incidents of social intercourse', for example, visually recording a person while they are showering, using a toilet or undressing. On the other hand, making a visual recording in a public place may be considered to be an 'ordinary incident of social intercourse', with exception to up-skirt filming, which should not fall within this category.

Returning to the concept of 'implied consent', Williams suggests that three conditions must be present. Firstly, the victim must know the act is being done or proposed to be done in relation to their body by the offender who is present.[819] This means that a person cannot consent to an act unless they know what is done. Secondly, the victim must have the ability to refuse consent.[820] For example, an unconscious person is unable to consent. Thirdly, the victim must indicate his or her refusal to consent by, for example, words, gestures or resistance.[821] These conditions appear to be neat but are likely to be of limited application in the context of making and/or distributing visual recordings because the person who is visually recorded is usually not aware that they are being visually recorded at the time it is done. For example, the parents of the children who were secretly visually recorded at South Bank Parklands in Brisbane only later found out what had happened when the visual recordings appeared on the Internet.[822] Further, people who are up-skirt filmed may never find out that it has happened in relation to their body. The small size and zoom capabilities of digital cameras, and the ability to transmit visual recordings, for example, from a digital camera back to a webpage in real time, enable a person making a visual recording to be absent from the location where the visual

---

[815] *Boughey v The Queen* (1986) 161 CLR 10, 25.
[816] *Criminal Code* (Qld) s 245.
[817] *Boughey v The Queen* (1986) 161 CLR 10, 25.
[818] *Boughey v The Queen* (1986) 161 CLR 10, 25.
[819] Glanville Williams, *Textbook of Criminal Law* (2nd ed, 1983) 550.
[820] Ibid.
[821] Ibid.
[822] See the discussion of this incident in chapter 1.

recording is made. Thus, in the context of making and/or distributing a visual recording, it may be impossible for the person who is visually recorded to indicate their refusal to consent.

When exploring the conceptual boundaries of consent, whether consent has been vitiated is a further important consideration. Williams states that consent may be vitiated in three situations.[823] Firstly, where a victim's consent is vitiated by mistake or fear.[824] Secondly, a victim's consent is vitiated where a victim is incapable of consenting because he or she falls within a vulnerable group, for example, children.[825] Thirdly, where public policy denies anyone from consenting to the act, for example, if the act is immoral or injures society.[826] If the consent of a victim is vitiated in one or more of these three situations, the criminal law steps in to protect the victim. Further, Simester and Sullivan discuss a range of factors that vitiate consent including fear of force; force; coercion; threats; opportunities; and mistake or ignorance about the offender's identity, conduct or consequences; and the age of understanding necessary for effective consent.[827] In addition to this literature, legislative definitions of consent, generally used in the context of sexual offences, provide guidance on whether consent is vitiated.

For example, in Queensland, consent is not voluntary for the purposes of rape and sexual assault if it is obtained by force, threat or intimidation, fear of bodily harm, exercise of authority, false and fraudulent representations about the nature or purpose of the act or a mistaken belief induced by the accused that the accused was the victim's sexual partner.[828] Similarly in Canada, consent is vitiated where there is an application of force, threats or fear of the application of force, fraud or an exercise of authority.[829] However, the Canadian definition of consent applies to all assaults, not just sexual assaults. The legislative definition of consent in New Zealand is more comprehensive than the

---

[823] Ibid.

[824] Ibid 551. See also Simon Blackburn, *Oxford Dictionary of Philosophy* (2005) definition of consent, which states that 'coercion, exploitation, fraud, [and] deception' imply at a lack of consent. 'Conversely, just or permissible transactions imply either the actual or potential consent of affected parties'. The definition of consent also raises the term 'potential consent', which is based on motivations, knowledge, rationality and situation of the agent. The dictionary also provides an example of tacit consent, that is, where a person does not actually consent to the laws of the country, but is bound by the laws.

[825] Glanville Williams, *Textbook of Criminal Law* (2nd ed, 1983) 551.

[826] Ibid. McSherry and Naylor put forward female genital mutilation, indigenous customary law and sadomasochism as examples of acts where consent is vitiated on public policy grounds: Bernadette McSherry and Bronwyn Naylor, *Australian Criminal Laws: Critical Perspectives* (2004) 198-202. They suggest that these examples show how one culture can intrude on other cultures: 198.

[827] AP Simester and GR Sullivan, *Criminal Law Theory and Doctrine* (2003) 612-617.

[828] *Criminal Code* (Qld) s 348.

[829] *Criminal Code* (Can) s 265(3). Further, see *Criminal Code* (Can) s 273.1(2), which provides further guidance on when there is no consent in the case of sexual assault. With regard to whether fraud or force vitiates consent see F H Beale, 'Consent in the Criminal Law' (1894-1895) 8 *Harvard Law Review* 317, 320-3.

definitions in Queensland and Canada. The New Zealand provision maintains that there is no consent to a sexual activity just because there is a lack of protest or physical resistance to the activity.[830] Despite each jurisdiction using different wording, the key themes are force and fraud, both of which are not relevant to the examples of visual recording provided in chapter 1. However, if the victim's consent is vitiated, there would be no consent, and the lack of consent element of an offence would be satisfied. In such a case, the conduct would be criminalised if the other elements of the offence are satisfied. While the vitiation of consent is very important to the conceptual boundaries of consent, it may have limited application in the context of making and/or distributing visual recordings because, in many of the examples used in chapter 1, the person visually recorded was not aware this was occurring. Vitiation of consent will be relevant where, for example, a person is aware that they are being visually recorded, but they have been overborne by the person making the visual recording.

The purpose of this discussion on the conceptual boundaries of consent is to show that there is no universal definition of consent that serves all jurisdictions and all offences. Definitions of consent have been derived from the criminal law literature, case law and legislation. Consent may be express, implied or tacit. Further, it may be vitiated in numerous ways including by force, threat of force and exercise of authority. In the context of making and/or distributing visual recordings, if the person who is visually recorded expressly consents to the making and/or distribution of the visual recording, the conduct should not be criminalised. However, it is a different situation if the person has had their consent vitiated. In that case, there is a lack of consent. Most of the examples in chapter 1 did not involve express consent or a vitiation of consent. In fact, most of the examples in chapter 1 involve people who were not aware that they were being visually recorded at the time it was done. Consequently, implied and tacit consent are particularly relevant to making and/or distributing visual recordings. Whether a person impliedly consents to making and/or distributing visual recordings should be determined by reference to the context. Given the importance of implied consent in this context, it is integral to consider whether a lack of consent should be an element of offences pertaining to making and/or distributing visual recordings.

5.2 Unpacking the Approaches to the Role of Consent

Having considered the notion of 'consent', this chapter will explore the different approaches to the role of consent available to the criminal law, including:

- Quantitative,
- Quantitative plus exceptions,

[830] *Crimes Act 1961* (NZ) s 128A.

- Individual autonomy,
- Paternalism,
- Morality, and
- Contextual.

The first five approaches on this list were derived from the 1995 England and Wales' Consultation Paper entitled, *Consent in the Criminal Law*,[831] while the sixth approach is constructed from the literature on privacy. In discussing the first five approaches, the 1995 England and Wales' Consultation Paper does not settle on a single approach or attempt to prioritise the approaches. In fact, the Consultation Paper suggests that the role of consent in the criminal law is a question for the legislature and depends on the political climate.[832] This chapter charters new territory by applying the five approaches in the context of making and/or distributing visual recordings. When applied here to visual recording and distribution, all of these five approaches to consent suggest that the consent of the person visually recorded is relevant to an offence pertaining to making and/or distributing visual recordings and that a lack of consent should be element of such an offence.

The thesis identifies a relationship between implied consent and privacy. This relationship is particularly significant in the context of making and/or distributing visual recordings because a person who enters a public place may have a right to privacy and may not necessarily impliedly consent to being visually recorded or having their image distributed across the Internet. The inverse of this may also be true. After engaging with the literature on privacy,[833] a contextual approach to consent is constructed. This is the sixth and final approach to consent listed above. The contextual approach to consent offers a pragmatic approach to implied consent and better enables the criminal law to cope with contemporary challenges such as making and/or distributing visual recordings.

Individual autonomy and morality emerged in chapter 2 as principles that may underpin the decision to criminalise conduct. In examining consent, individual autonomy and morality emerge again because these principles provide a means for approaching the role of consent.

---

[831] England and Wales, Law Commission for England and Wales, Consent in the Criminal Law, Consultation Paper No. 139 (1995) 245-276. The philosophical component of the Consultation Paper were written by Paul Roberts and subsequently published in Paul Roberts, 'The Philosophical Foundations of Consent in the Criminal Law' (1997) 17 *Oxford Journal of Legal Studies* 389.

[832] The importance of politics in the criminalisation debate was illuminated in chapter 2.

[833] William L Prosser, 'Privacy' (1960) 48 *California Law Review* 383, Elizabeth Paton-Simpson, 'Privacy and the Reasonable Paranoid: The Protection of Privacy in Public Places' (2000) 50 *University of Toronto Law Journal* 305, Daniel Solove, 'Conceptualizing Privacy' (2002) 90 *California Law Review* 1087 and Daniel Solove, 'A Taxonomy of Privacy' (2006) 154 *University of Pennsylvania* 477.

After discussing the six approaches to the role of consent in the criminal law, it is clear that a victim's lack of consent is relevant to making and/or distributing visual recordings and that a lack of consent should be an element of an offence pertaining to this conduct.

5.2.1 Quantitative Approach to Consent

In the 1995 England and Wales' Consultation Paper on consent,[834] Roberts argues that the vital issue underpinning the role of consent in the criminal law is quantitative. The notion of 'quantitative' focuses on the degree of harm involved in the type of conduct.[835] The quantitative approach draws a line along a harm continuum, which divides where consent is effective and where consent is ineffective. The ambit of the concept of 'harm' is crucial to the quantitative approach to consent. Chapter 2 discussed the concept of 'harm'.

To determine whether a jurisdiction adopts a quantitative approach to consent in its statutory offences depends on whether a lack of consent is relevant to some offences but not others. Queensland is a good example of a jurisdiction that provides a quantitative approach to consent in non-fatal offences against a person because making and/or distributing visual recordings is akin to this conduct, as opposed to other offences, for example property, motor vehicle, or homicide offences. In Queensland,[836] consent is an element in the definition of assault.[837] The element of assault and thus the concept of 'consent' are imported into the offences of assault,[838] assault occasioning bodily harm[839] and serious assault.[840] The element of consent is explicitly included in the sexual assault[841] and rape[842] offences. In contrast to these offences in Queensland, grievous bodily harm[843] and unlawful wounding[844] do not contain the element of consent explicitly and do not include the element of assault and thus consent.

---

[834] England and Wales, Law Commission for England and Wales, Consent in the Criminal Law, Consultation Paper No. 139 (1995) 245.
[835] *R v McIntosh* [1999] VSC 358, where a man pleaded guilty to manslaughter because his sexual partner died during bondage sex.
[836] See generally R S O'Regan, 'Consent to Assaults Under the Queensland Criminal Code' (1992-1993) 17 *University of Queensland Law Journal* 287.
[837] *Criminal Code* (Qld) s 245.
[838] *Criminal Code* (Qld) s 335. Similarly, the Canadian equivalent requires a lack of consent: *Criminal Code* (Can) s 265(1). Contrast the New Zealand provision on common assault, which does not refer to consent: *Crimes Act 1961* (NZ) s 196.
[839] *Criminal Code* (Qld) s 339. See also *Lergesner v Carroll* (1989) 49 A Crim R 51. Similarly, the Canadian equivalent regarding assault occasioning bodily harm requires a lack of consent: *Criminal Code* (Qld) s 265(2). Note that the Canadian equivalent lumps all types of assault together.
[840] *Criminal Code* (Qld) s 340.
[841] *Criminal Code* (Qld) s 352(1)(b). Similarly, the Canadian equivalent regarding sexual assault requires a lack of consent: *Criminal Code* (Can) s 265(2).
[842] *Criminal Code* (Qld) s 349.
[843] *Criminal Code* (Qld) s 320.
[844] *Criminal Code* (Qld) s 323.

Thus, consent is irrelevant to grievous bodily harm and unlawful wounding, but it is debatable whether this is deliberate or due to a drafting oversight.[845] If a person consents to grievous bodily harm or unlawful wounding, the offence will be made out if the elements in these offences are satisfied. Consequently, Queensland's quantitative approach to consent draws a line along the harm continuum above serious assault.

Even though the quantitative approach used in the Queensland non-fatal offences against a person appears to be an efficient means of determining whether consent is effective or ineffective, it has its drawbacks. The Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General criticises the importation of consent into the assault offences on the basis of assault as the key criterion.[846] For example, consent is irrelevant in Queensland to the offence of unlawful wounding according to the ruling in *Kaporonovski*,[847] but yet unlawful wounding may only involve a trivial nick, and thus there is no necessary correlation between the degree of harm and consent.[848] Further, a person in Queensland may legally consent to a high degree of violence, for example, assault occasioning bodily harm and assault with intent to cause grievous bodily harm, given that assault and thus consent is an element of these offences.[849] In addition to anomalies under the Queensland approach, there are other criticisms of the quantitative approach, which will be discussed below.

The quantitative approach to consent used in Queensland makes the consent of the victim relevant where assault is an element of the offence and, broadly speaking, to the less serious non-fatal offences against a person. As discussed above, the focal point of the quantitative approach is the concept of 'harm', which was examined in chapter 2. Chapter 2 established that on the harm continuum, making and/or distributing a visual recording was generally less serious than non-fatal offences against a person such as grievous bodily harm and more akin to assault, assault occasioning bodily harm and serious assault. Building on this finding from chapter 2 and applying the quantitative approach to consent, it could logically be argued that consent should be relevant to making and/or distributing visual recordings and it would be appropriate to use lack of consent as an element of an offence pertaining to this conduct.

---

[845] See generally *Kaporonovski* (1975) 133 CLR 209.
[846] Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Non Fatal Offences Against the Person* (1998) 123.
[847] (1975) 133 CLR 209.
[848] Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Non Fatal Offences Against the Person* (1998).123.
[849] Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Non Fatal Offences Against the Person* (1998) 123.

The 1995 England and Wales' Consultation Paper on consent highlights several of the flaws in approaching consent in a quantitative manner.[850] Firstly, the level of harm is not always a 'morally significant factor in evaluating its wrongfulness'.[851] For example,

> [a]rm-twisting to effect a robbery is morally worse than justified killing in self-defence, and a punch in the face causing no lasting damage is morally worse than the amputation of a leg, if the former is inflicted by a mugger on the street and the latter is performed by a surgeon with consent in order to prevent the spread of bone cancer.[852]

Secondly, the quantitative approach implies that the relationship between consent and harm that is relevant to various social contexts can be generalised to one proposition.[853] However, the conception of consent for the purposes of sexual offences may need to be expressed differently to assault offences. Thirdly, describing conduct is difficult without using terms such as ''harm,' 'injury,' 'wrong,' 'victim,' [and] 'violence,'',[854] which are 'skewed by concealed moral judgments masquerading as value-free descriptions of the empirical world'.[855]

Finally, using a quantitative approach as a 'blueprint for [this aspect of] criminalisation'[856] lacks commonsense because it would result in the criminalisation of activities that are currently permitted under the criminal law, for example, surgery and contact sports.[857] Of course, this final criticism is an exaggeration in codified jurisdictions such as Queensland, which adopt a quantitative approach to consent and yet surgery and contact sports are not criminalised in Queensland. The quantitative approach provides a straightforward means for drawing a line along the harm continuum to determine whether an individual's consent should be respected by the criminal law. If the dividing line is drawn too low on the harm continuum, there is a need to introduce exceptions as many worthwhile activities that involve serious harm, for example, surgery, must be permitted in contemporary society. While making and/or distributing visual recordings was classified as non-serious in chapter 2, the next section of this chapter will show that it may be necessary to use a quantitative plus exceptions approach to deal with this contemporary problem.

---

[850] England and Wales, Law Commission for England and Wales, Consent in the Criminal Law, Consultation Paper No. 139 (1995) 246.
[851] Ibid 247.
[852] Ibid.
[853] Ibid.
[854] Ibid 248.
[855] Ibid.
[856] Ibid.
[857] Ibid.

5.2.2 Quantitative Plus Exceptions Approach to Consent

In the context of non-fatal offences against a person, England does not adopt a strict quantitative approach to consent. In Appendix C of the 1995 England and Wales' Consultation Paper on consent, Roberts describes the English approach to consent in non-fatal offences against a person as the 'quantitative-rule-plus-exceptions approach',[858] which, similarly to the quantitative approach, respects an individual's consent to common assault,[859] but does not respect an individual's consent to bodily harm or more serious offences.[860] Thus, England draws a dividing line along the harm continuum for the purposes of consent above assault. However, unlike the quantitative approach in Queensland, England introduces exceptions in cases involving bodily harm or more serious harm. For example, consent is relevant to contact sports, rough horseplay, tattooing, body piercing and surgery, but it is not relevant to female genital mutilation, indigenous customary practices and homosexual sadomasochism.[861] These exceptions are based on principles, for example, individual autonomy, morality and public interest (social welfare), which were discussed in chapter 2. Individual autonomy and morality are considered below as theoretical approaches to the role of consent in criminal law, while public interest will be explored now.

Where public interest is adopted as an exception to the quantitative plus exceptions approach, consent is ineffective where there is an injury to the public interest as well the person injured.[862] Ormerod states that there is a

---

[858] England and Wales, Law Commission for England and Wales, Consent in the Criminal Law, Consultation Paper No. 139 (1995) 248 and Paul Roberts, 'The Philosophical Foundations of Consent in the Criminal Law' (1997) 17 *Oxford Journal of Legal Studies* 389, 404. This approach assumes that there are exceptions for 'surgical treatment, tattooing, risky sports and exhibitions, and the like': 404.

[859] *R v Donovan* [1934] 2 KB 498.

[860] AP Simester and GR Sullivan, *Criminal Law Theory and Doctrine* (2003) 618.

[861] Bernadette McSherry and Bronwyn Naylor, *Australian Criminal Laws: Critical Perspectives* (2004) 188 and 197. McSherry and Naylor suggest that the empirical evidence that which shows the widespread practice of violence against women supports the criminalisation of female genital mutilation: 198-9. Further, note that female genital mutilation has been criminalised in some jurisdictions, for example in *Criminal Code* (Qld) s 323A(2). On another note, see *Warren, Coombes and Tucker* (1996) A Crim R 78 with regard to the irrelevance of consent to indigenous customary practices such as payback. With regard to dangerous sports and surgery, Leng discusses how the individual's interest coincides with the public interest: Roger Leng, 'Consent in Criminal Law' (1988) 13 *Holdsworth Law Review* 129, 130. With regard to surgery, see *Department of Health and Community Services (NT) v JWB (Marion's case)* (1992) 175 CLR 218, 232. If the patient or their agent is unable to consent to surgery, doctors may operate in an emergency to preserve life or prevent serious permanent injury, but this does not extend to convenient treatment: *Murray v McMurchy* [1949] 2 DLR 442. For further discussion on sadomasochism see Cheryl Hanna, 'Sex is Not a Sport: Consent and Violence in Criminal Law' (2000-2001) 42 *Boston College Law Review* 239.

