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THE SENSE AND NONSENSE OF CRIMINALISING TRANSFERS OF OBSCENE MATERIAL

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The recent distribution of nude photos of a number of high profile Hong Kong celebrities has provoked intense discussion about the state of Hong Kong's obscenity and indecency laws. In this paper, I argue that Hong Kong's laws prohibiting the transfer of obscene and indecent information and images between consenting adults are both under-inclusive and over-inclusive. The *Control of Obscene and Indecent Articles Ordinance* is under-inclusive in that it does not adequately criminalise grave violations of privacy. It is also over-inclusive because it is a blanket prohibition against the transfer by all parties (including consenting adults) of all forms of obscene and indecent materials. These laws should be abrogated and replaced with a new piece of legislation that is narrowly tailored to deal with those types of offensive displays that are wrongful in a critical rather than a mere positive morality sense.

I. JUSTIFYING CRIMINALISATION

The aim of this paper is to develop and apply a normative theory of criminalisation to the problem of criminalising offensive displays. Criminalisation decisions only meet the requirement of justice when they are reconcilable

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with critical (objective)¹ accounts of fairness and justice. Positive morality (*i.e.*, community or conventional morality as it is sometimes labelled) will not do. Herbert Hart² rightly argued that positive morality could not be used to justify criminalisation decisions. Forty-five years ago, Hart argued it would be unfair to criminalise conduct merely because the majority of a community claim it is harmful (injurious, wrongful) in a subjective sense. Fairness in the criminalisation domain is about showing that the wrongdoer *deserves*³ the crime label. If a person commits an act that has been labelled as a crime, he or she is ultimately labelled as a criminal and is censured and punished accordingly. The general justifying aim of punishment is intrinsically connected with the general justifying aim of criminalisation⁴. Punishment is merely a part of the criminalisation process⁵. It is the penal consequences flowing from the criminal label rather than the crime label *per se* that cause an offender to suffer.

Criminalisation and its penal consequences aim to protect members of so-

¹A detailed discussion of the distinction between critical and positive morality is beyond the scope of this paper. I generally adopt Dworkin's approach. Dworkin provides a convincing defence of objective (critical) morality: Ronald Dworkin, "Objectivity and Truth: You'd Better Believe It" (1996) 24 *Philosophy and Public Affairs* 87. See also David Wiggins, *Ethics, Twelve Lectures on the Philosophy of Morality* (Cambridge: Harvard University Press, 2006) at c. 11 & 12; Matthew H. Kramer, *Objectivity and the Rule of Law* (Cambridge: Cambridge University Press, 2007) at 1-100; Hilary Putman, *Mind, Language, and Reality* (Cambridge: Cambridge University Press, 1975) at 12, 215ff.

²H.L.A. Hart, *Law, Liberty and Morality* (London: Oxford University Press, 1963) at 17. I have argued elsewhere that fairness is about making decisions based on notions of justice. And the concept of justice means treating people as they deserve, that is in accordance with just deserts. See generally Dennis J. Baker, "The Harm Principle vs. Kantian Criteria for Ensuring Fair, Principled and Just Criminalisation," (2008) 33 *Aust. J. Legal Phil.* 66. See also Dennis J. Baker, "Constitutionalizing the Harm Principle" (2008) 27:2 *Criminal Justice Ethics* 3.

³As Husak rightly notes, "[T]he notorious difficulty of justifying punishment is closely connected to the problem of defending a theory of criminalisation. We cannot hope to justify punishment without attending to what individuals are punished for. Since persons who commit crimes become subject to punishment, and punishment must satisfy a stringent standard of justification, the state must be cautious before enacting a criminal offence": Douglas Husak, "Malum Prohibitum and Retributivism," in Anthony Duff and Stuart Green, eds., *Defining Crimes: Essays on the Special Part of the Criminal Law* (Oxford: Oxford University Press, 2005) 68. Criminalisation is a message, principally addressed to the person who did wrong [objective harm doing], 'though also importantly overhead by others, denouncing the [objective] wrongdoing in a way that will not be ignored'. See J. R. Lucas, *Responsibility* (Oxford: Clarendon Press, 1993) at 101.

⁴Douglas Husak has also taken this approach in his latest book. See Douglas Husak, *Overcriminalization: The Limits of Criminal Law* (New York: Oxford University Press, 2008).

⁵As von Hirsch notes, questions about the general justification of punishment are about why the criminal sanction should exist at all. See Andrew von Hirsch, *Censure and Sanctions* (Oxford: Oxford University Press, 1993) at 6.

ciety from the injurious and wrongful choices of others by using *retribution* as a powerful deterrent.⁶ The criminal law arguably aims to keep conduct at tolerable levels by sending potential malefactors the message that if you wrongfully injure others you will receive hard treatment for doing so. The hard treatment involved in censure, stigmatisation and penal detention is an intrinsic part of criminalisation process and results in detrimental consequences for those who are convicted. Criminalisation aims to prevent⁷ harm and injury but it is the fairness (just desserts) constraint that ensures the criminalisation decision accords with justice⁸. Criminalisation rightly aims to prevent people from wrongfully injuring others, but it has to be deserved. That is, the alleged wrongdoer's conduct should be objectively blameworthy and have objective consequences that are deserving of criminal sanction. A dessert-based theory of criminalisation would require the state to produce objective reasons to show that it is fair to criminalise the choices of its citizens. The structure of my justification for criminalisation is one where crime *prevention* is checked by the requirement that a person is only criminalised when his or her wrongdoing makes him or her deserving of proportional retribution for objective wrongdoing of a kind that is worthy of criminal condemnation.

Criminalisation is a mechanism for censuring and punishing a person's culpable act when it has wrongfully violated the rights of others. The wrongdoer is not punished for mere accidents but for his or her culpable and responsible choice to injuriously wrong others. More generally, the core link between penal theory and criminalisation theory is that the lawmaker is required to produce sound normative reasons to justify using criminalisation to deter unwanted conduct, because the crime label inflicts hard treatment on those who are eventually labelled as criminal. Furthermore, criminalisation

⁶H.L.A. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford: Clarendon Press, 1968) at 8–9.

⁷Professors von Hirsch and Ashworth note that, '[T]he institution of the criminal sanction, on its face, seems to be supported by both preventative and deontological reasons. Its censuring element – of visiting the offender with formal disapprobation for his conduct – involves a moral appeal that cannot properly be reduced to a mere disincentive. However, the criminal sanction has other features – particularly in the manner which it threatens certain unpleasant consequences – that seem clearly to have something to do with inducing people to desist. The most plausible direction of analysis, therefore, is toward a principled account that includes both deontological features and those concerned with consequences: Andrew von Hirsch & Andrew Ashworth, *Proportionate Sentencing: Exploring the Principles* (Oxford: Oxford University Press, 2005) at 32.

⁸"Unlike blame in everyday contexts, the criminal sanction announces in advance that specified categories of conduct are punishable [have been criminalised]. Because the prescribed sanction is one which expresses blame, this conveys the message that the conduct is reprehensible, and should be eschewed": von Hirsch, *supra* note 5 at 10–14.

limits our choices. The just desserts constraint reconciles preventive criminalisation with fairness. It not only allows us to consider the grading of offences in accordance with proportionality, which is clearly an important *ex ante* matter that has to be considered at the criminalisation stage, but also allows us to ensure that criminalisation is only inflicted on those who deserve it.

II. PRINCIPLED CRIMINALISATION

The issue of which objective reasons justify criminalising conduct is a huge philosophical question that cannot be fully addressed in this paper. I do not aim to provide an exhaustive set of objective principles or reasons to deal with every possible counterexample. Instead, I make the general claim that conduct should only be criminalised when it is fair and just to do so. I call this the "Fairness Principle". Fairness in this context is about producing sound moral reasons to show that the conduct is deserving of criminalisation⁹. The fairness requirement will be satisfied in most cases by referring to the harm justification,¹⁰ as wrongful harm to others provides an objective justification for invoking the criminal law in a wide range of situations. Unquestionably, there are other objective principles, reasons or explanations for justifying criminalisation, but it is not my aim to identify all those principles and apply them to every possible counterexample. When a person engages in conduct that is objectively wrongful and that wrongdoing has objective consequences (harmful or otherwise: *i.e.*, a harmless¹¹ but grave privacy violation)

⁹As von Hirsch and Ashworth note with respect to fairness in the penal theory context, "The desert rationale rests on the idea that the penal sanction should fairly reflect the degree of reprehensibility (that is, the harmfulness and culpability) of the actor's conduct": von Hirsch & Ashworth, *supra* note 7 at 4.

¹⁰Joel Feinberg, *The Moral Limits of the Criminal Law: Harm to Others*, vol. 1 (New York: Oxford University Press, 1984).

¹¹The old adage in show business is, "Any publicity is better than no publicity". It is arguable that the free and widespread publicity following the release of Paris Hilton's sex-gate tapes did not harm her career. The invasion of privacy arguably augmented her celebrity and thus counterbalanced any ephemeral distress she may have felt. "Ms. Hilton tried to stop distribution of the tape, although its notoriety paradoxically catapulted her to an even higher orbit of fame, establishing her as a kind of postmodern celebrity, leading to perfume deals, a memoir and the covers of *Vanity Fair* and *W*". See Lola Ogunnaike, "Sex, Lawsuits and Celebrities Caught on Tape" *The New York Times* (19 March 2006). See also the discussion below with respect to the distinction between harmless and harmful offence. Likewise, a left-wing Australian politician was elected as Prime Minister in 2007 notwithstanding that it had been reported that he had visited a strip club and could not remember what he had done there. See Tim Johnston, "Ally of Bush Is Defeated in Australia" *The New York Times* (25 November 2007).

that *deserve* the crime label, he or she will suffer the penal consequences that are a part of the condemnatory process of the institution of criminalisation.

Wrongful harm to others is the most commonly cited objective justification for criminalisation. Mill famously expounded the harm principle in his essay *On Liberty* in 1859:

This Essay is to assert one very simple principle, as entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control, whether the means used be physical force in the form of legal penalties, or the moral coercion of public opinion. That principle is, that 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 be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good either physically or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise, or even right. ... The only part of conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.¹²

Mill's harm principle has played an influential role in criminalisation debates. It permeates section 1.02(1)(a) of the American Law Institute's *Model Penal Code*, which holds that one of the purposes of the criminal law is "to forbid and prevent conduct that unjustifiably and inexcusably inflicts or threatens substantial harm to individual or public interests". In 1957 the Wolfenden Committee,¹³ referring to Mill's philosophy, argued for the decriminalisation of homosexuality and prostitution. The Committee's recommendations sparked the now famous debate between Patrick Devlin and Herbert Hart. Devlin argued that positive morality (the subjective views of the majority of a given community at a given time) were a sufficient justification for criminalising conduct. He alleged that private vice had the potential to cause both

¹²John Stuart Mill, *On Liberty and Other Essays* (Oxford: Oxford University Press, 1991) at 14.

¹³Wolfenden Committee, *Report of the Committee on Homosexual Offences and Prostitution* (London: Home Office, Cmd. 247, 1957) at para. 13, 61.

physical and spiritual (tangible and intangible) harm to society.¹⁴ Devlin sums up his tangible harm argument in his social disintegration thesis: “It is obvious that an individual may by unrestricted indulgence in vice so weaken himself that he ceases to be a useful member of society. It is obvious also that if sufficient numbers of individuals so weaken themselves, society will thereby be weakened. ... A nation of debauchees would not in 1940 have responded satisfactorily to Winston Churchill’s call to blood and toil and sweat and tears”.¹⁵

Devlin alleges that vice should be criminalised to protect society from disintegration. His contention was not objective and was not supported with sound moral reasoning or credible empirical data.¹⁶ Devlin’s positive morality type harm argument is a variant of his extreme thesis,¹⁷ which advocates that conduct is criminalisable so long as it breaches the majority’s moral code.¹⁸ In *HKSAR v. Chan Man Lung*¹⁹ the Court of Appeal, in an attempt to justify a disproportionately unjust sentence, argued that it was necessary “because the standard of morality of our society is such that ‘the wide distribution and ready display and availability of material showing or suggesting explicit sexual activity of any kind’ are objectionable despite the more open society and more ready availability of such materials from other sources”. In this paper, I focus on moral arguments for decriminalisation, but it is worth noting in passing that at the pragmatic enforcement level it would be nearly impossible to police all those people who download pornography and obscene images from websites that are located in overseas jurisdictions.

The Devlin community morality justification also permeates the *Control of Obscene and Indecent Articles Ordinance* (H.K.). Section 10 of that enactment holds that: “In determining whether an article is obscene or indecent or whether any matter publicly displayed is indecent ... a Tribunal should have regard to: (a) standards of morality, decency and propriety that are generally accepted by reasonable members of the community”. Who are these reasonable members of the community? The young, the old, the poor, the ex-

¹⁴Patrick Devlin, *The Enforcement of Morals* (Oxford: Oxford University Press, 1965), at 111.

¹⁵*Ibid.*

¹⁶Hart, *supra* note 2 at 53–55.

¹⁷Devlin, *supra* note 14 at 54.

¹⁸“So the law must base itself on Christian morals and to the limit of its ability to enforce them, not simply because they are the morals of most of us, nor simply because they are the morals which are taught by the established Church—on these points the law recognises the right to dissent—but for the compelling reason that without the help of Christian teaching the law will fail”: Devlin, *ibid.* at 25.

¹⁹[2008] 1 H.K.L.R.D. 126 (C.A.).

patriates, the middle class, the artists, the academics; it is not clear. In Hong Kong, the anachronistic terms found in older English and New Zealand case law are used to interpret and define “obscene” and “indecent”.²⁰ “‘Obscenity’ is not confined to a tendency to depravity and corruption of a sexual nature. It encompasses material that tends to induce violence”.²¹ The courts have held that the dictionary meaning of obscenity and indecency can be employed to determine obscenity and indecency: *i.e.*, “disgusting, filthy, lewd, loathsome, repulsive or shocking for ‘obscene’; and unbecoming, in extremely bad taste, unseemly, offending against propriety or delicacy, or immodest for ‘indecent’”.²²

The old English cases also put a particular emphasis on using offensive materials to corrupt others. Interestingly, contemporary England has moved away from this 1950s morality. Modern England has designated nude beaches, photos of topless women on page 3 of some of its major newspapers and allows pornographic films to be sold to consenting adults, *etc.* Criminalising innocent activities merely because it might help to prevent harm, offence or injury to others (or others from being corrupted) is not acceptable.²³ In the

²⁰The legislation is also interpreted with reference to a number of anachronistic conceptions of public morality as set down in the older English and New Zealand case law. It is noted in the Hong Kong Archbold manual that “The English statutory definition is partially incorporated under Hong Kong law and certain provisions of the Hong Kong legislation were modelled after the New Zealand Indecent Publications Act 1965 (N.Z.)”: Archbold Hong Kong, *Criminal Law, Pleading, Evidence and Practice* (Hong Kong: Sweet & Maxwell Asia, 2007) at 1820.

²¹*Ibid.* at 1822.

²²*Ibid.*

²³The old English cases justify criminalisation by holding that the offensive material might corrupt others (lead them to self-harm): *R. v. Calder and Boyars Ltd.*, [1969] 1 Q.B. 151 (C.A.); *Kneller (Publishing, Printing and Promotions) Ltd. v. DPP*, [1973] A.C. 435 (H.L.). There are four core reasons why such arguments can be dismissed. Firstly, such a claim is a remote harm argument and will only be valid if a normative link can be drawn between the influencer’s activities and the ultimate harm that is likely to be brought on the corrupted party: it would be unjust to hold x responsible for merely influencing y’s potential (paternalistic) self-harming choices (*i.e.*, where x uses a book sold to her by y, which advocates drug-taking; it is x’s independent choice that causes any resulting harm). *Cf. John Calder (Publications) Ltd. v. Powell*, [1965] 1 Q.B. 509 (C.A.). Secondly, there is no empirical connexion to support such claims (*i.e.*, it has not been shown that merely supplying information about drug use is a but for cause to addiction). Thirdly, selling pornographic movies with adult actors, nude photos of adults, a lady’s directory, *etc.* to consenting adults is harmless and inoffensive because those who seek such products consent to receiving the material. Fourthly, such arguments are paternalistic (they aim is to protect people from their own autonomous choices). I have dealt with this type of criminalisation elsewhere and do not intend to revisit these arguments in this paper. See Dennis J. Baker, “The Moral Limits of Criminalizing Remote Harms” (2007) 10 *New Crim. L. Rev.* 370. For a very compelling account of the wrongness of using paternalism as a justification for criminalisation see Joel Feinberg, *The*

United States in *Stanley v. Georgia*,²⁴ the Supreme Court expounded that: “the State may no more prohibit mere possession of obscene matter on the ground that it may lead to antisocial conduct than it may prohibit possession of chemistry books on the ground that they may lead to the manufacture of homemade spirits.” In *HKSAR v. Hiroyuki Takeda*,²⁵ the court held that a deterrence sentence was justified because it reflected the “abhorrence of society”. It is worth noting that most of those who were outraged and offended by the recent scandal involving nude photos of celebrities in Hong Kong never saw the photos. Society’s so-called majority is offended by the bare knowledge that others are watching such movies in private. To the extent that people are offended by the bare knowledge of knowing that such activities are taking place behind closed doors, Murphy rightly notes:

We must remember *ex hypothesi* the acts in question are performed in private by consenting adults. Thus the only thing to which the complainant could object to is the bare knowledge that something of which he disapproves is going on in private. The question, then, is this: Is freedom from knowledge that some disapproved activity is taking place a right that ought to be recognised? Hart argues convincingly not.²⁶

I have argued above that unfair criminalisation can be constrained by applying objective principles of justice. What is meant by objective morality? Objective morality requires criminalisation decisions to accord with critical moral reasoning. Objective principles can draw on empirical and conventional understandings, but should ultimately have a normative quality²⁷. It would be inequitable to criminalise conduct just because the majority *subjectively* claim that it is harmful, injurious, *offensive*, and so forth. As Lee noted long ago:

Conventional morality is group sanction, and the public the great sophist now as truly as in the times of Plato. The public is interested in what appears to be persuasive [in the contemporary

Moral Limits of the Criminal Law: Harm to Self, vol. 3 (New York: Oxford University Press, 1986).