[862] See especially *Coney* (1882) 8 QBD 534, 539, which involved a prize-fight. Stephen J stated, 'the injuries given and received in prize-fights are injurious to the public, both because it is against the public interest that the lives and the health of the combatants should be endangered by blows, and because prize-fights are disorderly exhibitions, mischievous on many

public interest when the society is disturbed by witnessing or knowing about the conduct and when health services are burdened by the conduct.[863] In the context of making and/or distributing visual recordings, health services may not be burdened by this conduct because, unlike other non-fatal offences against a person, it does not generally involve physical injuries. Arguably, there is still a public interest in this conduct because society knows about the potential for inappropriate use of mobile phone cameras and digital cameras, for example, in up-skirting.

The quantitative plus exceptions approach to consent draws a line at bodily harm, such that if a person attempts to cause or causes bodily harm to another without a good reason, it is not in the public interest and the conduct is criminalised.[864] In explaining the notion of 'public interest', Lord Lane CJ in *Attorney General's Reference (No 6 of 1980)*[865] states that it does not matter whether the conduct occurred in a public or private place.

Kell uses the notion of 'social utility model'[866] to refer to the quantitative plus exceptions approach to consent. In this model,

> once injury reached the level of bodily harm, the accused was required to demonstrate that the particular activity was needed in the public

---

obvious grounds. Therefore the consent of the parties to the blows which they mutually receive does not prevent those blows from being assaults': 549.

[863] David Ormerod, 'Consent and Offences Against the Person: Law Commission Consultation Paper No. 134' (1994) 57 *The Modern Law Review* 928, 939.

[864] Bernadette McSherry and Bronwyn Naylor, *Australian Criminal Laws: Critical Perspectives* (2004) 191. See also English case law such as *Attorney General's Reference (No 6 of 1980)* [1981] QB 715, *R v Brown* [1993] 2 WLR 556, *R v Coney* (1882) 8 QBD 534 and *R v Donovan* [1934] 2 KB 498 on this point. The minority in *R v Brown* [1993] 2 WLR 556 considered the public interest test. See also Lord Mustill (a dissenting judge) on this point. In this case, five men performed consensual homosexual sadomasochistic acts in a private place. The acts resulted in injuries, but the men did not require medical attention and thus did not burden the health service. See also Andrew Ashworth, *Principles of Criminal Law* (5th ed, 2006) 322 regarding the health service issue. According to Ashworth, the majority in *R v Brown* [1993] 2 WLR 556 demonstrated 'an overwhelming distaste for the defendant's activities, and a determination to describe it in language designed to produce the conclusion that it should be criminalized': Andrew Ashworth, *Principles of Criminal Law* (5th ed, 2006) 322. Further, see other relevant English case law such as *R v Coney* (1882) 8 QBD 534 and *R v Donovan* [1934] 2 KB 498.

[865] [1981] QB 715, 719. Further, Lord Lane CJ recognised that many types of conduct resulting in bodily harm were criminalised because it was 'needed in the public interest': 719. This case involved a street fight between two youths. In particular, Lord Lane CJ stated, 'Nothing which we have said is intended to cast doubt on the accepted legality of properly conducted games and sports, lawful chastisement or correction, reasonable surgical interference, dangerous exhibitions, etc. These apparent exceptions can be justified as involving the exercise of a legal right, in the case of chastisement or correction, or as needed in the public interest, in the other cases': 719.

[866] David Kell, 'Social Disutility and the Law of Consent' (1994) 14 *Oxford Journal of Legal Studies* 121, 122.

> interest (social utility), rather than the prosecution having to prove that good reason exists for prohibiting the conduct (social disutility).[867]

The social utility and disutility model was utilised in the *R v Brown*,[868] by the majority and minority, respectively. The Model Criminal Code Officers Committee interpret the majority view in *R v Brown*[869] as requiring the conduct to be socially beneficial before consent would be relevant,[870] while the minority indicate that the consensual conduct is prima facie lawful unless there are social reasons for invalidating the consent.[871] *R v Brown*[872] involves homosexual sadomasochism. This conduct does not amount to an exception under the quantitative plus exceptions approach to consent. Lord Lowry and Lord Templeman in separate judgments indicate that sadomasochistic homosexual activities are not beneficial to the welfare of society or family life.[873] While their decisions refer to 'society', they 'display a degree of moral censure'[874] and thus their comments illuminate an overlap between the quantitative plus exceptions approach to consent and the morality approach to consent.

The quantitative plus exceptions approach to consent may conflict with the individual autonomy approach to consent because the former protects public interests while the latter protects individual interests. However, Vandervort explains how the potential conflict may be resolved. She states that the criminal law is committed to the promotion of public interests and only protects individual interests to the extent that they coincide with public interests.[875] Similarly to Vandervort, but in the context of sexual offences, the court in the Canadian case of *R v Welch*,[876] withdrew the issue of consent from the jury and stated that individual autonomy must yield to the public interest where sexual activities involve the deliberate infliction of bodily harm.[877] Thus, individual interests that do not coincide with public interests are ignored, where bodily harm is involved. This is important in the context of making and/or distributing visual recordings because chapter 2 identified the difficulty in prioritising public over individual interests in the form of privacy and freedom of

---

[867] Ibid. The majority in *R v Brown* [1993] 2 WLR 556 took a social utility approach, while the minority adopted a social disutility approach. See also Paul J Farrugia, 'The Consent Defence: Sports Violence, Sadomasochism, and the Criminal Law' (1996-1999) 8 *Auckland University Law Review* 472, 495.
[868] [1993] 2 WLR 556.
[869] [1993] 2 WLR 556.
[870] Criminal Law Officers Committee of the Standing Committee of Attorneys-General, 'Chapter 5 Fatal Offences Against the Person' in *Final Report Model Criminal Code* (1993) 125.
[871] Ibid.
[872] [1993] 2 WLR 556. Note that consent has been deemed irrelevant to heterosexual sadomasochism: *R v Emmett* unreported, 18 June 1999, No 9901191/Z2.
[873] *R v Brown* [1993] 2 WLR 556, 583 and 566.
[874] Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (2nd ed, 2005) 533.
[875] Lucinda Vandervort, 'Consent and the Criminal Law' (1990) 28 *Osgoode Hall Law Journal* 485, 494.
[876] (1996) 101 CCC (3d) 216.
[877] (1996) 101 CCC (3d) 216, 239.

expression. However, always prioritising public interests when bodily harm is involved may not be very helpful in the context of making and/or distributing visual recordings because this conduct may not generally involve bodily harm, for example, serious psychological harm, and may usually be more akin to common assault.

Blindly yielding to the public interest at the expense of individual autonomy does have drawbacks. For example, it may force the conduct to go underground[878] and it may support a dominant culture impinging on the practices of another culture or subculture.[879] At a conceptual level, the public interest exception rests on the vague notion of 'public interest',[880] which neither explains the current cases falling under the public interest exception, nor provides appropriate guidance for future bodily harm cases.[881]

The quantitative plus exceptions approach to consent used in England has been heavily criticised. Simester and Sullivan suggest that the 'English [criminal] law is internally inconsistent and, on occasion, irrational in determining whether consent to the risk of significant harm is effective'.[882] The quantitative plus exceptions approach is 'not the most direct or the most sophisticated approach'.[883] It overlooks moral considerations at the quantitative stage, but reintroduces them at the exceptions stage. Roberts describes the exceptions as 'messy' and 'ad hoc'.[884] As technology advances and creates contemporary issues, new exceptions may need to be considered. Finally, Roberts argues that a quantitative plus exceptions approach 'places unwarranted restrictions on individual freedom and fuels a disturbingly expansionist tendency in the criminal law'.[885]

In the context of assault in England, McSherry and Naylor recognise that delineating when a person can and cannot consent to injury is a problem.[886] Ashworth states that the relevance of consent in the criminal law is complex because of difficulties in differentiating assault from assault occasioning bodily

---

[878] Bernadette McSherry and Bronwyn Naylor, *Australian Criminal Laws: Critical Perspectives* (2004) 202.
[879] See especially *R v Brown* [1993] 2 WLR 556, where homosexual sado-masochism was undermined by dominant heterosexual culture. See also Bernadette McSherry and Bronwyn Naylor, *Australian Criminal Laws: Critical Perspectives* (2004) 198.
[880] Andrew Ashworth, *Principles of Criminal Law* (5th ed, 2006) 325.
[881] Brian Bix, 'Consent, Sado-masochism and the English Common Law' (1997-1998) 17 *Quinnipiac Law Review* 157, 170.
[882] AP Simester and GR Sullivan, *Criminal Law Theory and Doctrine* (2003) 610. Further, Simester and Sullivan state, '[w]hy violence perpetrated for sport, horseplay, or ornamentation has an acceptability denied to sexual fulfilment lies beyond reason': 621.
[883] England and Wales, Law Commission for England and Wales, Consent in the Criminal Law, Consultation Paper No. 139 (1995) 248.
[884] Ibid.
[885] Ibid.
[886] Bernadette McSherry and Bronwyn Naylor, *Australian Criminal Laws: Critical Perspectives* (2004) 188.

harm.[887] Determining the role of consent in the criminal law would be clearer if England provided, for example, a legislative response to assault and assault occasioning bodily harm that expressly states whether consent is an element of these offences. Further, at common law, it is not clear whether consent is an element of an offence or a defence,[888] and this impacts on whether the Crown or the accused have to prove consent. As a result, Ashworth recognises that drawing a line on a harm continuum for the purposes of consent is difficult[889] and it is not the answer to determining the effectiveness of consent on the basis of vague concepts such as 'public interest'. The criticisms associated with the quantitative approach and quantitative-rule-plus-exceptions approach 'provide a powerful *prima facie* case against slavishly adopting'[890] these approaches. Before discussing more preferable approaches to the role of consent, this section will apply the quantitative plus exceptions approach to making and/or distributing visual recordings.

The quantitative plus exceptions approach to consent used in England involves an extra step compared to the quantitative approach that is used, for example, in Queensland. Under the English quantitative plus exceptions approach, if the harm involved is less than bodily harm, the victim's consent is relevant and it is appropriate to use lack of consent as an element of the offence. If the harm involved constitutes bodily harm or more serious harm, the conduct must fall within an exception before the victim's consent will be effective. Chapter 2 established that distributing a visual recording involves greater harm than simply making one. Further, chapter 2 recognised that making visual recordings in private places and of intimate acts involves more harm than public places and public acts. More importantly for the purposes of the quantitative approach, chapter 2 determined that the harm involved in making and/or distributing a visual recording is non-serious in all instances.

The question that remains is whether making and/or distributing a visual recording is more akin to assault or assault occasioning bodily harm because this impacts on whether there is a need to consider whether the conduct falls within an exception to the quantitative approach. The most convincing argument is that making and/or distributing visual recordings is more akin to assault because the conduct does not involve any physical harm and generally only results in minor psychological harm. In this case, the quantitative plus exceptions approach would make the consent of the person who was visually recorded relevant, there would be no need to find an exception and a lack of

---

[887] Andrew Ashworth, *Principles of Criminal Law* (5th ed, 2006) 325.
[888] Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Non Fatal Offences Against the Person* (1998) 123. In considering whether the defence of consent is available, various factors should be considered including 'the type of harm caused, the age of the person consenting, the consenting party's ability to consent, whether a legal guardian can consent instead, and whether the harm had been done for the benefit of the consenting party': Editorial, 'Consensual Harm' (2005) 29 *Criminal Law Journal* 197, 198.
[889] Andrew Ashworth, *Principles of Criminal Law* (5th ed, 2006) 325.
[890] Ibid 249.

consent should be an element of an offence pertaining to making and/or distributing visual recordings. This begs a question about the scope of implied consent and this is addressed below under the contextual approach.

If this is incorrect, and making and/or distributing a visual recording is more akin to assault occasioning bodily harm, the quantitative plus exceptions approach may make the consent of the person who was visually recorded relevant or irrelevant depending upon theoretical justifications including individual autonomy, morality, paternalism, which are discussed in detail below.

Given the possible conflict between the public interest exception to the quantitative plus exceptions approach to consent and the individual autonomy approach to consent, it is timely to explore the individual autonomy approach to consent. The individual autonomy approach was one of the theoretical approaches to consent identified by the 1995 England and Wales' Consultation Paper on consent.[891]

5.2.3 Individual Autonomy Approach

Respecting individual autonomy is another approach to consent. Under this approach, if a lack of consent is an element of the offence and a person consents to the conduct, it is not an offence because the victim's consent is respected. Respecting an individual's consent is important in the context of making and/or distributing visual recordings because people regularly consent to be visually recorded, for example, in family photographs, and taking this right away from people is clearly inappropriate. The notion of 'individual autonomy' in the form of privacy and freedom of expression was examined in chapter 2. The crux of this approach to consent depends on whether the criminal law should respect the consent of the victim and, the content of consent.

The view of some leading criminal law theorists suggests that there is no link between the issue of whether the criminal law should or should not respect the consent of the victim and the harm or the risk of harm resulting from the offender's conduct. For example, Simester and Sullivan declare that individual autonomy is a 'key value'[892] and that 'if the harm in question is self-regarding and freely consented to, state intervention is unjustified'.[893] Similarly, Ashworth maintains that the 'principle of individual autonomy suggests that the liberty to submit to (the risk of) injury, however serious, ought to be

---

[891] England and Wales, Law Commission for England and Wales, Consent in the Criminal Law, Consultation Paper No. 139 (1995) 251. Note that the Commission used the concept of liberalism instead of individual autonomy. However, to be consistent with chapter 2, which drew on the criminalisation literature and in turn the notion of individual autonomy, this chapter is using the notion of individual autonomy.

[892] AP Simester and GR Sullivan, *Criminal Law Theory and Doctrine* (2003) 609.

[893] Ibid.

respected'.[894] Thus, if the victim consents to the offender's conduct, consent is relevant and the conduct is not an offence. In contrast to this view, it has been contended that the state should respect individual autonomy if the infliction of bodily harm does not constitute serious harm.[895] This is a more stringent view of respecting individual autonomy and may lead to a similar conclusion to the quantitative or the quantitative plus exceptions approaches explored above.

From the perspective of consent, individual autonomy requires an individual to have a range of reasonable options realistically available to them.[896] It also requires an individual to have 'access to relevant information',[897] particularly about their capacities, circumstances, consequences of their actions and the likely reactions of others.[898] An autonomous person is assumed to have sufficient maturity.[899] Children are deemed incompetent to give consent to matters that seriously interfere with their interests.[900] Parents or legal guardians make important life decisions in the best interests of their children because children are not assumed to have sufficient intellectual intelligence or experience.[901] A child's preference should be respected where it is neutral or promotes their interests.[902] In some situations involving serious harm, the criminal law respects the consent of adults and thus does not criminalise the conduct.[903] However, as discussed in chapter 2, making and/or distributing a visual recording does not involve serious harm, and thus there is more scope for the criminal law to respect the consent of a person visually recorded.

Roberts states that individual autonomy provides a more accurate account of criminalisation than paternalism. He states that the criminal law only constrains individual autonomy to the extent necessary to ensure that everyone receives the same level of autonomy, but acknowledges that on rare occasions paternalism underpins criminalisation.[904] Generally speaking, paternalism is the opposite of individual autonomy because it does not respect an individual's

---

[894] Andrew Ashworth, *Principles of Criminal Law* (5th ed, 2006) 323.
[895] Editorial, 'Consensual Harm' (2005) 29 *Criminal Law Journal* 197, 198.
[896] R George Wright, 'Consenting Adults: The Problem of Enhancing Human Dignity Non-Coercively' (1995) 75 *Boston University Law Review* 1397, 1431.
[897] Ibid 1430.
[898] Ibid 1430-1.
[899] England and Wales, Law Commission for England and Wales, Consent in the Criminal Law, Consultation Paper No. 139 (1995) 259.
[900] Ibid. Note that the Law Commission for England and Wales' Consultation Paper does not provide any examples of conduct that promotes or seriously interferes with a child's interests.
[901] Ibid 259-260.
[902] Ibid 260.
[903] Two examples that commonly emerge in the literature where the criminal law decided to respect the consent of the victim are *R v Wilson* [1996} 3 WLR 125 and *R v Aitken* [1992] 1 WLR 1006. While these examples do not relate to making and/or distributing visual recordings, they demonstrate that the criminal law is prepared to accept the victim's consent in some situations where the conduct results in serious harm.
[904] Paul Roberts, 'The Philosophical Foundations of Consent in the Criminal Law' (1997) 17 *Oxford Journal of Legal Studies* 389, 400.

consent. The next section will explore paternalism as an approach for making consent ineffective.

5.2.4 Paternalistic Approach to Consent

The 1995 England and Wales' Consultation Paper on consent discusses a paternalistic approach to consent, which does not respect any individual's autonomy.[905] This approach would not include lack of consent as an element of the offence and makes consent irrelevant. It restricts 'personal freedom'[906] and is justified on the basis of 'public policy and public interest'.[907] A paternalistic approach is used to protect people from themselves.[908]

Kell stresses that much thought needs to be put into the types of harm covered by paternalism, for example, physical and psychological harm, because the lesser the threshold of harm, the more likely the respect for individual autonomy will be 'nugatory'.[909] Chapter 2 refers to paternalism under the principle of harm, which is a principle that underpins the decision to criminalise conduct. Chapter 2 indicated that paternalism was not favoured as a means of justifying the criminalisation of conduct. For example, Simester and Sullivan disavow 'coercion through the criminal law as a means of furthering an individual's best interests',[910] that is, paternalism. The argument against criminalising conduct on the basis of paternalism is that the offender does not cause harm to others and merely causes harm to themself.

Kell states that paternalism intervenes when the harm reaches a certain level to protect the individual's well-being.[911] He does not offer guidance on how the

---

[905] England and Wales, Law Commission for England and Wales, Consent in the Criminal Law, Consultation Paper No. 139 (1995) 251.
[906] Paul J Farrugia, 'The Consent Defence: Sports Violence, Sadomasochism, and the Criminal Law' (1996-1999) 8 *Auckland University Law Review* 472, 473.
[907] Ibid.
[908] England and Wales, Law Commission for England and Wales, Consent in the Criminal Law, Consultation Paper No. 139 (1995) 266.
[909] David Kell, 'Social Disutility and the Law of Consent' (1994) 14 *Oxford Journal of Legal Studies* 121, 133.
[910] AP Simester and GR Sullivan, *Criminal Law Theory and Doctrine* (2003) 609.
[911] David Kell, 'Social Disutility and the Law of Consent' (1994) 14 *Oxford Journal of Legal Studies* 121, 134. Roberts states that paternalism involves the view that 'protecting or enhancing a person's welfare can be a good reason for interfering with that person's autonomy, or, more colloquially, one may interfere with a person's autonomy *for that person's own good.* This contrasts with, for example, the liberal conception of well-being according to which a person's autonomy should be respected even on occasions when [he or] she chooses to damage [his or] her welfare, providing [he or] she does so willingly and in full knowledge of the consequences': Paul Roberts, 'The Philosophical Foundations of Consent in the Criminal Law' (1997) 17 *Oxford Journal of Legal Studies* 389, 393. When Roberts refers to 'person's own good', he recognises that it could involve two 'conceptions of human interests': 393. The first conception, are the 'interests a person recognizes or chooses for [himself or] herself': 393. The second conception, are the 'interests a person *ought to* recognize or choose for [himself or]

required level of harm should be established, but it has been suggested that serious bodily harm[912] is the ordained level. Thus, where serious bodily harm is involved, paternalism requires 'scrutiny of the purpose and reasonableness of the accused's harm-producing conduct'.[913] Such an approach to paternalism would have the same effect as a quantitative approach.