²⁴394 U.S. 557 (1969) at 567.

²⁵[1998] 1 H.K.L.R.D. 931 (C.F.I.).

²⁶Jeffrie Murphy, “Another Look at Legal Moralism” (1966) 77 *Ethics* 50 at 54.

²⁷A principled argument is one based on principle. Principles set a standard “that [ought] to be observed, not because it will advance or secure an economic, political or social situation deemed desirable, but because it is a requirement of justice or fairness or some other dimension of morality”: Ronald Dworkin, *Taking Rights Seriously* (King’s Lynn: Duckworth, 1977), at 22ff. See more generally, J. R. Lucas, *On Justice* (Oxford: Clarendon Press, 1980).

context, public concern about people being corrupted by receiving obscene information], not in what is *rigorously rational* [sound normative principles based on fairness and justice]. And the most persuasive thing in the world is conventional morality, not 'as it ought to be' according to the sanctions of reason, but as it is. Therefore the body of conventional morality changes slowly, and not according to the dictates of reason.²⁸

A reasoned account of morality is objective, and draws on certain kinds of moral/ metaphysical principles. Hence, we could not claim that it is objectively fair to criminalise lesbians merely because their status offends the majority. Bearing in mind that sound principles for ensuring *fair* and *just* criminalisation are developed from objective morality, Dworkin was right to assert that Devlin's claims were not moral at all.²⁹

Hart referred to harm to others as an objective justification for invoking the criminal law, but he did not attempt to demonstrate how the harm principle might be used in practice to effectively limit the scope of the criminal law. It was Feinberg who reformulated the harm principle to make it a more effective normative principle for limiting criminalisation. Feinberg's harm principle differs from Mill's in that it is not an exclusive ground for criminalising conduct. He supplements the harm principle with a further normative principle, which holds that it would also be fair for wrongful *offence to others* to be criminalised in certain circumstances³⁰. In his *magnum opus* on criminalisation, he persuasively argues that under a liberal scheme for criminalisation "the harm and offence principles, duly clarified and qualified, between them exhaust the class of [objective moral] good reasons for criminal prohibitions"³¹. In his two

²⁸Harold N. Lee, "Morals, Morality, and Ethics: Suggested Terminology" (1928) 38 Int'l J. Ethics 450 at 465. Hart's theory is "strongly associated with a specific conception of morality as a uniquely true or correct set of principles—not man made, but awaiting discovery by the use of reason... [Whereas legal moralism] is associated with a relativist conception of morality, which has no rational or other specific content": H.L.A. Hart, *Essays in Jurisprudence and Philosophy* (Oxford: Clarendon Press, 1983), "Social Solidarity and the Enforcement of Morality" at 248ff. For a further convincing example of reason-sensitive morality, see Joseph Raz, *The Morality of Freedom* (Oxford: Oxford University Press, 1986).

²⁹Dworkin, *supra* note 27 at 250 ("If I can argue for my own position only by citing the beliefs of others ('everyone knows homosexuality is a sin') you will conclude that I am parroting and not relying on moral conviction of my own. With the possible (though complex) exception of deity, there is no moral authority to which I can appeal and so automatically make my position a moral one. I have reasons, though of course I may have been taught these reasons by others").

³⁰Joel Feinberg, *The Moral Limits of the Criminal Law: Offence to Others*, vol. 2 (New York: Oxford University Press, 1985) at 1.

³¹*Ibid.* at xiii.

later volumes he makes it explicitly clear that legal moralism and legal paternalism are insufficient grounds for criminalising conduct³². Feinberg's harm principle provides a *prima facie* objective justification for censuring wrongdoers for a wide range of conduct. The actual harm must be objective in that it does *in fact* setback the interests of the victim and it must be brought about by the (culpable *i.e.*, intentional – inexcusable/unjustifiable) actions of the offender. However, the focus in this paper is on offensive displays that do not result in harm. If the display results in tangible wrongful harm then it is *prima facie* criminalisable. I argue below that the *Control of Obscene and Indecent Articles Ordinance* criminalises a range of conduct that is not harmful, offensive or violative in any other sense.

III. FEINBERG'S OFFENCE PRINCIPLE AND CRIMINALISATION

Feinberg argues that a separate offence principle is needed because ephemeral annoyances, disappointments, disgusts, embarrassments, and detested conditions, such as fear, anxiety, and trifling ("harmless") aches and pains do not necessarily result in harm.³³ Some offensive encroachments (interferences) might set back our interests and thus come within the purview of the harm principle, but most forms of offence do not result in harm.³⁴ Even gross offences such as public displays of earrings made from human foetuses,³⁵ vomit eating in front of others in the confines of a public bus, copulating in public spaces and so forth do not amount to harm. Since, "[harm] even in the broad un-technical sense rules out mere transitory disappointments, minor physical and mental 'hurts', and a miscellany of disliked states of mind, including various forms of offendedness, anxiety, and boredom as harms, since harm in the broad sense is any setback of an interest, and there is (typically) *no interest* in the avoidance of such states".³⁶ Feinberg uses the concept of offence to criminalise those harmless but offensive acts, which in the widest possible interpretation of that term include "offences proper, (*e.g.*, revulsion and disgust) hurts (*e.g.*, 'harmless' throbs and pangs), and 'others' (*e.g.*, shame and

³²Feinberg, vol. 3, *supra* note 23; Joel Feinberg, *The Moral Limits of the Criminal Law: Harmless Wrongdoing*, vol. 4 (New York: Oxford University Press, 1988).

³³Feinberg, vol. 2, *supra* note 30 at 1.

³⁴Similarly, in Hong Kong there is no need for the criminalised offence to cause harm: *East Touch Publisher Ltd. v. The Television and Entertainment Licensing Authority*, [1996] H.K.L.Y. 41 (H.C.).

³⁵*R v. Gibson*, [1990] 2 Q.B. 619 (C.A.).

³⁶Feinberg, vol. 1, *supra* note 10 at 48.

embarrassment)".³⁷ The offense might leave the victim feeling annoyed, disgusted, harassed, invaded, violated, disappointed, frightened, anxious, and so forth.³⁸ Some liberals have suggested that the harm principle could be expanded to cover the worst kinds of offence,³⁹ but such interpretations seem to stretch the concept of harm to the extent that it becomes meaningless as a liberty protecting mechanism.⁴⁰

The offence principle allows the lawmaker to bring a wide range of *harmless wrongs* within the purview of the criminal law. But offence *per se* does not necessarily provide an objective justification for invoking the criminal law. Unlike harm,⁴¹ offence is assessed according to community mores, which might differ from community to community, from generation to generation. Relativism does not provide an objective justification for invoking the criminal law. For example, public nudity is not universally offensive. In many African and tropical regions it is common for the tribes-people to go unclothed. Public nudity is also common on many European beaches. Furthermore, topless swimming is permissible at most Western beaches. Similarly, a labourer swearing at another labourer on a building site would not have the same social meaning as a law student swearing at a professor in a university tutorial. The sight of two men or women kissing in public might cause profound affront in some parts of the Middle East, Russia or even in some parts of the United States,⁴² but might go unnoticed in London, New York or Stockholm. The sight of an interracial couple could cause profound offence in the Deep South of the United States, but might not be noticed in Hong Kong. The concept of offence is rooted in positive morality and social convention. Therefore, it is essential

³⁷*Ibid.*

³⁸Feinberg, vol. 2, *supra* note 30 at 1.

³⁹Harlon. L. Dalton, "Disgust and Punishment", Book Review of Feinburg, vol. 2, *ibid.* (1987) 96 Yale L.J. 881. Tasioulas also questions the distinction and attempts to provide an objective rationale for distinguishing criminalisable offence from offence according to community mores: John Tasioulas, "Crimes of Offense" in Andrew von Hirsch & Andrew Simister, eds., *Incidivilities: Regulating Offensive Behaviour* (Oxford: Hart Publishing, 2006) 149.

⁴⁰For an account of conventional and trivial rather than normative harm arguments and their misuse in criminalisation policy see Bernard E. Harcourt, "Collapse of the Harm Principle" (1999) 90 J. Crim. L. & Criminology 109.

⁴¹Intentionally causing harm (violating another's right to physical integrity or to maintain his or her propriety and economic resources) "entails by its very meaning that the action is *prima facie* wrong, [harm] is a normative concept acquiring its specific meaning from the moral theory within which it is embedded. Without such a connection to a moral theory the harm principle is a formal principle lacking specific concrete content and leading to no policy conclusions": Raz, *supra* note 28 at 414.

⁴² *Lawrence v. Texas*, 539 U.S. 558 (2003).

to provide an account of what makes offence criminal in an objective sense.