Rather than suggesting a quantitative approach, the Model Criminal Code Officers Committee recommends that the individual autonomy approach to consent (discussed above) and the paternalism approach to consent, be balanced. More specifically, the Model Criminal Code Officers Committee states that

> the law must balance the state's paternalistic role in protecting individuals from their own poor decisions with the freedom of the individual to make poor decisions. This balance is struck, differently in different times and according to different activities.[914]

In this regard, Roberts makes a compelling point that the criminalisation of conduct is rarely grounded on the basis of paternalism and that individual autonomy is the more convincing ground, which was discussed above. Farrugia insists that taking a paternalistic approach to consent 'may promote that person's overall long-term freedom, autonomy, integrity, and dignity.'[915] Even when individual autonomy is preferred over paternalism, ultimately the balance struck may be said to be in favour of paternalism because the decision is preserving the individual's well-being.

A paternalistic approach to consent makes the consent of the person visually recorded ineffective and criminalises the conduct. In the context of making and/or distributing visual recordings, if paternalism intervenes at the point of harm akin to serious bodily harm, the criminal law should not step in to protect the people that consent to being visually recorded because the level of harm resulting from this conduct (as discussed in chapter 2) is unlikely to reach the ordained level. This means that the consent of the person who is visually recorded is important and a lack of consent should be an element of an offence pertaining to making and/or distributing visual recordings. A paternalistic approach to the role of consent in the criminal law is not popular and is unlikely to be taken in the context of making and/or distributing visual recordings.

---

herself, whether or not she knows she has them or ought to have them': 393. Roberts provides the former with the label of 'paternalism', but provides the latter with the label of 'moral paternalism': 393.

[912] Editorial, 'Consensual Harm' (2005) 29 *Criminal Law Journal* 197.

[913] Ibid 198.

[914] Criminal Law Officers Committee of the Standing Committee of Attorneys-General, 'Chapter 5 Fatal Offences Against the Person' in *Final Report Model Criminal Code* (1993) 119.

[915] R George Wright, 'Consenting Adults: The Problem of Enhancing Human Dignity Non-Coercively' (1995) 75 *Boston University Law Review* 1397, 1433.

However, for completeness, in the unlikely event that a paternalistic approach to consent is taken, the criminal law should protect the well-being of vulnerable groups in society, for example, protecting children from consenting to visual recordings that are distributed for the sexual gratification of adults.

As mentioned above, the Model Criminal Code Officers Committee recognises that the loyalty to individual autonomy and paternalism change over time. Similarly, the morality approach to consent changes over time.

5.2.5 Morality Approach to Consent

The 1995 England and Wales' Consultation Paper on consent highlights the role of consent in criminal law from the perspective of morality.[916] Simester and Sullivan explain that, under the morality approach to consent, conduct is criminalised because it is immoral, despite the victim consenting to the conduct, and thus, a lack of consent would not be an element of the offence. Simester and Sullivan state that 'if conduct is sufficiently immoral or degrading, that *of itself* merits the punishing of persons who engage in such conduct, notwithstanding the consensual nature and self-regarding quality of the acts concerned' (*their emphasis*).[917] However, Simester and Sullivan do not provide any insight on how to judge when conduct reaches the level of 'sufficiently immoral or degrading' and it depends on the ambit of morality.[918]

The notion of 'morality' needs to be fluid to adapt to changes in society, for example, the moral quality of technology enabled conduct such as the increasing use of small digital cameras and mobile phone cameras; the increasing examples reported by the media of up-skirt filming; and the increasing number of visual recordings made in bathrooms and toilets as well as the advent of the Internet as a means of distributing visual recordings to a wide audience. The changing nature of morality emerged as an issue in chapter 2, when morality was considered as a principle underpinning the decision to criminalise conduct. Chapter 2 acknowledged that it is difficult to find a shared understanding of morality and that the concept changes over time and in place.

Even though up-skirt filming and visually recording a person while they engage in a private bodily function, such as using a toilet, is distasteful, it should not be an offence, if the person visually recorded consents to it. Thus, if a person consents to being visually recorded in distasteful circumstances, the criminal law should respect the person's consent and only disregard it on the basis of immorality on rare occasions, such as sexual objectification.

---

[916] England and Wales, Law Commission for England and Wales, Consent in the Criminal Law, Consultation Paper No. 139 (1995) 251.
[917] AP Simester and GR Sullivan, *Criminal Law Theory and Doctrine* (2003) 610.
[918] England and Wales, Law Commission for England and Wales, Consent in the Criminal Law, Consultation Paper No. 139 (1995) 273.

Despite recognising that morality normatively underpins the criminalisation of consensual activity, Simester and Sullivan argue that morality is 'not a proper basis for the deployment of criminal law in a modern democracy'.[919] Thus, the morality approach is not a popular means of approaching the role of consent in the criminal law. This brings the discussion to a pragmatic rather than theoretical approach to consent, which is based on waiving privacy.

5.2.6 Contextual Approach to Consent

This section creates a novel approach to the role of consent in the criminal law, which will be referred to as the contextual approach to consent. It is not a quantitative or theoretical approach, and it does not determine whether the victim consented based on whether the conduct occurs in a public or private place. It is a practical means of determining whether a person has impliedly consented to being visually recorded or having their image distributed. The contextual approach holds that if a person has a right to privacy, for example, from being visually recorded, it may follow that they do not impliedly consent to this conduct.[920] This approach to consent has not been considered elsewhere in the criminalisation literature, but it has been considered in relation to criminal procedure and surveillance.[921] Even though the contextual approach to consent is a practical approach, it does not relate to the 'Pragmatics Filter' which, as mentioned in chapter 1, considers the pragmatic outcome of the criminal law and requires a cost and benefit analysis of the consequences of the criminal law.[922]

As will be discussed below, the contextual approach to consent created in this thesis is based on privacy literature.[923] While privacy traditionally falls under the branch of tort law rather than criminal law, it is particularly important to making and/or distributing a visual recording. This conduct raises several key

---

[919] AP Simester and GR Sullivan, *Criminal Law Theory and Doctrine* (2003) 622.

[920] The conception of implied consent will be discussed below under this contextual approach to consent.

[921] See New South Wales, New South Wales Law Reform Commission, Surveillance, Interim Report No. 98 (2001), [2.102] where it is submitted that parties to a conversation should reasonably expect that their conversation will not be monitored unless they have expressly consented to the monitoring. See generally *R v Duarte* [1990] 1 SCR 30, where La Forest J discusses a reasonable expectation of privacy and the policy implications against recording conversations and warrantless surveillance.

[922] Jonathan Schonsheck, *On Criminalization: An Essay in the Philosophy of the Criminal Law* (1994) 33.

[923] With regard to the tort of privacy in the United States see Andrew McClurg, 'Bringing Privacy Law Out of the Closet: A Tort Theory of Liability for Intrusions in Public Places' (1995) 73 *NC Law Review* 989 and Clay Calvert and Justin Brown, 'Video Voyeurism, Privacy, and the Internet: Exposing Peeping Toms in Cyberspace' (2000) 18 *Cardozo Arts and Entertainment Law Journal* 469. With regard to the definition of privacy refer to Daniel Solove, 'Conceptualizing Privacy' (2002) 90 *California Law Review* 1087 and Daniel Solove, 'A Taxonomy of Privacy' (2006) 154 *University of Pennsylvania* 477. A detailed exploration of the tort of privacy and the concept of privacy is beyond the scope of this thesis.

issues including whether there is a right to privacy in a public place; whether an individual waives their right to privacy and thus impliedly consents to being visually recorded when they enter a public place; and whether there is a distinction between a public place and a private place. These issues will be addressed in detail below in the following parts.

If an individual's consent to being visually recorded is automatically implied when they appear in a public place, are there any drawbacks associated with this? As will be discussed below there are several shortcomings associated with this construction. For example, it leaps from an awareness of the risk of being visually recorded in a public place to a waiver of privacy and thus consent to the making of the visual recording. Further, it treats observing another person with a naked eye the same as making a visual recording of another person, when in fact the two are very different and the latter may involve a permanent record. Another difficulty with implying consent to being visually recorded in a public place is that it discriminates against homeless people who do not have a choice but to appear in public places, and imposes costs on people who wish to go to public places but maintain their privacy. These problems will be discussed in detail below. Therefore, the general proposition, that there is no right to privacy in a public place, is problematic.

The modern conceptions of 'privacy' outlined below do not carve the privacy terrain into public and private places, but recognise that privacy may exist in a public place and accept that privacy is a matter of degree. Rather than settling on a single overarching definition of privacy, a contextual approach to privacy (and thus consent) will be taken. A contextual approach delves into the social practices disrupted and the way in which privacy is disrupted in a given situation. While this approach is more flexible than a rigid overarching definition of privacy, it provides a framework in which to situate new contemporary privacy problems. Making and/or distributing visual recordings is an example that raises the issue whether an individual has a right to privacy and thus impliedly consents to reasonable infringements on that right.

As discussed below, if a person is visually recorded whilst they, for example, are using a toilet, undressing or engaging in a sexual activity; or if they are up-skirt filmed, a contextual approach protects the privacy of the person visually recorded. The effect of respecting a person's privacy is that the person visually recorded cannot be said to have impliedly consented to being visually recorded. In the same circumstances, if a person expressly consented to being visually recorded, their express consent should be valid unless it was vitiated. The issues underpinning the contextual approach to consent will now be fleshed out in more detail.

5.2.6.1 General Proposition: No Right to Privacy in a Public Place

Prosser's oft cited article on privacy sets out a general proposition that a person consents to intrusion as soon as they leave their home and thus there is no right to be let alone in a public place, for example a public street.[924] He states that if a person follows another person in a public place, it is no intrusion on the latter person's privacy. His comment (admittedly made in 1960) does not foresee the introduction of a stalking offence. More importantly, Prosser argues that taking a photograph of another person in a public place is not an invasion on privacy because it is no different from a person writing an account of what they saw in a public place.[925] Prosser's view normatively suggests that privacy in a public place is not worthy of protection.[926] In the context of making and/distributing visual recordings, Prosser's view is that if a person is in a public place they impliedly consent to being visually recorded by another person. Such a view requires one to distinguish a public place from a private place.

5.2.6.1.1 Distinction Between Public Place and Private Place

Paton-Simpson argues that a public place 'covers a wide range of locations, from bustling thoroughfares to remote getaways'.[927] It is doubtful whether a single definition of public and private place could serve all necessary purposes. Paton-Simpson notes that a public place may be publicly accessible, but also private in the sense of seclusion.[928] In the context of the Internet, Calvert and Brown argue that cyberspace can be a public place because millions of people can access vast amounts of information, but at the same time, it can be a private place where only people who pay a subscription may access some websites.[929] It is idea of restricting access that makes some parts of the web private.

The criminal offences pertaining to making visual recordings in breach of privacy and voyeurism shed more light on the notion of 'private place'. For example, the legislative response in Queensland to making and/or distributing visual recordings provides a definition of private place, which assists in separating a public and private place. In Queensland, a private place has been defined as 'a place where a person might reasonably be expected to be engaging in a private act'.[930] In turn, a private act is defined as '(a) showering or

---

[924] William L Prosser, 'Privacy' (1960) 48 *California Law Review* 383.
[925] Andrew McClurg, 'Bringing Privacy Law Out of the Closet: A Tort Theory of Liability for Intrusions in Public Places' (1995) 73 *NC Law Review* 989, 1025.
[926] Elizabeth Paton-Simpson, 'Privacy and the Reasonable Paranoid: The Protection of Privacy in Public Places' (2000) 50 *University of Toronto Law Journal* 305, 321.
[927] Ibid.
[928] Ibid 322.
[929] Clay Calvert and Justin Brown, 'Video Voyeurism, Privacy, and the Internet: Exposing Peeping Toms in Cyberspace' (2000) 18 *Cardozo Arts and Entertainment Law Journal* 469, 499.
[930] *Criminal Code* (Qld) s 207A.

bathing; or (b) using a toilet; or (c) another activity when the person is in a state of undress; or (d) intimate sexual activity that is not ordinarily done in public'.[931] The legislative response in Queensland does not define a public place, but logically it does not include a toilet, bathroom, bedroom or communal change room because these are places where private acts are done, and thus they are private places.

In contrast, the New South Wales provision for filming for indecent purposes does not refer to public or private place. Instead of using the public and private place dichotomy to inform whether conduct is criminalised, it refers to the intrusion on privacy. In particular, it refers to 'engaged in a private act', which occurs 'if the person is engaged in using the toilet, showering or bathing, carrying on a sexual act of a kind not ordinarily done in public or any other like activity'.[932] Similarly, the United Kingdom legislative response to voyeurism does not separate the concepts of public and private place, but rather refers to a 'private act'. This includes 'using the lavatory',[933] and 'doing a sexual act that is not of a kind ordinary done in public'.[934] Further, the Canadian voyeurism offence refers to a 'place in which a person can reasonably be expected to be nude, to expose his or her genital organs or anal region or her breasts, or to be engaged in explicit sexual activity'.[935] The New Zealand provision takes the same approach as the Canadian provision.[936] While it refers to place, it does not explicitly refer to public and private places, but focuses on the intrusion on privacy. The United States provision regarding video voyeurism is more explicit, and applies where the victim has a 'reasonable expectation of privacy', irrespective of whether the voyeurism occurs in a public or private place.[937]

Consequently, the legislative responses to voyeurism, and making and/or distributing visual recordings in breach of privacy are not necessarily anchored around the public and private place dichotomy. They focus on the intrusion on privacy, irrespective of whether it occurred in a public or private place, and usually hinge on a reasonable expectation of privacy. The notion of 'privacy' will be discussed below. The legislative responses illustrate that a bathroom, toilet, bedroom and communal change room are places where the expectation of privacy is paramount.

---

[931] *Criminal Code* (Qld) s 207A.
[932] *Summary Offences Act 1988* (NSW) s 21G(2)(b).
[933] *Sexual Offences Act 2003* (UK) s 68(1)(b).
[934] *Sexual Offences Act 2003* (UK) s 68(1)(c).
[935] *Criminal Code* (Can) s 162.
[936] *Crimes Act 1961* (NZ) s 216G.
[937] *Video Voyeurism Act* 18 USC §1801(b)(5(B) (2004).

5.2.6.1.2 Problems with the General Proposition that there is no Right to Privacy in a Public Place

Prosser's general proposition that there is no right to privacy in a public place is problematic. Firstly, it is 'grounded in the notion of consent'[938] and has been described as the 'knowledge equals consent' approach.[939] It assumes that people are aware that the risk to privacy is greater in public than in private.[940] It leaps from an 'awareness of risk to waiver of privacy'.[941] The general proposition implies that as the awareness of risk increases, the notion of 'privacy' erodes and ultimately there will be no right to privacy. When the awareness of risk changes over time and with advances in technology, there is a corresponding change in the expectation of privacy. For example, as people become more aware that others engage in up-skirt filming in shopping malls, does it follow that if a female walks into a shopping mall with a skirt on, she consents to others filming up her skirt? It is absurd to think that the answer to this question would be yes, but this is the unreasonable conclusion that is offered by Prosser's general proposition. Calvert and Brown developed this example in their excellent article on video voyeurism and argue that it would place a 'legal dress code on women. Wear a short skirt or dress and you take a risk. Wear slacks or pants and you're protected'.[942] Further, if a female does not mind whether other people see her underwear, she would choose not to wear a dress[943] or would pull her dress up herself.[944] Thus, it is unsound for the general proposition to equate an awareness of risk with a waiver of privacy.

To combat the changing nature of awareness of risk and expectations of privacy, Solove recommends a 'normative component'[945] in the conception of privacy and not simply a focus on 'current [or historical] expectations of privacy'[946] to shape future privacy laws.[947] While in theory this appears compelling, he does not develop the notion of 'normative component'. McClurg offers more guidance on how to tackle the changing awareness of risk issue by specifying that a person 'must have voluntarily consented to the

---

[938] Andrew McClurg, 'Bringing Privacy Law Out of the Closet: A Tort Theory of Liability for Intrusions in Public Places' (1995) 73 *NC Law Review* 989, 1039.
[939] JDR Craig, 'Invasion of Privacy and Charter Values: The Common-Law Tort Awakens' (1997) 42 *McGill Law Journal* 355, 396.
[940] Elizabeth Paton-Simpson, 'Privacy and the Reasonable Paranoid: The Protection of Privacy in Public Places' (2000) 50 *University of Toronto Law Journal* 305, 332.
[941] Ibid 333.
[942] Clay Calvert and Justin Brown, 'Video Voyeurism, Privacy, and the Internet: Exposing Peeping Toms in Cyberspace' (2000) 18 *Cardozo Arts and Entertainment Law Journal* 469, 495.
[943] Ibid.
[944] Ibid 496.
[945] Daniel Solove, 'Conceptualizing Privacy' (2002) 90 *California Law Review* 1087, 1142.
[946] Ibid.
[947] Ibid.

specific risk at issue'[948] and not merely be aware of the risk. According to McClurg, 'to find true consent, the plaintiff must have full knowledge of the risk and voluntarily choose to encounter it'.[949]

A further criticism with the general proposition that there is no right to privacy in a public place is that it fails to recognise the distinction between simply consenting to being in a public place and consenting to be visually recorded.[950] Paton-Simpson suggests that implied consent in a public place is limited to being casually observed by others nearby.[951] An observation by the naked eye is not the equivalent of making a visual recording.[952]

Making a visual recording intensifies the invasion of privacy compared to observing another person with the naked eye in three ways. Firstly, it allows a person making a visual recording to take an image of an individual and scrutinise the visual recording at a later date. As a result the person visually recorded 'loses control over an aspect of'[953] themselves. This is intensified when the visual recording captures moving images rather than still images because it enables the person making the visual recording to capture 'appearance, facial expressions, gestures, gaze, posture and even speech'.[954] Secondly, a visual recording may be a permanent record and intricate details that are not picked up by the naked eye in a transitory glance may be picked up in a visual recording at a later point in time.[955] Thirdly, as a visual recording may be a permanent record, it may be distributed, for example, on the Internet to a world wide audience,[956] or in a different context.[957] This is problematic because people dress and act according to their environment.[958] Therefore,

---

[948] Andrew McClurg, 'Bringing Privacy Law Out of the Closet: A Tort Theory of Liability for Intrusions in Public Places' (1995) 73 *NC Law Review* 989, 1040.
[949] Ibid 1039.
[950] Ibid 1039-40.
[951] Elizabeth Paton-Simpson, 'Privacy and the Reasonable Paranoid: The Protection of Privacy in Public Places' (2000) 50 *University of Toronto Law Journal* 305, 336.
[952] Andrew McClurg, 'Bringing Privacy Law Out of the Closet: A Tort Theory of Liability for Intrusions in Public Places' (1995) 73 *NC Law Review* 989, 1041.
[953] Ibid 1042.
[954] Ibid 1043. In fact, moving images can capture 'mood (anxiety, depression, happiness), attitude towards others (anger, love, wariness, boredom, impatience), mental state (concentration, puzzlement, self-confidence), or bodily state (fatigue, alertness, hunger)': 1044.
[955] Ibid 1042.
[956] Ibid.
[957] Ibid 1043. See also Elizabeth Paton-Simpson, 'Privacy and the Reasonable Paranoid: The Protection of Privacy in Public Places' (2000) 50 *University of Toronto Law Journal* 305, 321 on this issue. In particular, Paton-Simpson states that people act and dress differently in public places because they know that they will be scrutinized by others to some extent. In private places, people relax their guard because they know or believe they will only be scrutinized by family and friends.
[958] Andrew McClurg, 'Bringing Privacy Law Out of the Closet: A Tort Theory of Liability for Intrusions in Public Places' (1995) 73 *NC Law Review* 989, 1043. See also Standing Committee of Attorneys-General, *Unauthorised Photographs on the Internet and Ancillary Privacy Issues* (2005) <http://www.ag.gov.au> at 1 October 2005, [33].

consenting to being in a public place is not the same as consenting to being visually recorded and Prosser's general proposition ignores this distinction.

Another problem with Prosser's general proposition is that it assumes that people have a free choice in revealing information about themselves in public.[959] Paton-Simpson recognises that people often do not have a choice but to appear in public,[960] for example, a homeless person. Similarly, McClurg notes that people spend a lot of time in public places to survive in the community.[961] Homeless people, Indigenous and youth cultures spend a larger portion of their time in public places[962] than others in society who can afford to live in private places.[963] Thus, Prosser's general proposition is discriminatory and it is important to recognise privacy in public places because it enables more privacy equality.[964] For example, a homeless person's consent should not be automatically implied because they are generally always present in a public place.

The general proposition that there is no right to privacy in a public place assumes that people take precautions in public places if they wish to keep anything private.[965] McClurg states that people continuously take appropriate precautions to protect private body parts and private acts from the public view.[966] Similarly, Paton-Simpson maintains that reasonable people act according to the circumstances and do not act as though everyone is staring at them.[967] A person is deemed to have waived their right to privacy if they do not take appropriate precautions.[968] Thus, the general proposition that there is no right to privacy in a public place requires people to take appropriate precautions to protect their privacy in a public place, which is socially costly and discriminates against subcultures.[969] For example, if there was no right to privacy in a public place, some women may choose not to bathe topless at public beaches. It is important to recognise the right to privacy in a public place and not to automatically assume that topless female bathers at public beaches have lost their right to privacy.

---

[959] Elizabeth Paton-Simpson, 'Privacy and the Reasonable Paranoid: The Protection of Privacy in Public Places' (2000) 50 *University of Toronto Law Journal* 305, 337.
[960] Ibid 338.
[961] Andrew McClurg, 'Bringing Privacy Law Out of the Closet: A Tort Theory of Liability for Intrusions in Public Places' (1995) 73 *NC Law Review* 989, 1040.
[962] David Brown et al, *Brown, Farrier, Neal and Weisbrot's Criminal Laws - Materials and Commentary on Criminal Law and Process in New South Wales* (4th ed, 2006) 86.
[963] Elizabeth Paton-Simpson, 'Privacy and the Reasonable Paranoid: The Protection of Privacy in Public Places' (2000) 50 *University of Toronto Law Journal* 305, 343.
[964] Ibid.
[965] Ibid 321.
[966] Andrew McClurg, 'Bringing Privacy Law Out of the Closet: A Tort Theory of Liability for Intrusions in Public Places' (1995) 73 *NC Law Review* 989, 1137.
[967] Elizabeth Paton-Simpson, 'Privacy and the Reasonable Paranoid: The Protection of Privacy in Public Places' (2000) 50 *University of Toronto Law Journal* 305, 322.
[968] Ibid.
[969] Ibid 343 for an example on homosexuals.

In addition to the problems discussed above, the general proposition that there is no right to privacy in a public place, treats privacy as an 'all-or-nothing concept',[970] is 'too rigid',[971] and overlooks the difference between a loss of privacy to one or a few and a loss of privacy to the world at large.[972] It has also been described as 'unrealistic and places an unfair burden on those who value their privacy'.[973] Thus, Prosser's general proposition is problematic for the reasons outlined above. In the context of making and/or distributing visual recordings, it is absurd to think, for example, that people consent to up-skirt filming just because it happens when they are in a public place. Thus, privacy may exist in a public place.

5.2.6.2 Recognising that there is a Right to Privacy in a Public Place

McClurg[974] and Paton-Simpson[975] recognise a right to privacy in a public place and do not automatically imply consent to an intrusion on privacy merely because a person is in a public place. McClurg argues that people do not surrender all of their privacy (or consent to anything) merely because they venture into a public place:[976] 'Privacy is a matter of degree'.[977] Paton-Simpson suggests that one way of determining whether a person has impliedly consented to an intrusion on privacy in a public place is to 'imagine the likely response if express permission had been sought'.[978] For example, in the context of making and/or distributing visual recordings, if a person who had been visually recorded is likely to refuse to give express consent to being visually recorded, it could not be said that they impliedly consented to being visually recorded. However, this begs questions about whether implied consent should be determined subjectively from the perspective of the person visually recorded or objectively from the perspective of a reasonable or ordinary person. McClurg and Paton-Simpson support the notion of 'privacy' in a public place, which stems back to the 'legend of Lady Godiva and Peeping Tom of Coventry'.[979]

---

[970] Andrew McClurg, 'Bringing Privacy Law Out of the Closet: A Tort Theory of Liability for Intrusions in Public Places' (1995) 73 *NC Law Review* 989, 1040-1.
[971] Ibid 1041.
[972] Elizabeth Paton-Simpson, 'Privacy and the Reasonable Paranoid: The Protection of Privacy in Public Places' (2000) 50 *University of Toronto Law Journal* 305, 322.
[973] Andrew McClurg, 'Bringing Privacy Law Out of the Closet: A Tort Theory of Liability for Intrusions in Public Places' (1995) 73 *NC Law Review* 989, 1040.
[974] Ibid 1041.
[975] Elizabeth Paton-Simpson, 'Privacy and the Reasonable Paranoid: The Protection of Privacy in Public Places' (2000) 50 *University of Toronto Law Journal* 305.
[976] Andrew McClurg, 'Bringing Privacy Law Out of the Closet: A Tort Theory of Liability for Intrusions in Public Places' (1995) 73 *NC Law Review* 989, 1041.
[977] Ibid.
[978] Elizabeth Paton-Simpson, 'Privacy and the Reasonable Paranoid: The Protection of Privacy in Public Places' (2000) 50 *University of Toronto Law Journal* 305, 337.
[979] Ibid 327. This legend was described in more detail in chapter 1.

5.2.6.2.1 Conception of Privacy

As recognised above, there is a right to privacy in a public place and this in turn means that a person's consent to being visually recorded or having their image distributed on the Internet cannot be implied merely because the person was in a public place. Thus, if a person is in a public place, when should their consent to being visually recorded and/or having their image distributed on the Internet, be implied? The answer to this question depends on when the criminal law should protect the person's privacy and prompts an examination of the conceptual boundaries of privacy. Thus, the following discussion provides an overview of the concept of 'privacy'.

McClurg states that '[m]ost modern definitions of privacy offered by scholars are expansive enough to allow recognition of a right to privacy in public'.[980] While not defining the notion of 'modern', he does explicitly refer to Westin's definition of privacy. Westin's definition centres on the control of information about oneself.[981] He suggests that, in a public place, people do not expect to be under covert surveillance or have solitude, and they do expect to be observed by others.[982] His definition recognises a right to privacy in a public place and, goes on to identify some specific examples of public places such as shops, restaurants and hotels. It must be questioned whether his comment about covert surveillance applies in the 21st century when there is a prevalent use of surveillance cameras in public places, such as public malls, shopping centres and train stations. Further, the widespread use of visual recording technologies have made us aware that many people in society have the ability to capture our image and distribute it on the Internet, and thus our expectations about surveillance are likely to have shifted since 1967 when Westin made this comment.

Solove tracks different conceptions of privacy as falling under six headings.[983] The first conception was Warren and Brandeis' classic definition of the 'right to be let alone'.[984] The second conception involves protecting oneself from the access by others.[985] The third conception is anchored on secrecy, while the fourth conception is anchored on controlling information about oneself. Westin's definition of privacy is consistent with this fourth conception of privacy stated above.[986] The fifth conception as summarised by Solove hinges

---

[980] Andrew McClurg, 'Bringing Privacy Law Out of the Closet: A Tort Theory of Liability for Intrusions in Public Places' (1995) 73 *NC Law Review* 989, 1029.
[981] Alan Westin, *Privacy and Freedom* (1967) 7.
[982] Ibid 112.
[983] Daniel Solove, 'Conceptualizing Privacy' (2002) 90 *California Law Review* 1087, 1092.
[984] S Warren and L Brandeis, 'The Right to Privacy' (1890) IV *Harvard Law Review* 193, 195.
[985] See generally Ruth Gavinson, 'Privacy and the Limits of Law' (1980) 89 *The Yale Law Journal* 421 for more information on this conception of privacy.
[986] See generally Charles Fried, 'Privacy' (1968) 77 *The Yale Law Journal* 475 on this conception of privacy.

on protecting one's dignity and personality.[987] As will be seen below, dignity is particularly relevant to making a visual recording of a person who is using a toilet, showering or undressing. The final definition of privacy entails controlling access to intimate relationships.[988] Solove's work is useful because he collates the mainstream views of privacy in six pigeonholes.[989] However, it leaves unanswered whether making and/or distributing visual recordings neatly fall within one or more of these pigeonholes.

In most examples of making and/or distributing visual recordings, such as uploading an up-skirt film on the Internet, there are two intrusions on privacy. The first intrusion on privacy occurs when making a visual recording. It may breach a 'physical zone of privacy and the sense of security that comes with it'.[990] Thus, the first intrusion falls under the first and second definitions of privacy identified above by Solove; that is, the right to be let alone and to protect oneself from the access by others. The second intrusion on privacy occurs when a visual recording is distributed, for example, on the Internet. The distribution of a visual recording prohibits a person from controlling information about them.[991] Distributing a visual recording arguably falls under the fourth definition of privacy identified by Solove above, which is, controlling information about oneself. Consequently, the conduct involved in making and/or distributing visual recordings can be pigeonholed into several definitions of privacy illuminated above, but cannot always be confined to a single overarching definition of privacy tracked by Solove.

Solove does not rank or rate the six definitions above and criticises all of them for being 'too narrow or too broad'[992] or overlapping. For example, he disapproves of Warren and Brandeis' classic conception of privacy for failing to indicate how privacy is valued compared to other interests, for example, free speech,[993] and for not explaining the situations in which people should be let alone. Warren and Brandeis' conception is often misunderstood to support the 'non-interference by the state at all', when in fact it should support 'state

---

[987] See generally Edward J Bloustein, 'Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser' (1964) 39 *New York University Law Review* 962 on this conception of privacy.
[988] See especially Daniel Solove, 'Conceptualizing Privacy' (2002) 90 *California Law Review* 1087, 1092 and Charles Fried, 'Privacy' (1968) 77 *The Yale Law Journal* 475, 477 on this conception of privacy.
[989] See especially Edward J Bloustein, 'Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser' (1964) 39 *New York University Law Review* 962, Charles Fried, 'Privacy' (1968) 77 *The Yale Law Journal* 475, Ruth Gavinson, 'Privacy and the Limits of Law' (1980) 89 *The Yale Law Journal* 421, William L Prosser, 'Privacy' (1960) 48 *California Law Review* 383, and S Warren and L Brandeis, 'The Right to Privacy' (1890) IV *Harvard Law Review* 193.
[990] Clay Calvert and Justin Brown, 'Video Voyeurism, Privacy, and the Internet: Exposing Peeping Toms in Cyberspace' (2000) 18 *Cardozo Arts and Entertainment Law Journal* 469, 488.
[991] Ibid.
[992] Daniel Solove, 'Conceptualizing Privacy' (2002) 90 *California Law Review* 1087, 1092.
[993] Ibid 1101.

interference in the form of legal protection against other individuals'.[994] Gavinson criticises Warren and Brandeis' notion of 'privacy' for 'covering almost any conceivable complaint anyone could ever make'.[995] Solove does not adopt or promote any of the six conceptions, but develops his own approach.[996] As will be discussed below, his approach to privacy provides a useful structure for dealing with making and/or distributing visual recordings.

Solove avoids developing an overarching definition of privacy because such a definition often cannot be applied to a variety of scenarios involving privacy.[997] His flexible approach is path breaking because it provides a framework within which to situate multifarious invasions on privacy, which may emerge in the future as a result of advances in technology. The flexibility of his approach is important to making and/or distributing visual recordings because invasions on privacy evolve with advances in mobile phone cameras, video cameras and the Internet. Further, his approach does not involve segregating privacy intrusions into public and private places, and he is aware that the distinction between public and private places changes over time in any event, according to altering attitudes and advances in technology.[998] He suggests that the public and private dichotomy is informed by history and culture. Thus, Solove's approach is inconsistent with Prosser's general proposition that there is no right to privacy in a public place.

Solove conceptualises 'privacy' by concentrating on the 'types of disruption and the specific practices disrupted'.[999] He suggests that specific practices can be disrupted in several ways. He provides several examples, but the ones most pertinent to making and/or distributing visual recordings are interfering with a person's peace of mind, invading a person's solitude, destroying a person's reputation and ascertaining control of the facts about another person.[1000] Solove describes his approach as a 'bottom-up contextualized approach' and maintains that it is vital in 'today's world of rapidly changing technology'.[1001] Roberts also states that consent is a function of its context.[1002] The flexibility offered by a contextual approach to privacy is important because making and/or distributing visual recordings are regularly disrupting our social practices in changing ways due to advances in the capacity of mobile phone cameras, video cameras and the Internet. For example, the size of digital cameras has decreased to such an extent that they may be embedded in a person's shoe to enable up-skirt filming.

---

[994] Ibid.
[995] Ruth Gavinson, 'Privacy and the Limits of Law' (1980) 89 *The Yale Law Journal* 421, 438.
[996] Daniel Solove, 'Conceptualizing Privacy' (2002) 90 *California Law Review* 1087, 1126.
[997] Ibid, 1099.
[998] Ibid 1132.
[999] Ibid 1130.
[1000] Ibid.
[1001] Ibid 1154.
[1002] Paul Roberts, 'The Philosophical Foundations of Consent in the Criminal Law' (1997) 17 *Oxford Journal of Legal Studies* 389, 403.

Solove applies his contextual approach to privacy to *McNamara v Freedom Newspapers Inc*,[1003] which is a 1991 American case on the tort of public disclosure of private facts. While Solove's emphasis is on new problems not fitting into old conceptions of privacy, he chooses to illustrate his approach to privacy by using this case, which occurred almost 10 years before he published his journal article. While it is not clear why he chose this particular case, the facts of this case portray an example of making and distributing a visual recording. In that case, a high school boy's genitalia were unintentionally revealed on a soccer field and a newspaper published a photograph of the boy in such circumstances.[1004] The Court held that, as the photograph was taken in a public place, the boy could not argue that a photograph of his exposed genitals were private facts. This decision overlooks the notion that 'privacy' is a matter of degree and may exist in a public place. Solove disagrees with the Court's decision, and rightly so, and defends the boy's privacy. He advocates that there are social practices to conceal nude bodies and to excrete body wastes in private because these activities are embarrassing, distressing, 'animal-like', 'disgusting', 'vulnerable' and 'weak'.[1005] These social practices are 'deeply connected to human dignity', which falls under the fifth definition of privacy identified by Solove above. Solove states that

> [w]e scrub, dress, and groom ourselves in order to present ourselves to the public in a dignified manner. We seek to cover up smells, discharge, and excretion because we are socialized into viewing them with disgust. We cloak the nude body in public based on norms or decorum. These social practices, which relegate these aspects of life to the private sphere, are deeply connected to human dignity.[1006]

Similarly to Solove, Rothenberg suggests that 'intimate acts and intimate body parts' should be protected by privacy irrespective of whether the intrusion occurs in a public or private place,[1007] because they are connected to human dignity.[1008] Thus, the contextual approach to privacy suggests that the boy's privacy should have been protected. While a person visually recording the entire soccer match may have accidentally captured the boy's genitals, the person making the visual recording should never have distributed it to a newspaper for publication. Relating this back to consent, it could not be said that the boy consented to the newspaper publishing the visual recording.

[1003] 802 SW 2d, 904-5 (Tex. Ct. App. 1991).
[1004] Compare *Ettingshausen v. Australian Consolidated Press Ltd* (1991) 23 NSWLR 443. In that case, Ettingshausen was not visually recorded while playing a football game, but afterwards while he was showering.
[1005] Daniel Solove, 'Conceptualizing Privacy' (2002) 90 *California Law Review* 1087, 1148.
[1006] Ibid.
[1007] Lance Rothenberg, 'Re-thinking Privacy: Peeping Toms, Video Voyeurs, and the Failure of Criminal Law to Recognize a Reasonable Expectation of Privacy in the Public Space' (1999-2000) 49 *American University Law Review* 1127, 1158.
[1008] Ibid.

Solove's work could be extended to other examples of making and/or distributing visual recordings, and there are some obvious scenarios that would follow suit because they involve private acts or private body parts. These examples include where the person visually recorded is undressing in a change room, showering, using a toilet, engaging in sexual activities in a bedroom or being up-skirt filmed. However, Solove has not tackled the difficult examples in this area, such as whether the privacy rights of a topless female bather at a public beach or a child playing in a public park should be protected if they are the focal point of a visual recording and visually recorded without their knowledge. This chapter will fill this gap and address these two examples because they emerged in the media reports discussed in chapter 1 and were used in relation to the living-standard analysis tool in chapter 2.

In applying the contextual approach it is necessary to consider '[w]hat practices are being disrupted? In what ways does the disruption resemble or differ from other forms of disruption? How does this disruption affect society and social structure?'.[1009] It may be argued that topless female bathing is an accepted social practice in many countries including Australia.

Is the social practice of a topless female bather at a public beach disrupted, if she is visually recorded? Is a topless female bather disrupted in a similar way to a female who is up-skirt filmed? Both examples occur in public places, but just because a person is visually recorded in a public place does not automatically mean that they have lost their right to privacy as privacy may exist in a public place. Visually recording a topless female bather at a public beach is different to up-skirt filming because the topless female bather has chosen to expose her breasts to the public. While it is true that a female who is up-skirt filmed has chosen to wear a skirt in public, she has not chosen to expose her private body parts and/or underwear to the public. This is a key difference between up-skirt filming and visually recording a topless female bather. Perhaps a topless female bather is not disrupted because it could be said that she sought attention and is happy for other people to visually record her and distribute a visual recording of her. On the other hand, a topless female bather may be only happy if other people merely observe her body with their eyes or make a visual recording for their own purposes. To complete this example, it is assumed that topless female bathing is a social practice that is disrupted.