Offence alone is not sufficient to justify criminalisation, because being offended is not a sufficiently objective consequence for the purposes of providing a critical moral justification for criminalisation. Feinberg's formulation of the offence principle has the potential to allow offensive conduct to be criminalised regardless of the requirements of fairness and justice. While Feinberg argues that only *wrongful* offence is criminalisable, he fails to provide a theory of criminalisable *wrongful* offence. He also fails to demonstrate that offence *per se* has consequences of a kind that warrant criminalisation. Feinberg⁴³ uses the verb "to offend" as a catch all: it means to create in another an experience or psychological state of a universally disliked kind, *e.g.*, disgust, fear, shock anger, humiliation, embarrassment, shame, hurt, anxiety, boredom and so on.⁴⁴ Feinberg models his offence principle on his harm principle. Firstly, the word "offence" like the word "harm" has both a general and a particular normative meaning. In the general sense it refers to "any or all of a miscellany of disliked mental states".⁴⁵ In the normative sense it only refers to those disliked mental states that are caused by the wrongful (*right violating*) conduct of others.⁴⁶

Offence in the sense as used in Feinberg's offence principle "specifies an objective condition – the unpleasant mental state must be caused by conduct that really is wrongful".⁴⁷ Whereas "offence in the strict sense of ordinary language specifies a subjective condition – the offending act must be taken by the offended person to wrong him whether in fact it does or not".⁴⁸ For instance the strict sense requires resentment: *x* is offended subjectively when *y* causes *x* to suffer a disliked state; *x* is able to attribute that state to the *wrongful* conduct of *y*; and *x* subjectively resents *y* for his role in causing her disliked mental state.⁴⁹ Offence as laid down in Feinberg's offence principle is meant to be criminalisable when it causes wrongful resentment. "The offence principle as we shall interpret it then applies to offended states in either the broad or general sense – that is either with or without resentment – when these states are in fact *wrongfully* produced in *violation* of the offended

⁴³Feinberg, vol. 2, *supra* note 30 at 1–3.

⁴⁴*Ibid.* at 1–2.

⁴⁵*Ibid.* at 2.

⁴⁶*Ibid.*

⁴⁷*Ibid.*

⁴⁸*Ibid.*

⁴⁹*Ibid.* at 2–3.

[person's] *rights*".⁵⁰ It is essential that the victim be wronged, but there is no need for the victim to feel wronged in a subjective sense. Feinberg requires the offence to be wrongful, but he only provides a theory of profoundly offensive conduct rather than a theory of morally wrongful offence. He does not explain the wrongness of offence for the purposes of criminalising it. Feinberg ineffectually asserts that: "there will always be a wrong whenever an *offended state* (in the generic sense) is produced in another without justification or excuse".⁵¹

But what makes the offence unjustifiable or inexcusable? Feinberg tries to answer this question by asserting that the offence has to be reasonable in a normative sense. His mediating maxims are important, but cannot fully address the missing theory of wrongdoing. Feinberg weighs the seriousness of the offence against the reasonableness of the offence-doer's conduct, which is determined by six factors⁵²: (1) The personal importance of the offensive conduct to the actor; (2) its social utility; and (3) its free expression value. Feinberg puts a particular emphasis on the value of free speech and argues that the case for criminalising mere offence would *hardly ever* outweigh the value of free speech.⁵³ (4) The availability of alternative times and places where the conduct would cause less offence. (5) The nature of the location where the offence takes place also has some bearing on its reasonableness⁵⁴ (namely, people would be expected to tolerate nudity at a designated nudist park or beach, because it is widely known that it is common in such places). Likewise, people might be expected to tolerate nude displays if they purposely search for them on the Internet, but would not be expected to tolerate unsolicited obscene images popping up on their computer. Hence, if a person is able to readily avoid the offence then she cannot complain that she was wronged.

The rationale behind a ready avoidability justification for tolerating offensive displays⁵⁵ is that it strikes a balance between minority and majority interests. Licensing and zoning regulations restrict the practice of potentially offensive acts to classified or private areas to limit the minority's impact on

⁵⁰*Ibid.* at 2.

⁵¹*Ibid.*

⁵²*Ibid.* at 44.

⁵³Feinberg asserts that, "No amount of offensiveness in an expressed opinion can counterbalance the vital social value of allowing unfettered personal expression": *Ibid.* at 38–39.

⁵⁴*Ibid.*

⁵⁵Von Hirsch and Simester call this requirement the readily avoidability principle. Andrew Von Hirsch & AP Simester, "Penalising Offensive Behaviour: Constitutive and Mediating Principles" in Von Hirsch & Simester, *supra* note 39, 115 at 125–128.

the ethical environment in proportion to what its numbers and tastes justify.⁵⁶ A balance is struck between majoritarian claims and minority claims so that minorities are able to have some impact in our plural society.⁵⁷ Certain types of offensive conduct wrongs members of the public when they take place in the public arena, so they are subject to a ready avoidability requirement, that is, they are deemed as criminalisable when others are not able to readily avoid them “without undue restriction of their own liberty”.⁵⁸ This also ties in with Feinberg’s final mediating maxim, which takes into account whether the witness voluntarily assumed the risk of being offended (*volenti non fit injuria*). If the witnesses voluntarily assumed the risk of being offended, for example, through curiosity, she could hardly ask for the protection of the criminal law. If the offended party went to see a film knowing that it contained nudity and violence she could hardly complain about the offensive nature of the film.

Feinberg⁵⁹ argues that his reasonableness maxims are suitable for protecting morally innocent, but displeasing affronts. ‘The more people can expect to be offended, *ceteris paribus*, the stronger the case for legal prohibition. “Other things’, however, are rarely equal. It is important to remember that certain kinds of valuable, or at least innocent actions, can be expected to offend large numbers of people . . . The interracial couple strolling hand in hand down the streets of a deep southern town might still cause shock, even shame and disgust, perhaps to the majority of white pedestrians who happen to observe them”.⁶⁰ Feinberg asserts that if the legislature wanted to produce a *reason* against criminalising conduct, such as interracial handholding, all it would have to do is cite the reasonableness of the conduct: “The behaviour of the interracial couple has much to be said for it: it is reasonable, personally valuable, expressive and affectionate, spontaneous, natural, and irreplaceable, and the offence it causes is easily avoidable”.⁶¹ This is an important normative consideration, but Feinberg seems to be using mediating factors to prevent conduct that is not *prima facie* criminalisable from being criminalised.⁶² Interracial couples do not wrong others by appearing in public. Therefore such conduct is not even *prima facie* criminalisable. Maybe this is what Feinberg is

⁵⁶Ronald Dworkin, *Sovereign Virtue* (Cambridge: Harvard University Press, 2000) at 214.

⁵⁷*Ibid.*

⁵⁸Von Hirsch & Simester, *supra* note 55 at 125–128.

⁵⁹Feinberg, *supra* note 30 at 27–28.

⁶⁰*Ibid.*

⁶¹*Ibid.* at 29.

⁶²Andrew von Hirsch, “Toleranz als Mediating Principle” in Andrew von Hirsch, Kurt Seelmann and Wohlers Wolfgang, eds., *Mediating Principles* (Baden-Baden, Germany: Nomos Verlagsgesellschaft, 2006), at 97–110.

trying to say when he cites the reasonableness of such conduct. However, I think a fuller account of the moral rightness of such conduct is required if we are to protect a wide range of actions that are potentially offensive although morally faultless.

Von Hirsch and Simester⁶³ argue that it is the *wrongness* of certain offensive acts that provides the objective moral justification for criminalisation. They argue that exhibitionism is criminalisable because it treats the non-consenting viewer with a lack of respect and consideration. But mere deontological wrongness does not provide sufficient guidance to the lawmaker about what to criminalise. There are many acts that treat people with a lack of respect and consideration that do not warrant a criminal law response, *i.e.*, a lying husband treats his wife as a mere means (with a lack of respect) when he falsely promises that he will do the grocery shopping but fails to do so.⁶⁴ What distinguishes false promising from the act of uploading nude photos of a non-consenting adult onto the Internet? Distributing nude photos without consent is criminalisable because this type of offensive conduct has a particular *bad consequence*: that is, it causes a gross loss of privacy. It is this particular bad consequence that justifies criminalisation and gives the lawmaker a valid justification and guidance as to why the criminal law should be invoked.

IV. OBJECTIVE JUSTIFICATIONS FOR CRIMINALISING CERTAIN FORMS OF OFFENCE

Not all forms of offensive behaviour are harmless. Some offensive material cannot be produced without causing grave harm. One very serious form of offensive material that is both directly and indirectly harmful is child pornography. Those who directly harm children by using them to produce such material clearly deserve to be criminalised for doing harm. Furthermore, those who view such materials deserve to be criminalised regardless of whether they come into contact with the children who are used to produce the material, because they indirectly harm children by encouraging the child pornography industry. I have argued elsewhere that mere possession of child pornography can be criminalised even if the possessor does not directly harm

⁶³Von Hirsch & Simester, *supra* note 55 at 122–126.