Making a visual recording of a topless female bather may disrupt their right to be let alone and their ability to shield themself from unwanted attention. However, simply looking at the topless female bather may also disrupt their right to be let alone and their ability to shield themselves from unwanted access. Protecting privacy to the extent that no-one is able to look at a topless female bather at a public beach is extreme and is very unrealistic. So, it seems that just because a disruption of a social practice can be linked back to one of

[1009] Daniel Solove, 'Conceptualizing Privacy' (2002) 90 *California Law Review* 1087, 1147.

the privacy definitions tracked by Solove, it should not mean that the person's privacy should necessarily be protected.

An element of 'reasonableness'[1010] must step in to determine whether a social practice should be protected against invasions on privacy. It is unreasonable to protect a topless female bather's privacy from others observing them in a public place because everyone should be free to look at other people with their eyes in a public place. It follows that a topless female bather at a public beach impliedly consents to being observed by the naked eyes of others.

Whether a topless female bather's privacy should be protected from others visually recording them at a public beach is less clear-cut. In this example, the person is not merely looking at the topless female bather with their naked eyes, but they are using visual recording equipment to make an image that may be permanent. At first instance, the contextual approach to privacy suggests that a topless female bather's privacy should be protected because it impinges on the person's right to be let alone and their ability to shield themselves from others, which are two of the conceptions of privacy identified by Solove and listed above. An element of reasonableness probably dictates that the balance should swing in favour of freedom of expression rather than privacy because the use of visual recording equipment is important in our daily lives.

Rather than jumping to a conclusion to protect freedom of expression over privacy in all instances of visually recording a topless female bather at a public beach, the contextual approach to privacy requires an examination of other contextual considerations. Examples of other contextual considerations may include whether:

- the person visually recorded is the focal point of the visual recording or is merely caught in the background;
- the person visually recorded is identifiable by the visual recording;
- the person visually recorded is engaging in a private act, or exposing private body parts or female breasts;
- the person making the visual recording does so for the purpose of sexual objection, voyeurism, humiliation or embarrassment; and

---

[1010] This is akin to the expression of 'a reasonable expectation of privacy', which as noted in chapter 4 is used in the legislative responses to making and/or distributing visual recordings: *Crimes Act 1966* (NZ) s 216G; *Sexual Offences Act 2003* (UK) s 68; *Video Voyeurism Act* 18 USC §1801(a) (2004); *Criminal Code* (Qld) s 227A; *Criminal Code* (Can) s 162(1); and *Summary Offences Act 1988* (NSW) s 21G(1)(a). 'A reasonable expectation of privacy' depends on the context. In addition to the element of 'a reasonable expectation of privacy', these offences recognise that without consent is a relevant consideration and thus, contain it as a separate element. Developing the notion of 'a reasonable expection of privacy' may be a simpler approach than a contextual approach to consent, but as will be shown in chapter 6, including 'without consent' as an element of a proposed offence and taking a contextual approach to consent obviates the need to embed 'a reasonable expectation of privacy' as an extra element.

- there is a relationship between the person making the visual recording and the person visually recorded.

This list of contextual considerations does not purport to be an exhaustive list and the factors have not been prioritised because it would lead to a false sense of precision. Clearly, a topless female bather is exposing female breasts, which falls within one of the contextual considerations listed above. Where the topless female bather is identifiable, the person is the focal point of the visual recording, and there is no relationship between the person making the visual recording and the topless female bather, the privacy of the topless female bather should be protected. In this situation, it could be argued that the topless female bather has not impliedly consented to being visually recorded. In contrast, consent may be implied and privacy may not be protected if, for example, a husband made a visual recording of his wife who was topless bathing at a public beach. In this latter situation, the relationship between the topless female bather and the person making the visual recording supports the waiver of privacy and infers implied consent. Even though it may be said that a topless female bather has not impliedly consented to being visually recorded, there are difficulties in criminalising this conduct on the basis of principle.

Chapter 2 highlighted concerns about criminalising the making of visual recordings of other people in public places and suggested that the freedom of expression of the person making the visual recording should take priority over the privacy of the person being visually recorded. A different conclusion would make a mockery of the criminal law given that visual recording technologies are ubiquitous. On the other hand, chapter 2 suggested that distributing a visual recording should be criminalised if it done for an undesirable social purpose such as sexual objectification, voyeurism, humiliation and embarrassment. Thus, it is necessary to consider whether a topless female bather impliedly consents to having a visual recording of her distributed to a wider audience or in a different context.

When a person not only makes a visual recording of the topless female bather, but also distributes it, for example on the Internet, the disruption relates more to the topless female bather being able to control information about themselves because the person who made the visual recording is free to control the information captured in the image. The cumulative affect of making and distributing visual recordings shows that this conduct is invasive on privacy because it falls within several of the privacy conceptions outlined by Solove. Thus, the contextual approach to privacy suggests that a topless female bather should be protected from other people distributing visual recordings of her. An element of reasonableness requires the purpose of the distribution to be considered, for example, if the visual recording is distributed on the Internet for the purpose of sexually objectification, voyeurism, humiliation or embarrassment, it is likely that the topless female bather's privacy should be protected and that she has not impliedly consented to the distribution.

A range of contextual factors may be taken into consideration in determining whether a person would have impliedly consented to having their image distributed. These include:

- the audience to which the visual recording is distributed, for example, is it distributed to a world wide audience or a small group of friends;
- where the visual recording is distributed, for example, whether the visual recording was uploaded to a voyeuristic website, an unknown website or a friend's facebook site;
- whether the person visually recorded is the focal point of the visual recording or is merely caught in the background;
- whether the person visually recorded is identifiable by the visual recording;
- whether the person visually recorded is engaging in a private act, or exposing private body parts or female breasts;
- the person distributing the visual recording does so for the purpose of sexual objection, voyeurism, humiliation or embarrassment; and
- whether there is a relationship between the person making the visual recording and the person visually recorded.

Once again, this list of contextual considerations is not exhaustive and any attempt to weight the factors would be open to criticism. Clearly, a topless female bather exposes female breasts, and this should be taken into account when determining whether she has impliedly consented to the distribution of the image. The topless female bather is unlikely to impliedly consent to, for example, her image being placed on a voyeuristic or unknown website, or being distributed by a person unknown to the topless female bather.

It is common practice for websites that permit the sharing of visual recordings to require the person uploading visual recordings to indicate that they have the consent of the person visually recorded.[1011] Thus, it is reasonable for a person distributing a visual recording of the topless female bather to obtain their express consent before distributing their visual recording, for example, on the Internet. It follows that the topless female bather does not impliedly consent to having a visual recording of her distributed. In such a case, it is necessary to obtain the topless female bather's express consent before distributing the visual recording.

If the situation was changed from visually recording a topless female bather to a child playing in a public park, the results would be similar. The contextual approach would protect the privacy rights of the child from being visually recorded, but reasonableness dictates that freedom of expression should be prioritised over privacy because being able to use visual recording technologies is an important activity in our daily lives in the 21st century. Parents, family and friends may have an inherent right to visually record their children playing

[1011] See especially http://www.facebook.com and http://www.myspace.com.

in a public park, and while it is concerning that everyone has an open invitation to make such visual recordings, the criminal law should not criminalise this conduct. The criminal law should prohibit people from distributing images of children where it is done for the purpose of sexual objectification, voyeurism, humiliation and embarrassment. In criminalising the distributing conduct, a child's consent is relevant and the contextual factors above should be considered. This of course, raises another thorny issue, that is, at what age is a child able to impliedly or expressly consent to having their image distributed? Perhaps an analogy could be made with other offences involving children.[1012]

While a contextual approach to privacy is appealing, it has shortcomings. For example, Solove's approach to privacy requires an identification of the specific practices disrupted and types of disruptions; and enables a decision maker to manipulate the conception of privacy to fit the circumstances, rather than being confined to one overarching definition of privacy and finding that a particular scenario is not protected by the definition of privacy. Bruyer states that the contextual approach attempts 'to have privacy be all things to all people, …[and] risks trivializing privacy for everybody'. The consequences of this were shown above, where making and/or distributing a visual recording of a topless female bather at a public beach fell within some of the definitions of privacy identified by Solove, and there was a need to use reasonableness as means of determining whether to protect her privacy and thus not imply consent. Despite the criticisms with Solove's approach, the Australian Law Reform Commission in its 2008 report on privacy labels Solove's approach as a 'useful template for law reform', 'pragmatic approach' and 'makes more sense' than using an overarching definition of privacy.[1013]

Solove states that 'conceptions can still be useful without having to be circumscribed by fixed and sharp boundaries',[1014] and this enables privacy to keep up with advances in technology. This is particularly significant to making and/or distributing visual recordings because the technology is continuously improving.

To recap the contextual approach to implied consent, it is based on the contextual approach to privacy. Privacy is a matter of degree and may exist in a public place. Thus, there may be public privacy. This notion may be viewed as an oxymoron,[1015] if public and private were viewed as a mutually exclusive dichotomy. However, public does not refer to place in this context, but refers to interests. The notion of 'public interest' was discussed above as an exception to the quantitative plus exceptions approach to consent. Chapter 2 considers the

---

[1012] For example in Queensland, a child under 12 years is incapable of consenting to rape: *Criminal Code* (Qld) s 349(3).

[1013] Australia, Australian Law Reform Commission, For Your Information: Australian Privacy Law and Practice, Report No. 108 (2008) [1.67].

[1014] Daniel Solove, 'Conceptualizing Privacy' (2002) 90 *California Law Review* 1087, 1098.

[1015] Andrew McClurg, 'Bringing Privacy Law Out of the Closet: A Tort Theory of Liability for Intrusions in Public Places' (1995) 73 *NC Law Review* 989, 1044.

principle of social welfare, which centres on public interests, and underpins the decision to criminalise conduct. Similarly, the next chapter will consider the public and private dichotomy from an interest, rather than a place, perspective as one of the ways of distinguishing criminal law from civil law.

There is no universal conception of 'privacy' that serves all purposes. While Solove's approach to privacy claims to offer more than a universal definition of privacy, his bottom up approach enables the legislature to adopt a conception of 'privacy' that fits the relevant scenario. As illustrated above, a person in a public place does not automatically waive their right to privacy and impliedly consent to being visually recorded or having their image distributed; this determination is dependent on the context.

In modern society, where technology is ubiquitous and visually recording other people in public places is a common incident of social intercourse, the scope of 'implied consent' is critical. The contextual approach to consent, discussed above, provides a tool for dealing with the notion of 'implied consent'. As noted above, there is no implied consent where the conduct is hostile or done with a hostile intent. In the context of making and/or distributing a visual recording, a person is unlikely to impliedly consent to being visually recorded or having their image distributed, if, for example, it is done so for the purpose of sexual objection, voyeurism, humiliation or embarrassment.

The purpose of discussing various approaches to the role of consent in criminal law is to illustrate that irrespective of which approach is followed consent is always relevant to making and/or distributing visual recordings. Thus, there is no need to single out a particular approach or prioritise the approaches. The criminal law should make a lack of consent an element of an offence pertaining to making and/or distributing visual recordings and it should respect a person's consent if they choose to be visually recorded or have their image distributed.

5.3 Conclusion

The myriad of approaches to consent examined in this chapter, that is, quantitative, quantitative plus exceptions, individual autonomy, paternalism, morality and contextual, suggest that the victim's consent is relevant to making and/or distributing visual recordings and that a lack of consent should be an element of an offence controlling this conduct. Thus, a particular approach to consent does not need to be singled out and the approaches do not need to be prioritised. It is difficult to draw the line between what should be criminalised and what should not be criminalised on the basis of consent.[1016] In fact, the principles in chapter 2, that is, harm, morality, social welfare, individual

[1016] Ian Freckelton, 'Masochism, Self-Mutilation and the Limits of Consent' (1994) 2 *Journal of Law and Medicine* 48, 55.

autonomy and punishment, did the real dividing work, but consent is an important feature in creating new offences in this area.

While the criminal law should respect a person's express consent where the conduct results in non-serious harm, it is the scope of 'implied consent' that is particularly important here because often the person visually recorded does not know they are being visually recorded at the time it is made. This chapter argues that topless female bathers at a public beach and children playing in a public park do not automatically impliedly consent to anyone making and/or distributing a visual recording of them. Their implied consent and waiver of privacy depends on a range of contextual considerations, for example:

- the audience to which the visual recording is distributed, for example, is it distributed to a world wide audience or a small group of friends;
- where the visual recording is distributed, for example, whether the visual recording was uploaded to a voyeuristic website, an unknown website or a friend's facebook site;
- whether the person visually recorded is the focal point of the visual recording or is merely caught in the background;
- whether the person visually recorded is identifiable by the visual recording;
- whether the person visually recorded is engaging in a private act, or exposing private body parts or female breasts;
- the person distributing the visual recording does so for the purpose of sexual objection, voyeurism, humiliation or embarrassment; and
- whether there is a relationship between the person making the visual recording and the person visually recorded.[1017]

People do not impliedly consent to up-skirt filming merely because they wear a skirt and go out in public, and people do not impliedly consent to being visually recorded in private places such as in a toilet, bathroom, bedroom or communal change room. Up-skirt filming and visually recording people in private places are not ordinary incidents of social intercourse. The individuals in such recordings also do not impliedly consent to having such visual recordings distributed. However, if a person expressly consents to being visually recorded in these instances or having such visual recordings distributed, the criminal law should respect their individual autonomy because of the low level of harm involved in this conduct compared to other more serious types of non-fatal offences against a person.

This chapter examined the conceptual boundaries of 'consent' and different approaches to the role of consent in the criminal law as a means of determining whether consent should be an element of offences pertaining to making and/or distributing visual recordings and whether a person impliedly consents to being visually recorded or having their image distributed to a wider audience merely

[1017] Note that there was some overlap between the list of contextual considerations for making and distributing a visual recording, and these have been synthesised into one list here.

because they appear in a public place. It concluded that a lack of consent should be element of offences pertaining to making and/or distributing visual recordings. It also suggested that implied consent should be based on contextual considerations and that there is no implied consent where a person making and/or distributing a visual recording does so for a socially undesirable purpose, including sexual objectification, voyeurism, humiliation and embarrassment.

The next (and final) chapter will combine the findings from this chapter regarding consent with the findings from the previous chapters to articulate a principled approach to criminalisation and apply it to specific examples of making and/or distributing visual recordings that arose in media reports. It will also compare the results of a principled approach to criminalisation with recent legislative responses and discuss any discrepancies.

6 CHAPTER 6: CONCLUSION

Whether making and/or distributing visual recordings should be criminalised is a contemporary issue that has emerged with the advent of enhanced technological capabilities and the widespread availability and use of mobile phone cameras, digital cameras, video cameras, web cams, email, the blogosphere and websites that encourage the community to upload visual recordings to the Internet. This conduct is at the margins of the criminal law and determining whether it should fall within the boundaries of the criminal law is a difficult issue, given that the criminal law in the 21st century has randomly expanded in, what at times has been, a reactive and unprincipled way to deal with modern issues and has been encroaching on the civil law. This thesis addresses this issue by taking a principled approach to determining whether making and/or distributing visual recordings should be criminalised.

A principled approach to criminalisation is founded on the literature.[1018] Ashworth is a leading commentator in this area and his work has been very valuable in shaping the principles[1019] used here, including protection from harm, preservation of morality, promotion of social welfare, respect for individual autonomy, punishment of the offender, the offender's culpability and the victim's consent, which were discussed in chapters 2, 3, 4 and 5. Chapter 2 recognised that public opinion, the media and political climate may shape the criminal law, but they do not form part of a principled approach to criminalisation. To sharpen the focus of the criminal law and to ensure that it develops in a principled manner, chapter 3 distinguishes criminal law from civil law. A principled approach to criminalisation is a normative approach and it should prove to be a useful resource to legislatures because it provides guidance on whether future types of conduct should be criminalised.

The arguments in this thesis are original and make a significant contribution to the criminalisation debate because they go well beyond the criminalisation literature and explore whether making and/or distributing visual recordings should be criminalised. While other researchers have considered making and/or distributing visual recordings from a torts perspective, it has rarely been explored from a theoretical or criminal law perspective.

[1018] See especially Andrew Ashworth, *Principles of Criminal Law* (5th ed, 2006), Nicola Lacey, Celia Wells and Oliver Quick, *Reconstructing Criminal Law Text and Materials,* Law in Context (3rd ed, 2003), Bernadette McSherry and Bronwyn Naylor, *Australian Criminal Laws: Critical Perspectives* (2004), Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (2nd ed, 2005), Mark Findlay, Stephen Odgers and Stanley Yeo, *Australian Criminal Justice* (3rd ed, 2005) and AP Simester and GR Sullivan, *Criminal Law Theory and Doctrine* (2003).

[1019] Andrew Ashworth, *Principles of Criminal Law* (5th ed, 2006) and Andrew Ashworth, 'Is the Criminal Law a Lost Cause?' (2000) 116 *The Law Quarterly Review* 225.

This chapter will now synthesise the discussion in chapters 2, 3, 4 and 5. In doing so, it will consider whether a principled approach to criminalisation supports the criminalisation of making and/or distributing a visual recording in four scenarios, which have been derived from the prominent media reports and were highlighted in chapter 1:

1. Child playing in a public park,
2. Topless female bather at a public beach,
3. Up-skirt filming at a shopping centre, and
4. Housemate showering in a bathroom.

In some instances, according to a principled approach to criminalisation, distributing a visual recording should be criminalised, but not making such a visual recording, and thus making a visual recording in the above four scenarios will be discussed separately from distributing where appropriate.

This chapter will then explore whether the current criminal law response to making and/or distributing visual recordings in New Zealand, Queensland, Canada, the United Kingdom and New South Wales,[1020] is appropriate when measured against a principled approach to criminalisation. These jurisdictions have been chosen because, as mentioned in chapter 1, they have provided a recent legislative response to this conduct and, by choosing five jurisdictions, it is easier to see whether there is a pattern in the way the criminal law treats this conduct. This chapter will conclude with some recommendations for further research in this novel area of criminal law.

6.1 A Principled Approach to Criminalising Four Scenarios

The principles underpinning criminalisation and, the distinctions between criminal law and civil law can be synthesised into two factors, that is, the seriousness of the conduct and interests affected by the conduct. Harm and punishment centre on the seriousness of the conduct, and suggest that conduct should only be criminalised if it is serious or grave. In contrast, the principles of social welfare and individual autonomy, and the prohibiting and pricing distinction, the public and private distinction and the hybrid approach, all place emphasis on the interests affected by the conduct in determining whether conduct is criminalised. While this thesis does not seek to weight the importance of the seriousness of the conduct and the interests affected by the conduct, because that would lead to a false sense of precision, only the latter

[1020] *Crimes Act 1961* (NZ) s 216G-N, which came into effect in December 2006; *Criminal Code* (Qld) s 227A-C, which came into effect in December 2005; *Criminal Code* (Can) s 162, which came into effect in November 2005; *Sexual Offences Act 2003* (UK) s 67, which came into effect in May 2004; and *Summary Offences Act 1988* (NSW) s 21G-H, which came into effect in March 2004.

factor provides a justification for criminalising some examples of making and/or distributing visual recordings.

It should be noted that the principle of morality and the essentialist approach to distinguishing criminal law from civil law have been discarded from this synthesis. The principle of morality should be used sparingly to justify the criminalisation of conduct in the 21st century because, for example, it is difficult to identify a universal understanding of morality and several modern offences have no or a limited moral dimension. Further, if a type of conduct is immoral, it may not necessarily mean that the conduct should be criminalised. Similarly, the essentialist approach is flawed because that suggests whether conduct is a crime is inherently obvious and fails to appreciate that the criminal law evolves over time to control contemporary problems and does not offer a framework within which to situate novel conduct.

The seriousness of the conduct and the interests affected by the conduct will be considered below and applied in the context of criminalising the four scenarios listed above. After concluding that some examples of making and/or distributing visual recordings should be criminalised on a principled basis, it is imperative to apply the appropriate standard of culpability and role of consent in framing offences pertaining to this conduct.

6.1.1 Seriousness of the Conduct

According to the risk of harm and actual harm distinction, the criminal law controls conduct where there is not only actual harm, but also when there is a risk of harm. In contrast, the civil law concentrates on actual harm. However, just because conduct involves actual harm or a risk of harm does not automatically mean that the conduct should be criminalised. Before conduct is criminalised on the basis of the harm principle, the level of harm should be serious or grave harm, in the sense that the harm impacts on a person's survival or their maintenance of minimal dignity and comfort.

The punishment and compensation distinction reinforces that the criminal law should be used to punish offenders while the civil law should be used to compensate victims. The higher penalties and stigma associated with the criminal law suggest that the criminal law should be used for serious wrongs and as a last resort. Thus, only serious or grave conduct should be criminalised on the basis of punishment. The notion of 'last resort' should not be a justification for criminalisation in its own right, but merely a reinforcement that supports the decision to criminalise the conduct. For example, the civil law would be ineffective where a person visually recorded is unidentifiable and is unable to bring an action in civil law, as in the case of up-skirt filming; or where damages cannot be calculated, for example, where a person is visually recorded playing in a public park, but it does not automatically follow that these types of making and/or distributing visual recordings should be criminalised

because the criminal law is the last resort. In fact, this conduct should only be criminalised if another principle supports their criminalisation.

Should any of the four scenarios be labelled as serious or grave? Up-skirt filming at a shopping centre and visually recording a housemate showering in a bathroom involve a greater invasion on privacy and autonomy and freedom from humiliation[1021] than making a visual recording of a child playing in a public park or a topless female bather at a public beach, but none of these four scenarios fall within the serious or grave levels of harm, and they are not serious wrongs. These scenarios cannot be categorised the same as, for example, rape and murder, which seriously or gravely affect a person's physical integrity.[1022]

Now turning the discussion to whether distributing a visual recording of the four scenarios is serious or grave. Distributing a visual recording should result in more harm and thus would be more serious than simply making a visual recording because it arguably involves a greater intrusion on privacy and autonomy, and freedom from humiliation. However, distributing a visual recording of a child playing in a public park, a topless female bather at a public beach, a housemate showering in a bathroom; or up-skirt filming at a shopping centre, should be described as non-serious. This conduct falls a long way short of the notions of 'serious' and 'grave' harm, and is not a serious wrong. Thus, distributing visual recordings of the four scenarios should not be criminalised on the basis of the seriousness of the conduct.

To recap the conclusions above, the non-serious nature of making and/or distributing visual recordings in the four scenarios does not support the decision to criminalise this conduct. However, it is necessary to consider the interests affected by the conduct, before reaching a principled conclusion.

6.1.2 Interests Affected by the Conduct

In the context of making and/or distributing visual recordings, the social welfare principle and the individual autonomy principle are more influential in the decision to criminalise this conduct on a principled basis. The prohibiting and pricing distinction, the public and private distinction and the hybrid approach fit neatly under the head of interests affected by the conduct because, as discussed in chapter 3, they place emphasis on social welfare interests. The literature suggests prioritising social welfare interests over individual interests, but this is challenging in this context because both of the relevant individual interests, that is, privacy and freedom of expression, are also both social welfare

[1021] Note that privacy and autonomy, and freedom from humiliation are generic-interest dimensions of the living-standard analysis tool, which grades the harm involved in conduct.
[1022] As discussed in chapter 2, physical integrity is another generic-interest dimension of the living-standard analysis.

interests. However, an appropriate balance between the competing interests of privacy and freedom of expression is reflected in the discussion below about the four scenarios.

While privacy is relevant to both factors, that is, seriousness of the conduct and interests affected by the conduct, under this latter head, the invasion on privacy does not need to reach a pre-ordained level of seriousness before conduct is criminalised, but is rather balanced against other interests.

The social welfare interest of privacy should be promoted where a person makes and/or distributes a visual recording of another who is undressing, showering, using a toilet and engaging in a sexual activity; and where the visual recording focuses on a person's private body parts. In these examples, society should protect the public's privacy interest more vigorously than an individual's private interest of freedom of expression because there is no acceptable reason to promote freedom of expression. Drawing on the four scenarios above, on this basis, making and/or distributing a visual recording of housemate showering should be criminalised, as well as up-skirt filming at a shopping centre and distributing such a film.

When it comes to merely making a visual recording of a child playing in a public park or a topless female bather at a public beach, the social welfare principle should promote freedom of expression rather than privacy because the ability to make visual recordings is a freedom worth protecting in the 21st century and, engaging in such conduct is now an incident of the common, social intercourse of life as it is so ubiquitous. Many members of the community may make visual recordings for a socially desirable purpose, such as recording family and friends.[1023] It is unrealistic to suggest that the criminal law should prohibit people from making visual recordings of other people in public places, and if the criminal law did so, it would stand to lose the respect of the community and would be very challenging to implement because law enforcers may never find the visual recordings unless they see the person actually making the visual recordings. Thus, it is suggested that the criminal law should protect freedom of expression and permit people to make visual recordings of a child playing in a public park and topless female bather at a public beach.

A person invades another person's privacy to a greater extent when they not only make a visual recording, but then they distribute it to a wider audience or

[1023] Note that 'socially desirable purpose' is better determined on a case-by-case basis. The Australian Law Reform Commission uses the term 'acceptable' visual recordings without exploring this further. They acknowledge the importance of 'family, friends, community bodies, school, media, the artistic community and others' being able to make and/or distribute visual recordings: Australia, Australian Law Reform Commission, For Your Information: Australian Privacy Law and Practice, Report No. 108 (2008) [69.131]. While many of the images made and/or distributed by these groups are likely to be for a socially desirable purpose, this is not necessarily the case. Clearly, sexual gratification, voyeurism, humiliation and embarrassment are not socially desirable purposes.

in an inappropriate context. For example, a person may visually record a child wearing a tight, wet swimming costume and upload it to a website that is designed for the sexual gratification of adults. This is very concerning because the distribution has been done for a socially undesirable purpose. While this particular example involves vulnerable members of society, this by itself does not mean that the conduct should be criminalised, but rather it is distributing visual recordings for a socially undesirable purpose that justifies the criminalisation of this conduct. This is an example of where the criminal law should step in to protect the social welfare interest of privacy rather than freedom of expression. Other socially undesirable purposes for distribution may include humiliation, embarrassment, voyeurism and sexual objectification. In these situations, the criminal law should protect the privacy of the child playing a public park and a topless female bather at a public beach, rather than the freedom of expression of the person distributing the visual recording.

To sum up the conclusions made under the head of interests affected by the conduct in terms of the four scenarios, it is appropriate to criminalise the following conduct:

- distributing a visual recording of a child playing in a public park where the distribution is for a socially undesirable purpose, for example, sexual gratification, voyeurism, humiliation or embarrassment;
- distributing a visual recording of a topless female bather at a public beach where it is distributed for a socially undesirable purpose, for example, sexual gratification, voyeurism, humiliation or embarrassment;
- up-skirt filming and distributing an up-skirt film; and
- making and/or distributing a visual recording of a housemate showering in a bathroom.

Having determined that this list of examples of making and/or distributing visual recordings should be criminalised, the next step is to apply the appropriate standard of culpability to them.

6.1.3 Appropriate Standard of Culpability

The culpability distinction between criminal law and civil law suggests that the criminal law should employ a subjective standard of culpability, and this is true in the context of making and/or distributing visual recordings. However, before applying a subjective standard of culpability to the examples listed above, this section will recap why objective and no-fault standards of culpability should be dispensed with in this area.

An objective standard of culpability can be discarded in the context of making and/or distributing visual recordings because, for example, this conduct is not extremely dangerous and it does not cause extensive public injury. Further, the

imposition of an objective standard would be unfair to those people who unable to meet such a standard because of an intellectual or physical ability or who are unaware of the risks associated with their conduct. An objective standard of culpability also relies on a shared understanding of reasonable or ordinary, otherwise it may be applied inconsistently.

A no-fault standard of culpability should also be rejected in the context of making and/or distributing visual recordings because the conduct, on the one hand, is not trivial, but on the other, the conduct is not serious enough so as to necessitate extreme care. The conduct in question falls somewhere in between these two limits. Even though there are many benefits to having a no-fault standard of culpability, for example, expediency, compliance and ease of proof by the Crown, these considerations are not specially applicable to making and/or distributing visual recordings and thus do not justify why this conduct should attract a no-fault standard of culpability.

Even though a subjective standard of culpability, for example, intention or recklessness, is usually associated with serious conduct and making and/or distributing visual recordings is non-serious and has low-stigma, a subjective standard of culpability places emphasis on the purpose for which a person made and/or distributed a visual recording rather than the consequences of the conduct, and the purpose is important because if a person engages in this conduct for a socially desirable purpose, it should not be criminalised. If person engages in this conduct for the purpose of sexual objectification, voyeurism, humiliation or embarrassment, there is a principled argument for criminalising this conduct.

It is necessary to build subjective culpability into the examples of making and/or distributing visual recordings that should be criminalised. It is difficult to see how a person who makes and/or distributes an up-skirt film, or a visual recording of a housemate showering in a bathroom, could possibly argue that they have done so for a socially desirable purpose and, that their purpose justifies the prioritisation of freedom of expression over privacy. More than likely their purpose is for sexual gratification, voyeurism, humiliation or embarrassment, which is socially undesirable and, their conduct should be criminalised. Thus in these situations, intention and recklessness should be included as the relevant standard of culpability rather than the specific intention of a socially undesirable purpose.

A person who distributes a visual recording of a child playing in a public park or a topless female bather at a public beach, may do so for many reasons, including sharing visual recordings with family and friends, which is a socially desirable purpose. However, where a person intentionally or recklessly distributes such a visual recording for a socially undesirable purpose, for example, sexual gratification, voyeurism, humiliation or embarrassment, the conduct should be criminalised. The offender's purpose for making and/or distributing a visual recording, could be determined on the basis of a

confession, or in the absence of that, inferred from the contextual considerations listed below for implied consent.

After embedding a subjective standard of culpability, the examples of making and/or distributing visual recordings that should be criminalised remain relatively unchanged because the purpose of the offender was already factored into the examples of the child playing in a public park and a topless female bather at a public beach, when privacy interests were balanced against freedom of expression under the head of interests affected. However, a subjective standard of culpability, in the sense of the offender's purpose or intention rather than the consequences of the conduct, needs to be built into the examples of up-skirt filming and distributing an up-skirt film, and making and/or distributing a visual recording of a housemate showering in a bathroom. Attaching a socially undesirable purpose to the examples of up-skirt filming and the housemate showering does not add any value because an offender is unlikely to have a socially desirable purpose in such instances, so it is more important to specify intention and recklessness as the appropriate subjective standard of culpability. Accordingly, the following examples of making and/or distributing visual recordings should be criminalised:

- *intentionally or recklessly* distributing a visual recording of a child playing in a public park where the distribution is for a socially undesirable purpose such as sexual gratification, voyeurism, humiliation or embarrassment;
- *intentionally or recklessly* distributing a visual recording of a topless female bather at a public beach where it is distributed for a socially undesirable purpose such as sexual gratification, voyeurism, humiliation or embarrassment;
- *intentionally or recklessly* up-skirt filming and distributing an up-skirt film; and
- *intentionally or recklessly* making and/or distributing a visual recording of a housemate showering in a bathroom. (*New elements emphasised*)

As discussed earlier in this thesis, consent then becomes an essential consideration.

6.1.4 Role of Consent

There are a number of approaches to the role of consent in the criminal law including the quantitative, quantitative plus exceptions, individual autonomy, paternalism, morality, and contextual. Irrespective of which approach is adopted, they all suggest that the consent of the person visually recorded should be relevant to offences pertaining to making and/or distributing visual recordings. As a result, there is no need to rate or weight the different approaches.

Consent may be express, implied or tacit. If a person consents to this conduct, the criminal law should respect their consent. Thus, a lack of consent should be element of any offence controlling making and/or distributing visual recordings. For example, if a housemate expressly consents to a fellow housemate making and/or distributing a visual recording of them as they shower in a bathroom, the criminal law should respect their consent and not criminalise the conduct of the person making and/or distributing such a visual recording. In the absence of express consent, there is not likely to be implied consent in a private place, including a bathroom. Similarly, in any of the other examples of making and/or distributing visual recordings that should be criminalised, if the person visually recorded expressly consents to the conduct, the criminal law should respect it and not criminalise the conduct.

In framing criminal offences pertaining to making and/or distributing visual recordings, it is the conception of 'implied consent' that is particularly important as the person visually recorded is often unaware that they are visually recorded at the time it happens, sometimes only becoming aware of the visual recording once it has been distributed on the Internet or otherwise. A contextual approach to consent clarifies the notion of 'implied consent' in the modern criminal law in the context of making and/or distributing visual recordings. This approach recognises that when a person enters a public place they do not necessarily impliedly consent to being visually recorded or having such a visual recording distributed. The person has not necessarily waived their right to privacy because privacy may exist in a public place. For example, it is illogical to suggest that if a female wears a skirt or dress to a shopping centre, she impliedly consents to being up-skirt filmed or having such an image distributed to a wider audience. The criminal law should step in to prohibit this conduct as there is no implied consent in this situation.

In contrast, it is no so clear-cut whether a child playing in a public park or topless female bather at a public beach impliedly consents to their image being distributed, because the reactions of children and topless female bathers will vary from person to person. However, a contextual approach to the conception of 'implied consent' requires the consideration of a range of factors including:

- the audience to which the visual recording is distributed, for example, is it distributed to a world wide audience or a small group of friends;
- where the visual recording is distributed, for example, whether the visual recording was uploaded to a voyeuristic website, an unknown website or a friend's facebook site;
- whether the person visually recorded is the focal point of the visual recording or is merely captured incidentally in the background;
- whether the person visually recorded is identifiable by the visual recording;

- whether the person visually recorded is engaging in a private act, or exposing private body parts or female breasts;[1024]
- the person distributing the visual recording does so for the purpose of sexual objection, voyeurism, humiliation or embarrassment; and
- whether there is a relationship between the person making the visual recording and the person visually recorded.

If it is assumed that a child playing in a public park and a topless female bather are identifiable and the focal point of two separate visual recordings that are distributed to a world wide audience via, for example, a voyeuristic website, it could be reasonably argued that the child and the topless female bather did not impliedly consent to the distribution. Even if the distribution was done by a person in a position of trust to the person visually recorded, it could not be said that there was implied consent in this situation. Further, there would be no implied consent if a person distributed a visual recording on a facebook site, for example, of a child playing in a public park or a topless female bather at a public beach, if it is distributed for the purpose of humiliation or embarrassment. In such a situation, it should be appropriate to require the express consent of the person visually recorded before distributing the visual recording.

Having incorporated the role of consent, a principled approach to criminalisation suggests that the following examples of making and/or distributing visual recordings should be criminalised:

- intentionally or recklessly distributing a visual recording of a child playing in a public park where the distribution is for a socially undesirable purpose such as sexual gratification, voyeurism, humiliation or embarrassment, *and without consent*;
- intentionally or recklessly distributing a visual recording of a topless female bather at a public beach where it is distributed for a socially undesirable purpose such as sexual gratification, voyeurism, humiliation or embarrassment, *and without consent*;
- intentionally or recklessly up-skirt filming and distributing an up-skirt film *without consent*; and
- intentionally or recklessly making and/or distributing a visual recording of a housemate showering in a bathroom, *without consent*. (*New elements emphasised*)

In the absence of the express consent of the person in the visual recording, consent should be determined on a case-by-case basis with reference to the contextual factors listed above.

[1024] Note that as discussed in chapter 2, female breasts are not included in the notion of 'private body parts'.

The next section will compare the results from a principled approach to criminalisation to the current criminal laws in New Zealand, Queensland, Canada, the United Kingdom and New South Wales.

6.2 Comparing a Principled Approach to Criminalisation and the Current Criminal Law Response to the Four Scenarios

By considering five jurisdictions, it is instructive to determine whether there is a pattern in the criminal law's response to making and/or distributing visual recordings. As mentioned in chapter 1, New Zealand, Queensland, Canada, the United Kingdom and New South Wales have been chosen because they have enacted recent criminal offences relating to this conduct, and the following table provides a snapshot of their responses.

Offence or Element	**New Zealand**	**Queensland**	**Canada**	**United Kingdom**	**New South Wales**
An offence for making a visual recording of a person doing a private act (for example showering, using a toilet, undressing, or an intimate sexual activity) without their consent	Yes: *Crimes Act 1961* (NZ) s 216H	Yes: *Criminal Code* (Qld) s 227A	Yes: *Criminal Code* (Can) s 162(1)	Yes: *Sexual Offences Act 2003* (UK) s 67(3)	Yes: *Summary Offences Act 1988* (NSW) s 21G
An offence for distributing a visual recording of a person doing a private act without their consent	Yes: *Crimes Act 1961* (NZ) s 216J	Yes: *Criminal Code* (Qld) s 227B	Yes: *Criminal Code* (Can) s 162(4)	No	No
An offence for making or distributing a visual recording of a person in a public place without their consent	No	No	No	No	No

Offence or Element	New Zealand	Queensland	Canada	United Kingdom	New South Wales
An offence for making and distributing an up-skirt film without the person's consent	Yes: *Crimes Act 1961* (NZ) ss 216H and 216J	Yes: *Criminal Code* (Qld) s 227A(2)	No	No	No
Subjective standard of Culpability	Intention, reckless, knowledge	Intention	Sexual purpose	Intention and knowledge	Purpose of sexual arousal or sexual gratification
Consent is relevant	Yes	Yes	Yes	Yes	Yes
Defines visually records	Yes: *Crimes Act 1961* (NZ) s 216G(1)	Yes: *Criminal Code* (Qld) s 207A	Yes: *Criminal Code* (Can) s 162(2)	No	No, but films another person includes still or moving images: *Summary Offces Act 1988* (NSW) s 21G(2)
Defines distribute	Defines publishes and sells: *Crimes Act 1961* (NZ) s 216J(2)	Yes: *Criminal Code* (Qld) s 227B(2)	Lists distributes as well as a range of similar words such as prints, copies and publishes: *Criminal Code* (Can) s 162(4)	No, does not cover distributing	No, does not cover distributing

With respect to making and/or distributing a visual recording of a child playing in a public park or a topless female bather at a public beach, the criminal law in New Zealand, Queensland, Canada, the United Kingdom and New South Wales does not criminalise this conduct.[1025] Even if this conduct is done without consent and for a socially undesirable purpose, it is not an offence in these jurisdictions.