⁶⁴A rapist also treats his victim with a lack of respect as a person. In Kant's scheme false promising and rape are equally wrongful. Kant's deontology does not allow for consequences to be used to measure wrongness: see Baker, *supra* note 2. See also John Gardner and Stephen Shute, "The Wrongness of Rape," in Jeremy Horder, ed., *Oxford Essays in Jurisprudence*, 4th Series (Oxford: Oxford University Press, 2000) 193.

the children who were used to produce it.⁶⁵ The justification for criminalising the possessor's remote connexion to the direct harm caused by the producer of child pornography rests on the normative implications of receiving the proceeds of a wrongful (criminal) harm. The purchaser of child pornography can be normatively linked to the wrongful harm that is caused to *real children* who are used in the child pornography production process, because the normative implication is simply that the possessor receives the end product of a criminal harm. The normative link is based on the notion that it is wrong to intentionally receive products which the possessor knows can only be obtained when children are gravely harmed; and if the possessor receives the material, he or she normatively underwrites the underlying primary harm. By receiving a good that can only be produced through wrongful harm, the receiver underwrites the wrongful harm. Similarly, the gravamen of the offence of receiving stolen goods is the receiving of the goods with knowledge that they were stolen. It is wrong for a person to possess or receive goods that she knows are stolen, since she knows the goods have only come about because someone has committed a wrongful harm.⁶⁶

I do not intend to discuss such cases here, as they are not controversial. Clearly, it is fair to invoke the criminal law to prevent all forms of child pornography. Instead, I want to focus on the over-inclusiveness of the current legislation in Hong Kong. I will argue that the general laws against the distribution and publication of indecent and obscene materials are over-inclusive because they interfere with both the distributor's and receiver's freedom of expression rights without justification. The right to freedom of expression is based on fundamental norms⁶⁷ and should only be overridden in exceptional

⁶⁵Baker, *supra* note 23 at 386–88. See also Dennis J. Baker, "Collective Criminalization And The Constitutional Right To Endanger Others" (2009) 28:2 Criminal Justice Ethics (forthcoming).

⁶⁶*Ibid.*

⁶⁷Baker notes that the free expression right is based on four values, "(1) individual self-fulfilment, (2) advancement of knowledge and discovery of truth, (3) participation in decision making by all members of the society (which is 'particularly significant for political decisions' but 'embraces the right to participate in the building of the whole culture') and (4) achievement of a 'more adaptable and hence stable community'": C. Edwin Baker, *Human Liberty and Freedom of Speech* (New York: Oxford University Press, 1989) at 47. Dworkin outlines two justifications for free speech, "[T]he first treats free speech as important instrumentally, that is, not because people have any intrinsic moral right to say what they wish, but because allowing them to do so will produce good effects for the rest of us. The second kind of justification of free speech supposes [that it] is valuable, not just in virtue of the consequences it has, but because it is an essential 'constitutive' feature of a just political society that government treat all its adult members... as responsible moral agents": Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Oxford: Oxford University Press, 1996), at 199–200.

circumstances. Hence, if couple x and y want to upload a movie of themselves copulating onto You-Tube, and consenting adult n willingly (with warning of the movie's content), downloads it, the state has no business in criminalising the conduct because it does not cause offence, harm or violate the rights of any of the parties involved. There is no justification for criminalisation, nor is there any justification for limiting freedom of expression in such cases.

When producers of obscene materials use images of consenting adults,⁶⁸ the criminal law has no role to play because objective reasons cannot be produced to show why those who produce and view such materials deserve to be criminalised. Surely, if someone wants to purchase *Portnoy's Complaint*, which has been credited as being Philip Roth's most popular novel, then he or she should be free to do so.⁶⁹ Section 28 of the *Control of Obscene and Indecent Articles Ordinance* does provide a "public good" defence. But regardless of a book's literary merits, it will not be automatically exempt under section 28 if it contains graphic pornographic content.⁷⁰ Furthermore, a person could be criminalised for sending a very obscene love letter to his or her girlfriend/boyfriend. This type of private communication is criminalised by section 32 of the *Post Office Ordinance* (H.K.). Even if the aforementioned letter were exempted, it is clear that sending a pornographic video would not be exempt under any circumstances. Surely the wrong here is that the state interferes with the private communications of consenting adults. Such material is readily avoidable, as non-consenting adults and children are not exposed to the contents of other people's mail. To the extent that the media obtain a secret conversation or very private letter, it should be stopped from publishing its contents as this type of publication violates the privacy of its author/sender.⁷¹ However, the material would have to be of an exceptionally private nature (especially for public figures who gain benefits from public

⁶⁸Consent has its limits. Materials containing horrific violence against real people would not be permissible, as a person cannot consent to grave physical harm. See Dennis J. Baker, "The Moral Limits of Consent as a Defence in the Criminal Law" (2009) 12 *New Criminal Law Review* (forthcoming); Dennis J. Baker, "Rethinking Consensual Harm Doing" (2007) ALTA Proceedings.

⁶⁹*Portnoy's Complaint* was banned in, among other places, Australia for many years to protect public sensibilities see online: <<http://www.clivejames.com/articles/clive/roth>>.

⁷⁰*R. v. Penguin Books Ltd.*, [1961] Crim. L. R. 176. As for honest purpose under section 10 of the *Control of Obscene and Indecent Articles Ordinance*, see *Oriental Daily Publisher Ltd. v. Commissioner for Television and Entertainment Licensing Authority*, [1988] 2 H.K.L.R.D. 857 (CFA); and *Ming Pao Newspaper Ltd. v. Commissioner for Television and Entertainment Authority*, (1997) 7 H.K.P.L.R. 314.

⁷¹See Alan Cowell, "British Police Arrest 3 Over Taps on Phones at Royal Residence" *The New York Times* (9 August 2006). (The media violated the privacy of Prince Charles by publishing the contents of the so-called "Camillagate" tapes, where, "Famously, the conversation included Prince Charles expressing a wish to be a tampon.")

prominence) to justify using the criminal law rather than the civil law to stop the privacy violation, because of the fundamental value of free speech. If a person puts herself in the public spotlight, then she has to expect a much greater degree of media scrutiny than non-celebrities receive. But even then, there are limits.

This brings me to the other area that I focus on, which is the wrongness and criminalisableness of uploading onto the Internet (or otherwise distributing) very private information of others without their consent. I argue that distributing a person's intimate information without consent should be criminalised in certain circumstances. The distribution of nude photos of celebrities or homemade sex movies of a girlfriend/boyfriend without their consent is *prima facie* criminalisable because it involves a gross violation of their privacy rights. The *Control of Obscene and Indecent Articles Ordinance* does not directly criminalise this type of wrongdoing. Instead, it is a blanket provision that merely prohibits the publication or circulation of obscene and indecent material between everyone including consenting adults. It would not prevent *x* from uploading *y*'s medical records, bank details, *etc.* onto the Internet, because this information is not obscene.

What is needed is a narrowly tailored provision that targets exceptionally gross privacy violations. The focus needs to be on objective privacy losses rather than merely on obscenity and indecency. Thus, trivial or moderate privacy violations should not be criminalised, as the civil law provides adequate remedies.⁷² The criminal law should be used as a last resort and only when there are no other "means that is equally effective at no greater cost to others".⁷³ For the man on the street it would not be feasible to lodge expensive civil proceedings to protect his medical and banking details, *etc.* Therefore, data protection laws⁷⁴ are needed to protect his privacy. A celebrity/politician is entitled to have this type of moderate information protected but will be subjected to much more scrutiny than normal everyday citizens. More generally, a celebrity/politician should only be able to use the criminal law to protect

⁷²See *Douglas & Ors. v. Hello! Ltd & Ors.*, [2003] 3 All E.R. 996, 2003 EWHC 786 (Ch) [Douglas]; Law Reform Commission of New South Wales, *Invasions of Privacy*, Consultation Paper 1, (Sydney: 2007); Law Reform Commission of Hong Kong, *Civil Liability for Invasions of Privacy*, Report, (Hong Kong: December 2004). Cf. *Ettinghausen v. ACP*, (1991) 23 NSWLR 443 [Ettinghausen] where the violation clearly should have been criminalised.

⁷³Feinberg, *supra* note 10 at 28.

⁷⁴I do not want to engage with the case for protecting the rights of every day private individuals (non-celebrities) in this paper. But it is worth noting that personal information is now protected in many jurisdictions. See *e.g.*, *Crimes Act 1900* (N.S.W.), Part 6 and *Criminal Code Act 1995* (Cth.), Part 10.7; *Data Protection Act 1998* (U.K.), 1998, c. 29.

his or her privacy when there has been an extraordinarily grave violation of his or her privacy.