[1025] See generally *Crimes Act 1966* (NZ); *Criminal Code* (Qld); *Criminal Code* (Can); *Sexual Offences Act 2003* (UK) and *Summary Offences Act 1988* (NSW). Elsewhere, I have argued that this conduct does not fall within other criminal and quasi-criminal offences including stalking, public nuisance and indecent acts: Kelley Burton, 'Why Voyeurs Can Get Away With It' (2005) 25 *Proctor* 19.

Consistently, the principled approach to criminalisation advocated in this thesis suggests that making these visual recordings should not be criminalised because such conduct is worth protecting in the 21st century. Similarly, the stakeholders who contributed to the 2008 Australian Law Reform Commission Report on privacy did not recommend the criminalisation of making visual recordings of children or adults.[1026] In particular, they recognise the importance of "family, friends, community bodies, schools, media, the artistic community and others"[1027] being able to make and distribute "acceptable"[1028] visual recordings.

On the other hand, a principled approach to criminalisation supports the criminalisation of distributing a visual recording of a child playing in a public park or a topless female bather at a public beach, where it is done without consent and for the purpose of sexual gratification, voyeurism, humiliation or embarrassment, because these are socially undesirable purposes. As highlighted above, the criminal laws currently do not regulate this conduct, and as a result, a principled approach to criminalisation suggests that the scope of the criminal law in these jurisdictions could expand further to deal with this modern issue.

With regard to up-skirt filming without consent, this conduct is specifically criminalised in New Zealand and Queensland.[1029] Further, distributing an up-skirt film without consent, for example, on the Internet, is also criminalised in New Zealand and Queensland.[1030] While these provisions in New Zealand and Queensland include a subjective standard of culpability, they are not confined to a socially undesirable purpose. However, this is of no consequence because a person engaging in this conduct is unlikely to be successful in arguing that they are doing so for a socially desirable purpose. Criminalising up-skirt filming and distributing such film without consent is also rightly supported by a principled approach to criminalisation. In contrast, Canada, the United Kingdom and New South Wales do not specifically criminalise making and/or distributing up-skirt films without consent.[1031] This conduct should definitely be criminalised, and Canada, the United Kingdom and New South Wales

---

[1026] Australia, Australian Law Reform Commission, For Your Information: Australian Privacy Law and Practice, Report No. 108 (2008) [69.131]. Note that making and/or distributing visual recordings was not a primary focus of the Australian Law Reform Commission, but a small section of the report focused on visually recording children.

[1027] Ibid.

[1028] Ibid. Note that the Australian Law Reform Commission did not explore the notion of 'acceptable visual recordings'.

[1029] *Crimes Act 1961* (NZ) s 216G(1)(b)(i); and *Criminal Code* (Qld) s 227A(2). See also Kelley Burton, *Naked and Digital Eyes* (2006) Online Opinion <http://www.onlineopinion.com.au> at 7 December 2006 and Kelley Burton, 'New Visual Recording Offences' (2006) 26 *Queensland Lawyer* 188 regarding the scope of the relevant Queensland criminal laws.

[1030] *Crimes Act 1961* (NZ) s 216J; and *Criminal Code* (Qld) s 227B(1).

[1031] See generally *Criminal Code* (Can); *Sexual Offences Act 2003* (UK); and *Summary Offences Act 1988* (NSW).

should take a stand to extend the boundaries of the criminal law to prohibit this conduct.

In relation to making a visual recording of a housemate showering in a bathroom without consent, this is an offence in New Zealand, Queensland, Canada, the United Kingdom and New South Wales.[1032] While the provisions include a subjective standard of culpability, they are not confined to a socially undesirable purpose. In contrast, the equivalent offences in the United Kingdom and New South Wales are more limited than the provisions in New Zealand, Queensland and Canada because the United Kingdom offence requires the visual recording to be made for sexual gratification, while the New South Wales provision requires the visual recording to be made for sexual arousal or sexual gratification.

A principled approach to criminalisation appropriately supports the criminalisation of making a visual recording of a housemate showering in a bathroom without consent for a socially undesirable purpose. Thus, the United Kingdom and New South Wales should certainly expand their offences in this area to criminalise this conduct if it occurs for other socially undesirable purposes such as humiliation or embarrassment. The fact that the New Zealand, Queensland and Canadian provisions do not refer to a socially undesirable purpose is of no consequence because it is unlikely that a person could argue that they engaged in this conduct for a socially desirable purpose and thus these provisions can remain the same.

It is also an offence to distribute a visual recording of a housemate showering in a bathroom without consent in New Zealand, Queensland and Canada.[1033] These offences include a subjective culpability and it does not matter that they are not limited to socially undesirable purposes because a person engaging in this conduct is almost never likely to be doing so for an acceptable reason. However, distributing such an image is not a specific offence in the United Kingdom and New South Wales,[1034] and these jurisdictions need to step in and ensure that this conduct is prohibited.

Determining the boundaries of the criminal law is problematic when done on an ad hoc basis rather than a principled one. Using a principled approach to criminalisation in the context of making and/or distributing visual recordings has illustrated that some examples of this conduct should fall within the realm of the criminal law and that the criminal law in New Zealand, Queensland, Canada, the United Kingdom and New South Wales should be expanded in a principled manner to deal with this issue.

[1032] *Crimes Act 1966* (NZ) s 216G(1)(a)(iii); *Criminal Code* (Qld) s 227A(1)(b)(ii); *Criminal Code* (Can) s 162(1)(b); *Sexual Offences Act 2003* (UK) s 67(3); and *Summary Offences Act 1988* (NSW) s 21G(1).

[1033] *Crimes Act 1966* (NZ) s 216J(1); *Criminal Code* (Qld) s 227B(1); and *Criminal Code* (Can) s 162(4).

[1034] See generally *Sexual Offences Act 2003* (UK) and *Summary Offences Act 1988* (NSW).

6.3 Conclusion

Whether legislatures should criminalise making and/or distributing visual recordings is a timely topic given the growing importance of this conduct in the 21st century, the inconsistent national and international legislative responses to it, and the fact that it is an example of conduct that does not sit clearly within the core of the criminal law. The principles of harm, morality, individual autonomy, and punishment do not support the criminalisation of this conduct, but the principle of social welfare does suggest that in some examples, the conduct should be criminalised because privacy should be prioritised over freedom of expression. Legislatures across the world should reflect on their current criminal laws pertaining to making and/or distributing visual recordings and, take action to advance the criminal law in a principled, rather than random manner. Legislation in this area needs to be specifically tailored so as not to totally prohibit the ability to make and/or distribute visual recordings. The following model legislation reflects the discussion in this thesis.

Any person who intentionally or recklessly:

(a) makes a visual recording of another person whilst they are engaging in a private act without their consent;
(b) distributes a visual recording of another person whilst they are engaging in a private act without their consent;
(c) distributes a visual recording, for a socially undesirable purpose, of another person whilst they are present in a public place without their consent;
(d) up-skirt films another person without their consent; or
(e) distributes an up-skirt film of another person without their consent;

is guilty of an offence.[1035]

For the purposes of this section:

visual recording means a moving or still image.[1036]

distributes includes (a) communicates, exhibits, sends, supplies or transmits to someone, whether to a particular person or not; (b) makes available for access by someone, whether by a particular person or not; and (c) enters into an

[1035] The person making and/or distributing the visual recording in the model legislation must intend or be reckless as to the conduct specified in (a), (b), (d) and (e), and with regard to (c) they must intend or be reckless as to a socially undesirable purpose. Intention is not necessary and recklessness will suffice.

[1036] This is based on the definition of visually record in *Criminal Code* (Qld) s 207. As noted in chapter 1 at 1.2.8, Queensland and New Zealand provided the most recent legislative responses to this conduct compared to the other jurisdictions discussed in this thesis, and they use the term visually record. The comparative conceptions in the other jurisdictions discussed in this thesis are outlined at 1.2.8. As a result, the model legislation utilises the contemporary notion of visual recording in preference to a lengthy list including photographs and films.

agreement or arrangement to do something in paragraph (a) or (b); and (d) attempts to distribute.[1037]

public place includes a place accessible by the public.[1038]

private act means (a) showering or bathing; (b) using a toilet; or (c) another activity when a person is in a state of undress or (d) intimate sexual activity that is not ordinarily done in public.[1039]

socially undesirable purpose includes sexual gratification, voyeurism, humiliation and embarrassment.[1040]

In constructing offences in context of making and/or distributing visual recordings, the offender's culpability, in the sense of whether they engaged in this conduct for a socially undesirable purpose, and the victim's lack of consent, are vital elements. While this thesis has focussed on a specific type of conduct at the margins of the criminal law today, its usefulness stems well beyond today and equips the legislatures of tomorrow, across the globe, with a criminalisation framework that can be applied to emerging types of conduct, and provides a fresh approach on how to determine the appropriate boundaries of the evolving criminal law.

[1037] This is identical to *Criminal Code* (Qld) s 227B(2). As discussed at 1.2.9, this conception is preferred over the definitions in the other jurisdictions canvassed in this thesis because it is more encompassing.

[1038] As the literature discussed at 5.2.6.1.1 noted that the term public place is frought with difficulty, a broad inclusive definition of public place has been preferred in the model legislation. The current legislative responses to this conduct do not define public place.

[1039] This definition mirrors the definition of private act in *Criminal Code* (Qld) s 207A. As discussed at 5.2.6.1.1, the other jurisdictions discussed in this thesis provide a consistent definition, but their provisions are generally more verbose.

[1040] Defining sexual gratification, voyeurism, humiliation and embarrassment expressly in the legislation is unnecessary because the broader notion of socially undesirable purpose is inclusive rather than exhaustive. Further, restrictive definitions may not enable this legislation to shift with changes in society. The ordinary meanings of these notions should be applied in subsequent case law.

REFERENCES

Australian Police Arrest Nudists (2000) BBC News at 23 August 2005.

Crackdown Planned on Pervert Photos (2007) News Limited <http://www.news.com.au/story>.

'Cyber Law to be Tightened, Says Maran', *The Hindu* (India), 13 July 2006.

Ex-policeman Filmed Girls in Shower (2007) News Limited <http://www.news.com.au> at 18 May 2007.

'First Voyeurism Sentence 'a slap in the face,' says woman who proposed law', *Halifax Chronicle-Herald* (Amherst), 1 September 2006.

'Former State Worker Appeals Sentence for Taping Girls', *Associated Press Newswires* (Santa Fe), 18 June 2006.

'Law School Student's Roommate Shocked He was the Star in a Shower Scene: Campus Soap Opera', *National Post* 21 June 2006.

'Man Convicted under New Voyeurism Law Gets 90 Days in Nova Scotia Jail', *Halifax Chronicle-Herald* (Amherst), 29 September 2006.

'N.S. Man who Videotaped Girl in Shower Pleads Guilty to Voyeurism', *Halifax Chronicle-Herald* (Amherst), 30 August 2006.

'N.S. Voyeur Convicted under New Law', *Canada Digest* (Amherst), 29 September 2006.

'Not a Pretty Picture in this Legal Minefield', *Sydney Morning Herald* (Sydney), 30 August 2005.

'Parents Warned Over Online Beach Photos', *The Age* 27 January 2005.

'Peeping Tom Incident Prompts 'Fishbowl' Warning', *Times-Colonist* (Victoria, Canada), 4 August 2006, 24.

'Schoolies Urged to Look out for Peers', *Courier-Mail* (Gold Coast), 20 November 2006.

'Second Man Held Over Snaps of Women at Tennis', *Sydney Morning Herald*, 22 January 2007.

'Senate Passes Bill to Prohibit Employers from Taping Employees in Changing Rooms', *US Federal News* (New York), 25 May 2006.

'Shower Spy is Spared Prison', *Daily Mirror* 8 September 2006, 35.

'Teacher 'Films up Teen's Skirt' at Shopping Centre', *Sydney Morning Herald* 12 May 2007.

'Teacher Appears in Court Today', *Vancouver Sun* 24 August 2006, 22.

Teacher Refused Bail in 'Upskirt' Case (2007,) News Limited <http://www.news.com.au> at 12 May 2007.

'Teen Put on Gay Site May Lead to Camera Ban', *Herald Sun* 3 April 2002.

'Topless Photos Prove Costly', *Herald Sun* 2 December 2004.

'Torquay Man's 'Abhorrent' Collection 10,000 child porn pics', *Geelong Advertiser* 7 July 2006.

Tram Voyeur 'Filmed Up Skirts' (2007) News Limited <http://www.news.com.au/story>.

'An Unnecessary Video Intrusion: Security Worries Don't Justify Assault on Personal Privacy', *Calgary Herald* 11 July 2006.

'Vic-Police Powerless to Act on Gay Website Containing Schoolboys', *Australian Associated Press*, 22 February 2002.

'Victorian Charged Over Indecent Schoolies Photos', (Gold Coast), 2006.

'Voyeur Guilty', *The Plain Dealer* (Cuyahoga Falls), 28 September 2006.

Alexander, Larry, 'Crime and Culpability' (1994) 5 *Journal of Contemporary Legal Issues* 1.

Alexander, Larry, 'Insufficient Concern: A Unified Conception of Criminal Culpability' (2000) 88 *California Law Review* 931.

Armstrong, Jeremy, 'Tan Horror Man Guilty', *Daily Mirror* (Staffs), 3 June 2006.

Ashworth, Andrew, 'Criminal Attempts and the Role of Resulting Harm under the Code, and in the Common Law' (1988) 19 *Rutgers Law Journal* 725.

Ashworth, Andrew, 'Is the Criminal Law a Lost Cause?' (2000) 116 *The Law Quarterly Review* 225.

Ashworth, Andrew, *Principles of Criminal Law* (5th ed, 2006).

Attorneys-General, Criminal Law Officers Committee of the Standing Committee of, *Chapter 2 General Principles of Criminal Responsibility,* Final Report Model Criminal Code (1993).

Attorneys-General, Criminal Law Officers Committee of the Standing Committee of, 'Chapter 5 Fatal Offences Against the Person' in *Final Report Model Criminal Code* (1993).

Attorneys-General, Model Criminal Code Officers Committee of the Standing Committee of, *Non Fatal Offences Against the Person* (1998).

Australia, Australian Law Reform Commission, Principled Regulation: Civil and Administrative Penalties in Australian Federal Regulation, Report No. 95 (2002).

Australia, Australian Law Reform Commission, For Your Information: Australian Privacy Law and Practice, Report No. 108 (2008).

Bagaric, Mirko, 'The "Civil-isation" of the Criminal Law' (2001) 25 *Criminal Law Journal* 184.

Bamford, Anne, 'Cyber-bullying' (2005) 25 *Classroom* 18.

Beale, F H, 'Consent in the Criminal Law' (1894-1895) 8 *Harvard Law Review* 317.

Beale, Sara Sun, 'The News Media's Influence on Criminal Justice Policy: How Market-Driven News Promotes Punitiveness' (2006) 48 *William and Mary Law Review* 397.

Belsey, Bill, *Cyberbullying: An Emerging Threat to the "Always On" Generation* (2006) <http://www.cyberbullying.ca/> at 23 November 2006.

Bita, Natasha, 'Italian Beaches Littered by Laws', *The Australian* (Florence), 15 August 2005.

Bix, Brian, 'Consent, Sado-masochism and the English Common Law' (1997-1998) 17 *Quinnipiac Law Review* 157.

Blackburn, Simon, *Oxford Dictionary of Philosophy* (2005).

Blackstone, William, *Commentaries on the Laws of England* (1979 (originally published in 1765)).

Bloustein, Edward J, 'Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser' (1964) 39 *New York University Law Review* 962.

Bloustein, Edward J, 'Privacy Is Dear at Any Price: A Response to Professor Posner's Economic Theory' (1978) 12 *Georgia Law Review* 429.

Brett, Nathan, 'Sexual Offences and Consent' (1998) XI *Canadian Journal of Law and Jurisprudence* 69.

Bronitt, Simon and McSherry, Bernadette, *Principles of Criminal Law* (2nd ed, 2005).

Brown, David et al, *Brown, Farrier, Neal and Weisbrot's Criminal Laws - Materials and Commentary on Criminal Law and Process in New South Wales* (4th ed, 2006).

Burton, Kelley, 'Criminalisation: Applying a Living-standard Analysis to Non-consensual Photography and Distribution' (2007) 7 *Queensland University of Technology Law and Justice Journal* 464.

Burton, Kelley, 'Erosion at the Beach: Privacy Rights Not Just Sand' (2006) 11 *Privacy Law and Policy Reporter* 216.

Burton, Kelley, *Naked and Digital Eyes* (2006) Online Opinion <http://www.onlineopinion.com.au> at 7 December 2006.

Burton, Kelley, 'New Visual Recording Offences' (2006) 26 *Queensland Lawyer* 188.

Burton, Kelley, 'Why Voyeurs Can Get Away With It' (2005) 25 *Proctor* 19.

Byers, Bryan, 'Teaching about Judgments of Crime Seriousness in Research Methods' (1999) 10 *Journal of Criminal Justice Education* 339.

Calvert, Clay and Brown, Justin, 'Video Voyeurism, Privacy, and the Internet: Exposing Peeping Toms in Cyberspace' (2000) 18 *Cardozo Arts and Entertainment Law Journal* 469.

Campbell, Marilyn, 'Cyber-Bullying: The Case for New School Rules' (2005) (May) *Principal Matters* 6.

Campbell, Marilyn A, 'Cyber Bullying: An Old Problem in a New Guise?' (2005) 15 *Australian Journal of Guidance & Counselling* 68.

Canada, Department of Justice Canada, Voyeurism as a Criminal Offence - Summary of Submissions (2002).

Canada, Department of Justice Canada, Voyeurism as a Criminal Offence: A Consultation Paper (2002).

Canada, Law Commission of Canada, What is a Crime? Defining Criminal Conduct in Contemporary Society (2004).

Cane, Peter, 'Fleeting Mental States' (2000) 59 *Cambridge Law Journal* 273.

Cavanagh, Rebecca, *Snapped Naked While Sleeping* (2007) News Limited <http://www.news.com.au/story> at 9 June 2007.

Chalmers, Robert, 'Orwell or All Well? The Rise of Surveillance Culture' (2005) 30 *Alternative Law Journal* 258.

Coffee, John C, 'Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law' (1991) 71 *Boston University Law Review* 193.

Coffee, John C, 'Paradigms Lost: The Blurring of the Criminal and Civil Law Models - And What Can Be Done About It' (1992) 101 *The Yale Law Journal* 1875.

Cohen, Mark A, 'Some New Evidence on the Seriousness of Crime' (1988) 26 *Criminology* 343.

Colvin, Eric, *Principles of Criminal Law* (2nd ed, 1991).

Colvin, Eric, 'Recklessness and Criminal Negligence' (1982) 32 *University of Toronto Law Journal* 345.

Cooter, Robert, 'Prices and Sanctions' (1984) 84 *Columbia Law Review* 1523.

Cordingley, Glenn, *Cleaner Photographs Kids on Toilet* (2007) News Limited <http://www.news.com.au/story> at 11 May 2007.

Craig, JDR, 'Invasion of Privacy and Charter Values: The Common-Law Tort Awakens' (1997) 42 *McGill Law Journal* 355.

Cullen, Francis T et al, 'Consensus in Crime Seriousness: Empirical Reality or Methodological Artefact?' (1985) 23 *Criminology* 99.

Devlin, Patrick, *The Enforcement of Morals* (1965).

Dickerson, Darby, 'Cyberbullies on Campus' (2005-2006) 37 *University of Toledo Law Review* 51.

Dixon, Tim, 'Valuing Privacy: An Overview and Introduction' (2001) 7 *University of New South Wales* 2.

Douglas, Heather and Godden, Lee, 'The Decriminalisation of Domestic Violence: Examining the Interaction Between the Criminal Law and Domestic Violence' (2003) 27 *Criminal Law Journal* 32.

Douglas, Heather and Godden, Lee, 'Intimate Partner Violence: Transforming Harm into a Crime' (2003) 10 *Murdoch University Electronic Journal of Law.*

Dresser, R, 'Culpability and Other Minds' (1992) 2 *Southern California Interdisciplinary Law Journal* 41.

Dressler, Joshua, 'Does One Mens Rea Fit All?: Thoughts on Alexander's Unified Conception of Criminal Culpability' (2000) 88 *California Law Review* 955.

Duff, R A, 'Law, Language and Community: Some Preconditions of Criminal Liability' (1998) 18 *Oxford Journal of Legal Studies* 189.

Duff, R A, 'Theorizing Criminal Law: A 25th Anniversary Essay' (2005) 25 *Oxford Journal of Legal Studies* 353.

Durham, Alexis M, 'Crime Seriousness and Punitive Severity: An Assessment of Social Attitudes' (1988) 5 *Justice Quarterly* 131.

Editorial, 'Consensual Harm' (2005) 29 *Criminal Law Journal* 197.

England and Wales, Home Office, *Setting the Boundaries: Reforming the Law on Sex Offences* (2000).

England and Wales, Law Commission for England and Wales, Consent in the Criminal Law, Consultation Paper No. 139 (1995).

Epstein, Richard A, 'The Tort/Crime Distinction: A Generation Later' (1996) 76 *Boston University Law Review* 1.

Ericson, Richard V, 'Mass Media, Crime, Law, and Justice - An Institutional Approach' (1991) 31 *The British Journal of Criminology* 219.

Farmer, L, 'The Obsession with Definition' (1996) 5 *Social and Legal Studies* 57.

Farrugia, Paul J, 'The Consent Defence: Sports Violence, Sadomasochism, and the Criminal Law' (1996-1999) 8 *Auckland University Law Review* 472.

Feinberg, Joel, *The Moral Limits of the Criminal Law: Harm to Others* (1984).

Feinberg, Joel, *The Moral Limits of the Criminal Law: Offense to Others* (1985).

Ferzan, Kimberly, 'Holistic Culpability' (2006-2007) 28 *Cardozo Law Review* 2523.

Findlay, Mark, Odgers, Stephen and Yeo, Stanley, *Australian Criminal Justice* (3rd ed, 2005).

Finkelstein, Claire, 'Is Risk a Harm?' (2002-2003) 151 *University of Pennsylvania Law Review* 963.

Fletcher, George P, 'The Fall and Rise of Criminal Theory' (1997-1998) 1 *Buffalo Criminal Law Review* 275.

Fletcher, George P, 'The Fault of Not Knowing' (2002) 3 *Theoretical Inquiries in Law* 265.

Fong, Petti, 'Former Teacher Pleads Guilty to Voyeurism', *The Globe and Mail* (Vancouver), 15 July 2006.

Freckelton, Ian, 'Masochism, Self-Mutilation and the Limits of Consent' (1994) 2 *Journal of Law and Medicine* 48.

Fried, Charles, 'Privacy' (1968) 77 *The Yale Law Journal* 475.

Fried, Charles, 'Privacy: Economics and Ethics A Comment on Posner' (1978) 12 *Georgia Law Review* 423.

Froude, Amanda, 'Cyber bullying' (2005) 35 *Independent Education* 38.

Gardner, John, 'Rationality and the Rule of Law in Offences Against the Person' (1994) 53 *Cambridge Law Journal* 502.

Garfield, Leslie Yalof, 'A More Principled Approach to Criminalizing Negligence: A Prescription for the Legislature' (1997-1998) 65 *Tennessee Law Review* 875.

Garland, David, *The Culture of Control: Crime and Social Order in Contemporary Society* (2001).

Garland, David, *Punishment and Modern Society: A Study in Social Theory* (1990).

Gavinson, Ruth, 'Privacy and the Limits of Law' (1980) 89 *The Yale Law Journal* 421.

Golash, Deirdre and Lynch, James P, 'Public Opinion, Crime Seriousness, and Sentencing Policy' (1995) 22 *American Journal of Criminal Law* 703.

Green, Stuart P, 'Why it's a Crime to Tear the Tag off a Mattress: Overcriminalization and Moral Content of Regulatory Offenses' (1997) 46 *Emory Law Journal* 1533.

Hale, Chris et al (eds), *Criminology* (2005).

Hall, Jerome, 'Interrelations of Criminal Law and Torts: I' (1943) XLIII *Columbia Law Review* 753.

Hall, Jerome, 'Theory and Reform of Criminal Law' (1978) 29 *The Hastings Law Journal* 893.

Hanna, Cheryl, 'Sex is Not a Sport: Consent and Violence in Criminal Law' (2000-2001) 42 *Boston College Law Review* 239.

Harcourt, Bernard E, 'The Collapse of the Harm Principle' (1999-2000) 90 *The Journal of Criminal Law & Criminology* 109.

Hart, Henry M, 'The Aims of the Criminal Law' (1958) 23 *Law and Contemporary Problems* 401.

Heriot, Gail L, 'The Practical Role of Harm in the Criminal Law and the Law of Tort' (1994) 5 *Journal of Contemporary Legal Issues* 145.

Herzog, Sergio, 'Public Perceptions of Crime Seriousness: A Comparison of Social Divisions in Israel' (2006) 39 *Israel Law Review* 57.

Hirsch, Andrew von and Jareborg, Nils, 'Gauging Criminal Harm: A Living-Standard Analysis' (1991) 11 *Oxford Journal of Legal Studies* 1.

Honderich, Ted (ed), *The Oxford Companion to Philosophy* (New Edition ed, 2005).

Honore, Tony, 'Responsibility and Luck' (1988) 104 *The Law Quarterly Review* 530.

Horder, Jeremy, 'Rethinking Non-Fatal Offences Against the Person' (1994) 14 *Oxford Journal of Legal Studies* 335.

Husak, Douglas, 'Crimes Outside the Core' (2003-2004) 39 *Tulsa Law Review* 755.

Husak, Douglas, 'The Criminal Law as Last Resort' (2004) 24 *Oxford Journal of Legal Studies* 207.

Husak, Douglas N, 'Reasonable Risk Creation and Overinclusive Legislation' (1997-1998) 1 *Buffalo Criminal Law Review* 599.

Husak, Douglas N, 'Varieties of Strict Liability' (1995) VIII *Canadian Journal of Law and Jurisprudence* 189.

Jareborg, Nils, 'Criminalization as Last Resort (Ultima Ratio)' (2005) 2 *Ohio State Journal of Criminal Law* 521.

JWL, 'HFX OUT HQQ', *Halifax Chronicle-Herald* (Amherst), 29 September 2006.

Kastens, Aaron H, 'State v Stevenson, The "Peeping Tom" Case: Overbreadth or Overblown?' (2001) *Wisconsin Law Review* 1371.

Katz, Nancie L, 'Ladies' Room Perv Avoids Jail', *New York Daily News* (Brooklyn), 6 September 2006, 29.

Kell, David, 'Social Disutility and the Law of Consent' (1994) 14 *Oxford Journal of Legal Studies* 121.

Kelman, Mark, 'Interpretive Construction in the Substantive Criminal Law' (1980-1981) 33 *Stanford Law Review* 591.

Kelman, Mark G, 'Trashing' (1984) 36 *Stanford Law Review* 293.

Kirby, Michael, 'Editorial' (2001) 25 *Criminal Law Journal* 181.

Lacey, Nicola, 'Abstraction in Context' (1994) 14 *Oxford Journal of Legal Studies* 255.

Lacey, Nicola, 'A Clear Concept of Intention: Elusive or Illusory?' (1993) 56 *The Modern Law Review* 621.

Lacey, Nicola, 'In Search of the Responsible Subject: History, Philosophy and Social Sciences in Criminal Law Theory' (2001) 64 *Modern Law Review* 350.

Lacey, Nicola, Wells, Celia and Quick, Oliver, *Reconstructing Criminal Law Text and Materials,* Law in Context (3rd ed, 2003).

Leng, Roger, 'Consent in Criminal Law' (1988) 13 *Holdsworth Law Review* 129.

Lewis, Paul, 'Suspended Sentence for Student Voyeur', *The Guardian* 8 September 2006, 16.

Lindgren, James, 'Why the Ancients may not have Needed a System of Criminal Law' (1996) 76 *Boston University Law Review* 29.

Lindsay, David, 'An Exploration of the Conceptual Basis of Privacy and the Implications for the Future of Australian Privacy Law' (2005) 29 *Melbourne University Law Review* 131.

Luna, Erik, 'The Overcriminalization Phenomenon' (2004-2005) 54 *American University Law Review* 703.

MacCormick, Neil, *Legal Right and Social Democracy* (1982).

MacCormick, Neil, 'Reconstruction after Deconstruction: A Response to CLS' (1990) 10 *Oxford Journal of Legal Studies* 539.

Mackenzie, Geraldine, *How Judges Sentence* (2005).

Mann, Kenneth, 'Punitive Civil Sanctions: The Middleground between Criminal and Civil Law' (1992) 101 *The Yale Law Journal* 1795.

Marshall, S E and Duff, R A, 'Criminalization and Sharing Wrongs' (1998) 11 *Canadian Journal of Law and Jurisprudence* 7.

Marszalek, Jessica, 'Peeping Tom, Thieves Target Schoolies', *The Australian* (Gold Coast), 21 November 2006.

McClurg, Andrew, 'Bringing Privacy Law Out of the Closet: A Tort Theory of Liability for Intrusions in Public Places' (1995) 73 *NC Law Review* 989.

McCutcheon, Paul, 'Morality and the Criminal Law: Reflections on Hart-Devlin' (2002) 47 *Criminal Law Quarterly* 15.

McLeod, Chris, 'Sneaky Cameras' (2003) (August) *Australian Press Council News* 7.

McSherry, Bernadette and Naylor, Bronwyn, *Australian Criminal Laws: Critical Perspectives* (2004).

Meier, Robert F and Short, James F, 'Crime as Hazard: Perceptions of Risk and Seriousness' (1985) 23 *Criminology* 389.

Miethe, Terance D, 'Public Consensus on Crime Seriousness: Normative Structure or Methodological Artifact?' (1982) 20 *Criminology* 515.

Moore, Michael, *Placing Blame* (1997).

Murphy, Jeffrie G, 'Consent, Coercion, and Hard Choices' (1981) 67 *Virginia Law Review* 79.

Myers, David A, 'Defamation and the Quiescent Anarchy of the Internet: A Case Study of Cyber Targeting' (2005-2006) 110 *Pennsylvania State Law Review* 667.

New South Wales, New South Wales Law Reform Commission, Surveillance, Interim Report No. 98 (2001).

New Zealand, New Zealand Law Commission, Intimate Covert Filming Study Paper, Study Paper No. 15 (2004).

Norrie, Alan, *Crime, Reason and History* (2001).

Notes, 'Consent, Liability and Guilt: A Study in Judicial Method' (1954-1955) 7 *Stanford Law Review* 507.

O'Regan, R S, 'Consent to Assaults Under the Queensland Criminal Code' (1992-1993) 17 *University of Queensland Law Journal* 287.

Ormerod, David, 'Consent and Offences Against the Person: Law Commission Consultation Paper No. 134' (1994) 57 *The Modern Law Review* 928.

Overington, Caroline, 'Sugar and Spice...or Kiddie Porn?' *The Australian* 10 October 2006.
Parker, R, 'A Definition of Privacy' (1974) 27 *Rutgers Law Review* 275.

Parton, David A, Hansel, Mark and Stratton, John R, 'Measuring Crime Seriousness: Lessons from the National Survey of Crime Severity' (1991) 31 *British Journal of Criminology* 72.

Paton-Simpson, Elizabeth, 'Privacy and the Reasonable Paranoid: The Protection of Privacy in Public Places' (2000) 50 *University of Toronto Law Journal* 305.

Payne, Geoff and Payne, Judy, *Key Concepts in Social Research* (2004).

Perrie, Robin, 'Keep 'em Peeled', *The Sun* (Newcastle), 1 September 2006.

Pitfield, DJ and Naude, CMB, 'Public Opinion on Crime Seriousness and Sentencing' (1999) 12 *South African Journal of Criminal Justice* 22.

Privacy International, 'Privacy Advocates Call for Closed-circuit TV Controls' (1995) 2 *Privacy Law and Policy Reporter* 91.

Prosser, William L, 'Privacy' (1960) 48 *California Law Review* 383.

Roberts, Paul, 'The Philosophical Foundations of Consent in the Criminal Law' (1997) 17 *Oxford Journal of Legal Studies* 389.

Robinson, Paul and Darley, John, 'Objectivist Versus Subjectivist Views of Criminality: A Study in the Role of Social Science in Criminal Law Theory' (1998) 18 *Oxford Journal of Legal Studies* 409.

Robinson, Paul H, 'A Brief History of Distinctions in Criminal Culpability' (1979-1980) 31 *The Hastings Law Journal* 815.

Robinson, Paul H, 'The Criminal-Civil Distinction and the Utility of Desert' (1996) 76 *Boston University Law Review* 201.

Robinson, Paul H, 'A Functional Analysis of Criminal Law' (1993-1994) 88 *Northwestern University Law Review* 857.

Robinson, Paul H, 'The Role of Harm and Evil in Criminal Law: A Study in Legislative Deception?' (1994) 5 *Contemporary Legal Issues* 299.

Robinson, Paul H, 'A Theory of Justification: Societal Harm as a Prerequisite for Criminal Liability' (1975) 23 *UCLA Law Review* 266.

Rothenberg, Lance, 'Re-thinking Privacy: Peeping Toms, Video Voyeurs, and the Failure of Criminal Law to Recognize a Reasonable Expectation of Privacy in the Public Space' (1999-2000) 49 *American University Law Review* 1127.

Salako, Solomon E, 'Strict Criminal Liability: A Violation of the Convention?' (2006) 70 *The Journal of Criminal Law* 531.

Scarcella, Michael A, 'Homeowner's Hidden Camera Helps Send Voyeur to Jail', *Sarasota Herald-Tribune* (Manatee County), 14 August 2006.

Schloenhardt, Andreas, *Queensland Criminal Law: Critical Perspectives* (2006).

Schonsheck, Jonathan, *On Criminalization: An Essay in the Philosophy of the Criminal Law* (1994).

Seipp, David J, 'The Distinction Between Crime and Tort in the Early Common Law' (1996) 76 *Boston University Law Review* 59.

Servance, Renee L, 'Cyberbullying, Cyber-harassment, and the Conflict Between Schools and the First Amendment' (2003) *Wisconsin Law Review* 1213.

Shariff, Shaheen and Gouin, Rachel, *Cyber-Dilemmas: Gendered Hierarchies, Free Expression and Cyber-Safety in Schools* <www//oii.ox.ac.uk> at 23 November 2006.

Sheley, Joseph F, 'Crime Seriousness Ratings: The Impact of Survey Questionnaire Form and Item Content' (1980) 20 *British Journal of Criminology* 123.

Simester, AP, 'Moral Certainty and the Boundaries of Intention' (1996) 16 *Oxford Journal of Legal Studies* 445.

Simester, AP and Sullivan, GR, *Criminal Law Theory and Doctrine* (2003).

Simons, Kenneth W, 'Deontology, Negligence, Tort, and Crime' (1996) 76 *Boston University Law Review* 273.

Simons, Kenneth W, 'The Relevance of Victim Conduct in Tort and Criminal Law' (2004-2005) 8 *Buffalo Criminal Law Review* 541.

Solove, Daniel, 'Conceptualizing Privacy' (2002) 90 *California Law Review* 1087.

Solove, Daniel, 'A Taxonomy of Privacy' (2006) 154 *University of Pennsylvania* 477.

Standing Committee of Attorneys-General, *Unauthorised Photographs on the Internet and Ancillary Privacy Issues* (2005) <http://www.ag.gov.au> at 1 October 2005.

Statistics, Australian Bureau of, *8153.0 Internet Activity, Australia, Mar 2007* (2007) Australian Bureau of Statistics <http://www.abs.gov.au/ausstats/abs@.nsf/mf/8153.0/> at 29 October 2007.

Steiker, Carol S, 'Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide' (1997) 85 *The Georgetown Law Journal* 775.
Stewart, Hamish, 'Legality and Morality in HLA Hart's Theory of Criminal Law' (1999) 52 *SMU Law Review* 201.

Strom, Paris S and Strom, Robert D, 'Cyberbullying by Adolescents: A Preliminary Assessment' (2005) 70 *The Educational Forum* 21.

Treip, Mike, 'Re-Thinking the Study of Criminal Law?' (1992) 55 *The Modern Law Review* 733.

Uebergang, Kate, 'Fetish Stalker Fined', *The Courier Mail* (Brisbane), 10 August 2006.

Vandervort, Lucinda, 'Consent and the Criminal Law' (1990) 28 *Osgoode Hall Law Journal* 485.

Wacks, Raymond, 'Home videos: Is the Surveillance of Domestic Helpers Lawful?' (2000) *Privacy Law and Policy Reporter* 49.

Waller, L and Williams, C R, *Criminal Law: Text and Cases* (10th ed, 2005).

Warren, S and Brandeis, L, 'The Right to Privacy' (1890) IV *Harvard Law Review* 193.

Wasserstrom, Richard A, 'Strict Liability in the Criminal Law' (1959-1960) 12 *Stanford Law Review* 731.

Weinberg, Mark, 'Moral Blameworthiness - The 'Objective Test' Dilemma' (2003) 24 *Australian Bar Review* 173.

Wells, Helene, Allard, Troy and Wilson, Paul, 'Crime and CCTV in Australia: Understanding the Relationship' (Centre for Applied Psychology and Criminology: Bond University, Australia, 2006).

Wertheimer, Alan, 'What is Consent? And is it Important?' (1999-2000) 3 *Buffalo Criminal Law Review* 557.

Westin, Alan, *Privacy and Freedom* (1967).

White, Rob and Haines, Fiona, *Crime and Criminology: An Introduction* (3rd ed, 2004).

Whitman, James, 'The Two Western Cultures of Privacy: Dignity Versus Liberty' (2003-2004) 113 *The Yale Law Journal* 1151.

Williams, Glanville, *Criminal Law The General Part* (2nd ed, 1961).

Williams, Glanville, *Textbook of Criminal Law* (2nd ed, 1983).

Wood, Diane, 'Toilet Voyeur Sent to Prison; Man's 'Disgusting' Crimes Included Filming Kids, Friends in Bathroom', *Kitchener-Waterloo Record* 10 June 2006.

Wright, R George, 'Consenting Adults: The Problem of Enhancing Human Dignity Non-Coercively' (1995) 75 *Boston University Law Review* 1397.

Zimring, Franklin E, 'The Multiple Middlegrounds Between Civil and Criminal Law' (1992) 101 *The Yale Law Journal* 1901.