Free speech, public transparency and accountability mean that it is fair to subject public personalities to substantial media scrutiny. If a person wants the gargantuan sums of money that often comes with fame, then he or she must expect that the public will want details about what they are paying for. We are basically taxed⁷⁵ by the mechanism of *celebrity endorsement* whether we like it or not, as celebrities are paid millions to endorse basic necessities such as breakfast cereals. When a person sees a celebrity on the front of her favourite breakfast cereal box, she has the choice of finding a cereal that has not been endorsed by a celebrity (if it is possible to find a reasonable alternative) or pay the extra for the product. Thus, the public has an interest in knowing about the types of sums that are paid to sports stars and other celebrities with respect to sponsorship deals, *etc.* It also is permissible for the media to scrutinise the private aspects of a celebrity's life, because the celebrity chooses to live in the public eye. This is especially so with elected officials, prime ministers, politicians, police chiefs, *etc.* But it also applies to movie and sports stars. Free speech is a cardinal value and if a person puts herself under the public microscope to gain an extravagant lifestyle, then she cannot complain that too much attention is paid to her private life.⁷⁶

But there are limitations. Distributing private information clearly violates the privacy of the non-consenting victim. When a person distributes private information belonging to a celebrity (or of anyone for that matter) that is of an obscene nature, the public has no interest in seeing it, and the non-consenting party is entitled to have his or her privacy protected by use of the criminal law. It is one thing to report that a public figure is having a love affair,⁷⁷ it

⁷⁵When a celebrity is paid millions of dollars to appear in an advertisement for cosmetics, shoes, watches, cars or on the back of a breakfast cereal box, *etc.*, it is the customer who eventually foots the bill. It is also worth noting that the public have become fixated with celebrities of the very worst kind. Many of these people have very little to offer by way of entertainment, culture or education. See Shelley Gare, *Triumph Of The Airheads* (Sydney: Media 21 Publishing, 2006). To the extent that parents are complaining about the celebrities involved in the recent Hong Kong "nude-photo-gate" scandal failing to be good role models, it is the parents who are failing to be good role models because they should teach their children that there are better role models in society such as scientists, teachers, community volunteers, environmentalists, politicians, *etc.*

⁷⁶For instance, it seemed reasonable for the media to scrutinise Madonna's controversial adoption of a Malawi child given that it was alleged that, "[T]he Malawi Government had skirted laws that banned non-residents from adopting children in Malawi": "Malawi minister backs Madonna adoption," *Australian Broadcasting Corporation News* (12 February 2008), online: <<http://www.abc.net.au/news/stories/2008/02/12/2160093.htm>> .

⁷⁷For instance, the media have a freedom of speech interest in reporting about Sarkozy's ro-

is something entirely different to publish images of that person having actual sexual intercourse or of that person in the nude.⁷⁸ Modern technology makes it so easy to (covertly or otherwise) film, record, photograph and circulate such materials, so the criminal law seems the most effective way to protect privacy in such cases.

Gavison⁷⁹ postulates that an individual enjoys ideal privacy when others are denied any access whatsoever to her. This provides a methodological starting point, but obviously it is not possible to achieve this kind of ideal privacy in the real world. Privacy as defined by Gavison involves three independent components: "in perfect privacy no one has any information about X, no one pays attention to X, and no one has physical access to X".⁸⁰ A loss of privacy can result when people obtain information about another, or pay attention to her, or gain access to her.⁸¹ These elements of secrecy, anonymity, and solitude⁸² are interrelated and all form a part of the complex fabric of the concept of privacy. A person would suffer a proximity and anonymity loss when an uninvited stranger sits at her table in a restaurant or sits next to her on the train even though the carriage is full of empty seats. In this sense we are referring to physical access (physical proximity). This means physical proximity in the sense of a person gaining the sort of access that would allow her to get close enough to touch or observe the captive viewer through the normal use of her senses.⁸³

Gavison⁸⁴ provides a number of examples to demonstrate how certain privacy losses can be understood in terms of physical access. For example,

mance. However, it would have no right to publish obscene photos of the couple. Ian Fisher, "Sarkozy in Rome: Affairs of State and the Heart" *The New York Times* (21 December 2007).

⁷⁸See e.g. the recent scandal in Hong Kong where obscene photos of celebrities were taken from a star's computer that had been sent for repair and were subsequently uploaded onto the Internet. Keith Bradsher, "Internet Sex Video Case Stirs Free-Speech Issues in Hong Kong" *The New York Times* (13 February 2008). It is worth noting, that to the extent that some might argue that the victims should not have allowed themselves to be filmed or photographed in the first place, this is an irrelevant consideration for the purposes of criminalisation. It would be like saying that a rape victim should not have worn a short skirt, or a burglary victim should not have left the window open. Cf. Vera Bergelson, "Conditional Rights and Comparative Wrongs: More on the Theory and Application of Comparative Criminal Liability" (2005) 8 *Buff. Crim. L. Rev.* 567; Vera Bergelson, "Victims and Perpetrators: An Argument for Comparative Liability in Criminal Law" (2005) 8 *Buff. Criminal L. Rev.* 385.

⁷⁹Ruth Gavison, "Privacy and the Limits of Law" (1980) 89 *Yale L.J.* 421 at 428.

⁸⁰*Ibid.*

⁸¹*Ibid.*

⁸²*Ibid.*

⁸³*Ibid.* at 433.

⁸⁴*Ibid.*

if a stranger gains entrance to a woman's home on false pretences in order to watch her giving birth, it is the proximity violation that causes the loss of privacy. Similarly, if a stranger "chooses to sit on 'our' bench, even though the park is full of empty benches" it is the proximity violation (physical access) that causes the loss of privacy in this *context*. In both cases "the essence of the complaint is not that more information about us has been acquired or that more attention has been drawn to us, but that our spatial aloneness has been diminished".⁸⁵ The context is important. It would not violate a person's privacy to stand right next to her on a crowded train. It is not the proximity violation alone that violates the affected party's rights, but also the loss of anonymity that results from the prolonged inescapable encounter. People often have to cram into public places, but it is the nature of the encounter in the train that makes it violative. Two people may be forced to sit next to each other on a crowded train, but they do not make over-extensive claims on each other's territory, as they have a normative permission to sit near each other. It is the norm for people to use the shared space on a public train. If the train is totally crowded then people are expected to sit and stand closely together. The passengers expect this from experience. A person does not subject a fellow passenger to unwanted attention simply by sitting next to her.

I want to start my analysis of privacy as a basis for criminalising obscene obtrusions, by considering Gavison's first element of privacy, that is, "in perfect privacy no one has any information about X". I will consider the other elements (that is, "no one pays attention to X, and no one has physical access to X") below in the context of exhibitionism. Now that I have set the scene let us consider how distributing a non-consenting person's intimate information to the world at large might violate her privacy. In perfect privacy no one would have any information about the non-consenting party. But there is no such thing as perfect privacy. We all give up some privacy by entering the public domain to do our daily business: entering the public domain means public surveillance. However, a person is entitled to keep certain information private regardless of whether she is a public figure or not. Because freedom of expression is such a cardinal value, the criminal law should only be used to protect the most sensitive information, that is, information of a visually obscene or indecent kind. The criminal law protection of privacy cannot be extended to other kinds of intimate information involving celebrities, because this would be too great a restriction on freedom of expression. For example

⁸⁵*Ibid.*

if the press wanted to write about the illicit love affair between a famous couple, then it should be free to do so because the affected parties can protect their reputation by using civil means (libel and defamation laws). Mere writing would not be enough to justify invoking the criminal law to protect the privacy invasion.⁸⁶ Likewise, if a reporter reveals the contents of the diary of a senior member of The Royal Family, then the violation is best dealt with through the civil law, but there is a fine line here.⁸⁷

Similarly, tacit consent will be sufficient to waive the right to have your privacy protected by use of the criminal law. If a celebrity (or anyone else for that matter) goes to a public nude beach, then she makes her intimate information public. If the paparazzi takes photos or movies of the display and distributes it to the press, then the affected party cannot claim his or her privacy has been violated because she has made the information public by presenting it in the public domain. The blanket prohibition found in the *Control of Obscene and Indecent Articles Ordinance* against general publication of such images is over-inclusive, to the extent that the material merely contains images of consenting adults and is distributed to consenting adults. In such cases the prohibition serves no purpose because the consenting viewers' rights are not violated in any way. However, there is a distinction between public and quasi-public places. If a journalist or photographer gains access to a common dressing room or locker room and takes a photo of a famous actor or footballer in the nude, she could hardly claim that the victim tacitly consented to his intimate information being made public.⁸⁸ Where a celebrity accidentally or recklessly exposes her posterior in public, then she can hardly complain about a loss of privacy.⁸⁹

⁸⁶I have noted above that in the case of normal everyday individuals (non-public figures) that the standard is not as high as it is for public figures. The written medical and bank records etc. of non-famous people would be protected, because it would be too great a burden to expect such people to launch civil actions given that the damages awards involved are not likely to be significant. Cf. *Douglas*, supra note 72.

⁸⁷*HRH Prince of Wales v. Associated Newspapers Ltd*, 2006 EWCA Civ 1776.

⁸⁸See *Ettinghausen*, supra note 72, where a photo was taken of a famous footballer in the shower in a communal locker room after a match by the team's official photographer. The photo was subsequently published in a magazine. The non-consenting footballer successfully sued for civil damages. See also "Chan in Hong Kong photo protest" *BBC News* (29 August 2006), online: <<http://news.bbc.co.uk/go/pr/fr/-/2/hi/entertainment/5294806.stm>>

⁸⁹See Robert Stansfield, "Britney's VPL" *The Daily Mirror* (4 December 2006), noting that Britney Spears got out of a car in a public place without any underwear thereby exposing (either recklessly or accidentally) her person. In Hong Kong, exhibitionism is normally prosecuted under section 148 of the *Crimes Ordinance* (H.K.) (Cap. 200). See *HKSAR v. Ho Wong-Cheong* (unrep. HCMA No. 397 of 1997).

Furthermore, if a person sets up a secret camera in the ladies locker room to film women in a state of undress, he not only wrongs them but also violates their right to privacy. Stanley Benn⁹⁰ argues that such offence doing is wrongful because it treats its victim with a lack of respect as a person. He also connects the wrongness of this type offence with the objective consequence of *privacy loss*. These elements gives the lawmaker sufficient guidance as to why the conduct is objectively criminalisable. Benn argues that the pervert uses the unsuspecting women as a mere means.⁹¹ According to Benn, covert surveillance is morally wrongful because it “deliberately deceives a person about his [or her] world: It thwarts, on the basis of reasons that are not his [or her] own, the agent’s attempts to make rational choices”.⁹²

This type of violation is wrongful even though the information (movie, photos *etc.*) might never be made public, not merely because the clandestine spying would offend, harm or hurt the victim’s feelings, but because the wrongdoer uses the unsuspecting women as a mere means to serve his end.⁹³ Keeping the spying secret so that the victims do not find out might inadvertently spare the victims’ feelings, but it would also add dimension to the wrongdoing because it falsifies the victim’s self-perception. The victims might, acting on the false belief that they are in control of their private world, act even more “intriguingly for [their] manipulator’s ends”. Benn⁹⁴ goes on to assert that: “One cannot respect someone as engaged in an enterprise worthy of consideration if one knowingly and deliberately alters his conditions of action while concealing the fact from him”. Those who learn about the covert spying would feel resentment and would be offended within Feinberg’s wide definition of offence. The short-lived anger and psychological distress⁹⁵ would not be enough to set back their interests, but the loss of privacy and anonymity would cause profound psychological distress and a privacy violation. This type of wrongdoing is criminalisable not because it causes offence, but because it results in a wrongful privacy loss. The pri-

⁹⁰Stanley I. Benn, *A Theory of Freedom* (Cambridge: Cambridge University Press, 1988) at 275.

⁹¹*Ibid.*

⁹²*Ibid.*

⁹³*Ibid.*

⁹⁴*Ibid.*

⁹⁵*Ibid.* at 46. This would be different if the covert spying led to an incapacitating psychological condition, because this would amount to tangible harm. If the offence “is severe, prolonged, or constantly repeated, the mental suffering it causes may become obsessive and incapacitating, and therefore harmful.” Hence, a jackhammer being used outside a residential home late at night would not be harmful, but it would be if it were used every night for weeks, as it would prevent the homeowner from getting sleep and could reduce her productivity at work and so forth.

vacy loss is an independent objective element, which can be used to give the legislature guidance and justification for invoking the criminal law.

I want to now turn my attention to Gavison's other forms of privacy loss, that is, "no one pays attention to X, and no one has physical access to X". I have just considered the criminalisableness of private and intimate information being made public without the consent of the owner of the information. But what about those situations where we are forced to receive other people's private and intimate information, especially information that is considered to be indecent and obscene? I have in mind the couple that copulate on Feinberg's⁹⁶ hypothetical public bus. People may have a right to be able to copulate, but should members of the public be forced to see the intimate details of the couple's copulation in a public place? If a person walks naked in the university or shopping mall, the non-consenting viewers surely have a right to be let alone and not to receive this kind of intimate information.

Unwanted information such as nude displays resonate from obtrusions rather than invasions into domains.⁹⁷ Goffman⁹⁸ notes that wrongful encroachments can come about either through an intrusion or an obtrusion. X might intrude into y's physical space in certain contexts just by getting too close to y in a public park. Meanwhile, a wrongful obtrusion comes about when "an individual makes what are taken as *over-extensive* claims to personal space of those adjacent to him or her on areas felt to be public in the sense of being non-claimable".⁹⁹ Goffman cites unwanted and obtrusive loudness as an example. He also provides a discussion of personal spheres in public places. In his comprehensive work, *The Territories of the Self*,¹⁰⁰ he defines a territory as a "field of things" or a "preserve", which individuals have *claims* over. In the situational sense the individual would have an *entitlement to control*, use or possess the demarcated territory. In the egocentric sense there are "preserves which move around with the claimant, he being in the centre".¹⁰¹ Territories are not determined by objective factors, but rather the determiners

⁹⁶Feinberg, vol. 2, *supra* note 23 at 10–13.

⁹⁷Gavison rightly asserts that, "a number of situations sometimes said to constitute invasions of privacy will be seen not to involve losses of privacy *per se*. . . These include exposure to unpleasant noises, smells, and sights. . . insulting, harassing, or persecuting behaviour, presenting people in a 'false light'; unsolicited mail and unwanted phone calls" and so on: Gavison, *supra* note 79 at 436.

⁹⁸Erving Goffman, *Relations in Public, Microstudies of Public Order* (New York: Basic Books, 1971) at 50–51.

⁹⁹*Ibid.* at 51.

¹⁰⁰*Ibid.* at 29.

¹⁰¹*Ibid.*

are contextual. Their contours have a socially determined variability and are defined according to such “factors as local population density, purpose of the approacher, fixed seating equipment, character of the social occasion and so forth”.¹⁰²

Goffman’s territories of self are defined by contextual and conventional factors rather than by objective criteria. Accordingly, he defines personal space as the “space surrounding an individual, and where within which an entering other causes the individual to feel encroached upon, leading him to show displeasure and sometimes to withdraw.”¹⁰³ The contours of personal space are generally determined according to social norms,¹⁰⁴ so whether there is a violation of privacy seems to depend on context and convention. For example, if a person is the only passenger in the train wagon and someone sits next to her, she might find this invasive. If the person who sits next to her is of the opposite sex, this might add dimension to her concern and discomfort.¹⁰⁵ This sort of harassment has the potential to violate the train passenger’s right to be let alone and remain anonymous. Likewise, if a man goes to an almost empty beach and sits within a foot of a young woman, his propinquity would violate her right to be let alone. He is in her private domain – her territory. This would be an unjustifiable invasion of her personal space, which she has a claim over.

Egocentrically, a person’s personal space moves around with her, “[she] being in the centre”.¹⁰⁶ She is entitled to exclude others from her territory. If the beach was absolutely packed, then keeping a distance of a foot might go unnoticed, as he is merely asking her to share the public beach, which is a permissible demand. Beach-goers consent to the crowding by making the decision to use the crowded beach and they share the common end of using the beach for recreational purposes. Goffman notes that: “on the issue of will and self-determination turns the whole possibility of using territories of the self in a dual way, with comings-into-touch avoided as a means of maintaining respect and engaged in as a means of establishing regard. And on this duality rest the possibility of according meaning to territorial events and the practicality of doing so. It is no wonder that felt self-determination is crucial to one’s sense of what it means to be a fully-fledged person”.¹⁰⁷ In this

¹⁰²*Ibid.* at 31.

¹⁰³*Ibid.* at 31–33.

¹⁰⁴*Ibid.*

¹⁰⁵*Ibid.* at 31.

¹⁰⁶*Ibid.*

¹⁰⁷*Ibid.* at 60–64.

last sentence Goffman's idea suggests that the reverse-privacy right might be objectivity defined as a form of autonomy violation.

Von Hirsch and Simester also postulate that the criminalisableness of exhibitionism might be drawn from:

Nagel's conception of "reticence", regarding obligations of mutual restraint concerning persons' private (and especially their intimate sphere). Notions of reticence include an entitlement to privacy — to exclude others from one's personal domain. But the obverse should also obtain: we are entitled not to be involuntarily included in the personal domain of others — particularly, to be spared certain intimate revelations. It is the wrongfulness of that involuntary inclusion that, arguably, makes exhibitionism a matter of treating others without consideration.¹⁰⁸

This part of von Hirsch's and Simester's theory is somewhat convincing as it focuses not only on the deontological wrongness of disrespect and inconsideration but it refers to an objective bad consequence, which can be used to give the lawmaker guidance about whether a criminal law response is appropriate. It is also the gravity of the bad consequence that the moral agent has aimed to bring about that determines whether the criminal law is an appropriate response. It is arguable that objective privacy losses occur when the wrongdoer's information is forced upon non-consenting spectators' in the public domain. The unwanted information could be obtrusive without necessarily having to have an obscene or indecent content, for example, if a person plays a portable wireless in the confines of a public bus at its highest volume, she forces her way into the personal domains of the passengers. The loud decibels resonating from a portable wireless on the public bus would restrict the choices of the other passengers by preventing them from choosing between loud music and silence, or between the loud music and conversation with other passengers as features of their immediate ends.

Feinberg¹⁰⁹ argues that: "In being made to experience and to be occupied in certain ways by outsiders, and having had no choice in the matter whatever, the captive passengers suffer a violation of their [personal] autonomy". This type of privacy obtrusion is wrongful, but it would not be serious enough to warrant a criminal law response. The criminal law should be reserved for preventing people from being forced to receive very intimate information such as

¹⁰⁸Von Hirsch & Simester, *supra* note 55 at 122.

¹⁰⁹Feinberg, vol. 2, *supra* note 23 at 23.

public copulation in captive public places. When a person is forced to watch a couple copulating on a public bus her choices have been limited. Her right to be left alone in this context finds moral justification in the recognition that people need to have control over some matters that intimately relate to them in order to function as people responsible for their own actions. However, public nudity in designated areas would be permissible. If a person goes to a nude beach, she consents to what she might see.¹¹⁰ It should also be noted that to the extent people claim they have a right not to see interracial couples, homosexuals and lesbians kissing in public because it offends them, the criminal law has no role to play in such matters. Why? Not merely because this kind of information is not obscene, indecent, or otherwise intimate, but because this kind of conduct does not violate anyone's right to be let alone. Feinberg cites the reasonableness of such offensive displays¹¹¹ as a reason for toleration, but the better justification for tolerating such conduct is that it is not wrongful in an objective sense nor does it result in a bad consequence. It is no more wrongful for an interracial or lesbian couple to appear in public than it is for Anglo-Saxon heterosexual couples.¹¹²

There is nothing bad about being forced to know that there are interracial or lesbian couples out there in the real world; this is public information and being informed about reality is not a bad consequence. Furthermore, all humans are equal and are worthy of equal respect. The offended party has no greater rights than the lesbian or interracial couple because all humans are equals regardless of their race or sexual orientation. Each person has an equal right to exist. It is in fact the offended person's bigotry that is wrongful, because this type of offence produces bad consequences for minorities as it treats them as less than full members of the community.

What about knowing that books such as Salman Rushdie's *The Satanic Verses* or Philip Roth's *Portnoy's Complaint* exist? What about merely knowing that people are attending nude beaches and wild swinger's parties in Ibiza? We might not want to know that some people are attending swingers' parties and going to nude beaches, but this is different to being included in the domains of people whilst they are actually engaging in those activities. If

¹¹⁰In a plural society it is permissible to set aside certain public spaces for minorities, so that they can express themselves and choose alternative lifestyles. For example, nude beaches, art galleries, life drawing classes, etc. are designed to foster pluralism, tolerance and cultural growth. Dworkin, *supra* note 56 at 214.

¹¹¹Feinberg, vol. 2, *supra* note 23 at 26.

¹¹²This conclusion is based on the objective moral principles of equality and human dignity. See generally Dworkin, *supra* note 27 at 198.

we merely learn of these activities through words or print, without being confronted by the actual live display, then in a plural society we have to exercise some tolerance. Unless a person is forced to watch or read the offensive film or book, she could hardly claim she had been wronged. Would denying the Cambodian genocide or the Nanking Massacre at Speaker's Corner in Hyde Park violate a passing survivor's right not to receive such information? What about if a person goes to Speaker's Corner to publicly defend honour killings? This type of speech clearly treats passers-by with a gross lack of respect and consideration. But the overall consequences that flow from this type of wrongdoing are not sufficiently bad for invoking the criminal law. This type of political dialogue belongs in the public arena even though it is factually wrong and offensive, because it leads to informed debate, which allows the record to be put straight. People have an interest in knowing that these types of awful views exist in the real world and have a responsibility to publicly denounce such views.¹¹³ This type of information is public, not private, information. Therefore, it does not violate the rights of those who are forced to receive it. Such receivers consent to receiving this information by choosing to visit public places. People give up a certain amount of privacy and autonomy as soon as they walk out of their front door, and in doing this they cannot expect to be sheltered from the real world. This is not the type of sensitive and private information that a person could claim a right to be sheltered from. *Per contra*, copulation in a public bus does not serve a similar purpose and the intimate display is of no benefit to those who do not want to see it. If it did occur however, the public would have an interest in hearing or reading about it in the news, as it informs them about what is going on in the world.

The freedom of expression right protects this interest by creating an environment that facilitates the free flow of information. Waldron¹¹⁴ points out,

¹¹³Jeremy Waldron, "Homelessness and Community" (2000) 50 U. Toronto L.J. 371 at 391–92 ('In cases where people feel vehemently about some matter of principle—whether they feel great because the principle has been vindicated or whether they feel offended because it is violated—it almost always misrepresents their view to say that the pleasure of vindication or the pain of offence are themselves grounds for the principle in question. From the point of view of the principle's justification, these sorts of pains and pleasures are mere epiphenomena.')

¹¹⁴*Ibid.* at 379 ('[I]f ... pedestrians are regarded as progressive beings, in Mill's sense, then we should not go around saying that they have an interest in not knowing or in not perceiving the true state of affairs in their society—the condition in which some of their fellow citizens are having to live—simply because that knowledge or perception is distressing to them. If the situation of some in society is distressing, then it is important that others be distressed by it; if the situation is discomfoting, then it is important that others be discomfoted.')

in the context of people being offended by beggars, that some people may be distressed by the message conveyed by homeless people, but that the distress is beneficial for both the offended auditor and the homeless person. Firstly, the auditor might say: 'This is awful. I am glad I have found out about this'. Additionally, the encounter might even motivate the auditor to do something about it. Such an encounter is a good consequence and not a bad consequence, because it forces society to acknowledge and respond to the harsh realities of indigence.¹¹⁵ Unwanted speech that captures the public's attention is usually seen as a detriment, but it should not be seen as a detriment from the audience's point of view. "As Mill rightly emphasised, there is significant benefit in being exposed to ideas and attitudes different from one's own, though this exposure may be unwelcome."¹¹⁶ The beggar, the conservative, the liberal and the bigot all have an interest in articulating their views and in hearing the views of their adversaries. The objective consequence of being forced to deal with public political discussion is somewhat different from having a copulating couple's private affairs forced upon you in the confines of a public bus. This is why Feinberg asserts that offence would hardly ever outweigh the value of free speech. It appears that only a very narrow range of very intimate displays (copulating in a bus or shopping in the nude *etc.*) would come within the purview of the privacy principle, because to the extent that it results in a visual display, it is not *public information* and it interferes with the auditors' right to be let alone (right not to be included in the very private affairs of others in public contexts). Notwithstanding this, criminal punishments should be limited to fines in those cases where the wrongful privacy violation does not cause actual harm to others.

V. CONCLUSION

Clearly the laws criminalising the publication of indecent and obscene displays in Hong Kong are in need of reform. The current blanket prohibitions criminalise consenting adults for viewing indecent and obscene materials without any valid justification. I noted at the outset that criminalisation is a draconian measure that should be invoked as a last resort for the most reprehensible forms of wrongdoing. Criminalisation results in stigma, conviction, and hard treatment. Therefore, lawmakers need to produce sound objective reasons to justify criminalisation decisions. Clearly, it is sensible and fair to

¹¹⁵*Ibid.*

¹¹⁶*Loper v. New York City Police Dept.*, 802 F. Supp. 1029 at 1043 (S.D. N.Y. 1992).

invoke the criminal law when the obscene and indecent material is clearly harmful and worthy of criminalisation as is the case with child pornography. Likewise, I have argued that the wilful distribution of very intimate (obscene and indecent) images of non-consenting agents is deserving of criminalisation because it results in an objectively grave loss of privacy. At the other end of the scale, I have considered the objective justifications for criminalising indecent and obscene displays such as couples copulating on public buses or walking around the shopping mall in a state of undress. Here, I have argued that the conduct is criminalisable because it interferes with the non-consenting receiver's right not to receive non-public (obscene and indecent) information in public places. However, the latter category is not as serious as the former and penal sanctions should be limited to monetary fines. This type of conduct does not result in tangible harm and punishing it with imprisonment would be disproportionate and unjust.¹¹⁷

The current rationale for maintaining blanket prohibitions against the transfer of obscene and indecent materials between consenting adults differs little from those found in the Victorian literature.¹¹⁸ In earlier times obscenity and indecency was perceived as posing a major and seriously harmful threat to society. But these early conceptualisations were adopted in a social setting dissimilar to that found in modern Hong Kong. The harms that were targeted by this old legislation never really existed. It is nonsensical and wrong to continue to use these blanket prohibitions based on the idea of "innocent parties being corrupted" to arrest and prosecute consenting adults, when in its historical meaning the idea of public morals being corrupted is so utterly out of keeping with modern life in Hong Kong. To retain such blanket prohibitions seems to me inconsistent with a just and fair sense of personal liberty and respect for the rule of law.

¹¹⁷Baker, "Constitutionalizing the Harm Principle" *supra* note 2.

¹¹⁸James Fitzjames Stephen, *Liberty, Equality, Fraternity* (London: Smith, Elder, & Co., 1873).